UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civil-LENARD

GERARDO HERNANDEZ,
Plaintiff,

v.

UNITED STATES,
Defendant
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO GERARDO HERNANDEZ'S MOTION UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE

TABLE OF CONTENTS

INTRODUCTION

Gerardo Hernandez ("Movant") has moved to vacate his sentence in Case No. 98-721-Cr-LENARD(s)(s), pursuant to 28 U.S.C. §2255. The Motion, Addendum and Memorandum, Docket Entry ("DE") 1, DE1-2, and DE12, respectively, purport to state more than 100 claims. These fall roughly into three categories: 1) Claimed ineffective assistance of counsel; 2) Claims that payments to local journalists by the Broadcasting Board of Governors ("BBG") amount to a fatal due-process violation; and 3) Claims that newly-discovered or government-suppressed evidence entitle Movant to a new trial.

All of Movant's claims lack merit. The court appointed experienced criminal counsel, Paul McKenna, who ably defended Movant with great energy, loyalty, diligence, and professional skill, easily surpassing the minimal threshold for effective assistance of counsel. Movant was convicted following a seven-month jury trial at which he was meticulously afforded every right and process to which he was entitled. The case was tested rigorously on appeal, with three full rounds of appellate briefing, resulting in affirmance of Movant's judgment and sentence,[1] and addressing many issues that Movant now seeks to revisit. The claims of newly discovered and previously suppressed evidence lack support, and the purported new evidence is not qualitatively or substantially different from material previously available to Movant, including material produced in discovery and used at trial. The claims concerning BBG payments do not amount to a due-process violation, and Movant fails to show prejudice arising from the claimed violation. Movant's request

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[1] *See U.S. v. Campa, et al*, 419 F.3d 1219 (11th Cir.), [*"Campa* 1"], *vacated* 429 F.3d 1011 (11th Cir. 2005) (*en banc)*; *U.S. v. Campa, et al*, 459 F.3d 1121 (11th Cir. 2006) (*en banc*) ["*Campa* 2"]; *U.S. v. Campa, et al*, 529 F.3d 980 (11th Cir. 2008) ["*Campa* 3"], *cert. denied*, 129 S.Ct. 2790 (2009).

for discovery and an evidentiary hearing also lack merit, all as discussed further below.

As a preliminary matter, we note that this Motion has three distinct, but interrelated, characteristics with significant procedural implications that further counsel denial of the Motion:

First, this is not a *pro se* motion. Although *pro se* §2255 pleadings should be construed liberally, *Gomez-Diaz v. U.S.,* 433 F.3d 788, 791 (11th Cir. 2005), Movant is represented by experienced counsel and his pleadings should be held to the same standard as any attorney-filed pleading. *See Aron v. U.S.*, 291 F.3d 708, 715 (11th Cir. 2002) ("[T]he court should construe a habeas corpus petition filed by a pro se litigant more liberally than one filed by an attorney").

Second, this court tried Movant's criminal case and is closely familiar with the extensive record. When the trial judge also hears the post-conviction proceedings, that court may rely on its recollections of the trial in resolving the collateral attack. *Blanton v. U.S.*, 94 F.3d 227, 235 (6th Cir.1996). Indeed, "the judge's recollection of the events at issue may enable him summarily to dismiss a §2255 motion, even though he could not similarly dispose of a habeas corpus petition challenging a state conviction but presenting identical allegations." *Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977). We respectfully submit that the court's recollection of McKenna's tenacity, thoroughness, strategic deployment, and professional skill in defending Movant will be of significant assistance in summarily denying this §2255 motion.

Third, notwithstanding Movant's voluminous pleadings, his claims are highly conclusory and lack factual support, from either the criminal record or from Movant's §2255 submissions. Many claims are speculative projections of possible outcomes under hypothetical different strategic approaches, and conclusory claims of deficiency and harm to Movant, without substantiation or specifics of what the supposedly omitted investigation, witnesses, jury instructions, motions and

arguments would have stated, and without a record-specific assessment of the trial as it actually occurred. Movant provides no affidavit from McKenna or the witnesses who supposedly could have testified on his behalf. Movant belatedly filed his own affidavit, DE24-1, which consists largely of Movant's factual denial of charges, not amounting to a basis for §2255 relief. He cannot prevail upon an "ambiguous or silent record," *see Chandler v. U.S.*, 218 F.3d 1305, 1315 n. 15 (11th Cir.2000) (*en banc*) (rejecting ineffective-assistance claim), and has failed to meet the procedural thresholds for a §2255 motion, for which he has the burden. *See Wright v. U.S.*, 624 F.2d 557, 558 (5th Cir. 1980) ("In a section 2255 motion, a petitioner has the burden of sustaining his contentions by a preponderance of the evidence;" relief properly denied without evidentiary hearing.). *See also Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (*en banc*) ("The widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight – except perhaps the rule that we will not judge trial counsel's performance through hindsight.").

The great number, and frequently intertwined and repetitive nature, of Movant's claims makes it more efficient to address the claims topically, aggregating and grouping certain claims as appropriate. To assist the court, the government has assigned a serial claim number to each of Movant's claims as enumerated in Movant's outline-format Addendum, DE1-2. At Attachment One we append a copy of DE1-2 showing these assigned serial claim numbers.[2]

ARGUMENT

I. Movant's legal representation was effective and more than adequate to meet the Sixth

[2] Movant's Memorandum, DE12, uses different outline numbering than the Addendum, DE1-2. We address arguments made in both DE1-2 and DE12, and endeavor to advance clarity by using the claim numbers, set forth in Attachment One, that correspond to DE1-2's outline structure.

Amendment's constitutional threshold.

Movant launches a broad and multifarious attack on the quality and professional adequacy of representation by McKenna. "In short,"Movant's Memorandum says, "Hernandez's lawyer was his worst enemy in the courtroom." DE12:6.[3] This disparagement of McKenna's performance is conclusively refuted by the record, and by the recollection of all who attended the trial and witnessed McKenna's tireless, knowledgeable, strategic and professionally adept efforts on Movant's behalf. As McKenna put it himself in closing argument, and as he demonstrated repeatedly, he was an especially energetic, hardworking, loyal, tenacious and proactive advocate for his client: "I will go anywhere to find the evidence. I will go to the moon and I am not ashamed I went to Cuba [to find evidence]. I am glad I went there and I would go there again and I would go to the ends of the earth if I had to to find the evidence and find the truth." DE/cr[4] 1583:14469.

Movant's rhetoric and sweeping criticism of McKenna's performance is incorrect and overlooks the stringent requirements for, and presumptions against, a claim of ineffective assistance of counsel. The legal standards and principles governing such claims are summed up in *Michael v. Crosby*, 430 F.3d 1310, 1319-1320 (11th Cir. 2005), with citations to many leading cases and controlling precedents:

> Under *Strickland* [*v. Washington,* 466 U.S. 668 (1984)], in order to demonstrate that counsel was ineffective, a petitioner must show (1) deficient performance by counsel and (2) a reasonable probability that counsel's deficient performance affected the outcome of the trial. 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. If a defendant fails to make a showing as to either performance or prejudice, she is not entitled to relief. *Id*. at 697, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Thus, we need not

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[3] Page numbers as cited in this Response are to page numbers assigned by the court's CM/ECF system, appearing at the top right of each electronically filed page.

[4] "DE/cr" refers to docket entries in the criminal case, No. 98-721-Cr-LENARD.

address the prejudice prong if we find that the performance prong is not satisfied. *Turner v. Crosby*, 339 F.3d 1247, 1279 (11th Cir.2003), *cert. denied*, 541 U.S. 1034, 124 S.Ct. 2104, 158 L.Ed.2d 718 (2004); *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir.2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." (citation omitted)).

The standard for counsel's performance under *Strickland* is "reasonableness under prevailing professional norms." 466 U.S. at 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674. The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *See Mills v. Singletary*, 63 F.3d 999, 1020 (11th Cir.1995) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir.1994). Counsel's performance is deficient only if it is "objectively unreasonable and falls below the wide range of competence demanded of attorneys in criminal cases." *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir.1990) (citations omitted).

Moreover, "[c]ounsel will not be deemed unconstitutionally deficient because of tactical decisions." *McNeal v. Wainwright*, 722 F.2d 674, 676 (11th Cir.1984) (citations omitted); *Crawford* [*v. Head*, (11th Cir. 2002)], 311 F.3d at 1312 ("Deliberate choices of trial strategy and tactics are within the province of trial counsel after consultation with his client. In this regard, this court will not substitute its judgment for that of trial counsel." (quotation marks, internal alteration, and citation omitted)). There is a strong presumption that counsel's performance was reasonable and adequate, with great deference being shown to choices dictated by reasonable strategy. *Rogers*, 13 F.3d at 386; *see also Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir.2004), *cert. denied*, 544 U.S. 952, 125 S.Ct. 1703, 161 L.Ed.2d 531 (2005). "The presumption of reasonableness is even stronger when we are reviewing the performance of an experienced trial counsel." *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir.2005).

To overcome this presumption, the petitioner "must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir.2000) (*en banc*) (footnote and citation omitted). Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. *Id*. at 1317. Indeed, as we have recognized, "[a]bsolute rules would interfere with counsel's independence – which is also constitutionally protected – and would restrict the wide latitude counsel

> have in making tactical decisions." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir.2001).

430 F.3d at 1319-1320.

Movant, however, fails to carry his burden of showing both deficient attorney performance and outcome-affecting prejudice.

A. Severance

For instance, Movant claims that McKenna was ineffective in not seeking to sever Count 3 (the Brothers to the Rescue ["BTTR"]-shootdown murder conspiracy, in which only Movant was charged) from the remaining counts and from the co-defendants' trial, thus impeding the jury's individualized consideration of issues and McKenna's ability to focus separately and more amply on the different charges. The Motion further claims that McKenna was ineffective because he neither sufficiently considered nor explained to Movant the benefits of a severance that would enable co-defendants to testify favorably for Movant pursuant to *Byrd v. Wainwright*, 428 F2d 1017 (5th Cir. 1970) (Claims ##55, 58; *see also* DE12:8, 18-19, 21, 25, 55) and that would supposedly enable Movant himself to testify in ways not available at a joint trial.

As to severance, the Motion fails on both of *Strickland*'s ineffective-assistance prongs: performance and prejudice. As to performance, the Motion overlooks, and fails to address, the strategic context of the trial, and the reasonableness of counsel's decision to proceed to a single trial on all counts. Movant was charged with 13 co-defendants in a 26-count indictment. *See* DE/cr224.[5]

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[5] Movant was charged with: acting as an agent on behalf of a foreign government, without notification to the Attorney General as required (Count 13); causing and aiding and abetting other members of the spy ring to do so (Counts 15, 16, 19, 22, 23, 24,); conspiring to do so and to defraud the United States as to its governmental functions and rights (Count 1); conspiracy to commit espionage (Count 2); conspiracy to commit murder (Count 3); identity and passport fraud (continued...)

Movant and nine others were arrested in September, 1998.[6] Five pled guilty (Alejandro Alonso, Nilo Hernandez, Linda Hernandez, Joseph Santos, and Amarylis Silverio Santos) early in the process. DE/cr102-103, 115, 125, 123. The remaining co-defendants – John Doe No. 2, a/k/a Luis Medina III ("Medina"); Rene Gonzalez ("Gonzalez"); Antonio Guerrero ("Guerrero"); and John Doe No. 3, a/k/a Ruben Campa ("Campa") – proceeded, with Movant, to a joint jury trial that lasted from November, 2000 until June, 2001.

Attorneys were appointed to represent these five defendants. McKenna was appointed to represent Movant within a few days of the arrest, DE/cr13, and represented him for approximately 10 years, through pre-trial preparation, motions, discovery, including several trips to Cuba for investigation and depositions; the seven-month trial; sentencing and post-trial litigation; and three rounds of appellate litigation. Throughout, the five defendants and their counsel displayed significant solidarity and substantive agreement, frequently adopting one another's arguments and pleadings. As counsel and the court acknowledged, the five defense counsel functioned as a joint defense team. *See* DE/cr1554:11009-11010; DE/cr1577:13648; DE/cr1558:11487-11489 (court references "the joint defense that is my understanding," with different defense counsel each given a separate and distinct part of the defense presentation as it relates to all defendants); DE/cr1549:10371-10372 (court notes that counsel [including McKenna] "are each putting on a portion of the defense that all defendants share," with McKenna additionally presenting evidence

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[5] (...continued)
(Counts 4, 5); causing and aiding and abetting another to commit identity fraud (Count 6). Counts 3, 4, 5 and 13 charged Movant alone; his other counts charged him together with one or more co-defendants.

[6] Four co-defendants (Juan Pablo Roque and John Does No. 4, 5 and 6) have not been arrested.

relating only to Movant); DE/cr1558:11487. They worked harmoniously together, and the co-ordination of efforts enabled the team to make focused and coherent, non-redundant presentations both in cross-examinations and the affirmative defense cases, achieving efficiency, economies of time and effort, and better comprehensibility in what was bound to be a lengthy and complex case.

It was explicit that the defendants wanted to be tried together. When Jack Blumenfeld, Guerrero's lawyer, developed medical problems that complicated the joint-trial schedule, the court held a status conference June 26, 2000, to discuss whether the trial could proceed as planned, on time and with all five defendants and their counsel. Movant was present. *See* DE/cr1810:2.[7] The government, concerned at the prospect of delay, suggested that the court consider proceeding to trial as scheduled with four defendants, severing Guerrero and trying him separately after Blumenfeld recovered. DE/cr1810:9. Blumenfeld protested that "I have discussed it with my client. I believe he desires and I believe the defendants desire to be tried all at the same time." The court called for co-counsel to state their positions on severance. DE/cr1810:10. Joaquin Mendez, Campa's counsel, explained that the defense lawyers had tried to divide the considerable labor of trial preparation:

> [W]e have been working out a division of labor where everybody is assigned a different task, where we are pooling our resources . . . . We would prefer to go to trial together because we have all been dividing the work and trying to work as a team. To that extent and to the extent I have any standing at all I would object to a request for a severance because I think I would like to continue to work as a team.

DE/cr1810:12-13.

McKenna agreed:

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[7] This transcript was sealed due to a later discussion on an unrelated topic. The court has authorized us to quote transcript portions, like these, that occurred in open court, and were not sealed. *See* DE20.

> On behalf of Viramontes,[8] I agree with Mendez. We have divided the work, not only the work in the SCIF, but the defense and each client and each lawyer are responsible for a portion of this defense. We have met many times and we have assigned those positions . . . . What I am trying to say, Your Honor, we have always envisioned going to trial all together as a group in defending the charges jointly together. *The defendants want that and that is why they have instructed us to prepare that way and we have prepared that way.*

DE/cr1810:13-14 (emphasis added). Medina's and Gonzalez's counsel also objected to severance, making it unanimous. DE/cr1810:15 (William Norris: "There is a desire to present a joint defense"; Philip Horowitz: "This is a defense team that has been together for two years and working like a well oiled machine"). Horowitz added, DE/cr1810:16, that the team had been working together "very, very well" and needed to continue in tandem with Blumenfeld, even if it meant a delay, because joint effort was "crucial for us in presenting an effective case to the jury on behalf of these gentlemen. I think the Court should keep this case together as it is." *See also* July 17, 2000, status conference transcript [sealed], DE/cr1811:41, line5. After the court initially granted the government's motion to sever Guerrero, DE/cr515, the defendants moved for reconsideration; Movant joined in requesting that the cases be reconsolidated, and all defendants tried together. *See* DE/cr619.

In short, McKenna's position on severance, far from being one of failure or non-feasance, as Movant argues, was a considered decision to choose a joint trial, and to oppose severance, because of the joint and unified defense; the economies of labor achieved by the defense team's division of tasks; and because that is what his client wanted and had instructed McKenna, who prepared accordingly. The record conclusively shows that with regard to severance McKenna had and pursued

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[8] "Viramontes" was one of Movant's aliases, which he continued to use until the beginning of trial, notwithstanding that he was indicted under his true name, Gerardo Hernandez.

a reasonable strategy which also was the course his client wished.[9] The reasonableness of McKenna's approach is established not only in the explanation he gave, but in the case law. An attorney's electing a joint trial over severance, in order to pursue an overall unified-defense strategy, has been recognized as "a deliberate tactical decision well within the bounds of reasonable professional assistance." *See U.S. v. Ciancaglini*, 945 F.Supp. 813, 818 (E.D. Pa. 1996) (denying §2255 claim that counsel was ineffective for not seeking severance); *see also U.S. v. Gordon*, 2004 WL 1879988, *1-*2 (E.D.Pa. 2004); *Merlino*, 2 F.Supp.2d at 661-662 (same); *Schwander v. Blackburn*, 750 F.2d 494, 501 (5th Cir. 1985).

Other factors support the reasonableness of defense counsel deciding to eschew multiple separate trials. *See Flowers v. Norris*, 2008 WL 5401675, *7 (E.D. Ark. 2008) (habeas corpus denied; "choosing not to sever offenses can constitute a reasonable trial strategy for several reasons," including that convictions at multiple trials could increase the defendant's sentencing enhancements; and that multiple trials also multiply risk of conviction; if a defendant were acquitted at one trial, he still would risk conviction at the other). Under the Sentencing Guidelines, Movant faced these types of downside to a severance strategy, that is, that such a strategy increased his risk of conviction,[10]

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[9] Movant's and his co-defendants' wish to be tried together is another factor contributing to the reasonableness of McKenna's position on severance. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691; *see also, e.g., Reed v. Secretary*, 593 F.3d 1217, 1240 (11th Cir. 2010) ("[T]he defendant's own words and deeds play a role in assessing the reasonableness of counsel's conduct"). Nonetheless, whether to make a motion, including for severance, "is clearly an 'attorney decision'" requiring a §2255 petitioner to "overcome the presumption that his counsel's actions were within the objective standard of reasonableness," *U.S. v. Merlino,* 2 F.Supp.2d 647, 661 (E.D. Pa. 1997).

[10] Two trials would entail three potential verdict outcomes (convicted at both, acquitted at both, convicted at one but not the other) of which two-thirds would leave Movant convicted – (continued...)

and that if he were convicted twice, his second sentencing would be at a higher Criminal History Category due to a prior sentence of imprisonment from the first trial. *See* USSG §4A1.1. In addition, if he were severed and wanted to testify at one but not the other trial, he could have been encumbered with an impeaching prior conviction.

It is not necessary for McKenna to have articulated, or had in mind, these additional reasons for the court to consider them as factors showing the objective reasonableness of the decision to proceed to a joint trial. "To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. . . . [O]ur inquiry is limited to whether this strategy . . . might have been a reasonable one." *Chandler*, 218 F.3d at 1316 n.16; *see also id.* at 1315 (illustrating objective standard for reasonableness of attorney's performance with cases focused on reasons that *could* have motivated counsel's actions and strategy at trial). Because the standard for assessing reasonableness of attorney performance is an objective one, "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight. The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel." *Gordon v. U.S.*, 518 F.3d 1291, 1301 (11th Cir. 2008).

Movant argues that a much better strategy would have been to seek a severance of Count 3 (conspiracy to murder, based on the BTTR shootdown), so that Movant could testify exculpatorily at a trial of Count 3 alone, and so that he could call as his witnesses co-defendants who could not testify at a joint trial without incriminating themselves. But the proper focus of the Sixth Amendment analysis, and Movant's burden, is not to determine what was the arguably *best* possible

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[10] (...continued)
worse odds than at his single trial.

trial strategy. Instead, the Sixth Amendment requires examination of the strategy that was actually used, to determine if it was reasonable. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. For Movant to focus, as he does, on the supposed benefits of severing Count 3 into a separate trial, without acknowledging or assessing the strategic merits of the joint trial, is to ignore the Supreme Court's instruction "to begin any ineffective assistance inquiry with 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Waters*, 46 F.3d at 1511-1512, (quoting *Strickland*). *Waters* went on to quote *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992): "('We also should always presume strongly that counsel's performance was reasonable and adequate . . . .') Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a 'wide range,' a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden."

Movant's "difficult" task is not simply to sketch out, in hindsight, the best possible strategy for his case, or even a better one than McKenna pursued, but to show that *no* competent counsel would have done as McKenna did, proceeding to a joint trial. *See Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ("In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice.")

Movant seeks to sidestep this burden, and the presumption of effective representation, glossing over the merits of the strategy McKenna actually chose. For instance, Movant argues that by not severing Counts 3 and 2, McKenna had so much work to do in the joint trial that he could not focus on Count 2 and deferred to co-counsel all litigation concerns relating to Count 2, the conspiracy to commit espionage. *See* Claim 58; *see also* DE12:21, 46-47. The attack on the

effectiveness and reasonableness of McKenna's Count 2 defense is unwarranted, as discussed at pages 83-85, *infra.* In the severance context, Movant's criticism ignores that there are real and significant benefits when counsel operate in a joint defense and divide tasks among themselves, as all defense counsel acknowledged, DE/cr1810. It also ignores that a severance strategy would have enormously amplified the work-burden on McKenna, requiring him to prepare for and to conduct two lengthy, complex trials, each with its own risk of conviction, without assistance or the benefit of real-time strategic consultation from aligned co-counsel. *See Ciancaglini*, 945 F.Supp. at 818 (among reasons for denial of §2255 claiming ineffective assistance where counsel did not seek severance was that the case involved numerous defendants, charges and lasted 53 trial days; "the epitome of a very long and complex case"). An attorney's time and resources are not infinite, and a reasonable attorney could well decide that a more effective and efficient way to apply his time and resources, in furtherance of his client's defense, was to litigate one long and complex trial instead of two, especially where that conforms with his client's expressed wishes and instructions. *See Harrington v. Richter*, 131 S.Ct. 770, 779 (2011) ("Counsel is entitled to balance limited resources in accord with effective trial tactics and strategies;" reversing grant of habeas corpus).

McKenna's performance in proceeding to a joint trial of all counts, without seeking severance, was well within the wide range of choices that a competent attorney might take. Movant cannot establish that McKenna failed the "performance" prong of the *Strickland* standard as to severance.

Movant also fails to establish the "prejudice" prong. Indeed, Movant does not even make a facially adequate claim of prejudice. That is, although Movant argues that he was greatly injured by McKenna's not seeking a severance, he does not show, or even address, whether a severance would

have, or even could have, been granted. Showing "prejudice" for *Strickland* ineffective-counsel purposes, is not simply a matter of establishing that a chosen strategy – here, a joint trial – could have had some conceivable effect on the outcome of the proceedings. *See Strickland,* 466 U.S. at 693. It must also be the case that the strategy said to be better – here, severance – is lawful and has a prospect of being implemented. Otherwise, there would be "a potential windfall to the defendant rather than the legitimate 'prejudice' component contemplated by . . . *Strickland*." *Williams v. Taylor*, 529 U.S. 362, 392 (2000), (construing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)). Where the claimed ineffectiveness of counsel did not deprive a petitioner of any right to which the law entitled him, his ineffectiveness claim does not satisfy the "prejudice" component of the *Strickland* test. *Williams,* 529 U.S. at 1512-1513. *See, e.g., Trevino v. Evans*, 521 F.Supp.2d 1104, 1135 (S.D.CA. 2007) ("[p]etitioner [claiming ineffective-assistance-of-counsel] cannot establish prejudice because he has not shown he would have been granted a severance").

Here, too, Movant cannot establish prejudice because he has not shown that he would have been granted a severance. On the contrary, Movant would not have been entitled to a severance on the bases claimed. Movant does not argue, nor could he, that Count 3 was improperly joined in the indictment. Fed.R.Crim.P. 8(a) provides that an indictment may charge a defendant with multiple offenses in separate counts "if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Count 3 clearly qualifies. Count 13 charged Movant with acting as an agent of a foreign government without providing prior notification to the Attorney General; Count 1 charged him with conspiring to do so. All Movant's acts and transactions relevant to Count 3 were also acts done as an agent of a foreign government, and were relevant to, probative of, connected to, and constituted

a part of a common scheme or plan with, Counts 13 and 1. Joinder was clearly proper.[11]

Fed.R.Crim.P. 14 allows for permissive severance, at the discretion of the trial court, where joinder appears to prejudice a defendant, but the types of prejudice Movant argues do not typically warrant severance. Rule 14 severance is not lightly granted. The Eleventh Circuit "has repeatedly stated that '[i]n order to demonstrate an abuse of discretion, the defendant must establish that the joint trial subjected him not just to some prejudice, but to compelling prejudice against which the district court could not afford protection." *U.S. v. Hewes*, 729 F.2d 1302, 1319 (11th Cir. 1984). The test for 'compelling prejudice' is "a heavy burden, and one which mere conclusory allegations cannot carry." *U.S. v. Walser,* 3 F.3d 380, 386 (11th Cir. 1993) (quoting *U.S. v. Hogan*, 986 F.2d 1364, 1375 (11th Cir. 1993)).

Movant's "prejudice" arguments fall far short. He claims, *see* Claim #58, that joinder of Count 3 with the other counts prevented individualized presentation and jury consideration of evidence and issues. But "severance is required only when the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to . . . separate counts," and a defendant has a "heavy burden" to show real prejudice. *U.S. v. King*, 803 F.2d 387, 391 (8th Cir. 1986). A defendant is not entitled to severance merely because he may have a better chance of acquittal in separate trials. *Zafiro v. U.S.*, 506 U.S. 534, 540 (1993). Jury instructions that explain the government's burden of proof as to all elements of each charge, and that explain that the defendant has no burden to present any evidence or call any witnesses, sufficiently address arguable prejudice from an indictment charging multiple counts. *See, e.g., U.S. v. Harper*, 680 F.2d 731, 733-734 (11th

[11] For the same reason, joinder of his other charges also was proper: His identity fraud, conspiracy to commit espionage, and causing/aiding & abetting others all were also acts done as an agent of a foreign government, and relevant to and probative of Counts 13 and 1.

Cir. 1983). Such instructions were given here. *See* DE/cr1280:3 (government burden; no defense burden); 44 (consider each charge, and each defendant, separately and individually); *see also* specific-offense instructions squarely putting burden on government as to all elements.

In assessing a defendant's severance claims, the court also properly considers "the interests of judicial economy." *U.S. v. Forrest*, 623 F.2d 1107, 1115 (5th Cir. 1980). Where, as here, the evidence as to the count sought to be severed (here, Count 3) is independently admissible as to remaining counts as well (here, Counts 1 and 13), severance is unwarranted. A "defendant does not suffer any undue prejudice by a joint trial if the evidence is such that one crime would be probative and admissible in the defendant's separate trial of the other crime." *Bear Stops v. U.S.*, 204 F.Supp.2d 1209, 1213 (D.S.D. 2002) (denying, without evidentiary hearing, §2255 motion claiming trial counsel was ineffective for failing to request severance); *see also Krist v. Foltz*, 804 F.2d 944, 947-948 (6th Cir. 1986); *Bellamy v. Bell*, 2010 WL 3075003,*12 (E.D.MI 2010); *Woodruff v. Lauer*, 2007 WL 522704, *5-*6 (E.D.MI 2007) (denying habeas claims that counsel was ineffective for failing to seek severance, where evidence cross-admissible); *U.S. v. Zackson*, 6 F.3d 911, 921 (2d Cir. 1993) (similar, as to §2255 claim).[12]

The other aspect of Movant's ineffective-assistance severance claim is the argument, *see*

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[12] Movant argues conclusorily, *see* DE12:18, that the offenses underlying Counts 2 and 3 were "essentially two separate cases," with different levels of emotional prejudice. Movant never articulates a basis for this to require severance under Fed.R.Crim.P. 8, or to counsel permissive severance under Fed.R.Crim.P. 14. The argument is the sort of "conclusory allegation" of prejudice rejected in *Walser*, 3 F.3d 380. In *U.S. v. Dickens*, 685 F.2d 765, 779 (3d Cir. 1983), the defendant sought severance from a RICO trial of a racketeering act involving a brutal murder of a policeman. Severance was properly denied; the defendant cited no authority "to suggest that a crime committed to further a conspiracy may be too inherently prejudicial to allow presentation thereof to a jury." The same reasoning applies here, where Counts 3 and 2 were part of, and provable as to, Movant's part in Counts 1 and 13.

Claim #55, that at a separate trial of Count 3, he would have had the opportunity to testify exculpatorily to facts, as set forth in his affidavit, DE24-1:2-5, supposedly exonerating him of Count 3. This argument rests on the unstated, and false, premise that he did not, or could not, have that opportunity at his joint trial. Movant further argues that at a separate trial he would have been able to call as witnesses co-defendants to testify exculpatorily. Neither claim, on this record, establishes prejudice under *Strickland*.

There is no legally recognized reason why Movant could not have testified at a joint trial, including to the supposedly exculpatory facts in his affidavit, DE24-1:2-5. Although Movant argues that McKenna should have advised him of his "rights" to testify at a separate Count 3 trial without incriminating his co-defendants, or himself on other counts, see Claim #56; DE12:21, and states in his affidavit that McKenna did not so advise him, DE24-1:1, there is no explanation or legal basis supporting such claimed right.

As to not incriminating himself on other counts, Movant provides no basis for a right to severance. Significantly, Movant has not claimed, because he cannot, that his defenses, and his proffered testimony, on Count 3 were factually inconsistent with his defenses to the other counts. Severance is not required "simply because a defendant indicates that he wishes to testify on some counts but not on others." *U.S. v. Forrest*, 623 F.2d 1107, 1115 (5th Cir.1980) (citation omitted). To justify severance of counts upon a claim of inconsistent defenses, "a defendant must demonstrate that he has important testimony to give concerning some counts and a strong need to refrain from testifying on others." *U.S. v. Whitworth*, 856 F.2d 1268, 1277 (9th Cir. 1988). The "need" must be something more than the mere wish to increase the prospects of acquittal; where there is no factual inconsistency of defenses, severance is properly denied. *Id. Accord U.S. v. Garey*, 813 F.Supp. 1069,

1074 (D. Vt. 1993); *see also U.S. v. Werner*, 620 F.2d 922, 930 (2d Cir. 1980) (unexplicated assertion as to need to testify selectively on different counts is insufficient). *See also U.S. v. Weber*, 437 F.2d 327 (3d Cir. 1970) (rejecting claim that consolidation of counts improperly prevented defendant from testifying selectively as to only some counts, as he wished); *Zackson*, 6 F.3d at 921 (rejecting argument that counsel was ineffective for acquiescing to joint trial that prevented petitioner from testifying selectively as to only some charges).

Further, Movant provides no legal support for any purported limitation on the incriminating use of his testimony. One who takes the witness stand waives his Fifth Amendment rights with regard to all matters related to the testimony and a defendant's "credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." *Brown v. U.S.*, 356 U.S. 148, 154-55 (1958). "[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha v. California*, 402 U.S. 183, 215, (1971). *See also U.S. v. Hearst*, 563 F.2d 1331, 1340 (9th Cir. 1977) (scope of cross-examination is determined by whether government's questions are reasonably related to subjects covered by defendant's testimony.). It is difficult to envision any testimony Movant could have given concerning Count 3 that would not also reasonably relate to his status and occupation as a Cuban intelligence officer, opening up for examination virtually all areas of the case. *See also* pages 16-18 *supra* (discussing cross-admissibility of evidence concerning multiple indictment counts). This would be so even if Movant testified at a trial of Count 3 alone; his testimony still would be admissible against him at a separate trial on the other counts, and at sentencing proceedings on all counts. (Of course, since Movant provides no authority for the

argument that he would be entitled to sever the counts, he also provides no authority for the even more strained argument that he would be entitled to set the order of separate trials and sentencing.)

Nor is there any right of a defendant to testify selectively or at a separate trial so as not to incriminate co-defendants. Indeed, the co-defendants would not necessarily be able to complain about Movant's testifying, *see Zafiro*, 506 U.S. at 540 ("we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant"); the testifying defendant would have even less of a cognizable complaint. Movant does not argue, and his affidavit does not support, that his testimony would have been antagonistic to co-defendants' defenses. The notion that he would be significantly incriminating them is baseless, in light of the defendants' (including Movant's) collective and uniform defense resting not on denial of acting as agents of the government of Cuba ("GoC"), but rather on rationales for why they were in the United States, and for their supposedly benign, non-espionage purposes. Movant's proffered affidavit testimony is not inconsistent with the uniform defense position. Even if it were, Movant establishes no legally cognizable right not to incriminate a co-defendant.[13]

Movant's affidavit states, DE24:1, that McKenna never told him that he could have a separate trial on Count 3 with the right to testify without prejudice on other charges, and without prejudicing his co-defendants. Because there is no such right, this assertion, even if true, fails to state a basis for §2255 relief. Movant's corresponding §2255 claim, #56, DE12:18, 21, 55, that McKenna provided constitutionally ineffective assistance by failing to apprise him of this right fails.[14] There

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[13] Any severance-complaint as to antagonism would be from the non-testifying co-defendants, not from Movant.

[14] Claim #56 also invokes the Fifth Amendment, suggesting that it was infringed by (continued...)

is no right to be apprised of a non-existent legal principle.

As for the claim that Movant was deprived of the opportunity to call co-defendants to testify exculpatorily, it fails. The framework for analyzing a motion to sever based on the desire to offer a co-defendant's exculpatory testimony is well established. The defendant must demonstrate: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial." *U.S. v. Cobb*, 185 F.3d 1193, 1197 (11th Cir.1999). Once the defendant makes that threshold showing, the court must then: "(1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion." *U.S. v. Baker*, 432 F.3d 1189, 1239 (11th Cir.2005).

Movant does not pass the threshold. He presents no affidavit of Gonzalez, notwithstanding the many years in which he could have sought one. *See U.S. v. Abbell*, 926 F.Supp. 1545, 1553 (S.D. FL. 1996) (mere suggestion of a possible *Byrd* affidavit, with no specifics regarding what the co-defendant would testify to, insufficient*)*. Movant's own affidavit provides no description or specifics of what Gonzalez would testify to, and statements in Movant's pleadings in this regard are scant, conclusory and unsworn. DE12:19, 25 (asserting Gonzalez could show that Movant's knowledge

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[14] (...continued)
McKenna's failure to tell Movant of his rights to testify at a severed Count 3 trial, without incrimination on other counts. As discussed above, Movant had no such right. Indeed, if McKenna had so advised Movant, erroneously, the result could have been Movant losing the undoubted strategic benefits of a joint-defense joint trial, while still facing incrimination on all counts from his testimony, risking a much more formidable ineffective assistance of counsel claim. In any event, there is no basis for a claim of infringement on the Fifth Amendment. Movant does not claim that he was unaware that he had a right to testify, nor does he claim that McKenna refused to allow him to testify.

of the shootdown was only the general understanding in the public domain; that if an illegal shootdown was anticipated, Movant would have conveyed instructions to prepare for such an event, but that nothing more than lawful sovereign action was feared; that Gonzalez would have provided first-hand information as to Movant's state of mind, expressed intent and reactions and post-shootdown statement consistent with intent to act lawfully; and that Gonzalez and Movant believed in Cuba's lawful right to defend its airspace.)[15]

This is not a sufficient showing under *Byrd,* and is insufficient for a severance. The claim's substance is vague and stated as a "bare conclusory assertion," as in *U.S. v. Johnson*, 713 F.3d 633, 641 (11th Cir. 1983), which had the assertions in affidavit form, unlike here. As in *Johnson*, the alleged exculpatory testimony does not purport to be against the testifying co-defendant's penal interests, *id.* at 641, "carefully avoid[ing] any implication that [the witness/co-defendant] himself knew the object of the conspiracy, thereby insuring that he could likewise disclaim familiarity with its goal," *id.* at 641-642. *See also U.S. v. Pepe*, 747 F.2d 632, 651 (11th Cir. 1984) (proffered co-defendants' testimony of dubious credibility because not contrary to their penal interests; severance properly denied).

Furthermore, Gonzalez's vaguely described testimony – Movant offers only conclusory, unsworn statements of lack of intent – "is of doubtful exculpatory effect," *see U.S. v. Hewes*, 713 F.2d at 640; *see also U.S. v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980) (significance of proffered

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[15] Movant's arguments that a severance would have enabled him to present testimony from other co-defendants, including those who pled guilty and Juan Pablo Roque, must be rejected. Movant provides no description of what his trial co-defendants supposedly would have testified to. Co-defendants who pled guilty needed no severance to testify, and Roque was a fugitive at the time of trial. As to co-defendant "A-4" (indicted as John Doe No. 4), Movant's affidavit, DE24-1:3, recounts *Movant*'s purported testimony *about* A-4, but does not state what A-4 would testify to; whether A-4 was willing to testify; or even what A-4's name is.

testimony as exculpatory not certain or clear enough to warrant severance). It speaks in generalities, rather than in the "specific exonerative facts" that a court requires in a *Byrd*-type severance claim. *See Johnson,* 713 F.2d at 641 (conclusory allegations provide little clear indication of specific exonerative facts to which the co-defendant would testify); *Pepe*, 747 F.2d at 652 (showing fell far short of "specific and exonerative facts" required for severance). There also is no statement that Gonzalez would have been, or is presently, willing to testify. Finally, even from Movant's vague description, it appears that much of the supposed Gonzalez testimony would be an inadmissible account of things he heard Movant say, or that they discussed together. A defendant may not offer in evidence his own out-of-court hearsay statements. The exception for admission of out-of-court defendant statements is explicitly limited to admissions by a "party-opponent," Fed.R.Evid. 801(d)(2). The provisions whereby admissions, including a defendant's statements, may be admitted in evidence without running afoul of the hearsay prohibition apply only to "statement[s] . . . offered *against* a party," *see* Fed.R.Evid. 801(d)(2) (emphasis added); *see U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982) ("When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible").

Unable to show that he was entitled to, or would have received, a severance of Count 3 from the remaining counts, Movant fails to establish the "prejudice" prong of *Strickland*. The court need not consider both *Strickland* prongs if it finds that either fails. In this instance, moreover, failure of the prejudice prong in and of itself also defeats the performance prong. That is, if severance was not a legally viable avenue to pursue (no prejudice), McKenna could not have been ineffective for not pursuing it (no deficient performance). *See, e.g., Bear Stops*, 204 F.Supp.2d at 1213, 1215 (denying §2255 claim that counsel was ineffective where it was "a virtual certainty that a motion to sever

would not have been granted. . . . It would have been a futile act"); *Smith v. U.S.*, 343 F.Supp. 1315, 1318 (W.D. PA. 1972) (counsel not ineffective for failing to make dubious severance motion); *Johnson v. Tennis*, 2007 WL 789179, *9 (E.D.Pa. 2007) (same).

B. Supposed failure to call witnesses

Movant's severance claims overlap with the claim that McKenna's failure to call witnesses, including co-defendants (Claim #18) and possibly Movant himself, was but part of his failure to address the "only issue" relevant to Count 3, Movant's intent (DE12:8). First, Movant fails to show that no competent counsel would have foregone calling these witnesses. The Eleventh Circuit "has emphasized that '[w]hich witnesses, if any, to call . . . is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess.'" *Allen v. Secretary*, 611 F.3d 740, 759 (11th Cir. 2010) (quoting *Waters*, 46 F.3d at 1512). *See also Chandler*, 218 F.3d at 1314 n. 13 (similar). As with Gonzalez, Movant also fails to establish both the supposed testimony that would have been provided by these supposed witnesses, and their availability to testify at trial.

As for any suggestion that McKenna was ineffective for not calling Movant as a witness, it is too vague, qualified, and equivocal to merit relief. Movant's filings are muddled and inconsistent in this regard. Movant's initial claims and Addendum, DE 1-2, do not state that he should have taken the stand at his trial and testified in his own defense. His Memorandum argues, DE12:8, that Movant "could and should have done precisely that," but hedges by framing it as an attorney-advice issue, and that "at the very least" McKenna should have advised him better leading to a more informed decision. The Memorandum further states, DE12:25-26, that Movant "himself could have offered perhaps his strongest defense" at trial but never had that opportunity because McKenna failed to explain the advantages of Movant testifying. Yet the Memorandum does not say that Movant wanted

to, or would have, testified at his joint trial, nor that he would testify at the new trial he seeks. Movant's affidavit, DE24-1:1, states that he would have testified at a separate trial on Count 3, but not that he wanted to, or would have, testified at his actual joint trial. *See* DE24-1:5 ("I would have been entirely willing to [testify] *at a separate trial* on [Count 3]") (emphasis added).

Nowhere does Movant meaningfully assert a basis for his claim that his Fifth Amendment right to decide whether to testify was infringed. He argues that McKenna interfered with his right to testify by failing to advise him fully about the benefits of testifying, including at sentencing.[16] *See* Claims ##56, 64, DE12:8, 18, 21, 25-26, 55. Yet he does not claim that he wanted to testify but McKenna prevented him; nor does he claim that he did not know he had the right to testify. He cites no cases or examples of the content of attorney advice about testifying causing a Fifth Amendment violation. He argues, DE12:21, without citing to any authority, that in not moving for a severance that would have allowed him to testify as to Count 3 selectively, McKenna "made a testimonial decision" for Movant in violation of the Fifth Amendment. On the contrary, whether to seek a severance "is clearly an 'attorney decision,'" including in a context where the circumstances of a joint trial impact a defendant's decision whether to testify, *Merlino,* 2 F.Supp.2d at 661-663. As in *Merlino*, Movant does not claim either to have been unaware of his right to testify, nor that his lawyer refused to allow him to testify; there is no constitutional infringement.

The hidden proposition in Movant's arguments seems to be that if only McKenna had advised Movant differently, he would have wanted to testify; but there is no authority for this as a

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[16] The claims about sentencing are defeated by his extensive personal allocution at sentencing, *see* DE/cr1450:57-69, including a factual denial of involvement with the shootdown, DE/cr1450:63.

basis for §2255 relief.[17] On the contrary, this is the sort of "might-have-been" projection that was rejected by *Strickland* and disapproved in *Waters*, 46 F.3d at 1514. In any event, no testimonial decision was forced on Movant, who could have testified at his trial. As discussed *supra*, severance was not required, or likely to have been granted, based on a wish to testify selectively, and certainly was not required for Movant to have the opportunity to testify.

Movant's claims, *see* Claim #18, DE12:19-20, 21, 25, 30, 56, that McKenna was ineffective

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[17] Further, any claim by Movant that McKenna should have advised him to testify fails to consider or address the reasonableness of the opposite strategic calculation that it was inadvisable for him to testify. *See U.S. v. Teague*, 953 F.2d 1525, , 1535 n.1 (11th Cir. 1992) (significant legal risks for testifying defendant) (concurring opinion). As a career intelligence officer for the GoC, Movant had lived for years clandestinely in the United States under a false identity, with voluminous false documentation and elaborate "legends" of fake biography for his primary false identity and for backup false "escape" identities. He faced significant impeachment on that basis. He also followed a strict discipline, as an intelligence officer, of protecting Cuban secrets and of not divulging his actual situation. *See* Government Trial Exhibit ("GX") DG-126(E):9 (explicit instruction to Movant that if arrested and confronted with the falsity of his identity legend and documentation, he should "UNDER NO CIRCUMSTANCES . . . EVER ADMIT TO BEING PART OF, OR LINKED TO CUBAN INTELLIGENCE OR ANY OTHER CUBAN GOVERNMENT ORGANIZATION"). Under these circumstances, it was very unlikely that Movant could, or would, testify with the candor and breadth that would make any testimony effective. Indeed, to this day Movant never has testified or answered questions to United States courts or law enforcement, and while this is his right, it casts considerable doubt on any convenient, and belated, claim that he would have, or could have, testified profitably at trial. He was highly impeachable in other ways, as well; the thousands of pages of documented reporting to and from him included numerous unflattering and sinister features, such as his consideration of the prospect of the spy group committing arson on a boat in the Miami River, *see* Campa Defense Exhibit R64, pages 15-19; determining if sabotage of BTTR's facilities would be "FEASIBLE (AND CONVENIENT)", *see* GX DG139:10-11; and carrying out "active measures" that included death threats and that targeted United States and other government personnel, *see* GX DG108:28-29; DG127:7-8; DC101:11-19. Further, under the severance scenario Movant now promotes, he might have been impeachable with prior convictions from his first trial. Counseling Movant against testifying would have been eminently reasonable. Indeed, furnishing contrary counsel would have been perilous; one can only imagine the §2255 ineffectiveness-claim had McKenna so counseled and Movant had been convicted, as is highly probable, after testifying. Movant cannot establish that every reasonable attorney would counsel a client to testify, against such odds.

for failing to call other witnesses besides Movant similarly lack merit. As discussed *supra*, the choice of witnesses to call is the epitome of an attorney's strategic decision, not to be lightly second-guessed. *See Chandler*, 218 F.3d at 1314 n. 13. Further, "'Complaints of uncalled witnesses are not favored in federal habeas review,'" *United States ex rel. Cross v. DeRobertis,* 811 F.3d 1008, 1016 (7th cir. 1987) (quoting *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir.1984)), which in turn traces back to precedential former Fifth Circuit caselaw. *See Buckelew v. U.S.,* 575 F.2d 515, 521 (5th Cir. 1978)). Movant complains that McKenna should have called Gonzalez and Roque as witnesses. *See* Claim #18. As discussed above, Movant's claims are inadequate to establish what Gonzalez would have testified to, and whether Gonzalez would have testified. Nor is there an affidavit from Roque setting forth what he would have supposedly testified to, or whether he would have been available and willing to testify.[18] Movant suggests that McKenna was ineffective for not questioning Roque about his interactions with Movant, *see* DE12:30, but no specifics are provided. As to others, Movant argues, somewhat grandiosely, that "every other charged and uncharged defendant in the case" could have testified, *see* DE12:19, but provides no affidavit, no proffer, no specified description of what their testimony would have been and whether they would have been willing to testify. Except for the alias of one co-defendant, "A-4", also known as "Miguel," *see* DE12:21, Movant does not even name these other putative witnesses; as noted at 23 n.15 *supra*, Movant's

[18] At the time of trial, and continuing thereafter, Roque was himself an indicted co-defendant who has evaded arrest and is believed to be living in Cuba. Given Roque's fugitive status, Movant's failure to establish Roque's willingness to testify is particularly fatal. Even if Movant's position is that Roque could have testified by Rule 15 deposition, which he does not argue and is highly doubtful, that too would require Roque to be willing to testify. Moreover, the impeachability of such a witness would make it a questionable strategy, and Movant cannot show that no reasonable attorney would refrain from calling as a witness a person, charged with conspiracy to defraud the United States, who refused to come to the United States to provide testimony.

affidavit, DE24-1:3, recounts *Movant*'s purported testimony *about* A-4, but does not state what A-4 would testify to; whether A-4 was willing to testify; or even A-4's true name.[19] Movant makes a similarly broad, vague, and conclusory claim that Hernandez's family and unnamed "others who interacted with him in Cuba," DE12:19-20, could have testified to exculpate Movant, but he again provides no specifics. As with Gonzalez, if their testimony would be to Movant's statements to them or others, this would be inadmissible hearsay.

As with the discussion concerning Movant's own possible testimony, the issue of the other "missing witnesses" is additionally raised in terms of McKenna's consultations with and advice to Movant. *See* DE12:21 (failure to advise Movant of right to present Cuban agents as defense witnesses); DE12:30 (failure to consult Movant regarding potential witnesses). Here, too, however, Movant provides no specifics concerning their consultations and makes no acknowledgment of the legitimate strategic concerns that could underlie an attorney's decision not to call certain witnesses. This also is especially true with regard to the potential impeachment of witnesses who were Movant's "charged and uncharged" co-defendants, and other Cuban agents, all of whom would have had considerable negative credibility baggage. Movant's failure to address these circumstances fatally evades his burden to show that McKenna's course of eschewing such vulnerable and risky witnesses was "'outside the wide range of professionally competent assistance." *See Chandler,* 218 F.3d at 1314 (quoting *Burger v. Kemp*, 483 U.S. 776, 795 (1987)).

Movant cites, at DE12:55-56, cases for the proposition that adequate consultation between attorney and client is essential. None of the cited cases, however, warrants granting §2255 relief

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[19] Movant's inability or unwillingness to provide the true name of intelligence officer A-4, more than a decade after trial, belies the premise that A-4, or any other Cuban intelligence officer such as Movant himself, would have been willing to testify.

based on the kind of vague and conclusory claims here that Movant's attorney failed to tell him the winning strategy for the case.[20] On the contrary, *U.S. v. Tucker*, 716 F.2d 576 (9th Cir. 1983), granted relief on a record that defense counsel's few hours with his client were mainly spent discussing fees and the government's plea offer; that virtually none of the voluminous documentary material was discussed with the client, *id.* at 582; that counsel's pretrial preparation and consultation were so poor that at the 21-day trial he raised no objections to admission of any government document and but a single objection to any government question; and conducted almost no cross-examination, *id.* at 585, 578 n.1. Other cases cited by Movant are equally unavailing. Most pre-date *Strickland.* Several – *Tucker,* 716 F.2d at 582 n. 12, and *U.S. v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980) – rely on ABA standards of professional conduct as defining criteria for defense-preparation adequacy, an approach the Supreme Court rejected in *Strickland*, 466 U.S. at 688; *see also Bobby v. Van Hook*, 130 S.Ct. 13 (2009). More recent cases cited by Movant either *denied* habeas relief notwithstanding a record of arguable attorney-deficiency greater than shown here, *see Bower v. Quarterman*, 497 F.3d 459, 467 (5th Cir. 2007), or granted such relief in egregious circumstances that are easily distinguishable, *see White v. Godinez*, 301 F.3d 796, 801 (7th Cir. 2002) (attorney met with client, facing death penalty, only twice before trial, for total of 45 minutes).

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[20] The closest Movant comes to specificity is in his affidavit. He says that he "can't recall" if he and McKenna discussed severance, and that he does recall that McKenna never told him he could testify at a separate trial on Count 3 without incriminating his co-defendants or himself on other charges. As to the former, the record conclusively shows that McKenna and Movant in fact did discuss severance prior to trial; *see* DE/cr1510 (status conference discussing prospect of severance, and McKenna's report that "we have always envisioned going to trial all together as a group in defending the charges jointly together. The defendants want that and that is why they have instructed us to prepare that way ." DE/cr1510:13-14). As to the latter, as discussed *supra*, McKenna was not required to give Movant incorrect advice that he had a right to testify at a severed trial to avoid incriminating co-defendants or himself on other counts.

Movant shows nothing like this. Rather his claim, and his argument that McKenna's deficient advice violated his constitutional rights is but a conclusory, generalized proposition: McKenna failed to advise him to testify that he did not intend to aid an unlawful murder, DE12:8; McKenna failed to tell him that he could seek a severance and thereby have the opportunity to testify exculpatorily, DE12:18, 25-26, as to Count 3, DE12:55-56.

One who seeks to raise a claim of inadequate attorney-consultation must be more specific. *See, e.g., Brewer v. Lape*, 2010 WL 3565176, *28 (S.D.N.Y. 2010) (rejecting inadequate-consultation ineffectiveness claim; "petitioner offers no details regarding the nature and extent of the communications that he had with his attorney" and record reflects that there was consultation); *Ellington v. Carey*, 2010 WL 2652284, *15 (C.D.CA. 2010) (deficient-communication claim fails because conclusory; petitioner "fails to identify what legally relevant information counsel failed to elicit" from him, or how this impacted verdict); *Cage v. Newland*, 1999 WL 1080687, *5 (N.D.CA. 1999) (petitioner fails to show prejudice from counsel's alleged failure to consult sufficiently; general claim that counsel thereby could have obtained "crucial impeachment evidence" insufficient where petitioner does not show what this "crucial impeachment evidence" could have been).[21]

Movant's claim of inadequate consultation also overlooks that consultation is not required as to every aspect of a criminal defense. "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney." *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (concurring opinion).

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[21] Movant's argument, *see* Claim #37, DE12:35, that McKenna failed to follow certain client instructions given through Movant's handwritten notes does not cure the non-specificity defect. Movant provides no particulars about his handwritten notes, and thus has failed to supply anything but conclusory support for his claim that McKenna failed as to "calling of witnesses, presentation of evidence, and other fundamental trial decisions," *id.* Thus, Movant fails to establish any prejudice. *See Strickland*, 466 U.S. at 693.

It is defense counsel's responsibility, not the defendant's, to develop trial strategy and possible defenses. Not only do these decisions rest with the attorney, but such decisions often must, and properly may, be made without consulting the client. *Id.* Decisions that may be made unilaterally by defense counsel primarily involve trial strategy and tactics, such as what evidence should be introduced, which witnesses to call, what objections to raise, and what pre-trial motions should be filed. *See Teague*, 953 F.2d at 1531.

Although Movant's Motion is fatally silent on the actual nature of his consultations with McKenna, the record readily refutes even the general claim of inadequacy. The record reflects repeated timely consultation between McKenna and his client during the trial. *See, e.g.,* DE/cr1474:1261-1262 (McKenna successfully seeks court intervention so incarcerated client may review video in the evening after court); DE/cr1475:1489-1490 (McKenna requests, and gets, break in proceedings so that counsel may consult with clients as to exercise of peremptory challenges); DE/cr1483:2692, 2694 (McKenna and client consulting concerning detailed content of evidentiary documents); DE/cr1500:5077 (McKenna arranges for discovery to be provided for client review at Federal Detention Center). The record also reflects consultation, and McKenna's concern therefor, with Movant prior to trial. *See, e.g.,* DE/cr1800:7-8 (status conference, discussing ongoing discovery review, with McKenna noting Movant's participation; McKenna, explaining the need for more time, said he had "just made it through the first drawer [of government discovery], and that's working not just with myself but with an investigator *and with my client*. That's trying to have all of us digest this material together, because you can't -- this material is not just the kind of material that you can just look at yourself") (emphasis added). The court doubtless also will recall the discussions held, and the provisions it made, so that the marshals could bring Movant and co-defendants from the

detention center across the street to the defense SCIF where classified discovery was held, to enable client access to discovery, and consultation with counsel.[22] This is the very opposite of the situation in cases, such as *Tucker*, on which Movant relies where counsel failed to review discovery with his client, and cross-examined for only 150 pages of a 21-day trial record, 716 F2d at 578 n.1. By contrast, McKenna cross-examined government witnesses, especially those related to Count 3, extensively; his cross-examination of government aviation expert Charles Leonard alone took two days and more than 300 transcript pages, *see* DE/cr1529:7450-DE/cr1530:7751.[23]-

C. The Supposedly "Only" Proper Defense Focus

Movant's claims of missing witnesses are but one aspect of what is perhaps his central theme: that as to Count 3 McKenna failed to defend as to "the only issue" in the case, that is, whether Movant intended to aid the GoC in an unlawful murder; *see* DE12:8, and, conversely, that the defense McKenna employed as to Count 3 "presented only irrelevant and prejudicial evidence," *see* DE12:12, Claims ##1-17, 19-22, 28-29, and 59. *See also* DE12:57 ("Counsel failed to defend on the sole defensible ground.") This is an astonishingly broad claim, which essentially asserts that everything McKenna did during the seven-month trial was wrong; that everything that would have been right in defending Movant was omitted by McKenna; that no reasonable attorney would have

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[22] During trial, the court continued to be proactive in ensuring that Movant and his co-defendants would be able to review discovery and consult with counsel. *See* DE/cr1474:1257-1262 (court deals with prison personnel to facilitate attorney access and document-review capability); DE/cr1474:1261-1262 (McKenna's comments evincing close and ongoing consultation with client).

[23] A further distinction from *Tucker* is that the attorney there was inexperienced, having never before handled any federal case or conducted any jury trial. *See* 716 F.2d at 582 n.4. McKenna, by contrast, was a highly seasoned, well-established federal criminal litigator, with a history of many federal cases, including high-profile federal jury trials. "The presumption of reasonableness is even stronger when [a court is] reviewing the performance of an experienced trial counsel." *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir.2005).

done any of the things McKenna did; and that every reasonable attorney would have done the things that McKenna did not do. The claim is incorrect and wholly unsustainable in its uncontrolled sweep.

Even if Movant's claim is viewed more modestly, as an argument that McKenna essentially missed, or neglected, the key defense of lack of intent, and instead focused unduly on supposedly collateral matters like location of the shootdown, the claim fails. As explained below, McKenna focused considerable attention on Movant's intent. Furthermore, Movant claims that McKenna should have done more to develop issues, like the location of the shootdown, that Movant also – and inconsistently – disparages as irrelevant, harmful, or unimportant. When viewed this way, it is clear that the essence of Movant's claim is not really that McKenna was ineffective for failing to *address* intent, or for *addressing* issues like the shootdown location, but rather that his ineffectiveness lay in failing to *win* on those issues, by not wording his arguments, questions, and jury instructions on those issues in the magic words that would have won Movant's acquittal. But if this were the test for whether constitutionally effective legal representation has been furnished, every conviction would be proof and evidence of ineffectiveness, contrary to the core meaning of *Strickland. See* 466 U.S. at 690. The fact that a particular defense ultimately proves to be unsuccessful does not demonstrate ineffectiveness. *See Chandler*, 218 F.3d at 1314. "Ineffective-assistance-of-counsel claims will be raised only in those cases where a defendant has been found guilty," where "there is a natural tendency to speculate as to whether a different trial strategy might have been successful," but such speculation is not the appropriate test. *Lockhart*, 506 U.S. at 372. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Waters*, 46 F.3d at 1518.

Movant's multifarious claims that McKenna failed effectively to address the issue of criminal intent with regard to Count 3 appear in Claims ##11-17, 19-20, 22, 28-29, 34-39 and 59. These

claims fall into certain general subject areas that McKenna is said to have overlooked or failed to develop: the supposedly lawful, benign, or forebearing nature of Cuba's actions vis-a-vis BTTR, and therefore the lawfulness of Movant's participation in planning for that action (Claims ##11-14, 16-17, 20, 38-39),[24] which might be called "the Cuban perspective;" the distinction between Operations Venecia and Escorpion, supposedly undermining the government's theory that Escorpion was a sinister shootdown plot involving Movant (Claim #59; *see also* DE12:60), called "the Venecia/Escorpion distinction;" documentation of Cuba's belief that the shootdown was in Cuban airspace and the unlikelihood of contrary belief, rebutting inferences that Movant believed and intended an international-airspace shootdown (Claims ##29, 35); intelligence standards of compartmentalization that reduced the likelihood of Movant knowing about the shootdown (Claim #19); Movant's being outside the stream of high-frequency radio communications from Cuba (hereafter "HF"s) which helped prove Count 3 (Claim #22); Movant's post-shootdown promotion being routine rather than shootdown-related (Claim #28); Movant's remoteness from the events and contemporaneous decisions of February 24, 1996, the day of the shootdown (Claim #36); and failing to focus the jury on the intended usage, function and purpose of BTTR craft as hostile and fairly viewed by the GoC as a military threat (Claim #34).

Movant argues as if McKenna failed to develop these topics at all, or developed them too minimally to be effective. But Movant makes his arguments largely in a vacuum, without examining the extensive record in this case or addressing how McKenna actually dealt with these issues.

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[24] An important corollary, reflected mainly in Movant's affidavit of law professor Quigley, Appendix A at DE12-1, is that the lawfulness and reasonableness of Cuba's (and, derivatively, Movant's in any agreement with Cuba) perspective of its actions toward BTTR were shaped and determined by a history of misbehavior and threats from BTTR and its personnel, aimed at the GoC.

Movant's approach thus fails to carry his affirmative burden to disprove Mr. McKenna's competence, and to overcome "the presumption that what the particular defense counsel did at the trial . . . were acts that some reasonable lawyer might do." *Chandler*, 218 F.3d at 1315 n.15. "This presumption of competence must be disproved by a petitioner," *id.,* and the burden never shifts to the government. "Never does the government acquire the burden to show competence." *Id.* Movant's approach also ignores the admonition that "unless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act of omission of counsel was unreasonable," *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (quoting *Strickland,* 466 U.S. at 689).

Here, Movant has failed to carry his burden of proving that McKenna acted unreasonably and thereby rendered constitutionally ineffective assistance of counsel. Notwithstanding that Movant and not the government bears that affirmative burden, and without waiving the argument that Movant's non-feasance in this regard in itself defeats his motion, the government will do what Movant failed to do, and marshal specifically the record in this case to address the effectiveness of Mr. McKenna's performance generally, as well as on the very issues Movant claims were overlooked. This review of the record conclusively shows that McKenna's performance was effective and constitutionally reasonable, even if unsuccessful.

Pre-trial

Contrary to Movant's contentions, McKenna evinced, and explicitly stated, that the defense was closely focused on the issue of testing the government's proof as to his client's intent with regard to all counts including the BTTR-related Count 3. *See, e.g.,* DE/cr1703:86-88 (McKenna

forecasts that by developing evidence about violent Miami-based groups – BTTR in particular – threatening Havana, the defense would show Movant lacked the requisite criminal specific intent). He also argued – showing a reasonable strategy designed to protect his client from the risks attendant to testifying – that he should be permitted to present such evidence and arguments without Movant being forced to testify. *Id.* at 87, *see also id.* at 97.[25]

Opening Statement

Contrary to Movant's claim that McKenna failed to address the supposed government theory that the shootdown was "without warning,"Claim #20, DE12:34, McKenna carefully and forcefully developed this theme, beginning with opening statement. *See* DE/cr1476:1604 ("Basulto and these Brothers to the Rescue aircraft had been warned, repeatedly, about violating Cuban air space which they had done for over a year. They were warned by the FAA, they were warned by the State Department, and they were warned by the Government of Cuba; but they disregarded these warnings"); *see also* DE/cr1476:1615-1616. Developing further the "Cuban perspective" theme, McKenna recounted BTTR leader Jose Basulto's long history of trying to "create some armed insurrection" in Cuba, including a cannon attack on a Cuban hotel and Basulto's supposedly making antipersonnel devices to drop over Cuba, DE/cr1476:1608; Basulto and BTTR's strategy, beginning in 1994, to create confrontations with the GoC, DE/cr1476:1610; and BTTR's illegally entering Cuban airspace repeatedly to drop literature calling for Castro's overthrow, DE/cr1476:1610-1611.

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[25] These remarks occurred during argument of the government's motion to preclude the defendants from presenting an affirmative defense of necessity. *See* DE/cr719. McKenna and other defense counsel were successful in persuading the court to deny the government's motion, *see* DE/cr754, and the court adopted McKenna's argument that the evidence sought to be limited could be relevant to specific intent. *See* DE/cr1703:92-93; DE/cr754:2 (citing McKenna's argument at DE/cr1703:87); DE/cr754:3-5. Thus, McKenna was extremely effective in achieving this key defense victory.

McKenna effectively used opening statement to educate the jury on other matters relevant to the defense theory as to Count 3. He discussed the 24th parallel and its significance for air traffic control. DE/cr1476:1612. Further presenting the "Cuban perspective" theme, he outlined the GoC's concern that BTTR's flight history was disrupting Cuban radio communications and air traffic control, *id.*, and that BTTR had flown over the national oil refinery, further raising Cuban alarm, DE/cr1476:1614. McKenna sought to refute, and defuse, the perceived negative impact on the jury of the shootdown scenario: "It is not as the government has tried to portray it, some kind of out of the blue merciless shootdown of people who were searching over international waters for rafters. That is what they charged, but that is not what occurred." DE/cr1476:1621-1622. He was prudently non-committal about what the evidence would show regarding the shootdown location, "but one thing everyone agrees on, Basulto's plane was definitely in Cuban air space." DE/cr1476:1622.

Finally, McKenna used the climax of opening statement to explain that he would present expert testimony that the history and paramilitary actions of BTTR warranted the GoC's view that the shootdown was not murder but a legitimate act of war. DE/cr1476:1622-1623. This is, in essence, the very proposition that Movant claims, incorrectly, that the defense failed to assert. Movant argues, Claim #34; *see also* DE12:15, 39, that McKenna missed the point by focusing on distinguishing "civil from military aircraft on the basis of aircraft design and structure rather than their intended usage, function and purpose," but that was not McKenna's position. Rather, as McKenna stated in opening, the defense position was that, based on the evidence of Basulto's violent and provocative history and BTTR's overflying over Havana, BTTR was "doing something paramilitary" which, according to defense expert Col. George Buchner (who later testified at length) made the shootdown "not an act of murder, it was an act of war based on the activities that they were engaged in."

DE/cr1476:1623. Movant's claim that McKenna ineffectively failed to engage an expert witness to explain that the Cuban perspective on the shootdown was rationally, and properly, based on the history of BTTR flights' "intended usage, function and purpose" is conclusively refuted by the record.

Government's Case

McKenna continued to develop these themes, and other points relating to Count 3 that Movant claims were negligently overlooked, throughout the trial. He skillfully and strategically used cross-examination to build the theory of defense. For instance:

> With regard to the arguable distinction of "Operacion Venecia" and "Operacion Escorpion" (Claim #59; *see also* DE12:36), *see* DE/cr1485:2966-2973, 2979 (McKenna examines FBI translator to focus on nature, and arguable differences, of the operations); DE/cr1485:2972: ("There is a distinction between Operacion Escorpion and Operacion Venecia or German in these messages; is that correct? They seem to be two different operations?"); DE/cr1485:2980 (Movant's recognition by GoC supposedly linked to Venecia rather than to Escorpion). Besides the cited cross-examination, McKenna's legal arguments to the court reflect his full appreciation, and strategic emphasis, of the claim that Venecia/Vedette was a distinct operation for the exfiltration of Juan Pablo Roque, and unrelated to Operacion Escorpion and the shootdown. *See, e.g.,* DE/cr1526:7038-7040 ("There is no marriage [of Venecia and Escorpion operations] . . . this [government exhibit HF-112, pertaining to Roque's return to Cuba to denounce BTTR] is not a reference to the shootdown. This was another contingency . . . It is not the same thing as the conspiracy they charged here which is a conspiracy to commit murder. . . . This has nothing do with the shootdown. This is

another measure . . . a whole different little measure").

With regard to the claim, *see* Claim #28; DE12:34, that McKenna failed to show that Movant's post-shootdown promotion was administratively ordinary, *see, e.g.,* DE/cr1485:2975 (examining FBI translator to match date of promotion with Cuba's Ministry of Interior anniversary).

With regard to the supposedly rational and fair bases for Cuba to perceive BTTR as a grave threat, and the related argument that Cuba considered that it had shown forebearance in the face of BTTR provocations (the "Cuban perspective" theme, Claims

see, e.g., DE/cr1485:2985-2986, DE/cr1502:5489, DE/cr1504:5818-5819 (examining FBI translator, BTTR pilot, passenger to establish that Basulto plane's tail number references Bay of Pigs invasion); DE/cr1502:5463 (Basulto overflying Havana as "act of civil disobedience"); DE/cr1502:5464-5468; DE/cr1504:5767 (BTTR dropping smoke device, medallions over Cuban territory); DE/cr1502:5470 (BTTR intention to enter Cuban air space); DE/cr1504:5786, DE/cr1518:6063-6064 (whether BTTR entered Cuban airspace in January 1996, July 1995); DE/cr1502:5529-5531, DE/cr1504:5792-5800, 5825 (seeking to cross-examine about supposed BTTR anti-personnel devices, purchase by BTTR adherents of MiG 23; Basulto attempt to purchase Czech fighter jet); DE/cr1504:5773 (seeking to establish GoC's arguable restraint in the face of BTTR's pre-shootdown provocation); DE/cr1505:6024-6034 (explains to court strategy and need to develop testimony concerning Basulto's history as a perceived violent threat to Cuban regime); DE/cr1518:6068-6075, 6081-6082 (explains to court need to show BTTR background not as "a character attack against Basulto," but as predicate for Cuban wariness over plans for

February 24, 1996 assembly, and over Concilio Cubano association with arguably violent organizations and with Basulto message of civil disobedience); *see also* DE/cr1518:6093-6095 (cross-examining concerning Basulto as encouraging Cuban people to civil disobedience); DE/cr1529:7607 (cross-examining government aviation expert as to Basulto invoking civil disobedience while overflying Havana prohibited zone).[26]

With regard to the history of BTTR flights' "intended usage, function and purpose," which Movant argues McKenna missed (Claim #34, DE12:15, 39.), *see, e.g.,* DE/cr1502:5468 (attempting to inquire whether BTTR throwing medallions over Havana is "something you would consider a normal act of a civilian aircraft"); DE/cr1502:5489-5498 (successfully arguing for, and cross-examining on, history of BTTR plane's former military markings and under-wing mounts for rocket-carrying pylons);.

With regard to BTTR supposedly exhorting the Cuban populace to civil disobedience and overthrowing the government,[27] *see* DE/cr1529:7605 ("Isn't it a fact, Basulto, after he did

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[26] Movant's argument that Mr. McKenna failed to establish that a shootdown-agreement would have been lawful, and perceived by Movant as lawful, due to the circumstances and history of the conduct of BTTR and its principals, is tied to his argument that Mr. McKenna should have engaged an expert to explain that "even if Hernandez had joined in an agreement to down planes, that would not have been an unlawful objective under the circumstances and for the reasons outlined in the Quigley affidavit." DE12:28. The referenced Quigley affidavit, Appendix A, DE12-1, is replete with points that are the very ones Mr. McKenna developed at trial, concerning the history of Basulto's and BTTR's conduct. *See* DE12-1:6-7, ¶19. Movant's arguments concerning use of an expert like Prof. Quigley are flawed for additional reasons, discussed *infra.* Initially, however, it is notable that Mr. McKenna developed in cross-examination many of the points in the Quigley affidavit.

[27] This is another point that the Quigley affidavit suggests should have been developed, *see* DE12-1:6-7 ¶ 19. Movant argues, *see* DE12:29, that McKenna failed to show, through an expert, the significance for state authority regarding intruding aircraft intending to destabilize the political order and create civil strife. The record shows, however, that McKenna developed this point.

(continued...)

the [July 13, 1995] flight, came home and appeared on the six o'clock news and announced it for the whole world and published the photographs of his triumphant flight over Havana, calling for the end of the Castro regime; isn't that what happened?);" DE/cr1529:7607 ("That is pretty strong proof [for FAA enforcement action]; isn't it when you are captured on video over a prohibited zone in a foreign country announcing that you are engaged in an act of civil disobedience?").

Defense Case

During the extensive and robust defense case,[28] McKenna continued to develop the "Cuban perspective" and other themes Movant claims were overlooked. *See, e.g.,* DE/cr1545:9689-9690 ("What we are doing here is trying to show to the jury the Cubans' frame of mind with respect to the operator of the [BTTR] aircraft. . . I am generally trying to establish the Cuban frame of mind about Jose Basulto, that is all"). McKenna's development of the Cuban-perspective theme was not shallow as Movant suggests, *e.g.,* Claim #38; *see also* DE12:14 (characterizing McKenna's presentation as a crudely offensive "Cuba-was-right-and-America-was-wrong defense"). Instead, McKenna painstakingly elicited, especially from defense aviation expert Buchner, that the Cubans' perspective of the threat posed by Basulto and BTTR informed their plans and response leading up to the shootdown, in a way that negated criminal intent. McKenna took pains to show that Buchner's ultimate conclusion, *see* DE/cr1546:9955-9956, that the shootdown was a proper exercise of Cuba's sovereign rights, occurred within the context of Cuba's perception of threat, considering the history

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[27] (...continued)

[28] McKenna called 15 witnesses, live and by videotaped deposition, in a defense case that spanned 18 trial days; *see* DE/cr1533:8196-DE/cr1548:10317; DE/cr1560; DE/cr1563; DE/cr1566; DE/cr1567.

of BTTR and Basulto. *See, e.g.,* DE/cr1548:10298-10299.

Movant's claim (Claim #20) that McKenna failed to address any contention that the shootdown was "without warning" is conclusively refuted. McKenna called multiple Federal Aviation Administration ("FAA") witnesses, *see* DE/cr:1533:8301-8337; 1534:8373-8376, 8428-8472; 1535:8499-8558; 1563:12018-12025; retired U.S. Admiral Carroll, *see* DE/cr1533:8196-8205; former White House adviser Nuccio, *see* DE/cr1536:8631-8678, 1537:8755-8796; and Cuban aviation officials, *see* DE/cr1560:11612-11622, 11633-11672, 11699-11707, and introduced through them testimony and extensive documentation to adduce evidence of prior warnings, complaints, and stated apprehensions by the GoC regarding BTTR's pre-shootdown conduct. McKenna also elicited from hostile defense witness Basulto concessions in this regard,[29] and elicited testimony from defense aviation expert Buchner that Basulto had received warnings, *see* DE/cr1545:9714-9717.

Movant's claim (Claim #34) that McKenna mistakenly, simplistically and ineffectively focused the jury on whether Cuba-intruding aircraft could be considered civil or military on the crude basis of aircraft design and structure, rather than on the holistic basis of the aircraft's "intended usage, function and purpose" is refuted by the record. McKenna devoted extensive portions of expert Buchner's testimony to developing a detailed, nuanced, and comprehensive analysis of the usage, function, and purpose of BTTR aircraft and their flights, beyond the planes' physical markings. *See, e.g.,* DE/cr1544:9619 ff.; 9633-9642, DE/cr1545:9672 ff., 9683; 9685 ff., 9687 ff.; 9693 (explaining that the defense needed evidence concerning Basulto's background because it goes to Cubans' "state

[29] Basulto's concessions included BTTR's awareness of Cuba's repeated warnings about air space violations, DE/cr1541:9041; that Basulto knew violent repercussions were possible, DE/cr1541:9043; and that on the day of the shootdown BTTR knew that there was the possibitlity of "an additional level of danger that day," DE/cr1541:9063.

of mind as to whether or not this is a state or a civil aircraft. One of the factors is who the operator is"); 9697, 9698 ff., 9700 ff., 9701, 9707, 9710, 9714, 9727, 9730, 9773, DE/cr1546:9955-9956 ("These aircraft were operating in a subversive manner, trying to undermine the Government of Cuba. They vacated their civil status and became non-civil and this became a military on military operation and the Government of Cuba exercised their sovereign rights. . . .The operation of the Brothers to the Rescue aircraft vacated their civil category and became non-civil. That allowed the government of Cuba to exercise their sovereign rights . . . to protect their air space and they shot down the two aircraft"); 9961; DE/cr1548:10239 ("This area has been studied since World War I, 1918. It is a very esoteric area and the conclusion of the document is, basically, *the use of the aircraft determines what category it goes into [civil or state]. The use of the airplane determines its characterization*.") (emphasis added).

Nor is it so, as Movant claims, *see* Claim #12; *see also* DE12:34, 39, 57-58, that in developing the defense as to the Cuban perspective, McKenna obtusely "fail[ed] to distinguish the nature of the government of Cuba from the intent of petitioner Hernandez" and, Claim#14, "fail[ed] to develop and prove that petitioner Hernandez did not intend to join an agreement to commit an unlawful killing or an unlawful killing with knowledge of its illegality." As this court readily recognized at trial, McKenna's development of evidence concerning the history and supposed misconduct of BTTR and Basulto, and the Cuban perspective generally, was as it bore on Movant's criminal intent, and the defense strategy in resisting the government's theory of criminal prosecution of Movant. *See, e.g.,* DE/cr1537:8808-8821 (where, during a bench conference at the beginning of Basulto's testimony, the court overruled government objection and granted McKenna leeway to treat Basulto as a hostile witness and question him broadly on his past bad actions in order to, as

McKenna put it, DE/cr1537:8816, "understand the Cuban response"[30]). As the court stated, this was part of "Mr. McKenna's theory which he is in the process of developing, that there was another scenario [other than the government's theory] going on here and that it was not a conspiracy and this is why it was not a conspiracy. Just like the government is entitled to present their case, the defense is entitled to present their case and ultimately the fact finder will make a decision. . . . So far the evidence has come in with respect to lack of criminal intent to form the conspiracy . . . . I have allowed [defense] testimony to go forward on lack of criminal intent and should go forward on that and that is my finding." DE/cr1537:8820-8821. The record conclusively shows, as the court stated, that McKenna defended Movant on a basis of lack of criminal intent, and of there not being an unlawful conspiracy, in light of the history of BTTR and Cuba's perception thereof.

Closing Argument

McKenna's closing argument, DE/cr1583:14386-14470, skillfully and effectively built on these themes, which Movant incorrectly claims he overlooked. McKenna directly attacked any notion that the shootdown had been, in the words of Claim #20, "without warning". *See, e.g.,* DE/cr1583:14389 ("Ladies and gentlemen, the whole world knew what was going to happen. This wasn't some secret hatched plot. The FAA knew it, the State Department knew it, the President's adviser knew it and you know what, even Brothers to the Rescue knew it."). McKenna's argument concerning the Cuban perspective and perception of threat from BTTR leading to the shootdown, was not a crude "Cuba-was-right-and-America-was-wrong" slogan. Rather McKenna's argument relied on real-world context that Cuba was a "paranoid" place affording little leeway for

[30] McKenna said "the Cuban response to the shootdown." In context, it is clear that he was referring to what was necessary to understand the Cuban response culminating in the shootdown.

demonstrations and protests, DE/cr1583:14390; and was "an isolated country stuck in a time warp . . . like a cat in a corner," DE/cr1583:14402; and that to understand the context of the shootdown, "[y]ou have to look at it from the Cuban's point of view" that they were dealing, in Basulto, "with a very dangerous man," DE/cr1583:14392.

McKenna's argument that BTTR's flights took on a military character was not, as Claim #34 states, based simply on aircraft design rather than on intended aircraft usage, function, and purpose. *See, e.g.,* DE/cr1583:14401 ("These [BTTR] guys are operating little military missions"); DE/cr1583:14402-14403 (Basulto's language was "like military jargon" and didn't sound like normal, civil aviation); DE/cr1583:14407-14408 ("How do you decide what is a state aircraft and what is a civil aircraft? . . . *'The usage of the aircraft in question is the determining criterion and not, by themselves, other factors such as aircraft registration and markings'"*) (emphasis added); *see also* DE/cr1583:14409-14411.

McKenna argued extensively, and forcefully, the distinction between Operations Venecia and Escorpion, *see* Claim #59, and that this distinction undercut the government's theory of prosecution. DE/cr1583:14425 ("The government says Venecia and Escorpion are the same things. They are not. They are two completely different things"); DE/cr1583:14426 (Venecia "has nothing to do with Escorpion"); DE/cr1583:14429 (Venecia "isn't an operation to shoot down aircraft"); DE/cr1583:14430.

Movant claims, Claim #17, that McKenna failed to establish the unlikelihood of Movant being informed of operational details or plans for a shootdown, and, Claim #36, that McKenna failed to comprehend or argue the distinction between shootdown plans and Movant's knowledge of such plans and of the split-second decisions made by others the day of the shootdown. But that is exactly

the point McKenna was making when he argued, DE/cr1583:14390-14391, "Now they [the prosecution] want to make Mr. Hernandez responsible for this mess as if he knew that Basulto would ignore this warnings; as if he knew that MIGs were going to be ordered to shoot down the planes."[31]

McKenna's closing argument undercuts other claims. For instance, Movant claims, *see* Claim #22, that McKenna failed to challenge the government's premise that Movant received high-frequency radio messages pertinent to Count 3. But McKenna made this very challenge, forcefully arguing in summation, with detailed, explicit marshalling of HF-message exhibits, that the government failed to prove that Movant received the messages. *See* DE/cr1583:14416-14421, 14429 ("[T]he HF messages, they didn't go to him. He wasn't in the country and they went to somebody else after he got back and I will show that to you. . . . Let me go on to some of the other HF messages . . . . Let me address this issue of where the HF messages were going . . . Put the first one up there, 101 . . . . The next one is 29 . . . Let's keep going. This is number 30 . . . . Let's go on. This is message 31. You need to send computel. Use Giro's program. They are not talking to Giro. Why would they talk like this if they were sending all these HF messages to Giro? They are not. Here is the grand daddy of them all please look at very carefully, number 34. . . All these HF messages that the government has staked their case on, there is no proof beyond a reasonable doubt that Gerardo Hernandez even got these messages; there is no proof. . . . The final message in this series on Venecia is number 27 . . . it is obvious this is not being sent to Gerardo, they are being sent to

[31] At sentencing, McKenna again argued Movant's lack of knowledge of the unfolding split-second developments of the shootdown: "Was it Gerardo Hernandez that pulled the trigger? Was it Gerardo Hernandez that decided what was going to be done that day? Was he up inside the MIG cockpit trying to determine if the planes are inside our air space, are they outside our airspace? He is so far removed from the decision and the act. His case is extraordinary." DE/cr1450:55-56.

someone else") (detailed discussions of individual messages omitted).[32]

For another instance, Movant argues, Claim #15; *see also* DE12:34, that McKenna did not deal effectively with the government's theory that Movant was at the Cuban Ministry of the Interior in January, 1996, when the shootdown was being planned. But McKenna successfully objected to the government's argument that the evidence showed Movant's presence at Havana headquarters in January, 1996, *see* DE/cr1581:14078-14079 (referencing "CP," an abbreviation for Directorate of Intelligence headquarters). McKenna capitalized on this win in his closing argument, telling the jury, "Gerardo Hernandez at that time [January, 1996] was on vacation [in Cuba]. . . . there was no evidence whatsoever in this case that he was down at the headquarters hatching some plot. It wouldn't even make sense if you think about it. . . It was made up [by the prosecutor's argument]. I objected to it and the Judge sustained it. He never was at headquarters. There was no evidence he was at headquarters."[33]

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[32] McKenna's thorough understanding and treatment of this issue also is reflected in his arguments at the close of the government's direct case, seeking an acquittal arguing that the government failed to establish that Movant received the HF messages. *See* DE/cr1532:8021-8025, 8031-8033, 8042-8044. The extensive Rule 29 hearing, DE/cr1532, reflects McKenna's thorough grasp of numerous issues Movant claims McKenna failed to defend effectively on, like the HF messages, the Venecia/Escorpion distinction, the Cuban perspective and history of warnings to BTTR, and the nature of state sovereignty, and helps to refute Movant's claim, *see* Claim #36, that McKenna lacked understanding of the nature and elements of Count 3. This ample record of McKenna's detailed awareness of these Count 3 issues as defense arguments reduces Movant's claims to a quarrel with the tactics McKenna employed to mount them at trial. But "'[c]ounsel will not be deemed unconstitutionally deficient because of tactical decisions,'" *Michael v. Crosby*, 430 F.3d at 1320 (quoting *McNeal v. Wainwright*, 722 F.2d at 676).

[33] In actuality, McKenna's successful objection was a windfall to the defense, obtained by his tenacious advocacy. The government did not have the citation at its fingertips at the moment of the defense objection, but the evidence is unequivocal: GX DG103:3-4 is Hernandez's post-vacation expense report for his return trip from the CP to Miami, referencing money "I RECEIVED AT HEADQUARTERS," *id*. at 4. Legitimate *Strickland* prejudice is not to be found in claims that an attorney insufficiently exploited a windfall to which the defendant was not entitled. *See Williams*

(continued...)

Claims #22 (Movant's involvement with HF messages) and #15 (visit to headquarters) are framed as McKenna's failures of investigation and procurement of evidence, as well as failures to present evidence and argument. With regard also to Claim #59 (the Venecia/Escorpion distinction), Movant similarly claims McKenna failed to investigate and procure sufficient evidence. But since McKenna did argue these very points, the claims of failure to investigate and to procure evidence boil down to a Monday-morning quarterbacking complaint that McKenna did not do enough. Movant also claims failure to investigate or to secure evidence with regard to witnesses, like Gonzalez and Roque, as to Movant's lack of criminal intent, *see* Claim #18. Movant argues that these are fatal failures to investigate, as in *Wiggins v. Smith*, 539 U.S. 510 (2003), because McKenna supposedly lacked a reasonable basis to stop investigating short of discovering exculpatory information. *See* DE12:29-31. Movant's reliance on *Wiggins* is inapt. The habeas petitioner there identified what information counsel failed to unearth; here, as discussed *supra* regarding Claim #18, Movant fails to establish what the additional witnesses would have testified to, beyond duplicating admitted evidence as to Operation Venecia, or proffering generically exculpatory nostrums. Similarly, he does not identify what information or evidence existed as to claims #22 or #15 that McKenna failed to procure.[34] Thus, he cannot show constitutionally deficient performance, much less prejudice.

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[33] (...continued)
v. Taylor, 529 U.S. at 392 (construing *Lockhart v. Fretwell*, 506 U.S. 364).

[34] As to claim #59, the Venecia / Escorpion distinction, Movant appends, as Appendix B at DE12-2, a document relating to Operation Venecia said to have been acquired by his §2255 counsel from the GoC. This document will be discussed more specifically in Section 3 of this response, *see infra* pages 105-107, 113, addressing claims of newly-discovered evidence. For purposes of the ineffectiveness issue, suffice it to say that Movant states no basis to believe that this document was available to McKenna in 2000-2001; and in any event, as discussed in detail *infra*, (continued...)

Further, in *Wiggins* incomplete investigation was due to counsel's "inattention," *id.* at 534, and counsel presented a "half-hearted" mitigation case, *id.* at 526, without the uninvestigated evidence of petitioner's "excruciating" childhood abuse, *id.* at 536. McKenna, by contrast, was diligent in his preparation for and investigation of this case, issuing numerous subpoenas; engaging and consulting extensively with an aviation expert; traveling to Cuba to investigate and procure evidence; and reviewing thoroughly the voluminous discovery. "[W]hether [defense counsel] could have done more to investigate [petitioner's] case 'is not the question we must answer. Instead, we must look at the representation that [defense counsel] provided and determine whether it was objectively reasonable, and sufficed to make [petitioner's] trial fair.'" *Michael*, 430 F.3d at 1323, No one could call McKenna's defense of Movant "half-hearted." As the court will recall, McKenna's performance at trial was energetic, tenacious, knowledgeable, bold, and intense. As in *U.S. v. Roane*, 378 F.3d 382, 411 (4th Cir. 2004), "this case does not involve a situation where counsel neglected to investigate, or where his investigation was so cursory that we can now – eleven years on and with the benefit of hindsight – declare it constitutionally unreasonable."

This overview of Mr. McKenna's trial performance, from opening statement through closing statement, goes far to defeat Movant's claims. As the Supreme Court recently observed in *Harrington*, 131 S.Ct. at 791, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here [petitioner]'s attorney represented him with

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[34] (...continued)
the document is not substantially different from documents placed in evidence that made the same point: Juan Pablo Roque had wanted, and the Cuban Directorate of Intelligence had given consideration to, removal of Roque from Florida back to Cuba long before the BTTR shootdown. Movant fails to show prejudice because the pertinent substance of this "undiscovered" document was adduced at trial. *See Bobby v. Van Hook*, 130 S.Ct 13, 19 (2009) (no duty for counsel to seek cumulative evidence; to do so may become "distractive from more important duties").

vigor and conducted a skillful cross-examination." The same must be said of McKenna.

D. McKenna's Supposed Missteps

Besides faulting Mr. McKenna for what he failed to do, Movant also criticizes McKenna for things that he did do that Movant claims were wrongheaded or counterproductive. Foremost among these are Movant's complaints regarding McKenna's handling of proof and argument as to the location of the BTTR shootdown, and whether it was in international or Cuban airspace.

Movant's position on the shootdown-location issue is conflicted and inconsistent. On one hand, Movant claims, #1 (and also at Claim #9), that McKenna focused unduly on the geographic location of the shootdown, thereby supposedly obscuring the issue of the lawfulness of Cuba's plan to defend its sovereignty. Similarly, in Claim #3 Movant asserts that McKenna was constitutionally incompetent for challenging powerful U.S. evidence and ICAO[35] findings that the shootdown occurred in international airspace. On the other hand, Movant complains that McKenna did not do enough to establish the precise geographic location of the shootdown, such as by obtaining satellite imagery, Claim #4, and by securing evidence from the captain of the vessel Triliner to rebut government shootdown-location evidence from an officer of the Majesty of the Seas ("MoS") cruise ship, Claim #8. *See also* Claim #2 (McKenna failed to develop facts relating to the shootdown location based on accurate legal understanding of Count 3). Perhaps most conflicted is Claim #7, where Movant faults McKenna for relying on "insufficiently credible" Cuban-government evidence of the shootdown location, when there was readily available credible evidence to support a defense.

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[35] "ICAO" is the International Civil Aviation Organization, a United Nations body to promote aviation safety pursuant to an international convention. *See* DE/cr1527:7177-7178. ICAO's report concerning the BTTR shootdown was utilized extensively by both sides' aviation experts; the report is appended to Movant's Memorandum as Appendix E. *See* DE:12-5, 12-6.

The GoC evidence (camera-bag recovery, Cuban radar map, deposition testimony of Cuban military radar officer) was that the shootdown occurred in Cuban airspace. It is unclear whether Movant is asserting that the proof of Cuban-airspace location was weak, and that McKenna should have presented other, stronger proof of Cuban-airspace location; or if Movant is asserting that McKenna erred by offering incredible proof that the shootdown occurred in Cuban airspace, because it did not. A third possibility – that Movant is claiming that McKenna should not have tried to establish anything about the shootdown location – seems to be ruled out by Claims ##2, 4, and 8, faulting McKenna for not developing more facts about the shootdown location.

Such lack of clarity is fatal to these claims. Twelve years after his arrest, and arguing in pleadings as to which he has the entire burden, and in which he is represented by multiple skilled counsel, Movant should know what his position is regarding the shootdown location, legally if not factually, and should be able to state it clearly and consistently. In any event, the internal debate manifested in Movant's filings demonstrates that McKenna's strategic handling of the shootdown location was, at a minimum, a reasonably debatable position and not constitutionally-deficient representation.

Movant asserts, DE12:12, that McKenna "presented only irrelevant and prejudicial evidence," but makes no effort to show that proof of the shootdown-location could have no part in an effective defense. The indictment alleged, as an overt act of Count 3, that the shootdown occurred in the U.S. special maritime and territorial jurisdiction, that is, in international airspace. DE/cr224:15, ¶¶ 8, 9. The government presented proof of the international-airspace location, *see, e.g.,* DE/cr1527:7214; DE1528:7295, 7299-7300, 7323-7324, and McKenna acted as a conscientious and effective advocate in challenging that proof. Movant's Claim #3 contends that McKenna was

wrong to challenge the government's location proof; yet one can only imagine the claim of ineffectiveness had McKenna *not* challenged this evidence. Conversely, defense aviation expert Buchner's conclusion, *see* DE/cr1546:9870, 9957-9958, that the shootdowns occurred in Cuban airspace was strong corroboration for his other conclusions, consistent with the defense Movant says was part of the "right" defense, that the GoC was within its sovereign rights in shooting down the aircraft, DE/cr1546:9955-9956 – the supposedly "lawful plan to defend Cuban sovereignty," *see* Claim #1, that Movant incorrectly says that McKenna failed to focus on.[36]

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[36] Movant's claim, *see* Claim #1, that McKenna failed to develop the defense of "a lawful plan to defend Cuban sovereignty and prevent political instability," is extensively refuted by other portions of the record as well. McKenna was particularly alert for, and effectively developed, facts and arguments concerning Cuba's sovereignty, to build the theme that Cuba had a well-founded perception that BTTR threatened its security and sovereignty, negating criminal intent associated with any agreement as to action to be taken against BTTR. *See, e.g.,* DE/cr1502:5426 (McKenna replies to government argument that smoke devices were dropped over water seven miles offshore, stating, "That is over Cuba. It is their sovereign territory"); DE/cr1502:5470 (McKenna develops BTTR witness's concession of intent to enter Cuban air space by emphasizing, "That was in the Cuban sovereign territory; is that correct? A. Correct"); DE/cr1502:5472 (McKenna presses BTTR pilot, "Weren't there repeated warnings over the radio, you are violating Cuban sovereign territory, leave, your safety is not guaranteed. Do you remember those warnings?"); DE/cr1504:5801-5802 (cross-examination regarding BTTR leaflets encouraging Cuban people to rise up against the GoC); DE/cr1504:5805 (cross-examining BTTR witness, focusing on Cuban perception of threat to sovereignty: "Isn't it a fact, sir, everyone knew there was a special risk that day [February 24, 1996] for going below the 24th parallel? . . . Isn't that because the Government of Cuba had made very strong statements about defending their sovereign territory after what happened on January 9 and January 13, 1996? . . . [D]idn't the Government of Cuba to your knowledge make strong statements about consequences of any future violations of their sovereign territory?"); DE/cr1505:5960, 5963-5964 (cross-examining cruise-ship officer concerning warnings that Cuba was "vigorously enforcing their sovereign territory" in 1996, and that any trespassing vessel could be sunk); DE/cr1529:7485 (focusing government aviation expert on ICAO provision stating that every state has complete and exclusive sovereignty over its airspace); DE/cr1529:7537 (cross-examining government aviation expert: "Are aircraft permitted to fly however they want over another sovereign country?").

Indeed, McKenna used the term "sovereignty" so much during the trial that one of his co-counsel made a gentle joke about McKenna's colorful pronunciations of the word, *see* DE/cr1582:14217.

(continued...)

Movant argues generally, Claim #5, with no specific record references, that McKenna made a mistake in calling Basulto to the stand, due to Basulto's inflammatory character and potential to inculpate. Movant's conclusory reference to "[c]alling as a witness Jose Basulto," *see* Claim #5, DE1-2:1 ¶(5), is insufficient to state a *Strickland* claim, which requires that a person "making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," 466 U.S. at 690. This is especially so because, as discussed *supra*, which witnesses to call is the epitome of a strategic decision, which courts seldom, if ever, second-guess. *See Allen*, 611 F.3d at 759; *Waters*, 46 F.3d at 1512; *Chandler*, 218 F.3d at 1314 n. 13.

In any event, the record amply supports that McKenna's calling of Basulto was within the "wide range of reasonable professional assistance" *Strickland* sets as a minimum. 466 U.S. at 690. The mere fact that Basulto carried certain negative features as a witness does not bar a reasonable attorney from calling him. For instance, *Waters*, 46 F.3d at 1518-1519, explained its rejection of a claim that counsel was ineffective for calling a witness with both favorable and allegedly "very harmful" testimony: "Such are the strategic decisions that trial counsel are called upon to make. We cannot, and will not, second guess such decisions. *See, e.g., Hance v. Zant*, 981 F.2d 1180, 1184 (11th Cir.1993) (rejecting claim that counsel was ineffective for presenting witness testimony that contained favorable and unfavorable elements).

McKenna was well aware of Basulto's adversity, and took highly effective steps to address and control it. Over government objection, he won the ability to question Basulto immediately as a

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[36] (...continued)

hostile witness. *See* DE/cr1537:8808-8810. This enabled McKenna to use Basulto as a foil to establish, through leading questions, many of the defense propositions and themes that Movant acknowledges were important, such as the Cuban perspective associated with its past warnings to BTTR and Basulto's past actions that could be viewed by Cuba (and, by extension, Movant) as a threat to the Cuban people and Cuban sovereignty. *See, e.g.,* DE/cr1540:8915 ("You wanted the people to imitate your defiance of the Government of Cuba, correct? A. Yes"); DE/cr1537:8885 ("The Cuban Government knows what you did with respect to the [cannoning of a] hotel in Miramar in 1962; don't they? A. Yes. Q. You have never renounced that act, have you? A. No, sir. Q. Have you ever apologized for it? A. No, sir."); DE/cr1540:8968 ("Do you see a MIG doing a pass in front of your windshield [in April 17, 1994 video]? A. Yes, I do. . . . Q. What you tried to talk to them about was over throwing Castro; correct? . . . Q. Wasn't the final statement you made to do everything you can to bring an end to Castro's regime? . . . "); DE/cr1541:9039-9040 ("Isn't what your objective was, to provoke and taunt the Cubans? . . . [after reading aloud Basulto's radio-interview statements:] Q. Weren't you trying to slap them a little bit? . . . "). McKenna also got Basulto to acknowledge having violated Cuban airspace three distinct times before the shootdown; *see* DE/cr1540:8983.[37]

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[37] Movant argues, DE12:36, that Basulto's testimony harmed the defense because Basulto did not admit to, and denied, an airspace violation in another pre-shootdown flight, in January, 1996. But that is but one "unfavorable" aspect to be weighed along with the "favorable" aspects of what McKenna was able to establish through Basulto's testimony. McKenna articulated a reasonable strategy that he was calling Basulto "to tell the whole story" through the witness, supporting the Cuban perception that Basulto "has been hostile toward the Cuban regime from the beginning all the way up until now. It has never stopped. He dedicated himself to this," DE/cr1537:8810-8810. This was a pertinent and important aspect of the Cuban-perception theme, and it was later articulated in McKenna's closing argument characterizing Cuba as a cornered "cat" with good reason to perceive Basulto and BTTR as a threat to its sovereignty.

McKenna's examination of Basulto cast a negative light on Basulto in other ways. McKenna established Basulto's adversity to U.S. law enforcement and aviation oversight. *See* DE/cr1540:8922 ("Q. What [U.S. law enforcement] wanted you to do was to assist them in investigating violators of the Neutrality Act; correct? A. Violators of the Neutrality Act in my book are patriots"); DE/cr1543:9341-9432 (concerning those who export arms to Cuba and advocate Castro's violent overthrow, Basulto admits that he "sympathized with their objectives. . . I sympathized then and I sympathize today"); DE/cr1541:9061 (Basulto admission that regarding his January 1996 leafletting flight "it was good that the [U.S.] government was not there to prevent me from doing what I did"). McKenna's examination of Basulto was sufficiently skillful in casting him, and by extension BTTR, in a negative light that in its closing argument the government was impelled to distance itself even further from Basulto; *see* DE/cr:1581:14071, 14093. After Basulto made an outburst on the stand against McKenna, he had it stricken and obtained a court instruction that reflected adversely on Basulto and that reminded the jury of McKenna's sanctioned role in the proceedings: "Mr. McKenna's job is to provide a vigorous defense for his client. Mr. Basulto's statement regarding Mr. McKenna was inappropriate and unfounded." DE/cr1540:8955.

Movant further claims that calling Basulto was a mistake because Basulto "appealed to the prejudices of a Miami jury, " *see* Claim #5. This reference to the jury as prejudiced is an attempt to insinuate into this §2255 motion a matter that was extensively considered, and rejected, on appeal. The *en banc* Eleventh Circuit concluded in *Campa 2* that Movant's jury was not prejudiced; was selected properly and fairly; indeed, the Eleventh Circuit found this court's voir dire in the trial a "model" for others. *See Campa 2*, 459 F.3d at 1147. A §2255 petitioner may not "relitigate in a collateral proceeding an issue . . . decided on his direct appeal." *White v. U.S.*, 371 F.3d 900, 902

(7th Cir. 2004). Movant makes a similar flawed attempt in Claim #21, *see also* DE12:9, 14, 22, 32,which is factually related to Claim #5, arguing that McKenna was ineffective at trial for blaming the deceased BTTR personnel as responsible for their own deaths, because the community purportedly revered them as heroes. First, it is, again, inappropriate to seek to reintroduce the issue – heavily litigated and decided against the defense on appeal – that the trial was inappropriately colored by community sentiment. Second, McKenna was careful *not* to blame the deceased BTTR personnel, and to differentiate Basulto, and Basulto's history of misbehavior, from the deceased. Thus, McKenna argued in closing that it was Basulto who was to be coupled with BTTR, in the Cubans' perception, *see, e.g.,* DE/cr1583:14388 ("Brothers to the Rescue and its leader Basulto. It is always Brothers to the Rescue and Basulto. It is like bacon and eggs, they go together"); *see also* DE/cr1583:14411. McKenna's suggestion that Basulto laughed "while four men die," DE/cr1583:14406, clearly sought to distinguish the deceased as sympathetic victims of Basulto's wrongdoing. Indeed, McKenna – far from arguing, as Movant puts it, that "the-victims-had-it-coming-to-them," *see* DE12:14 – called their deaths tragic. *See* DE/cr1583:14426. McKenna also argued, DE/cr1583:14434, "My position about the other men that died, they were followers and they followed Basulto who led them recklessly. . . . They truly didn't deserve to die and I believe that, but for the recklessness of Basulto and what he led them into . . .." The record shows that McKenna employed reasonable strategy and was professionally effective in the way he addressed Basulto's testimony and the circumstance of those who died in the shootdown.

Another argument that McKenna presented harmful evidence appears at Claim #10. Movant argues that McKenna lacked a sufficient and credible basis to present evidence that cockpit video from Basulto's aircraft the day of the shootdown showed a MiG making a warning pass. This

testimony was based on the opinion of defense aviation expert, Col. Buchner, who had extensively examined the video, Basulto's aircraft, and Cuban MiG aircraft and who had consulted a Cuban aviation officer about the matter. Movant cannot establish (and does not try) that no reasonably competent attorney would present such an opinion on that basis.

Movant's attack on McKenna's strategy in using the video is no better founded. McKenna employed the video, and the proposition that it showed a pre-shootdown MiG warning pass, to try to establish that the GoC gave BTTR warnings, or, as Movant himself put it in Claim #20, to address the supposed government "'without warning' shootdown concept." Besides affirmatively adducing through his expert that the video proved that the Cubans tried to warn BTTR the day of the shootdown, McKenna also used the video to try to impeach government witnesses. *See, e.g.,* DE1504:5855 (McKenna uses the video in examining BTTR passenger to try to establish that Cubans performed warning pass, and that the shootdown was not without warning: "Sir, isn't it a fact what happened is, a MIG did a pass, you ignored the pass and your aircraft continued flying south?"). McKenna used this videotape in cross-examining government aviation expert Leonard, DE/cr1530:7736-7748. Movant's overheated rhetoric ("an interminable mind-numbing, irrelevant exploration of a frozen frame of a video tape," DE12:39 n.21) in complaining about McKenna's technique in using the video is no substitute for analysis. Movant fails to show that no reasonable attorney would have presented this evidence, which went to the "without-warning" concept that Movant acknowledges was a needed component of the trial defense. A similar request to "'imagine the visceral response of the jury'" to a defense argument was rejected in *Allen*, 611 F.3d at 756, which instead endorsed the state court's observation, also applicable here, "that imagined prejudice is no prejudice at all."

Strickland cautions that overly intensive hindsight scrutiny of counsel and rigid requirements for what constitutes adequate levels of legal assistance "could dampen the ardor and impair the independence of defense counsel," 466 U.S. at 690, which independence is also constitutionally protected, *see Michael v. Crosby*, 430 F.3d at 1320. "The law must allow for bold and for innovative approaches by trial lawyers." *Chandler*, 218 F.3d at 1317. McKenna's trial tactics, like calling Basulto to the stand, and using the MiG video, were based on reasonable strategic decisions, and to conclude that it was unacceptable for him to do so would significantly erode the independence of defense counsel. Indeed, one can only imagine what Movant's §2255 petition might look like had no one called Basulto to testify, or had McKenna not used available expert opinion testimony that concluded that there was videotaped evidence of Cuba's attempting to warn off the BTTR planes before the shootdown.[38]

In addition to claims refuted *supra*, other quarrels Movant has with McKenna's trial presentation are too minute or ill-defined to have merit. Claim #6, *see also* DE32, 33, 39 n.21, states that McKenna misread the log of the MoS ship but does not specify what the alleged misreading was or why it amounted to a constitutional deprivation. "[N]ot every misstep or miscue amounts to

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[38] Movant fashions an additional claim, *see* Claim #4, based on Buchner's affidavit, Appendix I at DE12-24, that McKenna should have obtained satellite imagery of the shootdown site that Buchner wanted. There is no showing of what such satellite imagery contains, only conjecture, and consequently no showing of prejudice has been made. "Imagined prejudice is no prejudice," *Allen*, 611 F.3d at 756. Moreover, the suggestion that satellite imagery was required contradicts Movant's claims that the shootdown location was over-emphasized. Buchner's affidavit mentions that he testified that satellite imagery would be the most reliable evidence of the shootdown location; it omits his unsuccessful effort to get satellite data, *see* DE/cr1546:9933. McKenna could well have concluded that amassing more data that might confirm the international-airspace shootdown location would be counterproductive. Counsel is not required to pursue every path until it bears fruit or decisively withers, *Chandler*, 218 F.3d at 1318, and an attorney need not pursue an investigation that might prove harmful to the defense, *Harrington*, 131 S.Ct. at 789-790.

ineffective assistance." *Waters*, 46 F.3d at 1520. Claim #7, besides being opaque and internally inconsistent, *see supra* at 51-52, states that McKenna wrongly relied on "insufficiently credible evidence" from the GoC as to the shootdown location, but does not claim that the evidence was false, just that there was unspecified more persuasive evidence. This is insufficient to state either ineffective performance or prejudice. Claim #8 states that McKenna failed to secure evidence from the captain of the Triliner vessel who could have rebutted government evidence as to the location of the MoS ship. Again, Movant fails to specify what the rebutting evidence was, or why it would be critical, especially since the cruise ship evidence went to shootdown-location issues that Movant inconsistently says (Claim #3) that McKenna should not have challenged. In any event, defense expert Buchner covered that point at trial, testifying to conflicting observations of the Triliner and the MoS crews. *See* DE/cr1546:9933 ff.

Claim #11 states that McKenna failed to show that on February 24, 1996, the MiGs did not confront BTTR until after Basulto entered Cuban airspace, basing this on an argumentative reading of minute data from the ICAO report, *see* DE12:33-34, 37 n. 19. Since this issue involves the split-second unfolding of events that Movant elsewhere states (Claim #36) should be distinguished from Movant's knowledge, Movant cannot establish prejudice on this claim. Further, the insistence, 10 years later, that evidence be developed in such a granular way, so minutely different from the presentation at trial, does not support an ineffectiveness claim, and ignores that the government would have sought to impeach this reading.[39] "[I]t sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Harrington*, 131 S.Ct. at 790.

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[39] For instance, Movant's argument, DE37-38 n. 19, is that all three BTTR planes "were either in Cuban airspace" or less than a minute away when intercepted, a claim for which the government had extensive contradictory proof.

Claim #13 states the McKenna failed to show that the GoC intended to act lawfully in the shootdown, and that he failed to introduce map evidence as to Cuba's understanding of prior incursions. Movant's Memorandum, DE12:34, 35, 36 n.15, appears to reference his complaint that McKenna failed to make sufficient use of such information of Cuba's claims of lawfulness, contained in the ICAO report, including two GoC maps from the ICAO report, Movant's Appendix C, DE12-3, concerning BTTR's leafletting flights the month before the shootdown. This claim, *see* DE12:36 n. 15, that McKenna should have done more to develop the facts in the ICAO report through cross-examination of government expert Leonard, is refuted by the record.

Over objection, McKenna successfully argued for the ability to place into the record, as cross-examination of government aviation expert Leonard, selective portions of the ICAO report. *See* DE/cr1529:7457-7474. McKenna capitalized on this opportunity, and in cross-examining Leonard adduced extensive testimony concerning the ICAO report, reading aloud significant portions that supported defense theories. Indeed, in arguing for this expansion of cross-examination, McKenna stated and reflected the very strategy, and defense theory, that Movant claims was overlooked. That is, McKenna argued that the history of BTTR's airspace violations, and of ineffectual efforts to discipline BTTR, were part of the necessary backdrop to Cuba's supposedly lawful decision to take stronger shootdown measures against BTTR. *See* DE/cr1529:7470-7471.

McKenna thus presented, during the Leonard cross-examination, and over objection, matter from the lead-up to the shootdown, including: BTTR's rafter mission drying up, DE/cr1529: 7465; Basulto statements encouraging Cuban popular confrontation of the GoC, DE/cr1529:7466, 7476-7477; past Cuban complaints of BTTR airspace intrusions, DE/cr1529:7477-7478, 7509-7510, 7513, 7519, including by diplomatic notes, DE/cr1529:7514-7517, 7520-7521, 7607-7610, and to the FAA,

DE/cr1529:7549-7551; DE/cr1530:7733-7734; arguable U.S. government non-feasance in response to Cuban complaints, DE/cr1529:7495-7501, 7610-7613, 7617-7519; DE/cr1530:7733-77345. McKenna also elicited extensive material from the ICAO report reflecting Cuba's views of the shootdown, both as it occurred and afterwards, including out-of-court statements and claims of Cuban armed forces personnel to ICAO, DE/cr1529:7619-7621, 7627-7628; unauthenticated, hearsay Cuban radar data, DE/cr1530:7679-7691; arguable "significantly different" shootdown-location estimates by the Tri-Liner vessel and MoS log, DE/cr1530:7691-7693; and Cuba's legal argument as to the shootdown being justified, DE/cr1530:7718-7730.)[40]

Movant's argument that McKenna should have done more to develop the ICAO report's account of Cuba's rationale is insupportable, in light of this record. Over two days, McKenna devoted hours of intense, document-specific cross-examination of Leonard to the ICAO report, taking him through its explicitly-developed content, including hearsay claims and justifications made by Cuban officials, over government objection. *See* DE/cr1529:7457-DE/cr1530:7735.

As a purported example of material McKenna supposedly failed to develop, Movant provides Appendix C to the Memorandum (that is, DE12-3, discussed at DE12:35-36), consisting of Cuban radar maps, incorporated into the ICAO report, purporting to show that the January 1996 BTTR leaflet drops occurred inside Cuban airspace. Yet McKenna cross-examined Leonard about these very maps, eliciting that they showed BTTR within Cuban airspace; *see* DE1529:7613-7614; *see also* DE/cr1530:7757-7760 (redirect as to maps McKenna cross-examined on, specifying map-page numbers 46 and 47 within ICAO report, coinciding exactly with DE12-3). The Motion's claimed

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[40] The ICAO report excerpts were not introduced for the truth, but for their role in shaping Leonard's opinion. This adequately served McKenna's purpose, showing Cuba's beliefs and intent regarding the shootdown.

example, and the general claim as to inadequate development of facts in the ICAO report, are refuted by the record. McKenna's utilization of the ICAO report was especially skillful; not only did he elicit extensive segments of the report that advanced his theories, he also prevented the government from eliciting segments of the report that did not advance defense theories, such as the ICAO report's statement of the shootdown location. *See* DE/cr1530:7787-7788.

At Claim #29, Movant argues that McKenna failed to introduce evidence that, following the shootdown, the GoC claimed that it occurred in Cuban airspace, rebutting a government inference that a later message to Movant from his headquarters congratulated him for an international-airspace shootdown. As an example, Movant appends Appendix D, DE12-4, a Cuban press statement that the shootdown occurred in Cuban airspace. But McKenna adduced ample proof that Cuba's post-shootdown position was that the shootdown occurred in Cuban airspace, including through use of the ICAO report during Leonard's testimony, as explained above. *See, e.g.,* DE/cr1530:7689, 7691, 7727 (over government objection, DE/cr1530:7680, McKenna adduces portions of ICAO report where GoC stated position that the shootdown occurred in Cuban airspace). McKenna also procured and played for the jury the video deposition of Cuban military radar officer Garcia de la Cruz, who testified to making radar plots at the time of the shootdown showing it to be in Cuban airspace. That Cuban radar map was entered into evidence. In addition, defense expert Buchner testified that the Cuban radar data reflected that the shootdown occurred in Cuban airspace. DE/cr1546:9870. Movant does not specify anything in Appendix D, DE12-4, that was not otherwise adduced at trial or that reaches constitutional-ineffectiveness proportions.

Finally, with regard to Movant's arguments that McKenna failed to effectively present facts at trial, Movant makes a number of claims – *see, e.g.,* Claim ##16-17, 19, 35, 38-39, 60-61 and 63

– that essentially amount to complaints that McKenna did not properly, or sufficiently, argue points from evidence in the record. These conclusory claims, with no enumeration of any specific lapse by McKenna that amounts to constitutional inadequacy, are merely arguments that McKenna's presentation was not the best that could be done. But "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. "The test [of effectiveness] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Waters*, 46 F.3d at 1512. McKenna easily surpasses this test. His energy, comprehensive knowledge, persistence and professional skill in defending Movant far outstripped what most reasonable lawyers would have done.

E. McKenna's understanding of law

Besides attacking McKenna's presentation of facts at trial, Movant also claims that McKenna failed to understand and properly deploy legal concepts. These claims fail, on their merits and procedurally because Movant does not demonstrate, as opposed to conclusorily assert, that McKenna's presentation deviated from the law.

Many of these claims of ineffective understanding and use of legal precepts relate to Count 3, the shootdown conspiracy, with Movant claiming that McKenna did not seek the right jury instructions, make the right motions, or properly match the defense to the law. *See* Claims ##9, 32-33, 45-48, 50-52. Movant fails to establish either ineffective performance or prejudice as to these claims. As for prejudice, Movant fails to establish that the defense would have been entitled to any rulings, instructions, or other legal outcomes different from what occurred. He argues no caselaw

that elucidates the law concerning Count 3.[41] He provides no examples of what the supposedly correct, constitutionally-compelled jury instructions would have been. As with the severance claims, discussed *supra*, Movant argues that he suffered prejudice from McKenna not seeking certain legal relief, but he skips the crucial step of showing – because he cannot – that the legal relief was warranted and would have been granted. Such bald arguments do not establish the "prejudice" required under *Strickland*. Also, as with the severance claim discussed above, Movant fails to satisfy *Strickland's* performance prong because an attorney cannot be ineffective for not pursuing non-meritorious legal positions. Therefore, Movant's claims that McKenna's legal positions were wrong fail on both prongs.

1. Count 3 scienter

Movant not only fails to justify his legal claims as to Count 3, he is affirmatively wrong. Movant's arguments, and positions, are largely premised on McKenna's supposed shortcomings in not procuring jury instructions that would have specifically required the jury, in order to convict on Count 3, to find proof beyond a reasonable doubt that Movant joined the conspiracy with the intent, and agreement, that the shootdown occur in the U.S. special maritime and territorial jurisdiction (that is, in international airspace). But as the Eleventh Circuit expressly held in *Campa 3*, there is no such scienter requirement: The government was not required to prove that Movant intended the shootdown to occur within the U.S. special maritime and territorial jurisdiction. *Campa 3*'s analysis is set forth at length because Movant fails to acknowledge it, and instead constructs his arguments

[41] Movant cites to, and quotes from, Judge Kravitch's dissent to *Campa 3*, *see* DE12:7, 10, 11, 26-27, but the dissenting opinion defines exactly what is NOT the law of this case. As discussed further below, the majority in *Campa 3* – which is of course the authoritative legal holding – undercuts and refutes the flawed legal theory of jurisdictional-intent that Movant continues to advance with regard to Count 3.

as if the scienter requirement he favors applied to Count 3:

> *First, Hernandez argues that the government was required to prove that he intended the murder to occur within the special maritime and territorial jurisdiction of the United States*. Hernandez contends that, because the government did not prove that there was a plan to "confront" Brothers in international, as opposed to Cuban, airspace, his conviction for conspiracy to murder should be reversed. *We disagree*.
>
> Whether sections 1111 and 1117 require proof that Hernandez intended the murder to occur within the special maritime and territorial jurisdiction of the United States "is a question of statutory construction." *Staples v. United States*, 511 U.S. 600, 606, 114 S.Ct. 1793, 1796, 128 L.Ed.2d 608 (1994). The language of the statute, the starting place of our inquiry, id., provides, "Murder is the unlawful killing of human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree." 18 U.S.C. §1111(a). Section 1111(b) provides, "Within the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life." Section 1117 provides a penalty of "imprisonment for any term of years or for life" for a conspiracy to violate section 1111.
>
> Although the statute explicitly describes the mens rea required for murder, the statute is silent about mens rea that the murder occur in the special jurisdiction of the United States. Ordinarily, we interpret statutes that are silent as to mens rea to require proof of general intent. *Ettinger*, 344 F.3d at 1158. This rule is subject to an exception when the nature of the statute is such that "congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Staples*, 511 U.S. at 607, 114 S.Ct. at 1798. An exception applies to section 1111.
>
> When a criminal statute is otherwise silent, no proof of mens rea is necessary for elements that are "jurisdictional only."*United States v. Feola*, 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 1260 n. 9, 43 L.Ed.2d 541 (1975). As the Supreme Court has explained, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *Id*. "[K]nowledge of jurisdictional facts is not required in determining guilt...." *United States v. Muncy*, 526 F.2d 1261, 1264 (5th Cir.1976). In *Feola*, the Court held that a statute that prohibits assault of a federal officer does not require knowledge that the victim is a federal officer because the victim's status as a federal officer is a fact that is jurisdictional only. 420 U.S. at 686, 95 S.Ct. at 1264-65. The *Feola* Court explained that its holding "poses no risk of unfairness to defendants" because "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." Id. at 685, 95 S.Ct. at

1264.

Hernandez argues that the requirement that the murder occur in the special jurisdiction of the United States is more than a jurisdictional requirement. Hernandez argues that, because the government did not introduce evidence that Cuban law prohibits murder, the jurisdictional language in section 1111(a) distinguishes between potentially legitimate conduct (murder in Cuba under Hernandez's theory) and conduct that is unlawful (murder in the special jurisdiction of the United States). *We disagree.*

The interpretation of sections 1111 and 1117 is a question of law, *United States v. Wilk*, 452 F.3d 1208, 1221 n. 19 (11th Cir.2006), that *does not depend on whether the government introduced evidence of Cuban law at trial.* [42] The discussion in *Feola* about fairness to defendants was part of an explanation by the Court for its inference that Congress intended the "federal officer" element of the assault statute to be jurisdictional only. 420 U.S. at 684-85, 95 S.Ct. at 1264. The statutory language did not expressly designate the "federal officer" requirement as jurisdictional. See 18 U.S.C. §111(a). In contrast, we know that *the requirement that a murder occur "[w]ithin the special maritime and territorial jurisdiction of the United States" is jurisdictional* based on the plain language of the statute. 18 U.S.C. §1111(b). Because it expressly defines the mens rea requirement for murder but is silent as to the mens rea requirement for the jurisdictional element, *the statute "unambiguously dispenses with any requirement" that the government prove intent that the murder occur in the special jurisdiction of the United States. United States v. Yermian*, 468 U.S. 63, 69-70, 104 S.Ct. 2936, 2939-40, 82 L.Ed.2d 53 (1984) (government need not prove knowledge of federal agency jurisdiction under false statements statute).

We hold that intent that the murder occur within the special maritime and territorial jurisdiction of the United States is not an element of section 1111. Because this intent is not an element of the substantive murder offense, it need not be proved to establish a conspiracy to murder, 18 U.S.C. §1117:

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[42] In one of Movant's few specific record references, he repeatedly cites DE/cr1579:13869 where the government stated, "[W]e are in an American court and in an American court – I don't know what the law in Cuba is." Movant argues that this was a fatal admission, which McKenna ineffectively failed to exploit, in which the government conceded that it could not prove that the shootdown was a crime as opposed to a legitimate exercise of sovereignty. The government made no such concession, and reading the statement in context shows a very different discussion. Prosecutor Kastrenakes was simply arguing that U.S., not Cuban, law, would define the jury instructions, and that U.S. law allowed only very narrow circumstances in which killing would be lawful. In any event, the Eleventh Circuit, in *Campa 3*, made it explicit that resort to Cuban law was unnecessary to the proper determination of legal concepts in this case.

Campa 3, 529 F.3d at 1006-1007 (emphasis added). Although unacknowledged by Movant, this is the law of the case and is fatal to Movant's claims that McKenna should have further exploited a legal position that the Eleventh Circuit has rejected. Otherwise, there would be "a potential windfall to the defendant rather than the legitimate 'prejudice' component contemplated by . . . *Strickland*." *Williams*, 529 U.S. at 392.

Contrary to Movant's claims of ineffectiveness, McKenna scored a windfall for the defense concerning the jurisdictional/scienter issue. McKenna's zealous advocacy obtained a favorable ruling, *see* DE/cr1579:13875, after extensive argument, spanning days, on the issue of whether the government was required to prove with regard to Count 3 that Movant agreed and intended for the shootdown to occur in international airspace. *See, e.g.,* DE/cr1578:13698-13718; DE/cr1579:13793-13798; 13817-13820; 13845-13877.

After the court, applying *U.S. v. Feola*, 420 U.S. 671 (1975), properly rejected McKenna's proposed jury instruction,[43] McKenna persuaded the court to use only the pattern instruction for conspiracies, 18 U.S.C. §371, coupled with the pattern instruction for the underlying substantive offense, 18 U.S.C. §1111 (substantive murder within the U.S. special maritime and territorial jurisdiction). *See* DE1579:13846-13847. This defense tactic ingeniously allowed McKenna to argue to the jury the defense position that the government had to prove that Movant agreed and intended for the shootdown to be in international airspace. McKenna forcefully argued the international

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[43] McKenna's rejected instruction as to Count 3, DE/cr1232, included a scienter element "that the murder the defendant conspired to commit was to occur within the special maritime and territorial jurisdiction of the United States;" McKenna further requested the court to instruct the jury "that you must find beyond a reasonable doubt that the location of where the alleged murder conspiracy was to occur, as described in the indictment, was planned to take place within the special maritime and territorial jurisdiction of the United States." *Id.*

airspace-scienter requirement in his closing, *see* DE1583/14414-14416; 14459. McKenna also successfully objected during the government's rebuttal argument where he felt the government strayed too close to the line of diluting that supposed scienter requirement. In so doing, McKenna obtained a windfall for Movant that created an unwarranted chance for acquittal on the basis of the supposed international-airspace scienter requirement. But legitimate *Strickland* prejudice cannot be found in Movant's claims that McKenna insufficiently exploited a windfall to which Movant was not entitled. *See Williams*, 529 U.S. at 392 (construing *Lockhart*, 506 U.S. 364).

On these bases – as well as on the bases, argued above, of insufficient specificity, lack of prejudice, and effective performance – Claims ##9, 32-33,[44] 45-46,[45]

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[44] Additionally, Claims ##32 and 33 relate to jury instructions Mr. McKenna sought concerning the sovereign rights of nations. After the court, properly, rejected Mr. McKenna's effort to craft an instruction insulating Movant from conviction based on the Act of State doctrine, DE/cr1198, McKenna found a more winning formula by suggesting an evolving series of instructions on state sovereignty based on ICAO principles, *see* DE/cr1231, 1234, 1235, 1236, culminating in the instruction the court gave on sovereign rights of states. *See* DE/cr1280:35. Once again, McKenna showed persistence and resourcefulness in discerning the strategic avenue that would get the instruction McKenna needed to argue his theory of defense, and then persuading the court based on the ICAO material that had been developed at trial. McKenna well stated his strategic pragmatism when he argued, as to the sovereignty-instruction issue, "My instruction . . . basically has three elements, that all nations have the exclusive control over their air space. It further defines what that airspace is consistent with international law and it also defines who is governed by these rules and it is civil aircraft, not state aircraft. That, your honor, at least gives me a threshold from which to argue my theory of defense to this jury. It is not everything I want but I will accept it. It gives me the necessary threshold from which to make my argument to this jury." DE/cr1576:13522. Movant's suggestion that McKenna should have withdrawn the instruction when the government won the right to a counter-instruction is not compelling. McKenna argued against the counterinstruction, *see* DE/cr1576:13521 ff, but lost. The notion that he should then have abandoned his own proposed instruction ignores the strategic reasons for it: to support the theory of defense and closing argument. It is unrealistic to surmise that some hypothetical instruction McKenna might have drafted (but which Movant fails to specify) would not have engendered its own contextual counterinstruction; courts do not typically give one-sided instructions.

Movant's claim #33 that the court's instructions lowered the government's burden of proof (continued...)

47-48, and 50-52 all fail.

2. Expert testimony

Movant's claims that McKenna was ineffective for not hiring and eliciting testimony from an international-law expert, *see* Claims ##23, 30-31, are linked to, and fall with, his erroneous premise that the international-airspace scienter requirement is the law of the case, contrary to *Campa 3*. Movant appends an affidavit from Professor Quigley, *see* Appendix A (DE12-1), to show the kind of testimony he says McKenna should have elicited. However, Quigley's affidavit is replete with themes that McKenna developed at trial to show the supposed lawfulness of the shootdown: Cuba's

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[44] (...continued)
was rejected by *Campa 3*, 529 F.3d at 1000. The Court's reference at 999-1000 to the invited-error doctrine did not sidestep Movant's appellate argument in that regard:. "Hernandez attempts to evade the invited error doctrine by arguing that other instructions that were given about International Civil Aviation Organization guidelines and arguments that the government made in closing argument somehow lowered the government's burden. This argument fails. *Nothing that Hernandez identifies in other instructions or in closing argument suggests that the government bore a burden lower than the burden stated in the murder-conspiracy instruction that the defendants requested*." (emphasis added). The Appellate Court already ruled on the issue raised in Claim #33, adversely to Movant.

[45] Claims ##45- 46 claim ineffectiveness by McKenna in not seeking jury instructions requiring the government to prove that Movant intended to enter into an unlawful plan with knowledge of its unlawfulness. However, these precepts were in fact addressed in the instructions. *See* DE1280:12, 21-22, 41, 42 ("Count 3 charges that Defendant Gerardo Hernandez conspired with other persons to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought and premeditated intent in the special maritime and territorial jurisdiction of the United States. . . . [as to count 3, government must prove] that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; . . . That the defendant, knowing the unlawful purpose of the plan, willfully joined in it; . . . if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and wilfully joins in that plan [he may be convicted] . . . .The word 'wilfully,' as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law. . . . if you have a reasonable doubt as to whether the Defendant acted in good faith, sincerely believing himself to be exempt by the law, then the Defendant did not intentionally violate a know legal duty – that is, the defendant did not act 'willfully' – and that essential part of the offense would not be established.").

perception of threat from BTTR and Basulto's past history; the usage, function and purpose of BTTR's flights as reflective of threat to Cuba's sovereignty; the accretion of cumulative harms that Cuba might have perceived; the pertinence of territorial incursions, propaganda-distribution, and incitement to civil unrest and political destabilization to a nation's perception of a threat. The BTTR-specific factors Quigley lists in bullet-point form at ¶19 of his affidavit, DE12-1:6-7, were elicited by McKenna at trial: Basulto's history of prior airspace incursions; the past warnings to Basulto and BTTR that they were violating Cuban airspace; Basulto's intransigence in the face of warnings; Basulto's exhortations to the Cuban populace to resist the GoC; Basulto's "taunting" Cuba as too weak to stop BTTR (or, as McKenna put it when cross-examining Basulto, DE/cr1541:9039-9040: "Q. Isn't what your objective was, to provoke and taunt the Cubans? . . . Weren't you trying to slap them a little bit?"); BTTR deviating from their flight plan February 24, 1996; February 24, 1996 being a national holiday, *see, e.g.,* DE/cr1505:5812 ("Sir isn't it the truth on February 24, 1996 you weren't looking for any rafters but you were flying down to Havana to honor this anniversary Grito de Baire and to once again tweak the nose of the Government of Cuba?"); *see also* DE/cr1529:7627, DE/cr1541:9061; DE/cr1545:9753; February 24, 1996, being a day scheduled for Concilio Cubano meeting; that BTTR had leafletted and incited the population in prior incursions; warnings to BTTR Feb. 24, 1996, Basulto entry into Cuban airspace February 24, 1996; all three planes deviating from flight plan. Quigley's affidavit says that he would have related the shootdown to prior historic aviation-incursion incidents, but defense aviation expert Buchner did just that; *see* DE/cr1545:9744; DE/cr1546:9960-9962; DE/cr1547:10013-10014; DE/cr1548:10300-10031.

In short, Movant fails to establish what a different expert could do that was not done at his trial and that could establish the requisite levels of *Strickland* prejudice. McKenna elicited extensive

testimony, including from a defense expert, on these very matters, and the failure to call an additional, or different, expert does not equate to ineffective assistance of counsel. *See Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) (that petitioner, years later, finds expert who can testify favorably does not demonstrate trial counsel ineffective for failing to present that expert at trial). *See also Harrington*, 131 S.Ct. 770.

If Movant's point is that these matters needed to be testified to by a "law expert," not merely an aviation expert like Buchner, his point is not well taken. The government would have objected to, and it is highly unlikely that the court would have allowed, a witness, expert or otherwise, lecturing the jury as to what the law is. In a trial, there is only one "expert" who may give the jury direction as to the law, and that is the judge. The court implicitly recognized this in its many rulings sustaining objections to witnesses testifying to legal conclusions. *See, e.g.,* DE/cr1503:5618-5619; DE/cr1518:6116; DE/cr1530:7734; DE/cr1520:6399-6402, 6413; DE/cr1525:6867; DE/cr1537:8785. "The law would be in a curious state if jurors received their instructions on the law from an expert witness as well from the trial judge. Resolving doubtful questions of law is the distinct and exclusive province of the trial judge. Expert testimony here would have been not only superfluous but mischievous." *U.S. v. Brodie*, 858 F.2d 492, 497 (9th Cir.1988) *overruled on other grounds by U.S. v. Morales*, 108 F.3d 1031, 1038 (9th Cir.1997) (rejecting proffer of an expert to testify on unsettled points of law) (internal citations omitted). *See also U.S. v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *U.S. v. Paradies*, 98 F3d 1266, 1290 (11th Cir. 1996); *Aguilar v. International Longshoremen's Union*, 966 F.2d 443, 447 (9th Cir.1992) (noting matters of law are for the court's determination, not that of an expert witness).

The government would have challenged any effort to have an expert witness testify as to legal

precepts, including on the basis of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) and *U.S. v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc). Under those cases, an expert's proposed testimony must be helpful in assisting the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue; and not excludable for its potential to confuse issues pursuant to Fed.R.Evid. 403. But a law professor expert who was offered to testify to the jury about the nature of the law, in competition with or distinct from the court's instructions, would not meet that test, and would not have been admissible.

McKenna was not unmindful of the benefit experts can bring to a case, nor slow to seek resources to engage expertise. He caused Buchner to be engaged, and estimated that he had spent 200 hours working with Buchner, as of mid-trial. *See* DE/cr1526:7090. He caused attorney Randee Golder to be appointed to assist him with legal issues and arguments to the court, including issues related to international-law matters like the Act-of-State doctrine and the Foreign Sovereign Immunity Act ("FSIA");[46] Movant does not assert that Golder was ineffective. McKenna's decisions concerning what experts to engage were reasonable ones, reflective of diligence and sound strategic planning. The Supreme Court recently reinforced the presumption against second-guessing trial

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[46] Golder's competent efforts notwithstanding, the FSIA argument was opposed by the government and properly denied by the court. Movant claims, Claim #49, that McKenna should be faulted for not bringing a motion, pursuant to the FSIA, that would have insulated Movant from criminal liability. Such a motion was in fact made by McKenna. *See* DE/cr1011:6-8. The government responded on the merits, and with a procedural argument of untimeliness, *see* DE/cr1021. The court denied the motion on the merits, *see* DE1259:16-17, without reaching the timeliness issue. The Eleventh Circuit found that Movant waived the FSIA claim by not bringing it timely, and declined to reach the merits. *Campa 3*, 529 F.3d at 1001. Nonetheless, Movant fails to challenge the soundness of this court's merits analysis at DE1259:16-17, and subsequent law has only reinforced the court's denial of the FSIA motion. *Samantar v. Yousuf*,130 S.Ct. 2278 (2010), concluded that the FSIA immunizes states, but not individual officials, in civil lawsuits, thereby removing any possible foundation for an argument that the FSIA could confer immunity on an individual criminal defendant.

counsel's tactical decisions, in the context of whether to engage an expert. *See Harrington*, 131 S.Ct. at 789 (finding habeas relief inappropriate notwithstanding defense counsel's decision not to consult or engage blood-evidence experts and noting: "From the perspective of . . . defense counsel when he was preparing [petitioner's] defense, there were any number of hypothetical experts . . . whose insight might possibly have been helpful. An attorney can avoid activities that appear 'distractive from more important duties.' . . . Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). The same could be said of McKenna's situation, especially since the admissibility of legal-expert testimony would have been dubious, whereas *Harrington*'s forensic-expertise issue was more compelling. Further, had the defense been able to call such a "law-expert" witness, the government likely would have countered with its own witness and challenged the defense expert's opinion, a strategic concern *Harrington* recognizes as supporting the reasonableness of defense counsel's decision not to "transform the case into a battle of the experts." *Id.* at 790.

3. Count 3's supposed flaws

Movant makes several claims, *see* Claims ##24-27, on the premise that the murder conspiracy, Count 3, could not properly extend beyond the date of the shootdown, and that McKenna failed to perceive and take legal action against this. The premise is incorrect. The indictment alleged a conspiracy from January, 1996, until September 12, 1998 (the date of Movant's arrest), *see* DE/cr224:13-14, with overt acts both before, *id.* at 14-15 ¶¶(D)(1)-(7), and after, *id*. at 15-16 ¶¶(D)10-12, the shootdown. A motion to dismiss the indictment would have been denied. On such a motion, all pled facts must be taken as true, and Movant's arguments that the post-shootdown acts were not in furtherance of the conspiracy are factual contentions for a jury, not for a judge weighing

the legal sufficiency of an indictment.[47] *See U.S. v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir. 1978) (on motion to dismiss criminal indictment, court must take the allegations as true). Nor is it correct, as Movant argues, that acts subsequent to February 24, 1996, were not part of the shootdown conspiracy. Count 3's post-shootdown overt acts, *see* DE224:at 15-16 ¶¶(D)10-12, were not acts of concealment, which *Grunewald v. U.S.*, 353 U.S. 391 (1957), cautions do not typically in and of themselves extend the duration of a conspiracy, but rather post-shootdown acts of recognition and follow-up analysis of the operation (¶ 10) and of distribution of promotion and reward to Movant for his role in the operation (¶¶ 11, 12).[48] Such distribution of rewards is properly considered part of the conspiracy. *See U.S. v. Knowles*, 66 F.3d 1146, 1155-1157 (11th Cir. 1995); *U.S. v. Helmich*, 704 F.2d 547, 548-550 (11th Cir. 1983); *U.S. v. Walker*, 653 F.2d 1343, 1345-1350 (9th Cir. 1981). Here, too, the point of the shootdown was not simply the elimination of BTTR planes on Feb. 24, 1996. It was the government's theory, explicitly argued in closing, that a purpose of the shootdown was for the GoC to score a propaganda coup, both by showing that it could not be toyed with as BTTR had been doing, and by denouncing BTTR as a terrorist organization, including

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[47] Nor is Movant correct, DE12:13, 14, 15, 57, that Count 3 was factually vague and legally insufficient; alleged nothing more than "a plan for violent confrontation; and "failed to allege any form of criminal foreknowledge" by Movant. The Count 3 charge, DE/cr224:13-16, was a complete statement of the charge, with a gravamen paragraph that encapsulated its elements, knowledge and *mens rea,* that is, that Movant "did knowingly, wilfully and unlawfully combine, conspire, confederate and agree . . . to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought, in the special maritime and territorial jurisdiction of the United States;" it also had an object paragraph, incorporated manner-and-means statements from other counts, and overt acts that provided additional detail and particularity as to the charged offense.

[48] The government appreciates that Movant contests that the promotion he received was connected to the shootdown, as McKenna did at trial; this is the "Venecia/Escorpion distinction theme" discussed *supra*. However, this is a factual dispute for the parties to argue to the jury, as McKenna thoroughly and effectively did, not a basis for a legal ruling on admissibility of post-shootdown events.

through the return of Roque. This was reflected, in part, in GX HF112, a high-frequency radio message in which the Cuban Directorate of Intelligence stated a wish to have Roque return to Cuba so that "we can denounce BTTR's role with spectacular proof and raise the spirit of the population facing BTTR's impunity." This propaganda role continued following the shootdown, and the government argued this as a goal of the shootdown. *See, e.g.,* DE/cr1581:14070-14071 (Movant's role included arranging return to Cuba of Roque "so Juan Pablo Roque could do his bit in the ongoing propaganda campaign"); *see also* DE/cr1581:14078; DE/cr1581:14082; DE/cr1581:14083; DE/cr1581:14095; DE/cr1581:14096; DE/cr1581:14113. This propagandistic goal of the conspiracy did not end with the shootdown, nor with Roque's return to Cuba. As the government pointed out in its closing, *see id.* at 14100-14101, Movant remained an enthusiastic, long-term participant in the goal of undermining BTTR's credibility, proposing to his headquarters the year after the shootdown a further propaganda exploitation of the shootdown, recommending that a book be produced about the shootdown with the theme that Basulto was to blame, capitalizing on the conscience pangs experienced by Basulto, and noting, "It is like in boxing, you have to bruise over the wounds." GX DG107:52-54, quoted at DE/cr1581:14101. Clearly, McKenna would not and could not have won motions and arguments based on the premise that actions and statements subsequent to February 24, 1996, could not be in furtherance of the Count 3 conspiracy. Under the *Strickland* standards, he was not required to raise such dubious or futile claims.

4. Premeditation

McKenna argued, and the court agreed, that the Count 3 offense and the government's theory of prosecution required that the government prove, as an element, premeditation. Movant claims, *see* Claims ##43-44, 54, 66-67, that this was ineffective and incompetent lawyering because it

exposed Movant to the greater sentencing guidelines, and impact, of a conviction for conspiracy to commit first-degree murder. But Movant's argument, which only challenges his sentence, is incorrect, and based solely on post-conviction hindsight, whereas "in order to determine whether counsel performed below the level expected from a reasonably competent attorney, it is necessary to 'judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart*, 506 U.S. at 371 (quoting *Strickland*, 466 U.S. at 690).

At the time of trial, and of jury-instruction conferences, McKenna had a sound and reasonable strategy that the government should be required to prove premeditation as to Count 3. He argued that otherwise the government, nervous about its prospects as the case drew to a close, would be able to evade its full burden. *See* DE/cr1568:12460-12464; 12476.[49] The record further supports the reasonableness of McKenna's strategic assessment. For instance, with considerable professional skill he had won a key ruling that hobbled the government's proof of premeditation, when, with sustained objection and persuasive argument to the court, McKenna prevented the government from adducing testimony from its expert Leonard as to his conclusion whether the MiG shootdown flight was a preplanned mission, *see* DE/cr1528:7340-7345. When the court included in the Count 3

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[49] "[T]hey [the prosecution] want you to avoid one of the elements in the crime. . . Why are we now avoiding one of the elements of the offense? . . . It didn't come out the way they wanted it to. Now their fall-back position is to say 'Let's call it second degree murder so we can argue to the jury maybe it wasn't, he didn't know precisely, this, that and the other thing. If he does something, one thing, and lets the conspiracy go forward he is liable. Don't worry about premeditation.' . . . It is so transparent what they are doing, Your Honor. They are trying to water it down now because the proof didn't come through as they had hoped and as they had planned. . . they are in trouble and they are backpedaling and they want this [lesser] instruction to get out of it. . . Now, the government is selecting the most convenient [murder instruction]. That's what's happening today. That will make their burden of proof easier when they present the case to the jury and argue it, but what they are really doing is trying to avoid how they charged it in the indictment and how they have maintained it throughout the trial."

instructions the premeditation element McKenna sought, the government was sufficiently alarmed that it included the issue in its emergency petition to the Eleventh Circuit, *In re Writ of Prohibition*, No. 01-12887 (11th Cir. May 25, 2001), which was denied.

After winning his point, McKenna exploited it in closing argument, reminding the jury that it must find premeditation to convict on Count 3, and how difficult that would be. *See* DE1583:14386; 14387; 14395; 14413; 14414; 14421; 14427. McKenna was seeking for Movant not a lesser conviction, but complete acquittal, consistent with the defense he presented that the government had failed to show Movant's knowledge of the shootdown or criminal intent, and instead had made him a "scapegoat"[50] for a tragic incident.

A strategy to seek an acquittal rather than conviction on lesser offenses has been recognized as reasonable and effective lawyering numerous times, including in cases implicating degrees of homicide. *See, e.g., Black v. Goord*, 419 F.Supp.2d 365, 381-382 (W.D.N.Y. 2006) (attorney's decision not to seek lesser-included instruction reasonable because it would have undermined strategy to seek acquittal; decision not to give jury the option to compromise was reasonable; tactical decision to pursue complete exculpatory defense rather than partial defense enjoys substantial deference); *Otero v. Eisenschmidt*, 2004 WL 2504382, *33-34 (S.D.N.Y. 2004) (seeking lesser-included instruction would have undermined counsel's strategy of seeking acquittal); *Fransa v. Stinson*, 58 F.Supp.2d 124, 150-151 (S.D.N.Y. 1999). Pursuing an "all-or-nothing" outcome has been approved as a reasonable strategy. *See, e.g., Walker v. Schriro*, 2007 WL 4168675 at *29 (D.

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[50] McKenna used that term, and that theme, in opening statement, DE/cr1476:1604; closing argument, DE/cr1583:14424, and at sentencing, DE/cr1450:55 ("there has to be a scapegoat. I said that at the beginning and I will say that at the end").

Ariz. 2007), where counsel decided to reject instructions on lesser-included offenses like second-degree murder: "[T]rial counsel's strategic decision to pursue an 'all-or-nothing' defense does not render counsel's performance deficient. An 'all-or-nothing' defense leaves the jury with two options, acquittal or conviction of the most serious offense, thereby eliminating the possibility that defendant might be convicted of a lesser-included offense." *See also Bashor v. Risley*, 730 F.2d 1228, 1240-1241 (9th Cir. 1984). McKenna's representation in this regard was well within the wide range of reasonable professional assistance.[51]

5. Jury selection

In Claims ##40, 42 and 57, Movant seeks to revisit issues, extensively considered on appeal, relating to the selection and composition of the jury. *Campa 2* found that the jury was not only fairly selected, but that the procedures the court employed were "a model . . . for a high-profile case," *Campa 2*, 459 F.3d at 1147. In light of this, and of the absence of any substantiation of problems with the jury or with jury selection, Movant's claims that McKenna should have done more to test the jury pool fail on both the performance and prejudice prongs. Mere "speculation regarding the abilities of these jurors to be fair and impartial" is inadequate to establish that a petitioner was prejudiced by trial counsel's claimed failure to question the venire differently or more vigorously. *See Black*, 419 F.Supp.2d at 381. Nor are Movant's arguments that McKenna should have undertaken a survey of community attitudes toward the shootdown, Claim #42, persuasive. The

[51] Nor is Movant correct, Claim #44, that conspiracy to commit second-degree murder is not an offense. *See, e.g, U.S. v. Chagra*, 807 F.2d 398 (5th Cir. 1986); nor, Claim #54, that McKenna should have sought to dismiss Count 3 for charging second degree murder while the government pursued first-degree murder. McKenna's strategy argued, and the court ruled, *see* DE/cr1578:13689-13690; 13698, that the indictment charged first-degree murder; Movant does not demonstrate how that ruling is incorrect.

defense-commissioned survey by Prof. Moran incorporated questioning about the BTTR shootdown, *see* DE/cr321:App.A:9; *see also Campa 2,* 459 F.3d at 1128 n.20, and *Campa 2* affirmed the trial court's finding that the survey was not entitled to the weight the defense attributed to it, *id.* at 1132, 1145-1146.

In challenging McKenna's effectiveness regarding voir dire and pursuing the change of venue motion, once again Movant fails to analyze what was actually done in this regard by McKenna and his co-counsel, whose arguments McKenna adopted and whose effectiveness Movant does not challenge. Once again – although Movant must disprove the presumption of McKenna's competence, and the burden never shifts to the government, *Chandler*, 218 F.3d at 1315 n. 15 – analysis of the record conclusively shows McKenna's diligence, skill, competence and effectiveness as to these issues.

McKenna's participation in the court's "model" voir dire was energetic and effective. At status conferences where the voir-dire questioning was planned, he was vigilant to insulate voir dire from being used to "condition the jury," *see* DE/cr1702:18-19, particularly in the context of the BTTR shootdown, *id.* at 19; persuaded the court to reject government-suggested voir dire concerning post-arrest statements, *id.* at 40, and the use of deadly force that he argued could pre-empt trial issues and condition the jury, *id.* at 41-42. He successfully petitioned the court to increase the number of defense peremptory challenges, *id.* at 75; DE/cr1703:6. Contrary to Movant's suggestion that McKenna was unaware of and inattentive to special voir-dire considerations due to the BTTR count, McKenna emphasized that very thing to the court, *see id.* at 35, asking for questioning of the venire as to how any of them had left Cuba, "because of the Brothers to the Rescue dimension which will be a big part of this case." The court granted the request and adopted the terminology McKenna

suggested for the pertinent voir-dire question. *Id.* He argued against overly benevolent voir-dire treatment of BTTR, *id* at 53. In later proceedings, he reflected a thorough familiarity with the court's voir-dire questionnaire, noting that it was a good questionnaire that "[w]e worked hard on." *See* DE/cr1472:758-759.

During jury selection, McKenna was alert and active. He paid close attention to venirepersons' responses, and successfully petitioned the court to follow up on unresolved matters. *See, e.g.,* DE/cr1469:81-82; 91; DE/cr1470:242-243; DE/cr1472:675-678; 708-709. He noted a venireman's agitated body language and had the court call him to the bench, resulting in dismissal of the venireman and avoidance of potential spillover to the rest of the panel. *See* DE/cr1470:303 ff. He was thoughtful and protective of Movant's interests, for instance seeking dismissal of a venireman whose planned vacation might "be in the middle of my defense case and I will have somebody who will be angry with me for putting on a lot of witnesses . . ." DE/cr1470:93. He challenged with counter-arguments government cause challenges, and contested its positions on inquiring further of venirepersons. *See, e.g.,* DE/cr1469:99-100; DE/cr1470:257, 380, 382, 384, 393-394; DE/cr1471:517-518; 528, 530; DE/cr1472:673-675; 703; 704-705; 761; DE/cr1474:1171-1172; 1172; 1178-1180. His own cause challenges were cogent and articulate; indeed, McKenna was selected to speak for all defense counsel. *See, e.g.,* DE/cr1472:852; DE/cr1473:1189-1190; 1193-1194, 1199-1199;.1200 *See also* DE/cr1473:1075, 1077. He furnished the court with a detailed defense witness list, including related to Count 3, so that the venire could be screened for any ties or previous interactions with defense witnesses. *See, e.g.,* DE/cr1471:516. At the end of voir dire, he made a detailed and ultimately persuasive argument that the court should allow additional peremptory challenges. *See* DE/cr1474:1381-1382.

Contrary to Movant's characterization of McKenna as not focusing on Count 3-related issues at voir dire, he asked for follow-up on precisely that basis. *See, e.g.,* DE/cr1469:83; DE/cr1472:673 (seeks more questioning as to venirepersons' aviation, radar background). *See also* DE/cr1470:270-272 (successfully challenges for cause venireman who attended mass for shootdown victim); DE/cr1470:312 (successfully removes from venire, and courtroom, venireman whose remarks touched on case facts). *See also* DE/cr1470:371, 387 (presses for follow-up questioning of venireperson who had dealings with Basulto, leading to cause-dismissal, over objection); DE/cr1470:385, 388-390; DE/cr1470:518-522; 534-537 (successfully seeks dismissal of venirepersons acquainted with shootdown-victim family members); DE/cr1471:537-540 (successfully seeks dismissal of venireman whose church had Basulto as a speaker); DE/cr1475:1435-1439 (successfully seeks further questioning of venireperson acquainted with BTTR passenger; makes cause challenge). Further evincing his sensitivity to Count 3 and voir dire, McKenna tried to persuade the court that shootdown victim family members should not be allowed to attend jury-selection proceedings, DE/cr1469:112-113, and that the court admonish the family members, DE/cr1469:115. McKenna's request to constrain the family members grew into a request, which was granted, for a gag order preventing witnesses from having contact with the press. DE/cr1469:118-119.

McKenna took the lead in exercising defense peremptory challenges. He was chosen by fellow counsel to announce the defense's aggregate, pooled peremptory challenges, further evincing the actual and perceived competence and effectiveness of his advocacy. See DE/cr1475:1493-1513. *See also* DE/cr1475:1518-1531 (McKenna speaks for all defense counsel on venireperson issues.); DE/cr1476:1553; 1555-1559. He tenaciously argued a *Batson* challenge to the government's

exercise of peremptory challenges, building a theme that later became a key (albeit unsuccessful) component of the defendants' appeals and petition for *certiorari*. *See* DE/cr1475:1497-1501 (first *Batson* challenge; McKenna's argument reflects thorough familiarity and facility with voir dire, readily comparing government response on different venirepersons); 1502; 1506-1508 (fourth *Batson* challenge; same); 1511; 1527. *See also* DE/cr1475:1510 (McKenna defends defense strike against government *Batson* challenge).

Against this record, Movant offers only speculation and conclusory assertions that McKenna should have done more. This is wholly insufficient to establish his claims.

6. Count 2 defense

Movant argues that McKenna ineffectively handled his defense on Count 2, the espionage conspiracy, including by neglecting it and unduly abdicating to co-counsel. Claims ##58, 60-63; *see also* DE12:46-47. These claims are refuted by the record. Mr. McKenna did not neglect, or unduly abdicate to co-counsel, defense of Movant at the joint trial as to Count 2 (conspiracy to commit espionage). For instance, McKenna's cross-examination of Joseph Santos – the only cooperating co-defendant who testified, and an important Count 2 witness – was thorough and robust. *See* DE/cr1488/3333-DE/cr1489:3434. McKenna was especially tenacious in seeking to establish through Santos the penalty for espionage-conspiracy, life in prison. *See* DE/cr1489:3398-3434. McKenna thereby succeeded in letting the jury know the penalty Movant faced as well, strategically erecting a sympathy-barrier to conviction, which he exploited in closing argument, *see* DE/cr1583:14463 ("my client . . . faces a possible life sentence"). Similarly, McKenna's cross-examination of FBI Cuban-intelligence expert Hoyt dwelt extensively on matters pertinent to Count 2, such as whether "secret" meant different things under the American classification system than as

used in the defendants' reports, DE/cr1492:3852-3853; seeking to equate the defendants' conduct with legitimate U.S. law enforcement and intelligence activity, DE/cr1492:3850-3851, 3853; and the unlikelihood of a non-English speaker [implicitly, like Santos] usefully penetrating Southern Command, DE/cr1492:3854-3856. McKenna further cross-examined Hoyt seeking to establish other aspects of the unlikelihood of a person like Santos penetrating Southcom, DE/cr1493:4036-4049. McKenna thereby laid the foundation for co-counsels' closing arguments, adopted by Movant, *see* DE/cr1583:14460-14461, that any penetration by Santos of Southern Command would have been at a non-clearance level without access to non-public information. *See, e.g.,* DE/cr1492:14305-14307.[52]

In cross-examining U.S. military-intelligence officer Winne, McKenna focused the jury on public availability of information concerning Southern Command, including its website, DE/cr1493:4031-4035, 4052. Additionally, co-counsel conducted extensive cross-examinations concerning Count 2 issues, and Movant never argues that their efforts, or their closing arguments,[53] were ineffective, nor does Movant illustrate how or why the joint efforts of defense counsel, including McKenna, were inadequate to defend him as to Count 2. Those joint efforts included extensive examination and proof aimed at showing that the defendants did not intend to access non-

[52] There was ample trial testimony about compartmentalization in intelligence work, including by Hoyt; *see, e.g,* DE/cr1491:3731-3797. Movant claims, Claim #60, that McKenna should have investigated and presented additional compartmentalization evidence, but fails to show what such evidence would have been or otherwise to establish prejudice.

[53] McKenna adopted his co-counsel's Count 2 closing arguments, which were thorough and effective; Movant in no way shows how those arguments were inadequate as to him. *See* DE/cr1583:14460-14461. McKenna also made his own Count 2 closing arguments, DE/cr1583:14461-14464, urging the unlikelihood of Santos getting access to secret information; the contingency and evanescence of the conspiracy-goal in the prosecution theory; the lack of proof of intent to acquire non-public information.

public information, refuting Movant's Claims #60, 61, and 63.[54]

A significant part of the affirmative defense case as to Count 2 was the videotaped testimony of Cuban military officer Amels Escalante Colas. *See* DE/cr1559:11588. McKenna was not only part of that deposition, taken in Cuba pre-trial; he also personally interviewed Escalante beforehand. *See* DE/cr626:1. This further refutes Movant's argument, *see* Claims #58, 60, that McKenna was ineffective in his preparation and investigation for the Count 2 defense. To the extent Movant, DE12:46, argues that McKenna was ineffective in asserting in opening statement that Movant lacked intent to injure the United States without referencing the other intent (to benefit a foreign country) element of Count 2, there are sound strategic reasons for McKenna to emphasize the element that casts his client in the sympathetic light of benevolence to the United States. In any event, this claim about opening statement was not made in the original §2255 motion, DE1-2. It is thus time-barred; *see* 28 U.S.C. §2255(f).

7. Government-misconduct claims

Movant claims, *see* Claims ##62, 68, 88-91; *see also* DE12:47-48; 53-54, that McKenna was

[54] Far from abdicating to defense counsel or being impeded from effectively defending on Count 2 in a joint trial, McKenna was instrumental in joint strategies where each defense counsel built upon and amplified the efforts of co-counsel in defending on Count 2. For instance, in cross-examining Santos, McKenna introduced the theme that any penetration by Santos of Southcom might have been merely as a gardener, DE/cr1488:3344-3345. Blumenfeld built on this point in his cross-examination of Santos, DE/cr1489:3498-3499. In cross-examining government intelligence expert Hoyt, McKenna followed up to establish that a gardener would not have access to top secret information, DE/cr1492:3856; co-counsel Norris took up the point in his cross-examination of Hoyt, *see* DE/cr1492:3867-3869. McKenna further developed it in cross-examining Southcom officer Winne, *see* DE/cr1493:4042-4043, 4045, 4069-4070, and Norris also addressed it, DE/cr1493:4069-4070. Counsel for all defendants charged in Count 2 thus worked as a team, culminating in co-counsel's closing argument, which McKenna adopted, *see* DE/cr1583:14460-14461, emphasizing that the gardener job Santos was considering would not have provided access to non-public information but rather would have furthered the supposedly benign, non-criminal goal of watching for publicly visible signs of military activity, *see* DE/cr1582:14305-14307.

ineffective for failing to object to government misconduct at trial, and for failing to argue some misconduct claims on appeal. In another instance of excessive rhetoric, Movant argues, DE:54, that the extent of misconduct in this case "exceeds that of any other reported case," yet he fails to argue individual misconduct claims. Instead, he tries to import into his §2255 Addendum an Appendix, at pages DE1-2:18-31, consisting of a chart defense counsel presented to the *Campa 3* panel, enumerating supposed instances of misconduct raised on appeal, and whether they had been objected to.

This is not an appropriate or permissible means of stating what amounts to potentially more than 100 additional §2255 claims. The number is impossible to quantify, because some chart items are repeated under different topics; also, some chart items reflect that they were objected to and others were not. Since Movant's claim is that Mr. McKenna was ineffective for failure to object, the objected-to claims are not pertinent, yet Movant makes no effort to distinguish or separate these out, or to specify exactly what misconduct claims he is seeking to raise in the ineffectiveness context. This wholly fails to comply with the Rules Governing Section 2255 Proceedings For the United States District Courts; *see* Rule 2(b)(1) ["The motion must . . . *specify* all the grounds for relief available to the moving party"]' 2(b)(2) [motion must "*state the facts* supporting each ground"] (emphasis added). Compounding the confusion, Movant appends to his yet another chart, at DE12-7, 12-8, 12-9, consisting of the chart that the United States government submitted to the *Campa 3* panel, responding to appellants' chart. Again, Movant makes no effort to distill, from this chart, the issues that he claims survive appeal and constitute a valid ineffectiveness challenge.

Without such specification, Movant fails to show prejudice, as he has no basis to show that the instances were in fact misconduct; that objection would have been meritorious; or that Mr.

McKenna's non-objections were outside the wide range of reasonable professional assistance. Indeed, deciding not to object can be a tactical decision, inasmuch as objecting can serve to highlight negative material. *See Bradford v. Timmerman-Cooper*, 2008 WL 3992142, *3 (N.D. Ohio 2008).

Strickland teaches that ineffectiveness exists only where the challenged attorney operates outside the range of competence demanded of attorneys in criminal cases, 466 U.S. at 687. Here there is an excellent barometer that Mr. McKenna was not outside that range, in that his four co-counsel also did not object to these claimed instances of government misconduct. Movant does not claim, and it is virtually inconceivable, that attorneys Mendez, Blumenfeld, Horowitz and Norris were so objectively incompetent that they all failed to notice misconduct demanding objection. Rather, there were no objections, because there was no misconduct to object to (or, arguendo, no misconduct so egregious that it was tactically worth objecting to or that demanded objection).

Movant argues that McKenna's failure to object to supposed prosecutorial misconduct cost Movant his ability to challenge that conduct on appeal. But appellate claims of prosecutorial misconduct, not objected to below, are reviewed for plain error. *U.S. v. Verbitskaya*, 406 F.3d 1324, 1336 (11th Cir. 2005). Movant and his co-defendants vigorously argued a plethora of government-misconduct claims on appeal, including all those in the charts, *see* appellants' briefs, available on Westlaw by links provided at the end of the *Campa 1, Campa 2,* and *Campa 3* opinions. Movant argues, *see* Claim #68; DE12:53-54, that *Campa 3* declined to review misconduct claims that were not raised until supplemental briefing, but Movant fails to parse out and separate which issues those are, as opposed to the misconduct claims *Campa 2* and *3* did not consider abandoned. As to the unabandoned misconduct claims, the Eleventh Circuit should be deemed to have done its duty and reviewed for plain error and found none. Furthermore, according to *Gordon v. U.S.,* 518 F.3d 1291,

1298 (11th Cir. 2008), when a claim of ineffective assistance is based on a failure to object to an error (there, committed by a district court, but there is no reason the principle would not apply equally to unobjected-to prosecutorial misconduct), "that underlying error must at least satisfy the standard for prejudice that we employ on our review for plain error. . . . It would be nonsensical if a petitioner, on collateral review, could subject his challenge to an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance." Thus Movant's government-misconduct claims would have to rise to the level of plain error to merit consideration, yet he fails to argue the specifics of these claims, let alone show plain error. Even assuming the *Campa 2* and *Campa 3* panels failed to consider these claims for plain error, all this conduct also was observed by the trial court. There is no prospect that this court, which was so careful to conduct a fair and legally proper trial, would have sat by silent as hundreds of unobjected-to instances of prosecutorial misconduct, amounting to plain error, accumulated as Movant claims.

In addition to the undifferentiated mass of misconduct allegations in the charts, Movant makes some more pointed claims. At Claim #62, he argues that McKenna ineffectively failed to object to unfairly prejudicial opinions, relating to Count 2, as to the "communist" nature of Movant's actions. No record citation is provided. Government rebuttal expert witness Clapper testified that the operation in this case "had all the classic earmarks of communist type human intelligence operation," DE/cr1573:13101. In context, the witness was clearly testifying as to a historical type of intelligence network, not an ideology. No counsel objected because that unobjectionable context was readily apparent. Government intelligence expert Hoyt testified, DE/cr1491:3699, that Cuba's intelligence system is headed by Fidel Castro, whose titles include president, Council Minister, head of the Cuban Communist Party and Commander-in-Chief. The statement was factual, not opinion, and was

not referenced to Movant.

Movant claims, *see* Claim #89, that McKenna was ineffective for not objecting to evidence said to be unduly prejudicial to Movant, in light of his stipulating to agent status. Movant provides no record citation and references it only with words from the government's rebuttal closing; he appears to be referring to GX DG105:2, in which Movant reported to his intelligence supervisors arguably subversive comments by a taxi driver as Movant exited Cuba, with Movant's analysis that Cuban counter-intelligence might be interested in following up. Movant does not suggest the report was inadmissible, except on discretionary grounds (presumably Fed.R.Evid. 403) as unduly prejudicial, especially given "the stipulation as to agent status," DE1-2:13. There was no stipulation. Movant, like his co-defendants, pled not guilty to every count, including the charge of acting as an agent of a foreign country without prior notification to the Attorney General, and required proof of every element, down to the person who maintains the registry of notifications to the Attorney General. Movant fails to show that a Rule 403 motion regarding this evidence would have been granted, and thus fails to show prejudice; he also cites no authority for the proposition that not moving for discretionary, Rule 403, exclusion of evidence can amount to ineffective assistance of counsel.

Movant claims, Claim #88; *see also* DE12:29, that McKenna should have hired his own translator to challenge FBI translation of "plastilina" as plastic explosive, and of "enfrentamiento."[55] McKenna pointedly tested the "plastilina" translation through recross-examination of the translator,

[55] Movant never explains how the FBI translated this word ("enfrentamiento"), or how he claims it should have been translated. This makes his claim incomplete; obviously, he fails to establish either prejudice or deficient performance since he fails even to articulate what it was McKenna's objection should have been, or what a different translator would have testified to.

see DE/cr1487:3170-3176.[56] This sufficiently brought the challenge to the jury's attention, and may have been preferable to the defense engaging its own expert and turning the matter into a battle of translation experts. *See Harrington*, 131 S.Ct. at 790 (refusing to find counsel's failure to engage blood-analysis expert ineffective; recognizing reasonableness of counsel choices whether to transform case into battle of experts, and that sometimes it is better for defense to try to cast doubt as to government version than for defense to strive to prove its own version).

A final misconduct claim is indecipherable. Movant claims, Claim #92; *see also* DE12:31 that McKenna was ineffective for not investigating and presenting evidence of the bias and interest of Hector Pesquera, FBI special agent in charge. Movant never states what this bias and interest consisted of.[57] Pesquera did not testify or sit with the prosecutors in the courtroom. Movant provides no illumination or explanation of what McKenna should have investigated; how it could have been relevant evidence at the trial; or what other legal action McKenna should have sought. There is, in short, nothing for this court to base an assessment of either prejudice or deficient performance on.

8. Sentencing

Movant claims, Claims ##64-67; *see also* DE12:45, 48, 51-53, that McKenna was ineffective at sentencing. Two of the claims, ##66 and 67, are but another expression of the argument, addressed *supra*, that McKenna should not have pursued an "all-or-nothing" strategy of seeking outright acquittal on Count 3, rather than conviction on some offense lesser than premeditated murder. As

[56] These transcript pages reflect at places that the questioner is prosecutor Miller; the context makes it clear that this was McKenna's recross-examination.

[57] At DE12:31 Movant says that the "agent in charge of the investigation" (which Pesquera was not) had "personal ties to intense political opponents of the Cuban government." No specificity is provided, nor is there any attempt to link this conclusory statement to any prejudice to Movant.

discussed above, McKenna's strategy was a reasonable one, within the wide range of professionally competent assistance. Although it was unsuccessful, thereby exposing Movant to the sentencing guidelines for first-degree murder conspiracy, lack of success does not equate to ineffectiveness. *See Bashor*, 730 F.2d at 1241 ("With the benefit of hindsight, we know that the strategy [not to seek a lesser-included instruction] was incorrect, however, it did not constitute ineffective assistance of counsel").

Claim #64 asserts general lack of preparation by McKenna for sentencing, but his sentencing pleadings and forceful sentencing arguments refute this. *See* DE/cr1397; 1406, 1412, 1448-1450. Claim #66 also asserts that McKenna failed to explain to Movant the right to testify concerning the underlying events. The effectiveness and adequacy of McKenna's consultation with his client has been addressed and shown *supra.* Movant does not claim that he was unaware of a right to testify. Further, his lengthy allocution to the court, DE/cr1450:56-69, in which he discussed the shootdown and said "neither Gerardo Hernandez nor even Juan Pablo Roque ever had anything to do with the plan to shoot down the aircraft," DE/cr1450:63, reflects his understanding that he could address these issues personally with the court.

At Claim #65 Movant argues that McKenna was ineffective for failing to seek a downward departure on minor-role grounds as to Count 3. However, McKenna addressed this issue, objecting to the recommended role-adjustment, specifically as to Count 3; *see* DE/cr1397:16 §20. The government rebutted McKenna's position as to role, *see* DE/cr1409:15 ff., including as to the Count 3-specific points Movant would suggest that McKenna supposedly failed to address, see DE/cr1409:18-19. Thus this issue was resolved by this court, on the merits. Movant fails to show that the court was wrong, and that different argument by McKenna would not have been futile.

Neither deficient performance nor prejudice has been established.

Finally, in an argument made in the memorandum, *see* DE12:51, but not in the initial §2255 motion and therefore time-barred, Movant claims that McKenna was ineffective for not challenging the obstruction-of-justice enhancement under USSG §3C1.1 to Count 3, because he was not charged with Count 3 at the time of the obstructive conduct, giving false information under oath at his initial appearance. Movant claims that at that time the prospect of such a charge was "unknown/unanticipated." However, the record shows that Movant clearly anticipated such a charge. The morning of his arrest, before the complaint was signed and before his initial appearance, he spontaneously raised the shootdown as the topic of discussion with the FBI. His post-arrest statements in that regard were fully developed at a motion to suppress, *see* DE/cr191:53-96; *see also* summary at DE/cr199:3-5, although not used at trial. His unsolicited remarks show that he clearly anticipated that his arrest was in connection with the shootdown. His obstructive remarks to the court at his initial appearance followed by two days his post-arrest statement evincing his appreciation that the shootdown was put in play by his arrest. The Eleventh Circuit rejected Movant's, and co-defendants', challenge to the obstruction-of-justice guideline. *See Campa 3*, 529 F.3d at 1015-1017, 1018.

9. Miscelleaneous ineffectiveness claims

Finally, as to Movant's ineffectiveness claims, some are not fleshed out or otherwise comprehensible. Movant asserts, Claim#41, that McKenna was ineffective for not presenting an affidavit of actual innocence. Movant does not specify whose affidavit he references, or what its use by McKenna would or supposedly should have been. If he is referencing an affidavit such as the one Movant belatedly filed, DE24-1, that affidavit relates to Movant's claims on collateral attack; there

is no basis to establish either deficient performance, or prejudice, for not presenting it at trial. An affidavit of actual innocence is typically associated with post-conviction litigation, rather than at trial, which is the topic of Movant's claims. *See, e.g., Frias v. U.S.,* 2010 WL 3564866 (S.D.N.Y. 2010); *see also Mize v. Hall*, 532 F.3d 1184 (11th Cir. 2008).

Movant claims, Claim #53, that McKenna was ineffective for failing to request a special Classified Information Procedures Act ("CIPA") hearing and procedures concerning Count 3. Movant provides no specifics of what the hearing would have been for, how it would have comported with CIPA, or what information it would have sought. There is no basis to rummage through unclassified government files on mere speculation that they may contain something; the basis for doing so with classified material is even more unfounded. As established in the discussion, *infra*, of Movant's claims of newly-discovered and withheld material, the court was meticulous in its application of CIPA procedures, which were upheld in *Campa 3.* Movant fails to establish either prejudice or deficient performance.

Besides making these individual claims of ineffectiveness, Movant argues, DE12:54 ff., that they cumulate to a collectivity that deprived him of the constitutional right to effective representation. On the contrary, review of the record as a whole shows McKenna to have been an enormously effective, energetic, loyal, astute representative on Movant's behalf. Any oversights by him, such as a missed objection here and there, are not of the magnitude either singly or collectively to call for relief. Movant's conclusory claims that McKenna, during the years of pre-trial litigation and the seven months of trial, somehow failed to discern the only viable defense wholly lack merit. The claims of ineffective assistance of counsel should be summarily denied.

II. Movant received a fair trial, free of due-process violations, notwithstanding his claim that

some local journalists received payments from the Broadcasting Board of Governors.

Movant claims, *see* Claims ##95-100; *see also* DE12:61-78, that U.S. government remuneration to south Florida journalists for services to Radio Marti and Television Marti violated his due-process rights and undermined the structure of his trial because those journalists also wrote articles about his case that he says were inflammatory and biased. Movant's contentions lack merit, and do not meet the threshold for an evidentiary hearing. He does not claim, and cannot establish, that these articles had any impact on his trial, which the Eleventh Circuit recognized as a model of procedures assuring a fair and impartial jury.

First, Movant's characterization of the remuneration to journalists as sinister and a deliberate government plot to prejudice him is overblown and without foundation. Second, the record he presents boils down to a handful of articles that were published for the most part after the jury had been empaneled and was being continually admonished not to read any accounts of the trial; there is no claim, or basis to believe, that any juror read any of the articles. Third, to the extent Movant argues that these articles, or the remuneration, added to claimed pervasive community prejudice, that issue is foreclosed by *Campa 2*, which extensively considered, and rejected, Movant's and co-defendants' claims that the case could not be fairly tried in Miami-Dade County.

Movant's claim is related to a newspaper account, and subsequent case study,[58] concerning 11 Miami journalists having received payments from the Broadcasting Board of Governors ("BBG").[59] Movant's invective about this as a vitriolic government campaign to inculpate him and

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[58] Columbia Journalism School Knight Case Studies Initiative: *When the story is us: Miami Herald, Nuevo Herald and Radio Marti* (hereafter "Case Study"). Movant provides no citation. Government counsel found the case study available for download, for a small fee, at https://casestudies.jrn.columbia.edu/casestudy/www/casestudy_collection.asp?#4.

[59] The BBG "was an independent Washington, DC, agency responsible for civilian (continued...)

his co-defendants is unfounded. The case study quotes some journalists as criticizing the ethics of journalists receiving payments from the government. However other voices, not cited by Movant, disagreed, pointing out that editors had approved some instances; disputing the ethics criticism; and noting that many payments were nominal amounts for appearing on Radio or TV Marti, similar to fees routinely paid for appearances on Voice of America, case study at 10, 13, 17-20. The payments were for work for Radio and TV Marti, which, according to Movant's Appendix H-13, "would not have been broadcast in Miami" but rather meant for the target audience in Cuba; "therefore any reporting done by these reporters was not on domestic airwaves at the time of the trial." *See* DE12-23:3 (BBG letter).

Movant argues that all the work of the paid journalists is suspect, and references publications of theirs in Miami-area media. This argument is based on pure conjecture that these journalists were co-opted by the government to produce partisan news articles adverse to him. There is no factual basis provided for this conjecture. Indeed, the specific facts argued by Movant quickly dwindle. He cites only three of the 11 journalists – Ariel Remos, Helen Ferre and Wilfredo Cancio – as having written about his case.[60] He references a total of eight articles by these three journalists, DE12:63-65, 72-73 (some articles are referenced twice).[61]

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[59] (...continued)
U.S. government and government-sponsored international broadcasting such as Voice of America, Radio Free Europe/Radio Liberty and Radio/TV Marti." Case Study at 7.

[60] Although Movant speaks of hundreds of thousands of dollars in government funds, the payments to these three was considerably less, about $15,000 total paid prior to June 8, 2001, when the trial ended. *See* DE12-11.

[61] Movant references only one publication by Ferre, an editorial writer and therefore not writing "in the guise of objective journalism," *see* Claim #95, DE1-2:14. This single publication is dated February 16, 2001, according to DE12:65. This is before Ferre received any BBG payments, according to Movant's own documentation, *see* DE12-11:22-24, making this publication, and Ferre, irrelevant to Movant's claim of co-optation by government payment.

Although Movant argues, Claim #97, that the material "published prejudicial evidence that the district court ruled was inadmissible," he specifies only an article by Cancio that reported, factually, a legal argument at the trial, DE12:64, and, at DE12:61, a television broadcast of a BTTR video "the defendants had successfully excluded in court earlier that day," February 1, 2001. This latter broadcast is not alleged to have anything to do with the journalists who received BBG remuneration. In any event, Movant's account concerning the February 1, 2001, broadcast is fatally garbled, and undercuts his claim that the media was somehow favoring the government. The trial proceedings of February 1, 2001, addressed a media video that *McKenna* wanted to use, over *government* objection; McKenna was allowed to present much of the video before the jury, with some edits. *See* DE/cr1502.

The dates of the eight articles Movant complains of are significant in refuting his claims. One, by journalist Remos, appeared Nov. 28, 1999, a year before the trial began, with ample time for any effect of this article to dissipate even if there were any basis to believe that any venire member or juror saw it, which there is not. The other seven appeared between January 16, 2001, and June 4, 2001, after the jury had been empaneled, and was being admonished by the court regularly not to read any media accounts about the trial. There has never been any suggestion that that admonition was not followed. The record conclusively shows no basis to believe any of these articles reached the jury.

With nothing in the record to support a claim of any impact on his trial, Movant's due process claim fails. Movant argues that in some circumstances government action can be so egregious that no showing of specific prejudice to a criminal trial need be shown, but the cases he cites undercut his position here. That is, his cited cases all deal with some circumstance in which the

criminal justice process itself is shown – not conjectured, but shown – to have been impacted, with some of these cases recognizing trial-specific circumstances so troubling that the defendant may be relieved from having to show causal prejudice. But none of the cases dispenses with an actual nexus of impact on the criminal justice process, as Movant's claim would. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.,* 129 S.Ct. 2252 (2009) (presiding judge who received campaign support from litigant should have recused); *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (egregiously bad jury instruction; discusses "structural defects *in the constitution of the trial mechanism*" as beyond harmless-error review [emphasis added]); *Rose v. Clark*, 478 U.S. 570 (1986)(jury instruction); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (grand jury); *Smith v. Phillips*, 455 U.S. 209 (1982) allegation of juror partiality);[62] *Estes v. Texas*, 381 U.S. 532, 577 (1965) ("carnival" atmosphere at trial, including intrusive broadcast equipment and live reporting from courtroom); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) ("kangaroo court proceedings" where arresting sheriff staged movie of defendant confessing, broadcast pervasively in small community; three seated jurors viewed the televised confession); *Irvin v. Dowd*, 366 U.S. 717 (1961) (two thirds of seated jurors thought defendant guilty based on extra-judicial accounts); *U.S. v. Eyster*, 948 F.2d 1196 (11th Cir. 1991) (prosecutor improperly vouched for government-witness credibility). Here these is no basis to claim impact on the trial from these articles or journalists, and no basis to claim involvement of the prosecution or law enforcement in the BBG's remuneration program. As the Supreme Court has

[62] *Smith* is illuminating. The Supreme Court there *reversed* habeas relief that had been granted on the premise that a juror who had applied for a job at the prosecutor's office must be presumed biased. Reversing, the Supreme Court noted, 455 U.S. at 217, "that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." Yet Movant would set the bar even lower, demanding a new trial where there is no fact-specific basis to presume juror bias, as there was in *Smith.*

repeatedly noted, a collateral-relief petitioner must demonstrate that he was *actually* prejudiced by the matter of which he complains. *See Bousley v. U.S.*, 523 US 614, 622 (1998); *U.S. v. Frady*, 456 U.S. 152,170 (1982) (collateral-attack petitioner must show actual prejudice, not merely "a *possibility* of prejudice, but that [the errors] worked to his *actual* and substantial disadvantage;" (emphasis in original)).

Finally, these claims are but a variation on issues of claimed pervasive community prejudice, tainting the venire pool, which were massively litigated at trial and on appeal, and determined adversely to Movant. The defendants had the trial court review many newspaper articles and other publicity about this case, but did not include the articles Movant cites now. This is not due to inattention of the five energetic defense attorneys, but because the articles were obscure, only tangentially related, if at all, to this case, and did not have the inflammatory character Movant would now ascribe to them. *Campa 2* thoroughly considered, and rejected, the suggestion that prejudice should be presumed in the Miami-Dade venire, or that the steps the trial court took to ensure a fair jury selection and trial were inadequate. Specifically, *Campa 2* distinguished several of the cases Movant cites, as inapplicable to this case. *See Campa 2,* 459 F.3d at 1149-1150:

> 5. **Supreme Court Precedent**. This case was nothing like the cases in which the Supreme Court has previously found that defendants were denied a fair trial by an impartial jury because of pretrial publicity or pervasive community prejudice. The record reflects that the pretrial community atmosphere in this case was unlike that which existed in *Irvin v. Dowd*. . . . Also distinguishable from this case is *Rideau v. Louisiana*. . . .Likewise, in *Estes v. Texas* (distinguishing) . . . The rare instances in which the Supreme Court has presumed prejudice to overturn a defendant's conviction are far different from this case. . . . Here, the district court carefully and meticulously evaluated the defendants' evidence of pretrial publicity and then made specific factual findings to discount that evidence. At trial, the court used numerous curative measures to prevent any publicity from affecting the jury's deliberations.. . . We find that the defendants in this case failed to meet this two-pronged test. They failed to show that so great a prejudice existed against them as to require a change

> of venue under Rule 21, in light of the court's effective use of prophylactic measures to carefully manage individual voir dire examination of each and every panel member and its successful steps to isolate the jury from every extrinsic influence. Under these circumstances, we will not disturb the district court's broad discretion in ruling that this is not one of those rare cases in which juror prejudice can be presumed.

The conclusions of *Campa 2* apply to these claims as well: Movant fails to make a case that his trial was subject to improper community-prejudice influence.

Writing in June, 2010, prior to *Skilling v. U.S.*, 130 S.Ct. 2896 (2010), Movant asserted, in Claims ##93-94, that *Skilling* would vindicate the defense position as to change of venue, and revive the claim that had been decisively rejected in *Campa 2.* After *Skilling* subsequently appeared, its outcome clearly was not as Movant hoped. *Skilling* affirmed the denial of change of venue in that case, relying in part on a voir dire far less stringent and extensive than the voir dire in this case. While Movant has not formally withdrawn the *Skilling*-based change-of-venue claim, Movant's argument of it in his post-*Skilling* Memorandum, *see* DE12:60-61, is so perfunctory as to be tantamount to a surrender. The change-of-venue claim was thoroughly considered, and rejected, by *Campa 2.* Movant argues that post-trial developments (presumably information on the BBG payments discussed *supra*) and McKenna's claimed ineffectiveness warrant reconsideration of the change-of-venue claim, but as discussed above, those matters lack merit; even if they had merit (which they do not), they provide no basis to countermand the familiar principle that a §2255 motion may not revisit, or relitigate, matters addressed on appeal. There is no basis to reconsider the much-litigated change-of-venue claim. *See Campa 2*, 459 F.3d at 1154, noting that Movants and co-defendants brought their venue claim to the trial court four times, and that the appellate court would "not permit . . . the defendants to take a second – or fifth – 'bite at the apple.'" If *Campa 2* was itself the fifth bite, and the cert. petition, which also raised the change-of-venue claim, was the sixth bite,

surely Movant's effort to take a seventh bite at the apple, through this §2255 motion, must be rejected.

III. Movant's claims of newly-discovered and government-suppressed evidence lack merit and should be denied.

Movant claims that newly-discovered evidence entitles him to relief. As to some of the purported new evidence, Movant claims that the government violated his due process rights by suppressing information. *See* Claims ##69-82, 101-104; *see also* DE12:58-60; 79-87. As to other purported newly-discovered evidence, he argues that he is entitled to relief because the information was "previously unavailable" and proves his actual innocence of Count 3, but does not claim that it was suppressed by the government. *See* Claims ##83-87; DE12:60.

As to both types of purported newly-discovered evidence, Movant's claims fail. The "newly discovered" material Movant references is either unspecified, immaterial, or but a cumulative reiteration of evidence that was produced in discovery and placed in evidence at the trial. The assertion that the government had, but suppressed, certain information is an unsupported conclusory statement, with no specifics or facts provided, and is a wholly insufficient basis to raise such a claim. Further, the material at issue was not unknown, or incapable of being known, to Movant.

A. Supposed newly-discovered evidence

Addressing first the claims, ##83-87, as to which Movant makes no claim of government suppression or other constitutional violation, these do not establish a basis for §2255 relief. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). *Herrera* reviewed a state

conviction, but the principle also applies in a wholly federal, §2255 context. *See, e.g., U.S. v. Guinan*, 6 F.3d 468, 470-471 (7th Cir. 1993), *overruled on other grounds, Massaro v. U.S.*, 538 U.S. 500 (2003) (extending rationale of *Herrera* to §2255 motions); *Douglas v. U.S.*, 2007 WL 952022, *6 (C.D. IL. 2007); *U.S. v. McArthur*, 2003 WL 1420252, *4 (E.D. Pa. 2003). *See also Frias v. U.S.*, 2010 WL 3564866, 6* (S.D.N.Y. 2010) (freestanding claim of actual innocence based on newly-discovered evidence, unaccompanied by allegation of constitutional error, provides no basis for habeas relief). While some debate continues whether *Herrera* left room for infrequent, extraordinary exceptions where actual innocence is persuasively demonstrated subsequent to a death sentence, *see Herrera*, 506 U.S. at 417, this is not such a case. The Eleventh Circuit has held that its "own precedent does not allow habeas relief on a freestanding innocence claim in non-capital cases." *Cunningham v. District Attorney*, 592 F.3d 1237, 1272 (11th Cir. 2010). Thus, Movant's claims ##83-87 would not warrant §2255 relief even if they were well-pled, specific, and supported by affidavits or other non-conclusory allegation, which they are not.[63]

These claims are also untimely. Claims of newly-discovered evidence, not cognizable as §2255 claims, may find an avenue for presentation pursuant to Fed.R.Crim.P. 33(b)(1), *see, e.g., U.S. v. Spellissy*, 2009 WL 3028158 (11th Cir. 2009); *U.S. v. Sims*, 2003 WL 21500184 (6th Cir. 2003); *see also U.S. v. Prescott*, 221 F.3d 686, 688 (4th Cir. 2000) ("Rule 33 and §2255 overlap to some extent"). But Rule 33 is subject to strict time limits: "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed.R.Crim.P. 33(b)(1). Movant was convicted June 8, 2001; his newly-discovered-evidence claims

[63] Movant's recent affidavit, DE24-1, recounting his denial of guilt for Count 3, is not "newly discovered" evidence. Movant argues, Claim #83, that his "own assertions of actual innocence" qualify as newly-discovered evidence, DE1-2:12; that argument, discussed *infra*, lacks merit.

are significantly time-barred. *See U.S. v. Mankarious*, 282 F.3d 940, 945 (7th Cir. 2002) (defendants "may not use §2255 to circumvent Rule 33's time limit"). *See also U.S. v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000); *Frias,* 2010 WL 3564866 at *6 (newly-discovered evidence claim made in §2255 motion subject to Rule 33's three-year limit).[64]

Apart from procedural flaws, Claims ##83-87 also fail substantively. Again, Rule 33 is instructive, for "[i]f a newly discovered evidence claim is brought in a §2255 motion, it must, at a minimum, meet the criteria for a Rule 33 motion for a new trial." *Ruiz v. U.S.*, 221 F.Supp.2d 66, 78 (D. Ma. 2002). *See also Barrett v. U.S.*, 965 F.2d 1184, 1194 (1st Cir. 1992) (§2255 petitioner must "meet the conventional criteria for obtaining a new trial on the ground of newly discovered evidence"). Rule 33's criteria require rejection of Movant's newly-discovered evidence claim.

"Motions for a new trial based on newly discovered evidence are highly disfavored in the Eleventh Circuit." *U.S. v. Devila*, 216 F.3d 1009, 1015-1016 (11th Cir.2000) (per curiam), *vacated in part on other grounds*, 242 F.3d 995, 996 (2001) (per curiam), *quoted at Campa 2*, 459 F.3d at 1151. To succeed, "the movant must establish that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the

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[64] Nor may Movant make a new argument that missing the Rule 33 deadline is another emblem of McKenna's ineffectiveness. Movant's time for submitting such ineffectiveness-of-counsel claims ran only until June, 2010, one year after certiorari was denied in *Campa 3*; *see* 28 U.S.C. §2255(f). Movant's cannot now add new ineffective-assistance-of-counsel claims to the dozens he has already asserted. DE1, 1-2.

In any event, as then-Judge Alito illuminated in *U.S. v. DeRewal*, 10 F.3d 100, 104 (3d Cir. 1993), claims of newly-discovered evidence and of ineffective assistance of counsel for faiing to discover that evidence are "mutually exclusive," because "newly discovered evidence must be evidence that trial counsel *could not have discovered* with due diligence before trial" (emphasis added). *See also U.S. v. Miranda*, 951 F.Supp. 368, 371 (E.D.N.Y. 1996) (claim that attorney failed to call co-defendants to testify inconsistent with claim that co-defendants' statements are newly discovered).

evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. The failure to satisfy any one of these elements is fatal to a motion for a new trial." *U.S. v. Schlei*, 122 F.3d 944, 991 (11th Cir. 1997) (citations, internal quotemarks omitted). Here, each of Claims ##83-87 fails one or more of the elements. Additionally, all the claims are so general and conclusory as not to warrant the court's consideration, failing to specify or cross-reference any specific facts or exhibits that would enable the court to know exactly what evidence each claim points to.

Claim #83 references witness evidence supposedly explaining Movant's lack of knowledge/scienter as to Count 3, but fails to say who the witnesses are or what they would say; no witness affidavits are provided. This is wholly inadequate. *Compare Herrera*, 506 U.S. at 417, which found suspect newly-discovered evidence claims based *merely* upon affidavits, and noted the potential for abuse through such motions; *Mize v. Hall*, 532 F.3d 1184, 1196-1198 (11th Cir. 2008) (similar); *Barrett,* 965 F.2d at 1195; *U.S. v. Miranda*, 951 F.Supp. at 370-371 (post-trial accomplice affidavits highly suspect and at best newly available, not newly discovered).[65] All those cases rejected claims that were much less threadbare than Movant's non-specific presentation. Movant also fails to establish that the evidence was only discovered after trial; indeed, witnesses' supposed

[65] Materials that are merely "newly available" do not qualify as "newly discovered" within the meaning of Rule 33. *U.S. v. Devila,* 216 F.3d at1016; *U.S. v. DiBernardo*, 880 F.2d 1216, 1224 (11th Cir. 1989); *U.S. v. Soghanalian*, 784 F.Supp. 860 (S.D. Fla. 1992); *U.S. v. Blucher*, 730 F. Supp. 428, 431 (S.D. Fla. 1990). *See also*); *U.S. v. Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("When a defendant is aware of a co-defendant's proposed testimony prior to trial, it cannot be deemed newly discovered under Rule 33 even if the co-defendant was unavailable because she invoked the Fifth Amendment").

Thus, Movant's own argument headings (DE1-2:12 ¶V. [". . . evidence that was previously *unavailable* . . ."]. DE12:60 DE1-2:12 ¶V. [". . . ESTABLISHED BY PREVIOUSLY *UNAVAILABLE* EVIDENCE . . ."] (emphasis added) defeat his claim.

knowledge of Movant's lack of knowledge and intent is a matter Movant would surely have known, and could have discovered with due diligence, before trial. Nor does Movant show that the vaguely referenced "witness statements" would have been admissible; for instance, as discussed, *supra* at 24, 29, defense efforts to introduce Movant's out-of-court statements through witness-hearsay would be inadmissible; *see* Fed.R.Evid. 801(d)(2). "Inadmissible evidence is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome." *U.S. v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983); *see also U.S. v. Montalvo*, 20 F.Supp.2d 270, 279 (D.P.R. 1998), *affirmed* 202 F.3d 54 (1st Cir. 1999).

Movant includes in Claim #83 his "own assertion of actual innocence," *see* DE1-2:12. This is absurd; obviously any such self-assertion of innocence, including as contained in his recent affidavit, DE24-1, was known to him at the time of trial, and cannot qualify as "newly discovered." *See U.S. v. Blucher*, 730 F.Supp. 428, 431 (S.D.Fl. 1990) (defendant's own proposed testimony not newly discovered). Five of the affidavit's six pages consist of Movant's factual denial of guilt on Count 3, and lack of knowledge about the shootdown. Such a claim of actual innocence does not state a ground for §2255 relief absent an independent constitutional violation; *see Herrera*, 506 U.S. 390; *Massaro*, 538 U.S. 500; *Cunningham*, 592 F.3d at 1272. *See also Schlup v. Delo*, 513 U.S. 298 (1995); *Milton v. Secretary*, 2009 WL 3150246, *2-*3 (11th Cir. 2009) (no threshold actual-innocence showing where affidavits of petitioner and others are of facts known at time of trial; this cannot satisfy *Schlup*'s requirement of new evidence showing "more likely than not that no reasonable juror would have convicted" in light of the new evidence).

There is no claimed constitutional violation arising from Movant's affidavit other than Movant's discredited severance/ineffectiveness argument refuted *supra*. To consider relief based on

the affidavit's denial of guilt, on any other, non-constitutional, basis, would violate *Herrera, Massaro* and *Cunningham*, and would open the door for any defendant to demand a new trial simply by swearing, after conviction, that he is actually innocent. Movant cites no authority for the position that a defendant's own self-serving affidavit, asserting factual innocence based on long-known facts, a decade after his trial, is on its own a basis for §2255 relief. On the contrary, courts have extended to new-evidence claims the principle that a defendant cannot harbor information at trial, gamble on a favorable verdict by remaining silent, and then complain post-verdict based on that information. *See U.S. v. Hall*, 854 F.2d 1269, 1271 n.4 (11th Cir. 1988); *Blucher*, 730 F.Supp. at 432.

Claims ##84-85 – concerning Cuba's supposed concern at protecting its territory, and the Venecia/Escorpion distinction – pertain to matters already adduced at trial and extensively argued. Any new evidence on these matters would be cumulative. Movant specifies, *see* DE12:31, 60, that his Appendix B (DE12-2), described as "a Cuban intelligence memorandum," is qualifying newly-discovered evidence (presumably relating to Claim #85, re Operation Venecia), but its content, describing Roque's pre-Escorpion wish to return to Cuba, coupled with denunciation of BTTR, is not significantly different from material that was made available to Movant, and introduced into evidence by the government at trial. *See* Attachment Two, government trial exhibits including decrypted pre-Escorpion high-frequency radio messages from the Cuban Directorate of Intelligence, dated November, 1994 (GX HF-104, HF-105); December, 1995 (GX HF-106); and January, 1996 (GX HF-110, HF-112; HF-113, HF-114). These exhibits are Cuban messages discussing and reflecting, similar to Movant's Appendix B, that a plan to return Roque to "CP" (Cuban headquarters), possibly in a plane stolen from BTTR, existed long before the shootdown, *see* GX HF-104; that Roque was chafing, as early as November, 1994, for this to occur immediately, whereas

his superiors resisted; *see* GX HF-105; but that by December, 1995, preparation for the travel was moving forward, *see* GX HF-106; and that the plan included an important propaganda component in that Roque, in returning to Cuba, would denounce BTTR, *see* GX HF-112. Roque evidently had misgivings about the prospect of making the trip in a BTTR-borrowed plane, but headquarters wanted this "variable" because of its publicity impact, *see* GX HF-113. After Escorpion was announced on January 29, 1996, *see* GX HF-115, the airplane "variable" for Roque's travel was cancelled, and his trip scheduled for late February, *see* GX HF-118. The argument that Roque's repatriation to Cuba through Operation Venecia had nothing to do with Escorpion and the shootdown was made, forcefully and robustly, by McKenna, including by reference to these HF messages. *See* DE/cr1583:14425-14426, 14428-14432. The jury rejected that argument, and there is no reason to believe that the outcome would have changed with the addition of more cumulative evidence making the identical point that Roque's wish to return to Cuba predated Operation Escorpion. *See U.S. v. Gonzalez*, 661 F.2d 488, 496 (5th Cir. 1981) (merely cumulative evidence not likely to produce a different trial result; motion for new trial properly denied); *see also U.S. v. Freeman*, 77 F.3d at 817; *U.S. v. Sutton*, 767 F.3d 726, 729 (10th Cir. 1985).

The material in Movant's Appendix B also fails to meet the requirement that it be newly discovered, or undiscoverable at time of trial with due diligence. Since Appendix B purports to be but a retelling of information known to Roque about his wish to return to Cuba, and since Movant worked with Roque including, according to trial evidence and Movant's affidavit at DE24-1:2, ¶¶G-H, ¶¶P-BB, on the Operation Venecia repatriation, there is no reason that this information was unknown or unknowable by Movant at the time of trial. *See U.S. v. Sims,* 2003 WL 21500184, **2 (6th Cir. 2003) (evidence known to defendant at time of trial not newly discovered; defendant may

not "sandbag" by withholding or failing to seek out evidence and then collaterally attacking conviction pursuant to Rule 33); *see also Spellissey*, 2009 WL 3028158 at **4.

Claim #86 – of newly-discovered impeachment evidence as to government expert witness Clapper – is made conclusorily, with no inkling of what the new evidence is and with no development in Movant's Memorandum, DE12. This non-specificity alone is reason to reject it. In any event, merely impeaching material does not meet the elements for newly-discovered evidence; *see Schlei,* 122 F.3d at 991 ("movant must establish that . . . the evidence is not merely cumulative or impeaching . . . "). *See also Barrett,* 965 F.2d at 1195 (§2255 claim fails; merely impeaching newly-discovered evidence is presumptively immaterial, not likely to cause different trial result). Claim #87 is similarly opaque, with no specification or description of the purported new evidence of lack of security for any information defendants might have had access to; as with Claim #86, the non-specificity alone is reason to reject Claim #87. In any event, this topic was the subject of extensive development and proof at trial, relating to count 2, both through cross-examination of government witnesses and presentation of defense witnesses, concerning supposed lack of security at Southern Command and Boca Chica Naval Air Station as to information the defendants might have accessed at those military installations. See, e.g., DE/cr1493:4032-4035, 4042-4044; 4069-4070; 4084-4085; DE/cr1494:4119-4123; DE/cr1531:7967-7972; 7977-7979; DE/cr1558:11493-11497; 11506-11524; DE/cr1562:11849-11855; 11864-11873. *See also* discussion of Count 2 defense, *supra*, at pp.83-85. New evidence in that regard would be merely cumulative.

B. Supposed government-suppressed evidence

Movant's remaining new-evidence claims are in the context of arguing that the government suppressed and failed to produce material to which he was entitled, in violation of *Brady v.*

Maryland, 373 U.S. 83 (1963). These claims lack merit; there was no *Brady* violation.

There are three essential elements to a *Brady* claim: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; (3) the evidence was material to either guilt or punishment. *Murphy v. Johnson*, 205 F.3d 809, 814 n.2 (5th Cir. 2000). *See also Strickler v. Greene,* 527 U.S. 263, 281 (1999); *Johnson v. Alabama*, 256 F.3d 1156, 1189 (11th Cir. 2001). Materiality, for *Brady* purposes, equates to prejudice: "To demonstrate prejudice, the petitioner must . . . convince us that there is a reasonable probability that the result of the trial would have been different if the [allegedly suppressed items] had been disclosed to the defense. In other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *High v. Head*, 209 F.3d 1257, 1267 (11th Cir.2000) (citations and internal quotation marks omitted).

Murphy, Johnson and *Strickler* list the elements in different order, but it matters not, for the petitioner has the burden to establish each, and if Movant fails to show any one of the three, the court need not consider the other two. *See Weeks v. Jones*, 26 F.3d 1030, 1047 (11th Cir. 1994)(habeas petitioner must demonstrate three things to establish *Brady* violation); *U.S. v. McMahon*, 715 F.2d 498, 501 (11th Cir. 1983) (*Brady* claimants must demonstrate three things) *U.S. v. Edwards*, 442 F.3d 258, 267 (5th Cir. 2006) ("parties alleging a *Brady* violation have the burden of establishing all three prongs of the *Brady* test"); *id.* at 267 n.8 (failure to show evidence suppressed, so no need to address whether evidence material); *Nelson v. Nagle*, 995 F.2d 1549, 1555 (11th Cir. 1993) ("We will not address the first two prongs of the [*Brady*] test because we find that the evidence was not material"). Indeed, that is the case here, for Movant does not and cannot establish *any* of the three essential elements. The government will address each of the three, but respectfully reminds the court

that it need not consider all three; Movant's failure on any one of the elements defeats his claim.

First, Movant fails to establish that the evidence at issue was favorable or exculpatory to the defense, for the simple reason that he largely fails to identify or specify what the evidence is. That is, he speaks generically, and conclusorily, of material "relating to" Cuba's right to confront intruding aircraft (Claim #70), or "relating to" the "illegality of Basulto's actions" (Claim #71), or "relating to" the U.S.'s "unwillingness to stop Basulto" (Claim #72), but he nowhere specifies what this material is, nor does he append the supposed evidence. Much of what Movant claims was not provided to him is not described, other than in conclusory generalities. *See* Claims ##70-72, 78-79, 81-82.[66] This falls far short of satisfying Movant's burden. A defendant who fails to identify "with precision" the supposed *Brady* material, and who is "unable to point to any specific evidence, exculpatory or otherwise, withheld by the government" cannot establish a *Brady* violation. *U.S. v. Warren*, 454 F.3d 752, 759 (7th Cir. 2006). *See also Murphy*, 205 F.3d at 814 (conclusory allegations cannot support *Brady* claim); *U.S. v. Davis*, 2010 WL 1857360, **1 (7th Cir. 2010) (no specification of particular evidence defendant says he should have received; "this lack of detail dooms his *Brady* claim"); *West v. Johnson*, 92 F.3d 1385, 1399 n.19 (5th Cir. 1996); *Morris v. Crosby*, 2005 WL 3468689, *16 (M.D.FL. 2005).[67]

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[66] As to claims ##69, 73-76, 80, 101-104, the government does not concede that they are stated with sufficient particularity. However, because these claims arguably reference something specific, the government will discuss the arguable specifics *infra.*

[67] Even in its unacceptable generality, the motion fails to allege that these matters are all exculpatory. Claim #77, for instance, argues that the government should have provided more material about the shootdown-location so that Movant's counsel would not have pursued the defense that it occurred in Cuban territory. Movant thus suggests that the government was required to provide additional *inculpatory* information supporting its theory (which already was massively documented) that the shootdown occurred in international airspace, in order to deflect Movant from trying to prove otherwise. But material that is not exculpatory is not required to be provided under *Brady*. *See U.S. v. Brunshtein*, 344 F.3d 91, 101 (2d Cir. 2003); *U.S. v. Neal*, 611 F.3d 399, 401 (7th Cir. 2010) (continued...)

As to the second element, Movant fails to allege specific facts showing that the government suppressed evidence. Movant asserts, repeatedly, that the government failed to disclose exculpatory evidence and to provide discovery, DE1-2:11, 15; DE12:58-59; 79-86, but never gets past speculative generalities to show, or allege with specificity, that the government had, but suppressed, any of the material Movant references. A defendant cannot demand a new trial based on mere speculation or unsupported assertions that the government suppressed evidence. *U.S. v. Jumah*, 599 F.3d 799, 809 (7th Cir. 2010). This is certainly so where the defendant additionally fails to identify with particularity the purported *Brady* material, as Movant largely does here; *see* discussion *supra*. *See U.S. v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984) (unsuccessful appellant conjectures INS file *might* contain *Brady* material, and fails to show government knows of such). It is also so even if the defendant identifies particular purported *Brady* information yet fails to show, other than by making a conclusory allegation, that the government had, but suppressed, that information. *See, e.g., Edwards*, 442 F.3d at 267 n.9 (speculative assertion that government knew of witness's book insufficient to establish *Brady* violation; §2255 petitioner's argument that government did not deny knowledge of the evidence "ignores that the [petitioners] have the burden of establishing all three prongs of the *Brady* test"); *U.S. v. Wilson*, 901 F.2d 378, 382 (4th Cir. 1990) (§2255 petitioner's *Brady* claim based on witness affidavit fails where petitioner does not show that witness told information to government). *See also Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (petitioner's burden to show evidence was withheld); *Mallet v. Miller*, 432 F.Supp. 2d 366, 377 (S.D.N.Y. 2006)

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[67] (...continued)
(*Brady* requires disclosure of exculpatory, not of inculpatory, evidence); *see also U.S. v. Agurs*, 427 U.S. 97, 112 n.20 (1976) (no constitutional duty to provide incriminating evidence or help defendant prepare for trial). Movant's argument also is logically inconsistent with his other argument that the government's disclosed case for high-seas location was so overwhelming that it was incompetence for McKenna to challenge it.

("mere speculation that exculpatory evidence was withheld is insufficient to warrant habeas relief").

As to the third element, Movant fails to establish that the information was material to either guilt or punishment, that is, that there is a reasonable probability that the result of the proceeding would have been different if the allegedly suppressed information had been disclosed to the defense. Indeed, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," *Strickler*, 527 U.S. at 281; that it "might" have done so is not enough, *id.* at 289; *see also Agurs*, 427 U.S. at 109-110. Rather, "petitioner's burden is to establish a reasonable *probability* of a different result," *Strickler*, 527 U.S. at 291 (emphasis in original), and to establish that "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" *id.* at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)); *Stephens v. Hall*, 407 F.3d 1195, 1203 (11th Cir. 2005) . Yet the items Movant claims were suppressed are all iterations of material that was produced, and adduced – admitted as evidence and vigorously argued – at trial. Producing more of the same would not have put the case in "a different light" at all, let alone one so drastically different as to undermine confidence in the verdict. "The non-disclosure of cumulative or repetitious evidence is not sufficient to establish a *Brady* claim," *Pardo v. Secretary*, 587 F.3d 1093, 1106 (11th Cir. 2009). *See also U.S. v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) ("Evidence that is merely cumulative is not material").

Specifically,[68] Claim #69 addresses material as to Cuba's intent to protect territorial integrity,

[68] The government here addresses those claims of suppressed information that are not wholly non-specific; the wholly non-specific claims (##70-72, 77-79, 81-82, and their deficiency, are discussed *supra*. Even these unacceptably general and conclusory claims, however, also referenced matters that were thoroughly aired at trial, and are thus cumulative, such as Cuba's claimed right to confront aircraft (Claim #70; explored during Leonard, Buchner testimony); (continued...)

and links this claim to Movant's Appendix G, *see* DE12:58, DE12-10, a transcript of a journalist's interview with Raul Castro July 21, 1996. The interview discusses events of January 13, 1996, when BTTR flew near (or, according to the GoC, over) Cuban territorial waters and dropped leaflets; and of July 13, 1995, when BTTR flew over Havana, dropping papers and religious medallions. *See* DE12-10:2-3. Both incidents were extensively explored, and presented evidentially, at trial, and Movant does not specify anything new in the Castro interview. For instance, the ICAO report, which was used extensively at trial, contained even more detailed accounts of the events of those dates, *see* DE12-5:42-49; 12-6:1-4, and also contained Cuba's stated position that its intent was to protect territorial integrity, *see* DE12-6:49-50, ¶¶2.1.4.1, 2.1.4.3; defense witness Buchner also testified extensively as to Cuba's wish, and supposed right, to protect territorial sovereignty. There is nothing in Appendix G that is not cumulative of these topics that were extensively provided to the defense and presented at trial. Castro's interview remarks in Appendix G could not possibly, let alone probably, have "put the whole case in such a different light as to undermine confidence in the verdict," because they do not put anything in a different light than the defense that was thoroughly developed at trial. *See U.S. v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004); *Henry v. Ryan*, 2009 WL 692356, *13 (D.Ariz. 2009) (where substance of claimed *Brady* material "was available from other sources and thus cumulative, its disclosure would not have cast the proceedings in a different light").

[68] (...continued)
arguable Basulto illegality, impunity from US government control, supposed US government knowledge of and indifference to GoC objections (Claims ##71, 72, 81, 82, explored through testimony of defense witnesses Buchner, Carroll, FAA officials, diplomatic-note exhibits); shootdown location (Claim #77). Movant's Claims ##78 and 79 are general and conclusory speculations that government files contain exculpatory materials concerning Movant's, or the GoC's communications, but this "shot in the dark" approach does not suffice for a *Brady* claim, *see Navarro,* 737 F.2d at 632, especially where, as here, Movant seeks to fish into classified materials notwithstanding the trial and appellate court's thorough exploration of this issue pursuant to CIPA, *see* discussion *infra.*

As for Claim #76, the separation of Roque's mission from any shootdown operation (what this response terms the "Venecia/Escorpion distinction"), at first glance it might seem that Movant refers specifically to his Appendix B, DE12-2, a Cuban intelligence memorandum on this subject. But elsewhere Movant describes DE12-2 as a Cuban intelligence memorandum, *see* DE12:60, recently obtained by post-conviction counsel upon inquiry with the GoC, *see* DE12:31. Movant does not assert that this Cuban memorandum was possessed, but suppressed, by the U.S. government, and he argues it as newly-discovered evidence rather than as a *Brady* violation. *See* DE12:31, 60. The government addressed it as such *supra*; *see* pages 105-107. In any event, as detailed *supra*, Appendix B is cumulative of evidence provided by the government to the defense in discovery, and admitted as government exhibits GX:HF-104-106; 110; 112-114; it would not be material for *Brady* purposes as it would not put the case in any different light.

Although Claim #80 references "satellite imagery," *see* DE1-2:12, it fails to provide any such imagery or explain how such was exculpatory or impeaching of the MoS evidence; the claim is speculative. Indeed, Movant fails even to assert – contrary to his burden – whether satellite imagery would have bolstered, or refuted, government proof that the shootdown occurred in international airspace. If the former, as discussed *supra* he had no *Brady* constitutional right to disclosure of inculpatory evidence. If the latter, then his argument denouncing McKenna for challenging that proof is suspect. Movant fails to establish a reasonable probability that satellite imagery, of unknown substance, would have changed the trial's outcome.

Claims ##73-75, 101-104 pertain to "HF"s – high-frequency radio messages from the GoC. Movant asserts that the U.S. government failed to disclose material exculpatory HFs generally (claims ##73, 101); relating to the Venecia/Escorpion distinction (claims ##74, 103); and to

Movant's lack of intent and knowledge (claims ##75, 102). Movant claims to have recently identified 10 HFs that should have been disclosed (claim #104). Movant describes, DE12:84-85, but does not append these 10 HFs, nor state how or from where he "identified" the material.[69] The description is of information repetitive and cumulative of what was produced to Movant and introduced at trial. That is, it all relates to Roque's wish, prior to the shootdown, to return to Cuba, and to the Directorate of Intelligence's consideration of, and propositions for, that return. As discussed in detail at 105-106 *supra*, this was also the substance of government exhibits GX:HF-104-106; 110; 112-114, *see* Attachment Two. Movant provides no further particularization of supposedly suppressed HFs relating to claims ##73-75, 101-104, and since the entirety of what he describes is cumulative of produced material and admitted evidence, it lacks *Brady* materiality.[70]

Of course, materiality is but one of the three *Brady* elements Movant must establish; he also

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[69] At DE12:85 Movant claims to have "only recently discovered [the information] on his own." The HFs were GoC communications, and the likely conclusion is that the referenced information was furnished to Movant by the GoC. Certainly there is no evidence, and Movant does not claim, that it came from the U.S. government. Any assertion by him that the U.S. government possessed it is pure speculation.

[70] Movant's heated arguments that omission of the purported *Brady* material allowed the government to distort and misstate evidence about the Venecia/Escorpion distinction are partisan hyperbole and incorrect. The government's argument was that Venecia and Escorpion were "interlinked;" *see* DE/cr1581:14072 ff. McKenna, in turn, argued that the two operations were wholly separate and less linked than the government proposed. These were both classic, and fair, instances of advocates in closing arguments arguing views of evidence that supported their respective positions. Because the purported *Brady* material Movant describes is not substantially different from introduced evidence, the advocates' arguments would not have been foreclosed or substantially reconfigured in light of the additional material; the reasonably probable outcome of the trial remains unchanged. Movant's argument, DE12:83, that the government similarly mischaracterized the "operation" for which he was praised also is wrong. He insists that this can refer only to Operation Venecia, solely involving Roque's return to Cuba February 23, 1996, *see* DE12:84, and cannot possibly refer to Operation Escorpion, involving the BTTR confrontation. Yet the formal order of recognition to Movant from the Directorate of Intelligence was, *see* GX:DG108:34, for "outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February of 1996," the date of the BTTR shootdown.

fails to make a prima facie showing that the U.S. government had, but suppressed, this material or any exculpatory HFs. He makes that assertion, vehemently, several times, but repeating a conclusory assertion in italics, *see, e.g.,* DE12:82, 84, makes it no less conclusory, and insufficient to state a *Brady* claim. He states no basis for his claim that the government possessed undisclosed exculpatory HFs. His argument that the government had access to more HFs than it produced is not sufficient to infer that *Brady* material was suppressed; if it were, then the mere showing that the government has unproduced files would convert *Brady* into a broad discovery provision mandating open-file production as a constitutional requirement. *See Kyles*, 514 U.S. at 437 ("We have never held that the constitution demands an open file policy"); *Jumah*, 599 F.3d at 809 (unsupported assertion that government suppressed evidence insufficient; *Brady* does not grant unfettered access to government files); *Stephens*, 407 F.3d at 1203; *U.S. v. Jordan*, 316 F.3d 1215, 1251-1252 (11th Cir. 2003); *Navarro*, 737 F.2d at 630-632 (mere speculation and bare allegation that unproduced government file may contain *Brady* material insufficient; "[a] due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device"). Similarly speculative is Movant's strained argument, *see* DE12:58-59, that the wording of an indictment in a different, but factually related, case means that the government must have possessed *Brady* material because the subsequent case alleged "utilizing" spy information and thus necessarily means that spy Movant's information was used without his appreciating its significance. As in *Warren*, 454 F.2d at 759, such inferential supposition (there, that a law-enforcement agent's phrase "formal deactivation" meant there must be unproduced documentation that defendant no longer worked as a confidential informant) is insufficient to state a *Brady* claim.

The infirmity of Movant's speculations is amplified here because the government files

Movant targets are classified material that was thoroughly considered by the trial and appellate courts pursuant to CIPA, and as to which the Eleventh Circuit in *Campa 3* considered, and rejected, the claims Movant seeks to resurrect. His attack on the propriety and fairness of the court's handling of CIPA issues, *see* DE12:79-82 is a rehash of issues he raised unsuccessfully at trial and on appeal; *Campa 3* squarely rejected them, *see* 529 F.3d at 994-996. Movant seeks to evade *Campa 3*'s preclusive effect by claiming, DE12:82, that newly-discovered evidence was always in the government's possession, but, as discussed above, that is a naked assertion for which he has no basis. On the contrary, Movant overlooks that the CIPA material has already been considered, by the trial and appellate courts, and found not to be producible. *See, e.g.,* DE/cr1483:2683, 2687 (government-held non-disclosed HFs presented to court pursuant to CIPA). The *Campa 3* panel also sought and received the government's CIPA material to review. *See* Attachment Three (12/20/07 letter, filed with Eleventh Circuit, confirming production to appellate court). Movant's argument, DE12:80, that only the defense could be trusted to review government files for discoverability[71] is contrary to CIPA and to the principle that the government ordinarily determines whether material in its possession must be turned over; *see Campa 3* at 995. Movant has no constitutional right to conduct his own search of government files to argue discoverability, *see Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

Here, the defendants got even more protection than the prosecutor's unilateral review, because the court considered CIPA materials, and did so with great alertness to defense concerns. *See* DE/cr1483:2688 (court utilized "a very broad brush" as to producibility). Movant already has

[71] Movant also claims that he should have been included in CIPA proceedings as to evidence-admissibility. DE12:80. However, CIPA review is only of discoverability; no decisions as to admission of evidence are made *ex parte*. *See* DE/cr232:2 (court explains that CIPA Section 4 proceedings do not relate to determination of admissibility).

received more process and *in camera* review than other §2255 petitioners whose similarly speculative efforts to invade classified material were rejected. *See, e.g., Wilson*, 901 F.2d 378 (4th Cir. 1990) (affirming district court denial, without evidentiary hearing, of §2255 *Brady* claim that NSA communications intercepts must exist based on inferences, where petitioner presented no direct evidence of existence; district court also properly relied on appellate CIPA-issue affirmance as precluding collateral-attack *Brady* claims); *Comer v. U.S.*, 2009 WL 5033924, *8 (N.D.TX. 2009). *See also Davis*, 2010 WL 1857360.

Finally, Movant's *Brady* claims also fail because most, *see* Claims ##69-70, 73-76, 79, 101-104, relate to communications or other documentation by the GoC, which Movant either knew of or could have obtained himself. Movant acknowledges that the defense had access to co-defendant Roque pretrial, *see* DE12:25, and Movant's own affidavit asserts that Movant was personally involved in Operation Venecia, see DE24-1:2, ¶¶G-H; 4, ¶¶P-BB. There is no reason Movant could not, at the time of trial, have sought from the GoC that employed him and Roque more information, and HFs of GoC communications, about Venecia, such as the material he claims now to have only recently discovered on his own, *see* DE12:85.

Brady does not apply to information that is not wholly within the control of the prosecution. "There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source," *Coe*, 161 F.3d at 36 (internal quotes omitted). *See also West*, 92 F.3d at 1399; *McMahon*, 715 F.2d at 501 (no *Brady* obligation to furnish information defendant already has or can obtain himself with reasonable diligence). So important does the Eleventh Circuit consider this principle that it includes it as a fourth *Brady* element a defendant must show, in *U.S. v. Newton*, 44

F.3d 913, 918 (11th Cir. 1995) (four-prong test; prong (2)). A claim by Movant that the U.S. government should have provided Movant communications, including HFs, of and by the GoC cannot meet this additional element. This is especially so where, as in *Wilson*, 901 F.2d at 381, purportedly exculpatory information "lies in a source where a reasonable defendant would have looked," such as the GoC that employed Movant as a career intelligence officer. *See also Roane*, 378 F.3d at 402.

IV. The court may, and should, deny the motion without evidentiary hearing or discovery.

Movant seeks an evidentiary hearing and discovery. Neither is called for. Movant's claims should be rejected without an evidentiary hearing because they either (1) if taken as true would not warrant relief; (2) are merely conclusory allegations unsupported by specifics; or (3) are conclusively refuted by the record. *See Allen*, 611 F.3d at 745; *Gordon*, 518 F.3d at 1301; *Tejada v. Dugger*, 941 F.2d 1551, 1559-1560 (11th Cir. 1991); *Vick v. U.S.*, 730 F.2d 707, 708 (11th Cir. 1984); 28 U.S.C. §2255(b) (no hearing where record conclusively shows no entitlement to relief). Where a district court has before it sufficient facts to make an informed decision regarding a habeas claim's merits, the court may refuse an evidentiary hearing. *Murphy*, 205 F.3d at 816.

For instance, Movant's first claim-group – that McKenna provided constitutionally ineffective assistance of counsel – is massively refuted by the record, as argued *supra*. This court also may rely on its own recollection of trial in rejecting that claim, without requiring an evidentiary hearing. *See Arredondo v. U.S.*, 178 F.3d 778, 782 (6th Cir. 1999); *Blackledge*, 431 U.S. at 74 n.4 (judge's recollection of trial may warrant summary dismissal of §2255 motion). As noted, many claims are conclusory, lacking specificity sufficient to trigger an evidentiary hearing. While a §2255 petitioner "need only *allege* – not prove" eligible claims, *Aron*, 291 F.3d at 715 n.6 (emphasis in

original), what must be alleged must go beyond bare conclusion, to state "reasonably specific, non-conclusory facts that, if true, would entitle him to relief," *id.*[72] Movant fails to do so. Movant says, DE12:51, 55-56, with no affidavit support, that at an evidentiary hearing McKenna would testify to representation errors. But the reasonableness of attorney performance is an objective inquiry, *Chandler*, 218 F.3d at 1315, which the court must resolve; admissions of deficient performance by attorneys are not decisive. *Harris*, 874 F.2d at 761 n.4. *See also Harrington*, 131 S.Ct. at 790 (following defeat, counsel may magnify responsibility for loss; "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"); *Grayson v. Thompson*, 257 F.3d 1194, 1222 (11th Cir. 2001) (counsel's own hindsight does not establish deficient performance). Even if McKenna's subjective state of mind were dispositive of *Strickland*'s performance prong (which it is not), there is no basis for an evidentiary hearing where Movant also fails to allege specific facts that can establish the prejudice prong, as argued extensively above, including as to the lack of merit of Movant's severance argument and affidavit.[73] *See Cauley v. U.S.*, 2010 WL 5382913 (11th Cir. 2010); *Saunders v. U.S.*, 2008 WL

[72] Arguing for an evidentiary hearing, DE12:87-89, Movant cites *Aron* and other cases distinguishable precisely because their allegations, unlike Movant's, were of specific, non-conclusory facts. *Aron*'s petitioner filed sworn objections that he made numerous, persistent efforts to communicate with counsel, and provided supporting correspondence and *pro se* pleadings. Movant, by contrast, has not sworn, either personally or through counsel, to his §2255 claims, in violation of the Rules Governing §2255 Proceedings; *see* Rule 2(b)(5), and provides no documentation in support of his self-serving affidavit. The petitioner in *Fontaine v. U.S.*, 411 U.S. 213 (1973), claiming illness and police coercion, tendered detailed factual allegations of abuse and hospitalization documented by records. *U.S. v. Jolley*, 2007 WL 3209136, 252 F.App'x. 669 (5th Cir. 2007), and *U.S. v. Magini*, 973 F.2d 261 (4th Cir. 1992), are distinguishable; the courts there made pre-hearing credibility-determinations based on extra-record material, which the government does not seek here.

[73] Thus, Movant's unsworn prediction, DE12:55-56, that McKenna would testify to not advising Movant of a right to sever the murder charges, and Movant's similar sworn affidavit (continued...)

2168739 (11th Cir. 2008); *Bauer v. U.S.*, 2008 WL 2561949, *6 (S.D.FL. 2008) (evidentiary hearing on ineffective-assistance claim not required where petitioner cannot show prejudice).

Movant's second claim-group – payments to journalists – also does not call for evidentiary hearing because here, too, he cannot show prejudice and accordingly has no basis for relief. As discussed *supra*, Movant shows no impact on his trial. The facts he alleges boil down to eight articles by three journalists, one published a year before trial and the others not until after the jury was empaneled and being continually admonished not to read or watch media accounts about the case. He states no basis to link journalist-payments by BBG to prosecutors. He argues, DE12:78, that he should get an evidentiary hearing requiring the government to prove lack of prejudice, but that misstates the §2255 petitioner's burden: Prejudice is his responsibility to prove, not the government's to disprove. In any event, extensive appellate litigation established that the trial court took exemplary, and effective, steps to insulate the jury from prejudice. Movant is not entitled to further evidentiary hearing on this well-worn topic.[74]

Movant's third claim-group – supposed newly-discovered and government-suppressed evidence – calls for no evidentiary hearing. On the contrary, Movant aspires to the kind of baseless fishing into government files that has been frequently condemned. At DE12:59-60 he enumerates far-reaching unbounded topics he seeks to explore at a hearing, but, as discussed *supra*, he has failed to show any newly discovered, non-cumulative evidence, or any basis to allege that the government

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[73] (...continued)
statement, DE24-1:1, do not require evidentiary hearing. No prejudice is shown, because there was no such severance right.

[74] Movant's argument, DE12:78 n.26, that he should get an evidentiary hearing to compensate for shortcomings of his supporters' Freedom of Information Act ("FOIA") litigation lacks merit. It states no §2255 rationale for making this court an ancillary forum for FOIA claims.

suppressed any *Brady* material. *Edwards*, 442 F.3d at 268 n.10, is instructive. There a §2255 petitioner urged the court "to grant an evidentiary hearing to explore their theory further, [however] we decline to do so. Due to the speculative and conclusory nature of [petitioners'] allegations with respect to both the materiality and suppression *Brady* prongs, such a hearing would serve as nothing more than a fishing expedition." Movant's argument is especially unfounded where the trial and appellate courts already have afforded significant review to CIPA materials he targets. *See, e.g., Wilson*, 901 F.3d 378 (§2255 petitioner was properly denied evidentiary re-exploration of CIPA issues litigated on appeal).

Finally, Movant's arguments for discovery lack merit. Movant fails to show good cause for discovery pursuant to Rule 6 of the Rules Governing §2255 Proceedings, a matter for the court's discretion. Speculation, hypothesis and fishing for claims is not good cause for discovery. *See Strickler*, 527 U.S. at 286 (mere speculation that exculpatory material may have been withheld unlikely to establish good cause); *Arthur v. Allen*, 459 F.3d 1310, 1311 (11th Cir. 2006) (court properly denied discovery, which cannot be ordered based on speculation or pure hypothesis); *Murphy*, 205 F.3d at 814 (speculative and conclusionary *Brady* and prosecutorial-misconduct allegations insufficient for discovery). Such impermissible speculation fuels Movant's appetite for broad, fishing-type discovery, *see* DE12:59-60, which should be denied. Nor is §2255 discovery appropriate to "replow . . . old ground" of previous complaints, *Tucker v. U.S.*, 269 F.Supp.2d 1024, 1047-1048 (E.D.Ark. 2003). Movant should not be able to use a baseless discovery request to reopen matters such as jury-prejudice claims, or penetration of CIPA materials, which have been previously adjudicated by this court and by *Campa 2* and *3. See also Wilson*, 901 F.2d 378 (district court properly denied §2255 petitioner's discovery requests where prior trial and appellate CIPA rulings

precluded collateral-attack *Brady* claim).[75]

CONCLUSION

Wherefore the government respectfully submits that Movant's §2255 Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF LENGTH

I HEREBY CERTIFY that the above Response, from the beginning of the Introduction

[75] Cases cited by Movant, DE12:88-89, do not advance his argument. Discovery was required in some where good cause was shown by specific factual allegations beyond anything Movant supplies. *See Bracy v. Gramley*, 520 U.S. 899 (1997) (trial judge convicted of bribery; discovery needed for judicial-bias claim); *Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996) (petitioner whose counsel ignored pretrial pleas for blood-testing entitled to previously unavailable DNA testing of exhibits); *East v. Scott*, 55 F.3d 996 (5th Cir. 1995) (death-row inmate established *prima facie* due-process claim as to interaction of private and public prosecutor; some discovery ordered while denial of other discovery, based on *Brady* speculation, affirmed); *U.S. v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1990) (government law-enforcement witness subsequently charged with false statements; discovery required as to role in defendant's investigation). *Hansen v. U.S.*, 956 F.2d 245 (11th Cir. 1992), and *Rush v. U.S.*, 559 F.2d 455 (7th Cir. 1977), deal with ensuring incarcerated petitioners access to records and transcripts of their trials, which is not at issue here. *U.S. v. Baynes*, 687 F.2d 659 (3d Cir. 1982) predated *Strickland*, and its cited proposition – that potential fruitlessness cannot excuse failure to investigate – has been abrogated. *See Lewis v. Mazurkiewicz*, 915 F.2d 106, 114 (3d Cir. 1990); *Gatto v. U.S.*, 997 F.Supp. 620, 631 n.8 (E.D.Pa. 1997).

through the end of the Conclusion, is 40,739 words in length.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 25, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, for uploading and service by electronic notice to counsel and parties authorized to receive electronically Notices of Electronic Filing.

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