NO. 01-17176-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

GERARDO HERNANDEZ, *et al.*,
Defendants/appellants.

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

APPELLANTS' JOINT SUPPLEMENTAL REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Gerardo Hernandez, *et al.*
Case No. 01-17176-BB

Counsel for the appellants certify that no new interested persons have been added to the certificates of interested persons previously filed with the briefs.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTORY AND OTHER AUTHORITY:

REPLY ARGUMENT

I. *En Banc* Consideration of Defense Motions Raising Venue Prejudice–Including New Trial Motions–Did Not, Either Explicitly or Implicitly, Resolve Appellate Claims of Prosecutorial Misconduct in Relation to Closely-Contested Counts of Conviction.

Faced with indisputable and unjustifiable misconduct under controlling circuit caselaw (caselaw the government cannot in any way distinguish and, thus, does not address in its brief), and the non-overwhelming, closely-contested nature of the evidence of guilt on the most serious counts (which, under the caselaw and the appropriate *de novo* standard of review of prosecutorial misconduct, would mandate reversal), the government advances a novel reading of the doctrine of law of the case, seeking an escape route from a factual and legal quagmire in which it finds itself after successfully obtaining *en banc* review of the venue issues. Gov't-Supp-Br:3-18.

The government's attempt, after the fact, to broaden the scope of the *en banc* venue decision, *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (*Campa II*)–erroneously construing it as setting forth new circuit precedent on prosecutorial misconduct *unrelated* to venue; treating as surplusage the express *en banc* order remanding the prosecutorial misconduct claims to the panel, *id*. at 1126 n. 1; and ignoring that the *en banc* references to specific instances of

misconduct was in the context of limited misconduct allegations in new trial motions raising venue issues–cannot be squared with the record. The government also misconstrues the *en banc* decision by claiming its presumptive prejudice holding *necessarily* resolves prosecutorial misconduct claims.

A. The "alleged incidents of misconduct" noted in *Campa II* relate to instances cited in new trial motions renewing venue claims, and the context of the *en banc* analysis shows that the "potential prejudice" at issue was venue-related prejudice.

The *en banc* Court's affirmance of the denial of new trial motions by *four* of the defendants, 459 F.3d at 1140 (citing August 2001 motions by Campa, Gonzalez, Guerrero, and Medina), did not resolve prosecutorial misconduct claims briefed on appeal, including those briefed by defendant Hernandez, whose post-verdict motion, R11:1301, raised prosecutorial misconduct, but–unlike the other four motions–did not include venue arguments, and whose motion and misconduct claims were *not* addressed *en banc*.[1] Contrary to the government, the *en banc* Court's statement that "[*t*]*hese alleged incidents* of misconduct are so minor that they could not possibly have affected the outcome," 459 F.3d at 1153 (emphasis added), refers–both logically and expressly–to instances of misconduct alleged in the new trial motions addressed *en banc*. The government's speculation that the

[1] The government acknowledges it is "less clear" whether all of Hernandez's misconduct claims were addressed *en banc*. Gov't-Supp-Br:13 n. 10.

en banc new trial ruling also related to three improper prosecutorial arguments noted separately in the *en banc* opinion's trial background section, *id*. at 1139, is unsupported by the decision and inconsistent with review principles applicable to motions for new trial.

Contrary to the government, both the context of the relevant section of the *en banc* decision and the *en banc* Court's specific, footnoted citations to the record, identifying the four new trial motions and the transcript pages of sustained objections, establish that the Court's express reference to "[t]hese alleged incidents of misconduct" did not include either the matters addressed separately in the *en banc* opinion's trial background section or arguments briefed on appeal as *independent* claims of prosecutorial misconduct, i.e., claims that were remanded to the panel. *See id*. at 1140, 1153 nn. 270 & 282 (citing R12:1338, 1342, 1343, 1347, new trial motions by Campa, Guerrero, Gonzalez, and Medina; and citing R124:14482, 14483, 14493, transcript pages reflecting corresponding rebuttal arguments to which *Campa* objected and the district court sustained objections).[2]

Because a district court cannot abuse its discretion in denying a motion for new trial by failing to address allegations *not* included in the motion, *see*, *e.g.*, *United States v. Wright*, 363 F.3d 237, 248 (3d Cir. 2004), the *en banc* Court

[2] In quoting the *en banc* opinion, the government omits the footnoted references to specific new trial motions. Gov't-Supp-Br:6.

should not be presumed to have addressed misconduct claims that were never raised in the referenced motions. *See also Carlisle v. United States*, 517 U.S. 416, 431-32, 116 S.Ct. 1460, 1469 (1996) ("'a judge has no power to order a new trial on his own motion'") (quoting Fed.R.Crim.P. 33, advisory committee's note). "Indeed, even if a defendant moves for a new trial, a trial judge may not grant a new trial on a ground not raised in the motion." *Wright*, 363 F.3d at 248; *see Campa II*, 459 F.3d at 1153-54 & n. 287 (Rule 33(b)(2)'s limitation on authority to grant relief is an "inflexible claim-processing rule"; holding that defendants must "present the *entirety* of their interests of justice argument" when moving for new trial) (emphasis added); *United States v. Gupta*, 363 F.3d 1169, 1174 (11th Cir. 2004) ("district court's power to act [post-conviction] is sharply constrained by the relevant rules of criminal procedure").

There was no occasion for the *en banc* Court to even consider–in addressing denial of the four venue-related new trial motions–claims of misconduct that the district court itself was not called upon to address in those motions. That the defendants did not raise on appeal the question of abuse of discretion in the denial of the new trial motions, and relied on the motions only for their renewal of venue claims, *see* Campa-*En-Banc*-Reply-Br:6, is *further* confirmation of the *en banc* Court's focus on potential venue prejudice stemming from the *cited* prosecutorial

comments.[3]

Further, the *en banc* Court's reference to consideration of the prejudicial effect of the cited misconduct instances was in relation to the *venue* question. The *en banc* Court did not address any theory of "potential prejudice" *other* than *venue* prejudice. *See* 459 F.3d at 1140 ("In July and August of 2001, the defendants *reasserted their claims of improper venue in post-trial motions* for judgment of acquittal and for new trial.") (emphasis added). And, most importantly, the *en banc* Court did not conduct the usual analysis appropriate to independent prosecutorial misconduct claims, i.e., *de novo* review of the *cumulative* effect of the misconduct, focusing on the closeness of the evidentiary contest. *See* Guerrero-Supp-Br:45-46 (citing *Davis v. Zant*, 36 F.3d 1538, 1551 (11th Cir. 1994); *United States v. Hands*, 184 F.3d 1322, 1333-34 (11th Cir. 1999)). Indeed, the *en banc* Court said nothing about the quality or sufficiency of the evidence.

The government notes many of the dozens of incidents of misconduct cited

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[3] Even if the government's decontextualized interpretation of "[t]hese alleged incidents" were not contradicted by the *en banc* Court's record citations, judicial comments beyond the issues presented in the new trial motions would be *obiter dicta*, in light of the *en banc* Court's express remand holding. *See Kastigar v. United States*, 406 U.S. 441, 454-55, 92 S.Ct. 1653, 1662 (1972) (broad language unnecessary to decision cannot be considered binding): *United States v. Bracciale,* 374 F.3d 998, 1007 n. 11 (11th Cir. 2004) ("*dicta* is neither law of the case nor binding precedent") (internal quotation omitted).

in defendants' briefs on appeal, *see* Gov't-Supp-Br:12 n. 8, but downplays the fact that the *en banc* Court did not cite such briefed claims of misconduct in relation to denial of new trial motions. The government also claims that the "great majority" of misconduct claims briefed by appellants went without objection at trial. Gov't-Supp-Br:18. But the government's no-objection thesis is incompatible with its contention that the *en banc* Court considered the *briefed* misconduct claims–and not just new trial claims–when it asserted that the district "court granted the defendants' objections and specifically instructed the jury to disregard the improper statements." 459 F.3d at 1153. Considered in context, the *en banc* discussion of *alleged instances* of misconduct in relation to the four cited motions for new trial is *not* directed to what the government refers to, Gov't-Supp-Br:18, as the "myriad" of misconduct claims briefed by the appellants *after* denial of their new trial motions, just as it is *not* a reference to misconduct cited in Hernandez's new trial motion, which *did not raise venue* claims and was not considered *in any way* by the *en banc* Court.[4]

The *en banc* Court's focus remained on the overriding discretionary issue

[4] The government ignores the record and precedent in presuming, Gov't-Supp-Br:7, that the *en banc* characterization of alleged instances as "so minor" applies to the false "final solution" reference. *See* Guerrero-Supp-Br:41 (citing 5th, 11th, and D.C. Circuit condemnation of prosecutorial analogies to Nazi Germany and/or Hitler).

of determining intolerable venue prejudice, or, as the *en banc* Court described it, the "potential" for prejudice. 459 F.3d at 1153. And while the Court found no prejudice from a "single remark" by witness Basulto, *id*., the Court did not have occasion to reach the question of *cumulative* effect essential to resolving the misconduct issue. Given the Court's specific holding that the prosecutorial misconduct claim is reserved for this panel, any suggestion that isolated references to instances of misconduct trump that holding ignores Eleventh Circuit precedent and must be rejected. *Dantzler v. IRS*, 183 F.3d 1247, 1251 (11th Cir. 1999) (actual "judicial decision" prevails over isolated language touching on matters not "squarely presented"); *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir.1992) (assertion in prior opinion is *dicta* where later panel is expressly made "free to give that question fresh consideration").

B. *En banc* rejection of claims of pervasive community prejudice does not *necessarily* imply that appellants' prosecutorial misconduct claims are or are not meritorious.

The government's alternative contention–that in rejecting pervasive-prejudice venue claims, the *en banc* Court decided "virtually all" of defendants' *appellate* claims of prosecutorial misconduct "by necessary implication," because the panel decision and the appellants' briefs asserted that inflammatory

prosecutorial arguments fueled pre-existing community prejudice, Gov't-Supp-Br:3–is incorrect. The *en banc* Court's implicit rejection of the "tandem effect" or "perfect storm" argument does not, contrary to the government, *necessarily* imply resolution of independent claims of prosecutorial misconduct. The panel recognized this critical distinction. *United States v. Campa*, 419 F.3d 1219, 1223 n. 1 (11th Cir. 2005) (reserving for decision prosecutorial misconduct issue; making no finding whether entirety of prosecutorial misconduct warranted reversal). The *en banc* Court did not disturb that aspect of the panel decision. Instead, the *en banc* Court stated that "[h]aving decided these *issues upon which we granted en banc review*, we REMAND this case to the panel for consideration of the *remaining* issues," 459 F.3d at 1155 (emphasis added), which issues, the Court held, include the "outstanding" issue of "prosecutorial misconduct." *Id.* at 1126 n. 1.[5]

The government ignores also that the core holding of *Campa II* has nothing to do with prosecutorial misconduct. *See Chandler v. McDonough*, __ F.3d __,

[5] The government's claim of significance in the *en banc* abbreviation of the panel's more detailed footnote 1–which identified issues remaining for resolution–lacks substance. Gov't-Supp-Br:15. The *en banc* holding recognizes prosecutorial misconduct as a separate, unresolved issue, making the point in strong terms: "We remand this case to the panel for consideration of these outstanding issues." 459 F.3d at 1126 n. 1.

2006 WL 3702736, *1 (11th Cir. Dec. 18, 2006) (*Campa II* holds "that the burden a defendant bears when attempting to establish presumed prejudice is 'an *extremely heavy one*,' and ... that '[t]he *presumed* prejudice principle is rarely applicable and is reserved for an *extreme situation*.'") (quoting *Campa II*, 459 F.3d at 1143) (emphasis added). These special and highly-deferential review principles applicable to presumed-prejudice venue claims are inapplicable to prosecutorial misconduct claims: the context of *Campa II* is defined by that overarching focus on presumed prejudice, not on the very different dispositive factors of prosecutorial misconduct.

If the defendants' appellate claims of prosecutorial misconduct had been premised solely–or even predominantly–on inflammatory arguments aggravating pre-existing community prejudice, the government's argument might have some theoretical weight, albeit still less than required to overcome the daunting obstacle of the express *en banc* remand order. But the prosecutorial misconduct arguments on appeal are not based on aggravation of community prejudice. *See* Hernandez-Reply-Br:24-28 & App. A. None of the cases appellants cited on misconduct relates to pre-existing community prejudice. *See* Guerrero-Supp-Br. 2-52 (citing more than forty misconduct decisions, unrelated to pre-existing community prejudice and covering a broad range of misconduct).

The government's "necessary implication" argument is likewise not helped by chastising defense counsel for seeking unsuccessfully in *en banc* briefing to link claims of prosecutorial misconduct to pervasive community prejudice under the "tandem effect" rationale. Gov't-Supp-Br:9. Although appellants sought to include the misconduct factor as a component of the venue issue–specifically, that improper comments *inflamed* community prejudice–the *en banc* Court ultimately found the evidence of community and media prejudice so insignificant that it did not address either "perfect storm" or "tandem effect" principles, and thus did not even reaffirm the continued vitality of the tandem effect doctrine. *See*, *e.g.*, 459 F.3d at 1145 (defendants' allegations of prejudicial pretrial publicity "fall far short" of what is required to "presume prejudice"); *id*. at 1150 (defendants "failed to show that so great a prejudice existed against them as to require a change of venue" where district court "carefully manage[d] individual voir dire" and shielded jury from "extrinsic influence").

The *en banc* Court's focus was on its perception of the uniquely diverse and heterogeneous Miami community as being immune to such pre-existing presumptive prejudice, rendering all subsidiary arguments of aggravation of pre-existing prejudice inapposite. *Id*. at 1154 (*en banc* Court summarizes conclusion by asserting that "Miami-Dade County is a widely diverse, multi-racial community

of more than two million people" from which district court could assemble "twelve fair and impartial jurors").

And, notably, the *en banc* Court focused on the defense's own approval of the jury in claiming spontaneously that "we worked very hard to pick this jury and we got a jury we are very happy with," and the defense's approval of the success of voir dire in resolving prejudice concerns, by claiming "the way this Court has interrogated some of the prospective jurors" allowed for detection and elimination of prejudice. *Id*. at 1137 (citations omitted). As interpreted by the *en banc* Court, this terrain was so inhospitable to venue prejudice that the misconduct–however inflammatory–could not produce venue prejudice. *Id*. at 1147-48 (defendants "failed to express any dissatisfaction with the selected jurors[,] ... complimented the court's voir dire as 'extraordinary' and stated that they were 'very happy with' the jury"; "court's voir dire was *so effective* ... defendants did not exercise all of their peremptory challenges") (emphasis added) (footnotes omitted).[6]

Contrary to the government, Gov't-Supp-Br:10-14, an appellate decision's meaning is determined by its own content, not by arguments an unsuccessful party

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[6] Although the defendants strongly dispute the *en banc* Court's interpretation of these comments and its ultimate holding as to presumed prejudice, nevertheless, the *en banc* Court made its view of the absence of such presumed prejudice abundantly clear.

sought to have the appellate court address. *Cf. Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S.Ct. 2144, 2159 (1995) (holding of case is final disposition and determinations *necessary* to that result). Clearly, the *en banc* Court was not drawn into a review of the various appellate claims of prosecutorial misconduct, nor did the dissenting judges address misconduct issues, because the *en banc* Court's analysis of the venue rendered such inquiries *unnecessary* to the result. As the government's brief observes, the meaning of a majority decision is sometimes best seen in the content of the dissent. Gov't-Supp-Br:9 (acknowledging that dissenting opinion can help define what issues were and were not resolved by "main opinion"). In the instant case, the dissenting opinion, 459 F.3d at 1155-1180, never mentions the word "misconduct," a telling fact the government's brief omits.

The government implies that the *en banc* Court made findings of fact, Gov't-Supp-Br:4, but fails to identify any such fact findings. The government notes, however, that the *en banc* Court stated the trial "'comported with the highest standards of fairness and professionalism.'" Gov't-Supp-Br:18 (quoting 459 F.3d at 1149). But, once again, close examination of the referenced page of *Campa II* reveals that the district court actions and trial comportment to which the *en banc* Court referred relate *exclusively* to *venue* matters, not prosecutorial

misconduct. 459 F.3d at 1149 (citing "gag order," "sequestration order," "admonish[ment] [to] jurors not to discuss the case," "designating certain rows to certain groups and requiring the media to sit in the back," "prevent[ing] the media from accessing the voir dire questions," "instruct[ing] the marshals to accompany the jury," "reject[ing] the media's request for ... jurors' names," "insulat[ing] the jurors during their deliberations, arranging for ... a private entrance and providing them with transportation to their vehicles or mass transit"). The government cannot stretch the record to link the *en banc* comments on page 1149 of *Campa II* to any misconduct issue.

Notwithstanding the government's attempt to recharacterize the record, the fact remains that the panel reserved the prosecutorial misconduct issue in its original opinion. The *en banc* Court did not include prosecutorial misconduct questions in its specification of the relevant points for *en banc* rehearing. The government maintained in the *en banc* Court that prosecutorial misconduct–as an independent claim–was not part of the *en banc* case. Gov't-*En-Banc*-Br:44. The *en banc* Court then followed the panel's reservation of the prosecutorial misconduct claim and reserved it for consideration on remand. Clearly, the issue

remains undecided. It was not "decisively rejected as a ground for reversal."[7] Gov't-Supp-Br:3; *cf. Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 406 (2005) (undue reliance on language unnecessary to decision can "obscure[ ] the central point" of a decision).

II. The Government's Merits Arguments on Misconduct Explain the Intentionality of the Misconduct, but Do Not Justify It.

The government ignores the bulk of the misconduct claims, fails to address the relevant legal precedents, and essentially reiterates its prior arguments that the nature of the case and the defense evidence compelled rebuttal arguments that would otherwise clearly warrant reversal. Gov't-Supp-Br:18-27. Contrary to the government, presentation of a defense for which there is ample record support is not grounds for retaliatory prosecutorial misconduct. *See United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048 (1985).

The government relies on two new unfounded theories: that false prosecutorial

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[7] While citing cases dealing with the wholly different context of repeated appeals of the same issue–*e.g.*, *Riley v. Camp*, 130 F.3d 958, 981 (11th Cir. 1997) (appended unpublished opinion) (law-of-the-case doctrine applies to qualified immunity issue raised in two successive appeals where subsequent trial evidence confirms facts on which prior panel relied in denying immunity)–the government has apparently found no precedential rationale for applying an issue-preclusion bar following an *en banc* decision, where an issue was expressly left unresolved and remanded to the panel. *See* Gov't-Supp-Br:13, 17. *Riley v. Camp* persuasively explains the limits of the different evidence exception to the law-of-the-case doctrine, but does not suggest that issues expressly left unresolved can be deemed barred from direct appellate review.

claims in rebuttal were merely interpretive exaggerations and that some rebuttal misconduct can be justified as invited by unobjected-to defense opening statements (given six months earlier). The new government arguments fail: defendants' offering of evidence that although three of them violated immigration laws in entering the country, they never committed espionage and were investigating anti-Cuban terrorism does not warrant false claims of sinister plots to destroy America or that the defendants used bombs or violence. Gov't-Supp-Br:19 n. 12, 21 & n. 18. And the government's unprecedented invited-misconduct argument that because some defense counsel "disclosed" their court-appointed status in *opening* statements in December 2000, the government was permitted to make "ironic" comments about it in connection with its improper destruction-of-America argument in *rebuttal* closing in June 2001, Gov't-Supp-Br:19 n. 13, stretches the invited-misconduct rationale beyond recognition. These new twists on the government's arguments–unsupportable under accepted invited-rebuttal analysis–merely epitomize the strategic, planned nature of the rebuttal misconduct.

On the question of prejudice, the government ignores all of its prior representations to this Court as to "insurmountable" evidentiary obstacles on multiple counts. *See* Guerrero-Supp-Br:17 n. 11, 46, 50-51 (quoting government's emergency petition for writ of prohibition). Contradicting such representations, the government baldly claims that the evidence on all counts "was strong." Gov't-Supp-Br:27. This

new government argument of harmless error, which in any event is waived because the government previously refrained–likely due to its prior representations in seeking a writ of prohibition–from asserting such a claim, *see Prado-Gonzalez v. INS*, 75 F.3d 631, 632 (11th Cir. 1996) (issues not clearly raised in briefs are abandoned), should be rejected, particularly as to the factually and legally tenuous espionage and murder conspiracy charges.[8]

The government makes much of Guerrero's unintentional misquoting of the district court finding of the government's prior appellate "*outright* misrepresentation" as an "*outrageous* misrepresentation," Gov't-Supp-Br:27 n. 25 (emphasis added), but the difference is slight, particularly in view of the district court's additional finding of the government's making of "'*gross* misrepresentations'" of facts in its prior emergency, interlocutory appellate filings in this prosecution. Guerrero-Supp-Br:17 (quoting R121:14025) (emphasis added). The government seeks some form of credit for the district court's finding of these improprieties–arguing it proves the court monitored the government's interlocutory appellate misconduct, Gov't-Supp-Br:27

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[8] Readily distinguishable are cases where evidence overwhelmingly established guilt. *See*, *e.g.*, *United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (but for "overwhelming" evidence of guilt, court would have reversed based on government's "drug war" argument, focusing on defendants as "enemy" who "don't care what they do [or about] the hurt and death they cause"); *United States v. Alvarez*, 755 F.2d 830, 854 (11th Cir. 1985) ("convincing" and "amply demonstrated" direct evidence provided by eyewitness law enforcement agents established defendants' guilt of involvement in drug transaction).

n. 25–but cites no precedent for the proposition that a prior record of misconduct is a favorable factor in evaluating an offender's subsequent misconduct and fails to address the logical conclusion that the government's perception of an emergency created by the jury instructions precipitated much of the improper closing arguments.

Ultimately, the government's brief reflects a distorted redefinition of defense and prosecution arguments, according to which the defense, absurdly: wanted the jury to make a "moral judgement," Gov't-Supp-Br:26, as to Castro; sought to justify the shootdown as a valid means of suppressing annoying expressions of opinion, Gov't-Supp-Br:23; tried to call attention to taxpayer funding of the defense, not to distance themselves from the Cuban government–after one witness accused counsel of being a Cuban spy–but just for the fun of making "iron[ic]" comments, Gov't-Supp-Br:19 n. 13; and "*politicized*" the trial by introducing evidence of, and explaining the defendants' role in investigating, terrorism against Cuban civilian targets and assassination efforts against Cuban governmental targets. Gov't-Supp-Br:26 (emphasis added). The government's overly imaginative reliving of the trial defies credibility and does not dispel the impropriety of the rebuttal closing.

The government largely avoids quoting any supposedly offending defense arguments, instead opting for squibbed characterizations that deviate from the contextual meaning. In the government's brief, the only quoted defense arguments are two statements by Hernandez's counsel that clearly do not justify the

government's personal attacks in rebuttal directed to that attorney.[9]

The government's mischaracterization of the arguments is perhaps best seen in its omission of Hernandez's counsel's closing argument on the shootdown count:

> Ladies and gentlemen, the rules apply to everyone, and when you don't play by the rules, *especially with a paranoid isolated country like Cuba*, that is a recipe for disaster; and in this case disaster struck. Now, five years later, *they want to make Mr. Hernandez responsible for this mess* as if he knew that Mr. Basulto would ignore these warnings; as if he knew that MIGs were going to be ordered to shoot down the planes. *Ladies and gentlemen, he has to be the biggest scapegoat ever in the history of this courthouse, Gerardo Hernandez*.

R124:14390-91 (closing argument of Paul McKenna) (emphasis added).

Reading the government's brief, one would never imagine that this was McKenna's argument–i.e., that a "paranoid," "isolated" government (Cuba) could "disast[rously]" overreact to those it saw as a threat–an argument that did not invite the false "final solution" attack or the "rules of Cuba, thank God" remark, and that refutes the government's convoluted reasoning on appeal.

The argument that Hernandez should not be made liable for the actions of the

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[9] The government quotes two arguments by Hernandez's counsel, specifically, the obviously factual points that: (1) "somebody in a command bunker [in Cuba] was given authority to exercise the final option" to stop BTTR territorial incursions by shooting down planes, R124:14433; and (2) the open violation of Cuban laws, including those barring anti-government "protests" that would be protected in the U.S., much like violating un-American laws in other countries, such as Saudi Arabia, risks precipitating enforcement action. *See* Gov't-Supp-Br:24 n. 20 (quoting R124:14390, but omitting counsel's reference to repressive Saudi Arabian laws).

government of Cuba in shooting down planes was well-supported by the record and did not invite misconduct. Nor did it invite the wholly improper and false rebuttal that McKenna lied and failed to raise the argument in opening statement. *See* Guerrero-Supp-Br:12-14, 33-34. Contrary to the government, fair arguments, particularly where they are strongly supported by the record, do not invite foul rebuttal. *Id*.

The government's strawman argument–protesting at length a factually-accurate comment in Guerrero's brief that there were nearly 300 references to Fidel Castro at trial, Gov't-Supp-Br:24-25 & App. D & E–ignores that the Castro references merely illustrate the background for government introduction of prejudicial evidence and argument. It is of course not misconduct merely to *mention* Castro where relevant to an issue in the case; indeed, it was unavoidable.[10]

The government ignores, however, that references to the Cuban commander in

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[10] Thus, the government's painstaking count of 239 uses of the word "Castro" in the jury's presence overlooks that not merely the word "Castro," but also "Fidel" (40 additional times where *not* used with "Castro"), "commandante" and "commander in chief" (75 times), "dictator" (5 times), "President of the Council of State" (5 times), and other references to "him" (or "he" or "his," meaning Castro) (40-plus times) were employed. With these additional references, the total exceeds 400 references, or about four a day, without even including references to Castro and the Cuban Communist Party in physical evidence, photos of Castro, demonstrative exhibits with Castro's name, and anti-Castro political documents introduced by the government, such as the Concilio Cubano petition and leaflets dropped by Basulto. In addressing these matters, mention of Castro was made by both prosecution and defense.

chief began in the *government's opening statement*. R29:1598 (government seeks to link Hernandez to murder conspiracy by arguing "Commander [in] Chief" was pleased with shoodown). The relevant point is that, having emphasized Castro's image at the beginning of the case–e.g., projecting a giant photo of Castro for the jury, in the aftermath of the inflammatory "dead baby" evidence–and at other critical points at trial, including throughout the translation and message-interpretation evidence, including placing Castro at the top of the conspiratorial pyramid in demonstrative exhibits, the government *thereafter*, in rebuttal argument, committed misconduct by positing Castro's evil to argue for the defendants' criminal guilt. Knowing that emphasizing Castro was a prejudicial matter, *no matter where the case was tried*, the government did not "minimize" the prejudice, Gov't-Supp-Br:25, instead utilizing Castro extensively in rebuttal closing. *See* R124:14487, 14495, 14522.

The government claims to suppose that the defense wanted the case to be about whether the jury should approve of Castro–despite the defense's having accepted jurors who made clear their strong-to-virulent opposition to him–and that the defense injected "*politics*" into the case. The government's mysterious claim of "politics" has an insulting ring to it, but has nothing to do with the defense arguments and evidence. Gov't-Supp-Br:25. Instead, the defense tried to explain–through substantial

documentary and testimonial evidence, including government-intercepted message traffic between Cuba and the defendants–how significant the terrorist threat to Cuba was and that the defendants were acting under that premise in serving as Cuban agents. Whether the ultimate truth supports the defendants or not, their defense was not *political* and it does not justify the extraordinary–indeed unprecedented–level of prosecutorial misconduct in closing argument.

III. The Government, Seeking to Lower its Burden of Proof as to Espionage Conspiracy, Mistates the Holding in *Rosen*.

The government, recognizing that it failed to show any effort by the appellants–despite years of presence in the United States–to obtain a position of employment requiring a security clearance or to acquire any information available only to persons with security clearances, misstates the holding of *United States v. Rosen*, 445 F.Supp.2d 602 (E.D. Va. 2006), wrongly claiming that *Rosen* broadens the espionage statute to include obtaining information that is "[ ]available to the public through other sources," i.e., sources *not* protected by the government. Gov't-Supp-Br:30 (citing 445 F.Supp.2d at 620-21).

Contrary to the government's argument, *Rosen* instead explains that stealing classified information that *confirms* public information constitutes espionage, *not* that obtaining public information that may *also* be found or confirmed in classified or

secret documents is espionage. 445 F.Supp.2d at 620-21. The government's misstatement of espionage caselaw exposes the key flaw in the government's prosecution on Count 2. An agent's learning of useful information from public–i.e., non-secret–sources is *not* actionable as espionage, even if it is learned by being around publicly-accessible areas of a public military base and even if the information could *also* be learned from secret sources.[11]

At most, the government established in this case a network of agents that *potentially* could have been directed, at some future time, to change the nature of their investigations and to seek to obtain closely-held government secrets, but who *never were* so directed by Cuba. Nor did any defendant independently agree to undertake espionage. Whether they would have sought or obtained authorization to do so if the occasion arose remains unknowable on this record, but the occasion *never* arose, and the foreign-agent conspiracy here never ripened into an espionage conspiracy.

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[11] The government's claim, Gov't-Supp-Br:28 n. 26, that by looking through the windows of a "greenhouse" in an area lacking access restrictions, Guerrero could have breached the protections of *closely-held* national security information is erroneous; information that is not protected from obvious visual observation is not *protected* information. *See Rosen*, 445 F.Supp.2d at 620-21. Base employees testified that the transparent mobile unit–designated, because of its appearance, "the greenhouse"–was maintained, when not in use, in a public parking lot, unguarded and unattended. R103:11850, 11860.

IV. The Government Offers No Basis for Sustaining Hernandez's Conviction of Murder Conspiracy.

The government's argument hinges on speculation that Hernandez knew Cuba would exceed the broad limits of its sovereignty in confronting illegal BTTR flights. *See* Gov't-Supp-Br:32-33 (claiming that "[n]otwithstanding" the *literal* terms of Cuba's communications, Hernandez should be presumed to know that "Cuba would fatally confront BTTR"); *id*. at 30 (blurring factual record by referring to "the events of February 24, 1996," when document to which government refers *expressly* relates to other events, not shootdown). The government also blinks reality in claiming its prior argument to this Court of insurmountable hurdles in proving Hernandez knew or intended that Cuba would exceed its territorial sovereignty, much less act illegally in doing so, can be ignored.[12]

The government's speculative theorization of Hernandez's knowledge and culpability—remains unprecedented, ignoring a consistent line of authority barring convictions based on speculation of an employee's knowledge of his employer's

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[12] *See* Gov't-Supp-Br:33 n. 30. The government seeks, again, to recharacterize the record of its persistent misstatement, in rebuttal argument, of the jury instructions on murder conspiracy. *Id.* (arguing transcript *dashes* give different impression than *ellipses*). The record–including six sustained objections in just two pages of transcript, R124:14517-18–speaks for itself: the government fought to convey to the jury a lesser burden than that on which the court instructed. *See* Hernandez-Reply-Br:28.

undisclosed criminal plans. *See* Hernandez-Reply-Br:11. Thus, in attributing to Hernandez *Cuba's* historically unprecedented actions with regard to BTTR flights–as to which the evidence shows he neither was, nor logically would have been, a party–the government advocates for a grave injustice.[13]

V. The Government's New Plain Error Arguments as to Jury Instructions Were Waived in its Initial Brief.

The government concedes that its new claim–that the defendants waived jury instruction requests they filed and objections they presented in charge conference proceedings–was not raised in the government's opening brief in 2003, nor at any time thereafter. The government's plain-error claim, which in any event is factually inaccurate, the district court having clearly understood and resolved the objections, has been waived. *See*, *e.g.*, *United States v. Burston*, 159 F.3d 1328, 1334 n.10 (11th Cir. 1998) (government implicitly conceded, by not briefing issue, that defendant preserved objection to exclusion of evidence); *United States v. Witek*, 61 F.3d 819, 824 n.7 (11th Cir. 1995) (argument raised by government at oral argument not considered because court "does not try ever-changing theories parties fashion during

[13] The evidence shows Hernandez committed another offense, possession of a false passport, Count 7, but the government chose not to indict him, and instead indicted Campa. Despite the government's conclusory claim that the document was Campa's "own," Gov't-Supp-Br:34, Campa had not been in the house where the document was found for months, and the government offered no evidence of whether Campa knew of its existence.

the appellate process").

On the merits of defense-theory instructions on specific intent and necessity, appellants rely on their original and supplemental briefing. Necessity was properly a question for the jury under the facts presented in this case. As to the *mens rea* for a violation of 18 U.S.C. § 951, the government's attempt to distinguish *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240 (1957), fails, particularly with respect to an American citizen defendant–such as Rene Gonzalez–whose alleged actions included contacting a member of Congress and engaging in expressive activity. *See* Gonzalez-Reply-Br:1-14.

As to the erroneous instruction applying civil aviation rules to criminal liability for a murder conspiracy, the government does not try to justify the ICAO instruction as a correct statement of the law, Gov't-Supp-Br:38 n. 32, but argues that the incorrect instruction "balanced" a truthful instruction requested by Hernandez stating that foreign states have sovereignty over their own territory. Notwithstanding the government's "balancing" argument–for which it offers no precedential support–balancing a truthful instruction with one that impermissibly expands criminal liability for a murder conspiracy is obvious error. *See* Hernandez-Initial-Br:55-58.

VI. The Government's CIPA Argument Ignores Defense Objections and the Nature of the Relevant Discovery Principles.

Contrary to the government, appellants' CIPA claims *were* timely raised in the district court. *See*, *e.g.*, Campa-Reply-Br:16-17 (citing R1:210, Campa's objection to *ex parte* hearing). With regard to the CIPA procedural violation, the issue is not whether extraordinary CIPA procedures might be warranted in some case, Gov't-Supp-Br:39-40, but whether they were warranted here, where the nature of the evidence at issue–materials possessed by, and seized, from these defendants–is inconsistent with any need for procedures beyond what is expressly authorized by the CIPA statute.

Nor does the government's materiality analysis withstand scrutiny. Contrary to the government, Gov't-Supp-Br:40, materiality is *not* the "touchstone" of discovery obligations under Fed.R.Crim.P. 16(a)(1)(B)(i) & (E)(iii), where the defendants' own records–seized by the government–are concerned. Instead, there is no Rule 16 materiality requirement for discovery of such documents, and, for CIPA purposes, the question is whether discovery would be *helpful* to the defense. *United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006). In this unique prosecution–where the materials largely consisted of defendants' own communications and the government claimed a years-long espionage conspiracy without even an attempt to commit

espionage, much less the actual obtaining of classified information–the withheld evidence reasonably would have been helpful to the defense.

VII. The Government's New Justification for Racially Disparate Juror Evaluations Comes Too Late under *Batson* and Lacks Credibility.

The government offers new arguments for distinguishing jurors McCollum and Sabater, but ignores that the explanation it offered at *trial* governs. *See Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332 (2005) (appellate review of "*Batson* challenge does not call for a mere exercise in thinking up any rational basis" during appellate proceedings; trial "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives"). The trial prosecutor's attempt to distinguish the white and black jurors, *see* Hernandez-Joint-Supp-Br:33-37, was facially contradictory, a defect the government's belated new explanation does not cure.

VIII. The Government's Sentencing Arguments–All of Which Lack Relevant Precedential Support–Should Be Rejected by this Court.

1. The government's unprecedented claim, Gov't-Supp-Br:47, for applying the life sentence guideline to an espionage conspiracy conviction where no secrets were transmitted, and no likelihood of any future transmission of any secret information was shown, contravenes the express language and logic of the espionage guideline, §2M3.1, under which the highest penalties apply only to serious breaches

of national security and consequent determinable risks of grave harm, not speculative possibilities or inchoate "aspiration[s]." Gov't-Supp-Br:47. The government claims that Cuba "priz[ed] classified information," *id*., but none was ever demanded of these defendants, nor did they seek it on their own. Application of the completed-offense, top-secret-transmission guideline lacks any proportionality and contravenes both the plain language and common sense understanding of the guideline. The government's attempt to distinguish *United States v. Pitts*, 176 F.2d 239 (4th Cir. 1999), is unavailing, where defendant Pitts' base offense level was set five levels below that in the instant case, despite his having committed actual espionage involving classified documents that harmed national security, while here there was no espionage, no transmission of secrets, and no harm.

2. The government's constricted reading of the three-level guideline reduction for uncompleted conspiracies, §2X1.1, erroneously discounts fundamental differences between intended-loss guidelines, such as robbery and theft guidelines, and actual-harm guidelines, such as the espionage guideline. Gov't-Supp-Br:48. These crucial guideline distinctions vitiate the government's attempt to *extend* §2X1.1 decisional law that has subsequently been called into question even as to robbery offenses.

3. The government does not directly address the district court's procedural

failure to *apply* the guideline rules applicable to a dual-object conspiracy, so as to avoid unnecessary imposition of consecutive sentences. Gov't-Supp-Br:44 (claiming Gonzalez might not have benefitted from correct application of guideline mandates). On one hand, the government argues the district court "agreed to consider guideline related matters." *Id*. On the other hand, the government claims the district court correctly sided with the probation officer, finding that it was too "cumbersome to apply guidelines" to this dual-object offense. *Id*. The government's policy, harmlessness, and complexity-of-compliance arguments are unfounded. The purpose of the guidelines system is to avoid disparity. Failing to undertake the requisite guideline analysis under §3D1.1 because it is cumbersome is prohibited. *See* Medina-Supp-Br:42-44.

4. The government fails, once again, to explain how any prior education obtained by Guerrero–including any training Cuba afforded him to work as an agent–set him apart or significantly facilitated his actions so as to warrant application of a special-skill enhancement under §3B1.3. Gov't-Supp-Br:45. The enhancement clearly is not meant to apply to visual observations of obvious construction work in a small building. Nor does the government acknowledge precedent that training provided to an individual for the purpose of undertaking the charged activity does not constitute abuse of a special skill, *see* Medina-Supp-Br:33-35; indeed, there is no

more-than-minimal-planning enhancement applicable to espionage or most other guidelines. Arguably, if Guerrero had been trained by the United States as an American intelligence agent and then used that training for the illegal benefit of Cuba, an abuse of skill could be found (assuming, unlike the instant case, that the training were shown to have significantly facilitated the offense, *see* Medina-Supp-Br:35-41). But that is not this case, and the application of the enhancement here is not warranted under the plain language of the guideline.

5. The district court's adoption of the government's categorical reasoning for imposing a §3C1.1 obstruction of justice enhancement for a defendant's initially identifying himself by the name under which he had long been living is not justified by the government's "common sense" claim. Gov't-Supp-Br:46. The guidelines require a showing of materiality even in the particular context of an initial appearance proceeding. *See* Medina-Supp-Br:45-52. And while an actual effect on an investigation is not necessary, the circumstances must show an objective basis for materiality based on the specific facts of the case. *Id*. at 46 (citing *United States v. Ruff*, 79 F.3d 123, 126 (11th Cir. 1996)). At a minimum, the matter should be remanded for resentencing under the correct, case-specific materiality standard.[14]

[14] The government waived, in prior briefing, its new claim that Campa failed to adequately preserve this component of his sentencing argument. Gov't-Br:78 n. 56.

6. As in its original brief, the government *concedes* a §3B1.1 role-in-the-offense guideline error as to Campa, Gov't-Supp-Br:49, but misstates the record in claiming Campa did not object to the district court's error. *See* Campa-Reply-Br:31-32 (citing R132:19: Campa argues enhancement inapplicable where Campa supervised no other person). The government cites no authority for a requirement–in the local rules or governing caselaw–of written objections to a PSI *addendum*; Campa's objection at sentencing sufficed. The government's new claim of involvement of another agent, Gov't-Supp-Br:50, is waived, having not been raised at sentencing or in the government's original brief. Nor did the district court find such supervision by Campa. Despite the government's speculative claim that Campa might receive the same sentence on remand, circuit precedent compels resentencing. *See United States v. Glover*, 179 F.3d 1300, 1303 (11th Cir. 1999).

CONCLUSION

Appellants respectfully request that the Court reverse their convictions and sentences in accordance with their supplementally-briefed claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 6,983 words.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was forwarded by U.S. Mail and next day hand-delivery mailed on this 2nd day of January 2007, to Caroline Heck Miller and Kathleen M. Salyer, Assistant United States Attorneys, 99 N.E. 4th Street, Miami, Florida 33132.

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