IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
(Crim. Case No. 98-721-Cr-LENARD)

GERARDO HERNANDEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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INTRODUCTION

The Government's response fails to demonstrate that movant is not entitled to an evidentiary hearing on his Motion for § 2255 relief. Under § 2255, the Court "shall" grant a hearing "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (emphasis added). Despite the Government's arguments to the contrary, movant has set forth numerous bases for § 2255 relief—including the ineffective assistance rendered by his counsel, and the denial of due process that resulted when the United States Government spent hundreds of thousands of dollars to fund a propaganda campaign about the case in the same jurisdiction as the trial itself. This Reply addresses the Government's response, and sets forth the case for an evidentiary hearing.[1]

ARGUMENT

I. Counsel's Ineffectiveness Deprived Movant of His Constitutional Right to Adequate Representation.

Movant Gerardo Hernandez is not a murderer. He did not shoot down planes in 1996, nor did the Government present any direct evidence that he knew about or intended to assist the Cuban military in so doing. Nevertheless, on the basis of thin speculation and circumstantial evidence, movant was convicted of conspiring with the Cuban government to commit murder. Hernandez's Motion does not go to the sufficiency of the evidence in the case. Rather, he argues that his conviction was only possible because the Government urged the jury to infuse all of his actions with conspiratorial intent, while movant's court-appointed attorney, Paul McKenna,

[1] For ease of reference, this Reply will continue to use the Government's scheme for numbering movant's claims, set forth in Attachment 1 to the Government's response. This Reply will also adhere to the Government's system of referencing entries from the criminal case, No. 98-721-Cr-LENARD, with "DE/cr," while referring to entries on the docket in this case with "DE." Any claims advanced in movant's Motion and Memorandum but not addressed in this Reply are not conceded, but are advanced on the strength of the previous submissions.

violated movant's constitutional right to effective assistance of counsel by failing to put on a defense relating to movant's intent. Instead, counsel attempted to justify the actions of the Cuban government, and to persuade a Miami jury to adopt "the Cuban perspective" on the shootdown. No reasonable attorney would have conducted the defense this way.

In response to movant's original Motion and Memorandum, the Government points to everything that counsel did in the movant's defense as evidence of counsel's effectiveness. However, these arguments miss the point, as movant does not contend that counsel sat, catatonic, for the entire period of representation. The core of movant's ineffective assistance claim is that counsel committed two significant errors, each comprising a series of other missteps.

First, counsel focused the overwhelming majority of his attention on a doomed issue: whether the Cuban government was justified in shooting down the Brothers to the Rescue planes. Counsel did so at the expense of the much simpler, clearer, and easily proved defense—indeed, the only viable defense—that whatever Cuba's intent, the Government had failed to present any convincing evidence that movant himself agreed to join such a plan. There was significant evidence (not presented at trial)—including movant's testimony, the exculpatory testimony of his co-defendants, and expert and documentary evidence relating to standard intelligence practices in Cuba—that movant did not intend to join any plan to shoot down airplanes at all, and especially did not join any plan to do so aggressively, or in international waters.

Second, with regard to the defense that counsel did pursue, he failed to execute his strategy in a manner that gave it any hope of succeeding. Instead, he allowed crucial legal standards to remain undeveloped, and he focused on legally irrelevant issues, such as the location of the shootdown and the culpability of the victims, to the detriment of his client's case. These arguments were not only distracting, but counterproductive.

If these two errors—a plainly erroneous understanding of the case, and a failure to execute his flawed strategy at a reasonable level—prejudiced movant, then under the Supreme Court's precedent in *Strickland v. Washington*, 466 U.S. 668 (1984), a constitutional violation occurred. As the original Motion and Memorandum, as well as this Reply, demonstrate, counsel's errors were not the result of informed choices, and the commission of these errors was not only material to the outcome of the trial—it was critical. McKenna has sworn an affidavit, attached to this Reply as Appendix A, confirming that his understanding of the case was flawed, that his strategy was misguided, and that in his view, his errors "before and during the trial allowed the Government to convict [Hernandez] even though it had no direct evidence of criminal intent on his part." McKenna Aff. ¶ 7.

Before considering the Government's response in detail, it is important to foreground that the Count 3 conviction is extraordinarily tenuous. Indeed, the Government itself practically conceded defeat in its Emergency Petition for a Writ of Prohibition to the Eleventh Circuit, where it acknowledged that it had failed to produce evidence specific to movant's intent. *See* Gov't Emergency Pet. for Writ of Prohibition 21 (11th Cir. No. 01-12887). On appeal, while a panel of the Eleventh Circuit upheld movant's conviction, it did so over a vigorous partial dissent opining that "the Government failed to provide sufficient evidence that Hernandez entered into an agreement to shoot down the planes at all," *United States v. Campa*, 529 F.3d 980, 1024 (2008) (Kravitch, J.), and a special concurrence highlighting that the Count 3 conviction "presents a very close case," *id.* (Birch, J.). The panel was able to uphold movant's conviction only by affording the Government the most favorable interpretations of highly circumstantial evidence. Under *Strickland*, prejudice is established when "[t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." 466 U.S. at 694. Given the weakness of the conviction, the prejudice prong of the *Strickland* inquiry—*i.e.*, that movant was convicted when a constitutionally adequate defense was reasonably likely to have resulted in his acquittal—is easily satisfied in this case.

A. Counsel Failed to Present the Only Viable Defense: That Movant Did Not Have Criminal Intent.

Movant's principal ineffective assistance of counsel claim is that McKenna's misunderstanding of the law led him to disregard the only meaningful available defense in the case and focus instead on irrelevant (sometimes even harmful) arguments that had no prospect of success. In particular, the Motion and Memorandum showed that counsel all but ignored the fact that movant did not have the requisite criminal intent to participate in a conspiracy to commit murder, and counsel instead treated the location of the shootdown as the primary focus of the case. This failure was disastrous—as explained in the Memorandum, the location of the shootdown was completely, demonstrably, and concededly *irrelevant* to movant's guilt or innocence, and was, in any event, impossible for the defense to prove. Movant's conviction can be attributed directly to counsel's decision to focus the case on this issue, an act that squandered movant's credibility with the jury and shifted the focus away from the movant and to the government of Cuba. *See* Memorandum 4–6.

Based on the allegations in the Indictment, the available evidence, and the atmosphere surrounding the trial, a reasonable, effective attorney would not have made this mistake—he would have oriented his strategy around his client's intent, and his client's intent alone. This process would have required several steps. First, a reasonable attorney would have conducted the necessary pre-trial investigation and study to understand that the actual location of the shootdown was not relevant to the outcome of the case. He would have realized that because his client was charged only with conspiracy, the lawfulness of his client's conduct depended entirely

on what he *agreed* to do. How the events later unfolded in the air—hundreds of miles away and entirely out of his client's control—was legally beside the point.

Had counsel understood the law, he would have argued that whatever Cuba's intent, and whatever subsequently occurred, his client never willingly agreed to join any plot to shoot down airplanes, and especially not to do so in international waters. To facilitate that argument, a reasonable attorney would have moved to sever the Count 3 allegation, as severance would have enabled him to present his client's testimony and the exculpatory testimony of co-defendants who could not testify in the context of a joint trial. A reasonable attorney also would have sought documentary evidence to establish his defense, illustrating that the messages directed to his client were unrelated to the shootdown, as were any commendations his client received after the fact.

A reasonable attorney also would have recognized the difficulty of convincing the jury to believe that the shootdown occurred in Cuban airspace, as well as the special difficulty of getting the jury to adopt the "Cuban perspective" on the case. He therefore would never have raised these issues, as doing so could only alienate the jury and thus undermine his one viable defense.

This is the defense that a reasonable attorney would have deployed. But it was not the defense that counsel put on. The key distinction between the reasonable approach and the actual defense put on by counsel is the focus on *movant's* intent, as opposed to the intent of the government of Cuba. As the Motion showed, counsel misunderstood the legal core of the case: it was not until closing argument that he confessed to the jury that he had spent the vast bulk of the trial arguing an "irrelevant" issue: the location of the shootdown. DE/cr-1583:14439. Counsel's misunderstanding in turn caused him to make several additional crucial errors.

First, counsel did not move for severance, or even consider the ways that severance could benefit his client. *See* McKenna Aff. ¶ 4. Severing Count 3 was an obvious choice. Not only

would severance enable counsel to present vital exculpatory testimony, but it would also force the Government to prove Count 3—which hinged on circumstantial evidence and speculation—separately from the allegations of espionage, for which the proof was more solid. Severance would thus prevent the prejudice of the other charges from infecting the Count 3 trial, and vice versa. But counsel did not move for a severance. Consequently, counsel began trial from a position of weakness, with his client accused of participating in a broad conspiracy against the United States, seated among alleged Cuban spies, unable to testify in his own defense for fear of incriminating himself or his co-defendants, and unable to seek their exculpatory testimony for fear of forcing them to incriminate themselves.

Once the trial began, counsel focused the court's attention on the irrelevant question of whether the actual shooting of the planes was lawful, and in particular whether it occurred over Cuban waters and whether the Brothers to the Rescue ("BTTR") mission could be characterized as military rather than civilian.[2] To this end, the defense fixated on minutiae regarding radar evidence and on a general theme that BTTR posed a threat (indeed a military threat) to Cuba that justified a violent response. The Memorandum demonstrated that these arguments were legally irrelevant, that there was no real prospect of proving the factual basis of the first claim (that the planes were shot down in Cuban airspace), and that pursuing the second (that BTTR was a threat) played into the Government's hands, tending to increase sympathy for the victims while also suggesting that Cuba intended to shoot down the BTTR planes regardless of their location.[3]

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[2] Movant's point is thus not that counsel's defense was factually erroneous because the shootdown occurred over international waters—to the contrary, movant continues to maintain that the shootdown occurred in Cuban airspace. The point, however, is that this fact was not legally relevant, and was not provable at trial, and was therefore counterproductive.

[3] The motion also shows that even if the Court disagrees, and concludes that the strategy counsel chose was a potentially effective one, it was not pursued effectively because counsel failed to follow important lines of investigation (including, for example, satellite imagery that

On the key question of his client's intent, counsel did not present any meaningful evidence of his client's innocence—he attempted instead to point out holes in the prosecution's case. To permit such a one-sided presentation on the crux of the case was a mistake that no reasonable attorney would have made.

The Government does not contest the fact that counsel failed to seriously argue that Hernandez had no intent to enter into a conspiracy to commit murder, or to distinguish the confrontation that was planned from the confrontation that occurred. Nor does it contest that these would have been critically important and valid lines of defense. Instead, the Government attempts to show that counsel occasionally (and apparently by happenstance) introduced evidence and made arguments that would have been consistent with such a defense, had counsel properly attempted to make it. In so doing, the Government merely picks at the edges of Hernandez's ineffective assistance claim, focusing much of its brief on isolated pieces of evidence and arguments in an attempt to divert attention from the fact that this case was tried on a theory that was legally erroneous and practically hopeless.

The Government's response thus fails to address the fundamental reason why movant is entitled to § 2255 relief: an effective defense requires counsel to correctly identify the governing legal principle; investigate its factual premise; establish the critical facts at trial; secure appropriate jury instructions, allowing the jury to give proper weight and application to those facts; and demonstrate to the jury the relationship between the facts and the law. Without a reasonable effort at each step in this process, the defense will inevitably fail—making an

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would have provided more reliable evidence regarding the location of the shootdown, Claims ##4, 8). Pointing to these alternative arguments, the Government claims that Hernandez's position is "conflicted and inconsistent." U.S. Br. 51. But movant is entitled to make arguments in the alternative, particularly when the Government insists that movant's counsel provided effective representation by basing the defense on the location of the shootdown.

argument to the jury that has no support in the trial record is frivolous; developing evidence to support a theory that is never argued is pointless; and arguing a theory that the jury cannot accept under its instructions is ineffective. Accordingly, the fact that the Government may be able to point to random bits of evidence, or stray statements of counsel, that *could have* been used in an effective defense is of no consequence when the record plainly shows that counsel never made the required concerted effort to present a viable defense.

To be absolutely clear, movant's argument is not a mere attack on his attorney's strategic choices. Movant's contention is that his attorney misunderstood the legal principles at issue in the case, even though those principles should have been obvious to anyone familiar with the law of conspiracy. Because movant's attorney misunderstood what he had to prove, he drove the trial in a hopeless direction. Counsel's errors began before the trial, and accumulated throughout the proceedings. Ultimately, as a result of counsel's failure to grasp the core of the case, movant was convicted of conspiracy to commit murder.

The Government's attempts to prove otherwise are unconvincing.

1. Counsel Did Not Develop a Viable Defense Before Trial.

Had counsel rightly perceived the law governing this case, he would have taken a number of critical steps before the trial began, including (1) investigating the basis of a defense focused on Hernandez's personal understanding about the nature of the operation he was agreeing to assist; (2) moving to dismiss or clarify the indictment; and (3) moving to sever the trial in order to clear the way for Hernandez's alleged co-conspirators to testify regarding Hernandez's intentions. He did none of those things.[4]

[4] The Government asserts that counsel's failure to undertake an investigation designed to assist in a viable defense did not render his representation ineffective because he nonetheless was diligent in pursuing the hopeless strategy of trying to show that the BTTR planes were shot down

The Government nonetheless insists that counsel demonstrated an awareness of the proper defense, pointing to two instances in which counsel indicated that he planned to focus on "developing evidence about violent Miami-based groups" and should be allowed to do so without calling his client to the stand. U.S. Br. 37. This argument reinforces movant's point.

Throughout its response, the Government emphasizes that counsel took steps to develop what it calls the "Cuban perspective"—the Cuban government's view of BTTR (and particularly Basulto) as a threat to its security, the legitimacy of that concern, and therefore the lawfulness of its decision to down the BTTR planes. *See* U.S. Br. 35, 37–38, 40–42, 44–45, 55–56, 61–62. But Hernandez's objection is that counsel treated that evidence as necessary to prove *his client's* innocence—*i.e.*, that counsel failed to distinguish between (1) proving that Cuba lawfully shot down the BTTR planes (the defense he pursued, despite its essential futility), and (2) proving that Hernandez—regardless of the lawfulness of the action Cuba took, or planned to take—never agreed to a plan under which the BTTR planes would be unlawfully shot down (the defense he ignored).

The "Cuban perspective" would have been critical if counsel had been defending the government of Cuba. But he was not—he was representing an individual whose criminal liability was, as a matter of law, entirely distinct from his government's. Rather than tying his client's fate to the jury's perception of the legitimacy of Cuba's eventual actions during a confrontation over which Hernandez had no control, counsel should have been making a clear distinction between what Cuba did, and planned to do, and what Hernandez agreed to assist ex ante.

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in Cuban waters or that the Cubans were otherwise justified in killing the BTTR pilots. *See* U.S. Br. 50. But an investigation need not be "'half-hearted'" to be ineffective. *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 526 (2003)). The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). The zealous pursuit of a hopeless defense, while ignoring a viable one, falls far below prevailing professional norms by any standard.

The Government cites nothing in the pre-trial record to show that counsel perceived that distinction, much less took any steps to prepare to litigate the case on the basis of it. And in the context of this case, counsel's focus on the "Cuban perspective" was affirmatively harmful, reinforcing in the jury's mind that Hernandez could be found innocent only if the jury accepted the legality of the Cuban government's actions. This prejudice was not the mere unintended consequence of a reasonable strategy that happened to fail—it was the inevitable outcome of a doomed approach to the case.

2. Counsel's Opening Statement Did Not Advance a Viable Defense.

The Government's attempt to show that counsel actually put on a proper defense in his opening statement is equally fruitless. It again emphasizes that counsel focused attention on the "Cuban perspective" that Jose Basulto was a threat to Cuba, *see* U.S. Br. 37–38, and that the nature of the flights were paramilitary (apparently therefore justifying shooting down the planes in international waters). The Government notes that counsel "used the climax of [his] 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." U.S. Br. 38 (emphasis added). This was, the Government insists, "the very proposition that Movant claims, incorrectly, that the defense failed to assert." U.S. Br. 38.

But that emphatically is *not* the proposition Hernandez argues his counsel failed to assert, and the Government's attempt to obscure the central distinction of this Motion serves only to prove the Motion's merit. While counsel focused on "the *GoC's view*" and intentions, the legally relevant question, and the only responsible defense, focused on the beliefs and intentions of Gerardo Hernandez.

On that critical question, counsel's opening statement said not a word. The only reference to Hernandez's intent was with respect to the espionage charge, when counsel simply stated that Hernandez never intended to injure the United States, a point that has no relevance at all to the murder conspiracy charge. *See* DE/cr-1476:1606. Counsel never told the jury that even if it believed the killings were unlawful, it should nonetheless acquit Hernandez because the evidence would show that he did not intend to join a plot to shoot down airplanes, or in the alternative that Hernandez believed that the Cuban government would only shoot down the planes if they were in Cuban airspace illegally. Counsel never told the jury that he would call witnesses to show that regardless of what actually happened in the skies above the Florida straits, Hernandez agreed only to a course of action that was entirely lawful and that he never intended to assist in an unlawful killing. And counsel never said that the Government's witnesses would be unable to prove that what actually happened was what Hernandez had agreed to support.

3. Counsel Did Not Present a Viable Defense During Trial.

Counsel never made any of those promises in his opening statement because he never intended to make that defense during the trial. And, in fact, he did not make that defense. Nor does the Government even attempt to show that he did.

Instead, the Government focuses again on counsel's development of the "Cuban perspective" theme, *see* U.S. Br. 40–42, which did nothing to show that Hernandez's intentions were distinct from the Cuban government's plans and actions, and instead tended to reinforce the assumption that Hernandez's cases stood or fell with the Cuban government's justification for the killings. The Government thus acknowledges that counsel attempted to "negate[] criminal intent" by showing "that *the Cubans'* perspective of the threat posed by Basulto and BTTR informed *their* plans and responses leading up to the shootdown . . . ." U.S. Br. 42 (emphases

added). Rather than focusing on *Hernandez's* intent and plans, counsel directed the defense toward defending the "plans and response[s]" of the Cuban government. U.S. Br. 42; *see also* U.S. Br. 43–44 (defending counsel's focus on whether BTTR aircraft could be considered by Cuban authorities to be military aircraft).

Thus, it is hardly surprising that when the Government finally acknowledges the Motion's central objection—that counsel "fail[ed] to distinguish the nature of the government of Cuba from the intent of petitioner Hernandez" and "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," U.S. Br. 44 (quoting Claims ##12, 14) (alterations in U.S. Br.)—its only response is to deny that there is any meaningful difference between defending the Cuban government and defending Gerardo Hernandez. The Government argues that "evidence concerning the history and supposed misconduct of BTTR and Basulto, and the Cuban perspective generally . . . bore on Movant's criminal intent . . . ." U.S. Br. 44. That simply proves Hernandez's point that counsel—as the Government here acknowledges—conflated his client's intent with that of the Cuban government.

4. Counsel's Closing Argument Conceded That the Focus of His Defense Was "Irrelevant," But Did Not Adopt a New, Viable Focus.

Even if counsel had developed evidence at trial that would have supported a defense distinguishing between Hernandez's intentions and plans from those of the Cuban government, that evidence could serve its purpose only if counsel had actually asked the jury to draw the critical distinction during its deliberations, and secured a jury instruction that allowed and directed the jury to give heed to the argument. But he did not. Indeed, during his closing, counsel conceded that the issue on which he had spent the bulk of the trial: the location of the shootdown, was "irrelevant" because his client had been charged with conspiracy. DE/cr-

1583:14459. Counsel then failed to follow that admission by articulating a theory of the defense that would enable the jury to acquit his client.

The Government claims this is not so, but is able to point to only one passing sentence in the course of the entire closing argument that supposedly shows that counsel asked the jury to distinguish between the beliefs and plans of the Cuban government and Hernandez's intent and agreement. *See* U.S. Br. 47. That sentence simply stated, "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." *Id.* (quoting DE/cr-1583: 14390–91) (alteration in U.S. Br.). But that sentence cannot bear the weight the Government must put on it.[5]

First, counsel never returned to the point, including at the critical stage of discussing the elements of the offense or the jury instructions. Without such direction, the jury could hardly be expected to discern a defense based on a single statement made in the course of generally describing Hernandez as a scapegoat.

Second, even if the jury had understood the sentence to relate to the intent element, the sentence does not make the critical point that there was no evidence that Hernandez intended that any lethal confrontation would occur, nor that any such confrontation, if it were to occur, would be unlawful. It instead suggests a much weaker claim that Hernandez did not know that Basulto

[5] Perhaps recognizing as much, the Government also asserts in a footnote that counsel made a similar point at sentencing. *See* U.S. Br. 47 n.31. But, of course, effective counsel makes his defense during the trial, not after his client has been convicted. The footnote fails additionally because the statements quoted do not make the relevant point regarding Hernandez's intent, but simply note that Hernandez was not involved in the actual confrontation. That is beside the point as a matter of law—if Hernandez intended to assist in an unlawful killing, the fact that he was not the person who "pulled the trigger," U.S. Br. 47 n.31 (quoting DE/cr-1450:55–56), is irrelevant. His guilt depended on his beliefs about the nature of the planned confrontation, not his degree of involvement in its execution.

would ignore warnings and initiate a confrontation (an implausible claim given Basulto's well-known history of violating Cuban sovereignty), and that Hernandez did not know that Cuba would respond to an incursion by confronting Basulto in the air with fighter jets. Those claims are quite distinct from the much more plausible defense that even if Hernandez contemplated that Basulto would be confronted, Hernandez did not contemplate the use of lethal force at all, and he certainly did not contemplate the unlawful use of lethal force.

Aside from its entirely unpersuasive attempt to show that counsel raised the proper defense at closing, the Government again takes pains to point out that counsel focused on the "Cuban perspective" of Basulto as a threat and the BTTR aircraft as military rather than civilian. *See* U.S. Br. 45–46. But, as discussed, that is insufficient (and even potentially harmful). And while the Government attempts to show that counsel effectively raised other points, *see infra*, it cannot show that the overall effect of the closing was to set forth Hernandez's only viable defense with a reasonable prospect of success.

B. Counsel's Failure to Perceive the Correct Defense Led to Numerous Subsidiary Errors.

Because counsel failed to perceive or pursue the most important defense in the case, it is not surprising that he failed to investigate, develop, and present the evidence critical to such a defense, or take other steps necessary to pave the way for a successful invocation of the defense before the jury.

1. Counsel Unreasonably Failed to Consult His Client About Severance, and to Move This Court to Sever Count 3.

Any competent counsel pursuing the proper defense would have taken steps to focus the case on the question of his client's intent, including by moving to sever Count 3 from the remaining counts. No reasonable attorney would have preferred to try the murder conspiracy

charge in Count 3 together with the other charges in the indictment, especially when doing so compromised his ability to prepare, and his client's ability to testify in his own defense and to seek the exculpatory testimony of his codefendants. Counsel's failure even to consult movant about the possibility of seeking a severance of Count 3 was constitutionally inadequate, and undoubtedly prejudicial. The Government argues, however, that counsel made a wise tactical choice in not seeking a motion for severance, and that no prejudice resulted because a motion to sever would not have been granted. These contentions fail.

First and foremost, counsel's decision not to seek a severance was not a tactical decision. The most on-point precedent establishes that when "it is not clear whether the lawyer's refusal to sever the charges was tactical," it is inappropriate to defer to that refusal as a tactical decision. *Thames v. Dugger*, 848 F.2d 149, 151 (11th Cir. 1998). In movant's affidavit, filed with this Court on March 31, 2011, he swears that counsel:

> [N]ever explained to me that it would be possible to have a separate trial on Count III at which time I would have the right to testify on my own behalf on the conspiracy to murder charge free of the prejudice to other charges, and to my co-defendants . . . . Nor did Mr. McKenna explain to me that at a separate trial, I could secure the testimony of one or more of my co-defendants without their having to choose between incriminating themselves or refusing to give relevant evidence at my trial on the conspiracy to murder charge . . . . Had I known that, I would have insisted that my lawyer make every effort to secure a separate trial on that count.

Hernandez Aff. ¶¶ 3–5, DE-24:1. Likewise, in counsel's own affidavit, he admits that:

> I never considered the possibility of filing a motion on Hernandez's behalf to sever Count 3 from the remaining allegations against him. At the time, I believed that Hernandez's co-defendants would probably wish to sever their trial from his to avoid being associated with the murder charge, but I did not consider the benefit that might accrue to Hernandez from severing his Count 3 trial from the broader joint trial, or of severing Count 3 from the other allegations against him. Additionally, I believed, based on discussions that Hernandez and I had in the context of preparing for a joint trial, that Hernandez and his co-defendants did not wish to testify. Therefore, I never discussed with him the possibility of severance as a means to procure his testimony or the testimony of his co-defendants.

McKenna Aff. ¶ 4. Under the Eleventh Circuit's holding in *United States v. Yizar*, it is ineffective assistance of counsel to fail to move for severance when the exculpatory testimony of co-defendants would have been available in separate trials, and there is a "'reasonable probability'" that the trial court would have exercised its discretion to grant the motion. 956 F.2d 230, 233 (11th Cir. 1992) (quoting *Strickland*, 466 U.S. at 494).

The Government's response misses the mark. First, the Government attempts to argue that the decision actually was tactical, and cites a discussion of possible severance that arose when Blumenfeld, counsel for defendant Guerrero, fell ill. *See* U.S. Br. 10–12. The Government notes that in this discussion, McKenna expressed the view that the defendants desired a joint trial and joint defense. This makes sense, as Blumenfeld had prepared portions of movant's defense on counts other than Count 3, and severing Guerrero would have deprived movant of the fruits of that labor. However, this discussion proves nothing about whether McKenna considered the possibility of severing his own client's trial with regard to Count 3—a count for which McKenna was solely responsible—nor does it suggest that McKenna discussed that possibility with his client. The Government's insinuation that these excerpts somehow demonstrate a strategic choice to pursue a joint trial on all counts overstate their significance—the nature of an attorney's decision cannot simply be inferred by vague circumstantial evidence. *See Thames*, 848 F.2d at 151 n.2 (rejecting a similar argument when the evidence before the court demonstrated that the attorney "was aware of the existence and application of the rules governing severances because she sought to ever other counts" of the indictment). And the out-of-circuit cases cited by the Government are distinguishable because the attorneys in those cases were considering moving to sever so that their own clients could have an individual trial; the attorneys were not contemplating the severance of another conspirator (in this case Guerrero) from a broader joint

trial.[6] This distinction is important because in this case, there is no evidence that counsel ever considered severance for his client's benefit, as opposed to the benefit of another defendant.

The Government then argues that because the standard is objective, it does not matter whether counsel actually considered moving for severance, as long as some competent lawyer could have declined to file the motion after considering all of the benefits and drawbacks. While the Government correctly states the law, its response both mischaracterizes movant's claim and fails on its own terms. First, the Government erroneously amalgamates movant's claims as a single argument related to severance. But Movant actually alleged multiple errors with regard to the motion to sever—the first of which is that counsel erred by "[f]ailing to explain to the petitioner his rights with respect to testimony as to Count 3 if that count were tried separately." Claim #56.

The Government argues that because the decision to file a motion is an "attorney decision," client consultation is unnecessary. U.S. Br. 12 n.10 (citation and internal quotation marks omitted). But in the context of a decision that burdens the defendant's constitutional right to testify, the failure to consult the client is a constitutional error. The decision to testify in one's own defense, like the decision to appeal, belongs solely to the defendant, who "has a fundamental constitutional right to testify in his own defense." *McGriff v. Dep't of Corrs.*, 338 F.2d 1231, 1237 (11th Cir. 2003). "This right is personal to the defendant and cannot be waived by either the trial court or by defense counsel." *United States v. Teague*, 953 F.2d 1525, 1532

[6] *See, e.g.*, *United States v. Gordon*, No. CRIM.A.99-348-02, Civ.A.03-6515, 2004 WL 1879988, at *2 (E.D. Pa. 2004) (attorney's pre-trial motion made it "apparent . . . that he considered seeking severance of charges and concluded, on the basis of the evidence, that it would have been fruitless"); *United States v. Ciancaglini*, 945 F. Supp. 813, 818 (E.D. Pa. 1996) (attorney had submitted an "uncontroverted affidavit" stating "that he considered the possibility of severance, and decided against it"); *see also Schwander v. Blackburn*, 750 F.2d 494, 501 (5th Cir. 1985) (finding no prejudice in failing to move for severance, without discussing performance).

(11th Cir. 1992) (en banc). Counsel thus has a duty to advise his client of the benefits and drawbacks of testifying, and to leave the decision to his client. *Id.* at 1533; *cf. Roe v. Flores-Ortega*, 528 U.S. 470, 479–81 (2000) (holding that because the decision to appeal lies with the defendant, effective attorneys must consult with a client regarding appeal "in the vast majority of cases"). In this case, counsel's decision not to consider a severance burdened movant's constitutional right to testify in his own defense because the principal reason to sever the trials was to enable movant to testify in his own defense on the Count 3 allegations. The error in this case therefore falls under the rubric of *Teague* and *Flores-Ortega*, and counsel's failure to consult his client is damning to the Government's claim that he performed in an objectively reasonable manner.

But even putting aside the defendant's constitutional right to testify, and considering the Government's argument on its own terms, the Government is incorrect that a reasonable attorney would not have filed a motion for severance. While the Government expounds on the virtues of a joint trial *in general*, *see* U.S. Br. 12–13, it does not explain how a reasonable attorney could weigh those virtues against the drawbacks of a joint trial *in this case* and conclude that a motion to sever was ill-advised. The cases cited by the Government do not stand for the proposition it necessarily asserts: that the failure to seek a severance is *never* constitutionally inadequate.

The Government points out that multiple trials create multiple opportunities to be convicted. *See* U.S. Br. 12 n.10. But that simple arithmetic obscures the fact that the two trials would only have been partially independent events. In all likelihood, the joint trial would have taken place before any separate trial on Count 3 to avoid imposing delay on the four other defendants. *See Yizar*, 956 F.2d at 233, n.17 (noting in that case that "[i]f the trial court granted severance, it would have been extremely likely to order the sequence of trials for the co-

defendants so that the precise reason it granted severance would take place."). If movant had been acquitted of the other charges, then it would have been very difficult, if not impossible, for the Government to proceed against him on Count 3, for if he had been acquitted of espionage in general, then it would have been very difficult to prove that he had engaged in the more specific acts charged in Count 3.

Additionally, it is apparent that the risk of conviction in both trials would be lower than the risk of conviction in a joint trial. In separate trials, the prejudicial nature of the murder allegations would not have infected the proceedings relating to the other counts, and the Government's contention that the defendants were all engaged in a broad-ranging conspiracy against the United States would not have influenced the jury with regard to the allegations in Count 3. There is little doubt that the Government's various charges cross-pollinated to prejudice the jury against the defendants, and any reasonable attorney would have acted to prevent such an outcome.

Moreover, movant had an interest in testifying, and in obtaining testimony from codefendants relating to Count 3, which he could not obtain in the context of a joint trial on all counts. The Government argues at some length that movant would not have testified. *See* U.S. Br. 25–27. However, the Court never conducted a *Teague* colloquy[7] to assess whether movant was voluntarily waiving his right to testify in his own defense. Movant's affidavit states that he would have testified, and this Court is well-equipped to consider the matter at an evidentiary hearing. At this point, it bears noting only that the Government has mischaracterized movant's claim: Movant does not argue that counsel had to call him to the stand in the joint trial, but only that he should have been advised of his right to testify, and of the benefits and risks of doing so.

[7] *See United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (en banc).

Binding circuit precedent establishes that rule. *See, e.g.*, *Teague*, 953 F.2d at 1533. The Government claims that this testimony might not be exculpatory, but that is a matter for this Court to determine after a hearing. For now, it is clear that movant's codefendants, particularly Rene Gonzalez, were in a position to testify regarding his knowledge and intent of Cuban operations, and would have done so if they could have accomplished that feat without exposing themselves to a risk of conviction. *See Byrd v. Wainwright*, 428 F.2d 1017, 1019–20 (5th Cir. 1970); Memorandum 15, 21.

In sum, because it is clear that separate trials would have benefited movant's defense, and that bundling Count 3 with the other counts would impair his defense, it was objectively unreasonable for his attorney to refuse to file a motion to sever Count 3. The fact that there are some benefits to joint trials does not establish that those benefits could reasonably have been expected to accrue in this case, and the facts of this case demonstrate that any benefit to joining Count 3 with the remaining counts is illusory, and in any event significantly outweighed by the prejudice to movant's case. Faced with the circumstances of this case, any reasonable attorney would have moved to sever Count 3.

As a fallback position, the Government argues that there was no prejudice from counsel's failure to seek severance under Federal Rule of Criminal Procedure 14 because the motion would not have been granted. In responding to this claim, it is important to note at the outset that the Government has overstated the defendant's burden. Most of the cases cited by the Government on this point, *see* U.S. Br. 16–17, are cases in which the trial court's denial of a motion to sever was reviewed for abuse of discretion. Such appeals almost never succeed, because the question whether to grant a Rule 14 motion is left to the sound discretion of the trial court. However, the allegation in this case is not that the Court improperly denied a severance, but is instead that the

Court was denied the opportunity to exercise its discretion by counsel's failure to perceive the benefits of severance and to file the appropriate motion. The Supreme Court has provided guidance on the appropriateness of a Rule 14 motion at the district court level, stating that:

> [A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened . . . . Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial.

Zafiro v. United States, 506 U.S. 534, 539 (1993). *Zafiro* describes this case perfectly: a complex case involving many defendants who exhibited different degrees of culpability, in which the evidence of the larger espionage conspiracy was likely to taint the jury's view of the evidence relating to Count 3, and vice versa. Furthermore, as demonstrated above, this case involved a real risk of jury confusion, and the joinder of defendants also restricted movant's ability to offer exculpatory testimony in his own defense.

In addition to authorizing the severance of defendants, Rule 14 authorizes separate trials for different offenses, including when a defendant "has both important testimony to give on one offense and a strong need to refrain from testifying on the other." *United States v. Outler*, 659 F.2d 1306, 1313 (5th Cir. Unit B Oct. 1981). That condition is satisfied here. Courts have held that when a defendant faces a very grave charge, such as murder, together with other charges, Rule 14 severance is justified to permit the defendant to testify on the murder charge while continuing to force the Government to meet its burden of proof on the other charges. *See, e.g.*, *United States v. Best*, 235 F. Supp. 2d 923, 929–30 (N.D. Ind. 2002). Here, part of movant's

defense to Count 3 was to argue that he was a participant in Operation Venecia, which was not the same as Operation Escorpion, and that the accolades he received were related to his assistance in helping Roque return to Cuba, and not to anything he did in relation to the BTTR planes. In explaining (and conceding) his involvement in Operation Venecia, movant would have implicated himself in other counts of the Indictment. Movant had the right to testify in his own defense on Count 3 without relieving the Government of its burden to prove the remaining counts. *See United States v. Kinsella*, 530 F. Supp. 2d 356, 366–67 (D. Me. 2008) (when the same evidence would constitute a defense to one count but evidence of guilt as to another, prejudice exists); *see also United States v. Jordan*, 112 F.3d 14, 17 (1st Cir. 1997) (holding joinder inappropriate when defendant wished to testify to his own subjective beliefs on one count but not others, because his state of mind was a subject on which he was uniquely qualified to testify). Additionally, courts have held that when, as here, the evidence against a defendant is weak, severance is appropriate to facilitate his testimony on one count. *See, e.g.*, *United States v. Ragghianti*, 527 F.2d 586, 587–88 (9th Cir. 1975).

Against the burdens that the movant would face in a joint trial, a court considering a motion to sever would have had to weigh the interests of judicial economy. *See Byrd*, 428 F.2d at 1020. As a general matter, joint trials are preferred because they conserve judicial resources. And the Government argues that because this case was long and complex, the judicial economy concerns are significant. These arguments fail for three reasons. First, *the Government itself* requested a separate trial for Guerrero when his attorney fell ill, suggesting that the imperative for a single trial was not overwhelming, and that the Government saw no trouble in presenting its case twice. *See* DE/cr-513 (minutes of status conference recording Government's motion to sever Guerrero). Indeed, this Court granted that severance before reconsidering. *See* DE/cr-515

(granting oral motion for severance); DE/cr-623 (granting motion for reconsideration and reconsolidating defendants). It is simply disingenuous for the Government now to argue that the judicial economy concerns were so significant that they would have outweighed movant's need to present probative evidence regarding a murder charge. Second, as the *Zafiro* Court made clear, complex cases involving multiple defendants are prime candidates for severance, *see* 506 U.S. at 539, which means that under binding Supreme Court precedent, the mere fact that the trial was long and complex cannot justify a denial of severance. Finally, the record reveals that a substantial portion of the joint trial—including weeks of testimony on the location of the shootdown—was spent on Count 3. Attorneys for the other four defendants were paid large sums of taxpayer money to travel to Cuba for depositions, and to be present in the courtroom during the Count 3 litigation, even though they had no role in preparing the relevant arguments and even though their clients had nothing at stake in the proceedings. Judicial economy would have been better served by permitting these other attorneys and witnesses to forgo participation in the Count 3 trial, and to focus on the common charges in the joint trial. Because the judicial economy concerns actually weigh in favor of severance, there would have been no compelling reason to deny a Rule 14 motion in this case.

The Government offers several additional contentions relating to a Rule 14 motion. First, it argues that there was no prejudice because the Court gave instructions to the jury to hold the Government to its burden of proof, and to consider each charge and defendant individually. While such instructions may go some distance toward curing the risk of jury confusion, it is simply unrealistic to regard them as a panacea, especially in a case like this one, where the prosecution grouped all of the defendants together with the following characterization: "When all is said and done and when the smoke clears, you can look at all of these defendants for what they

truly are, they are spies, bent on the destruction of the United States of America. They are conspirators, three of them in espionage and Gerardo Hernandez has the blood of four people on his hands." DE/cr-1583:14535–36. The odds that the charge of espionage generally would taint the jury's perception of movant's defense to the charges in Count 3 were thus significant, and the lines between the counts were blurred throughout the trial. Additionally, jury confusion is only one kind of prejudice. This contention does nothing to address the fact that movant was unable to testify or to solicit the testimony of his codefendants.

The Government then argues that the evidence would be cross-admissible as between the two trials. U.S. Br. 18. This is wrong. The joint trial would have certainly occurred first, so testimony relating to Count 3 would not have been introduced at that trial. While some of the evidence relating to Count 3 might have gone to prove a more general involvement in espionage, a great deal of the evidence—including Basulto's prejudicial testimony, the long, laborious, and irrelevant discussion over the location of the shootdown, and the discussion of international norms relating to aerial incursions, all of which were harmful to movant—would not have been relevant at the joint trial. Similarly, evidence relating to the other defendants and to conspiracies to commit espionage generally would not have been relevant to movant's trial on Count 3.

In sum, there is a "reasonable probability," *Strickland*, 466 U.S. at 694, that a motion to sever, competently filed and argued, would have been granted. For these reasons, counsel was ineffective both for failing to consult movant about the virtues of severance, and for failing to file a motion to sever Count 3 from the remainder of the indictment.

2. Counsel Failed to Challenge the Scope of the Count 3 Conspiracy.

Counsel was ineffective for failing to challenge the indictment's references to events occurring after the shootdown as part of the Count 3 conspiracy. Specifically, overt acts 10, 11,

and 12 of Count 3 of the Indictment referred to praise and a promotion that movant received after the shootdown occurred. The Government contends that a motion to dismiss these portions of the indictment would have failed because the post-shootdown events involved the distribution of rewards, which has been held to be part of a conspiracy, and because the entire effort was part of a larger propaganda scheme. These arguments are wrong. The cases that the Government cites regarding distribution of rewards hold only that distribution of the proceeds of a conspiracy can constitute an act "in furtherance of" that conspiracy because the acquisition of those proceeds is one of the "central criminal objectives" of the conspiracy. *United States v. Knowles*, 66 F.3d 1146, 1156 (11th Cir. 1995) (emphasis removed) (citation and internal quotation marks omitted); *see also United States v. Helmich*, 704 F.2d 547, 549 (11th Cir. 1983) (holding that when "an agreement to receive financial remuneration" is "part of a conspiracy," then the receipt of payment constitutes an overt act in furtherance of that conspiracy). In *Knowles*, an attorney was indicted, and his conviction sustained, for distributing the proceeds of drug smuggling to one of the smugglers.

Here, in contrast with the cited cases, it was never alleged that movant agreed to provide information in exchange for remuneration or praise, such that the praise he received from the Cuban government could be fairly characterized as being "in furtherance of" the conspiracy. Instead, the indictment alleged that the actual "object of the [Count 3] conspiracy" was a confrontation with the BTTR aircraft. The plain language of the indictment likewise debunks the Government's argument that the Count 3 conspiracy was designed to further a larger propaganda campaign, so that any action to discredit Basulto or BTTR could be fairly regarded as being "in furtherance of" the conspiracy. The charged conspiracy was to commit murder, and a conviction for murder cannot be obtained by evidence of a desire to engage in propaganda.

The prejudice resulting from counsel's error is obvious. The post-shootdown statements constituted a substantial portion of the government's supposed proof of Hernandez's intent, which the prosecution emphasized at closing argument, stating repeatedly that "he who profits by crime commits it." DE/cr-1583:14521–22. The statements that give rise to this argument, allegedly made by the Directorate of Intelligence, were blatant hearsay, but were admitted without objection at trial only because under Federal Rule of Evidence 801(d)(2)(E), statements made by a coconspirator in furtherance of a conspiracy are not regarded as hearsay. A challenge to the scope of the conspiracy as set forth in the indictment would have enabled a challenge to this prejudicial evidence, which constituted a substantial portion of the Government's thin, circumstantial case against movant. *See Campa 3*, 529 F.3d at 1010–11 (citing the post-shootdown statements as sufficient evidence of guilt under the deferential appellate standard).

3. Counsel Failed to Build a Case Around Movant's Intent

In addition to his failure to sever Count 3 from the other charges, counsel failed to investigate and develop the case that his client did not have the requisite criminal intent. He did not call relevant fact witnesses, gather or introduce relevant evidence, or call relevant experts. As a result, the jury heard only one side of the story with regard to movant's intent: the Government's side. This failure was unreasonable, and undoubtedly resulted in prejudice.

a. Counsel Failed to Call Fact Witnesses on the Subject of Movant's Intent.

The Government claims that counsel's failure to consider securing the testimony of his client and various others to demonstrate movant's intent constitute strategic decisions. As illustrated above, to the extent that these choices were strategic, the strategy was born of ignorance of the proper focus of the defense, which had to be movant's intent.

With regard to calling movant himself, the law in this circuit is clear that to the extent that counsel made a "strategic decision" not to permit his client to testify in his own defense, U.S. Br. 25, that decision violated movant's "*fundamental* constitutional right to testify in his . . . behalf at trial." *Teague*, 953 F.2d at 1532. "Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment of abandonment of a *known* right or privilege." *Id.* at 1533 (citation and internal quotation marks omitted). A failure to engage in this sort of consultation abrogates a defendant's rights and calls out for relief. The Government argues, at length, that counsel consulted with movant with adequate frequency. U.S. Br. 29–32. But again, the concern is not with the *quantity* of consultation, but rather with the *substance* of the discussions. With regard to the crucial issue of whether movant should testify in his own defense, and, as discussed *supra*, whether a severance would facilitate that testimony, counsel did not consult with movant, and the law of this Circuit establishes that such a failure constitutes ineffective assistance.

The Government argues that counsel's decision not to call other witnesses from Cuba likewise constitutes a strategic decision, U.S. Br. 28, but this response misses the point of movant's argument, which is that counsel failed to seek out the witnesses that would have supported a viable defense. "[W]hen counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel." *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir. 1973) (holding that if a lack of preparation caused counsel not to identify an alibi witness, it would be ineffective assistance of counsel); *see also, e.g.*, *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (attorney's performance held deficient when

he failed to pursue crucial alibi witness); *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present character witnesses at sentencing); *Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985) (performance deficient when attorney did not investigate possible witnesses). In this case, it is clear that Gonzalez and Roque have unique insights into movant's activities in connection with Operations Venecia and Escorpion, and could illuminate his intent better than other witnesses. Whether counsel's failure to approach these witnesses was part of a strategy, adopted after proper investigation, or was simply a failure is a matter for this Court to resolve after a hearing. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

b. Counsel Failed to Introduce Evidence Regarding Movant's Intent.

Constitutionally effective counsel also would have introduced readily available evidence to rebut the Government's suggestion that Hernandez's post-shootdown statements and activities were consistent with his agreement to a plan an unlawful killing in international waters. *See* Claim #29. The Government had argued to the jury that Hernandez's subsequent acknowledgment of the shootdown as a success showed that he intended the plan to unfold as it did. The *Campa 3* court likewise characterized Hernandez's statements this way. *See* 529 F.3d at 1010–11. Effective counsel could easily have rebutted that claim by refocusing the jury on Hernandez's own intent (rather than, as the Government urged, on what had actually happened), or by introducing evidence regarding the official Cuban version of events, which Hernandez plainly accepted over the contrary views of others. In particular, counsel should have introduced the easily available press release issued by the Cuban government after the shootdown, making clear that Cuba took the position that the confrontation took place in Cuban airspace, and thus

that to the extent that Hernandez was describing the shootdown when he discussed the "success" of the operation (as opposed to Operation Venecia), he was describing what he believed to be a lawful act, and not a murder. *See* Motion, Appendix D, DE-12:4.

The Government does not dispute that competent counsel would have introduced such evidence. Its only defense of counsel's conduct is to claim that he "adduced ample proof [of] Cuba's postshootdown position" through the ICAO report and testimony from a Cuban military radar officer. U.S. Br. 63. But the ICAO report, produced months after the incident, did not show in any meaningful way what the Cuban government was telling the world (including Hernandez) in the *immediate aftermath* of the shooting, so as to provide an explanation for Hernandez's reaction in the immediate aftermath of the incident. Nor did the testimony of a single Cuban radar operator, in a deposition taken years after the fact. Even less convincing is the Government's reliance on the fact that expert Buckner testified that Cuban radar data showed that the confrontation took place in Cuban airspace. The question is not what Cuban data showed, but what Hernandez was told about the Cuban position in the days following the shooting that caused him to describe the operation as a success. Absent any proof that Hernandez was privy to the radar data or spoke with the radar operator, the alternative evidence counsel presented was insufficient to show that Hernandez believed that the shootdown was lawfully conducted in Cuban airspace. Furthermore, the fact that the evidence that counsel did not seek and introduce may, in hindsight, express themes similar to evidence that he did introduce does not matter. "Because counsel's behavior must be assessed as of the time he made the complained of decision, the cumulative nature of the [evidence] provides no basis for counsel's failure to" consider introducing it. *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995) (citation and internal quotation marks omitted).

c. Counsel Failed to Call Expert Witnesses Relating to Movant's Intent.

Counsel's defense was also inadequate because he did not solicit the aid of an expert in international law who could assist the jury in determining whether the shootdown constituted a lawful killing. Claims ##23, 30–31. A sovereign nation's actions in shooting down an aircraft entail different considerations than a homicide between private persons, and an international law expert could have put into perspective for the jury what the phrase "unlawful killing" means in the context of a case involving a sovereign nation. The Government makes two responses: first, that the proffered expert testimony echoes themes developed elsewhere at trial, and second that expert testimony on the law would have been inadmissible because it is the judge's province to decide what the law is. U.S. Br. 70–72.

The Government's first argument fails because expert witness testimony is of a different character than that of lay witnesses. The key question in this case was whether movant intended to agree to assist in an unlawful killing. An international law expert is uniquely well qualified to explain what the movant would have regarded as lawful or unlawful.

The Government's second argument fails because the Government agreed with this court that the question of what constitutes an "unlawful killing" is a question of fact for the jury. DE/cr-1579:13873 ("The killing is either lawful or unlawful and that is a determination that the jury is going to have to make based upon the totality of the facts."). Courts frequently hear international law experts to determine questions of fact that have some basis in international law. *See, e.g.*, *United States v. Marino-Garcia*, 679 F.2d 1373, 1378 n.3 (11th Cir. 1982) (international law expert testified that vessel in question was stateless). The point of expert testimony would be to illustrate for the jury the factors that would reasonably have permitted

movant to think that he was agreeing to assist in a lawful confrontation rather than an unlawful killing.

The Government also relies on *Harrington v. Richter*, 131 S. Ct. 770 (2011). U.S. Br. 72, 74. But that case is inapposite, as it involved § 2254(d), and thus raised the issue of the appropriate level of deference to a state court decision under AEDPA, which this case does not. *Id*. at 780-81, 786-87. *Harrington* is further distinguishable because while it might not have been deficient performance to decline to call an expert in that case given the other strengths of the prosecution's presentation, this case should have centered on the issue of the movant's intent, and that issue in turn hinged on the relationship between an intelligence agent and his supervisors, a subject on which expert testimony would be particularly useful.

In addition to this argument, the Motion sets forth a separate failure, which was counsel's decision not to call an expert on intelligence operations who could testify as to the compartmentalization of knowledge within intelligence organizations that would naturally have prevented movant from knowing what the Cuban military was planning to do. *See* Claim #17. The Government's only direct answer to Claim #17 is that in one sentence of his closing argument, counsel stated that the prosecution's case depended on movant's knowledge of what the MiGs would do. U.S. Br. 46–47. But that is no answer, because the essence of Claim #17 is that counsel failed to investigate the issue, not that counsel failed to allude to it in passing during his closing argument.

These errors are subsidiary to counsel's larger error of failing to understand the true nature of the case. Taken in context, and placed alongside counsel's other missteps, they represent a failure in advocacy of constitutionally significant proportions. Furthermore, because

movant's intent was a central issue in this case, there is a strong probability that the failure to present appropriate, authoritative evidence on that question prejudiced movant.

4. Counsel Failed to Effectively Address the Government's Evidence Relating to Intent.

In addition to failing to marshal an effective intent-based defense, counsel also failed to effectively respond to the Government's contrary evidence and arguments regarding Hernandez's intent.

a. Counsel Failed to Show That Movant's Post-Shootdown Promotion Was Unrelated to Unlawful Killing.

The Government attempts to show that counsel effectively demonstrated that Hernandez's "post-shootdown promotion was administratively ordinary" by pointing to a single exchange with an FBI translator in which the translator stated that June 6 is the anniversary of the establishment of the Cuban Ministry of Interior. U.S. Br. 40. But that fact was barely probative, much less sufficient to show that Hernandez was promoted "based on time of service," Claim #28, rather than, as the Government claimed, a reward for assisting in the murder of the BTTR victims. Had Hernandez been able to testify in his own defense, or had counsel called any expert familiar with operating procedures at the Cuban Directorate of Intelligence, or had counsel sought documents relating to standard promotion procedures, that evidence would have been able to establish the reason for Hernandez's promotion. At an evidentiary hearing on this Motion, movant will present his own testimony, as well as the relevant documentation supporting his contention that his promotion was completely unrelated to the shootdown.

b. Counsel Failed to Establish the Distinction Between Operations Venecia and Escorpion.

With respect to movant's argument that counsel failed to obtain documentary and other evidence from Cuba proving that Operation Venecia was a plan to return a Cuban agent to Cuba

to denounce the BTTR—and not, as the Government had asserted at trial, a plan to shoot down BTTR planes—the Government points to places in the record where counsel made the argument that Operation Venecia was different from Operation Escorpion. U.S. Br. 39. But the deficiency claimed is not that counsel failed to make such an assertion, but rather that counsel failed to secure documentary evidence to prove the assertion. Claim #59. To this day, the Government denies that counsel presented sufficient evidence to show that the operations were distinct. *See* U.S. Br. 39 (referring to the "arguable distinction" between the operations). An argument without persuasive evidence is little better than no argument at all.

5. Counsel Focused on Irrelevant, Often Harmful Arguments.

Counsel's failure to present the right defense was exacerbated by his unconvincing presentation of the wrong defense, wasting time and diverting the jury's attention from the critical issues in the case by pursuing unsupportable theories with non-credible evidence that often made it appear that Hernandez was attempting to blame the victims or apologize for the Cuban government. The Government's attempt to defend these choices falls flat.

a. Counsel Unreasonably Focused on the Location of the Shootdown.

Although the Government attempts to defend counsel's decision to spend the bulk of the trial trying to show that the shootdown occurred in Cuban territory, counsel himself readily—and correctly—acknowledged in his closing that the question was legally "irrelevant" because movant was charged only with conspiracy, and the location of the actual shootdown had no bearing on what movant agreed to do. DE/cr-1583:14459. In any event, the Government's defense is half-hearted at best, as it never argues—not once—that a defense based on the location of the shootdown would have been legally relevant to the Count 3 conspiracy charge. The closest the Government comes is to note that it mentioned the location of the shootdown in the

indictment, and then presented extensive evidence relating to the location during trial. U.S. Br. 52. Because counsel merely responded to the prosecution's case, the Government argues, he behaved properly. But this argument is disingenuous—the fact that the Government introduced an irrelevant issue into the trial does not justify counsel's decision to try the case on the Government's terms.

Additionally, the Government's claim that the location of the shootdown is an element of the underlying substantive offense misses the point, which is not that counsel should have said nothing about the location, but that he should not have pinned his client's freedom almost *exclusively* on the hopes that he could convince the jury that the BTTR planes were shot down in Cuban territory, to the exclusion of the far more viable defense that Hernandez never intended that result.

Finally, the Government's argument that the present Motion continues to equivocate with regard to the relevance of the location of the shootdown is specious. It was unequivocally error for counsel to focus on the location of the shootdown, and movant has never argued otherwise. However, it is telling that even in his pursuit of the flawed goal of proving that the shootdown happened in Cuba, counsel committed additional, serious errors in advocacy. These additional errors show that counsel not only misunderstood the case, but also litigated his adopted strategy ineffectively.

b. Counsel Erred by Casting Blame on the Victims.

Counsel's second major strategy—focusing on the bad behavior of BTTR rather than the lawful intent of Hernandez—was equally harmful. *See* Memorandum 28–29. The Government does not seriously dispute that effective counsel would not attempt to blame the victims of a murder for their fate. It instead makes two responses, neither convincing.

First, the Government attempts to recharacterize the argument as an attempt to relitigate the venue claim rejected by the Eleventh Circuit. U.S. Br. 57. But Hernandez does not claim that counsel was ineffective in blaming the victims in this particular case because of biased community sentiment. Blaming the victims would be ineffective in *any* community, not because of any expectation of jury bias, but because of a reasonable expectation of jury decency. Even if the venue motion had been granted, no effective counsel would have concluded that it was reasonable to malign the victims in a murder case like this, whether the trial were held in Miami or Memphis.

Second, the Government argues that counsel sought to blame only Basulto and not the actual BTTR members who lost their lives. U.S. Br. 57. This is an inaccurate description of the record. To be sure, counsel was much more critical of Basulto than the others. Nonetheless, the focus of the defense was not simply to malign the BTTR leader, but to claim that all of the BTTR members that day had brought their deaths on themselves by intentionally and flagrantly violating Cuban airspace. *See, e.g.*, DE/cr-1476:1619 ("There has been a myth perpetrated about Brothers to the Rescue that all they do is fly around looking for rafters. These were missions of provocation, slapping the Cuban Government's face.").

c. Counsel's Presentation Contained Numerous Other Distractions.

Counsel's misguided defense also resulted in other harmful distractions and embarrassments, including time wasted analyzing a cockpit video for evidence of a MIG warning pass, counsel's detour based on a misreading of a ship's logbook, and an endless argument regarding whether the BTTR planes could be characterized as civil or military.

The Government again attempts to defend these diversions, but its defense misses the larger point. No defense was to be found in the fact that Cuban planes gave a warning pass to

Basulto, before proceeding to shoot down other BTTR pilots. And counsel's feeble attempt to refute the government's evidence regarding the location of the shootdown—including by relying on an obvious misunderstanding of Captain Johansen's logbook, which the Government was able to show in rebuttal was a "total unmitigated falsehood," DE/cr-1583:14524[8]—could serve no purpose other than to distract the jury from the question of Hernandez's intent.

C. Even if Counsel's Defense Was Potentially Viable, He Pursued It Ineffectively.

1. Counsel Failed to Establish the Relevant Legal Rules.

One of counsel's critical failures in presenting the defense he did elect to pursue was that he did not translate his legal theories—even those accepted by the Court—into instructions and arguments for the jury. Specifically, counsel failed to divorce the question of the "lawfulness" of the shootdown from the location of the shootdown. *See* Claims ##1, 45. In the debate over jury instructions, this Court held a discussion regarding whether the killing would be "unlawful" under the federal murder statute if the shootdown was an act of Cuban self-defense. *See* DE/cr-1579:13866–74. The crux of the dispute was whether, if Cuba perceived a legitimate threat from the BTTR flights, it could lawfully shoot the aircraft down. *See* DE/cr-1579:13865 (counsel argues that shootdowns in response to threats are the right of sovereign nations); DE/cr-1579:13863–65 (the Government argues that a shootdown in Cuban airspace would nevertheless be unlawful because it would not be justifiable). Another important issue was whether the unlawfulness of the killing was an element of the offense, or whether lawfulness was an affirmative defense to a murder charge. *See* DE/cr-1579:13871 (William Norris argues that

[8] The Government complains that the Motion "does not specify what the alleged misreading was," U.S. Br. 59, but that is untrue, *see* Motion 35 n.21. As the Government itself explained in some detail in its rebuttal during closing arguments, *see* DE/cr-1583:14523–25, counsel had accused the first officer of the Majesty of the Seas of lying about the location of his ship during the shootdown, only to have the Government show in rebuttal that counsel was relying on the wrong entry in the logbook.

unlawfulness is an element of the offense); DE/cr-1579:13866–69 (the Government argues, and this Court rejects the argument, that the only time a killing can be lawful is when it is an accident or self-defense). During the discussion, the Court appeared to agree wholeheartedly with movant, stating that:

> [T]he substance of the crime is the unlawful killing. The killing is either lawful or unlawful and that is a determination that the jury is going to have to make based upon the totality of the facts as presented by the government and the totality of facts as presented by the defendants, whether this conspiracy to kill, if in fact there was a conspiracy and whether or not it was a conspiracy to unlawfully kill.

DE/cr-1579:13873.

However, when it came time to rule, the Court resolved the issue by adopting the pattern instruction for conspiracy, followed by the instruction for the federal murder statute. DE/cr-1579:13877. At this point, counsel did not request, and the Court did not give, any particular instruction to establish that if Cuba perceived a legitimate threat from BTTR, then the shootdown would not be "unlawful." Nor did counsel request, or the Court give, any instruction as to which side bore the burden of proof in establishing whether the shootdown was unlawful. Instead, the legality of the shootdown was subsumed into a different question: whether the shootdown occurred in international waters. In his affidavit, counsel concedes that he erred by not pursuing a clarifying instruction more diligently. McKenna Aff. ¶ 6.

Counsel's failure to clarify the legal rules governing the case was a serious error. He argued successfully that the Government had to demonstrate that the killing was unlawful, and that the legality of the killing could be determined, in part, by reference to Cuba's sovereign rights. He failed, however, to obtain the necessary instructions for the jury, and was thus left to defend the proposition that the shootdown was lawful because it actually occurred in Cuban airspace. No reasonable attorney would have restricted his defense in this manner. In essence,

counsel's errors allowed the Government to bypass an element of its burden of proof. *Cf. Krzeminski v. Perini*, 614 F.2d 121, 124-25 (6th Cir. 1980) (holding that it was a "constitutional violation" for a court to instruct a jury to presume that a killing was "unlawful" absent proof of an affirmative defense).

To the extent that counsel put into issue the lawfulness of Cuba's plan, he did so by crafting an instruction based on ICAO norms relating to the distinction between civil and state aircraft. This instruction also failed to clarify that the Government had the burden to prove that the killing was unlawful. Furthermore, as explained in the Motion, reliance on ICAO norms virtually assured defeat on this issue. Claims ##32, 33.

2. Counsel Did Not Diligently Pursue Exculpatory Satellite Evidence.

Movant's expert Buckner advised counsel that he should have obtained satellite imagery regarding the location of the shootdown, yet counsel failed to conduct this investigation. Claims ##4, 7. This evidence still has not been produced. The Government's response to this argument, U.S. Br. 51, 59 n.38, is to note that it is inconsistent with movant's current claim that a focus on the location was inappropriate, and that there is no guarantee that the satellite imagery would have supported movant's position. Both of these arguments fail.

First, as noted above, movant is permitted to argue in the alternative. While a defense based on the location of the shootdown is, as counsel conceded, legally "irrelevant," counsel should have presented that defense to the best of his ability. Any such presentation would have sought the most authoritative evidence available on the location of the shootdown: satellite imagery.

Second, the fact that satellite imagery might not vindicate movant's position can only be determined in this case after an evidentiary hearing, as the Government has still not produced

that imagery, and even the Government's response to the present Motion does not take a position on the contents of that imagery. While acknowledging that this fact should not have been the basis of his defense, movant continues to contend that the shootdown occurred over Cuban airspace. The satellite imagery would resolve that question, and the Government should be required to produce it if it is exculpatory, or to state, definitively in a hearing, that it is not.

II. Government Payments to Journalists Covering Movant's Trial Violated Movant's Right to Due Process.

In his opening Memorandum, movant contended that he was denied due process because the government funded an anti-Cuba propaganda campaign in the Miami area: the government paid at least seven Miami-area journalists hundreds of thousands of dollars to endorse an anti-Cuba and anti-Castro message on Radio and TV Martí, which then carried over into these journalists' purportedly "independent" reporting on movant's trial, on the shootdown, and on the government's Cuba policy in general. The government's conduct—funding a propaganda campaign in the venue of the trial—constitutes an unprecedented violation of a criminal defendant's right to a fair trial, and calls out for a remedy.

The Government makes, in essence, three responses to movant's claim. It first challenges the factual basis for movant's claim by arguing that payments to journalists for their appearances on Radio and TV Martí did not influence those same journalists' articles in other publications. U.S. Br. 94–95. Second, the Government contends that there was no prejudice from any improper news coverage because movant cited only eight articles in his opening Memorandum, and because this Court took steps to insulate the jury from outside influences. *See* U.S. Br. 95–97. Finally, the Government argues that these issues were resolved in *Campa 2*, 459 F.3d 1121 (11th Cir. 2006) (en banc). *See* U.S. Br. 98–99. These arguments fail.

Before considering the Government's contentions individually, it should be noted that the Government's response to movant's due process argument utterly misses the point, because the Government does not address—at all—the fact that the United States Federal Government was directly complicit in creating the publicity at issue. That fact alone places this case beyond the precedents cited by the Government, and also distinguishes the issues considered in *Campa 2*. Movant's allegation is not only that negative press might have improperly prejudiced the jury—although that almost certainly was the case. Movant's allegation is also that the Executive Branch of the United States Federal Government prosecuted movant and his co-defendants while simultaneously paying a small fortune to journalists who saturated the local media with stories designed to prejudice the defendants. The prosecution never disclosed this fact, even as it opposed movant's request for a change of venue. The appearance of impropriety is overwhelming, and taints the verdict in the eyes of the world.

Indeed, the global outcry against the government's propaganda campaign and its effect on the verdict has been remarkable. In 2005, the United Nations Working Group on Arbitrary Detention adopted an opinion that the United States had failed to guarantee the defendants a fair trial as required by Article 14 of the International Covenant on Civil and Political Rights. *See* U.N. Working Group on Arbitrary Detention, Opinion No. 19/2005, U.N. Doc. E/CN.4/2006/7/Add.1, at 61 (adopted May 26, 2005). To movant's knowledge, the United Nations has never before condemned a U.S. trial on these grounds. Numerous domestic and international human rights organizations, including Amnesty International, have likewise expressed concerns regarding the conviction and conditions surrounding the trial. *See, e.g.*, Amnesty Int'l, *USA: Amnesty International seeks review of case of the "Cuban Five,"* AMR 51/096/2010 (Oct. 13, 2010), *available at*

http://www.amnesty.org/en/library/asset/AMR51/096/2010/en/675bdaf0-ff18-46ce-bfee-694211b2e43b/amr510962010en.html (specifically referencing this Motion's claims relating to journalists); *see also* Amnesty Int'l, The Case of the Cuban Five, AMR 51/093/2010 (2010), *available at* http://www.amnesty.org/en/library/asset/AMR51/093/2010/en/9911673a-a171-49db-b757-581f2fbdfe11/amr510932010en.pdf. In addition to these established advocates, grassroots organizations have sprung up to advocate specifically for movant and his co-defendants. *See also* Nat'l Comm. to Free the Cuban Five, http://www.freethefive.org (last visited Aug. 15, 2011); Int'l Comm. for the Freedom of the Cuban Five, http://www.thecuban5.org (last visited Aug. 15, 2011). And when movant filed a petition for certiorari in the Supreme Court, twelve amicus briefs were filed in support of his petition—an unprecedented number for a petition seeking review of a criminal conviction. Organizations as diverse as the National Association of Criminal Defense lawyers, a group of Cuban-American scholars, a coalition of Nobel laureates, the National Jury Project, and the Senate of United Mexican States, joined by several European national parliaments and parliamentary committees, urged the Supreme Court to reverse the Eleventh Circuit's decision. *See* United States Supreme Court Docket No. 08-987 (listing amici). Even former United States President Jimmy Carter has stated his belief that "the detention of the Cuban Five makes no sense," and that "there have been doubts [about the trial] expressed in U.S. courts and by human rights organizations around the world. They have now been in prison 12 years and I hope that in the near future they will be freed to return to their homes." *See* Jimmy Carter's Havana Press Conference: Transcript, Apr. 1, 2011, http://www.freethefive.org/updates/CubanMedia/CMCarterPressConf33011.htm (last visited Aug. 15, 2011). The weight of global opinion presses heavily against the Government's assertion that the trial was free from prejudice.

Against this backdrop, the Government argues first that the stories printed about movant and the trial had nothing to do with the government's propaganda campaign. U.S. Br. 94–95. The Government must say this, as domestic propaganda efforts are illegal under the Smith-Mundt Act. *See* 22 U.S.C. § 1461. But the Government's assertion strains credulity. During the months leading up to movant's trial, as well as during the trial itself, the Office of Cuba Broadcasting paid Miami-area journalists hundreds of thousands of dollars through Radio and TV Martí, on which the journalists appeared to deliver anti-Castro messages. Those very same journalists then published inflammatory and inculpatory stories in which they asserted that movant was guilty of the crimes for which he was being tried, and linked him to a much broader pro-Castro and anti-American agenda; the journalists also published fervent anti-Cuba and anti-Castro propaganda, all in supposedly independent media sources. The Government attempts to dismiss these stories as essentially a coincidence, expecting this Court to believe that any link between the previously undisclosed payments and the stories is the product of "pure conjecture," U.S. Br. 95—that is, that the government paid the journalists solely to espouse anti-Cuba and anti-Castro views on Radio and TV Martí, with no expectation that they would echo the same views in their own stories in other media.

The Government's protests blink reality. As noted in movant's Memorandum, on September 8, 2006, the Miami Herald published a front page story under the headline "10 Miami Journalists Take U.S. Pay." *See* Memorandum 58. The story documented that, pursuant to FOIA requests, the Miami Herald had discovered that ten of the "most popular" journalists in South Florida had been receiving thousands of dollars in U.S. government pay while simultaneously reporting on issues involving Radio or TV Martí for their news organizations. Two of the

journalists, Pablo Alfonso and Wilfredo Cancio Isla, were discharged for the conflict of interest.[9] Although the journalists subsequently were reinstated, an independent review determined that "the [government payment] story . . . was factually accurate and raised a serious and legitimate issue. Journalists taking payment for appearing on government-run broadcast outlets put themselves in an inherently compromised position, because the credibility of independent news media depends on the public's trust that we are free from outside influences, especially government influence." Joe Strupp, *Hoyt's Report on Flawed "Miami Herald" Coverage*, Editor & Publisher (Nov. 17, 2006). It is clear that under prevailing professional norms, payments for appearances on Radio and TV Martí gave rise to a strong impression that those journalists' coverage of Cuba issues was tainted.

Indeed, the Government's protests that movant's allegations lack a "factual basis" for the link between the payments and the inflammatory stories border on the outrageous given the government's repeated efforts to delay and outright obstruct FOIA requests seeking precisely the information that the Government now complains is lacking in movant's Memorandum—for example, the contracts between the journalists and the Office of Cuba Broadcasting. Notably, although movant's opening Memorandum devotes several pages to a description of the "arduous,

[9] Alfonso received $58,600 in payments during the trial alone, and a total of $252,325 in payments between November 1, 1999 and February 5, 2009. Alfonso published twenty-two pieces, *see* App. C, including those cited in movant's Memorandum, and another on October 21, 1998, in which he quoted the ex-director of Radio Martí as stating that "according to his reports, the FBI had been able to examine 'dozens of documents and diskettes and it is surprised at the breadth of Castro's espionage network as well as the aggressiveness of its plans.'" Pablo Alfonso, *Cortina de Humo Sobre Espionaje*, El Nuevo Herald, Oct. 21, 1998 (headline translated: "Smokescreen About Espionage"). Cancio received $4725 during the trial, and $21,800 from September 30, 2000 to November 20, 2006. In addition to the pieces cited in movant's opening Memorandum, Cancio published a speculative, inflammatory piece on June 4, 2001, alleging that Cuba used hallucinogens to train its spies. Wilfredo Cancio Isla, *Cuba uso alucinogenos al adiestrar a sus espías*, El Nuevo Herald, June 4, 2001 (headline translated: "Cuba uses hallucinogens to train its spies").

unproductive and unending" FOIA effort undertaken by the National Committee to Free the Cuban Five ("the Committee"), *see* Memorandum 70-73, Ex. H1–H13, the Government makes no effort to either dispute or explain the difficulties that the Committee has encountered. That effort continues to shed light on the scope of the ties between journalists covering the trial and the government. An affidavit from Mara Verheyden-Hilliard, enclosed with this Reply as Appendix B, substantiates the difficulties that activists, the media, and attorneys have encountered in obtaining transparency on this issue. *See* Verheyden-Hilliard Aff. ¶¶ 4–8. An evidentiary hearing would shed further light on the truth.

Next, the Government contends that the media's environment was not pervasively negative because movant's original Memorandum highlighted only three journalists and eight stories. But the cited pieces represent but a sampling of the work of journalists paid by the government before and during the trial. In addition to the cited pieces, movant has other pieces, including an article by paid journalist Julio Estorino, published on May 14, 1999, and headlined (translated from Spanish) "Malice Aforethought," which contained statements (translated) that:

> It is clear from the prosecution's arguments that the brutal attack was not a heated response to a provocation, but a coldly calculated aggression; a crime in every sense, aggravated and perfidious.
>
> This ought to make us think a bit about our own conduct and the ease with which we often allow for the weeds to grow among us, all of us victims of the same victimizer.

Julio Estorino, *Premeditación y alevosía*, Diario Las Americas, May 14, 1999, at A-4. On January 5, 2001, Estorino wrote a column headlined (translated) "Espionage and Indifference," in which he stated (translated) that:

> The trial that is ongoing in Miami against a number of Cubans accused of being spies for Castro's regime is serving, if for nothing else, at least, to prove, at least, the good sense and seriousness of the exiles who have been proclaiming forever their conviction that Fidel Castro is capable of everything evil, false and

> unscrupulous, above all if it can be directed against the United States or against the most distinguished people and organizations among the exiles.
>
> . . .
>
> For if the insanity shown in the downing of the airplanes from Brothers to the Rescue over international waters, with cold, malicious calculation, were not enough, now it comes to light that Castro's secret services have been trying to find infiltration points for weapons and explosives on the coastlines of this country, a task that was assigned to some of those implicated in this spy network . . .

Julio Estorino, *Espionaje e indiferencia*, Diario Las Americas, Jan. 5, 2001, at A-4.

These articles represent only a small sampling of materials written before and during the trial. Movant is prepared to present additional examples at a hearing. As an initial showing, Appendix C to this Reply sets forth fifty-four relevant articles by seven paid journalists, all of which can be translated and presented to this Court. And contrary to the Government's claim that these articles were "obscure," U.S. Br. 98, the vast majority were published in El Nuevo Herald, a publication with a daily readership of approximately 200,000, *see* About El Nuevo Herald, http://www.miamiherald.com/about-el-nuevo/ (last visited Aug. 15, 2011), and in Diario Las Américas, which has a daily circulation of over 45,000, *see* Echo Media, http://www.echo-media.com/mediaDetail.php?ID=6075 (last visited Aug. 15, 2011). These are among the most heavily circulated Spanish-language papers in the nation, and in a locale like Miami with such a large Hispanic population, they constitute major sources of public information.

The Government next attempts to downplay the significance of movant's allegations by arguing that the stories cited by movant could not have had any effect on the jury because they were published either too far in advance of the trial or too late to influence the jury, which "was being admonished by the court regularly not to read any media accounts about the trial." U.S. Br. 96. But this argument cannot be reconciled with the argument that the Government itself made while seeking the enforcement of a gag order for witnesses involved in the trial: in its motion

regarding the gag order, the Government argued to the trial court that although the jury had "been strictly instructed not to read press accounts of the case, and there is no reason to believe that they have disregarded that instruction," comments to the media by witnesses would "pose[] risks *to the process* that none of the parties should have to endure." *See* Memorandum 70 (emphasis added) (quoting United States' Motion to Enforce Court's Directive Concerning Witness Comments to News Media, DE/cr-818). That is precisely movant's point—that beyond the issue of whether the movant can actually demonstrate jury bias resulting from the Government's payments to journalists, the payments corrupted the trial process itself. For the same reason, the fact that the trial was ongoing when many of the articles were published does not mitigate the risk of prejudice. True, the Court admonished the jury not to heed outside input, but given the pervasiveness of the negative press, and the diligence with which the media pursued members of the jury themselves, it simply was impossible to guarantee that outcome.

The Government's remaining contentions—that movant is not entitled to relief because he cannot show any impact on his trial from the government's media campaign generally, and that movant's allegations are merely a variation on his community prejudice arguments—fail for the same reasons. In his opening Memorandum, movant explained that his conviction should be reversed for several independent reasons: (1) the government's sponsorship of the anti-Cuba media campaign "negate[d] the fundamental conception of trial" enshrined in the Due Process Clause, *see* Memorandum 69 (quoting *Estes v. Texas*, 381 U.S. 532, 564 (1965)); (2) the government's campaign "created a constitutionally intolerable probability" of influencing movant's trial, *see* Memorandum 70 (quoting *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262 (2009)); (3) the deprivation of due process "unquestionably qualifies as 'structural error'" because it results from government misconduct "with consequences that are necessarily

unquantifiable and indeterminate," *see* Memorandum 72 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)); and (4) reversal is required here because of the extraordinary circumstances of this case, *see* Memorandum 72-73. The Government makes no real effort to dispute any of this. Instead, it argues only that there is "nothing in the record to support a claim of any impact on [movant's] trial." U.S. Br. 96.

This argument fails. As the Court is well aware, jurors were harassed by the media during the trial, a fact that forced the Court to take corrective action to protect the jurors and their objectivity. Clearly, the intense media attention surrounding the trial was cause for concern. Furthermore, as movant's Memorandum made clear, a conclusive showing of prejudice is not required as long as the circumstances "pos[e] such a risk of actual bias or prejudgment that the [Government] practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 129 S. Ct. at 2255 (citation and internal quotation marks omitted). The Government tries to downplay the significance of this language, insisting that the cases movant cites do not "dispense[] with an actual nexus of impact on the criminal justice process." U.S. Br. 97. But this assertion is belied by *Caperton*, in which the Supreme Court specifically reiterated that it was neither questioning the lower court Justice's "subjective findings of impartiality and propriety" nor "determin[ing] whether there was actual bias." 129 S. Ct. at 2263. Rather, as the Court explained, "[d]ue process requires an objective inquiry" into the *risk* of bias or prejudgment. *Id.* at 2264. All objective indicators indicate that such a risk was overwhelming here. The government's ties to the journalists who assaulted movant's innocence in print cast doubt on the objectivity of the trial process, and call the verdict into question.

Finally, the Government points to *Campa 2* to argue that this issue has already been decided. U.S. Br. 97–98. But the Government overreads *Campa 2*. First, the Eleventh Circuit

reviewed this Court's decision under a deferential "abuse of discretion" standard. *See Campa*, 459 F.3d at 1144. But at the time of trial and appeal, neither this Court nor the Eleventh Circuit knew that government-paid journalists had produced the propaganda alleged to have affected the trial, so on the crucial point of this Motion, there is no decision or reasoning to which the court could defer. Furthermore, in its discussion of the news articles, the Eleventh Circuit held that "pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged" was not sufficient to create a presumption of prejudice. *Id.* However, the articles that movant has cited to this Court, and most particularly those by Alfonso, Estorino, and Remos, unambiguously *do* relate "directly to [movant's] guilt for the crime charged." The Eleventh Circuit also noted that the "volume, saturation, and invidiousness of news coverage" was not sufficient to presume prejudice. *Id.* at 1145. But as the FOIA process has proceeded, and as additional news stories have been uncovered, it has become clear that journalists published dozens of inflammatory pieces about movant, while being paid by the government, during the proceedings. Clearly, *Campa 2* did not contemplate the sort of media campaign alleged in the present Motion and Memorandum.

For these reasons, movant is entitled to a hearing on his due process claim.

III. Movant Is Entitled to an Evidentiary Hearing.

Movant easily meets the Eleventh Circuit's admonition that an evidentiary hearing is appropriate as long as he can allege facts that, if true, would entitle him to relief. *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002). And Section 2255 is explicit that a court must grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." The Government's response hinges on the idea that all of movant's claims are "conclusory." As established above, that is not the case. Furthermore, as

noted at the beginning of this Reply, the Count 3 conviction was extraordinarily tenuous, and it is not difficult to establish prejudice when, as here, the Government's case hangs by a thread.

Thus, with regard to ineffective assistance of counsel, movant would be entitled to relief if this Court determines that counsel failed to properly understand, investigate, and present a proper defense. Similarly, movant would be entitled to relief if this Court concluded that counsel improperly failed to advise him regarding the benefits of severance, or failed to move for severance of Count 3. Even if this Court determines that counsel's defense had potential to be adequate, movant would nevertheless be entitled to relief if counsel's cumulative failures to present appropriate evidence and secure proper jury instructions rendered his adopted strategy ineffective. And movant would deserve relief as well if counsel failed to present a cogent case in mitigation at sentencing. As the Motion, Memorandum, and this Reply have demonstrated, all of these are fruitful grounds for relief that merit, at a minimum, a hearing.

With regard to movant's due process claim, the Government's response glosses over the crux of movant's argument, which is that the Government-funded journalists published numerous columns adverse to Hernandez. This is not a garden-variety case in which the jury might have been affected by comments in the media. Rather, the media activity in this case suggests a pattern of Government interference with the judicial mechanism. Movant has alleged that the Government paid journalists who produced materials that were deeply prejudicial to his case. A hearing is warranted to determine the scope of those materials and the prosecution's level of awareness of their existence, even as it sought to deny movant a change of venue and thus capitalize on the pseudo-journalism that poisoned the atmosphere around the trial.

Movant is also entitled to a hearing on his other claims for relief, advanced in the Motion and Memorandum but not discussed in this Reply. Specifically he is entitled to determine what

exculpatory high-frequency messages and other evidence the Government had in its possession but did not disclose to the defense. This Court should also scrutinize the record of prosecutorial misconduct to determine whether the prosecution's cumulative errors warrant a new trial.

CONCLUSION

An evidentiary hearing on movant's Motion to Vacate, Set Aside, or Correct Judgment and Sentence under 28 U.S.C. § 2255 should be scheduled, and the Motion should be granted.

Respectfully Submitted,

/s/ Thomas C. Goldstein .

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
Criminal Case No. 98-721-Cr-LENARD

GERARDO HERNANDEZ,

Movant,

AFFIDAVIT OF PAUL A. MCKENNA

v.

UNITED STATES,

Respondent.

_____/

I, Paul A. McKenna, declare under penalty of perjury as follows:

1. I represented the above-named movant in his criminal trial and I make this affidavit in support of his motion to vacate, set aside or correct judgment and sentence under 28 U.S.C. § 2255, filed on June 14, 2010.

2. I was appointed by the Court to represent Hernandez in his criminal trial.Hernandez's trial was more complicated than any other case I have ever tried, involving unusual facts, novel questions of law, and very high profile proceedings.

3. I bore sole responsibility for conducting movant's defense to the charges in Count 3 of the second superseding indictment. Although I occasionally solicited and received input from co-counsel, from expert witnesses, and from my client, I was responsible for devising and executing the defense strategy to Count 3.

4. I never considered the possibility of filing a motion on Hernandez's behalf to sever Count 3 from the remaining allegations against him. At the time, I believed that Hernandez's co-defendants would probably wish to sever their trials from his to avoid being associated with the murder charge, but I did not consider the benefit that might accrue to Hernandez from severing his Count 3 trial from the broader joint trial, or of severing Count 3 from the other allegations against him. Additionally, I believed, based on discussions that Hernandez and I had in the context of preparing for a joint trial, thatHernandez and his co-defendants did not wish to testify. Therefore, I never discussed with him the possibility of severance as a means to procure his testimony or the testimony of his co-defendants.

5. I believed during the trial that if I could show that the shootdown had occurred in Cuban airspace, my client would have a viable defense to the Count 3 conspiracy charge.For this reason, the primary focus of my defense—on which I spent the most time, and the most energy, and presented the most evidence—was that the shootdown had occurred in Cuba, and that it was a justifiable act by the Cuban government. I now believe that my decision to pursue this line of argument—which was impossible to prove as a factual matter, and of questionable relevance as a legal matter—resulted in my client's conviction, as our presentation undermined our credibility and focused the jury on the actions of the Government of Cuba.

6. I believed during the trial that the Court was going to issue an instruction stating that the Government was required to prove that my client had intended for the shooting to occur over international waters, a burden of proof that the Government acknowledged was "insurmountable" in its writ of prohibition to the Eleventh Circuit. Reviewing the trial proceedings, I realize that this instruction was not issued. Instead, the Court issued the pattern instruction for murder, next to a pattern instruction for conspiracy. I should have pursued a clearer instruction more diligently.

7. I believe that the Government's case against my client was exceptionally weak, and that my errors at before and during the trial allowed the Government to convict my client even though it had no direct evidence of criminal intent on his part.

Further Affiant Sayeth Naught.

Paul A. McKenna

Sworn to and subscribed before me,
this 15th day of August, 2011.

Notary Public, State of Florida
Commissioned Name of Notary Public: Rosaminda Perez
Personally Known Y or Produced Identification ____
Type of Identification Produced:

ROSAMINDA PEREZ
MY COMMISSION # DD 987008
EXPIRES: April 29, 2014
Bonded Thru Notary Public Underwriters

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
Criminal Case No. 98-721-Cr-LENARD

GERARDO HERNANDEZ,

Movant,

AFFIDAVIT OF MARA VERHEYDEN-HILLIARD

v.

UNITED STATES,

Respondent.

_____/

I, Mara Verheyden-Hilliard, declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am Executive Director of the Partnership for Civil Justice Fund (the "PCJF"), headquartered at 617 Florida Ave., NW, Washington, D.C., 20001. I make this affidavit in support of Gerardo Hernandez's motion to vacate, set aside or correct judgment and sentence under 28 U.S.C. § 2255, filed on June 14, 2010.

2. The PCJF is a public interest legal organization dedicated to the defense of human and civil rights secured by law, the protection of free speech and dissent, and the elimination of prejudice and discrimination. The PCJF has extensive experience litigating civil rights issues in the federal courts, with an emphasis on the intersection between First and Fourth Amendment issues. The PCJF also pursues issues of government transparency, often by filing requests under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

3. On September 8, 2006, the Miami Herald published an article headlined "10 Journalists Take U.S. Pay." This article, which relied on FOIA requests for information, revealed for the first time that numerous journalists who had reported on Cuban issues, including on the trial of movant and his co-defendants (together, the "Cuban Five"), had received significant payments from the U.S. Government, specifically from the Office of Cuba Broadcasting, a propaganda agency that pursues U.S. foreign policy toward Cuba. This revelation sparked a broader investigation of the role that propaganda efforts play in shaping domestic public opinion about issues relating to Cuba, and specifically about the influence of paid journalism on the outcome of the trial of the Cuban Five.

4. On January 23, 2009, the National Committee to Free the Cuban Five (the "Committee") submitted a FOIA request to the Broadcasting Board of Governors (the "Board"), an arm of the State Department that houses the Office of Cuba Broadcasting. The request sought production of records "in the possession of the Broadcasting Board of Governors and Office of Cuba Broadcasting, regarding all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by U.S. media communications entities in television, newspaper, radio and Internet, from the Office of Cuba Broadcasting and the Broadcasting Board of Governors," as well as "any and all records, including correspondence and contracts regarding the purpose of those grants, payments and/or transfers from the [Board] and [Office of Cuba Broadcasting] to those individuals, organizations and vendors."

5. In response to initial communication from the Board, in order to facilitate processing, the Committee provided to the Board initial prioritized lists of reporters for whom it was seeking information. The Board responded with a summary chart listing payments to a subset of journalists, and demanded more than $30,000 in fees for a more complete disclosure. The Committee followed up by providing the Board with a list of contracts for disclosure, listed by name, number, and date, and reiterating its grounds for a fee waiver. The Committee offered to pay for the production of the contracts relating to the journalists it had named, while reserving its right to protest the fees later. However, over the months that followed, the Board refused to provide any further disclosure, despite repeated requests from the Committee, and despite the Board's acknowledgement that some if not all of the requested materials were easily accessible to the Board.

6. On September 9, 2009—after six months of efforts and administrative appeals, during which the Board offered a range of excuses and justifications for non-disclosure, but no additional contracts despite the Committee's willingness to pay for the production of the contracts—the PCJF filed a lawsuit on behalf of the Committee, seeking injunctive relief in the form of a response to the FOIA request.

7. On October 20, 2010, *Liberation* Newspaper submitted separate FOIA requests with the Board and the State Department seeking the production of the contracts of journalists who were paid by the U.S. government. The Board responded by releasing at least some of the contracts and records relating to its extensive payments to journalists based in Miami. *Liberation* has analyzed the disclosed materials and begun publishing articles about its findings. *Liberation* has established a website devoted to its investigation into the U.S. Government's funding of the Miami media at Reporters for Hire http://www.ReportersforHire.org. The disclosed materials have also been made available for public search and review on the website.

8. The State Department, which was requested by *Liberation* Newspaper to disclose the responsive documents in its possession for the period covering January 1998 to December 2002, has not done so. The State Department is understood to possess or have control over the responsive information that was previously in the possession of the U.S. Information Agency, the predecessor agency to the Broadcasting Board of Governors and the Office of Cuba Broadcasting. The U.S. Information Agency was integrated into the Department of State. We have filed an appeal on behalf of *Liberation* Newspaper regarding the failure of the State Department to produce responsive information.

9. The difficulties faced by the Committee, by *Liberation*, and by the PCJF in the FOIA process have demonstrated the Government's strong reluctance to disclose its financial arrangements with Miami-area journalists. It is perhaps telling that when the Committee, an organization expressly dedicated to public exposure of the injustice suffered by the Cuban Five sought the documents in question, it was met with dilatory tactics and resistance from the Board. The State Department has not provided contract documents with Miami journalists, which are believed to be in its control, which cover the period of the Cuban Five's arrest through trial. For instance, contracts obtained in the *Liberation* FOIA request show that one of the journalists, Julio Estorino, was employed by the Government from 2002 to 2003. However, Estorino's own CV states that he was employed by the Government as of 1998. The difficulties encountered thus far raise concerns that there are more payments, and perhaps more journalists, whose existence the Government has not yet disclosed, and so the investigation remains ongoing.

10. The Office of Cuba Broadcasting and the Broadcasting Board of Governors, and their predecessor agency, the U.S. Information Agency, which was integrated into the Department of State, are responsible for the operation of Radio Martí and TV Martí, by which the U.S. Government broadcasts into Cuba and into Florida.

11. The U.S. Information Agency, the Board, and the State Department were and are barred by law from propagandizing the U.S. public under the Smith-Mundt Act, 22 U.S.C. § 1461. To what extent the government was and is engaged in covert propaganda operations that would illegally influence U.S. domestic public opinion on Cuba and the Cuban Five is a critical issue.

12. The U.S. Government appears to have paid journalists in Miami who also published reports that were inflammatory and prejudicial towards Cuba and the Cuban Five tried in Miami. Those journalists, who presented themselves as independent reporters, did not disclose that they were paid by the U.S. Government despite publishing and airing stories in the Miami media during the prosecution and trial that were supportive of the U.S. Government's prosecution of the Cuban Five and which contained hostile and false information about the Cuban Five. Disclosure of these contracts may evidence serious government malfeasance in intentionally and covertly funding the "independent" U.S. media to propagandize and influence domestic public opinion including the jury pool and sitting jury during the high-profile government prosecution and resulting conviction of the Cuban Five. However, the Government has to date refused to provide complete disclosure of these documents.

Mara Verheyden-Hilliard

Washington District of Columbia
Subscribed and sworn to before me, in my presence,
this 16th day of August, 2011
by Mara Verheyden-Hilliard
Notary Public
My commission expires 9/14/14

LEONARD A. SMITH, JR.
Notary Public, District of Columbia
My Comm. Expires Sept 14, 2014

APPENDIX C

APPENDIX C: Overview of Relevant Paid Propaganda Journalists

Based on the information obtained in FOIA requests, the following journalists were paid by the Government to engage in propaganda, and also covered the trial or closely related subjects.

1. Pablo Alfonso received a total of $252,325 from November 1, 1999 to August 22, 2007, including at least $58,600 during the time of the trial of the Cuban Five. He may have received payment prior to November 1, 1999, but that information has not yet been disclosed. He published twenty-two articles relevant to the subject matter of the trial. The citations are:

    a. *No Aparecen Pruebas Contra Hermanos al Rescate*, El Nuevo Herald, Mar. 9, 1996
    b. *Abre Pesquia: La OEA Sobre Derribo de Aviones*, El Nuevo Herald, Mar. 9, 1996
    c. *U.S. Lawmaker to Present Cuba's Rights Record*, Miami Herald, Apr. 10, 1996
    d. *¿Dió Raúl Castro la Orden?*, El Nuevo Herald, May 10, 1996
    e. *U.S. Turns Over Tapes of Brothers Drowning. Raul Castro May Have Spoken to Jet Pilots*, Miami Herald, May 10, 1996
    f. *Inteligencia de EU no Sabe Si Raúl Castro Habla*, El Nuevo Herald, May 10, 1996
    g. *Preocupa Supuesta Proximidad a EU de Cazas Cubanos Perseguidores de Avioneta*, El Nuevo Herald, July 3, 1996
    h. *Cae Red de Espionaje de Cuba, Arrestan a 10 en Miami*, El Nuevo Herald, Sept. 15, 1998
    i. *Posible Alianza con Terrorismo*, El Nuevo Herald, Sept. 16, 1998
    j. *Espías: Un Viejo Consejo de Krushchev*, El Nuevo Herald, Sept. 20, 1998
    k. *Fundación apoya pedido de Helms sobre espías*, El Nuevo Herals, Oct. 1, 1998
    l. *Cuba en cimero puesto en la ONU*, El Nuevo Herald, Oct. 17, 1998
    m. *Frente*, El Nuevo Herald, Oct. 21, 1998
    n. *Cortina de humo sobre espionaje*, El Nuevo Herald, Oct. 21, 1998
    o. *Analizarán infiltración de espías entre anticastristas*, El Nuevo Herald, Oct. 27, 1998
    p. *Sentencia de Juez Genera Conflicto entre Cuba y EU*, El Nuevo Herald, Feb. 14, 1999
    q. *Hermanos al Rescate volará al punto del derribo*, El Nuevo Herald, Feb. 23, 1999
    r. *Todo está listo en Seattle para recibir a Fidel Castro*, El Nuevo Herald, Nov. 24, 1999
    s. *Castro, la incognita de la reunion de Seattle*, El Nuevo Herald, Nov. 28, 1999
    t. *Castro rehúsa venir por temor a ser arrestado*, El Nuevo Herald, Nov. 30, 1999
    u. *Díaz-Balart pide a Alemania arrestar a Castro*, El Nuevo Herald, July 20, 2000
    v. *Llevarán El Caso De Hermanos Al Gobierno De Bush*, El Nuevo Herald, Jan. 14, 2001

2. Wilfredo Cancio Isla received a total of at least $21,800 from September 30, 2000 to November 20, 2006, including $4725 during the trial. He published at least five relevant articles during the period of documented payment. The citations are:

    a. *La fiscalía teme que Cuba controle el juicio a espías 'Cuba prepara una version arreglada de los hechos', dijo*, El Nuevo Herald, Apr. 19, 2001

b. *Llaman Patriota a Acusado de Espía*, El Nuevo Herald, May 31, 2001
c. *Califican a los Espías de 'Protectores' de EU*, El Nuevo Herald, June 1, 2001
d. *Cuba usó alucinógenos al adiestrar a sus espías*, El Nuevo Herald, June 4, 2001
e. *Los Presuntos Espías Esperan por el Veredicto*, El Nuevo Herald, June 5, 2001

3. Julio Armando Estorino received $15,050 from October 16, 2002 to December 1, 2003. His CV (which is undated, but was obtained in a FOIA request), states that he has worked for T.V. Martí, and the "U.S. Government," from March 1998 to the present. It also states that he worked for Radio Martí from March 1998 until August 2001. Further documentation of payments he received during his employment is being pursued. He published at least five relevant articles. The citations are:

   a. *Los espías de La Habana y las intenciones de Washington*, Diario las Américas, Sept. 18, 1998
   b. *Washington, La Habana . . . y Miami*, Diario las Américas, Oct. 2, 1998
   c. *Premeditación y alevosía*, Diario las Américas, May 14, 1999
   d. *Espionaje e indiferencia*, Diario las Américas, Jan. 5, 2001
   e. *Espías y malaslenguas*, Diario las Américas, Feb. 2, 2001

4. Helen Ferre was the editor of the editorial page at Diario las Américas. She received at least $6025 from September 30, 2000 to November 20, 2006, including $1125 during the trial. She wrote or edited at least four relevant articles. The citations are:

   a. *La Trascendencia de la Captura de los Espías de Castro en la Florida*, Diario las Américas, Sept. 16, 1998
   b. *Crimen sin castigo*, Diario las Américas, Feb. 10, 2001
   c. *La Tiranía Totalitaria de Castro Sí Es Una Amenaza Para Los Estados Unidos de América*, Diario las Américas, Feb. 16, 2001
   d. *El Rayo*, Diario las Américas, May 15, 2001

5. Alberto Muller received at least $39,871 from October 1, 2004 until April 15, 2010. Documentation relating to prior payments is being pursued. During the trial, he published at least two particularly incendiary articles.

   a. *Fidel Castro asesino, instigador y terrorista*, Diario las Américas, Nov. 21, 2000
   b. *Asesinos*, Diario las Américas, Feb. 20, 2001

6. Ariel Remos received at least $24,350 from September 30, 2000 until November 20, 2006, including at least $11,750 during the trial. She published at least fifteen relevant articles both before and during the period of documented payment. The citations are:

   a. *Ataca a la seguridad nacional la descubierta red de espionaje cubana*, Diario las Américas, Sept. 16, 1998
   b. *Espías y agentes de influence castrista*, Diario las Américas, Sept. 20, 1998
   c. *Respalda la Fundación el pedido de "enérgica respuesta" hecho por el senador Jesse Helms*, Diario las Américas,Oct. 2, 1998

d. *¡Arresten a Castro!*, Diario las Américas, Oct. 21, 1998
e. *Demandan arresto de Castro*, Diario las Américas, Oct. 22, 1998
f. *Insiste Basulto en que la Administración pudo evitar el derribo de las avionetas*, Diario las Américas, Oct. 24, 1998
g. *Volará Hermanos al Rescato a "Punto Mártires" durante la Cumbre*, Diario las Américas, Nov. 12, 1999
h. *Castro podría ser arrestado y enjuiciado en Estados Unidos*, Diario las Américas, Nov. 18, 1999
i. *Llevarán a Bush el caso de Hermanos al Rescate*, Diario las Américas, Jan. 11, 2001
j. *Castro representa un reto continuo a la seguridad de EE.UU.*, Diario las Américas, Jan. 16, 2001
k. *Castro planeó el asesinato en EE.UU de Jesús Cruza Flor*, Diario las Américas, Jan. 19, 2001
l. *Piden al president Bush que enjuice a Castro*, Diario las Américas, Feb. 8, 2001
m. *$93 millones para familiars de Hermanos al Rescate*, Diario las Américas, Feb. 14, 2001
n. *Recibe Jeb Bush y llevará al Presidente carta pidiendo enjuiciamiento a Fidel Castro*, Diario las Américas, Feb. 27, 2001
o. *Jeane Kirkpatrick pide a Aschcroft encausar por terrorismo internacional a funcionarios cubanos*, Diario las Américas, Feb. 27, 2001

7. Enrique Encinosa is a long-time news commentator on Radio Mambí WAQI, which covered the Cuban Five extensively from the time of their arrest. He received at least $10,410, including $5200 during trial. Research thus far has revealed one relevant item. The citation is:

   a. Olance Nogueras, *Expertos Creen Que Cuba Vendía Información de Espías*, El Nuevo Herald, Sept. 21, 1998 (article in which Encinosa is interviewed, and states the possibility that Cuban spies are spying on the United States so that they can then sell the information to parties in Africa and the Middle East).

   In addition, Encinosa has been cited and quoted as advocating terrorism against the Castro regime on at least four occasions. The citations are:

   b. *Alpha 66 Celebra Cumpleaños con Nuevo Campamento*, El Nuevo Herald, Nov. 20, 1996 (article about Encinosa, who was the keynote speaker at Alpha 66's inauguration of a new military training camp)
   c. Kathy Glasgow, *Overthrow on the Radio*, Miami New Times, Feb. 13, 1997 (article about Miami radio discussing a broadcast in which Encinosa expressly advocates the overthrow of the Castro regime)
   d. 638 Ways to Kill Castro (documentary film) (Encinosa is interviewed, and advocates the bombing of hotels in Havana as a means to pressure the Castro regime)
   e. Abdala, http://www.terrorfileonline.org/es/index.php/Abdala (articles about the terrorist organization Abdala, naming Encinosa as a leader)