UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:11-CV-22854
(Criminal Case No. 98-CR-721-LENARD)

LUIS MEDINA,
[RAMÓN LABAÑINO],

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION

William M. Norris
Florida Bar #309990
William M. Norris, P.A.
8870 SW 62nd Terrace
Miami, FL 33173-1616
Tel. (305) 279-9311
Fax. (305) 279-9026

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INTRODUCTION

Luis Medina (Ramón Labañino) has timely filed a petition for relief under 28 U.S.C. § 2255 and memorandum in support (DE#1,5), to which the Government has filed a response in opposition (DE#15).[1]

ARGUMENT

I. The Government's Payments to Journalists Tainted the Verdict and Denied Petitioner Due Process.

The Government's response to petitioner's due process argument is, frankly, shocking. At no point does the Government ever acknowledge that it would be improper or inconsistent with basic norms of fair play for it to secretly pay journalists in the trial venue to publish articles asserting the guilt of an accused foreign agent. Instead, the Government takes a very rigid and formalistic stance, arguing that whatever the United States State Department might have been doing to petitioner and his codefendants in Miami, the United States Justice Department has no obligation to

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[1] This Reply uses DE# to refer to docket entries in this case. As the Government notes, the various codefendants in this case reference each others' briefs with some frequency. The arguments relating to journalism in petitioner's memorandum and in this Reply draw considerable support from the contentions advanced by Gerardo Hernandez in Case No. 10-CV-21957. This Reply will also cite to briefs in the case of Antonio Guerrero, No. 10-CV-23966. For docket entries in those cases, this Reply will use the relevant defendant's initials as well as the docket number. Citations to the trial transcript are "T."

consider or disclose it when charging them with a crime in the same venue. But every objective observer—from the United Nations Working Group on Arbitration Detentions to former U.S. Presidents to Amnesty International[2]—has declared that the verdict in this case raises serious due process concerns for precisely this reason. Given the international outcry that this case has generated, the Government's cavalier attitude toward the alleged violations in this case strains credulity.

The response also misses the point of petitioner's argument. Petitioner is not arguing solely that the trial was unfair because Government-funded publicity may

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[2] *See* U.N. Working Group on Arbitrary Detention, Opinion No. 19/2005, U.N. Doc. E/CN.4/2006/7/Add.1, at 61 (adopted May 26, 2005) (stating that the United States failed to guarantee the defendants a fair trial as required by Article 14 of the International Covenant on Civil and Political Rights); Jimmy Carter's Havana Press Conference: Transcript, Apr. 1, 2011, http://www.freethefive.org/updates/CubanMedia/CMCarterPressConf33011.htm (last visited Feb. 14, 2011) (stating that the detention of petitioner and his codefendants "makes no sense" and noting "doubts" about the trial); Amnesty Int'l, *USA: Amnesty International seeks review of case of the "Cuban Five,"* AMR 51/096/2010 (Oct. 13, 2010), *available at* http://www.amnesty.org/en/library/asset/AMR51/096/2010/en/675bdaf0-ff18-46ce-bfee-694211b2e43b/amr510962010en.html (specifically referencing this claims relating to journalists). The Amnesty International Report for 2011 continues to report on this case and reference the claims relating to journalists. Available at http://www.amnesty.org/en/annualreport/2011. *See also* United States Supreme Court Docket No. 08-987 (listing eleven *amici* who urged Supreme Court review of the conviction, including Nobel Laureates, the National Jury Project, the Senate of the United Mexican States, and several European parliaments and parliamentary committees).

have influenced the jury—although that is certainly *part* of the argument. Petitioner also argues that the Government behaved improperly in bringing this Indictment and insisting that this trial to occur in a venue that was infected with Government-funded propagandists asserting petitioner's guilt. The harm from the Government's unconstitutional conduct stems not merely from influence on the jury, but from the fact that the entire trial process is suspect.

Petitioner argued that Miami-area journalists, who received literally hundreds of thousands of dollars from the Office of Cuba Broadcasting—a government agency that seeks regime change in Cuba—published dozens of articles alleging petitioner's guilt. The petition argues further that the prosecution either knew or should have known of the Government funding of the journalists, but it nevertheless brought the Indictment and insisted that the Court hold the trial in the tainted venue, and it failed to disclose the ties between the Government and the journalists to the Court, as well as to petitioner and his codefendants. By capitalizing on this tainted media environment—whether willfully or not—the prosecution failed to live up to the due process standard that governs criminal prosecutions. The result is a tainted verdict that cannot stand.

Rather than refute petitioner's claim, the Government's response merely demonstrates the need for an evidentiary hearing, as the Government disputes the facts

petitioner alleges, but it does not establish that petitioner's arguments fail as a matter of law. The response's substantive arguments are unpersuasive because they are essentially assertions about the facts of the case—which can only be evaluated after a hearing, and its procedural arguments find no support in controlling precedent.

A. Petitioner's Due Process Claim Is Meritorious.

If petitioner can show that Government-funded journalists influenced the jury, either by biasing it in favor of the Government or against petitioner, or by intimidating members of the jury, or by offering the jury information that was not in evidence, then petitioner clearly is entitled to relief, because he will have shown actual, tangible prejudice. Even absent such a showing, however, if petitioner can show that by pressing to keep the trial in Miami, the Government sought to take advantage of the climate surrounding the trial—the same climate that taxpayer dollars helped create—then petitioner should be entitled to relief, as such a showing would severely taint the verdict. It would validate the concerns expressed by myriad members of the international community that despite the court's best efforts to control the trial and preserve fairness, the result here was unjust.

The Government's substantive answers to petitioner's claim are scattered throughout its response. In general, the Government primarily disputes the factual

underpinnings of the claim. Rather than support the Government's case, these arguments only demonstrate why an evidentiary hearing is necessary.

For example, the Government argues that even though the Office of Cuba Broadcasting—a Government agency that avowedly spreads anti-Castro propaganda in Cuba[3]—gave significant payments to journalists, those journalists' other work, for publications like *El Nuevo Herald* and *Diario Las Americas*, was unaffected by these payments. (DE#15:9-10). That assertion is contradicted by subsequent analyses of the journalists' conduct, all of which concluded that the journalists had breached an ethical boundary, and that a journalist who takes money from the Government cannot be expected to be objective in his reporting. (DE#5:28-30, GH/DE#12:61-79, GH/DE#33:39-47, AG/DE#7, imaged under DE#6). At an evidentiary hearing,

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[3] The Government is understandably ill at ease with the use of the word "propaganda," which it places in scare quotes whenever possible, but that is precisely what Radio and TV Martí are designed to do. *See* Paul McCleary, *When All Things Are Not Equal*, Columbia Journalism Rev., Sept. 20, 2006 (noting that Radio Marti is "funded by the federal government to broadcast explicitly political propaganda"). As petitioner's memorandum, as well as those of his co-defendants, illustrate, Radio and TV Martí are not permitted to broadcast in the United States because Congress regards their message as inconsistent with the unbiased domestic flow of information. (DE#5:24-25; GH/DE#33:42 (citing the Smith-Mundt Act, 22 U.S.C. § 1461)). As Senator Edward Zorinsky, who offered the amendment that banned domestic propaganda, noted, that ban "distinguishes us, as a free society, from the Soviet Union where domestic propaganda is a principal government activity." 131 Cong. Rec. S7736 (June 7, 1985).

petitioner would offer evidence and expert testimony on the question of whether a journalist's other work can fairly be regarded as independent if he accepts payments from the U.S. Government in connection with its propaganda mission.

The Government also argues that the payments to journalists were "modest," and were not designed to influence, nor capable of influencing, those journalists' views. (DE#15:12-14). As petitioner's co-defendants have illustrated, the payments were anything but modest—one journalist, Pablo Alfonso, received $58,600 during the trial alone from the Government (a total of more than $250,000 altogether), and he published articles directly about the trial, alleging the defendants' likely guilt. (GH/DE#33:43, GH/DE#33:Appendix C). Whether the payments were sufficiently large to give rise to an inference of bias constitutes yet another factual issue that merits a hearing.

Moreover, while the journalists' conduct is relevant to this inquiry, the Government's conduct—in insisting that the trial proceed in a tainted venue, and in failing to disclose its relationship to the tainted press—is even more disturbing, and more significant from a due process perspective. The Government insists that the "prosecution team" neither knew about the journalists nor had reason to know about

them. (DE#15:28-31).[4] Petitioner believes otherwise, and while petitioner cannot yet point to any hard evidence to the contrary, this would be an appropriate subject to take up through discovery prior to an evidentiary hearing, as it is likely that in a case of this profile, involving such complex foreign policy issues, the State Department (which oversees the Office of Cuba Broadcasting) was at least consulted prior to the Indictment being sought.

The Government also contests petitioner's claim that members of the jury read and responded to news articles. Petitioner established this fact by considering the dramatic change in the jury pool after the publication of an article noting that Cuban Americans were regularly recusing themselves. Petitioner noted that after the article was published, the number of jurors who attempted to remove themselves from the pool dropped markedly. The Government quibbles with the details, and argues that the sample was not "statistically sound" (a claim that makes no sense, as petitioner is not attempting to use the venire as a sample to make inferences about a population). (DE#15:45-48). The Government also responds to a series of arguments that petitioner never made. For example, the Government notes that the article in question

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[4] Actually, the Government is slightly more coy than that. Rather than deny knowledge, the Government asserts that neither petitioner nor his codefendants have expressly alleged that the "prosecution team" had knowledge. Lest there be any doubt, movant does make such an allegation.

was not written by a paid journalist, and the Government also notes that even though many potentially biased jurors stayed in the venire, they were subsequently removed using peremptory strikes or other means. While the Government is correct to note some minor points,[5] the thrust of petitioner's argument—that the venire and the jury were in fact influenced by news accounts, either because jury members themselves read those accounts, or because the sentiments conveyed in those accounts were somehow communicated to the jury—remains valid.

At most, the Government can say that whether members of the jury were influenced is a disputed factual question. Thus far, petitioner has the better of this dispute. While the Government resorts to dismissive rhetoric, labeling petitioner's argument as "wild speculation," this Court itself recognized on several occasions that

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5 For example, the Government notes that while the memorandum states that 21 venirepersons had withdrawn from the jury pool prior to the publication of the article in question, the footnote cites only three people. This was the result of an accidental deletion. In fact, 20 jurors expressed political views that supported motions to strike for cause. In addition to the three named in the memorandum, the other seventeen are MPar, T.725/756; ROru, T.734/757; RBel, T.736/757; VPic, T.749/759; VBur, T.771/786; ROiu, T.773/789; PBel, T.781/789; lOar, T.783/789; LPon, T.794/848;CPaz, T.799/848; RBra, T.815/848; KOra, T.865/955; LLop, T.900/955; VLop, T.922./955; RCod, T.930/955; SPad, T,9311956; DCas, T.933/956; MPla, T.975/997; HMor, T.l021/1077; Deue, T.I046/1077. Petitioner apologizes for the mistake, as well as for mistakenly naming juror MPla in footnote 9 of his memorandum as a juror who raised a political issue—the correct juror identity was actually MPer, T.657/688.

the media was extremely aggressive in attempting to contact, and perhaps influence, the jury. *See* T.111-12 ("[C]ertain of the jurors walked out with juror tags and were approached by members of the media. At least one or two of them were observed talking to cameras and the media. I thought I gave them a strong instruction . . . . I am as concerned as you are."); *id*. 113 (on the first day of jury selection, after a discussion of members of the victims' families who attended trial and spoke with the press, the Court commented that it was "extremely concerned and not happy about the situation"); *id*. 115 ("There is a tremendous amount of media attention for this case. My office has received calls from around the country with regard to this case. They have been calling on a weekly basis to find out when the trial is beginning. It may behoove the government to make sure [the jury] are not exposed [to the media] because their exposure is not appropriate at this juncture."); *id*. 625 ("I have been getting a tremendous amount of requests from the media for those particular questions [to be asked during jury selection]"); *id.* 14644-46 (during deliberations, the Court noted that the jurors "were filmed yesterday and several of them felt they were filmed all the way to their cars and their license plates had been filmed . . . . [I]t was brought up by the jurors . . . . They are concerned they are being pressed and filmed . . . ."). At an evidentiary hearing, petitioner would seek to establish that the jury had been

influenced, by seeking statements from the jurors themselves, as well as others who could comment on the atmosphere surrounding the trial.

Finally, the Government raises numerous objections to the manner in which petitioner has referenced factual materials, arguing that by failing to append those materials to his submissions, petitioner failed adequately to "state the facts" supporting his claim for relief. (DE#15:9 n.8). At other points, the Government contends that the allegations in the petition are speculative. (*Id*. 50). A brief word about these contentions is in order. In the Eleventh Circuit:

> The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege*—not prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief. If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the petitioner must offer proof.

Aron v. United States, 291 F.3d 708, 715 n.6 (11th Cir. 2002). This standard is not a high one, and petitioner's claims meet and exceed it.

B. Petitioner's Due Process Claim Is Not Procedurally Barred.

The Government makes two irreconcilable procedural arguments. First, it argues that petitioner's due process claim has already been litigated, so that the law of the case doctrine forecloses relief. Second, it argues the exact opposite: that

petitioner's claim was defaulted, so that he must demonstrate cause for the default and actual prejudice in order to obtain relief. Neither argument is persuasive.

1. The Law of the Case Doctrine Does Not Bar Consideration of Petitioner's Due Process Claim.

This Court should reject the Government's argument that the law of the case bars consideration of petitioner's claim. The Government openly acknowledges that it is making the extraordinary claim that after many decades of litigation of habeas corpus claims, and sixteen years after the enactment of the AEDPA, "a third [procedural bar] *should be added*" to the existing canon of § 2255 hurdles. (DE#15:6).[6] While some courts have adopted a version of this rule, the Government's broad interpretation of the law of the case finds no support in any precedent. Thus, even assuming that the doctrine applies, it does not preclude relief here because changed circumstances distinguish this case from *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (*Campa 2*).

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[6] The Government refers to the "mandate rule" as the source of a new procedural bar. The "mandate rule is a specific application of the 'law of the case' doctrine," which requires trial courts to adhere to the mandate of a court of appeals. *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1888 (11th Cir. 2010) (internal quotation marks omitted). This reply will use the term "law of the case" for clarity, because in fact this Court is not charged with implementing the Eleventh Circuit's mandate in this collateral action.

The Eleventh Circuit has never held that the law of the case doctrine applies in a § 2255 proceeding. The application of the doctrine at all is thus open to question, and one fraught with difficulty because determining the scope of the prior court's ruling is a challenge when, as here, new evidence has come to light. In its most recent treatment of the subject, the court of appeals "assume[d] that it could apply," but concluded that its application was inappropriate. *Thomas v. United States*, 572 F.3d 1300, 1304 (11th Cir. 2009). The same result obtains here.

Assuming that the doctrine applies, the Court should exercise its discretion to hear petitioner's claim. The law of the case doctrine "is not an inexorable command." *Thomas*, 572 F.3d at 1304 (internal quotation marks omitted). Rather, "[t]he doctrine is based on the premise that an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Id*. at 1303-04 (internal quotation marks omitted). Because this case involves new evidence and new law, which add a fundamentally new dimension to petitioner's due process claim, this Court should reach the merits.

First, and importantly, the Government overreads the Eleventh Circuit's decision in *Campa 2*. There, the court considered solely whether pre-trial publicity

had influenced the jury. The court commented that much of the publicity submitted did not appear to "relate directly to the defendant's guilt for the crime charged." *Id*. at 1144. The court distinguished between "largely factual publicity" on the one hand, and publicity that is "invidious or inflammatory" on the other. *Id*. The court also praised this Court's handling of the voir dire process. *Id*. at 1147. In light of those facts, the court held that this Court had not abused its discretion in denying the defendants' motion for a change of venue. *Id.* at 1146. Importantly, the court never had the opportunity to consider evidence that the Government itself was complicit in the production of the negative publicity, and it certainly did not state, or even suggest, that the facts alleged in the petition do not support a due process claim. Thus, to the extent that this petition involves evidence that was not before this Court when it initially denied the motions for change of venue, this Court should consider it anew.

Here, evidence of the Government's payments to journalists merits this Court's consideration. By uncovering ties between the Government and Miami area journalists, petitioner and his co-defendants have been able to identify the biased authors, and thus discover additional press accounts, in Spanish-language papers, which are a far cry from the "accurate, objective, and unemotional" publications that the *Campa 2* court found insufficient to demonstrate prejudice. 459 F.3d at 1131. Instead, the recently found articles portray petitioner and his codefendants as violent

threats to U.S. national security, and accuse them of being instruments of Fidel Castro, which is precisely the conduct with which they were charged. (DE#5:11-14 (citing nine such articles and describing their contents); GH/DE#33:44-45 (translating and quoting two articles by Julio Estorino); GH/DE#33:App. C (listing dozens more articles in the same vein)).[7] The Government does not dispute that this evidence was not obtained until after the trial and appeal, and so it cannot argue that the courts have already passed upon it. *See Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991) (holding that the law of the case "does not bar consideration of matters that could have been, but were not, resolved in earlier proceedings").

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[7] The Government refers to Estorino as an "independent contractor," (DE#15-2:57-60), but Estorino's own resume indicates that he regarded his employer as the "U.S. Government." The label is irrelevant—the key point is that Estorino received payments from the United States to appear on a propaganda station. Estorino's resume is attached to this Reply as Exhibit A. Also included in Exhibit A is a translation of an article by Estorino entitled (translated) "The spies of Havana and Washington's intentions," which was published in *Diario Las Américas* on September 18, 1998. This article presumes petitioner's guilt and argues that his association with Fidel Castro constitutes a threat.

Attached as Exhibit B is a reprint of an article entitled "Overthrow on the Radio," which was cited in petitioner's memorandum. That article appeared in the *Miami New Times* on February 13, 1997, and discusses the activities of Enrique Encinosa, who received payments from the Government, and who preached sabotage of the Government of Cuba by acts of terrorism. Encinosa's mindset is illustrative of the type of mentality that the Court sought to exclude during the voir dire process.

Moreover, the law has become petitioner's claim. Specifically, the United States Supreme Court's decision in *Caperton v. A.T.* more favorable to *Massey Coal Co.*, 129 S. Ct. 2252, 2264-65 (2009), establishes that even absent proof of actual bias, some facts can give rise to an objectively unreasonable risk of a due process violation. While *Caperton* concerned the possibility of judicial bias, misconduct by the Government gives rise to the same concerns because, as petitioner's memorandum explained, the Government "must turn square corners when it undertakes a criminal prosecution," and "courts must be scrupulous in holding the government to this high standard as to sympathetic and unsympathetic defendants alike." (DE#5: 9 (quoting *Ferrara v. United States*, 456 F.3d 278, 280 (1st Cir. 2006))).[8] Moreover, the allegations in the petition go to whether the Government attempted to improperly

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[8] The Government attempts to distinguish *Caperton* on the ground that the alleged violations in this case are "remote" from the judicial mechanism. (DE#15:26). That distinction is weak. In *Caperton*, both the objecting party and the judge who had failed to recuse himself described the suspect campaign contributions as remote from the judge's electoral victory, 129 S. Ct. at 2264, but the Court held that the risk objectively was too great to bear. So too here. While the Office of Cuba Broadcasting is not officially part of the "prosecution team," whether the prosecution knew about the propaganda efforts, and whether the prosecution conferred with officials at the OCB or elsewhere in the State Department concerning this case are issues of fact that would support petitioner's claim. Petitioner acknowledges that *Caperton* was a case in which extreme facts justified strong relief, and he submits that the facts of this case are equally extreme. To the extent that the Court has any question about the applicability of *Caperton* or any other cited authority, oral argument on this motion may assist the Court in resolving those issues.

influence the jury—or at least was content to permit the jury to be influenced—via the media. In its efforts to bias the decision makers, the Government tampered with the judicial process in a way that created an objective risk of bias, and a clear appearance of impropriety.

The Government's authorities do not support a broader application of the law of the case doctrine. In the only binding case cited by the Government, *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000), the § 2255 claim was completely identical to the claim on appeal—the court took pains to note that it could "discern no fact or other evidence underlying the present due process claim which was not raised . . . and considered by us in his prior immunity claim." Here, by contrast, the key facts alleged in the petition were not known during the direct proceedings. The other authorities that the Government cites are distinguishable for similar reasons.[9] Thus,

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[9] Justice Scalia's concurring opinion in *Reed v. Farley*, 512 U.S. 339, 358-59 (1994), which did not command a majority of the Court, stated that "claims will ordinarily not be entertained under § 2255 that have already been rejected on direct review," but acknowledged that this was based on non-binding "dictum," and also that it was limited to cases in which "mere statutory violations are at issue." No member of the Supreme Court suggested that a constitutional claim like petitioner's can be barred in the same way, and the Court did not consider the effect of new evidence of the type at issue here. In *Moore v. United States*, 598 F.2d 439, 441-42 (5th Cir. 1979), the court concluded that the claim at issue was not precluded, because even though it had been raised in a prior petition for rehearing, the court could not be sure whether the prior court had actually considered the claims in denying the petition. In *Yick Man Mui v. United States*, 614 F.3d 50 (2d Cir. 2010), the court applied its settled rule that

this Court should hold that the law of the case doctrine, even if it applies, does not preclude consideration of petitioner's claim.

2. The "Cause and Prejudice" Standard Does Not Bar Consideration of Petitioner's Due Process Claim.

For three reasons, the "cause and prejudice" standard—which applies when a § 2255 petitioner fails to raise a "trial error" in direct proceedings—does not bar petitioner's claim. First, the alleged violation here is not a "trial error," but a *structural error*. Second, petitioner did not default his claim, or any part of it. Third, even if the "cause and prejudice" standard does apply to this claim, petitioner satisfies both prongs of that analysis.

First, the "cause and actual prejudice" standard applies only to "trial errors to which no contemporaneous objection was made." *United States v. Frady*, 456 U.S. 152, 167-68 (1982). The Supreme Court has long distinguished between "trial errors," which are amenable to a harmless error analysis, and "structural defects," which "affect the framework within which the trial proceeds," and require automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

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a § 2255 petitioner cannot raise a claim if "the factual predicates" of the claim were "rejected by the appellate court mandate," either expressly or by implication. Because the factual predicates of petitioner's claim were not before the trial or appellate court, that rule would not bar relief in this case.

The Government does not argue that publicity about the trial by biased journalists could not "affect the framework" of the trial, but rather contends that the error in this case is too far removed from the trial process to constitute structural error. (DE#15:24-25). However, the Government's response merely assumes the facts that justify its conclusion: it assumes that the prosecution had no knowledge of the journalists in question, and it assumes that the inflammatory publications cited by petitioner and his co-defendants had no effect on the trial process. However, the hallmark of a structural error is that it "undermine[s] the fairness of a criminal proceeding as a whole," as opposed to merely influencing one aspect of the trial. *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 (2004); *see also Fulminante*, 499 U.S. at 310 (structural error is one that prevents a criminal trial from "reliably serv[ing] its function as a vehicle for determination of guilt or innocence"). Claims of systematic impropriety by the Government, geared toward biasing the jury, raise precisely that concern. Because the alleged error in this case is structural, this Court need not engage in a cause and prejudice inquiry.

Second, the "cause and actual prejudice" standard applies only if "no contemporaneous objection was made." *Frady*, 456 U.S. at 68. Here, petitioner raised his due process claim in direct proceedings, so there was no default. The claim has become monumentally stronger because of new caselaw and the discovery of

more evidence, which has revealed additional bad publicity as well as evidence of the Government's complicity in the production of that publicity, but the fact that particular documents were not presented during the direct appeal is not what the procedural default rule guards against.

To the extent that this Court accepts the Government's interpretation of the rule, petitioner clearly has both cause and prejudice for not knowing that the Government was funding journalists who were publishing inflammatory articles about the trial. With regard to "cause," Petitioner's argument is based on factual revelations that did not occur until 2006. The Government kept the program at issue a secret, and indeed continues to resist disclosures under the Freedom of Information Act. The Government duplicitously chides petitioner for failing to raise these arguments during his trial in 2001, even as it denies that the "prosecution team" had any knowledge of these facts at that time. (DE#15:28-31). In reality, this evidence would not have been available to even an extremely diligent defense attorney at the time of trial. Although the relevant articles had been published in Spanish-language publications, neither petitioner nor his court-appointed attorney had any reason to suspect that their authors had been paid by the Government. It was only in 2006, when the *Miami Herald* published a front-page story with the discovery that the Government had been paying

Miami-area journalists, that the relationship between the bad publicity and the Government's actions became clear.

The Government's argument to the contrary is unpersuasive. The relevant information, *i.e.*, that the Government had paid these journalists, was not publicly available—the *Miami Herald* obtained it only through Freedom of Information Act requests—and when it was revealed, it "unleashed a firestorm of protest from Cuban-Americans and others in greater Miami." Kirsten Lundberg, *When the Story Is Us:* Miami Herald, Nuevo Herald, *and Radio Martí* 1 (2010), *available at* http://www.latinamericanstudies.org/exile/Herald-Columbia.pdf. The author of the original *Miami Herald* article received numerous death threats from anti-Castro activists, and had to be moved from his home. *Id.* at 17. Clearly, the facts at issue were not mundane realities just waiting to be cited.

With regard to "prejudice," petitioner has submitted evidence that the violations in this case did prejudice the jury, and has signaled his intent to present further such evidence at a hearing. While jurors are presumed to follow the Court's instructions to avoid outside information about the case, that presumption is not conclusive. Jurors are human beings, and this trial and the events that gave rise to it were the subject of intense public outcry and media scrutiny. The evidence already presented shows that, at least during jury selection, jurors were attentive to the publicity, or at least to the

effect of the publicity on broader sentiment; and there is no reason to believe that this effect diminished over the course of the trial. Moreover, as the Court is well aware, reporters hounded the jurors throughout the proceedings—indeed, it is well-established that anti-Castro activists, journalists, and members of the public attempted to contact and perhaps sway the jurors during the trial, so that even if the jurors themselves studiously followed the Court's instructions, they nevertheless would not have been able to avoid the maelstrom of public attention.

Petitioner has also argued that the Government's failure to disclose its ties to journalists prejudiced him by depriving his counsel of necessary information to make informed decisions about his defense. This discussion included mention of the efforts the Court had made to protect the jury from outside influence, referring to the daily instruction to the jury to avoid media coverage (*Id*., at 10, citing T.11415-16), and discussion of appropriate response to a demonstration on February 7, 2001 aimed at defendants ("Fair trial wanted, spies to be killed") (*Id*., citing T.6097-98; 6147). Those contentions are adequately set forth in petitioner's original memorandum. (DE#5:14-20).[10]

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[10] Seizing on the fact that petitioner cited *Brady v. Maryland*, 373 U.S. 83 (1963), the Government expends considerable effort attacking the idea that petitioner has a *Brady* claim. (DE#15:27-37). The Government's response is overwrought, because petitioner's argument does not depend on *Brady* and its progeny. Specifically,

Independently, petitioner has a compelling argument that the due process violations here critically undermine confidence in the verdict such that a new trial is warranted. The key point is not that the atmosphere surrounding the trial was tainted by slanted journalism—it surely was. Rather, the central issue is that the Government itself funded that propaganda. That fact, newly revealed, distinguishes this case from every past case in which negative media attention has threatened the legitimacy of the trial, because it draws the integrity of the prosecution itself into question. Every objective observer—from the United Nations Working Group on Arbitration Detentions to former U.S. Presidents to Amnesty International—has opined that the verdict in this case raises serious due process concerns. Thus, whether the

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petitioner has no independent disclosure claim, because in this case, the Government should not have been willing to try this case in the same venue where paid Government propagandists were likely to publish about the trial, and disclosing the fact would not have cured that problem. To be sure, disclosure might have enabled the Court to protect the trial from the inevitable prejudice, and the fact that the Government was silent highlights the prejudice movant suffered, but it does not create a separate claim for failure to disclose outside of the ineffective assistance claim described in the memorandum.

On one point, however, petitioner vehemently disagrees with the Government. The Government speculates that information about the propaganda payments would not have helped petitioner advance or win his motion for a change of venue. (DE#15:37). Petitioner argues that it is highly likely that had the facts regarding Government payments to journalists been known at the time of trial, the result of that motion proceeding would have been different. The fact that the Government is not willing to acknowledge that a different result would obtain even if all parties had known about the propaganda suggests that it does not fully appreciate the gravity of allowing such a pernicious influence on the trial venue.

"prosecution team" actually knew of the propaganda campaign or not, the appearance of impropriety is enough to taint the verdict.[11]

II. Petitioner's Claim of Ineffective Assistance of Appellate Counsel Warrants Relief.

The Government's presentation in opposition to Petitioner's assertion of ineffective assistance of appellate counsel by failure to challenge the factual basis for affirmance of the two level sentence enhancement imposed by this Court for obstruction of justice is substantially correct. Petitioner pursued this issue aggressively during sentencing, the Court's ruling was based on multiple considerations.

Counsel for Petitioner continues to hold the view that the single finding of the Court of Appeals upon which that court based its affirmance is incorrect. That is: "The adjustment was based on a finding that Medina gave a false name to the magistrate judge at his pretrial detention hearing." *United States* v. *Campa*, 529 F.3d 980, 1015 (11th Cir. 2008) (*Campa 3*). The Government seeks to avoid the thrust of petitioner's argument by presenting in bold font all of this sentence, except for the operative

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[11] The Government's proposed rule, that as long as the "prosecution team" did not know of any impropriety, there is no violation of due process, would create perverse incentives for prosecutors to shield themselves from knowledge of what other branches of the Government are doing.

language "at his pretrial detention hearing" (DE#15:58). In addition, the government presents a creative argument.

This creative argument is that since Mr. Labañino, when called to the podium at his first appearance as "Luis Medina," provided that name. Although he never spoke at his detention hearing, the Government casts that detention hearing as somehow a continuation of this preliminary appearance before a judicial officer.

There is no question that Mr. Labañino is not Luis Medina. The Government knew that and charged him as "John Doe No.2, aka Luis Medina III." One might question how it might be that a man who is hailed into court and called to the podium as "Luis Medina" obstructs justice when he responds to that name, particularly when, as developed in Petitioner's memorandum, the Government made it clear to the Court that this is a false name.

It is not clear from the *Campa 3* opinion whether the court considered the distinction between a man who simply responds to the name he is called, even though everyone knows it is not his, and a man who falsely attempts to obtain release based on a claim of false identity. What is clear is that the enhancement was based on the belief that petitioner had made the false claim at his detention hearing, and he did not. By calling the pretrial detention hearing a "continuance" of his preliminary appearance, the Government attempts to dissolve this distinction.

The Government also asserts that Mr. Labañino waived his right to present this claim by entry into a Sentencing Agreement, which is in the record as CR/DE#1768-1 (DE#15:59). Counsel has consulted with his client, and Mr. Labañino has instructed that he does not wish to pursue an issue in violation of his agreement.

However, it is far from clear to counsel that the argument is foreclosed by the sentencing agreement for two reasons. First, the sentencing enhancement issue was not before the district court for resentencing by reason of the mandate rule. As discussed above, the enhancement for obstruction of justice was affirmed by the Eleventh Circuit. Therefore, the issue was not before the court when Mr. Labañino was resentenced.

Second, the Government characterizes the Sentencing Agreement as "carefully and narrowly drawn" (DE#15:59). The scope of the collateral attack waiver is addressed in a separate paragraph. What the agreement waives is the right "to attack collaterally his sentence based on a claim of ineffective assistance of counsel at sentencing" (CR/DE#17681:6, ¶11). It is not a waiver of all rights to bring collaterally attack, and does not encompass this issue, which is a challenge to ineffective assistance of appellate counsel. A copy of the agreement is included in the Appendix as Exhibit C.

CONCLUSION

Petitioner's claim for § 2255 relief should be granted.

Respectfully submitted,

/S/ William M. Norris

_____
William M. Norris

TFB # 309990
William M. Norris, P.A.
8870 SW 62nd Terrace
Miami, FL 33173-1616
Tel: 305 279-9311
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing memorandum was filed electronically this 15th day of February, 2012, and served by that means on all counsel of record.

S William M. Norris

_____
William M. Norris

APPENDIX

Index

A. Julio Estorino resume and Estorino article entitled “The spies of Havana and Washington’s intentions,” *Diario Las Américas,* September 18, 1998.

B. Article by Kathy Glasgow, “Overthrow on the Radio.” *Miami New Times*, February 13, 1997, discussing activities of Enrique Encinosa.

C. Sentencing Agreement.

APPENDIX

Index

A. Julio Estorino resume and Estorino article entitled "The spies of Havana and Washington's intentions," *Diario Las Américas,* September 18, 1998.

B. Article by Kathy Glasgow, "Overthrow on the Radio." *Miami New Times*, February 13, 1997, discussing activities of Enrique Encinosa.

C.Sentencing Agreement.

[Note: This C.V. of Julio Armando Estorino was obtained by the 2010 *Liberation* newspaper FOIA to the BBG. Page 1 of 4]

Julio Armando Estorino

(b) (6)

(b) (6) (b) (6) (b) (6) SSN: (b) (6)

Education

B.A. in Spanish — **May 1978**
St. Thomas University (formerly Biscayne College), Miami, FL

B.A. in Political Science — **May 1978**
St. Thomas University (formerly Biscayne College), Miami, FL
Total credits earned: 159

Last High School attended

Ramón Matthieu School, Matanzas, Cuba. — **Sep. 1961**

Radio & TV Experience

W.A.C.C. Radio Paz, Miami, FL — **Nov. 1997 - present**
Aug. 2003-present: *Executive Director of Morning Show*: news and commentary magazine
Nov. 1997-present: *Host*: "El Portal de Miami," daily evening drive-time interview show
Nov. 1997-Jan. 2002: *Co-host*: "Al día," (formerly "Amanecer") news and opinion show
Employer: Pax Catholic Communications
1779 N.W. 28 St.
Miami, FL 33142
Salary: $33,000.00 per year, one three-hour morning show and one one-hour evening show, 20 hours per week
Supervisor: (b) (6) (may be contacted)
Duties: Select guests and topics. Contact guests, produce the show and conduct interviews. Write and broadcast own news commentary.
Accomplishments: "El Portal de Miami" is one of the most listened-to programs in Radio Paz. Over the years I have been able to present a wide array of international experts on many different topics, especially on Cuba-related issues.

W.W.F.E. La Poderosa, Miami, FL — **Jan. 2002 – Aug. 2003**
Co-host: "La Revista de la Mañana," daily morning drive-time news and opinion show
Employer: Fenix Broadcasting Corp.
330 S.W. 27 Ave., Suite 207
Miami, FL 33135
Salary: $12,000.00 per year, 15 hours per week
Supervisor: (b) (6) (may be contacted)

Duties: Select and edit news and sound bites for newscast. Contact people in the news and/or commentators for interviews. Write and read on the air own daily commentary. Broadcast the news and introduce segments and guests. Interview guests and receive and respond on air listener's calls.
Accomplishments: In the fifteen months that I have been on this show the audience has steadily increased according to Arbitron polls.

T.V. Martí, Miami, FL **Mar. 1998 - present**
Host: "Mesa Redonda," weekly interview show
Employer: U. S. Government
Office of Cuba Broadcasting
4201 N.W. 77 Ave.
Miami, FL. 33166
Salary: Independent contractor, $175.00 per 30-min. show, one per week
Supervisor: [redacted] (may be contacted)
Duties: Together with the producer, select guests and topics. Introduce and interview guests.
Accomplishments: I have been able to have on the show, over the years, people of different political backgrounds and thinking, Cubans and non-Cubans, freely expressing and debating their views. I have promoted serious, in-depth news analysis and I have covered all events relevant to the Cuban situation.

Radio Martí, Miami, FL **Mar. 1998 – Aug. 2001**
Co-host: "Tempranito y de mañana," a daily news, interview, opinion, and variety show
Employer: U. S, Government
Office of Cuba Broadcasting
4201 N.W. 77 Ave.
Miami, FL 33166
Salary: Independent contractor, $150.00 per three-hour daily show, plus one daily news commentary, 15 hours per week
Supervisor: [redacted] (may be contacted)
Duties: Together with the producer and the co-host, select guests and topic for news-related interviews. Research, broadcast and comment on Cuban history, culture and current events for different segments of the show. Introduce guests and sections. Write and broadcast own daily news commentary.
Accomplishments: "Tempranito y de mañana" was, according to credible sources, one of the audience's favorite shows in Radio Martí. I have been told it was the most listened to by Cubans in the island. I always took pride in being part of that show, and felt very comfortable working with Oscar del Río and the rest of the crew. I received many letters from listeners in Cuba with very interesting opinions about the show and my work in it. Copies will be available on request.

W.Q.B.A., Miami, FL **Sep. 1992 - Nov. 1997**
News director: Morning and noon newscasts
Co-host: "Detrás de la Noticia," daily news and opinion show
Co-host: "Primera Plana," daily interview show
Host: "Debate Semanal," weekly interview show
Writer and Reader: "Cantaclaro," daily editorial news commentary
Writer: "Candelaria," daily satirical news commentary
Employer: Heftel Broadcasting
W.Q.B.A.
2828 Coral Way
Miami, FL 33145
Salary: $68,000.00 per year, 40 hours per week
Supervisor: (b) (6)
Duties: Select and edit the news and sound bites for the morning and noon newscasts. Check on content and readiness of segments. Select people to be interviewed on news-relates issues. Comment on daily news with co-hosts and guests. Write and broadcast own daily news commentary. Write a daily satirical news-related poem for a fictional character of own creation.
Accomplishments: During my time at WQBA, it regained its long lost competitive status in the local market. My morning show, with Agustín Acosta, reached first place in the Arbitron ratings in the 34 to 54 year-old audience several times, and, together with the rest of the programs and newscasts I was involved in, showed consistent growth.

Newspaper Experience

Diario Las Americas, Miami, FL **1997 - present**
Columnist

Revista Ideal, Miami, FL **1985 - present**
Columnist

El Nuevo Herald, Miami, FL **1988 – 1996**
Columnist

Publications

Patria y pasión, poetry, Miami, FL, 1975.

Other works of poetry published in:
- *107 poetas cubanos del exilio*, Miami, FL, 1988.
- *El amor en la poesía hispanoamericana*, Buenos Aires, 1985.
- *Resumen literario El Puente*, Madrid, 1982.
- *Poesía en Exodo*, Miami, FL, 1970.

Honors and Awards

Honors and Awards received include:
- ACCA Trophy, Creativity in radio broadcasting, Cuban Critics Association in Exile, 1996.

- ACCA Trophy, Best Newscast, Cuban Critics Association in Exile, 1995.
- National Journalism Medal, Cuban Press Club in Exile, 1994.
- Sergio Carbó Award for Journalism, Cuban Rotary Club in Exile, 1982.
- Ramiro Collazo Award, Cuban Lions Club in Exile, 1979 and 1981.
- Ignacio Agramonte Award, newspaper article, Cuban Bar in Exile, 1972.

Public Speaking Public speaking engagements include presentations at student's clubs of the School of International Relations of Northwestern University, Chicago, the First Cuban Dissidents International Congress (Paris, France, 1979), and different Cuban exile's associations in Costa Rica, the Dominican Republic, Venezuela, Puerto Rico and several cities all over the United States.

Service Activities

- Municipios de Cuba en el Exilio, 1967-1996
- Dade County Fair Elections Practices Committee, 1980s
- Comité del Centenario de la Instauración de la República (Republic of Cuba Centennial Committee), 2002-2003

Military Service U. S. Army, Cuban Volunteer's Program, 1963-1964

Special Skills

- Fully bilingual (English-Spanish) and skilled translator
- Experienced writer of editorial and news content as well as broadcast scripts press releases, advertising copy, and media alerts and announcements
- Possess office and newsroom management experience
- Skilled at organizing events
- Internet proficient
- Extensive knowledge of word history and current affairs

References References are available upon request.

Other

U.S. Citizen: Yes
Veteran's Preference: No
Federal Civilian Employee: No
Eligible for Reinstatement: No

The spies of Havana and Washington's intentions

Diario Las Américas, 18 September, 1998, page 4-A
By Julio Estorino

The issue of the spies, just to call it something, is inescapable. The matter of the capture and denouncing of an alleged pro Castro spy ring, by the U.S. authorities, is an obligatory subject. We must talk about it, even if you don't want to and despite my preference to do so with stronger evidence than what is currently known. I don't think it is too early for some comments, as we say in Union de Reyes, they will fall from the tree.

Independently of this particular case, it seems to me that anyone that even approximately knows the will of Fidel Castro; his wickedness, his prepotency and his dreams of grandeur, could doubt that something like what was discovered and reported would be in his list of things to do. Throughout his lengthy reign of terror, many have known and almost all have assumed that certainly in this country and in Miami, amongst us, there are Castro agents moving about and performing different missions, none of which we can say are any good.

The novelty of this case is that it confirms this criteria on the one hand, then on the other, for the first time the United States government has decided to arrest and prosecute someone — ten people in this case — under the direct charge of working for the most sinister interests of the Castro regime and consequently make this public.

In asking ourselves, why do this now? We would have to respond from the world of conjecture, into which much fits. However, if we conjecture from the logical, we would have to conclude that something like this is not decided in Miami and that whatever the reason for this unusual process by Washington; the capture, public denunciation and indictment of Castro's spies would not happen if the intention were the understanding, appeasement or normalization of relations with Havana.

This is not good news for Fidel Castro, but at the same time, it largely dismantles the argument of some amongst us, whose argument and approach to the Cuban situation is characterized by an unblemished anti-Americanism, sometimes more visible than the anti-Castro sentiment that supposedly motivates them.

Thus, constantly announcing the "imminent " pact or agreement between the United States government and the dictatorship of Fidel Castro, when no secret entente designed to exclusively favor the tyrant existed between the two. Even as I write this, no one has up to this minute seen this pact anywhere.

Either way, a constant toxic state is maintained between Miami and Washington that severely hampers what should be a profitable relationship for Cuba's freedom. Since it cannot help or cease agitating you, you characterize daily with the worst insults — and worst of all, condemn as "anti-Cuban heresy" — any attempts to review our own errors. If we do not have them, then we do not commit them. To talk about it "plays into the enemy". The Americans are to blame for all our ills, and that's final.

I do not mean that Washington should be excused from their mistakes, past and present, as far as Cuba is concerned. I do not mean you have to blindly trust anyone. I do not mean that there are no people within all branches of this country's government that would give their soul to have an understanding with Castro. I do not mean that there are none who suffer from some perverse admiration for the despot. I do not mean that if he lets himself

be wanted, if the circumstances were different, they wouldn't already be in full collusion.

I'm not talking about what could potentially be but rather what is at this moment, of something that was revealed with the public "uncovering" of these alleged spies for Castro in Miami.

Of course there are those that would say otherwise, and would attributed what happened to the more sinister ploy of the "great conspiracy" whose supposed main objective — unexplained and inexplicable — is to "oxygenate " Fidel Castro to keep him in power for ever and ever. Remember, however, I spoke of conjecturing from logic, not from delirium.

Many other interesting conclusions can be drawn from the "case of the spies" and without doubt, the coming days will provide more material to draw from. We are aware that this is getting interesting. Very interesting, hickory.

Los espías de La Habana y las intenciones de Washington

Diario Las Américas, 18 de septiembre 1998, página 4-A
Por Julio Estorino

El tema de los espías, por llamarlo de alguna manera, es inescapable. El caso de la captura y denuncia de una supuesta red de espionaje castrista, por parte de las autoridades de Estados Unidos es tema obligado. Hay que hablar de ello, quieras que noy aunque yo preferiría hacerlo con mayores elementos de juicio que los que hasta ahora se conocen, creo que no es temprano para algunos comentarios que como decimos en Unión de Reyes, se caen de la mata.

Independientemente del caso en particular, me parece a mí que nadie que conozca, siquiera por aproximación, el talante de Fidel Castro; su maldad, su prepotencia y sus sueños de grandeza, pueda dudar de que algo como lo que se ha descubierto y denunciado esté dentro de sus quehaceres. A lo largo de su prolongado reino de terror, muchos han sabido y casi todos hemos supuesto que, efectivamente, aquí, en este país, en Miami, entre nosotros, se mueven y actúan agentes del castrato con diversas misiones, ninguna de ellas muy buena que digamos.

Lo novedoso de este caso consiste en que el mismo viene a confirmar esos criterios, por una parte, y por otra, el que, por primera vez, el gobierno de los Estados Unidos decide detener y encausar a alguien — diez personas en este caso — bajo la directa acusación de trabajar para los más siniestros intereses del régimen castrista y, por consiguiente, hacer de esto cosa pública.

Al preguntarnos ¿por qué se hace esto ahora? Tendríamos que responder desde el mundo de las conjeturas y es mucho lo que cabe en él. Sin embargo, si conjeturamos desde lo lógico, habrá que concluir que algo como esto no se decide en Miami y que cualquiera que haya sido la razón para este inusitado proceder de Washington, la captura, denuncia pública y acusación formal de espías del castrismo no sucedería si la intención fuese el entendimiento, el apaciguamiento o la normalización de relaciones con La Habana.

Esto no es buena noticia para Fidel Castro, pero, al mismo tiempo, desarticula en buena medida el discurso, de algunos entre nosotros, cuya argumentación y enfoque de la actual situación cubana se caracteriza por un acendrado antiyanquismo, más visible a veces que el propio anticastrismo que se supone los mueve.

Así, anuncian permanentemente la "inminencia" de un pacto o acuerdo entre el gobierno de Estados Unidos y la dictadura de Fidel Castro, cuando no la existencia de un secreto entente entre ambos, destinado exclusivamente a favorecer al tirano, pacto que, hata el minuto en que escribo esto, no se ha visto por ningún lado.

De igual forma, mantienen un estado de perenne enquistamiento entre Miami y Washington que lastra gravemente lo que debiera ser una relación provechosa para la libertad de Cuba, pues no te puede ayudar o dejar destorbar aquel a quien día a día califícas con los peores epítetos, y lo peor de todo, censuran como "herejía anticubana" cualquier intento de revisar nuestros propios errores. No los tenemos, no los cometemos. Hablar de ello es "hacerle el juego al enemigo". Los americanos tienen la culpa de todos nuestros males, y se acabó.

No quiero decir con esto que hay que eximir a Washington de sus propios errores, pasados y presentes, en lo que a Cuba se refiere. No quiero decir que haya que confiar ciegamente en nadie. No quiero decir que no haya en todas las ramas del gobierno de este país gente que daría el alma por poderse entender con Castro. No quiero decir que no haya algunos, incluso padeciendo de cierta perversa admiración por el déspota. No quiero decir que si éste se dejara querer, si las circunstancias fueran otras, no estarían ya en pleno contubernio.

Pero no estoy hablando de lo que potencialmente sería, sino de lo que, en este minuto es, de algo de lo que nos revela el público "destape" de estos supuestos espías de Castro en Miami.

Claro que no faltará quien diga lo contrario y atribuye lo ocurrido a la más tenebrosa artimaña de la "gran conspiración" cuyo supuesto gran objetivo — inexplicado e inexplicable — es "oxigenar" a Fidel Castro y mantenerlo en el poder por los siglos de los siglos. Recuerden, sin embargo, que hablé de conjeturar desde la lógica, no desde el delirio.

Muchas otras conclusiones interesantes pueden sacarse del "caso de los espías" y, sin duda, los días venideros ofrecerán más tela por donde cortar. Estemos al tanto, pues, que esto se pone interesante. Muy interesante, carya.

Note: Enrique Encinosa received monies from the OCB and BBG during the trial

Overthrow on the Radio

With a vengeance born of extremists, the radical La Voz de la Resistencia show goes straight for Castro's jugular

Miami New Times, February 13, 1997
KATHY GLASGOW

One night each week, three Cuban exiles make their way through a tall gate and the cluttered, overgrown yard of a house in Westchester. They file past a long table stacked with pamphlets and papers in what used to be the living room, then down a hallway and into a bedroom that has been converted into a cramped radio studio. A man waits near an ancient reel-to-reel tape recorder and worn audio control board. Then for half an hour the exiles sit before banged-up microphones and instruct the people of Cuba in the dark arts of sabotage, arson, and assassination.

Here's the opening of one such taping session, recorded this past December: "Since the sugar harvest is about to begin, and it's almost the new year, we want to start this new period with review and explanation, with an understanding of what those on the island are suffering. Now, this year's sugar harvest, it must be destroyed. In the past Castro promised ten million tons. Now it must be ten million acts of sabotage. Cubans, we urge each of you to destroy the grinders of the sugar mills by tossing pieces of lead pipe or screws into the cane that is being processed. Loosen or damage parts of the mechanisms. Also burn the cane fields. This can be done by pouring a little gasoline or combustible liquid on an empty cloth sack. Set the sack on fire and let it burn a few minutes, then put out the fire. At night throw the sack into a field. The next day the heat of the sun by itself will cause the sack to reignite."

The speaker is 47-year-old Enrique Encinosa, youngest of the three exiles, a writer of fiction and books about Cuban history. Encinosa and his colleagues then go on to detail methods of burning down warehouses and disabling government vehicles. They'll save for other taping sessions instructions for destroying computers, derailing trains, short-circuiting electrical systems and power grids, driving tourists out of ritzy hotels, even selectively assassinating high-ranking communist officials.

These and other recipes for mayhem are being broadcast to Cuba on a shortwave radio program called La Voz de la Resistencia (The Voice of the Resistance). The half-hour program is taped in this house that serves as headquarters for Radio CID (Independent and Democratic Cuba), the shortwave station founded by exile leader Haber Matos, a former Cuban Rebel Army major who resisted Castro's move toward communism and served twenty years in prison as a result.

La Voz de la Resistencia and other Radio CID programs are broadcast from a transmitter whose exact location in Central America is a closely guarded secret. According to station personnel, the program airs Tuesday at 6:35 p.m. and also on various other days -- depending on the station's programming commitments. (Anyone with a shortwave radio can tune in to Radio CID at 9940 kHz from 6:00 p.m. to midnight, and at 6305 kHz from midnight to 2:00 a.m. and 6:00 a.m. to 10:00 a.m.)
Encinosa, along with 69-year-old Coral Gables cardiologist Armando Zaldivar and 63-year-old building contractor Ramon Ramos, has been producing La Voz de la Resistencia for about fifteen months, but until recently they were reluctant to discuss the program in the

English-language media, concerned that such exposure would attract scrutiny from federal authorities owing to La Voz de la Resistencia's seditious content. (Encinosa says he did speak about the program on Spanish-language radio this past summer.) But they have since learned that because the broadcasts originate outside the U.S., federal telecommunications regulators have no jurisdiction. In addition, a spokesman for the U.S. Attorney's Office in Miami says the program almost certainly is protected by free speech provisions of the U.S. Constitution.

The shortwave saboteurs also say they were encouraged to go public by none other than Fidel Castro himself. According to Encinosa, Castro decried subversive radio broadcasts such as La Voz de la Resistencia in a January 1 speech in Havana. (New Times was unable to confirm Encinosa's claim.) "Now even Castro himself talks about [the show]," Encinosa beams. "He mentioned in a pissed-off tone that there were some exiles on the radio trying to get the Cuban people to commit acts of sabotage. After the speech there were a lot of comments about that on the radio here."

Along with the supercharged rhetoric and inflammatory calls to action commonly heard on Miami's Spanish-language AM airwaves, myriad other anti-Castro broadcasts reach Cuba on shortwave bands -- the U.S. government's Radio Marti and the Cuban American National Foundation's station La Voz de La Fundacion being the most prominent. But La Voz de la Resistencia pushes the format to its extreme. "Are we advocating the overthrow of the Cuban government? Yes, we are," declares the bearded Encinosa, taking a quick drag from a Kool. Despite his relatively young age, he has been involved for decades in both peaceful and paramilitary anti-Castro activities. He is the author of three books about armed struggle within Cuba, and hosts a half-hour talk show on WQBA-AM (1140). "We don't claim we have a resistance army inside the island, or commando units. What we have is a direct line by radio to explain ways of resisting, and encouraging acts of resistance."

http://www.miaminewtimes.com/1997-02-13/news/overthrow-on-the-radio/1/addComment/2/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-721-Cr-LENARD(s)(s)

UNITED STATES OF AMERICA

vs.

JOHN DOE No. 2, a/k/a
Luis Medina III,
Defendant.
_____/

SENTENCING AGREEMENT

The United States of America and JOHN DOE No. 2, a/k/a, Luis Medina III, a/k/a Ramon Labanino Salazar (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees that he faces resentencing as to Counts 2, 9, 10, 11 and 12 of the second superseding indictment, which counts charge the defendant with conspiracy to commit espionage, in violation of Title 18, United States Code, Section 794(c) (Count 2); with fraud and misuse of documents, in violation of Title 18, United States Code, section 1546(a) (Counts 9, 11); with false statement in passport application, in violation of Title 18, United States Code, Section 1542 (Count 10); and with possession with intent to use five or more fraudulent identification documents, in violation of Title 18, United States Code, Section 1028(a)(3) (Count 12).

2. The defendant is aware that the sentence for these counts will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentencing guidelines range under the Sentencing Guidelines and that the applicable guidelines will be determined by the court relying in part on the results of a Pre-Sentence Investigation by the

court's probation office, including all Addenda to the Pre-Sentence Report, up to and including the Second Addendum to the Pre-Sentence Report. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that range under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1.

3. The defendant also understands and acknowledges that the court may impose for Count 2 a statutory maximum term of imprisonment of up to life in prison, followed by a term of supervised release of up to five years, and a fine of up to $250,000; for each of Counts 9, 10 and 11 a statutory term of imprisonment of up to 10 years in prison per count, followed by a term of supervised release of up to three years, and a fine of up to $250,000 per count; and for Count 12 a statutory term of imprisonment of up to three years in prison, followed by a term of supervised release of up to one year, and a fine of up to $250,000, for a cumulative maximum possible sentence on all of Counts 2, 9, 10, 11 and 12 of life imprisonment, followed by five years supervised release, and a $1,250,000 fine.

4. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of $100.00 will

be imposed on the defendant for each of Counts 2, 9, 11 and 12, and that a special assessment in the amount of $50.00 will be imposed on the defendant for Count 10, for a total special assessment of $450 as to Counts 2, 9, 10, 11 and 12. The parties agree that the defendant shall receive credit for any special assessment previously paid by him pursuant to his original sentencing as to Counts 2, 9, 10, 11 and 12.

5. The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

6. The defendant is aware that the sentence for Counts 2, 9, 10, 11 and 12 has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the court. The defendant understands further that any recommendation that the government makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges that he may not withdraw from this sentencing agreement based upon the court's decision not to accept a sentencing recommendation

made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

7. The United States and the defendant agree that, although not binding on the court, they will jointly recommend that the court make the following findings and conclusions as to the sentence to be imposed:

a. Guideline components: That the components of the applicable guideline range for Count 2 are accurately and completely set forth in the Second Addendum to the Presentence Report, "Group A," including the Base Offense Level of 37; Specific Offense Characteristics of zero; Victim-Related Adjustments of zero; Adjustment for Role in the Offense of +3 (manager/supervisor in offense involving more than five participants); Adjustment for Obstruction of Justice of +2; and that the components of the applicable guideline range for Counts 9-12 are accurately and completely set forth in the Second Addendum to the Presentence Report, "Group B," including the Base Offense Level of 11; Special Offense Characteristics of +3 (involvement with at least six but not more than 24 documents); additional Special Offense Characteristics of +4 (defendant knew documents would be used to facilitate commission of felony); Victim-Related Adjustments of zero; Adjustment for Role in the Offense of zero; Adjustment for Obstruction of Justice of +2; and that the Multiple-Count Adjustment for Group A and Group B is accurately and completely set forth in the Second Addendum to the Presentence Report, for a Total Offense Level of 42.

b. Overall guideline range: That the applicable guideline range for Counts 2, 9, 10, 11 and 12, under all of the circumstances of the offense(s) committed by the defendant, is Level 42, as stated in the Second Addendum to the Presentence Report, and that the defendant's

criminal history category is I, resulting in a guideline imprisonment range of 360 months to life imprisonment.

8. The United States and the defendant agree that, although not binding on the court, they will jointly recommend that the court impose a sentence on Counts 2, 9, 10, 11 and 12 as follows:

a. a total cumulative sentence of 360 months incarceration, to run concurrently with the court's previously imposed sentences on Counts 1, 14, 16, 25 and 26 of the second superseding indictment, for a total incarceration sentence of 360 months;

b. a total cumulative term of supervised release of five years, with conditions of supervision, as set forth in the court's original sentence of the defendant;

c. a $450 special assessment, with credit for special assessment amounts previously paid by the defendant pursuant to his original sentence; and

d. no fine or restitution.

9. The United States and the defendant agree that neither party shall seek any departure, either upward or downward, from the agreed overall guideline range of Level 42, and that neither party shall seek any variance, upward or downward, from the agreed joint sentence recommendation of 360 months incarceration, five years supervised release, and $450 special assessment.

10. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this sentencing agreement, the defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the advisory sentencing guideline range that the court

establishes at sentencing. The defendant waives all right to appeal the court's Omnibus Order of October 23, 2009, (Docket Entry 1763), dealing with information including damage assessments. Should the court sentence the defendant to more than 360 months incarceration, the defendant may appeal the reasonableness of the sentence to the extent it exceeds 360 months. The defendant expressly acknowledges the reasonableness of a sentence to 360 months incarceration. The defendant understands and agrees that should the court sentence the defendant to more than 360 months incarceration, the defendant waives all rights to appeal that sentence on any basis other than the reasonableness of the sentence. The defendant also understands and agrees that the United States retains the right in any appeal to defend any sentence the court imposes, on any ground including its reasonableness. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney.

11. The defendant is aware that Title 28, United States Code, Section 2255 affords convicted persons the ability to attack their sentences collaterally under certain circumstances. Acknowledging this, in exchange for the undertakings made by the United States in this sentencing agreement, the defendant hereby waives all rights conferred by Title 28, United States Code, Section 2255, to attack collaterally his sentence based on a claim of ineffective assistance of counsel at sentencing. By signing this agreement, the defendant acknowledges that he has discussed the collateral-attack waiver set forth in this agreement with his attorney.

12. The defendant understands and agrees that this sentencing agreement will be filed with the court, and will become part of the public record in this case, and that he is subject to the court making inquiry as to his agreement to the terms of this sentencing agreement being knowing and voluntary.

13. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings.

JEFFREY H. SLOMAN
ACTING UNITED STATES ATTORNEY

Date: 11/16/2009

By: _____
CAROLINE HECK MILLER
ASSISTANT UNITED STATES ATTORNEY

Date: 11/16/09

By: _____
MICHAEL R. SHERWIN
ASSISTANT UNITED STATES ATTORNEY

Date: 10/29/09

By: _____
WILLIAM M. NORRIS, Esq.
ATTORNEY FOR DEFENDANT

Date: 10-29-2009.

By: _____
JOHN DOE No. 2, a/k/a, Luis Medina III a/k/a
RAMON LABANINO SALAZAR
DEFENDANT