UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NOS. 01-17176-BB, 03-11087-BB

UNITED STATES OF AMERICA,

Appellee/Plaintiff,

v.

LUIS MEDINA,

Appellant/Defendant.
______________________________________/

PRELIMINARY STATEMENT

The government's answer brief "restructured" appellants' arguments in a way which presents a general recitation of facts as a narrative that is not tied to the elements of proof for the charged counts. This is effective storytelling, but may not aid legal analysis. Count II involves conspiracy to commit espionage with no related substantive charge. This count presents elements of proof rarely encountered criminal cases, and the elements are therefore not familiar. In his reply brief, Appellant Ramon Labañino[1] returns to the structure with which he initially presented his appeal. He

[1] Appellant was indicted as "John Doe No. 2," and used the name "Luis Medina, III," but his true name is Ramon Labñino. See Initial Brief at 3. He is referred to in this reply by his true name.

addresses, first, the sufficiency of the evidence to sustain specifically his conviction on Count 2 and, second, errors committed by the sentencing court in imposing a life sentence on this count.

REPLY ARGUMENT

I. THE EVIDENCE RELIED UPON BY THE GOVERNMENT IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR CONSPIRACY TO COMMIT ESPIONAGE AND COMPLETELY FAILS TO ESTABLISH THE "CLOSELY HELD" OR "GUARDED" PRONG OF THE COURT'S INSTRUCTION TO THE JURY.

At trial, the government devoted weeks of testimony to proving matters that were not contested, indeed conceded by the appellants in opening statement. The government's brief repeats this emphasis on matters not in issue.

Ramon Labañino Salazar conceded that he acted on behalf of his homeland and that his actions included the gathering of intelligence. While the government devoted considerable effort to proving both of these facts, the true issue at trial was the purpose and intent with which Labañino and the others sought to gather intelligence on behalf of Cuba.[2]

---

[2] Nor does the government discussion of political or quasi-political activities discussed or engaged in by one or more of the defendants add to proof that the object of the intelligence gathering was other than publicly-accessible information. See Gov't Br. at 20, 22.

The government, in essence, contends that Ramon Labañino came to the United States to "spy" and to commit "espionage." See, e.g., Gov't Br. at 2, 13, 32, 36, 40, 50, 61, 78. However, neither the term "spy" nor "espionage" is used in the statute under which Labañino was indicted. The statute of indictment, 18 U.S.C. §794, applies only to the gathering and transmission of national defense information.

What the term "national defense information" means, and whether obtaining such information was the object and purpose of Labañino's efforts was the issue at trial. It is this issue as to which he challenges the sufficiency of the government's evidence to sustain his conviction. The trial court defined this term carefully for the jury:

> The term "national defense," is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.
> To prove that information relates to the national defense, there are two things that the government must prove.
> First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States, and second, it must prove that the material is **closely held by the United States Government**.
> Where information has been made public by the United States Government and is found in sources lawfully available to the general public, it does not relate to the national defense.
> Similarly, where sources of information are lawfully available to the public and the United States Government has made no **effort to guard** such information, the information itself does not relate to the national defense.

R125:14595 (emphasis added).

There are two principal flaws in the government's arguments about the sufficiency of evidence as to Count 2. The first flaw is that the conviction is based on an appeal by the government to what could be described as paranoia about Cuban intentions–attitudes characteristic of a Miami-Dade venue, but unsupported by the record which exhaustively establishes that the appellants actually spent years gathering and collecting open source intelligence.[3] The second flaw is that the government's proof fails to meet the legal instruction regarding the demands of the statute. The court instructed the jury, consistent with well-established precedent, that "national defense information" must be not only non-public but also must be guarded by the government.

A. The appellants' purpose and intent:

The government admitted in opening statement to the jury: "One thing you will not see, ladies and gentlemen, is any classified document that these defendants were able to gather and pass through to the government of

[3] The government's intelligence expert, Lieutenant General James R. Clapper, Jr., USAF (ret), former Director of the Defense Intelligence Agency and something of an unreconstructed Cold War warrior, certainly fanned this paranoia. He said of appellants: "[T]his operation had all of the classic earmarks of a communist type human intelligence operation. . . . I am very familiar with the pattern and the organization and the philosophy, the doctrine and approach that communist intelligence organizations undertake." (R114:13101-02).

Cuba." (R29:1588). The government had acquired a complete record of all communications between the appellants and their homeland for many years, comprising some 20,000 pages of seized documents. The prosecution proceeded on the premise that the defendants intended to accomplish, at some unknown time in the future, objects and purposes which they had never accomplished or attempted to accomplish in the past, i.e., to gather and transmit classified national defense information.

The government's theory in this prosecution is intellectually suspect. They argue that the defendants, who were operating for years in the United States undetected, were not really doing what they intended to do. Put another way, the government asserts that despite many years of uninterrupted gathering and transmission of openly acquired information, the defendants really planned to do something entirely different, that is gather classified or closely-held and guarded national defense information.

Three people were sentenced to life in prison for espionage in this case. Taking the evidence in the light most favorable to the government, it was established that Antonio Guerrero worked as a civilian at the Key West Naval Air Station and reported on aircraft movement, based on information he gathered from visual observation and public newspapers. Ram n Laba ino had performed the same task at MacDill Air Force Base in Tampa,

Florida before moving to Miami to supervise Guerrero. Labañino took over the tasks of Gerardo Hernandez, who had previously supervised Guerrero. In addition, Labañino supervised Santos, who was tasked with investigating and reporting on matters of public information regarding the United States Southern Command and the neighborhood in which this Command was located. Clearly, a joint and common purpose bound these men together.

What is interesting about this case is that the terms and conditions of the agreement which bound these defendants together is not subject to speculation or inference. It is express. It was written in the documents seized by the government.

The document identified as DG-141 identified Guerrero's "Missions:"

> 2. Missions:
> He [appellant Guerrero] is clear on what is principal mission is: to detect indications present in the NAS, that indicated preparation and/or implementation of an action against Cuba, which he should report on urgently, among them, changes in the o.s.[operational situation], increases in complement and resources, reinforcements in security measures, etc.
> Does not have possibilities of detecting the plans and implementation of visits and activities of the main military leaders which may influence the decision-making of an act of aggression, **except those that might be published, or that he would be able to see** without knowing what they are in response to.

DEX51 at 10 (emphasis added).

This express directive to Guerrero instructed him to complete his tasks "according to the possibilities for **visual observation and public sources** " (Id. at 20). He was further instructed to "take advantage of **open public activities**, anytime that it is justified, and **without violating any security measures**" (Id. at 24).

Guerrero was specifically tasked to report "on the comings and goings of aircraft and military units." (R48:4289). This was to be accomplished on an open base, where the commander not only invited the public, but facilitated public viewing of all military air traffic from a deck that was constructed for the very purpose of such public viewing. (R74:7915). These visual sources of military information were obviously not closely-held. They were public, unguarded sources of visual information that allowed Guerrero watch aircraft take off and land, i.e., his mission. That he reported such open-source information to Cuba is plainly not violative of § 794.

Joseph Santos testified for the government after himself entering a guilty plea to charges that did not include a § 794 conspiracy. The government in its answer brief claims that as a part of the instant group of agents, Santos was instructed to obtain "secret" information, Gov't Br. at 20, but this claim is disingenuous. It was a claim made by the government at

trial, but debunked by cross examination of Santos (R43:3536-44).[4] The use of the term "secret" simply referred to the person doing the reporting, not to the nature or the quality of the information, nor to the status of that information as "national defense information" as defined by the court in its instruction to the jury. All of the material called "secret" was obtained through visual observation by Santos of things in public view. The government's claim that there might have been "secret" material reported simply misleads this court.

Despite the great volume of documents seized by the government, the prosecution was unable to find a single instruction to Santos to gather non-public and guarded information. On cross examination, Santos was specifically asked if he had ever been directed to obtain classified information, and he said that he had not. In fact, he was given detailed instructions about what he was supposed to do; he did what he was told to do and he did not improvise. (R44:3538-39). What Santos and his wife did was work and socialize in the Cuban exile community in Miami, and this is what they were tasked to write reports about. (R44:3552-53). The

---

[4] U.S. Major General (Ret.) Edward Atkeson, an expert on intelligence and counterintelligence), also explained, and the government concedes, Gov't Br. at 10 n.8, that intelligence activity seeking "penetration" of targets did not imply seeking "top secret" material. (R96:11100).

government can parse words in its answer brief, but cannot erase that clear denial of the core requirement of criminal conduct or criminal intent by its own key witness, Mr. Santos.

The question of true purpose is central to this appeal. What the defendants actually did is not a violation of the espionage law. The government's convoluted theory is that, for some reason, the defendants did not do what they intended to do, but that in the future they might seek to accomplish such actions. Cf. United States v. Soblen, 301 F.2d 236, 239 (2d Cir.1962) (where issue was whether defendant sought open-source intelligence or closely-held, protected information, conviction upheld because information seized from defendant was "classified as secret"). Here, the government's intelligence expert, Lt. Gen. Clapper, admitted that not only was there no classified information, but also there was no national defense information in the stacks of seized documents he reviewed on behalf of the government. (R114:13101).

Appeals challenging the sufficiency of circumstantial evidence cannot be determined by mere selective references to the record, but rather only upon consideration of the totality of the record. The reviewing court determines the sufficiency of the evidence by"[v]iewing the record as a whole." United States v. Miller, 730 F.2d 699, 674 (11th Cir.1984); see also

United States v. McCarrick, 294 F.3d 1286, 1292 (11th Cir. 2002) ("To find for the government, the factfinder would have to ignore all of the undisputed evidence in the case ... ."). And particularly where activities are "susceptible of either an illegal or legal interpretation," such evidence "cannot be used to establish a conspiracy." United States v. Fernandez, 892 F.2d 976, 986 (11th Cir. 1990) (alleged conspirators'meetings and discussions "useful in advancing the primary [non-criminal] object" of the participants will not be presumed to be for the purpose of achieving an "unlawful object"); accord United States v. Villegas, 911 F.2d 623, 630 (11th Cir. 1990) (considering totality of the evidence, "presumption of innocence remains constant, irrespective of the heinous nature of condemned activity, ... notwithstanding the presence of mere suspicion and speculation").

B. The evidence fails to meet the requirements set by the jury instructions in the court below.

In United States v. Heine, 151 F.2d 813 (2d Cir.1940), the court reversed an espionage conviction based on the defendant's having obtained military information drawn from public sources. The Heine court explained that if access is allowed by the government – even though such access was not consciously intended for access by foreign agents – the material at issue, though valuable, is open-source information, not protected, and not covered by the statute.

> There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information ... procured by a magazine through interviews with officers.

Id. at 816.

This principle retains its vitality. In United States v. Squillacote, 221 F.3d 542, 576 (4th Cir.2000), the Court held: "Where sources of information are publicly available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense."

The trial court in the instant case gave an instruction to the jury that incorporated this principle. (R125:14595). To establish a violation of the law, the government must establish beyond a reasonable doubt not only that the information gathered and transmitted by the defendant is not publicly available, but that the government has made an effort to guard such information. Id. Nowhere in its answer brief does the government even mention an effort by the government to guard the information that it alleges these defendants were after.

The government does not mention any such efforts because they cannot. Since they cannot meet the standard required by the law, the government appears to have proceeded with an argument that ignores the "guarded" prong of the offense. Nor did the government object to the

district court's instruction in this regard; and certainly the government has not preserved any opposition to the law as instructed by the court below. In this regard, the government in much of its brief attempts to substitute "non-public" information in place of "national defense information." See Gov't Br. at 14, 30, 32, 33, 36. Nowhere is this more tellingly demonstrated that when the government's brief misstates the law pertaining to the government's burden: "The government was required to prove only that appellants agreed to transmit to Cuba non-public information related to the national defense ... ." Gov't Br. at 32 (emphasis added). The clear requirement that the information be "guarded" – not merely generally unavailable to the public without effort – is an element of the law critically missing in the government's case.

The stability of this requirement, from Heine to Squillacote to this case, demonstrates the fundamental nature of the government's failure of proof here. See United States v. Morison, 844 F.2d 1057, 1076 (4th Cir.1988) (recognizing limitations in the term "national defense").

This failure of proof is fatal. "Although a jury has wide latitude to determine factual issues and to draw reasonable inferences from circumstantial evidence, this power is not without limits." McCarrick, 294

F.3d at 1293. The evidence in this case is not sufficient to sustain the jury's verdict and the convictions on Count II should be vacated.

II. THE SENTENCING COURT ERRED IN ITS APPLICATION OF THE SENTENCING GUIDELINES TO THE FACTS OF THIS CASE.

Several points raised in the government's answer brief merit reply.

A. No top secret information was gathered or transmitted.

The government urges ratification of the base offense level of 42 for the Count 2 conviction because the verdict implies that there was an "attempt" or a "conspiracy" to try to obtain top secret information. However, there was no finding that "top secret information was gathered or transmitted," which is what the guidelines require for this base offense level to apply. U.S.S.G. § 2M3.1.

The government says that "The clear intent of the guideline is to distinguish between cases involving 'top secret' materials ... and those not involving top secret materials" and argues that "the patently-obvious intent of the guideline [is] to punish more seriously those offenders who seek to obtain top secret material." Gov't Br. at 80. This not only ignores the plain language of the guidelines, it attempts to rewrite them. If the sentencing Commission had wanted the difference between base offense level 42 and 37 to hinge on intent, or on the object of the offense conduct, rather than on the conduct itself, it could have done so in a variety of ways. It could have

written, for example, "42, if top secret information was involved; 37, otherwise." It could have followed the fraud guidelines, where loss is specifically defined as the "greater of the actual or intended loss." U.S.S.G. §2B1.1, Application Note 2(a) (emphasis added). It did not do so. Rather, the guidelines clearly state that a base offense level of 42 is to be applied if top secret material was actually gathered or transmitted, and a base offense level of 37 is to be applied in all other cases. §2M3.1. This five-level difference subtantially prejudiced the defendant and compels resentencing.

The government's attempt to rewrite the guideline would upset a balance carefully crafted by Congress in classified information cases. A balance has been struck in the Classified Information Procedures Act, 18 U.S.C. App. 3, between the government's need to protect classified information and the defendant's right to confront the evidence against him. If the reading of the guideline urged by the government were correct, then the government could simply dispense with charging completed crimes. Instead, they would simply charge conspiracy. This would allow the government to escape the burden of complying with CIPA and deny the defendant the protections of the Act, but allow the imposition of the same sentence without the balancing of competing interests achieved by Congress.

Also, proof of the gathering and transmission of actual top secret information, as opposed to the nebulous, uncertain information to be determined at some unknown date in the future, is essential for reasoned exercise of the sentencing power. Top secret information is such information, the disclosure of which "reasonable could be expected to cause exceptionally grave damage to national security." U.S.S.G. § 2M3.1, comment. (n.1). **No information met that test in this case**. Guerrero's "mental floorplan" of Building A1125, which his attorney also obtained under the Freedom of Information Act, was not such information. Nor did civil-use frequencies on the radio in the "Greenhouse" (so named because of its interior's openness to view from anyone outside the building), which were left on radios parked in public view in public parking lots, constitute such national defense information. The guarded evidence standard was not met by the government.

Nor did the defendant have a full opportunity to offer evidence to prove this position. In this case, the application of specific sentencing guidelines to specific conduct which has not yet even been described by the government, let alone actually having occurred, gives additional reason for Labañino's request at sentencing for disclosure by the President's designee to evaluate the significance of any harm done to the national security here.

As applied by the government in this case, the espionage statute shows a potential for political abuse. The guidelines contain a counterweight to this potential abuse – a professional national security assessment of the harm posed to the national defense – but access to the counterweight was denied to the defendant.

The government should not be granted the unrestrained power it asks for in this case. Having failed to meet the clear evidentiary and legal burden imposed by U.S.S.G. § 2M3.1 to prove gathering of top secret information, the government cannot maintain application of the guideline enhancement in this case. Hence, the sentence should be vacated and the matter remanded for resentencing without the enhancement.

B. The sentencing court erred in failing to apply the three-level reduction of §2X1.1.

The government claims that "Appendix A of the Guidelines Manual specifically refers all violations of §794 to §2M3.1," Gov't Br. at 83, which is true. But that does not resolve the issue raised by Ramon Labañino in his initial brief. The guidelines specifically provide:

> Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense.

U.S.S.G. § 1B1.2(a) (emphasis added). Given this express guideline language, it was error for the sentencing court to fail to apply the mandatory language of U.S.S.G. § 2X1.1, which required a three-level reduction in the base offense level for the underlying substantive offense where the conspiracy did not result in completed acts of transmission of national defense information.

The issue here concerns the vitality, and – equally importantly – the question of whether to extend the reasoning and application, of United States v. Thomas, 8 F.3d 1552 (11th Cir. 1993). Thomas adopted United States v. Skowronski, 968 F.2d 242, 250 (2d Cir. 1992), without separate analysis. Any expansive interpretation of Skowronski has been explicitly rejected by the Second Circuit in favor of a straightforward interpretation of the guideline language of the individual guideline at issue in a given case. The Second Circuit clearly sides with the position asserted by the defendants here. Specifically, in United States v. Amato, 46 F.3d 1255 (2d Cir. 1995), the court explained:

> It is true that Skowronski also noted that the Hobbs Act included conspiracy in its explicit terms, as well as the substantive offenses it covers, and inferred an intent of Congress to have such conspiracies sentenced similarly to the substantive violations. Skowronski, 968 F.2d at 249-50. Nonetheless, we view the court's discussion of Congressional intent as supportive reasoning, rather than basic justification, for treating Hobbs Acts conspiracies under § 2B3.1, rather than

> § 2X1.1. After all, the **determinative passage in § 2X1.1(c)(1) makes this turn** not on the content of the criminal statute in question, but rather **on whether the Guidelines assign the particular class of conspiracy to a section other than the general conspiracy section**.

Id. at 1261 (emphasis added).

This Court must independently determine the application of § 2X1.1 in relation to § 2M3.1, but the analysis in Amato is compelling and clearly correct. The government's argument for ignoring § 2X1.1 is meritless and the Court should either reverse the failure to apply § 2X1.1 or vacate the sentence for further application in light of the correct understanding of the law.

The government's alternative argument – of nearly-completed espionage–an argument not accepted by the district court at sentencing–is also without merit. No such obtaining of top secret material was just around the corner. To the extent the record or findings by the district court remain unclear, the correct resolution would be to vacate the sentence and remand for resentencing. See, e.g., United States v. Dodds, No. 03-10578, 2003 WL 22290325, *7 (11th Cir. Oct. 7, 2003)(Where the evidentiary issue raised on appeal by the government was unresolved in the district court, the court of appeals was "not prepared, in the first instance, to determine [defendant's] appropriate sentence after resolving the definitional question above. Thus,

we remand for the district court to conduct a new sentencing hearing to consider evidence and argument of counsel to determine whether sufficient evidence exists to support" enhanced base offense level.").

C. The merits of the obstruction enhancement:

The government urges affirmance of the sentence enhancement imposed for obstruction of justice because Ramon Labañino, who used the name Luis Medina as part of his service to his country, persisted in that self-identification after his arrest and upon his initial appearance. Were this a typical case, some of the harms contemplated by U.S.S.G. § 3C1.1 might apply, but it is not a typical case. The government, after all, knew that Luis Medina was a cover name because they chose to indict Laba ino as John Doe No. 2. Far more serious is the fact, as disclosed by the government in their answer brief, that Laba ino was the subject of ex parte and in camera proceedings, including applications for searches authorized by the United States Foreign Intelligence Court pursuant to FISA, 50 U.S.C. §1801.

To suggest that Ramon Labañino obstructed justice in any way by responding to his cover name after he had been haled into court, in this context, is meritless. Even the government's own witness, Joseph Santos, was overwhelmed by the experience. He commented: "Well, I did hear that language but I did not understand truthfully what was going on. In fact

many of us did not really understand what was going on"(R42:3402). To hold Ramon Labañino to a higher standard is simply a punishment for his exercise of his right to a jury trial. The enhancement for conduct not materially obstructive of justice should be vacated.

CONCLUSION

Wherefore, Ramon Labañino requests that his conviction on Count 2 be reversed as unsupported by substantial evidence and as unsupported by any evidence that he conspired to gather and transmit national defense information that was both non-public and guarded by the United States. In the alternative, Labañino requests that his sentence to life in prison be reversed and this case be remanded for resentencing in accordance with correct application of the Sentencing Guidelines.

Respectfully submitted,

____
WILLIAM M. NORRIS
Attorney for Ramon Labañino

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing reply brief contains words, in compliance with the limits of Fed.R.App.P. 32.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed, postage prepaid, this 17th day of November, 2003 to Caroline Heck Miller, Assistant United States Attorney, 99 N.E. 4th Street, Miami, FL 33132, and to all counsel of record.

____

William M. Norris