UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-23376-CIV-Lenard

RUBEN CAMPA
[FERNANDO GONZALEZ],
Plaintiff,

v.

UNITED STATES,
Defendant
_____/

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

Through counsel, Ruben Campa ("Movant Campa") has moved to vacate, set aside or correct his sentence in Case No. 98-721-Cr-LENARD(s)(s), pursuant to 28 U.S.C. §2255. He makes essentially two claims: that payments to local journalists from the Broadcasting Board of Governors ("BBG") amount to a fatal due-process violation; and that his sentencing guideline was wrongly enhanced by two-levels for obstruction of justice because of ineffective representation by his attorney. Both claims lack merit. The claim concerning journalists does not establish a due-process violation, and, in any event, Movant has shown no prejudice based on that claim and cannot overcome the binding appellate determination that the trial court ensured selection of a fair and unbiased jury that was properly insulated from media accounts. It also essentially amounts to a claim of newly discovered evidence, which is time-barred. The substance of the guideline-enhancement claim is not cognizable as a §2255 issue, and in any event the guideline-enhancement was proper, and Movant's counsel provided effective

representation on the sentencing issue at trial and on appeal. Movant's request for an evidentiary hearing is not merited. The United States respectfully submits that the Motion should be denied.

Movant Campa[1] is one of five co-defendants convicted at trial in Case No. 98-721-Cr-LENARD(s)(s). All five have filed §2255 motions. *See Gerardo Hernandez v. United States,* Case No. 10-21957-cv-LENARD; *Rene Gonzalez v. United States*, Case No. 10-21975-cv-LENARD; *Antonio Guerrero v. United States*, Case No. 10-23966-cv-LENARD; *Ruben Campa v. United States*, Case No. 11-23376-cv-LENARD. The United States previously has responded to the §2255 motions of co-defendants Hernandez, Gonzalez, and Guerrero, each of which also raised the claim about BBG payments to local journalists. The United States today is responding in separate but similar pleadings to the §2255 motions of Movant Campa in this case and of co-defendant Luis Medina (hereafter "Movant Medina"[2]) in Case No. 11-22854-cv-LENARD. Due to the close similarity of the §2255 motions of Movant Campa and Movant Medina – each movant raises the same two claims, and significant portions of their briefs are verbatim the same – the United States will make the same response to each of their respective motions. Thus, from this point onward, the United States' responses in opposition to Movant Campa's §2255 motion in this case and to Movant Medina's §2255 motion in Case No. 11-22854-cv-LENARD are

[1] This Movant was charged as "John Doe No. 3, a/k/a Ruben Campa." Later he claimed, through counsel, that his true name is Fernando Gonzalez Llort. He was referred to as Campa extensively in the proceedings and in the lengthy opinions of the Court of Appeals; we continue to use this reference.

[2].This Movant was charged as "John Doe No. 2, a/k/a Luis Medina III." Later he claimed, through counsel, that his true name is Ramon Labanino Salazar. He was referred to as Medina extensively in the proceedings and in the lengthy opinions of the Court of Appeals; we continue to use this reference

identical, encompassing and addressing the Movants'[3] identical claims, and also noting and discussing any individual variances, in one comprehensive analysis.

The Criminal Proceedings

The Movants were charged, with 12 others, in a second superseding indictment in the underlying criminal case. *See* DE/cr[4] 224. Five pled guilty; four have never been arrested; and these Movants proceeded to a seven-month jury trial with the remaining three defendants. All five were convicted at trial on all counts for which each was charged. Movants were convicted as follows: Both Movants on Count One (conspiracy to act as an agent of a foreign government – the Republic of Cuba – without prior notification to the Attorney General as required, and to defraud the United States of and concerning governmental functions and rights, in violation of 18 U.S.C. §371); Movant Medina on Counts Two (conspiracy to commit espionage, in violation of 18 U.S.C. §794(c)), Nine and Eleven (possession of fraudulent passport, in violation of 18 U.S.C. §1546(a)), Ten (false statement to obtain passport, in violation of 18 U.S.C. §1542), Twelve (possession of five or more false identification documents, in violation of 18 U.S.C. §1028(a)(3), (b)(2)(B) and (c)(3)), and Fourteen, Sixteen, Twenty-Five and Twenty-Six (acting, and causing another to act, as an agent of a foreign government – the Republic of Cuba – without prior notification to the Attorney General as required, in violation of 18 U.S.C. §951); and Movant Campa on Counts Seven (possession of fraudulent passport, in violation of 18 U.S.C. §1546(a)), Eight (possession of five or more false identification documents, in violation of 18 U.S.C. §1028(a)(3), (b)(2)(B) and (c)(3)), Sixteen and Seventeen (acting, and causing another to

[3] "Movants," as used in this pleading, refers to Movant Medina and Movant Campa collectively.

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

act, as an agent of a foreign government – the Republic of Cuba – without prior notification to the Attorney General as required, in violation of 18 U.S.C. §951).

Following lengthy appeals, Movants' convictions on all counts were affirmed, with a remand for resentencing. *See United States v. Campa,* 419 F.3d 1219 (11th Cir.), ["*Campa 1*"], *vacated* 429 F.3d 1011 (11th Cir. 2005) (*en banc*); *United States v. Campa,* 459 F.3d 1121 (11th Cir. 2006)(*en banc*) ["*Campa 2*"]; *United States v. Campa,* 529 F.3d 980 (11th Cir. 2008) ["*Campa 3*"], *cert. denied*, 129 S.Ct. 2790 (2009).

Upon remand, the trial court resentenced Movant Medina to 360 months total incarceration, followed by five years of supervised release. DE/cr 1784. Movant Medina appealed his resentencing, *see* DE/cr 1791, but then moved to dismiss the appeal. The Eleventh Circuit dismissed Movant Medina's resentencing appeal August 18, 2010, and issued its mandate. *See* DE/cr 1797. Movant Medina thereafter timely filed his §2255 motion, *see* 28 U.S.C. §2255(f). Also on remand, the trial court resentenced Movant Campa to 213 months total incarceration, followed by three years of supervised release. DE/cr 1780. Movant Campa appealed his resentencing, *see* DE/cr 1790, but then moved to dismiss the appeal. The Eleventh Circuit dismissed Movant Campa's resentencing appeal on September 17, 2010, and issued its mandate. *See* DE/cr 1798. Movant Campa thereafter timely filed his §2255 motion, *see* 28 U.S.C. §2255(f).

Argument and Memorandum of Law

1. Movants received a fair trial, free of due-process violations, notwithstanding their claim that some local journalists received payments from the Broadcasting Board of Governors.[5]

Movants' claim concerning payments to journalists flows from an article published by the *Miami Herald* newspaper on September 8, 2006. The article, which Movants reference, *see* DE/LM 5:31, DE/RC 1-2:33,[6] but do not append,[7] reported that 10 south Florida journalists received payment from the U.S. government to participate in Radio Marti and TV Marti programming aimed at Cuba. From this, Movants conjecture that the United States government

[5] Due to the length of discussion of this issue, it is divided topically, at these page numbers:

[6] "DE/LM" refers to docket entries in Movant Medina's §2255 civil matter, Case No. 11-22854-cv-LENARD. "DE/RC" refers to docket entries in Movant Campa's §2255 civil matter, Case No. 11-23376-cv-LENARD.

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

[7] The article can be found at https://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=sel&totaldocs=&taggedDocs=F1%3A81Z1%3A1F1%3A&toggleValue=&numDocsChked=11&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=&dedupeOption=0&T21=21&T22=22&T23=23&T24=24&_m=bc62d47e951da14e89850634efb9ba18&docnum=24&_fmtstr=FULL&_startdoc=21&wchp=dGLzVzt-zSkAz&_md5=6cba6b62e73861912f3b2879477a0e0c&focBudTerms=BYLINE%28corral%29&focBudSel=sel . A copy is appended hereto as Attachment A.

sought to co-opt the journalists' non-Marti reporting in south Florida publications about Movants' case and trial so as to create propaganda against them in this venue, amounting to a due-process violation that requires that the judgment against them be vacated. Substantively, their claim is factually unsound and their conjecture baseless, illogical, and contradicted by their own referenced materials, as will be discussed below. In addition, and largely ignored by Movants, their claim is procedurally unsound, barred on several independent procedural bases, and not eligible for §2255 relief even if it had any substantive merit, which it does not.

A. Procedural overview

The baseline case for procedural requirements for one seeking §2255 relief is *United States v. Frady*, 456 U.S. 152 (1982), which enunciated a "cause and actual prejudice" standard – two distinct elements, *each* of which it is the movant's burden to establish. *Id.* at 167-168. "Cause" refers to the requirement that for any claim which a §2255 petitioner did not raise in his direct appeal, the petitioner must show that some objective factor external to the defense prevented the petitioner and his counsel from raising the claim on direct appeal. *See Lynn v. United States*, 365 F.3d 1225, 1235 (11th Cir. 2004). "The question is not whether legal developments or new evidence has made a claim easier or better, but whether at the time of the direct appeal, the claim was available at all," *id.* "Prejudice" requires a §2255 petitioner to show that the complained-of errors created "not merely . . . a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitution dimensions." *Frady,* 456 U.S. at 170 (emphasis in original).

To these two fundamental procedural pillars for §2255 jurisprudence – "cause" and "prejudice" – a third should be added: the doctrine against relitigating in a §2255 motion issues that already were raised on direct appeal. "[C]laims will ordinarily not be entertained under

§2255 that have already been rejected on direct review," *Reed v. Farley*, 512 U.S. 339 (1994)(Scalia, J., concurring). *See also Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979)("If issues are raised and considered on direct appeal, a defendant is thereafter precluded from urging the same issues in a later collateral attack"); *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000)(once a matter has been decided adversely to defendant on direct appeal, it cannot be re-litigated in a §2255 collateral attack). This principle – sometimes called "the mandate rule" – is related, and corollary to, the "cause" standard: Both are doctrines of claim-preclusion, because a §2255 petitioner ordinarily may neither re-litigate claims that were previously litigated in the direct appeal (the mandate rule), nor claims that could have been, but were not, litigated in the direct appeal (the "cause" standard). *See Yick Man Mui v. United States*, 614 F.3d 50, 53-54 (2nd Cir. 2010); *see also United States v. Peirce,* 2011 WL 4001071, *2 (S.D.N.Y. 2011).

All three pillars – the mandate rule, the "cause" standard, and the "prejudice" requirement – bar Movants' claims regarding United States government payments to journalists. First, their claims are based on the issue of community attitudes, biases and supposed prejudices in the venue, including as impacted by local news media, which issue was massively litigated previously, both at the trial level and on appeal. While Movants argue that new information published in the 2006 *Miami Herald* article adds a new dimension to their challenge to the fairness of the venue, their §2255 motions largely seek to reassert the same claim – with the same type of depiction of a trial besieged by fear and jury harassment found in prior appellate pleadings – that was previously rejected on direct appeal, in contravention of the mandate rule. Second, Movants' discussion of the 2006 information expands into general claims that they were well aware of at the time of trial and could have raised at trial and on direct appeal, such as broad

denunciation of the United States information (or, as they put it, "propaganda") program of Radio Marti and TV Marti, and such as additional newspaper stories published at and before the time of trial. These news articles, and the Office of Cuba Broadcasting (which produces Radio Marti and TV Marti) all were in existence and known (or, with due diligence, knowable) to the defense at trial, and the Movants have no "cause" for not having raised claims based on these pre-2006 issues and data at trial and on appeal, in contravention of the "cause" standard. Finally, Movants do not, and cannot, show prejudice as required by the *Frady* standard. Not only do they fail to show that they suffered any prejudice at trial due to Radio Marti and TV Marti having paid local journalists to appear on broadcasts directed to the nation of Cuba, the appellate decision on the very issue of jury fairness, and press coverage, in this case establishes that there was no prejudice. *Campa 2* concluded that the trial court's voir-dire process – "a model . . . for a high profile case," 459 F.3d at 1147 – and other measures taken by the court assured a fair trial and a jury that was actually unbiased; that pervasive community prejudice could not be presumed, notwithstanding the appellants' (including Movants') full opportunity to develop a record of contemporaneous publicity; and that even if, arguendo, prejudice were to be presumed, the trial court's careful and thorough voir dire rebutted any presumption, *id.* at 1148. In short, the Court of Appeals determined, on the very issue of community- and jury-prejudice which Movants seek to revisit, that Movants received a fair trial. The parties and the trial court are bound by that determination. There is simply no injury or harm to be remedied, and where there is no prejudice, there is no basis for §2255 relief.

B. Substantively, Movant's claim fails

The United States will address these three procedural pillars further in this response. First, however, we address the substance of Movants' claim, notwithstanding that it is

procedurally barred, to dispel any concerns raised by Movants' heated characterizations. Movants repeatedly reference a supposed government program to propagandize the south Florida community and to promote inflammatory, pro-prosecution, anti-defendant media publication in the venue, but the *facts* adduced by them do not support this rhetoric. The factual material Movants reference[8] show that the Office of Cuba Broadcasting ("OCB") contracted with individuals, including journalists, to provide services by appearing on Radio Marti and TV Marti programs.[9] Radio Marti and TV Marti broadcasting is directed at Cuba, not at Florida, *see* Attachment A, and although Movants complain about leakage of Radio Marti and TV Marti broadcasting into south Florida, they have identified no particular Radio Marti or TV Marti broadcasts that injured them or that reached the jury venue. Rather, Movants focus their complaints on newspaper stories and other media products published by non-governmental private publishing entities – *i.e.*, not Radio Marti or TV Marti – written by some of the same

[8] Most of the material is not appended to their pleadings, but rather is buried within websites they cite, some linking to thousands of pages of documents. This is not adequate to state a claim under 28 U.S.C. §2255 or under the Rules Governing Section 2255 Proceedings For the United States District Courts. *See* Rule 2(b)(2) [motion must "state the facts supporting each ground"]. Without conceding that this is an appropriate way for Movants to make a record or to carry their burden in a §2255 petition, and without waiving objection to the inadequacy of such a record, the United States has reviewed, and will address, materials from the websites Movants cite.

[9] According to the General Accountability Office 2009 report "BROADCASTING TO CUBA: Actions are Needed to Improve Strategy and Operations," U.S. Gov't Accountability Office, GAO-09-127 (2009) (hereafter "GAO Report"), referenced by Movants, *see* DE/LM 5:4 n.2, 31 n.19; DE/RC 1-2:1, 33 n.19, the OCB is a federal entity which operates United States broadcasting to Cuba via Radio and TV Marti, GAO Report at 7. Radio Marti has its genesis in the Radio Broadcasting to Cuba Act, passed by Congress in 1983 "to provide the people of Cuba, through Radio Marti, with information they would not ordinarily receive due to the censorship practices of the Cuban government." *Id.* at 6. The OCB is part of the Broadcasting Board of Governors ("BBG"), "which is an independent federal agency responsible for overseeing all U.S. government-sponsored nonmilitary, international broadcasting programs," *id.* at 7. Other BBG-overseen broadcast programs include Voice of America, Middle East Broadcasting Networks Inc., Radio Free Europe/Radio Liberty and Radio Free Asia. *Id.*

The GAO Report is available at 2009 WL 284728, but without pagination. A paginated copy can be found at http://www.gao.gov/new.items/d09127.pdf .

journalists and published in south Florida. *See* DE/LM 5:14-17; DE/RC 1-3 (Movant Campa's Appendix A). With no supporting evidence, Movants then contend that these non-government publications are "news articles the government paid to be created and disseminated throughout the Southern District of Florida," DE/LM 5:14. *See also* DE/RC 1-2:2 ("[T]he United States government was directly complicit in creating the publicity at issue," referring to DE/RC 1-3, appendix listing non-governmental newspaper article in south Florida publications), DE/RC 1-2:15 (describing non-governmental news coverage as "government-paid media campaign").

The factual materials Movants submit or reference are to the contrary, and conclusively refute the conjecture and insinuation that the government payment purchased and manipulated private media coverage in south Florida. That is, notwithstanding complaints about the processing of Freedom of Information Act ("FOIA") requests made by Movants' third-party supporters, voluminous material was obtained by them from the BBG documenting purchase orders and contracts between the BBG and journalists. Thousands of pages of this material is linked to a website Movants reference, http://www.pslweb.org/reporters-for-hire/documents-released/ , *see* DE/LM 5:13 n.3, DE/RC 1-2:17 n.4, yet Movants chose not to append or analyze any of the contracts or purchase orders. Indeed, the purchase orders refute Movants' speculative premise that the government paid for non Radio- or TV-Marti services, or for any private-media work anywhere, including south Florida. Some of this material, relating to the six individual persons arguably relevant to Movants' claim, is appended as Attachment B.[10] For each of the

[10] Attachment B compiles contractual purchase orders between the OCB and Helen Ferre, Wilfredo Cancio Isla, Pablo Alfonso, Ariel Remos and Enrique Espinosa. The website Movants reference has contract materials for numerous other journalists with the OCB, but most are for contracts and payments subsequent to the trial in this case. Accordingly, they have no relevance to Movants' claim that somehow the BBG's payments to journalists impacted or compromised their trial. (Indeed, the ongoing engagement of journalists to perform services for the OCB's Radio Marti and TV Marti, post-trial and continuing into recent years, undermines Movants' [footnote continued]

persons, the appended material and purchase orders reflect that their financial relationship with the BBG / OCB was a straightforward and transparent engagement of them to appear on or otherwise help produce Radio Marti or TV Marti programs, not for services in connection with any private media publications or outlets. *See, e.g.,* Attachment B at 2-4 [11] (purchase order for Ferre to appear Feb. 14, 2001 as guest on OCB "Mesa Redonda" roundtable discussion, for $75.00); 11-19 (purchase order for Cancio to participate in OCB weekly half-hour show "A Debate" for $75.00 per show, amended to reflect a total quantity of 52 weekly appearances); 31-34 (purchase order for Alfonso to be an expert guest on the Radio Marti weekly one-hour show "Sin Pedir Permiso", for $200 per show, amended to reflect a total quantity of 52 shows); 35-36 (purchase order for Alfonso to co-host 43 episodes of a one-hour Radio Marti show, "Haciendo Caminos," at $200 per show); 42-46 (purchase order for Remos to participate in a twice-weekly Radio Marti show "En Vivo" at $50 per show, amended to reflect engagement for 104 episodes);

[footnote continued]
premise that somehow such engagements were intended or designed to impact their trial.) Of the fewer journalists who had a financial relationship with the OCB / BBG that predates the end of the trial, some are not claimed by Movants to have written or published anything relating to them or their case; these individuals too are irrelevant to their claim. This leaves the five individuals noted above, whose material relating to the period prior to the end of trial is excerpted at Attachment B. (Attachment B is only excerpts; even for these five, there is additional material, totaling hundreds of pages. Undersigned counsel has examined it and found it similar to the excerpts, for different dates.)

Movants would add a sixth individual, Julio Estorino, because his resume states that he was an independent contractor with the Office of Cuba Broadcasting during the relevant time period, although no contracts or purchase orders have been produced. Notwithstanding the slenderness of the reference, we include the Estorino resume at the end of Attachment B.

Movants also name Alberto Muller as a "government paid news reporter," *see* DE/LM 5:14 n.3, DE/RC 1-2:17. The website materials they reference show Muller receiving BBG payments beginning in 2004, well after the trial ended. Muller therefore is irrelevant to their claim that somehow BBG payments to journalists impacted their trial.

[11] Page numbers refer to the pagination assigned by the court's CM/ECF headers at the top of each page.

52-56 (purchase order for Espinosa to participate in weekly one-hour Radio Marti program "Weekend Magazine" at $100 per show, amended to reflect 52 episodes).[12] The per-show rate of payment is modest, and frequently noted as meeting the standard "VOA" (Voice of America) rate schedule, *See, e.g.,* Attachment B at 12, 14, 43, 43. While some individuals received more money due to the frequency and volume of their OCB work, the records reflect that their earnings were for considerable services on Radio Marti or TV Marti programming.

This record shows that the payments made by the BBG were for defined and discrete services to Radio Marti and TV Marti, not for media coverage and publications by non-governmental newspapers in south Florida. The newspaper articles by these individuals which Movants discuss at such length and with such vehemence, *see* DE/LM 5:13-14 n.3, 14-17; DE/RC 1-2:6, 7, 11 n.2, 12, 15, 17-18; DE/RC 1-3, were not paid for by the government and are not referenced by or the subject matter of the purchase orders. Movants' speculative inference that the BBG payments for services to Radio Marti must have also influenced and shaped the journalists' non-governmental publications is without any proffered evidentiary foundation. Thus, when Movants make claims like "the United States government was directly complicit in creating the [south Florida newspaper] publicity," DE/RC 1-2:2, and was "flooding the community with prejudicial, inflammatory news articles," DE/RC 1-2:5, this hyperbole is based on no evidence, only Movants' argumentative and speculative insistence that payments for journalists to appear on Radio and TV Marti must actually, or also, have underwritten or supported their non-government newspaper stories, contrary to the documentation.

[12] For the sixth person, Estorino, Movants referenced no specific contracts or purchase orders, as noted *supra*.

Both Movants make verbatim identical arguments, DE/LM 5:30-33; DE/RC 1-2:32-36, that journalists were "co-opted" by BBG payments to disseminate United States government propaganda about Cuba domestically, and suggest that this extended to a "media attack" on Movants. Their analysis, however, is but a selective culling from debates among journalists as to the professional ethics of receiving government remuneration, with no grounding in caselaw or legal authority upon which to apply a journalism-ethics debate to federal criminal litigation. Indeed, none of the participants in the journalism debate, and nothing in the Movants' referenced materials, discussed or addressed the issue in the context of Movants' case at all.

Even the journalism-profession debate over the BBG payments, with no contextual reference to Movants' case, was ambiguous. While two reporters at *El Nuevo Herald* who had received BBG payments were fired for violation of The Miami Herald Media Company ethics policies, they were (as Movants note) reinstated. Other BBG-remunerated journalists, at non-Miami Herald Media Company publications, were not fired; as *Diario Las Americas* editorial writer Ferre pointed out, reporters at other publications could not be held to *Miami Herald* ethics standards. *See* Columbia Journalism School Knight Case Studies Initiative: *When the story is us: Miami Herald, Nuevo Herald and Radio Marti* (hereafter "Case Study"), referenced by Movants at DE/LM 5:31-33, DE/RC 1-2:33-36. Fired *El Nuevo Herald* reporter Cancio said he had cleared receiving the BBG remuneration with a prior editor; fired reporter Alfonso's regular work for Radio and TV Marti turned out to have been a known and previously-published circumstance, Case Study at 14. Both were reinstated. Subsequent reporting established that the BBG paid other journalists for appearing on other BBG programming, like Voice of America, unrelated to Cuba. *Id.* at 17 n.23, 18. A later internal review by *The Miami Herald* of its own coverage concluded that the September 8, 2006, story was flawed and overly accusatory in tone.

See Joe Strupp, *Hoyt's Report on Flawed "Miami Herald" Coverage,* Editor & Publisher (Nov. 17, 2006), referenced by Movant Campa at DE/RC 1-2:11.[13] The *Herald* internal review also rejected comparisons that had been made to a 2005 incident in which the Department of Education had paid a talk-show host to promote the government's "No Child Left Behind" policy in mainstream United States media. As the *Herald* review noted, the journalists who appeared on Radio Marti and TV Marti were not paid to broadcast within the United States, and were not paid to promote a particular government policy. *Id.* Yet that type of flawed comparison is exactly the analysis Movants suggest.

Movants' co-optation premise also is illogical. Prior to trial, during trial and on appeal Movants' position was that the south Florida press was pro-government, anti-Cuba, anti-defense and biased against them.[14] The notion that being paid $75 to make an appearance on a Radio

[13] No website reference for this article was provided, but it can be found at http://www.editorandpublisher.com/Article/Hoyt-s-Report-on-Flawed-Miami-Herald-Coverage ,

[14] *See, e.g.,* Movant Campa's opening brief in *Campa 1*, 2003 WL 25245478 at *16 ("distinctly adverse media publicity" contributed to tainting the trial); Appellate Joint Brief of Movant Medina and co-defendants Hernandez, Guerrero and Gonzalez in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial) at 37 ("blistering editorials and news articles throughout trial"); Appellate Brief of Movant Campa in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial) at 39 (40 years of anti-Castro publicity in Miami created hostile atmosphere), 66 (long stream of local-press articles "relentlessly portrayed [Cuba and the Castro regime] as a human rights abuser and international pariah"), 75 (local media greatly re-enforce widespread community view that government of Cuba terrorizes its citizens and belongs on terrorism blacklist; "[h]ardly a day goes by without there being something in the mass media that severely criticizes the Cuban government or otherwise fans anti-Castro sentiments"); co-defendant Gonzalez's opening brief in *Campa 2*, 2005 WL 4638012 at Section IV. 1 [the Westlaw version does not contain full star paging](claim of many prejudicial press matters;"Defense counsel pointed out the one-sided nature of the press coverage"); co-defendant Hernandez's opening brief in *Campa 2*, 2003 WL 2524571 at *38 (Spanish-language newspapers and radio "were constant in galvanizing" opposition to Cuba and its spies); Movant Campa's opening brief in *Campa 2*, 2005 WL 4638011 at *41 ("widespread adverse and editorialized publicity surrounding the case"); co-defendant Gonzalez's reply brief in *Campa 2*, 2006 WL 2252119 at *2-*24 ("disturbing nature and magnitude of media coverage . . . barrage of media coverage was hardly peripheral or objective . . . Media coverage intensified [footnote continued]

Marti program would transform journalists – whom Movants already considered biased – from being objective to being anti-defense propagandists defies their own prior arguments and confounds reason. As reporter Cancio stated for the Case Study, "What I thought about Cuba didn't change because I did some work at Radio Marti." Case Study at 14.

C. Procedural issues: "Cause"

Substantively, then, Movants' claims about BBG payments to journalists do not state a violation of any legal right, or a due-process violation. To the extent that Movants seek to expand their claim beyond the 2006-emerging information to mount a broad and general attack against the BBG, the OCB, Radio Marti and TV Marti and the United States' foreign policy with regard to broadcasting to Cuba, they transgress the "cause" standard. That is, all these matters were

[footnote continued]
passions within the venue by stressing harms to the community as a result of the defendants' activities and the shootdown incident; by characterizing those harms in inflammatory terms as 'murders' and 'terrorism;' and by labeling the perpetrators, identified not only as the defendants, but also as the Cuban government and Castro himself, as guilty beyond doubt. . . . Definitive assertions of the defendants' guilt, as well as that of Cuban government and Castro, thus appeared repeatedly in the press . . . publicity surrounding this case, whether offered as feature, news, or commentary, was presented virtually entirely from an intensely prosecutorial, guilt-assuming, and exile-community perspective, asserting repeatedly – prior to jury deliberations – that the defendants, along with the Cuban government and Castro himself, were guilty beyond doubt . . . numerous articles reporting negative, if not dangerous, consequences arising from a perceived failure to embrace the exile viewpoint, tainted the fairness of the trial.")

The Appellate Joint Brief of Movant Medina and co-defendants Hernandez, Guerrero and Gonzalez in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial) and the Appellate Brief of Movant Campa in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial) do not appear in Westlaw. They are appended here as attachments, respectively Attachments C and D. Again, page references are to the CM/ECF numbering at the top of each page.

It should be borne in mind that the descriptions in the appellate briefs, cited above, of the local press as uniformly and relentlessly partisan and anti-defense, are of the local press generally, not of the six specific journalists Movants focus on in their §2255 motions. This further diminishes the outsized significance Movants now would place on the few journalists who received BBG payments, and also refutes any notion that the Movants believe that the BBG payments turned otherwise fair journalists against them.

known to, or knowable by, Movants at the time of their trial and of their direct appeal. Nothing prevented Movants from launching their broadside against Radio Marti and TV Marti, and the BBG broadcast agenda, on direct appeal. *See Lynn v. United States, supra*, 365 F.3d at 1235 ("to show cause for procedural default, Lynn must show that some objective factor external to the defense prevented Lynn or his counsel from raising his claims on direct appeal"). Thus, when Movants argue that Radio Marti and TV Marti have been criticized for their journalism standards and management protocols, *see* DE/LM 5:30, 31 n.20 ; DE/RC 1-2:32, 33 n.19; or that the BBG engages in foreign propaganda spending $37-million per year[15] to effect regime change in Cuba, *see* DE/LM 5:33; DE/RC 1-2:35; or that Radio Marti and TV Marti have been generally problematic since 1983, as well as ineffective, *see* DE/LM 5:29, 29 n.18; DE/RC 1-2:31, 31 n.17,[16] Movants are in violation of the "cause" procedural bar. Nor can they properly argue that it was only the 2006 *Miami Herald* article about BBG payments to individual south Florida journalists that could have awakened them to these pre-existing issues. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991), teaches that so long as known or discoverable information could have supported a claim, there is not "cause" to omit it (there, from a first federal habeas petition, but the principle also applies to direct appeals preceding a §2255 action, *see Lynn v. United States,*

[15] Movants' use of figures is problematic. Both Movants reference $34,000,000 a year as the measure of the United States' "propaganda" campaign against Cuba, *see* DE/LM 5:4, 31; DE/RC 1-2: 1, 33, and link that amount as being brought to bear against them and their case, *see* DE/LM 5:31; DE/RC 1-2: 1, 33; Movant Campa also speaks of the government spending "a small fortune" on journalists to prejudice him, DE/RC 1-2:3. But of course, the multi-million figure describes not the journalist payments but the entire OCB budget. The actual amount paid to journalists is far less, with payments at VOA per-program standard rates. A few journalists earned more significant sums, due to frequent program appearances, but the record material reflects that these were fees for services performed for Radio Marti and TV Marti.

[16] A typographical problem in Movant Campa's brief at this point incorrectly joins argument text to the quoted statement from Sen. Zorinsky; Movant Medina's brief, at DE/LM 29, using the same verbiage, correctly separates the material.

supra, 365 F.3d at 1235 n.19) merely because additional evidence supporting the claim emerges later:

> If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

McCleskey v. Zant, supra, at 498.[17]

Additionally, the news articles they discuss and others they list in Movant Campa's DE 1-3 also existed and were knowable (literally, published) at the time of trial and of their direct appeal, and there is no "cause" for Movants not to have included them in the many compilations of publicity they brought to the trial court's attention. *See* DE/cr 329, 334, 397, 455, 483, 498, 656, 804, 1009, 1638, 1669 – all defense pleadings that compiled and presented newspaper articles to the court. Indeed, one of the pleadings, DE/cr 329, included, at page 19, one of the very articles also cited now: "*Cae Red de Espionaje de Cuba*, *Arrestan a 10 en Miami"*, El

[17] Even if these issues were not procedurally barred, they lack substantive merit. Notwithstanding Movants' negative view of the BBG and its function with regard to Cuba broadcasting, it operates pursuant to a statutory mandate, the Radio Broadcasting to Cuba Act, 22 U.S.C. 1465 et seq. *See* GAO Report at 6. "Broadcasting to Cuba has been an important part of U.S. foreign policy toward Cuba for more than two decades," *id.* at 41, and while Movants may not agree with that policy, they cannot cite it as a due-process violation. Nor is the BBG's mission regime-change, as Movants claim. Again, the GAO Report is instructive: "The objectives of Radio and TV Martí are to (1) support the right of the Cuban people to seek, receive, and impart information and ideas through any media and regardless of frontiers; (2) be effective in furthering the open communication of information and ideas through the use of radio and television broadcasting to Cuba; (3) serve as a consistently reliable and authoritative source of accurate, objective, and comprehensive news; and (4) provide news, commentary, and other information about events in Cuba and elsewhere to promote the cause of freedom in Cuba," *id.* at 6-7. OCB guidelines proscribe insertion into broadcasts of personal opinion, reporting unsubstantiated information, and incitement to revolt or other violence, *id.* at 26.

Nuevo Herald, Sept. 15, 1998, item 1h. in Movant Campa's Appendix A, DE/RC 1-3:1; *see also* DE/RC 1-2:2. This further demonstrates the availability of this material to Movants years ago.[18]

Because the decade-old news articles are procedurally barred, the government need not address their substance, but will briefly do so, without abandoning or waiving its procedural-bar objection. Generally, the profile of the articles is not significantly different from many that were previously presented, and that the trial and appellate courts determined did not preclude a fair trial for Movants, either due to the articles' tone or as a reflection of supposed community prejudice. Many of the articles Movant references are too distant in time before the trial to pose a risk of prejudicing the entire venire to an extent that could not be cured by the court's model voir dire. *See Campa 2,* 459 F.3d at 1145;[19] *see, e.g.,* articles 4 and 5 at DE/LM 5:15,[20] and articles

[18] Any suggestion that the articles were unattainable without FOIA litigation, *see* DE/CR 1-2:15 (" . . . as the FOIA process has proceeded, and as additional news stories have been uncovered . . ."), is specious. The news articles were published to the world at the time they were written, and have been available in archives and online thereafter.

[19] Affirming the trial court's assessment of the news articles, the Eleventh Circuit said:

> Here, the news materials submitted by the defendants fall far short of the volume, saturation, and invidiousness of news coverage sufficient to presume prejudice. Of the numerous articles submitted, very few related directly to the defendants and their indictments. The articles primarily concerned subjects such as the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter. Of the articles about the Brothers to the Rescue shootdown, most were published approximately one year before the court first ruled on the change of venue motion. Therefore, the few articles that did relate to the defendants and their alleged activities in particular were too factual and too old to be inflammatory or prejudicial. Moreover, the record reflects that not a single juror who deliberated on this case indicated that he or she was in any way influenced by news coverage of the case. Nor does the record reflect that any one of them had formed an opinion about the guilt or innocence of the defendants before the trial began. In fact, most of the venire revealed that they were either entirely unaware of the case, or had only a vague recollection of it. "To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely

[footnote continued]

1a-1t, 3a-c, 4a, 6a-h, 7a-c at DE/RC 1-3. Other articles are, like some assessed by the trial court previously and by *Campa 2*, not related directly to the defendants and their indictments. *See* DE/RC 1-3 article 1o (about upcoming seminar reviewing the Cuban Missile Crisis, and referring to 1963 consultations between Fidel Castro and Nikita Khruschev on how to set up a spy-penetration system), 6d (about Wall Street Journal editorial seeking arrest of Castro in parallel to arrest of Chilean General Pinochet while traveling abroad). While Movants may consider that articles reflecting generally on Castro and the government of Cuba support their claims of an unfair trial, *Campa 2* expressly addressed, and rejected, that argument. *See* 459 F.3d. at 1144. [21] Other articles are non-inflammatory, factual accounts of trial proceedings. *See* DE/CR 1-3, article 2b (summarizing closing statement by Movant Campa's counsel, with brief mention, at end, of prosecutor's closing statement), article 2e (factual account of case going to jury, quoting trial judge's remarks and jury instructions). One such article, DE/CR 1-3, article 2a (reporting lawyer arguments at trial, outside presence of jury, concerning prospect of further depositions in Cuba), receives particular criticism by Movants, *see* DE/LM 5:16, DE/CR 1-2:7,

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[footnote continued]
prominent." Accordingly, the defendants have failed to demonstrate that this trial was "utterly corrupted by press coverage."

Campa 2, 459 F.3d at 1145 (footnotes, citations omitted)

[20] Movant Medina cites and addresses nine articles at DE/LM 5:14-17. Eight of the nine are also listed on Movant Campa's DE/RC 1-3, and will not be duplicatively discussed. The remaining article, number 8 at DE/LM 5:15, is said to be an item written by Jose Basulto, and therefore would have nothing to do with Movants' claims about journalists paid by the BBG. The cited Basulto article is said to have been written in May, 2000, months before the court imposed its gag order on trial witnesses.

[21] "Prejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged. In fact, we are not aware of any case in which any court has ever held that prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant." 459 F.3d at 1144 (footnotes omitted).

for reporting on events that the jury was not privy to. However, the reported-on discussion occurred in open court, *see* DE/cr 1560:11726-11753; the press was not barred; and Movants do not claim that other reporters unconnected to BBG payments did not similarly report court proceedings that occurred when the jury was not present. Movant Medina also argues that this news article occurred six days after the court cautioned about media reporting on information the jury is not privy to, DE/LM 5:16, but no citation is provided. Certainly the court never stated or ruled that the press could not report matters occurring in open court. Indeed, such a ruling could have run afoul of the First Amendment and of the Sixth Amendment requirement that criminal trials be public.

Finally, with regard to the "cause" procedural bar, the record reflects that the defense, and the individual defendants, were keenly aware of Radio Marti and TV Marti and its arguable adversity to them. Among the taskings to the defendants from the Cuban Directorate of Intelligence was observation and surveillance of TV Marti's aerostat balloon transmitter at Cudjoe Key. *See* DG-108 (directive to defendant Hernandez on "urgent task" to acquire information on balloon, transmitting equipment, transmission schedule, how signal will be directed, all toward the goal of preparing mechanisms "that will allow the neutralization of the enemy's signal"); *see also* DE/cr 1487:3229; 1489:3495; 1580:13966-13967; 1582:14269 (testimony and closing arguments about co-conspirators surveilling, photographing TV Marti blimp; government of Cuba concern about TV Marti upgrade); DC-102, DE/cr 1497:4604-4605, 1562:11946-11948 (tasking for defendant Gonzalez as to "active measure" *Tejedor*, to sow dissension between leaders of Radio and TV Marti and conservative members of the Cuban American National Foundation in Miami). Radio and TV Marti were the subject of frequent mention and testimony at the trial. *See, e.g.,* opening statement by Hernandez counsel, DE/cr

1476:1617, and testimony elicited by Hernandez counsel, including colloquy and cross-examination, DE/cr 1504:5786-5790; 1518:6081-6095; 1534:8377-8385; 1536:8662-8665; 1537:8764-8766; 1540:9001-9005; 1541:9032-9057; 1542:9228-9236; 1545:9685-9686, concerning witness Basulto's interview on Radio Marti's "*En Vivo*" show. Counsel for Movant Campa also elicited testimony about Radio Marti. *See* DE/cr 1518:6125-6130 (testimony from Cuban dissident Morejon about appearing telephonically on Radio Marti). The court and counsel discussed Radio and TV Marti covering the ongoing trial. *See* DE/cr 1492:3839-3840 (Radio Marti requested transcripts), 1585:14646-14647 (TV Marti cameras). Indeed, both Movants voiced some complaints about Radio and TV Marti in their appeals. *See* Appellate Joint Brief of Movant Medina and co-defendants Hernandez, Guerrero and Gonzalez in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial), Attachment C, at 37 ("dogged following of jurors by Spanish language media (including government-sponsored Radio Marti")). *See also* Appellate Brief of Movant Campa in *Campa 1* (consolidated Case No. 03-110-87, appeal from denial of motion for new trial), Attachment D, at 65 (jurors filmed by camera crews of Channel 23 and Radio Marti, "two vehemently anti-Castro Spanish language news organizations"). The adversity of Movants to Radio Marti and TV Marti was well known at the time of trial and the direct appeal. In the face of this record, Movants cannot show "cause" to have delayed claims about Radio and TV Marti, and the OCB's supposed "propaganda" program until years after their appeals. Even the premise that Movants were prevented by externalities from knowing the additional fact that some Radio and TV Marti commentators and program participants also were local journalists is questionable. As the *Miami Herald* article they rely on noted of Movants' employer, *see* Attachment A, "The government of Cuba has long contended that some South Florida Spanish-language journalists were on the federal payroll."

Even if Movants had cause not to have discovered the payments to the six journalists until after the *Miami Herald* 2006 article, that information does not bear the enormous and unique significance Movants freight it with. Rather, it would be at most "evidence discovered later [that] might also have supported or strengthened" claims either actually made, or capable of having been made, at trial and on direct appeal, which, as *McCleskey v. Zant* teaches, is impermissible as a basis for collateral relief, 467 U.S. at 498. Indeed, Movants use their claim in just that way, as a motion to reconsider the change-of-venue issues that have already been extensively litigated. For instance, Movants argue, DE/LM 5:10-11, 21; DE/RC 1-2:13-14, that the jurors were harassed and frightened by demonstrations and by a media blitz. They argued similarly on appeal, *see* 2003 WL 25245480 at *35-*36; 2003 WL 25245464 at *3; 2005 WL 4638012 at Section IV (1) [no star pagination]; 2006 WL 2252119 at *7, *13-*14; Attachment C at 37, 70; Attachment D at 64-65.[22] The Eleventh Circuit rejected the argument, finding that the trial court "maintained strict control over the proceedings by employing various curative measures to insulate the jury from any outside influence, from the beginning of the trial, , , , The court fiercely guarded the jury from outside intrusions . . . The court took extra steps to insulate the jurors during their deliberations." *Campa 2,* 459 F.3d at 1149. Movants do not, and cannot, explain how or why the fact that the BBG paid a handful of journalists to be panelists on Radio Marti and TV Marti shows would change the appellate court's analysis, or would undo the trial court's careful and successful measures to protect the jury.

[22] Some of these appellate briefs were filed by Movants' co-defendants; however, they co-adopted one another's briefs. *See* 2003 WL 25245479 at *viii - *ix (Movant Medina adopts co-defendants' briefs); 2003 WL 25245478 at *xvi - *xvii (Movant Campa adopts co-defendants' briefs).

D. Procedural issues: Prejudice

Indeed, as discussed *supra*, Movants' inability to show prejudice from the BBG payments, as required by *Frady*, is fatal to their claim. "To establish prejudice, a petitioner 'must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions,'" *Glass v. Williams*, 2009 WL 975366, **1 (11th Cir. 2009), quoting *Frady*. But here there were no errors at Movants' trial, as the Eleventh Circuit found, particularly in the realm on which Movants would re-focus: the fairness, lack of bias and taint, and impartiality of the jury. Nor do Movants show how the fact that the BBG paid journalists to appear on Radio Marti and TV Marti programs directed for broadcast toward Cuba worked to their "*actual* and substantial disadvantage," infecting their entire trial with error. Indeed, Movant does not even claim error by the court, but rather that counsel would have done certain things differently, had they known of the BBG payments. For instance, Movants state, DE/LM 5:21, DE/RC 1-2:8, 22-24, that had they known of the BBG payments, they would have moved to sequester the jury. But speculating over what they might have done differently[23] is not the same as establishing prejudice, and they make no articulation of how they were prejudiced by not having a sequestered jury. There is no evidence, or basis to believe, that the unsequestered jury was tampered with or tainted, and *Campa 2* concluded that the trial court properly and

[23] Movants may be adverting to standards for ineffective assistance of counsel, which can widen the scope of issues considered in a §2255 petition. As discussed *infra*, Movants' claims that not knowing about the BBG payments rendered them ineffective as counsel are legally unsound. Even when ineffective assistance of counsel is a procedurally appropriate claim, it is not a vehicle merely to project hindsight scenarios, in the absence of prejudice. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (*en banc*) ("The widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight – except perhaps the rule that we will not judge trial counsel's performance through hindsight.").

sufficiently protected the jury from intrusion and instructed them about not reading or listening to media accounts, with nothing to suggest violation of that instruction. Movants' hypothesis that the trial court might have sequestered the jury, or even granted Movants' change-of-venue request, based on the BBG payments is not only illogical,[24] it is also irrelevant: As the court of appeals found, Movants got a fair trial with the unsequestered jury. Movants suffered no prejudice and they are entitled to no relief. *See, e.g., United States v. Entrekin*, 508 F.2d 1328, 1330 (8th Cir. 1974)(§2255 relief properly denied, notwithstanding claim of prejudicial pretrial publicity, where trial court recognized the possibility of prejudice and carefully screened prospective jurors to obtain impartial venire). One who has had a fair trial is not entitled to a new trial.

E. Claim of structural error

Tacitly conceding their inability to show *Frady* prejudice, Movants never cite the case nor try to match their arguments to its standard. Instead, they either proclaim, with no analysis, that there was prejudice, *see* DE/LM 5:9 n.1, or argue that this is one of the very rare cases where prejudice need not be shown because they were deprived of due process in a manner qualifying as structural error, DE/RC 1-2:14. A structural error is "a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *Johnson v. United States*, 520 U.S. 461, 468 (1997). It applies "only in a very limited class of cases," *id.*, none of

[24] It is illogical not only to conjecture that the court might have granted sequestration, or changed venue, on such a slim reed, but also because there is no logical nexus between the BBG payments and the venire and jury circumstances the court was asked to assess. That is, even under Movants' most lurid speculations that somehow the BBG payments shaped the news media that reached the venue, the news stories and articles are a historical artifact, known and knowable to Movants at the time of their trial, regardless of their genesis. How news media impacted the venue is unchanged by Movants' speculation of BBG influence. If the jury was not tainted and Movants were not prejudiced by the media accounts, the funding source behind the media accounts could not have altered that fact.

them remotely like Movants'. Because the cases are so rare, they can be catalogued, and Judge Carnes made such a catalogue in *United States v. Rodriguez*, 406 F.3d 1261, 1268-1269 (11th 2005)(Carnes, J., concurring), drawn from and building upon *Arizona v. Fulminante*, 499 U.S. 279 (1991). Without repeating the catalogue, we note that all involve some grave defect in the judicial proceeding itself, such as deprivation of right to counsel, racially invidious exclusion of grand jurors, seriously incorrect critical jury instruction, admission of evidence obtained in violation of the Fourth Amendment. Here, by contrast, Movants rely for their claim on action by an entity, the BBG, far removed from the judicial proceeding, with no discernible nexus to the proceeding. Even under Movants' conjured theory – that the BBG payments either deliberately or incidentally influenced what a handful of journalists published apart from their Radio/TV Marti work – there still is no arguable nexus to the proceedings different from the one that *Campa 2* already considered, that is, whether the venue was presumptively prejudiced, and whether the jury was properly and fairly selected, instructed and insulated from outside intrusions and publicity.

Movant Campa cites three cases in support of his "structural error" argument, DE/RC 1-2:14. In *Estes v. Texas*, 381 U.S. 532, 578 (1965), the defendant was denied due process where court proceedings were conducted in a "carnival atmosphere," with the courtroom a mass of wires, TV cameras, microphones and photographers, with cables snaking across the courtroom and press microphones on the judge's bench, beamed at the jury box and at counsel's table. *Campa 2* expressly considered *Estes* and found that Movant's trial "'comported with the highest standards of fairness and professionalism'" and "was nothing like" *Estes*. *Campa 2*, 459 F.3d at 1149. Movant also cites *Caperton v. A.T. Massey Coal, Co.*, 129 S.Ct. 2252 (2009) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), but those also are distinguishable as involving defects in the

judicial mechanism itself. Further, structural error requires much more than nexus and is reserved for rare and extraordinary cases, as Judge Carnes points out. *Sullivan* involved an egregiously, and concededly, bad jury instruction; *Caperton* involved a judge who had received millions of dollars in campaign contributions from a litigant's principal and did not recuse when he should have. Movant Campa faults the government's analysis of *Caperton*, likely replying to the government's response to a similar argument and citation by Movant's co-defendant Hernandez in *Gerardo Hernandez v. United States,* Case No. 10-21957-cv-LENARD.[25] Movant Campa is incorrect; the government correctly noted that in *Caperton* there was a direct nexus between the claimed defect – judge failed to recuse – and the judicial proceeding over which the judge presided (on appeal), whereas here there is no nexus between Movants' trial and the BBG paying journalists to appear on Radio Marti and TV Marti. *Caperton* was decided after Judge Carnes made his catalogue in *United States v. [Vladimir] Rodriguez, supra*, but the Eleventh Circuit had occasion to note in a later case, *United States v. [Alicia] Rodriguez*, 627 F.3d 1372, 1382 (11th Cir. 2010), that the Supreme Court's holding in *Caperton* was narrow, based on the extreme facts of that case where the presiding judge had received a multi-million dollar campaign contribution from a litigant, and that the Supreme Court "limited its holding to the 'extraordinary situation' where the 'probability of actual [judicial] bias rises to an unconstitutional level." *Caperton* also had a unique circumstance not present here: There, the judge's studied conclusion that he was not actually biased is subjective, "not one that the law can easily superintend or review," 129 S.Ct. at 2263. Here, by contrast, the value at issue – whether

[25] The government responded to Hernandez's similar claim about BBG payments to journalists, at Docket Entry 28, pages 93-100, in *Gerardo Hernandez v. United States,* Case No. 10-21957-cv-LENARD. The government respectfully refers the court to that response as to Movants' claims as well, and incorporates here by reference its arguments stated there.

Movants had a fair trial, before a fair jury – can be, and indeed has been, superintended and reviewed, and found to pass muster, by the Eleventh Circuit in *Campa 2*.

Finally, with regard to Movant Campa's structural-error argument, he omits to cite another case that was cited by co-defendant Hernandez: *Smith v. Phillips*, 455 U.S. 209 (1982). In *Smith* the Supreme Court *reversed* habeas relief that had been granted on the premise that a juror who had applied for a job at the prosecutor's office must be presumed biased. Reversing, the Supreme Court noted "that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." 455 U.S. at 217. Yet Movant would set the bar even lower, demanding a new trial where there is no fact-specific basis to presume juror bias, as there was in *Smith*, and where the Eleventh Circuit has already determined that there was no juror bias. Nor do Movants cite any case where structural error has been applied in the context of a §2255 petition, with its *Frady* requirement of *actual* prejudice.

F. Brady claim

Movants also argue that the prosecution was required to disclose to them the BBG payments to journalists, citing *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *Strickler v. Greene*, 527 U.S. 263 (1999). Their claim is incorrect.

There are three essential elements to a *Brady* claim: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to either guilt or punishment. *Murphy v. Johnson*, 205 F.3d 809, 814 n.2 (5th Cir. 2000); s*ee also Strickler v. Greene*, 527 U.S. 263, 281 (1999);[26] *Johnson v. Alabama*, 256 F.3d 1156, 1189 (11th

[26] *Strickler*'s wording is different, but the three elements are the same: "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been [footnote continued]

Cir. 2001). Materiality, for *Brady* purposes, equates to prejudice: "To demonstrate prejudice, the petitioner must . . . convince us that there is a reasonable probability that the result of the trial would have been different if the [allegedly suppressed items] had been disclosed to the defense. In other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *High v. Head*, 209 F.3d 1257, 1267 (11th Cir. 2000) (citations and internal quotation marks omitted).

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

i. First *Brady* element: suppression

As for the suppression prong, where the prosecution does not possess information, there is no suppression and the prong is not met. Here, the Movants claim that information about the BBG payments to journalists was held by the BBG. Movants do not claim, in any but the most

[footnote continued]
suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-282.

vaguely indirect way, that the prosecutors or the prosecution team had this information or knew about the BBG's payments.[27] While a prosecutor's duty to disclose goes beyond the prosecutor's personal awareness of government possession of information, that duty, and the imputation of knowledge to the prosecutor, does not extend limitlessly to all reaches of the government, as Movants suggest or imply. *See* DE/LM 5:19 n. 5; DE/RC 5:7-8, 21 n.6. Rather, "*Brady* and its progeny apply to evidence possessed by a [federal] district's 'prosecution team,' which includes both investigative and prosecutorial personnel. *Brady*, then, applies only to information possessed by the prosecutor or anyone over whom he has authority." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989). *Meros* predates *Kyles v. Whitley*, 514 U.S. 419 (1995), but *Kyles* is not to the contrary, holding that a prosecutor "has a duty to learn of any favorable evidence known to the others *acting on the government's behalf in the case*, including the police," *id.* at 438 (emphasis added). Movants cite *Kyles*, including to this passage, *see* DE/LM 5:19 n.5; DE/RC 1-2:8, 21 n.6, but still argue for a government-wide sweep of information to be imputed to the prosecutor, essentially reading the emphasized words out of the case.

Post-*Kyles*, the Eleventh Circuit has continued to articulate and rely on the concept of limiting the prosecution's disclosure duty to information known or possessed by the prosecution team working on the criminal case. *See Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002). *Meros*'s statement that *Brady* applies only to information possessed by the prosecutor or anyone over whom he has authority continues to be relied on and cited by the Eleventh Circuit. *See, e.g.,*

[27] Although Movant Campa says, at DE/RC 1-2:3, that the Executive Branch of the federal government prosecuted him while simultaneously paying journalists, and that "[t]he prosecution never disclosed this fact, even as it opposed" the change-of-venue motion, he never directly claims that the prosecution knew the fact of the BBG payments. Movant Medina speaks of "the government's concealment of its activities," DE/LM 5:13, but, significantly, without specifying the prosecution team; *see also id.* at 19, 20 ("there is no doubt the government – the very party to the underlying criminal case – engaged in fraud on the court").

United States v. Naranjo, 634 F.3d 1198, 1212 (11th Cir. 2011). Movants' reliance on *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1989), is also misplaced; subsequent cases in both the Fifth and Eleventh Circuits recognize that *Martinez* does not expand the duty to know and disclose information limitlessly throughout the government. *See, e.g., United States v. Webster*, 392 F.3d 787, 798 n.20 (5th Cir. 2004)(citing *Martinez v. Wainwright*, but also noting that "there are limits on the imputation of knowledge from one arm of the government to prosecutors"); *Parker v. Allen*, 565 F3d 1258, 1277 (11th Cir. 2009)(citing *Martinez v. Wright*, but qualifying it and finding no *Brady* violation in non-disclosure of information held by another arm of government).

Indeed, *Moon v. Head* favorably noted other cases, chiefly in the Second Circuit, that make the point that a government-wide duty of knowledge and disclosure was neither required nor feasible. *See* 285 F.3d at 1309-1310, quoting *United States v. Avellino*, 136 F.3d 249, 255 (2nd Cir. 1998):

> [K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt "a monolithic view of government" that would "condemn the prosecution of criminal cases to a state of paralysis."

See also United States v. Quinn, 445 F.2d 940, 944 (2d Cir. 1971)(refusing to impute the knowledge of a Florida prosecutor to an AUSA in New York, and rejecting as "completely untenable [the] position that 'knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor'"). *Sutton v. Bell*, 2011 WL 1225891 (E.D. TN. 2011) also made this point, and cited these cases. *Id.* at *14-*15. It also pointed out that the rare cases where courts have imputed to the prosecution information from outside the team's files "usually concern conducting criminal background checks on the government's key cooperating witnesses." *Id.* at *14. Even cases where courts *refuse* to impute knowledge involve information

about trial witnesses, as in *Sutton*, *Moon v. Head*, *Quinn*, *Parker v. Allen* and others. *See also United States v. Morris*, 80 F.3d 1151, 1168-1169 (7th Cir. 1996)(refusing to impute to prosecutor knowledge, and duty to disclose, potentially exculpatory information possessed by other federal agencies independently investigating similar or related matter); *United States v. Webster, supra*, 392 F.3d at 798 n.20 (concluding that prosecutors did not constructively possess, or imputedly know, arguable impeachment material from prior Department of Justice civil litigation).

Movants, by contrast, posit constructive possession, and a duty to disclose, far vaster than anything in those cases: that is, that the prosecution was required to inquire of the entire federal government for anything that any federal entity was doing that might touch on their case. Further, Movants would extend that duty beyond just factual information about their charges to even the very attenuated connection they seek to make that the BBG's and OCB's engaging participants for Radio Marti and TV Marti programs impacted Movants' prosecution. This is a position even more "completely untenable" than what *Quinn* or the other cases projected.

The BBG is an independent federal agency, GAO Report at 7. The Office of Cuba Broadcasting is overseen by the BBG, the BBG's International Broadcasting Bureau and the Department of State Office of Inspector General. GAO Report at inside cover, 36-38. They are in no way part of the Department of Justice, and their mission is not law enforcement. Movants do not claim, and provide no substantiation, that the BBG was part of the prosecution team or the criminal investigation or prosecution. Under all the applicable caselaw, the BBG's materials and information are not imputable to the knowledge of the prosecution.[28] The first prong of the

[28] Similarly, the supposed failings of the BBG, implied in Movants' arguments about the Smith-Mundt Act and Sen. Zorinsky's remarks on the proscription against domestic propaganda, would not be imputable to the prosecution, even if Movants could make out their very shaky claim of
[footnote continued]

Brady standards – suppression by the prosecution of information in their actual or constructive possession – is not met.

Movants' arguments that the prosecutors perpetrated a fraud on the court, and that the government violated Local Rules and the trial court's gag orders through the BBG payments, also fail for the same reason, and based on the same precedents, as inform the "prosecution team" concept: Knowledge of those payments cannot be imputed to the prosecution team, and the prosecutors had no duty to learn of or seek out such far-flung information not possessed by the prosecution team.

The court imposed two different types of gag order in this case, one at the request of the government and one at the request of the defense. In October 1998 the government sought enforcement of Local Rule 77.2 controlling attorneys' extrajudicial statements to the press, after a defense attorney's repeated extrajudicial press comments, including describing co-operating co-defendants as "rats" coming to collect government-offered "cheese." DE/cr 118. The court granted the motion, DE/cr 122. On the first day of trial, the court noted that relatives of the Brothers to the Rescue shootdown victims had been talking to the press, leading to discussion of the extent of the extant gag order and of the witness-sequestration rule. *See* DE/cr 1469:111-121; *see also* DE/cr 1470:194. Defense counsel requested that the existing gag order be broadened to apply to prospective witnesses as well, precluding them from commenting on the trial to the

[footnote continued]
BBG impropriety. Movants' point seems to be that simply by engaging, and paying, journalists to participate in OCB programming, the BBG violates the Smith-Mundt Act and engages in prohibited domestic propaganda. Movants offer no legal support for this proposition. As Movants' own materials make clear, the BBG continues to engage journalists for BBG broadcasting, and has done so for years, including for non-OCB programs like the Voice of America. *See* Case Study at 17 n.23. Further, even if Movants' farfetched theory of violation were sound, it would not have impacted or prejudiced Movants' trial.

press. The court granted this request and announced such an order and directed the attorneys to so instruct their witnesses. *See* DE/cr 117-119.[29]

Movants do not establish a violation of either order. They produce no press articles in violation of it nor any extrajudicial press statements by a government witness or by a prosecutor or other member of the prosecution team.[30] Movants focus on trial litigation over whether a prospective defense witness, Richard Nuccio, had violated the order, *see* DE/cr 818, 820, but do not acknowledge that the court's gag order was, properly, limited to statements by witnesses and trial participants, and did not extend to gagging the press itself. Movant Medina argues again, as he did at trial, *see* DE/cr 820:4, that the prosecution exploited its pleading about Nuccio to channel information to the press. But the prosecution made no extrajudicial statement, and Movant Medina's claim was fully known to him at trial and could have been raised by him on appeal; as a §2255 claim it cannot clear the *Frady* "cause" hurdle. Movant Medina also claims that the government's statement, in its pleading, that extrajudicial witness statements pose a "risk" amounts to a concession that supports Movants' claims about the BBG payments, DE/LM 5:8. This is not correct. The government was referring, explicitly, to extrajudicial statements "by persons who are designated witnessed in this matter," DE/cr 818:3. Further, mere recognition by the government of a risk that should be prudently avoided is no more a concession of a violation than the court's extensive measures to insulate and instruct the jury away from media accounts amount to a concession that there was a violative taint.

[29] The transcript has the court saying "I *suspect* all of the attorneys will instruct their witnesses they are not to talk to each other or to the media," DE/cr 1469:119 (emphasis added), but clearly the court's actual word was "expect."

[30] Of course, any news articles produced at this late date, more than 10 years after the trial, would fail *Frady*'s "cause" test.

Any effort by Movants to convert the court's orders in this case to a broad injunction against every federal agency's actions, outside the scope and authority of, and unknown to, the prosecution team, does not square with the law. In addition to the extensive caselaw, cited *supra*, defining and delimiting the responsibilities of the prosecution team, *see also Wyler v. Korean Air Lines Company, Ltd.*, 928 F.2d 1167, 1171 (D.C. Cir. 1991)("One federal agency 'should not be charged with knowledge of what another is doing simply because both are components of the same federal government.'"); *United States v. Weinsten*, 1998 WL 3381, *6 (E.D.N.Y. 1998)(citing and quoting *Wyler* in criminal-case context). Having received the court's orders, the prosecution was required to obey it and to ensure that all members of the prosecution team obeyed it; Movants cite no authority that the prosecution's duty extended to providing notice of the order limitlessly throughout the federal government.

In any event, Movants do not show that any government entity violated the court's order, whether served with it or not. As described at length above, the BBG's payments to journalists were for participation in Radio Marti and Television Marti programming aimed at Cuba. If Movants' complaint is that the very operation of Radio Marti and TV Marti affronted the court's order, Movants were well aware of those operations at the time of the trial, as set forth extensively above, and could have made that claim then, when the court could have addressed it; Movants also could have raised it on direct appeal. If Movants' complaint is that the BBG payments to journalists seeped into and influenced the journalists' south Florida non-government publications, that conjecture is, as discussed above, without foundation, and contradicted by Movants' materials, which show payment for participation in Radio Marti and TV Marti programming.

ii. Second *Brady* element: favorability to the defense

The second *Brady* prong is that the information at issue is favorable to the defense or, as *Strickler v. Greene,* 527 U.S. at 281-282, put it, "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching." Here, the information about BBG payments to journalists is neither exculpatory nor impeaching. While Movants claim that it is favorable to their legal arguments for a change of venue, they provide no authority that would expand the *Brady* standard to encompass information that has no relationship to the factual guilt or innocence of a defendant, or to impeachment of a witness. Production of information that is not expressly exculpatory, but possibly might be favorable to the defendant by inferential reasoning, is beyond the scope of *Brady*. *See, e.g., United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("The Government has no obligation to disclose possible theories of the defense to a defendant. If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense. To hold otherwise would impose an insuperable burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning. We are confident that the Supreme Court did not intend the *Brady* holding to sweep so broadly"). In any event, as discussed above, the existence of BBG payments to journalists does not advance the Movants' interests and is not "favorable" to their claims.

iii. Third *Brady* element: materiality

Movants also cannot meet the third *Brady* prong, materiality. *Kyles v. Whitley, supra*, sets forth the standard, construing *United States v. Bagley,* 473 U.S. 667:

> *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . *Bagley*'s touchstone of

> materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley, 514 U.S. at 433-453 (citations and paragraph breaks omitted). Since none of the information at issue here is evidence relating to Movants' guilt or innocence, or witness-impeachment, it would seem to be excluded *per se* from being material. Even if there is not a *per se* exclusion, the information about BBG payments to journalists cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." The information would have had no impact on the jury, as it was not admissible evidence and never would have been presented in court. The prospect that the information would have added to the Movants' arguments for change of venue, or for, as they claim, jury sequestration, does not undermine confidence in the verdict, where the Court of Appeals has concluded that the trial was conducted in an exemplary fashion, and that the jury was unbiased and was properly selected, insulated, and instructed. It comes back to the point that Movants cannot establish prejudice, and indeed "prejudice" is but another way of stating the materiality prong of *Brady. See Strickler v. Greene,* 527 U.S. 281-282, which restates the third (materiality) *Brady* prong as "that prejudice must have ensued." *See also Banks v. Dretke*, 540 U.S. 668, 691 (2004), recognizing the parallel between prejudice and *Brady*'s materiality standard.[31]

[31] Nor is "confidence" in the verdict to be measured by critiques of persons and entities external to judicial review, such as former President Carter, the UN Working Group on Arbitrary Detention, and the National Committee to Free the Cuban Five, referenced by Movants. This [footnote continued]

The government does not concede that information about the BBG payments to journalists would have helped Movants advance – let alone win – their change of venue argument. Further, since Movants received a fair trial even without the change of venue they sought, the information is immaterial for *Brady* purposes. But even if it would have been "helpful" to their argument, that is not the measure of *Brady* materiality. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 (1976); *see also Kyles v. Whitley,* 514 U.S. at 436-437: "[T]he Constitution is not violated every time the government fails or chooses not to disclosure evidence that might prove helpful to the defense." It is noteworthy that *Bagley* was itself a case that reversed a Ninth Circuit decision that dispensed with a showing of (prejudice) materiality where the government had suppressed impeachment information. Quoting *Giglio v. United States,* 405 U.S. 150 (1972), *Bagley* said, 473 U.S. at 677, "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .' A finding of materiality of the evidence is required under *Brady."* Movants would go even further than the rejected Ninth Circuit approach, and make such a rule of relief for a combing, years later, of the records of the entire United States government, not just the prosecutor. This is contrary to common sense, and contrary to long-established Supreme Court caselaw. Movants' claims that the prosecution violated its disclosure duties should be rejected.

[footnote continued]
case has generated proponents on both sides, and "confidence in the verdict" is not assessed by referendum among partisans, but by objective judicial review, based on the court record.

G. Claim that counsel were rendered ineffective

In their quest to articulate a due process violation, Movants' counsel (each of whom also represented these respective Movants at trial) claim that non-disclosure to them of the BBG payment information caused them to be ineffective in representing their clients, in violation of the Sixth Amendment. Since there was no duty for the prosecution to make disclosure of this information, Movants' claim in this regard could be denied simply on that basis. Nonetheless, and without waiving the point, we will address the claim further.

Movants' contentions are an inappropriate assertion of the ineffective-assistance-of-counsel doctrine of *Strickland v. Washington*, 466 U.S. 668 (1984). That doctrine recognizes that every defendant is entitled to be represented by counsel operating at or above a constitutional minimum of competence. It is a test of attorney competence, based on evaluation of "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Only those habeas petitioners who can show that they have been denied a fair trial "by the gross incompetence of their attorneys" are eligible for relief. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Here Movants' counsel claim not that they were incompetent, nor that their performance was deficient from the standpoint of what they knew at the time of the trial, but that they were thwarted from representing Movants effectively due to not being told the BBG-payment information. This flouts *Strickland*'s directive "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," *Strickland v. Washington*, 466 U.S. at 689. To be sure, if the prosecution improperly fails to disclose required information, there may be recourse for a defendant; that is what *Brady v. Maryland, supra*, 373 U.S. 83, and its progeny are all about. But as the government already has shown, Movants cannot meet the established tests for a *Brady*

claim, and they may not avoid those tests by repackaging their claim as *Strickland* ineffective assistance of counsel, which is meant to assess attorney performance based on the events as of the time of the attorney conduct.

Indeed, there is mutual exclusivity between a *Brady* claim and a claim of *Strickland* ineffective assistance of counsel, in this regard. Then-Judge Alito illuminated this in *United States v. DeRewal*, 10 F.3d 100, 104 (3d Cir. 1993), explaining that claims of newly-discovered evidence and of ineffective assistance of counsel for failing to discover that evidence are "mutually exclusive," because "newly discovered evidence must be evidence that trial counsel *could not have discovered* with due diligence before trial" (emphasis added). *See also United States. v. Miranda*, 951 F. Supp. 368, 371 (E.D.N.Y. 1996) (claim that attorney failed to call co-defendants to testify inconsistent with claim that co-defendants' statements are newly discovered). The point is equally applicable in a *Brady* context as well as in a newly-discovered-evidence context:[32] Movants' claim that the government had a duty to disclose the BBG payment

[32] Movant Campa's §2255 form motion, DE/CR 1, refers to his §2255 claim as "Newly discovered evidence," *see* DE/CR 1:4 GROUND ONE (b)(2), although he does not argue it that way in his supporting memorandum, DE/CR 1-2. Movants' claim as to the BBG information fails to pass muster as a *Brady* claim, and, with no support from the *Brady* doctrine, essentially amounts to, and may be construed as, a motion for new trial based on newly discovered evidence. *See Mankarious v. United States,* 282 F.3d 940 (7th Cir. 2002)(claim, styled as §2255 motion, analyzed as, and subject to rules of, Fed. R. Crim. P. Rule 33 motion for new trial based on newly discovered evidence).

As such, the claim fails. The claim could not meet the five-part test for newly discovered evidence; *see United States v. Schlei*, 122 F.3d 944, 991 (11th Cir. 1997). Further, the claim of newly discovered evidence is time-barred. *See* Fed.R.Crim.P. 33(b)(1) (motion for new trial based on newly discovered evidence must be filed within three years of verdict or finding of guilt). That Movants' §2255 motions were timely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *see* 28 U.S.C. §2255(f), does not extend the time limits of Fed.R.Crim.P. 33. *See Mankarious v. United States,* 282 F.3d at 945. ("[D]efendants, as we know, may not use §2255 to circumvent Rule 33's time limit.") *See also United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000); *Frias v. United States,* 2010 WL 3564866, *6 (S.D.N.Y. 2010) (newly-discovered evidence claim made in §2255 motion subject to Rule 33's three-year
[footnote continued]

information necessarily includes and subsumes a claim that they and their counsel could not have discovered the information themselves with due diligence, *see West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *United States v. McMahon*, 715 F.2d 498, 501 (11th Cir. 1983) (no *Brady* obligation to furnish information defendant already has or can obtain himself with reasonable diligence), in which case they were not ineffective and incompetent for failing to argue based on the information. Movants cite *Gonzazlez-Soberal v. United States*, 244 F.3d 273 (1st Cir. 2001), but there the appellants had, but relinquished at oral argument, an alternative *Brady* claim, *id.* at 274 n. 1, eliminating the logical dissonance that afflicts Movants' position.

Stated another way, Movants cannot show deficient performance of counsel – one of *Strickland*'s two required prongs – based on the events as of the time, and under the then-known circumstances, of their conduct at trial.

Nonetheless, and without waiving any procedural objection to Movants' ineffective-assistance-of-counsel claims, we will briefly respond to those claims. Movants claim four ways in which they say that their counsel were rendered ineffective: in arguing for change of venue; in not seeking sanctions based on the BBG payment information; in not moving to sequester the jury; and in not arguing due-process violations. *See* DE/LM 5:18-23; DE/RC 1-2:20-25. The jury-sequestration issue has already been addressed, *supra*. As for not having the BBG-payment argument to add to their arguments for change of venue, Movants do not even try to, and cannot, establish *Strickland* prejudice, as required for an ineffective-assistance-of-counsel claim. "The

[footnote continued]
limit). Rule 33(b)(1) constitutes a nonjurisdictional rule for processing claims, whose inflexible bar and three-year deadline cannot be avoided if invoked by the government, as we do here. *See Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam). Whether characterized as a Rule 33 motion or as a §2255 action, the claim by Movants of newly discovered evidence comes too late.

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This test is essentially the same as the third prong of *Brady*, the materiality test. *See id*, 466 U.S. at 694: "[T]he appropriate test for [*Strickland*] prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . ." As discussed extensively above, the information at issue here does not meet the *Brady* materiality test, and therefore counsel's not having argued it does not meet the *Strickland* prejudice test either. In addition, Movants cannot show that it is likely, let alone reasonably probable, that the court would have made a different ruling with regard to Movants' change-of-venue motion by counsel adding argument about the BBG payments to the plentiful other arguments they made, including claims of pervasive, decades-long community prejudice; a wave of prejudicial publicity; and the community-attitudes survey of Dr. Moran.

As for not seeking sanctions, Movants do not show that they had a meritorious sanctions claim, and so there is no deficiency in their not having argued for sanctions. On the contrary, as discussed extensively *supra,* there is no basis to conclude that the prosecution violated any duty in this case; there is no basis, other than Movants' unsupported conjecture, to believe that the BBG payments to journalists for Radio Marti/ TV Marti work either had, or were designed to have, impact on the journalists' non-Marti, non-government work; and there is no basis to conclude that the court's orders or Local Rules were violated, warranting any sanction. Counsel is not ineffective for not making a futile argument. Further, *Strickland* prejudice cannot be shown for the same reasons that *Brady* materiality cannot be shown.

As for not arguing due-process violations, Movants fail to articulate, as opposed to announce, how due process was violated, let alone that they would have had an argument in that regard reasonably probable to have caused a different result in the proceeding. They insinuate that the BBG's payments to journalists violated the Smith-Mundt Act, but they furnish no authority for that contention nor explain how any such statutory violation would amount to a due-process violation. They reference the Fifth and Sixth Amendments, and the Equal Protection Clause, *see* DE/LM 5:22-23; DE/RC 1-2:24-25, but do not flesh out any arguments based on these provisions with case law or analogous fact patterns. If the Sixth Amendment claim is their ineffective-assistance-of-counsel claim, that fails as discussed herein. If the Fifth Amendment claim lies in their allusion to convictions secured "through a deliberate deception of the court and jury," *see* DE/LM 5:22; DE/RC 1-2:24, they fail to establish any deception. Further, this argument is made in the context of, and citing to, *Brady v. Maryland* but as previously discussed, there was no *Brady* violation here. The Equal Protection argument also is not made. If Movants' point is that they are discriminated against as employees and supporters of the Government of Cuba, their argument amounts to a quarrel with the Radio Broadcasting to Cuba Act, Congress, and United States foreign policy, rather than a due-process claim. Rather, Movants come closer to the reality of their position when they describe their claim as "unprecedented," DE/RC 1-2:2, and note that courts have never before addressed such a claim, DE/LM 5:4, DE/RC 1-2:2. This is but a veiled admission that Movants have no authority or legal precedent for their due-process claim. Accordingly, not being able to argue such an unprecedented and meritless claim at trial was not ineffective assistance of counsel. Nor can Movants show *Strickland* prejudice, as set forth at the *Brady* materiality discussion *supra*.

Movant Campa adds to these four ineffective-assistance-of-counsel claims a fifth that is also meritless. He inserts a one-sentence claim, at DE/RC 1-2:24, that because he did not know of the BBG-payment information he did not understand the strategic significance of preserving and raising on appeal every instance of what he characterizes as inflammatory and prejudicial evidence and argument, referring to his Appendix B, attached as DE/RC 1-4. *See also* DE/RC 1-2:15, referencing Appendix B. This Appendix is a 14-page chart listing more than 100 instances of purported prosecutorial misconduct in tabular form. Movant Campa offers no argument as to any of these claimed instances of prosecutorial misconduct, and his presentation of such perfunctory and underdeveloped argument is insufficient to meet the requirements of the Rules Governing Section 2255 Proceedings For the United States District Courts. *See* Rule 2(b)(1) ["The motion must . . . *specify* all the grounds for relief available to the moving party"], 2(b)(2) [motion must "*state the facts* supporting each ground"] (emphasis added).

In any event, notwithstanding and without waiving objection to the procedural inadequacy of such presentation, we note that Movant Campa's suggestion that counsel was ineffective for failing to raise these claims on appeal is plainly wrong. Movant Campa's appellate counsel, Richard Klugh, sought to raise each of these claims on appeal, and indeed Appendix B is a copy of a chart of misconduct claims Mr. Klugh submitted to the Eleventh Circuit Court of Appeals in *Campa 3*, and also appended to the §2255 motion of co-defendant Hernandez, whom he now represents. *See* chart, with Mr. Klugh's cover letter, as submitted to Court of Appeals, attached hereto as government's Attachment E. As for the claim that counsel was ineffective for not objecting to certain of these prosecutorial acts, Movant Campa's chart DE/RC 1-4 includes both objected-to and unobjected-to acts, but he makes no effort to cull out objected-to acts or to specify exactly which misconduct claims he is seeking to raise in the

ineffectiveness context. Further, since his ineffectiveness-of-counsel claim is based on counsel's supposedly being deprived of the BBG-payment information, Movant Campa's failure to articulate individual claims or explanations, or to link them to the BBG information, is fatal.

Without such specification, Movant Campa fails to show prejudice, as he has no basis to show that the instances were in fact misconduct; that objection would have been meritorious; what possible relation the BBG-payment information had to his non-objection; or that his non-objections were outside the wide range of reasonable professional assistance. Indeed, deciding not to object can be a tactical decision, inasmuch as objecting can serve to highlight negative material. *See Bradford v. Timmerman-Cooper*, 2008 WL 3992142, *3 (N.D. Ohio 2008).

As noted, Movant Campa's appellate counsel sought to raise all these claims to the court of appeals. Indeed, claims of prosecutorial-misconduct were among the most extensively litigated in the appeals,[33] and Movant Campa's attempt to repackage them as an ineffective-assistance-of-counsel §2255 motion transgresses the mandate rule. *See United States v. Peirce, supra*, 2011 WL 4001071 at *2-*4 (ineffective-assistance-of-counsel §2255 claims may trump the "cause" procedural default issue-preclusion bar, but not the mandate-rule issue-preclusion bar; "simply repackaging these [appellate-court] rejected lines of reasoning as ineffective assistance claims cannot circumvent the mandate rule or entitle [petitioner] to habeas relief").

Appellate claims of prosecutorial misconduct, not objected to below, are reviewed for plain error. *United States v. Verbitskaya*, 406 F.3d 1324, 1336 (11th Cir. 2005); *see also United*

[33] *See, e.g.,* 2003 WL 25245478 at Statement of Issues, IV, *17, *52-*60; 2003 WL 25245480 at *36-*37; 2003 WL 25245477 at *44-*54; 2003 WL 25245469 at *23-*27; 2003 WL 25245468 at *23-*25; 2003 WL 25245466 at *24-*28; 2005 WL 4638012 at Section IV(2), page 28 ff. (no star pagination); 2003 WL 25245471 at *34-*35, *56, *66-*69; 2006 WL 2252120 at *20-*24, 2006 WL 2252113 at *19-*29; 2006 WL 4877273, entire brief; Attachment C at 34-35, 47-48, 65-66, 74-76.

States v. Naranjo, supra, 634 F.3d at 1206-1207. When a claim of ineffective assistance of counsel is based on a failure to object to an error, "that underlying error must at least satisfy the standard for prejudice that we employ on our review for plain error. . . . It would be nonsensical if a petitioner, on collateral review, could subject his challenge to an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance." *Gordon v. United States,* 518 F.3d 1291, 1298 (11th Cir. 2008). Thus, Movant Campa's government-misconduct claims would have to rise to the level of plain error to merit consideration, yet he fails to argue the specifics of these claims, let alone show plain error. In addition to appellate plain-error review, all this conduct also was observed by the trial court. There is no prospect that this court, which was so careful to conduct a fair and legally proper trial, would have sat by silently as hundreds of unobjected-to instances of prosecutorial misconduct, amounting to plain error, accumulated as Movant Campa's chart claims. Movant Campa's effort to import multiple government-misconduct claims into his §2255 motion fails.

H. Claim that a news article reached the venire

Movants also claim that they now discern from a December 3, 2000, news article that venirepersons may have been reading media accounts, contrary to instructions. *See* DE/LM 5:24-27, DE/RC 1-2:25-29. This argument is based on nothing but speculation; is refuted by the record; and comes more than a decade too late. The article, which Movants do not append,[34] was

[34] We located the Spanish-language article at https://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=XCITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=&dedupeOption=0&_m=543cc765d19f2d9c9ad604cc13d0c59f&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzS-zSkAb&_md5=2975f81275ac6f39f296d76463b1609a&focBudTerms=AUTOR%28ferreira%29&focBudSel=all and append a copy as Attachment F. We will supplement later with an English translation.

published by *El Nuevo Herald* and was written by Rui Ferreira. Reporter Ferreira is *not* one of the journalists Movants claim received BBG payments, and this article has no factual relation to their complaint about the BBG payments. The Sunday, December 3, 2000, eight-paragraph article reports on the jury-selection process that had been proceeding in open court. The seventh paragraph contains a statement that as of Friday December 1 the jury so far was mainly "anglo" and African-American, in part because almost all the summoned persons of Cuban origin have said that they could not be impartial. The article concludes with a final paragraph stating that there are exceptions, and quotes a young venireperson of Cuban origin saying that she would not be influenced. Movants point to the seventh-paragraph statement, and seek to link it to what they describe as a remarkable change in the responses of Cuban-American[35] venirepersons subsequent to the article's publication, resulting in Cuban-American venirepersons being dismissed for cause at a lower rate than previously. From this, Movants divine that Cuban-American venirepersons must have read the Ferreira article and decided to shade their responses so that they could get on the jury and establish a Cuban-American presence there.

This wild speculation has no support in the record, and is contradicted by it. First, Movants' account of the voir dire is factually garbled. They claim that prior to the Ferreira article, 21 venirepersons were stricken for cause based on political views, but their footnote only cites three venirepersons, *see* DE/LM 5:25 n.11; DE/RC 1-2:27 n.12, making their claim meaningless and impossible to assess. The numerical base they focus on as being suspect – "five jurors, all Cuban," DE/LM 5:25-26, 26 n.15; DE/RC 1-2:28, 28 n.15 – is too small to be

[35] Movants refer to "Cuban" jurors. Of course, all venirepersons of Cuban origin or background were Cuban Americans. *See* 28 U.S.C. §1865 (United States citizenship as prerequisite for federal jury service). Further, the individuals discussed by Movants were not "jurors"; they are all venirepersons who were not selected to serve on the jury. As the court is aware, no Cuban-Americans served on the jury. *See Campa 2*, 459 F.3d at 1135-1136.

statistically sound for the kind of extrapolation they project. Furthermore, one of these five supposedly Cuban-American venirepersons was not Cuban-American. *See* DE/cr 1474:1117-1128, 1175-1177 (venireperson discusses having close Cuban American friends, but not being Cuban, having ever lived there or having family or close friends living there). *See also* 2003 WL 25245480 at *21, co-defendant Guerrero's appellate brief describing this venireperson as "Hispanic, but non-Cuban." The brief further discussed and cited this venireperson as one who expressed fear of being on the jury, *see id.* at 19-22, completely inconsistently with Movants' conjecture that she was trying to get on the jury.[36] (Movants adopted Guerrero's brief, *see* note 22 *supra*.) This reduces their statistical base to an even more unreliably small number.

Finally, and most important, Movants ignore that these venirepersons were not, as Movants now claim, trying to get on the jury but rather were, in their own previous words, "close calls" for cause-strikes due to their mixed presentation. *See* DE/cr 1474:1181 (Movant's counsel: "I will admit it's a close call"); 1248-1249 (Movant's counsel: "I do think this morning we have talked to twelve people, many of them have been close calls. They have all gone against us, that is, the Court has denied our motions to strike them for cause, and the Court will agree they were close calls. . . . We do have a number of close calls"). Defense counsel then used this "close call" argument to seek, and receive, additional peremptory voir dire challenges, and the court agreed that "there are a number of very close decisions made by the court this morning as to original statements . . . that subsequently were rehabilitated by subsequent answers . . . . There were some very close decisions made by the Court this morning and on the basis of that I do find that the

[36] This venireperson also had a critically ill parent out of town, and expressed concern about visiting the parent if she were a juror, *see* DE/cr 1474:1125, – again, totally at odds with Movants' depiction of venirepersons as angling to serve on the jury.

defendants in totality should be entitled to an additional three challenges." *See* DE/cr 1474:1382-1384.[37]

The record refutes Movants' speculation that these five (which should be four) Cuban-American venirepersons came to court with a mission to get on the jury, fueled by the Ferreira article. The voir dire record of each reflects the varying and nuanced circumstances that made their cause challenges "close calls," not a drive to be selected for the jury. Nor is there anything in the record to suggest that any of these venirepersons ignored or violated the court's repeated instructions not to read media accounts about the case. A jury (and, we submit, a venire) is presumed to have followed the court's instructions, *United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008), and Movants' baseless speculation about the Ferreira article does not in any way rebut that presumption, or warrant further inquiry.

Finally, Movants' claim relating to the Ferreira article comes far, far too late in the day. The article was published Sunday, December 3, 2000, and the time to bring it to the court's attention, if the defense was concerned about it, was when court reconvened the next day, and could have addressed the concern. There is no "cause" for Movants to wait until 2011 to mention it. Nor is there any basis for Movants to claim that it is only the BBG-payment information that allowed them to appreciate the significance of the prospect of venire exposure to newspaper stories. On the contrary, all defense counsel, and the court, were acutely attuned to this issue at the time of the trial. Counsel's silence about the article at the time showed that they were not concerned about it and in fact recognized that the venirepersons on whom they now seek to

[37] Movants acknowledged, and argued based on, the "close call" theme on appeal. *See* 2003 WL 25245469 at *4; 2005 WL 4638011 at *14; *27 (noting venirepersons' "own statements of hesitancy as to fairness issues," at odds with Movants' current claim that these venirepersons engineered responses so as to be selected for the jury); 2006 WL 2252113 at *15-*16. These are appellate briefs of Movant Campa.

refocus were, as they established then, "close calls" for cause-challenges, and a predicate to be allowed more peremptory challenges. None of these venirepersons was seated, and Movants were left with excess peremptory strikes that were never exercised even after striking these venirepersons.

For all the foregoing reasons, Movants' claim concerning the BBG payments to journalists should be denied. Furthermore, the government respectfully submits that the court may, and should, deny the claim without evidentiary hearing. For one thing, even if Movants' claims were true, Movants cannot show prejudice. The Court of Appeals has found that their trial was fair, including as to the issues they re-target here. *Campa 2* establishes that pervasive, disabling prejudice of the south Florida venire could not be presumed and that if there were any presumptive prejudice the presumption was rebutted by the court's model voir-dire and trial management; that the jury that tried Movants was not actually biased; and that the jury was properly insulated from outside media and influence. Additionally, Movants' *Brady* claim fails on several bases, including the materiality prong, which is another way of connoting prejudice. Where prejudice has not been shown, and cannot be shown, there is no reason for an evidentiary hearing on any other issues. *See Bouloute v. United States*, 645 F. Supp. 2d 125, 133 (E.D.N.Y. 2009)(court finds that knowledge of impeachment information cannot be imputed to prosecutors, and also that information is not material; request for hearing to explore imputed-knowledge issue denied; "such an inquiry is unnecessary because . . . the allegedly withheld information is insufficiently material to satisfy the prejudice requirement"); *United States v. Bradley*, 2009 WL 1064470 at *3 (S.D. GA. 2009) (information defense sought to impute to prosecutor was not material and could not be said to undermine confidence in the outcome of the trial; "[a]s no

evidentiary hearing can cure this defect in the defendant's *Brady* claim, the Court denies the request for such a hearing").

Claims based on mere supposition or conjecture do not warrant an evidentiary hearing. Conclusory and speculative claims should not be afforded an evidentiary hearing. *See Lynn v. United States, supra*, 365 F.3d at 1239 (affirming district court's denial of §2255 petition without evidentiary hearing, and collecting cases stating that merely conclusory allegations and unsupported generalizations do not warrant evidentiary hearing). Thus, when Movants seek to move from the fact of BBG payments to journalists for Radio and TV Marti appearances, to a claimed impact on south Florida from the journalists' non-Radio and TV Marti publications, they are merely supposing and conjecturing, with no evidentiary basis and no right to fish for one in an evidentiary hearing.[38]

Similarly, they state no basis for linking the BBG payments to the prosecution team in this case. *See United States v. Edwards*, 442 F.3d 258, 267 nn.7, 9 (5th Cir. 2006). There, §2255 petitioners claimed that "prosecutors were *apparently* aware of alleged *Brady* material," (emphasis in original) and endeavored to support their claim by asserting that "'the government has not denied' knowledge of this evidence." The court found that this argument of support by the government's non-denial ignored that the §2255 petitioners, "as the parties alleging a *Brady* violation, have the burden of establishing all three prongs of the *Brady* test." Evidentiary hearing was denied because the appellants "have failed to provide 'independent indicia' of the likely

[38] This is especially so where the materials they reference, such as the underlying contracts and purchase orders, refute their conjecture, showing payment exclusively for Radio and TV Marti work.

merits of their allegations and instead rely on speculation," which is insufficient to warrant an evidentiary hearing.[39]

Movants state that at an evidentiary hearing, they would present additional news articles, and that the ones referenced in their brief are only "representative," or a "sampling." *See* DE/LM 5:14-15, DE/RC 1-2:12-13. But media articles and publications need no evidentiary hearing for submission to the court, and there is no excuse for delayed presentation. These news articles were written more than 10 years ago, and could have been presented at the time of Movants' original change-of-venue arguments, which were raised as early as January, 2000. *See* DE/cr 329:13. Even if Movants claim that they were not alerted to the significance of finding more articles until they knew about the BBG payments, that occurred no later than September, 2006, when the *Miami Herald* published its story, *see* Attachment A, approximately five years before the filing of Movants' §2255 motions.

Movants also state that at an evidentiary hearing they could support indications that news reports by "funded" reporters impacted the jury-selection process, but they articulate no basis for this bald allegation. DE/RC 1-2:4; *see also* DE/LM 5:5. While a §2255 petitioner "need only

[39] In a similar misunderstanding of their burden, Movant Campa argues that the government has not disputed or explained (presumably again referring to government response to co-defendant Hernandez's §2255 motion) the difficulties encountered in obtaining the BBG information through Freedom of Information Act ("FOIA") litigation. Movant Campa argues that an evidentiary hearing "would shed further light on the truth." *See* DE/RC 1-2:11-12. He states no basis for this court's review of his §2255 motion to become an ancillary forum for FOIA claims already litigated elsewhere. *See National Committee to Free the Cuban Five v. Broadcasting Board of Governors*, Case No. 09-cv-01713-RMC (D.D.C. 2009), Docket Entry 24, 25 (Memorandum Opinion and Order of United States District Judge Rosemary M. Collyer granting defendant's motion for summary judgment, based on plaintiff's failure to exhaust administrative remedies, but without prejudice so as to allow narrowing of request). Movants were eventually able to obtain the BBG and OCB contract and purchase-order records their supporters sought, but to no avail; as discussed *supra*, and as reflected in Attachment B, the records undermine, rather than support, Movants' claims.

allege – not prove" eligible claims, what must be alleged must go beyond bare conclusion, to state "reasonably specific, non-conclusory facts that, if true, would entitle him to relief" *Aron v. United States,* 291 F.3d 708, 715 n.6 (11th Cir. 2002)(emphasis in original). The only news article Movants reference in regard to jury-selection was written by reporter Rui Ferreira, whom they do not claim was a government-"funded" reporter. Their theory about Ferreira's article impacting the venire is sheer speculation and contradicted by the record, including the court's instructions to the venire; their own "close-call" argument: and their appellate briefs.

An evidentiary hearing is not called for by this unsupported theory, nor by Movants' speculative theory of reporter "co-optation." *See Edwards, supra*, 442 F.3d at 268 n.10 (§2255 petitioner urged the court "to grant an evidentiary hearing to explore their theory further, [however] we decline to do so. Due to the speculative and conclusory nature of [petitioners'] allegations . . . . , such a hearing would serve as nothing more than a fishing expedition.") This is especially so because even if Movants' co-optation theory were correct, they would not be entitled to relief due to lack of prejudice.

2. Movants had effective representation of counsel with regard to a two-level Guidelines adjustment for obstruction of justice, which was properly imposed.

Movants both claim that their sentencing guidelines were improperly enhanced two levels for obstruction of justice. Ordinarily, sentencing guideline errors are not cognizable on collateral review; however, if couched as ineffective-assistance-of-counsel claims, they may be reviewed. *United States v. Crutchfield*, 2007 WL 2022001 at *2 (S.D. AL. 2007), *citing Cofske v. United States,* 290 F.3d 437, 441 (1st Cir. 2002). Here, each Movant's counsel, who also were trial counsel, assert their own ineffectiveness in addressing this issue. However, the two-level guideline adjustment for obstruction of justice was properly imposed, and each counsel litigated

the issue properly and effectively. Their performance was not deficient, and there is no prejudice because the enhancement was proper; accordingly, their claim does not meet the *Strickland* test for ineffective assistance of counsel. In addition, as discussed at the end of this section, Movant Medina's claim was waived by a Sentencing Agreement he entered into, agreeing to the guideline adjustment and agreeing not to make a collateral attack on his attorney's representation at sentencing.

Both Movants appeared in court before Magistrate Judge Barry Garber on Monday, September 14, 1998, for initial appearance, along with their eight co-defendants who also had been arrested that weekend. *See* DE/cr 44. Magistrate Judge Garber began the hearing by advising the defendants of their rights. This was a very full advice of rights, and included advice of the right to remain silent, contrary to Movant Medina's claim, DE/LM 5:34, that such advice was omitted.[40] *See* DE/cr 44:2-4. Magistrate Judge Garber advised, in pertinent part:

> All right, at this time the Court is going to advise each of you of rights that are guarantied [sic] to you by the constitution and laws of this country. If after I've completed giving you this advice of rights, you feel that you don't understand what I told you, raise your hand and I'll attempt to better explain it to you.
>
> Each of you have the right to refuse to make any statements whatsoever about your case. In the event you do make such a statement, I want you to understand that statement can, and probably would be used against you in future court proceedings.
>
> Each of you are entitled to be represented by counsel . . .
>
> Do each of you understand the Advice of Rights the Court has just given you.
> For the record, seeing no negative response, the Court assumes each defendant fully understands his or her rights.

[40] Movant Campa makes a somewhat more guarded claim, that Magistrate Judge Garber gave "no advice regarding a right to remain silent if they were called up by the names used in the charging document," DE/RC 1-2:36. Movant Campa provides no basis to suggest that there is a right to be advised of the right to remain silent in particularized circumstances; on the contrary, had Magistrate Judge Garber limited that right to certain circumstances, he could have been faulted. The right to remain silent that Magistrate Judge Garber advised of was unconditional.

DE/cr 44:2-4. Magistrate Judge Garber then called forward three of the defendants: the two Movants and one other for whom counsel made a temporary appearance. The other two – the Movants – said they wanted to have counsel appointed, and Magistrate Judge Garber administered the oath to them. DE/cr 44:5. Magistrate Judge Garber then made inquiry of each Movant separately, asking each, among other things, his name. Each responded by providing and stating the false identity he was using: "Ruben Campa," DE/cr 44:6, and "Luis Medina," DE/cr 44:11. The government requested pre-trial detention as to each of the defendants, and sought a continuance of the hearing, DE/cr 44:8, which the court granted. Movant Medina's hearing continued on Wednesday, September 16, DE/cr 61, and Movant Campa's hearing continued on Friday, September 18, DE/cr 88. At these continued hearings, Movants did not speak.

Following Movants' convictions, the court's Probation Office prepared a detailed Pre-Sentence Report ("PSR") as to each. The PSRs for Movant Medina and for Movant Campa each recommended an adjustment for obstruction of justice, with a back-up discussion. The back-up discussion, which is verbatim identical for each, appears in Movant Medina's original PSR at ¶67 and in his PSR revised as of 1/3/02 at ¶57; and in Movant Campa's original and first revised PSR at ¶67 and in his PSR revised as of 12/21/01 at ¶57. In all instances the text is the same, and references specifically each of these Movants (and co-defendant Gerardo Hernandez) having falsely stated under oath, at the September 14, 1998, initial-appearance hearing before Magistrate Judge Garber, their false identities as, respectively, Luis Medina, Ruben Campa (and Hernandez's false name). The PSRs paragraph did not discuss or reference the September 16 or September 18 hearings.

Movant Medina objected to the Probation Office's recommendation of a two-level increase for obstruction of justice. *See* DE/cr 1379:18-21, stating several grounds, including an

argument such as he makes in his §2255 motion: "At magistrate court, he simply responded to the summons in that name," DE/cr 1379:21. The United States' response to Movant Medina's objection, DE/cr 1415:18-22, and its response to objection to the same adjustment by co-defendant Hernandez, DE/cr 1409:10-14, referenced the September 14, 1998, hearing, again making it clear that the basis for the obstruction of justice enhancement was for affirmatively false sworn testimony as to identity on that day, not for standing mute. DE/cr 1415: 19; DE/cr 1409:10. Movant Campa did not object to the adjustment. DE/cr 1448:4-5. The United States' response also cited caselaw clearly supporting the propriety of the adjustment: *United States v. Ruff*, 79 F.3d 123, 126 (11th Cir. 1996) (obstruction adjustment warranted upon defendant's lying to magistrate judge concerning financial situation); *United States v. Hitt*, 164 F.3d 1370, 1371 (11th Cir. 1999) (same); *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994) (obstruction enhancement appropriate where defendant falsely identified himself to magistrate judge even though government possessed true identity).

At sentencing, the court addressed the objections to the obstruction-of-justice adjustment, and overruled them. In doing so, the court made it explicit that the obstruction enhancement applied based on the false sworn testimony on September 14, 1998, not based on "standing mute" on some other occasion. *See*, as to Movant Medina, DE/cr 1451:9-11;[41] as to co-defendant

[41] The court said:

At first appearance in the prosecution of this case, Mr. Labanino who at that time was not known by what he asserted at the time -- I believe it was the first day of trial, asserted at the first day of trial through counsel his true name Ramon Labanino; was informed by Magistrate Judge Garber on September 14, 1998 of his right to refuse to make any statement whatsoever regarding his case and the facts that if he did make a statement, that the statement can and probably would be used against him in further court proceedings. Judge Garber then went on to advise this defendant and the other defendants who were present that day of the availability of counsel to be appointed and the fact there will be a probable cause hearing before the Court to determine whether or not they would be detained or not detained pending trial.
[footnote continued]

Hernandez, DE/cr 1449:10-12. Thus, the record could not be more clear: The obstruction of justice enhancement was imposed based on statements made by Movants, and by Hernandez, at the September 14, 1998, initial appearance hearing, not based on Movants standing mute at any later hearing.

On appeal, Movant Medina raised as an issue the two-level obstruction-of-justice enhancement. *See* 2003 WL 25245479 at *41-*44; 2003 WL 25245470 at *19-*20; 2006 WL

[footnote continued]

The defendant was then placed under oath and Judge Garber stated at page 11, line 5 [of DE/cr 44]. "State your full name." To which the defendant stated at line 7, "Luis Medina."

Judge Garber then went on to question him how old he was, what was his home address, whether he was married or single. All of the information that a Magistrate Judge collects through testimony from a defendant to determine whether or not the defendant is a risk of flight or danger to the community and whether or not a defendant should be detained pending trial on those bases.

Mr. Labanino did not have to answer any questions as they were asked of him by Judge Garber. Under oath he gave a false name. Note 6 of the application notes under 3(c)(1).1 teaches us that material evidence means evidence, facts, statements or information that if believed would tend to influence or affect the issue under determination.

Truthful rendition of a name or the untruthful rendition of a name is a material fact when the Magistrate Judge is determining and making bond determinations. The name given by this defendant, if believed, would tend to influence or affect the issue under determination. It is one of the factors that the Magistrate Judge must consider.

Therefore, I find pursuant to the authority of 3(c)(1).1 and the United States versus Ruff 79 F.3rd 123, a 1996 decision by the Eleventh Circuit, as well as the cases cited in Ruff, United States versus Mafanya, M A F A N Y A, 24 F.3rd 412, a 1994 decision by the Second Circuit and United States versus McDonnell 964 F.2nd 390, a 1992 decision by the Fifth Circuit; that Mr. Labanino specifically provided a false statement to Magistrate Judge Garber at the first appearance regarding his offense of conviction; that this was a false statement made under oath and that the deliberate misrepresentation of the truth was material in the determination that Judge Garber needed to make as to bond, as to appointments of counsel, as to all the matters that the Magistrate Judge must consider at that first appearance.

Therefore, the two level increase in paragraph 77 for obstruction of justice under 3(c)(1).1 is well taken and the objection is denied.

4877272, Issue IV (no star paging available). Although Movant Campa had not objected to the enhancement below, he adopted Movant Medina's arguments as to the enhancement, raising the obstruction-of-justice enhancement in Movant Campa's appeal as well. *See* 2003 WL 25245478 at *XVI; 2006 WL 4877271 at "STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLATNS" (no star paging available). Movant Medina's appellate arguments stated, correctly, that the obstruction enhancement had been applied based on affirmative testimony, *see* 2003 WL 25245479 at *53 ("He was called by the name Luis Medina to the bar of court and swore that it was his name"), at the initial-appearance hearing, 2003 WL 25245470 at *19 ("upon his initial appearance"); 2006 WL 4877272, Issue IV ("U.S.S.G. § 3C1.1 Enhancement for Obstruction of Justice Based on Provision of Name to Magistrate Judge at Initial Appearance").[42]

Campa 3 affirmed the sentencing court's application of the two-level upward adjustment for obstruction of justice. *See* 529 F.3d at 1015-1015.[43] *Campa 3* used the term "pretrial detention hearing" in describing the proceeding, and Movants seize on that as the basis for their argument, claiming that this means they were wrongly assessed a two-level obstruction enhancement for standing mute at their later pre-trial detention hearings. But *Campa 3*'s wording does not change the record in this case, and the pretrial detention process started at the September 14 hearing, at which the government sought pretrial detention as to all defendants. In any event, *Campa 3* clearly understood, articulated and affirmed on the basis that the obstruction

[42] Movant Medina's counsel also acknowledged, correctly, at sentencing that the obstruction enhancement referred to Movant stating his name as Luis Medina before Magistrate Judge Garber at his initial appearance. DE/cr 1451:2.

[43] *Campa 3* also afforded Movant Campa appellate review on this issue, based on his adoption of Movant Medina's arguments, *see Campa 3,* 529 F.3d at 1014; however, as *Campa 3* noted, the claim failed on its merits, along with Movant Medina's, *id.*.

of justice enhancement applied to Movants' affirmative false statements, not to standing mute. *See Campa 3* at 1015-1016:

> **The adjustment was based on a finding that Medina gave a false name to the magistrate judge** at his pretrial detention hearing. Medina, whose real name is Ramon Labanino, concedes that he "stood by his legend **and stated that he was Luis Medina**," but argues that . . .
>
> **Medina's false statement** clearly occurred within the scope of application note 1.
>
> **Providing a false name to a magistrate** at a detention hearing qualifies as obstructive conduct. Application note 4(f) lists "providing materially false information to a judge or magistrate" as an example of the kind of conduct to which section 3C1.1 applies. . . . . See *United States v. Tran*, 285 F.3d 934, 940 (10th Cir.2002) ("It is plain that **[the defendant's] misidentification of himself** was an attempt to obstruct or impede the administration of justice, and that this attempt might well have borne fruit at his detention hearing if the court had decided to release him based on his apparent lack of a criminal history.") . . .

(boldface emphases added).

On this record, it is clear that the obstruction of justice enhancement was properly applied, that both Movants sought and got appellate review of the guideline adjustment, and that *Campa 3* correctly determined that the adjustment was applied for affirmatively false statements each Movant made. There was no error, and they were not penalized for standing mute, as they argue; the adjustment properly applied, as *Campa 3* stated, for providing a false name to a magistrate. Accordingly, there is no *Strickland* prejudice.

Nor were counsel's performances deficient in any way. Movant Medina's counsel objected to the enhancement and argued it vigorously on appeal. Movant Campa's counsel did not object at the district court level, but that was a decision well within the "wide range of reasonable professional assistance" acceptable under the *Strickland v. Washington* standard, *see* 466 U.S. at 690. The objection was not well taken, as the district court and *Campa 3* found, so Movant Campa's counsel was not deficient for not objecting. Further, competent counsel may,

and frequently do, choose among possible objections to raise so as to husband the force of their argument for more meritorious claims. In any event, Movant Campa was not prejudiced by the non-objection, since the Court of Appeals accepted his counsel's effort to raise the issue on appeal anyway, and because the claim would fail even if objection had been raised, as it was by Movant Medina. Nor did either Movant suffer *Strickland* prejudice; the obstruction of justice adjustment was properly applied.

Movant Medina's obstruction-enhancement claim also should be denied because he waived it in a carefully and narrowly drawn Sentencing Agreement at his resentencing. See DE/cr 1768-1. In that agreement, he agreed that the two-level adjustment for obstruction of justice was correct; that his correct total offense advisory guideline level was 42, resulting in a guideline imprisonment range of 360 months to life imprisonment, DE/cr 1768-1:4-5, ¶7; and that he would not seek any guideline departures or sentence variance, DE/cr 1768-1:5, ¶9. In exchange, the United States agreed to join Movant Medina in recommending a sentence at the low end of the guideline range, 360 months, DE/cr 1768-1:5, ¶8. Movant Medina also agreed not to appeal a sentence of 360 months, and not "to attack collaterally his sentence based on a claim of ineffective assistance of counsel at sentencing." DE/cr 1768-1:5, ¶11. At Movant Medina's resentencing, the court engaged him in a thorough and careful colloquy as to his understanding of this agreement, *see* DE/cr 1793:8-22, including specifically the waivers of right to appeal and to attack collaterally his attorney's effectiveness at sentencing. *See* DE/cr 1793:19-21.

Movant Medina should not be able to renege on this agreement and to collaterally attack the effectiveness of his counsel at sentencing. Movant Medina received a very substantial consideration from the United States in this agreement: recommendation of a sentence of 360 months, at the low end of his sentencing guideline, which the court accepted, as opposed to life

in prison, which also was within the advisory guideline range. Sentence appeal- and collateral-attack waiver agreements have been found lawful and enforceable by the Court of Appeals. *See United States v. Williams*, 396 F.3d 1340, 1342 (11th Cir. 2005). Movant Medina's entering into such an agreement here brought him a significant benefit, and its terms preclude his obstruction-of-justice collateral attack.[44]

WHEREFORE, for the above-stated reasons, the United States respectfully submits that Movant Medina's and Movant Campa's motions to vacate, set aside or correct their sentences in Case No. 98-721-Cr-LENARD(s)(s), pursuant to 28 U.S.C. §2255, should be denied.

Respectfully submitted,

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[44] Movant Campa also was resentenced, *see* DE/cr 1776, but did not enter into a sentencing agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, for uploading and service by electronic notice to counsel and parties authorized to receive electronically Notices of Electronic Filing.

/s/ Caroline Heck Miller
Caroline Heck Miller
Assistant U.S. Attorney