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.

MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT JUDGMENT AND SENTENCE UNDER 28 U.S.C. § 2255

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MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT JUDGMENT AND SENTENCE UNDER 28 U.S.C. § 2255

GROUND I: DENIAL OF DUE PROCESS:

THE GOVERNMENT'S FAILURE TO DISCLOSE ITS PAYMENTS TO COMMUNITY NEWS REPORTERS PUBLISHING INFLAMMATORY ARTICLES RESULTED IN AN UNJUSTIFIED WAIVER OF A VALID ARGUMENT/DEFENSE AT THE PRETRIAL AND TRIAL PROCEEDINGS, RENDERING COUNSEL INEFFECTIVE AS MATTER OF LAW WARRANTING THE CONVICTION AND SENTENCE TO BE VACATED.

A. Summary of Petitioner's Argument[1]:

The government operates a $34 million a year[2] propaganda campaign to destabilize the regime in Cuba. A deeply funded propaganda campaign was recognized at its inception as a threat to our democratic institutions. Recent disclosures about the way that propaganda campaign has been operated - by paying nominally independent reporters of the news to provide the substance of the propaganda broadcasts - has revealed a troubling compromise of journalistic ethics. More troubling questions of due process of law are also revealed. The highly publicized criminal trial of five men, including Petitioner, in the very media market in which those compromised journalists published their stories raises questions of due process of a very fundamental nature which our courts have never before been required to address.

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[1] Petitioner is sometimes referred to by his true name, Ranón Labañino.

[2] The Office of Cuban Broadcasting budget for fiscal year 2008 was approximaly $34 million, inclusing about $18 million for salaries, $7 million for general operating expenses, and almost $9 million for transmissions. Broadcasting to Cuba: Actions Are Needed to Improve Strategy and Operations, USGAO January 2009, GAO-09-127, p.8.

In this case, the question of whether a fair and impartial jury could be selected in this community to try Petitioner and his codefendants received exhaustive scrutiny and the conclusion was that such a jury could be, and was, selected. However, this conclusion was reached without the knowledge that the government was paying journalists to destabilize the regime in Cuba and without any empirical data regarding the "news" these paid journalists were pumping into the community while the trial was being held. These facts were not known and were not considered because the government did not disclose its practice of paying journalists and, in violation of local rule and orders of this Court, continued its practice during trial.

Petitioner believes that the government's practice described above and detailed below robbed Petitioner of a guaranteed, fundamental criminal process and otherwise corrupted the reliability of the verdict. The government has taken the view that he cannot prove this. However, Petitioner can prove that news reports did have an impact on the jury selection process. He can prove this because this was the only phase of the trial in which jurors were interrogated on the record. Had counsel for petitioner known, and had the government disclosed what counsel now knows, counsel for Petitioner could have sought to protect his client's right to due process of law and the court could have conducted the inquiry necessary to resolve the matter. However, the government's failure to disclose rendered counsel ineffective.

B. Local Rules and Orders of this Court Require Disclosure and Provide for Sanctions:

1. The Court's Orders:

On October 22, 1998, at the urging by the government, this Court entered an order directed at "all Parties and Counsel" to abide by Local Rule 77.2 (RELEASE OF INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS). DE# 122. This Court ordered the parties and counsel

to "refrain from releasing 'information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation' where 'such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.'" *Id*. (quoting, *S.D. Fla. L.R. 77.2 (A)(1)*).

Some two years later, the government pressed the prohibition of contact with the news media, urging this Court to compel the defense witness not to discuss the case with the news media. DE# 818 ("United States' Motion To Enforce Court's Directive Concerning Witness Comments To News Media"). The government sought protection from this Court from the "unfairness" of using the media to disclose facts, evidence and other information that the jury would not otherwise receive during the course of the trial proceedings.

This case was tried very much in the glare of media attention. When the media presented the government in an unfavorable light, or drew conclusions with which the government disagreed, the prosecution team responded.

This particular motion was framed as raising a "gag order" issue, but may have been an attempt to supplement the record to correct a media report of trial testimony. During trial, the government presented evidence that it had intercepted high frequency radio messages when they were being transmitted to the defendants. The government claimed these messages included instruction about the impending shoot-down of BTTR aircraft. On December 23, 2000, a *Miami Herald* article reported that the FBI had intercepted before-the-fact Cuban radio transmissions indicating that the Brothers to the Rescue aircraft would be shot down. Gail Epstein Nieves, *Messages May Have Warned of Shoot-down*, The Miami Herald, Dec. 23, 2000, at 1A. The article contained comment by Richard Nuccio, who had been the national security advisor on Cuba to

President Clinton, expressing his shock and outrage that the FBI had not shared these interceptions with him. Nuncio had been listed, but not yet called, as a defense witness.

The prosecution filed a Motion to Enforce Court's Directive Concerning Witness Comments to News Media, DE #818. Nominally, the motion took the defense to task for failing to insure that its prospective witness complied with the court's gag order.[3] The government expressed concern about the substance of the coverage, which the motion characterized as prejudicial to "the United States" and "one-sided." *Id*., at 2. The prosecutors attempted to correct the conclusion that since the government had been able to intercept the message traffic when actual sent, that the FBI was able to read these messages contemporaneously with the intercept. The government asserted that the messages had not been read until after the shoot-down had occurred. *Id*.

The prosecutors' attempt to influence the media understanding of what the trial evidence established was successful. On December 28, 2000, an article appeared in the Miami Herald based on the prosecutors' motion. Gail Espstein Nieves, *U.S. Denies Knowing of Shoot-down Threat*, The Miami Herald, Dec. 28, 2000. See, Defendant Luis Medina's Reply to Governments Motion to Enforce Court's Directive Concerning Witness Comments to News Media, DE #820:6.

The prosecutors filed their motion because they did not want the public to believe that the FBI knew of the shoot-down before the event, but did nothing. They recognized that there is a

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[3] The prosecutor noted, in contrast, that the F.B.I. spokesperson made no comment and claimed that "private individuals such as Jose Basulto, whom the United States had apprized of the Court's directive, also declined to comment to the press." Mr. Basulto has expressed his views fully. He wrote an article about the BTTR shoot- down entitled "Criminal Indictment of Castro, when?" printed in the Diario Las Americas on May 20, 2000. As the parties were engaged in trial, Mr. Basulto called for "the legal process that is owed to us as victims of the terrorist act of February 24, 1996" and asking "all our brothers to join us in calling for truth and justice for our martyrs."

broader issue about the integrity of the trial process itself created by media reporting. The prosecutors wrote, DE #818:3:

> The jury in this trial has been strictly instructed not to read press accounts of the case, and there is no reason to believe that they have disregarded their instruction. Nonetheless, unbridled comment by persons who are designated witnesses in this matter, contrary to the Court's clear directives, **poses risks to the process that none of the parties should have to endure.** (Emphasis added.)

In his response, counsel for Mr. Labañino spoke to the risk to the process created by the prosecution's decision to limit disclosure to the jury of the FBI's investigative capabilities and intentions, and then "correcting the record" with pleadings essentially addressed to the media. DE #820:4.

Now, with hindsight improved with disclosure that the government was paying journalists to participate in its anti-Castro propaganda efforts, and that these journalists were publishing articles supportive of the theory of prosecution in this case, Mr. Labañino agrees with the prosecutions' words from years ago. There are "risks to the process that none of the parties should have to endure."

Of importance, the government pressed a very important constitutional theme that "unbridled comment by persons who are designated witnesses in this matter, contrary to the Court's clear directives, poses risks to the process that none of the parties should have to endure." *Id., p.3*. Petitioner has since learned that the government was doing exactly what it convinced this Court to forbid Mr. Labañino, his defense counsel and witnesses from doing during the pendency of the criminal case – that is, having the media perpetuate inflammatory and derogatory news content relating to and/or directed at the other party in the criminal case.

As a direct result of the government's portrayal of themselves as being on the righteous side of justice, seeking fundamental fairness during the critical stages of the criminal process and adhering to the orders entered by this Court as well as the Local Rules, Petitioner's defense counsel was deprived of an opportunity to present compelling evidence to support a change of venue of the criminal trial and/or moving for sanctions to be imposed against the government for engaging in such manipulation of the news media and efforts in flooding the community with prejudicial, inflammatory news articles and Radio/TV commentary, via its paid journalists. Defense counsel would have sought sanctions ranging from dismissal of the indictment[1] to striking some of the core evidence to be presented by the government at trial. This Court had a variety of sanctions available to impose against the government for committing such serious misconduct during the course of the criminal proceedings.

This Court was clearly troubled by the issue. The Court ordered the counsel for the parties to control their witnesses and took the care to obtain an on-the-record acknowledgment from counsel for each party. TR.(Dec. 6, 2000) pp 1546-47.

2. The court was concerned about insulating the jury from community sentiment:

[1] A jurist in this district noted that, while the Eleventh Circuit has acknowledged the split in the circuits, the Fifth Circuit would approve dismissal of the instant case by a district court's use of its supervisory powers where the defendant, like Mr. Labañino, was prejudiced by government misconduct or when any prejudice to the defendant cannot be cured by a less drastic remedy. *United States v. Arango*, 670 F.Supp. 1558, 1567 (S.D. Fla. 1987) (citing, *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982) and *United States v. Pabian*, 704 F.2d 1533, 1540 (11th Cir. 1983) (recognizing a split between the Third and Fifth Circuit on this issue, expressing no opinion thereon). It is without saying that "government misconduct may be so egregious as to violate a defendant's Fifth Amendment due process rights." *Arango*, 670 F.Supp. at 1566 (citing *Hampton v. United States*, 425 U.S. 484 (1976) and *United States v. Russell*, 411 U.S. 423 (1973)).

The Court attempted to insulate the jury from community sentiment, and explained its efforts during trial, T.11415-6:

> On a daily basis although I instruct the jury not to read or see or listen to anything touching on the case in any way, the Court and the parties, specially in light of the numerous motions for change of venue that had been made, one of which is still pending, the Court and the parties have an interest in protecting the jury from matters not presented to it in the open courtroom and that is the reason for the gag order that was entered by the Court with respect to discussion of attorneys and the like; so the focus of any coverage that may somehow by osmosis or otherwise, hopefully not, but in the event it did reach the jury, and there has been no indication anything has, but it would be what was in the open courtroom pursuant to the numerous cases that talked about protection of the jury from outside influences.

While the ability of the outside world to penetrate the jury room by osmosis is a legitimate concern, some penetration was far less subtle. For example, on February 7, 2001, the Court advised that a demonstration concerning the case had been permitted for 50 people outside the Courthouse from 10:00 A.M. to 2:00 P.M. Like much of the trial, the question of what to do about this provoked a difference of opinion. Counsel for Gerardo Hernandez suggested a recess in trial to insulate the jury from this expression of community sentiment. T.6097. The prosecutor objected: "I don't want to create a situation where demonstrators feel they could somehow force the hand of this Court * * * that would not be a good message to send." T.6098. Counsel for Mr. Labañino was more concerned about his client's right to a fair trial, expressing his concern "about the impact of community sentiment on this jury even though they may not personally hold it." Id.

The question of recess became moot. The demonstration had begun. The Court advised, T.6107,6147:

> There are still about 20 people outside with the Cuban flag and some of the examples of the signs were, take Castro down. I want you to have this information so you can make your positions. Fair trial wanted, spies to be killed.

> * * *
> /T/hey are out there with a PA system
> * * *
> The leader has given a press conference. It is a very large Cuban flag. It is up on the building, the art gallery across the street, it is on that wall.

Of course, the Court could not protect the process from undisclosed influences, such as the government's payments to journalists to produce the substance of its propaganda campaign to destabilize the Cuban regime.

3. The Power of Local Rules on the Parties and Counsel during the Pendency of a Federal Case:

"Local Rules are promulgated by district courts primarily to promote efficiency of the court . . . and such local rules have the same force and effect as law and are binding upon the parties and the court until changed in the appropriate manner." *Matter of Abrams*, 734 F.2d 1094, 1098 (5th Cir.1984); *Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 426 (8th Cir.1997) (same); see also, *Martinez v. Thrifty Drug & Discount Co*., 593 F.2d 992 (10th Cir.1979) (courts have held that a broad discretion exists in adopting rules to promote efficiency in the court). Further, "[l]itigants are presumed to have notice of local rules the same as with knowledge of the federal rules and all federal law." *Broussard v. Oryx Energy Co.*, 110 F.Supp.2d 532, 537 (E.D. Tex. 2000). Where a party violates one or more of the Local Rules, this Court can devise such sanctions as seem appropriate. *Matter of Adams*, 734 F.2d at 1098. When a party is found to violate one of the Local Rules of this Court, as the government has done during the course of the underlying criminal trial, *with impunity*, the government must show good cause for noncompliance of the Local Rules. *Michael v. Fisher*, 185 B.R. 259 (N.D. Ill. 1995).

Numerous district courts have cited only a particular Local Rule of the Court as "authority"

to take an action in case before them. See, *Sayers v. Stewart Sleep Center, Inc.*, 932 F.Supp. 1415, 1419 (M.D. Fla. 1996) ("Pursuant to this rule [Local Rule 3.01(b)] . . . unsolicited memorandum . . . will not be considered by the Court."); *United States v. Abbell*, 939 F.Supp. 860 (S.D. Fla. 1996) (determining that Local Rule 1, Rule 3.7(a)(3 and Rule 4-3.7(a) required disqualification of defendant's attorney); *Dalton v. FMA Enterprise, Inc.*, 953 F.Supp. 1525, 1533 n.2 (M.D. Fla. 1997) ("Pursuant to Local R.M.D. Fla. 1.02(e), the Court exercises its discretion by transferring the trial of this case to the Tampa Division instead of keeping it in the Fort Myers Division.").

4. The Government's Obligations to the Trial Judge, Petitioner and his Trial Counsel.

"It is axiomatic that the government must turn square corners when it undertakes a criminal prosecution. This axiom applies regardless of whether the target of the prosecution is alleged to have engaged in the daintiest of white-collar crimes or the most heinous of underworld activities. It follows that courts must be scrupulous in holding the government to this high standard as to sympathetic and unsympathetic defendants alike." *Ferrara v. United States*, 456 F.3d 278, 280 (1st Cir.2006).[2] The instant case "plays out against these aphorisms." *Id.*

[2] A prosecutor has a responsibility to strive for fairness and justice in the criminal justice system. *United States v. Okenfuss*, 632 F.2d 483, 486 (5th Cir. 1980). The government's attorneys' interest in this case "is not necessary to win, but to do justice." *United States v. Chapman*, 524 F.2d 1073, 1088 (9th Cir. 2008). The Eleventh Circuit has expressed the importance of a federal prosecutor's role in a criminal case or proceeding:

> A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, "he owes a heavy obligation to the accused." Such representations imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape then the innocent suffer.

United States v. Wilson, 149 F.3d 1298, 1303 (11th Cir. 1998) (quoting, *Dunn v. United States*, 307

While "[t]here is a presumption that prosecutors can be relied on to perform their official duties properly[,]" *Ramirez v. Sanchez-Ramos*, 438 F.3d 92, 99 (1st Cir.2006), a defendant like Mr. Labañino "should be able to trust the government to turn square corners and fulfill its ... obligations." *Ferrara*, at 293. However, the "government's actions in the criminal case do not demonstrate some garden-variety bevue, but, rather, paints a grim picture of blatant misconduct. The record virtually compels the conclusion that this feckless course of conduct," i*d*., i.e, the government putting news reporters and TV commentators on its payroll to generate inflammatory and highly prejudicial news permiating the Miami-Dade community constituted a deliberate and serious breach of its promise to do justice. In the circumstances of this case, then, the government's conduct was so outrageous and deceitful warranting the imposition of the most severe sanction – dismissal of the indictment in the underlying criminal case.

5. The Government's Concealment of its Payments to News Reporters During the Course of the Criminal Proceedings Caused Defense Counsel to Unjustifiably Waive Valid Arguments that May Have Had an Impact on the Outcome - A Clear Sixth Amendment Violation Warranting the Conviction and Sentence to be Vacated.

Petitioner submits the government's concealment of its activities and control of the inflammatory and prejudicial publicity[3] generated by its paid messengers, the news reporters and TV

F.2d 883, 885 (5th Cir. 1962)). The government capitalized on the credibility of the federal prosecutors appearing before the trial judge in the underlying criminal case by making it appear, through the government prosecutors, to all involved the government was inherently interested in fundamental fairness and justice being applied to Petitioner – an appearance completely at odds with the aggressive pursuit of the government's propaganda campaign.

[3] Petitioner requests this Court to take notice of the following websites which provide a copy of the contracts between the government and the news reporters and TV commentators:
http://www.pslweb.org/reporters-for-hire/documents-released/
http://freethefive.org/legalFront/FOIA/index.htm

Two of the articles published on this website analyze some of the U.S. paid journalists, who wrote about Petitioner and his co-defendants, otherwise known as the "Cuban Five." The first article deals with 3 of them: Pablo Alfonso, Wilfredo Cancio Isla, and Ariel Remos. The second

commentaries in Miami-Dade county, caused Petitioner's defense counsel to waive valid arguments at critical stages of the criminal process, which effectively rendered his former trial counsel constitutionally ineffective as a matter of law as more fully demonstrated below. On habeas courpus review, trial counsel's conduct can be measured against the level of performance he could have achieved had evidence been available to him at trial. *Gonzales-Soberal v. United States*, 244 F.3d 275 (1st Cir.2001).

Here are just a few of the scores of news articles the government paid to be created and disseminated throughout the Southern District of Florida and elsewhere:

> 1**. Cuba usó alucinógenos al adiestrar a sus espías**, *El Nuevo Herald*, June 4, 2001, WILFREDO CANCIO ISLA (English Translation: Cuba used hallucinogens to train its spies)
>
> 2. **Castro representa un reto continuo a la seguridad de EE.UU.**, *Diario las Américas*, January 16, 2001. ARIEL REMOS (English Translation: Castro represents a continuous challenge to the security of the US)
>
> 3. **Jeane Kirkpatrick pide a Ashcroft encausar por terrorismo internacional a funcionarios cubanos,** *Diario las Américas*, February 27, 2001. ARIEL REMOS (English Translation: Jeane Kirkpatrick asks Ashcroft to prosecute Cuban Officials for international terrorism)

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article deals with the fact that at least 3 of them have terrorist roots, and quotes from some of the articles created by the government paid news reporters Julio Estorino, Enrique Encinosa and Alberto Muller. See, http://www.pslweb.org/reporters-for-hire/analysis/

Petitioner has attached hereto a summary chart prepared by *The National Committee to Free the Cuban Five* ("The Committee"), showing some of the amounts of government money each journalist received, dates of pay, contract number and amendments, program(s) they were on, both radio and/or TV Martí. Julio Estorino, a news reporter, admits in his own *curriculum vitae* that he worked for Radio and TV Martí since March 1998, but the FOIA documents obtained The Committee and Liberation Newspaper reflect his employment with the government was from 2002 to 2003.

4. **Posible Alianza con Terrorismo**, *El Nuevo Herald*, Sept. 16, 1998, PABLO ALFONSO (English Translation: Possible Alliance with Terrorism)

5. **Espías: Un Viejo Consejo de Krushchev**, *El Nuevo Herald*, Sept. 20, 1998, PABLO ALFONSO (English Translation: Spies: Old advice from Krushchev)

6. **Díaz-Balart pide a Alemania arrestar a Castro,** *El Nuevo Herald*, July 20, 2000, PABLO ALFONSO (English Translation: Díaz-Balart Asks Germany to Arrest Castro)

7. **La fiscalía teme que Cuba controle el juicio a espías 'Cuba prepara una versión arreglada de los hechos', dijo**, *El Nuevo Herald*, April 19, 2001, WILFREDO CANCIO ISLA (English Translation: The prosecution fears Cuban control in spy trial "Cuba is preparing a fabricated version of the facts")[4]

8. **Criminal indictment of Castro, When?** *El Nuevo Herald*, May 20, 2000, JOSE BASULTO

9. **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
http://freethefive.org/legalFront/FOIA/Enrique_Encinosa/BackgroundEN.pdf

These articles are far from an exhaustive presentation of what the government's propaganda effort spawned. They are representative. They are inimical to the concept of a fair trial and to the government's obligation to insure a fair trial.

[4] This article was published 6-days after Judge Lenard reminded all the parties, counsel and witness of the gag order. TR (Apr. 13, 2001) pp..11415-6 ("THE COURT: … I also want to reinforce and have everybody acknowledge on the record the gag order that was entered by the Court early on in this case and now has been extended to witnesses.").

Journalist Pablo Alfonso was by far the most prolific of all of the government paid news reporters, writing an average of more than 200 articles each year for El Nuevo Herald. Mr. Alfonso was known for interviews of self-professed terrorists, reporting on their methods and beliefs.

Item 6 above is one of several articles of a similar theme by Mr. Alfonso and Ariel Remos in which they wrote about the accusation against Fidel Castro for the plane-shoot-down, always referencing the criminal charges against the Cuban Five in the news articles.

In item 7 above, Reporter Cancio reveals to the Miami-Dade community the claim made in court by the prosecution the day before, on April 18, 2001, when AUSA Carolyn Heck Miller said Cuba would be "preparing a fabricated version of the facts," after defense counsel Paul McKenna requested permission from Judge Lenard to return to Cuba to obtain additional witness testimony, in April 2001. What is important about this article is that the jury was removed from the courtroom, but of course the prosecution's claim was made public in the media. This occurred six days after the Court cautioned, on April 13, 2001, afout media reporting on information that the jury is not privy to in court. The journalist was one paid by the government.

Item 8 is an article wherein the government's witness, Jose Basulto was not only quoted , but actually authored an article demanding Fidel Castro's indictment for the BTTR shoot-down, dated May, 2000. As the trial record reflects, in the government's December, 2000 motion, it claimed Basulto was honoring the gag order by not speaking to the press. This is true only in a technical sense - he was not the source, her was the author.

And finally, item 9 is an article about the terrorist activism of one of the most prominent journalists who received government monies during the Cuban Five prosecution, Enrique Encinosa. The article was published in Miami New Times, which was not a recipient of monies, although the

subject of the article, Encinosa was. Mr. Encinosa was director of Radio WAQI (the most powerful anti-Cuba radio station in Florida) news department during the trial, and had a program on Radio and TV Martí. Mr. Encinosa stated quite openly that he supported the Havana hotel bombings that took place in 1997. That youtube video: http://www.youtube.com/watch?v=-pJyHRQVZUY shows his quote.

a. Ineffective Assistance of Counsel -- The Law.

The standard which must be applied in determining what constitutes ineffective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). The Court in *Strickland* held that "the proper standard of attorney performance is that of reasonably effective assistance," and that the burden is on the defendant to demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-88.

In determining whether the defendant has met his burden,

> A Court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's unchallenged conduct on the facts of the particular case, viewed as of the time counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, at 690.

The "burden of proof for showing ineffective assistance of counsel is, and remains, on [defendant] throughout a habeas corpus proceeding." *Roberts v. Wainwright*, 666 F.2d 517, 519 (11th Cir.1982); *Jones v. Kemp*, 678 F.2d 929, 932 (11th Cir.1982). The 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." *Strickland*, at 694.

Finally, trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment." *Id*. at 688-90. An evidentiary hearing is not required where the movant's allegations do not demonstrate prejudice resulting from the alleged errors of counsel. See, *Harich v. Dugger*, 844 F.2d 1464, 1471 n.7 (11th Cir.1988) (en banc).

Having said that, a defendant has the constitutional right to the assistance of counsel at every "critical stage of a proceeding against him or whenever his substantial rights . . . may be affected." *Mempha v. Rahe*, 389 U.S. 128, 134 (1967). Defense counsel is under an obligation to familiarize himself with the facts and law applicable to his client's criminal case. *Correale v. United States*, 479 F.2d 944 (1st Cir.1973). "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, at 691.

b. The Waiver of Argument for Change of Venue.

The government vehemently opposed Petitioner's efforts to change the venue to any district in order to get out of Miami-Dade county where the community was saturated with the inflammatory and highly prejudicial publicity which was one sided for the government and totally unfavorable to Petitioner and his defense. Of course, we now know the government had direct ties with the news reporters and TV/Radio commentators. Had Petitioner's counsel known of the government's conduct described above, counsel would have presented a more concrete case justifying the change of venue to outside the Southern District of Florida, on these additional grounds.

The Supreme Court has held, "A rule declaring that a prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process . . . . Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668 (2004). This rule applies of course to the government, not just its legal representative. Further, "our adversary system depends on a most jealous safeguarding of truth and candor," *Shaffer Equip. Co.*, 11 F.3d at 463, and "[t]he system can provide no safe harbor for clever devises to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *Id.* at 457-58. [5]

Petitioner submits the government's intentional refusal or failure to disclose its payments to news reporters and TV commentators to generate inflammatory and prejudicial publicity surrounding the criminal trial during the course of the proceedings to Petitioner's former trial counsel caused counsel to forego presenting evidence in support of change of venue, imposition of sanctions against the government, and/or due process violations.

The Supreme Court has determined evidence to be material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (internal quotations omitted); see also, *Kyles v. Whitely*, 514 U.S. 419 (1995) (A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the

[5] It is beyond peradventure the prosecutor is imputed with having knowledge of the withholding of the government's deeds described *supra* by the government and its agents as a matter of law -- acts which deprived Defendant of a fundamentally fair and reliable criminal process and trial. See, *Kyles v. Whitley*, 514 U.S. 419, 432, 437 (1995); see also, *Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) (The duty to disclose favorable evidence exists whether or not the prosecutor knew of the existence of the evidence if the evidence was in the possession of the government's arm or generally provided only to governmental entities.)

outcome . . .") (citing, *Bagley*, 473 U.S. at 678)). "When the government responds incompletely to a discovery obligation, that response not only deprives the defendant of the missing evidence but also has the effort of misrepresenting the nonexistence of that evidence." *Ferrara*, 456 F.3d at 293 (citing, *Bagley*, 473 U.S. at 682-83) (suggesting that an incomplete response could "represent[] to the defense that the evidence does not exist" and cause it "to make pretrial and trial decisions on the basis of this assumption.")).

c. The Unjustified Waiver of Argument for Imposition of Sanctions.

Upon commencement of the underlying criminal case, this Court had the inherent authority to remedy the misconduct of attorneys and parties practicing before them. *United States v. Butera*, 667 F.2d 1376, 1383 (11th Cir. 1982) ("We join . . . in the sentiment of our brethren in the Second Circuit that it may be necessary to consider more direct sanctions to deter prosecutorial misconduct . . . We encourage the district courts in this circuit to remain vigilant. . . . and consider more formal disciplinary action in cases of persistent or flagrant misconduct.").

Having said that, it should come to be no surprise to the government that "[e]very district court 'has the power to conduct an independent investigation in order to determine whether it has been a victim of fraud.'" *Jones v. Clinton*, 36 F.Supp.2d 1118, 1125 (E.D. Ark. 1999) (quoting, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)). In light of the recent disclosures of the news reporters and TV commentators being paid money by the government in exchanged for prejudicial and inflammatory publicity targeting Petitioner, there is no doubt the government – the very party to the underlying criminal case -- engaged in fraud on the court. This clever and deceitful devise utilized by the government, via the media, should not find any safe harbor in this Court.

d. The Waiver of Argument to Sequester the Jury.

The trial record clearly demonstrated this Court, the parties and counsel were all concerned about the media blitz pounding the airwaves and in print about the Cuban Five. In the absence of this damning evidence against the government now subject of the instant habeas proceedings, Petitioner's counsel did not request this Court to sequester the jury. It is of no consequence that this Court expressed during the course of the trial her view that the jury was not impacted by the bad publicity[6]. Had counsel presented this Court with evidence the government was paying the news reporters and TV/Radio commentators to broadcast the government's hardline anti-Castro, anti-Cuban Five message across the Southern District of Florida on a day-to-day basis, this Court would have been convinced the proper course, at the very least, would have been to sequester the jurors.

Of course, the decision for a change of venue was in the discretion of this Court. *United States v. Salerno*, 868 F.2d 524, 540 (2d Cir.), cert. denied, 491 U.S. 907, 109 S.Ct. 3192, 105 L.Ed.2d 700 (1989) ("The decision to sequester the jury to avoid exposure to publicity is committed to the discretion of the court, and failure to sequester the jury can rarely be grounds for reversal."). Petitioner submits this Court would have exercised that discretion upon learning of the government's egregious conduct in buying print and airwaves to broadcast its message unfavorable to Petitioner and his co-defendants. In sum, requesting the jury to be sequestered would have been a valid argument by Petitioner's counsel at one of the critical stages in the criminal process. Such a valid argument was not presented by defense counsel because of the government's concealment of its activities with the news media here in Miami-Dade community, resulting in former trial counsel being rendered ineffective for purposes of the Sixth Amendment right to the U.S. constitution.

[6] See TR Apr. 13, 2001, pp 11415-6.

e. The Waiver of Argument of Due Process Violation.

Petitioner submits his counsel would have moved for dismissal of the indictment or a new trial had he known of the government's underhanded and deceitful conduct with the news media prior to and during the course of the criminal trial. Such conduct by the government was a clear violation of his due process rights under the Fifth and Sixth Amendment as well as Equal Protection Clause to the U.S. Constitution. This valid argument was not made by defense counsel simply because the government concealed its underground activities with the journalists.

Relying on earlier Supreme Court precedents which held that due process is not satisfied if a defendant's conviction is secured and his liberty is deprived "through a deliberate deception of the court and jury[,]" the Supreme Court in *Brady v. Maryland* extended those principles to hold that due process is likewise violated when a prosecutor -- whether in good faith or bad faith -- withhold material evidence favorable to the accused. 373 U.S. 83, 86-87 (1963); see also, *Porter v. White*, 483 F.3d 1294, 1303 (11th Cir. 2007)(explaining that *Brady* rule protects the "defendant's right to a fair trial mandated by the Due Process Clause of the Fourteenth Amendment to the Constitution") (citation omitted)).

"In general, the Equal Protection requires that the government treat such similarly situated persons alike." *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996) (citing, *City of Cleburne v. Cleburne Living Moreland Ctr., Inc.*, 473 U.S. 432, 439 (1985)). "To be "similarly situated," groups need not be identical in makeup, they need only share commonalities that merit similar treatment." *Betts v. McCaughtry*, 827 F.Supp. 1400, 1405 (W.D. Wis. 1993) (quoting, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981)). The Eleventh Circuit held that 'although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so

unjustifiable as to be violative of due process." *Jackson v. State B. of Pardons & Paroles*, 331 F.3d 790, 797 (11th Cir. 2003) (quoting, *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir. 1982) (per curiam)).

C. The Jury Selection Process Proves that the Jury Panel Heard Messages from the Media.

The issue of media intrusion into the jury box is a sensitive one. In this case, there is evidence that prospective jurors followed reporting about juror conduct to alter how they acted during the jury selection process. Notwithstanding instruction by the court that jurors should ignore media coverage, the government sought protection from media coverage of out of court comments made by a prospective defense witness, recognizing that media coverage can corrupt the truth finding process of a criminal trial.

Discussion of these two points is preamble to the claim of constitutional defect raised here. Prior to trial, Movant and codefendants filed selections of the incendiary rhetoric against them being published in the Miami media and filed a survey of local attitudes in support of a motion for change of venue. That motion was denied, but the articles continued. Years after his conviction, Mr. Labañino learned that the government itself had a hand in shaping the media message against him, a message that pervaded the community during his trial. While the change of venue question has been resolved, the government's role in the media coverage is both newly discovered and discovery is ongoing.

Movant begins with jury selection because review of this part of the trial, the only part of the trial in which the finders of fact actually speak on the record, provides an opportunity to make empirical measure of the impact of the media on the process .

This court imposed a jury selection process which was described at length and praised by the Eleventh Circuit Court of Appeals. *See, United States v. Campa*, 457 F.3d 1121, 1132-37, 1147 -48 (2006) ("The voir dire in this case was a model voir dire for a high profile case." *Id*., at 1147). This process broke the jury pool into panels which were first examined in a general and traditional way. Surviving panelist were then recalled individually for a second phase, which sought disqualifying bias or prejudice based on political views concerning Cuba and its regime. *Id*., at 1133, n.72; 1134, n.73, 1135, n.74 (questions asked during voir dire).

This portion of this memorandum focuses on a change in the sea state among "Cuban"[7] jurors that occurred during the second phase of the jury selection process. Review of the transcript of the jury selection process allows the development of an empirical basis for the existence of this change.

During the first phase of jury selection, the court attempted to avoid inquiry into pertinent political attitude.[8] Five of the potential jurors advanced themselves into the matters reserved for the second phase, conceding that they could not be fair in this case as a consequence of their views of Cuba and its regime.[9] They were stricken for cause.

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[7] Jurors are classified as "Cuban" based on their responses to questions during voir dire. A few references are made to non-Cuban jurors, but they are identified as such, without an attempt to place them in any other racial or ethnic sub-set. Also, this discussion requires mention of particular jurors, but, in seeking a balance between clarity of this memorandum and privacy of the jurors, they are identified by their first initial and the first three letters of their last name.

[8] See, e.g. RBel, who stated during phase one that "I do have strong feelings about the political situation." T.580. There was no followup in phase one. He was recalled during phase two, and explained that "the reason I am in this country is because of the political system in Cuba." T.736. He was stricken for cause. T.

[9] KHal was non-Cuban, but married to a Cuban who was "a very strong supporter of the Cuban exile community" and could not be fair. T.201. He was striken for cause. T.245. AVar, T.203, CUrr, T.245, RSil, T.304, and MPla, T.975, were Cuban jurors who declared that their political views overrode their impartiality.

On November 30 and December 1, 2000, the second phase of jury selection was undertaken. On these two days, 48 prospective jurors were individually questioned about the impact of their political attitudes on their ability to sit as jurors. Two of the prospective jurors developed their case for hardship excuse.[10] Twenty one of the prospective jurors expressed political views that supported motions to strike for cause.[11] This represents 45% of the otherwise qualified jury pool. If the five jurors who disqualified themselves for political reasons during phase one of the selection process are added, this becomes 26 juror disqualifications out of 51 otherwise qualified jurors, or a remarkable 51%.[12]

Suddenly, on the third day of the selection process, there was a profound change in the responses of Cuban jurors. On December 4 and 5, 2001, 34 jurors were questioned individually. Again, one juror was excused for hardship.[13] Five jurors were stricken for cause, but only three of these jurors were in the "Cuban" sub-set stricken for political views.[14] The focus of this numerical shift in strikes for cause is five jurors, all Cuban, who provided enough reason for concern for the

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[10] JTei, T.1000/1076, and AFis, T. 718/762. Transcript citations identify where the juror began the second phase interview and where the court ruled.

[11] RCod, T.930/955; SPad, T.931/956; DCas, T.933/956;

[12] The reason to include these Phase 1 disqualifications in the total is that these jurors spoke prior to the Ferriera article discussed below and counting them gives a more accurate picture of both the true juror sentiment and of the impact of the article on the remaining jurors.

[13] JSil, T. 1451/1488.

[14] GHer, T. 1263/1318; JLom, T.1319/1370; and EHer, T.1361/1370. LMaz, T. 1203/ , is included in this count although he may present a special circumstance in that he whispered, perhaps to the prosecutors. "Don't pick me." Also, JHow, T. 1272/1315, was stricken for cause, but appears to be non-Cuban and motion for cause appears to have been granted not because of his political views, but due the potential impact of ongoing social contacts on his ability to deliberate. JGra, T662/1443, was stricken for cause during this part of jury selection for reasons other than his political views, and is not included in the count because he had been recalled from November 30, 2000.

defense to make motions to strike, but fell short of providing sufficient cause in their answers to have the court grant the motion.[15] Each of these jurors acknowledged political issues, but maintained that they could be impartial, nevertheless.

Thus, of the 34 jurors subject to phase two questioning on December 4 and 5, 2000, only three, or 11%, were Cuban jurors who provided answers to questioning that provided the basis for a successful motion to strike for cause. This is sharp contrast to the 45 or 50% previously stricken for cause. The representation of Cuban jurors on the panel was roughly equivalent before and after the change.

On December 3, 2000, the intervening Sunday, Rui Ferreira, a journalist who covered the trial on an almost daily basis, wrote an article published in *El Nuevo Herald* entitled "Miedo a ser Jurado en Jucio a Espias" (Fear of Becoming a Juror in the Spies Trial). A reprint of this Spanish language article is attached as Exhibit A.[16] Fact checking this article against the trial transcript shows that the article is extremely accurate. In the days of jury selection before Ferreira wrote this article, virtually all of the members of the jury panel who identified themselves as Cuban removed themselves from the jury by their declarations - they laid the foundation for a successful motion to strike for cause. Many laid the basis for such a motion so effectively that no motion was even needed. What is note worthy is the profound change in the declarations by this subset of the prospective jurors about their ability to be fair and impartial after the Ferreira article was published.

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[15] BPar, T. 1117/1187; ADea, T. 1139/1193; LLop, T. 1148/1199; LTri, T. 1121/1258; and HDua, T.1239 /1256.

[16] This article is reprinted from the archives of *El Nuevo Herald* and appears to contain formatting anomalies that appear in the reprint as question marks ("?").

On December 3, 2000, Rui Ferreira wrote about fact that Cuban jurors were opting out of jury service on this case and that, as a consequence, the jury pool consisted of Blacks and Anglos. On the day after the article appeared, the Cuban jurors largely declared that they could sit as a fair and impartial jury. The defense ultimately removed these jurors with peremptory challenges.

Feireira's article did not expressly call for this change, but there is no other identifiable cause of the demonstrable change in juror response to political questions from the court. The only conclusion that can be drawn is that the Cuban members of the jury panel heard a message in the Feireira article. To a large degree, a degree which is statistically significant, they heeded the message they heard.

D. **Congress created a broadcast arm of the government for publication of propaganda abroad with express prohibitions against domestic dissemination of such propaganda.**

As the United States embarked on the Cold War, it borrowed tools sharpened in armed conflict, including radio propaganda. As this governmental function was authorized, first for the Department of State and then separated to the United States Information Agency, Congress recognized that government propaganda disseminated to the citizens of that government is antithetical to democracy and took steps to insure that creature they were creating remained constrained. Title 22, United States Code, Section 1461(a) authorizes "the preparation, and dissemination abroad, of information about the United States, its people, and its polices," but domestic dissemination was expressly prohibited. Such information "shall not be disseminated within the United States, it territories, or possessions." See, U.S. Information and Educational Exchange Act of 1948, Public Law 80-402. This legislation is popularly known as the Smith-Mundt Act.

Recognizing the benefit of making the materials available to researchers and journalists as well as to its own members, the Congress struck a balance between that interest and the "underlying rationale for the prohibition on domestic dissemination of USIA materials: namely that USIA should not be engaged in domestic propaganda," S.Rep. No. 101-46, 31 (1989), by providing limited, "examination only" access to USIA materials. *See* 22 U.S.C. § 1461(a). Later, because it "believe[d] there is little likelihood that material 12 or more years old will be of significant use for domestic propaganda purposes," the Congress directed that the materials be made generally available for domestic consumption twelve years after their preparation or dissemination. See, 18 U.S.C. § 1461(b)(1).

The Smith-Mundt Act contained a "loophole" in the prohibition of domestic dissemination which was closed in 1985. This loophole was the second mandate to USIA, to tell the United States about the rest of the world. Popularly known as the Zorinsky Amendment, after its sponsor Senator Edward Zorinsky (NE), this loophole closing legislation expressly prohibited domestic activities and expenditure of appropriated funds for that purpose by USIA was codified in 18 U.S.C. § 1461-1a.[17]

Senator Zorinsky's comment on the floor of the Senate, reprinted in the Congressional Record of the 99th Congress, 1st Session, June 7, 1985:

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[17] The full text of the amendment is as follows: "Except as provided in section 1461 of this title and this section, no funds authorized to be appropriated to the United States Information Agency shall be used to influence public opinion in the United States, and no program material prepared by the United States Information Agency shall be distributed within the United States. This section shall not apply to programs carried out pursuant to the Mutual Educational and Cultural Exchange Act of 1961 (22 U.S.C. 2451 et seq.). The provisions of this section shall not prohibit the United States Information Agency from responding to inquiries from members of the public about its operations, policies, or program."

> Mr. ZORINSKY. Mr. President, I offer this amendment to prohibit USIA from engaging in domestic propaganda and to restate the existing prohibitions on domestic dissemination of USIA products.
>
> By law, the USIA cannot engage in domestic propaganda. This distinguishes us, as a free society, from the Soviet Union where domestic propaganda is a principal government activity.
>
> There is considerable discussion within USIA about using the Agency's so-called second mandate to engage in domestic propaganda. The second mandate -- "telling America about the world" -- has never been implemented. It should not now be implemented as part of a USIA strategy to propagandize the American people on foreign policy issues.
>
> The American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her. My amendment ensures that this will not occur.

In 1983, Congress passed the Radio Broadcasting to Cuba Act, Pub. L. No. 98-111 (1983). From this inception, Radio, and later TV, Marti, have posed particular issues which have engendered management problems and controversy.[18]

The Broadcasting Board of Governors currently oversees the Voice of America and other broadcast propaganda arms of the U.S. government, including Radio Marti and Television Marti. While regime change is not an explicit part of the congressional findings and declaration of purposes in the creation of this broadcasting arm aimed particularly at Cuba, See, 22 U.S.C. § 1465, it is an implicit purpose since Congressional authorization for both Radio Marti and Television Marti will

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[18] See, CUBA: IMMEDIATE ACTION IS NEEDED TO ENSURE THE SURVIVABILITY OF RADIO AND TV MARTI, 111th Congress 2d Session S.Rpt. 11-46, April 29, 2010, p. 4:

> Radio and TV Marti have received negligible support from among the Cuban people and have had almost no impact on Cuban Government behavior and policy. As a result, Congress has made several attempts over the years to cut funding for the programs, especially for TV Marti. In addition to the programs' ineffectiveness, in December 2006, press reports alleged significant problems in OCB's operations, with claims of cronyism, patronage, and bias in its coverage, issues that attracted further attention in Congress.

expire upon "transmittal of a determination by the President * * * that democratically elected government in Cuba is in power." 22 U.S.C. § 6037(c).

Given the omnidirectional nature of radio transmissions and the physical proximity of the South Florida media market to Cuba, the embargo on dissemination of Radio/TV Marti broadcasts, designed to effect regime change in Cuba, in the domestic South Florida market poses problems. Congress has permitted domestic dissemination of Radio Marti's propaganda if such dissemination is "inadvertent." Pub. L. No. 101-246, § 243(a) (1990). The question of what is, or is not, permitted inadvertent domestic dissemination has never been asked in government publications.

The Government Accountability Office has examined Radio and TV Marti on many occasions and, as noted above, has concluded that audience in Cuba is negligible The size of Radio Marti's domestic audience has not been determined, or, if determined, the studies have not been published. The decision to broadcast Radio Marti signals from two powerful commercial broadcast facilities located in Miami-Dade County strongly suggests that the domestic audience in anything except the Congressionally authorized "incidental" domestic dissemination of the Radio Marti message.

E. Discovery of a breach of journalistic ethics: journalists co-opted to carry the propaganda message of United States foreign policy against Cuba.

While Radio Marti's journalistic standards and management protocols have been criticized, the standards and methodologies by which this broadcast arm of the government has selected it contract journalists have also provoked a conflict over journalistic ethics. Issues of journalist ethics may not normally be germane to federal habeas corpus review. In this instance, the government's

funding of anti-Cuban propaganda in the amount of $34,000,000.00 a year[19] served not only to corrupt the journalism involved, it also created an environment in which Mr. Labañino constitutional right to due process was denied.[20]

On September 8, 2006, the *Miami Herald* published a story by Oscar Corral titled *10 Miami Journalists Take U.S. Pay.* This was a page A1 article based on materials received by Corral from the Broadcasting Board of Governors by way of Freedom of Information Act requests. The article identified ten journalists who had received compensation from Radio Marti for their participation in broadcasts aimed, nominally at least, at Cuba. Three of these journalists were affiliated with *El Nuevo Herald* and such conduct violated the Miami Herald's written code of ethics. While *El Nuevo Herald* had no equivalent, written code of conduct, the two journalists who were employees were fired, and the third journalist who worked freelance was severed, for breaches of journalistic ethics.

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[19] Precise numbers are elusive due to funding changes in an annual budget cycle and the question of what budgets are included. This estimate reflects solely the base-line budget of the Office of Cuban Broadcasting.

[20] See, e.g., S.Rept. 11-46, at 5:

> OCB's failure over many years to adhere to generally accepted journalistic standards remains its most significant problem, and the grounds for most criticism leveled against it. These failures have been documented in the press, in a January 2009 report by the Government Accountability Office (GAO), and in IBB's own internal evaluations.

This may be a symptom of deeper problems. Id., at 2:

> OCB's parent organization should consider moving OCB to Washington and subordinating it into the Voice of America. This could help ensure that programming is up to VOA standards. In the meantime, OCB should ''return to basics'' to clean up its operation. It must attract quality talent from outside Miami, implement quality editorial standards, and attract quality management. Hiring and training must be overhauled to ensure a de-politicized and professional workforce.

Herald, Nuevo Herald and Radio Marti, Columbia University, 2010.[21] While this study examines the controversy from a newspaper management perspective, and focuses on the anomaly of having two newsrooms reflecting divergent cultures under one roof, the study also address the issues of journalistic ethics. In addition, the case study provides considerable background information about the controversy that Ms Lundberg obtained during interviews with principals to the controversy.

Lundberg reported that Corral began with the idea of a story that examined where USAID moneys being spent on promotion of democracy in Cuba were going, but he soon realized that the $20 million per year being spent by USAID was secondary; the Broadcasting Board of Governors was spending "some $37 million a year" on Radio/TV Marti. *Id*., at 6-7. Corral's second FOIA request, this time to BBG, resulted in the production of 1,200 pages "of names and numbers – what specific individuals had been paid for specific services." *Id*., at 7. Corral told Lundberg that, as he worked through the pages of disclosure and found journalists who worked in his building taking money from Radio/TV Marti, with the totals adding up: "I know that I'm a reporter and if I'm taking money from a government agency, especially one that I'm covering, I better be prepared to have an explanation for that." He was frustrated by the way some in the South Florida media "just kind of fell in line with everything the federal government did." Corral saw a conflict of interest in that "the people who were supposed to be informing [the Cuban exile community] about Cuban exile politics are benefitting from the US policy towards Cuba." Corral had a simple question: "What is going on here?" *Id*., at 8.

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[21] This 28 page case study is available on line at: https://casestudies.jrn.columbia.edu/casestudies/files/global/43/Herald%20case.pdf

Tom Fiedler, who was then Executive Editor and Vice-President of the The Miami Herald, knew exactly what was going on here: these journalists were "in effect giving a contribution in kind, [their] time and [their] expertise, to carry out the mission of the U.S. government, a propaganda mission." *Id*., at 11. According to Fiedler, the story was about how the Broadcasting Board was "using Spanish speaking, Spanish media journalists in Miami to carry out what would be US policy toward Cuba… The larger story was that there are journalists who are on the payroll of the US government."

The Broadcasting Board of Governors engages in foreign propaganda, which, in the instance of Radio/TV Marti, involves the expenditure of $37 million per year to effect regime change in Cuba. The Broadcasting Board of Governors is prohibited from disseminating any of it propaganda in the domestic market, but *The Miami Herald* revealed that the BBG was using prominent journalists, widely read in the Miami market, to further its propaganda. The question is whether the loop can be closed and journalists paid by BBG can be shown to have engaged in the media attack on Mr. Labañino and his codefendants.

Widely-read Miami journalists were on the government payroll in the months leading up to and throughout Petitioner's trial, and the stories these journalists published asserted the guilt of Mr. Labañino and his codefendants and linked the defendants to events and to speculation beyond the evidence adduced at trial. In addition to reporting on inadmissible speculation and accusation, journalists on the government payroll published fear-mongering anti-Castro and anti-Cuba articles during the trial. As Oscar Corral had lamented to Kristen Lundberg about these journalists, "they just kind of fell in line with everything the federal government did." *Id*., at 8.

II. Wrongful sentence enhancement/ Ineffective assistance of counsl:

PETITIONER STOOD MUTE AT HIS PRETRIAL DETENTION HEARING, BUT WAS WRONGFULLY GIVEN A TWO LEVEL SENTENCING ENHANCEMENT FOR OBSTRUCTION OF JUSTICE BY GIVING HIS "LEGEND" NAME.

Petitioner was arrested and charged as "John Doe #3, aka Luis Medina," with several other aliases. When he was brought before a United States Magistrate Judge for a pretrial detention hearing, on September 16, 1998, he was called before the court as "Luis Medina," the name under which he was charged.

Petitioner's initial appearance before a judicial officer occurred on September 14, 1998. This appearance has been transcribed and the transcript is in the record. DE#44. United States Magistrate Judge Barry L. Garber addressed the eleven defendants in this case and advised them of their rights. Id., at 2-4. There was no advise regarding their right to remain silent. The Court then called up the defendants in threes. Petitioner was in the first group of three. He was not represented by counsel. He was sworn for purposes of brief inquiry regarding his eligibility for court appointed counsel. Id., at 11. Eric Cohen was appointed under the Criminal Justice Act to represent Petitioner and appeared with him at the next judicial proceeding, the September 16, 1998 pretrial detention hearing.

A. The record conclusively establishes that Petitioner stood mute:

The pretrial detention hearing was transcribed and the transcript is in the record as DE#61. A review of this transcript shows that the pretrial detention hearing, held in conjunction with the detention hearing of codefendant "Manuel Viramontes," was lengthy. It shows that the government proceeded with proffer by Assistant U.S. Attorney Guy Lewis and examination of Special Agent Mark P. De Almeida of the Federal Bureau of Investigation. The Court heard, in addition, argument by Mr. Lewis and by Petitioner's court-appointed counsel, Eric M. Cohen. Throughout this proffer,

examination and argument, the Court was fully apprised that "John Doe #3, aka Luis Medina" was a man with many aliases.[22]

Petitioner stood absolutely mute. The transcript reveals that he never addressed the Court in any way, except through his attorney. Specifically, Ramon Labañino never identified himself claiming a false alias. Indeed, if counsel had permitted him to do so in the face of the charges, the complaint and the compelling evidence of false aliases presented by the government in its proffer, such conduct would have presented a serious case of ineffective assistance of counsel.[23]

Nevertheless, Ramón Labañino received a two level enhancement of his base offense level for obstruction of justice under U.S.S.G. § 3C1.1. This enhancement , which, at the bottom of the applicable guideline range, represented a 68 month increase in Mr. Labañino's term of incarceration.[24]

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[22] "This defendant's code name, and indeed alias, according to the reports, was Vicky. He also admitted to agents during the course of their personal interview, or their personal history, that he used the name Johnny as well." DE#:8-9. "He maintained his birth certificate in his false name, Luis Medina of course, which, again, we believe is his false name." Id., at 9. A video tape was seized establishing his true name as "Ramon." Id. Fifteen to 20 death certificates were seized, "which is consistent with the idea of assuming various identities." Id., at 10. "Alan" was another code name. Id., at 49.

[23] Indeed, counsel acted with the highest level of professionalism and made no attempt to prove the unprovable, notwithstanding the fact that the prosecutor called him to task for not having tried to prove a falsehood. The prosecutor said, Id., 71: "If they're from Texas, there's nobody from Texas here. There's been on proffer that anybody could ever come from Texas. We submit, accordingly, because they, indeed, are using false identifications." Ineffective assistance of counsel can be attributed only to sentencing counsel, by failing to correct this factual error if it was introduced by the sentencing court, or appellate counsel, if the reviewing court misread the record.

[24] After remand, Mr. Labañino was resentenced to 360 months incarceration, the low end of the Offense Level 42, Criminal History Category I, range of 360 months to life. Reduction of two levels, to Offense Level 40, would place Mr. Labañino in the range of 292 to 365 months.

Mr. Labañino objected to this enhancement prior to his initial sentencing, DE#1379;18-21, and raised this issue on direct appeal to the Eleventh Circuit Court of Appeals. That court affirmed the enhancement, *United States v. Campa*, 529 F.3d 980, 1015-16 (11th Cir.2008):

> Medina next argues that the district court erred when it applied a two-offense-level upward adjustment for obstruction of justice under section 3C1.1 of the Guidelines. 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 his deception was part of the offense, instead of the "investigation, prosecution, or sentencing," U.S.S.G. § 3C1.1 cmt. n.1. He also argues that the evidence did not establish that he had the requisite mens rea or that his conduct significantly hindered the prosecution or investigation of the offense. Each of these arguments fails.
>
> * * *
>
> 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. "[I]f believed," a false name "would tend to influence or affect the issue[s] under determination" by a magistrate judge in a detention hearing. U.S.S.G. § 3C1.1 cmt. n.6. The magistrate judge must consider, among other things, the family ties, financial resources, residence, past conduct, criminal history, record of appearance at court proceedings, and probationary status of the person before the magistrate judge in a detention hearing. *See* 18 U.S.C. § 3142(g)(3). A false name, if believed, would tend to affect the magistrate judge's assessment of these factors. 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."); *United States v. Charles,* 138 F.3d 257, 267 (6th Cir.1998); *United States v. Berrios,* 132 F.3d 834, 840 (1st Cir.1998); *United States v. Mafanya,* 24 F.3d 412, 415 (2d Cir.1994); *United States v. Blackman,* 904 F.2d 1250, 1259 (8th Cir.1990).

The Court of Appeals took care to focus specifically on Mr. Labañino's statement to the Magistrate Judge at his pretrial detention hearing as the basis for the sentencing enhancement, Id., at 1016-17

> Medina next argues that the district court must explain how Medina's conduct significantly hindered the prosecution or investigation of the offense, but this argument misreads the application notes of section 3C1.1. Note 5(a) explains that "providing a false name or identification document *at arrest*" ordinarily does not warrant application of the adjustment unless "such conduct actually resulted in a significant hindrance to the investigation or prosecution of the ... offense." U.S.S.G. § 3C1.1 cmt. n.5(a) (emphasis added). Medina's adjustment was based on the provision of a false name to a magistrate judge at a detention hearing. The adjustment was appropriate whether or not a significant hindrance occurred. U.S.S.G. § 3B1.1 cmt. n.4(f).

Ramón Labañino comes before this Court as a man whose sentence has been wrongfully enhanced. "Medina's adjustment was based on the provision of a false name to a magistrate judge at a detention hearing." This is not true. He stood silent.

B. The Fifth Amendment affords Petitioner the option of standing mute and he cannot be penalized for having elected to do so.

The Supreme Court in *United States v. Salerno*, 481 U.S. 739, 755 (1987), upheld the constitutionality of the pretrial detention provisions of the Bail Reform Act of 1984 on the assumption that pretrial detention would be imposed only on those arrestees "found after an adversary hearing to pose a threat ... which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing." The Supreme Court revisited the issue of pretrial detention in *United States v. Montalvo-Murrillo*, 495 U,S, 711, 723-24 (1990), cautioning:

> [I]t is well to remember the magnitude of the injury that pretrial detention inflicts and the departure that it marks from ordinary forms of constitutional governmance. Executive power to detain an individual is the hallmark of the totalitarian state. Under our Constitution the prohibition against excessive bail, the Due Process Clause of the Fifth Amendment, the presumption of innocence - indeed, the fundamental separation of powers among the Legislative, the Executive and the Judicial Branches of Government - all militate against this abhorrent practice.

(Footnotes omitted).

No where has it been suggested that an arrestee at a pretrial detention hearing loses his right under the Fifth Amendment to remain silent and, if he chooses the exercise that right, that he may be penalized for standing mute. Yet that is what has happened here.

Mr. Labañino's sentence should be vacated and he should be resentenced without the enhancement for obstruction of justice.

C. Ineffective Assistance of Counsel:

As discussed in Section B.5.1 under Ground I, page 14 above, ineffective assistance of counsel claims are measured against the two prongs of *Strickland v. Washington*, 466 U.S. 688 (1984).

Deficient performance is clear. Here, the Eleventh Circuit gave a detailed and specific justification for the obstruction of justice enhancement based on a plain error- the mistaken belief that Petitioner provided "a false name to a magistrate judge at a detention hearing." The transcript shows that Petitioner did not provide a false name. In fact, he said nothing at all. How this error crept into the ananlysis of the Eleventh Circuit is not clear. If it was entirely a construct of the panel, appellate counsel should have corrected this plain error. If it was somehow based on the sentencing proceedings in the trial court, sentencing counsel should have corrected this plain error. In either case, the error was plain, but it was not corrected by counsel. This constitutes deficient performance.

Prejudice is clear. As a consequence of this error of fact, the Eleventh Circuit affirmed the enhancement of Petitioner's sentence by two levels. At the bottom of the applicable guideline ranges, this resulted in an additional 68 months of incarceration.

CONCLUSION:

For the foregoing reasons, Petitioner Ramón Labañino respectfully requests that the Court grant his motion to vacate, set aside or correct the judgment and sentence.

Respectfully submitted,

S William M. Norris

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing memorandum was filed electronically this 8nd day of August, 2011, and served by that means on all counsel of record.

S William M. Norris

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William M. Norris