

ADDENDUM STATING 28 U.S.C. § 2255 CLAIMS

I. Counsel provided constitutionally ineffective assistance in the guilt phase of the case by failing sufficiently to investigate and research questions pertinent to the determination of the trial issues, including the guilt or innocence of his client, and by failing sufficiently to prepare for trial, file appropriate motions, address pertinent questions regarding the trial venue, submit appropriate questions for voir dire, request appropriate jury instructions, and otherwise preserve petitioner's rights with respect to the charges.

(A) Counsel provided constitutionally ineffective assistance with respect to the presentation of evidence and argument on the geographic location of the shutdown.

Counsel specifically provided constitutionally ineffective assistance, individually and cumulatively, through the following:

- (1) Focusing the defense on the geographic location of the shutdown, as opposed to a lawful plan to defend Cuban sovereignty and prevent political instability.
- (2) Failing to develop facts relating to the location of the shutdown on the basis of an accurate legal understanding of the relevance of the location in light of the charges and applicable law.
- (3) Challenging the location of the shutdown notwithstanding the findings of the ICAO report and U.S. governmental evidence showing that the shutdown occurred in international waters.
- (4) Failing to develop facts relating to the precise location of the shutdown when he failed to seek information available from the government via discovery, *Brady* requests or subpoena and from satellite imagery, as recommended by his expert.
- (5) Calling as a witness Jose Basulto, whom he knew to be an inflammatory and inculpatory witness, who predictably appealed to the prejudices of a Miami jury and testified that his activities were innocent when the established record indicated otherwise and who furthermore offered evidence to buttress the prosecution's theory of its case.

- (6) Arguing facts relating to the location of the shutdown that were derived from a misreading of the log of the ship, Majesty of the Seas.
 - (7) Relying on insufficiently credible evidence, principally Cuban government-produced evidence, relating to the location of the shutdown, including the supposed recovery of a camera bag, when there was readily available credible evidence that would have supported a relevant defense.
 - (8) Failing to develop pertinent facts relating to the location of the shutdown, including securing evidence from the Captain of the vessel Triliner, who would have offered testimonial evidence rebutting the prosecution evidence concerning the location of the Majesty of the Seas.
 - (9) Failing to understand the legal significance of the location of the shutdown and placing singular focus on demonstrating that it occurred in Cuban airspace together deprived his client of a valid defense and undermined the credibility of the defense overall.
- (B) Counsel provided constitutionally ineffective assistance with respect to the presentation of evidence and argument as to the events leading to the shutdown.

Counsel specifically provided constitutionally ineffective assistance of counsel, individually and cumulatively, through the following:

- (1) Focusing the defense on the question whether a frame of a video showed a pass by a MiG fighter aircraft by pursuing this matter without a basis for deeming that question legally relevant and where counsel lacked a sufficient and credible basis in fact for that assertion.
- (2) Failing to develop a valid defense premised on readily available US radar data that showed that the Cuban air force, acting in defense of Cuban territorial airspace, did not confront the incoming BTTR flights until the lead plane entered Cuban airspace after diverging from the filed flight plan which would have taken it out over international airspace and away from the Cuban coast.

- (3) Failing to distinguish the intent of the government of Cuba from the intent of petitioner Hernandez.
- (4) Failing to develop and prove that the Cuban government intended to act lawfully in shooting down the BTTR planes, including failing to introduce mapping evidence indicating evidence of Cuban understanding of prior incursions.
- (5) Failing to develop and prove that petitioner Hernandez did not intend to join an agreement to commit an unlawful killing or an unlawful killing with knowledge of its illegality.
- (6) Failing to secure available evidence and argument to refute the prosecution's argument that, prior to the shutdown, petitioner went to the Cuban Ministry of the Interior to pick up his paycheck, with the improper implication that he attended a meeting wherein he was informed of a Cuban plan to shutdown aircraft in international waters, where counsel failed to: show the actual meaning of the terms HQ, MX, and others pertinent to understanding the falsity of the implication as to petitioner's travel and meetings; introduce evidence of petitioner's vacation in that period; and introduce evidence that an undercover agent would not have gone to headquarters during such a vacation, but would have received payment in an informal encounter.
- (7) Failing to develop a factual record and to argue that petitioner Hernandez reasonably would have believed in the lawfulness of any orders he received from the Cuban government and would have accepted, obeyed, and credited post-event assertions of his government.
- (8) Failing to offer evidence regarding intelligence norms and practices of compartmentalization regarding the unlikelihood of Hernandez being informed of any operational details or plans for a shutdown, whether expert, Cuban, or otherwise or through cross examination of government intelligence experts.
- (9) Failing to secure evidence from available witnesses who knew the petitioner was not aware of an illegal plan and related state of mind evidence, including failing to seek a *Byrd* affidavit from Rene Gonzalez as to the supposed warning by Cuba to stay off planes and failure to obtain the testimony of Juan Roque.

- (10) Failing to introduce facts regarding the lack of importance of a request to keep Juan Roque and Rene Gonzalez off the planes – including that petitioner was aware that Roque was to be returned to Cuba, that Gonzalez had not flown with BTTR for years prior to the shutdown, and that petitioner was not conscious of an illegal plan.
 - (11) Failing to address the “without warning” shutdown concept with explanatory and other evidence as to warnings in the relevant context.
 - (12) Focusing the defense on the theory that the BTTR pilots were responsible for their own deaths in a trial conducted amidst a community that honored the decedents as heroes.
 - (13) Failing to properly investigate and present the defense with respect to the question whether petitioner Hernandez was involved in high frequency message traffic, including focusing the defense on whether petitioner Hernandez received certain high frequency message traffic, failing to pursue evidence relevant to whether and when such messages were received and what responses to such traffic were given; and failing to pursue evidence as to whether messages electronically signed by two agents were actually forwarded only by one agent or otherwise not attributable to the petitioner.
 - (14) Failing to develop and present expert testimony regarding the lawfulness of Cuba’s response to Brothers to the Rescue incursions.
- (C) Counsel provided constitutionally ineffective assistance with respect to the presentation of evidence and argument as to the events following the shutdown.

Counsel specifically provided constitutionally ineffective assistance, individually and cumulatively, through the following:

- (1) Failing to file motion to dismiss or clarify indictment allegations of a murder conspiracy extending beyond the date of commission of the crime, so as to eliminate the government theory that post-hoc support of Cuba’s actions constitutes a conspiracy to commit murder.
- (2) Failing to request an instruction as to post-completion conduct not constituting a conspiracy.

- (3) Failing to request a cautionary instruction upon the introduction of evidence of post-shutdown conduct.
 - (4) Failing to object to the introduction of such evidence as outside the scope of the indictment.
 - (5) Failing to introduce evidence that the petitioner's promotion months after the shutdown was administratively ordinary and based on time of service.
 - (6) Failing to introduce documentary evidence that showed that for months prior to petitioner Hernandez's allegedly writing that the operation "ended successfully," the official position of the government of Cuba was that the aircraft were downed in Cuban territorial airspace, rebutting the inference sought by the government that the reference was to a shutdown over international waters.
- (D) Counsel provided constitutionally ineffective assistance by failing to research and pursue evidence and legal arguments relevant to Count 3, as a matter of both domestic and international law.

Counsel specifically provided constitutionally ineffective assistance of counsel, individually and cumulatively, through the following:

- (1) Failing to secure the advice and assistance of an international law expert, where the facts, circumstances, allegations in the indictment and investigations by international bodies all pointed to issues of international law as being relevant to the defense of Count III.
- (2) Failing to introduce evidence, including expert testimony on international law, of state authority in regard to territorial incursions of aircraft, including civil aircraft, intending to destabilize the political order and create civil strife.
- (3) Premising the defense on ICAO principles regarding the interception of civil aircraft, including by introducing ICAO principles into evidence and in jury instructions, and failing to withdraw that jury instruction request when the district court granted government's request for a ICAO counter instruction.

- (4) Requesting a theory of defense jury instruction based on ICAO civil standards, thereby lowering the government's burden of proof and irrationally assuming a burden of proving Cuban compliance with inapplicable civil standards.
- (5) Premising the defense on the argument that the jury's task in deciding the legality of the Cuban plan and response to intruding aircraft would be to distinguish civil from military aircraft on the basis of aircraft design and structure rather than their intended usage, function and purpose.
- (6) Failing to establish the implausibility of the claim that Cuba would have intended to shootdown the planes unlawfully in international airspace.
- (7) Failing to develop an accurate and comprehensive understanding of the nature and elements of the conspiracy charged in Count 3, leading to his failure to present evidence and arguments so that the jury could distinguish between facts relevant to the nature of the plan, and his client's knowledge of it, as opposed to the ultimate result of what occurred on the day of the shootdown and the split second decisions made by others.
- (8) Failing to follow instructions given to counsel in handwritten notes from petitioner with regard to the calling of witnesses, presentation of evidence, and other fundamental trial decisions.
- (9) Failing sufficiently to develop a factual record regarding Cuba's intentions in planning and executing the shootdown.
- (10) Failing to present objective evidence, including U.S. radar data and intercepted MiG pilot communications that the shootdown was intended as a lawful act of self-defense by Cuba.
- (11) Failing to submit proposed voir dire questions relating to Count 3, including questions relating to attitudes toward Cuban technical experts, the right of Cuban self defense under international law should the facts and circumstances justify such action, and the claimed right of Miami based aircraft to violate both US and Cuban laws, allegedly to foster pro-democracy movements inside Cuba.

- (12) Failing to present an affidavit of actual innocence, explaining lack of knowledge of intent to violate the law and other facts pertinent to Count 3.
 - (13) Failing to make individualized BTTR-based arguments for change of venue as to Count 3, including failure to undertake a survey to determine the solidity of community attitudes regarding the illegality of the shutdown.
- (E) Counsel provided constitutionally ineffective assistance by failing to research and present legal arguments, motions, and instructions concerning the law applicable to Count 3 as charged, as a matter of both domestic and international law.

Counsel specifically provided constitutionally ineffective assistance of counsel, individually and cumulatively, through the following:

- (1) Urging that the jury be instructed on a charge of first-degree murder when petitioner Hernandez was indicted for second-degree murder.
- (2) Failing to file motions in limine to address the scope of the offense and the evidence and by failing to object that a conspiracy to commit second-degree murder is not an offense.
- (3) Failing to request a jury instruction requiring the prosecution to prove that the alleged Cuban co-conspirators intended to enter into an unlawful plan to confront the BTTR aircraft.
- (4) Failing to request a jury instruction requiring the prosecution to prove that petitioner Hernandez intended to join a plan with knowledge of its unlawfulness
- (5) Failing to request an instruction, or to object to the failure to instruct the jury, that Count 3 required the government to prove that petitioner Hernandez intended to join a conspiracy to commit an unlawful killing that specifically was to occur in international waters and that he had knowledge of that unlawful intent, and that a conspiracy with the purpose of shooting down or confronting aircraft in Cuban waters would not violate the conspiracy statute even if planes were ultimately shot down in international waters.

- (6) Failing to request, during rebuttal closing argument, a curative instruction explaining to the jury that Count 3 required the government to prove that petitioner Hernandez intended to join a conspiracy to commit an unlawful killing that specifically was intended to occur in international waters.
 - (7) Failing to file (Foreign Sovereign Immunity Act) FSIA motion to dismiss and to limit the scope of petitioner Hernandez's potential liability for Cuba's actions.
 - (8) Failing to preserve a specific request for a jury instruction as to the territorial intent element.
 - (9) Failing to ensure that a proper jury instruction was given upon the district court's favorable ruling as to territorial intent; and failure to request an express cautionary instruction when the government sought to avoid the effect of the ruling.
 - (10) Failing to request a theory of defense instruction with respect to Count 3 so as to eliminate the confusion created by the government's closing argument caricaturing the defense theory.
 - (11) Failing to request special CIPA hearing and procedures as to Count 3 so that issues of geographic and temporal fact and leads regarding essential witnesses could be pursued and to avoid counsel adopting unfounded approaches regarding historical fact at trial.
 - (12) Failing to seek dismissal of Count 3 on the basis that the government indicted petitioner for second degree murder while pursuing a claim of first-degree murder.
- (F) Counsel provided constitutionally ineffective assistance by failing to take appropriate steps to allow for individualized presentation of evidence and jury consideration of the separate offenses in the indictment.

Counsel specifically provided constitutionally ineffective assistance of counsel, individually and cumulatively, through the following:

- (1) Failing to seek a severance of Count 3 so as to allow the petitioner the opportunity to testify as to those allegations, where the testimony would

have affirmatively exculpated the petitioner and shown his actual innocence.

- (2) Failing to explain to the petitioner his rights with respect to testimony as to Count 3 if that count were tried separately, such that the petitioner could testify without incriminating himself or other defendants as to other counts, thereby infringing the petitioner's exercise of his Fifth Amendment rights as to the decision to testify.
 - (3) Failing to request any voir dire specifically addressed to Count 3, which was the most likely to arouse the passions of the particular venue, and required a jury's assessment of the intentions of the Cuban government and its Miami-based opponents, as well the credibility of Cuban witnesses versus U.S. witnesses.
 - (4) Failing to seek a severance of Count 3 so as to allow for individualized presentation of evidence and jury consideration of the espionage conspiracy charge (Count 2) and unregistered agent and related offenses in the indictment, in that trying murder and espionage allegations together presented too great a level of prejudice, impeding individualized consideration of the issues and overburdening the jury and where the difficulty to counsel of preparing for Count 3 made it impossible to prepare for Count 2, such that counsel deferred to counsel for codefendants all espionage litigation concerns.
- (G) Counsel provided constitutionally ineffective assistance of counsel by failing to secure documentary and other evidence from Cuba proving that Operation Venecia did not involve the shutdown of the BTTR planes but instead related to the return of a Cuban agent to Cuba in order to denounce BTTR.
- (H) Counsel provided constitutionally ineffective assistance by failing to investigate and present evidence pertinent to Count 2 showing the organization and structure of Cuban intelligence operations so as to establish that the operations in which the petitioner was involved were limited to obtaining non-classified information.
- (I) Counsel provided constitutionally ineffective assistance as to Count 2 issues relating to specific criminal intent and the object of the conspiracy by failing to request jury instructions explaining the theory of defense that the information he was tasked with obtaining was non-classified and distinguishing incidental from intended information gathering.

- (J) Counsel provided constitutionally ineffective assistance as to Count 2 by failing to object to unfairly prejudicial opinion evidence improperly going to the question of intent, offered by the government in violation of Fed. R. Evid. 701 et seq., including opinions as to the “communist” nature of the petitioner’s actions.
- (K) Counsel provided constitutionally ineffective assistance as to Count 2 by failing to present a comprehensive analysis of all communications by or from the petitioner showing the absence of any communications regarding classified information.

II. Counsel provided constitutionally ineffective assistance at the sentencing phase with regard to Count 3 by failing sufficiently to research and investigate the factors relevant to the sentencing of his client and by failing to properly object to and seek a departure from sentencing guideline calculations on which the sentence was premised.

Counsel specifically provided constitutionally ineffective assistance of counsel, individually and cumulatively, through the following:

- (A) Failing sufficiently to prepare for the sentencing phase of his client and to explain to the petitioner the right to testify concerning the underlying events.
- (B) Failing to develop the factual record for or otherwise object to the sentencing guideline role determination or to specifically request a sentencing downward departure on minor role grounds as to Count 3 and in deferring to other counsel, not knowledgeable about Count 3, to present minor role arguments.
- (C) Failing to object to the application of the first-degree murder sentencing guideline scheme to petitioner Hernandez.
- (D) Failing to identify nature of offense - i.e., first degree murder conspiracy, at an earlier time in the case - such that he could evaluate the sentencing consequences of failing to request a voluntary manslaughter instruction (level 29) that was substantially below the espionage conspiracy offense level.

III. Counsel provided constitutionally ineffective assistance on direct appeal of the conviction and sentence by failing to raise and argue all appropriate appellate issues, including issues counsel failed to preserve in the district court as stated in this petition and in Appendix A, attached, as to discovery issues, instructional

error, and improper evidence and arguments offered by the government, such that issues were abandoned, and when counsel attempted belatedly to expand the issues, the appellate court would not consider them.

IV. The government violated petitioner Hernandez's rights of due process and to a fair trial, and furthermore undermined the constitutionally effective assistance of petitioner's counsel, when it failed to disclose material exculpatory evidence.

The material exculpatory evidence withheld by the government included, but was not limited to:

- (A) Materials relating to Cuba's intention with respect to protecting its territorial integrity.
- (B) Materials relating to Cuba's right to confront intruding aircraft.
- (C) Material relating to the illegality of Basulto's actions.
- (D) Material relating to the government's unwillingness to stop Basulto from violating Cuban sovereignty and/or its inability to do so.
- (E) Material relating to high-frequency message, including additional messages themselves.
- (F) Additional high-frequently messages that revealed that the scope of so-called Operation Venecia was different and more long-standing than any operation related to the shutdown.
- (G) Additional high-frequency messages reflecting on petitioner's lack of intent to commit violate the law.
- (H) Materials relating the status of Roque's mission as separate from any operation to shoot down the planes.
- (I) Materials relating to the situs of shutdown that would have led counsel not to pursue the line of defense that it occurred in Cuba's territorial waters.
- (J) Materials relating to the government's inability to recover and translate additional transmissions that left gaps in the communication history.

- (K) Materials relating to the Cuban communications regarding the shoot down.
- (L) Materials, including satellite imagery, that would have demonstrated where the shutdown occurred and that the Majesty of the Seas was not in the position claimed in support of the government's theory on where the shutdown occurred.
- (M) Materials relating to the knowledge of U.S. officials regarding Cuba's objections to the Brothers to the Rescue incursions and plans to defend its territorial integrity.
- (N) Materials relating to local officials in the Miami office of the FAA, who failed to stop the Brothers to the Rescue flights of February 24th, 1996.

V. Newly discovered and other evidence of petitioner's actual innocence, including evidence that was previously unavailable relating to the shutdown and Cuba's intentions prove that the petitioner is actually innocent of Count 3.

- (A) Witness evidence explaining petitioner's lack of knowledge relating to the shutdown plan or intent to violate the law, including petitioner's own assertions of actual innocence.
- (B) Evidence newly discovered from Cuba demonstrates Cuba's actual intent was to protect its territorial integrity, not to commit an unlawful killing.
- (C) Evidence proving that Operation Venecia did not involve the shutdown of the BTTR planes but instead related to the return of a Cuban agent to Cuba in order to denounce BTTR.
- (D) Critical impeachment evidence – including evidence of bias, payments and emoluments, and prior false statements – as to its rebuttal witness James Clapper, where his highly prejudicial opinions and inculpatory characterizations of the nature of the petitioner's conduct substantially contributed to the convictions.
- (E) Evidence as to the lack of secure measures regarding any information to which the defendants might have had access in relation to the charged conduct, impeding the defense from showing that the material and places at issue were unprotected from security classification.

VI. Counsel provided constitutionally ineffective assistance with regard to all counts of the indictment by failing to raise and preserve objections to the presentation of improperly inflammatory and unduly prejudicial evidence and arguments by the government at trial.

The improper introduction of inflammatory evidence and argument by the government included, but was not limited to those reflected on the attached list, Appendix A, and also includes:

- (A) Counsel provided constitutionally ineffective assistance by failing to seek a security clearance for a translation or decoding expert to review materials presented by the government and decoded and translated and failing to call a translation expert to counter impermissibly prejudicial testimony of an FBI translator, including false implications of plastic explosives, and to explain what was conveyed by “enfrentamiento” and other language associated with 1995 and 1996 high frequency messages.
- (B) Counsel provided constitutionally ineffective assistance of counsel by failing to object to the “tune-up” evidence, given the stipulation as to agent status and due to unfair prejudice
- (C) Counsel provided constitutionally ineffective assistance of counsel by failing to object to the government’s use of unfairly prejudicial and inflammatory evidence, such that the court of appeals failed to consider the arguments not preserved.
- (D) Counsel provided constitutionally ineffective assistance by failing to object to, seek a mistrial or change of venue, and failing to appeal from, a pattern and series of improper, inflammatory, offensive and prejudicial arguments made in front of the jury, particularly in closing argument.
- (E) Counsel failed to investigate and present evidence of the personal bias and interest of FBI special agent in charge, Hector Pesquera, including personal ties to intense political opponents of the Cuban government.

VII. The denial of a change of venue deprived the petitioner of a fundamentally fair trial, as demonstrated by the Supreme Court’s intervening decision in *Skilling v. United States*.

- (A) Intervening authority of the United States Supreme Court – anticipated to be announced within the month – requires reconsideration of the denial of a change of venue in this case in light of the impossibility of any assurance of eradicating deep-seated biases and their impact in the course of a lengthy trial principally through voir dire directed at pretrial publicity and general attitudes.
- (B) Intervening authority of the United States Supreme Court shows that voir dire was insufficient to provide a remedy equivalent to a change of venue in light of the substantial showing of ingrained antipathy to the petitioner based on his status and identity.

VIII. The petitioner was denied due process of law because before, during and after the indictment and trial, the government surreptitiously funded a highly inculpatory, anti-Cuba propaganda campaign in the community in which the defendants were tried.

- (A) The government violated petitioner’s right to due process of law by secretly paying highly influential journalists in the trial venue to deliver its propaganda message in the guise of objective journalism.
- (B) The petitioner was denied due process of law because government-funded media inculcated the defendants by, among other things, purporting to link the defendants to myriad Cuban conspiracies-fictitious and otherwise-and highlighting and/or misrepresenting purported evidence against the defendants.
- (C) The petitioner was denied due process of law because government-funded media published prejudicial evidence that the district court ruled was inadmissible.
- (D) The petitioner was denied due process of law because the government’s propaganda campaign was both prejudicial and inflammatory.
- (E) The government’s misconduct undermined the fundamental structure of petitioner’s trial and petitioner’s convictions must thus be vacated.
- (F) The government’s misconduct created an unconstitutional probability that the petitioner was deprived of a fair trial.

IX. Petitioner’s rights were violated by the government’s abuse of the CIPA process and its failure to comply with its *Brady* obligations.

- (A) The district court violated due process and CIPA by, over petitioner's objection, holding an ex parte, in camera CIPA hearing to determine the discoverability and admissibility of the large volume of classified information involved in this prosecution.

Because petitioner and counsel for petitioner (who had received the appropriate security clearance to review the classified information) were excluded from the hearing, petitioner was deprived of the constitutional right to present a defense because he was denied the opportunity to identify and seek to introduce classified materials that were favorable to the defense at trial and at sentencing.

- (1) For example, the government's manipulation of the CIPA regime prevented petitioner from learning that there existed a number of classified high frequency messages, as well as other classified communications, that undermined and contradicted the government's theory of prosecution as to Count 3.
 - (2) Had petitioner known of the existence of these high frequency messages (it was later known that the government disclosed only 44 out of approximately 350 intercepted messages) and the additional classified communications, he would have sought to introduce them into evidence to show that he had no knowledge that the government of Cuba intended to shoot down the Brothers to the Rescue aircraft.
- (B) Notwithstanding its well-established *Brady* obligations, and based on its abuse of the CIPA process, the government failed to provide discovery or inform the petitioner of the existence of the large number of high frequency messages (over 300) and other classified communications, many of which were favorable to petitioner at trial and sentencing.
- (1) For example, the government failed to disclose the existence of several classified high frequency messages that clearly illustrated the differences between Operations Escorpion, Venecia, and Giron, which involved distinct innocuous activities which, however, the government successfully and unfairly portrayed as mere components of a single unified operation to destroy the Brothers to the Rescue aircraft and commit murder.
 - (2) Petitioner has recently been able to identify at least ten classified high frequency messages and other communications that should have been

disclosed pursuant to CIPA and the government's *Brady* obligations. Had the government complied with its *Brady* obligations and turned over the set of favorable and exculpatory high frequency messages and other classified communications, petitioner would have been able to place the messages the government did turn over and introduce into evidence at trial in their proper context and show that petitioner Hernandez did not knowingly and willfully participate in the alleged Count 3 conspiracy to commit murder.

APPENDIX A

PROSECUTORIAL MISCONDUCT CHART

(Appendix to Addendum Stating 28 U.S.C. § 2255
Claims in Gerardo Hernandez v. United States)

Type of Misconduct/ Relevant Case Law	Specific Instances: Comments/Arguments/Evidence	Was There a Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>1. Misstating the record – in violation of court orders re: unproven/ uncharged espionage (“spying”) by Campa on military base in Fayetteville, N.C.</p> <p><i>Hands Davis Blakey Alzate</i></p>	<p><u>Opening:</u></p> <p>– “Defendant John Doe number three, the evidence will show, lived for a time in Fayetteville, North Carolina, a stone’s throw from the Camp LeJeune Marine Base.” (R29:1583)</p> <p><u>During Trial:</u></p> <p>Government elicits testimony to which Campa objects as attempts to link Campa to spying on military base in Fayetteville, North Carolina. <i>See</i> R54:5253 (testimony of FBI Agent Giannotti regarding possibility of uncharged Fayetteville activities by Campa); R68:6936, 6938 (government seeks to introduce map depicting Fort Bragg and elicits references to Fayetteville military installation during testimony of Campa’s former Fayetteville landlord, Olin Baggett); R76:8272 (government seeks testimony from Admiral Carroll regarding Fort Bragg and Fayetteville, NC)</p> <p><u>Rebuttal:</u></p> <p>“I submit to you it is impossible to believe we would be better off with spies in our community in Tampa, in Fayetteville, North Carolina, in Norfolk, Virginia, on our military bases” (R124:14477)</p> <p>“Ruben Campa ... a Cuban spy sent to the United States to destroy the United States” (R124:14481)</p> <p>“It is not just the dead kids. How about the live people they have ... Osvaldo Reina, a truck driver from Florida. . . . Look, they are Cuban spies.” (R124:14482)</p> <p>“Let's ask, why are you on military bases? Why are you in Key West Florida at Boca Chica Naval Air Station? Why are you in Fayetteville North Carolina”? (R124:14483)</p>	<p>No</p> <p>Yes – Objections made to each of four references: (R54:5253; R68:6936, 6938; R76:8272)</p> <p>Court twice instructs government not to suggest criminal/military-related activity in Fayetteville by Campa. (R54:5282; R68:6958).</p> <p>Court denies motions for mistrial. (R54:5277-79; R68:6952-56; R76:8338).</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes – Sustained. (R124:14483). Motion for mistrial (R124:14483, 14538-14543) denied (R124:14543 -14545) – although court states “it is close. I don’t disagree with your concern.” (R124:14544).</p>	<p>No</p> <p>As to 4th reference – R 7 6 : 8 3 7 3 (directing jury to disregard government’s suggestion of military connection)</p> <p>No</p> <p>No</p> <p>No</p> <p>No – despite defense request for curative instruction as alternative to mistrial. R124:14541.</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>2. Additional instances of misstating the record/evidence – during closing argument</p> <p><i>Hands</i> <i>Davis</i> <i>Blakey</i> <i>Alzate</i></p>	<p><u>(A) Defendants were spies sent to destroy the United States:</u></p> <p>– Campa “is a Cuban spy sent ... to destroy the United States” (R124:14481)</p> <p>– “These [constitutional rights, including right to counsel] are for people bent on destroying the United States, paid for by the American taxpayer” (R124:14482)</p> <p>– “When the smoke clears, you can look at all of these defendants for what they truly are, they are spies, bent on the destruction of the United States of America.”(R124:14536)</p> <p><u>(B) They sponsor “book bombs:”</u></p> <p><u>Trial:</u> Govt. seeks testimony of FBI witness that <i>plastilina</i> (modeling clay) is same substance as “plastique” used in making bombs. R39:3122.</p> <p><u>Initial Closing:</u> – Objectives of Operation Picada include “Prepare an alleged book bomb [with] plastique and send it via express mail” (R121:13965)</p> <p><u>Rebuttal:</u> – “Yes this is great, we want these guys sending ... book bombs...” (R124:14476)</p> <p>– “They sponsor book bombs” (R124:14480)</p> <p><u>(C) Cuba is preventing FBI investigation of exile activity:</u></p> <p>– “The FBI isn’t invited back to pursue that stuff” (R124:14493)</p> <p>– “When the bosses in Havana decide that they want to share evidence with the United States of America (R124:14493)</p> <p>– “When they want to allow witnesses to be interviewed in Cuba, then that process will take place” (R124:14493)</p>	<p>No</p> <p>Yes – Sustained; motion for mistrial reserved, but denied. R124:14482, 1448545.</p> <p>No [previous objection sustained]</p> <p>Yes – Sustained. Motion to strike granted. R39:3122.</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes – Sustained (R124:14493)</p> <p>Yes – Sustained (R124:14493)</p> <p>Yes – Sustained (R124:14493)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>(cont'd – 2. additional instances of misstating the record/evidence)</p> <p><i>Hands Davis Blakey Alzate</i></p>	<p><u>D) All violent activity by exile groups has been prosecuted:</u></p> <p>– “Every case Mr. Mendez brought before you resulted in somebody getting arrested and prosecuted. It sounds like the FBI does do their job” (R124:14471-72)</p> <p><u>(E) Cuba employs death penalty for littering</u></p> <p>– “What typically is the consequence of a pilot violating civil aviation regulations with regard to throwing things out of airplane windows? ... The penalty for that would not be death, would it?” (R73:7806-07)</p> <p><u>(F) Captain Johansen’s log book didn’t plot longitude</u></p> <p>– “Mr. McKenna, what you forgot to tell the jury, what the longitude was because if you look at it, this is February 17” (R124:14523)</p> <p><u>(G) “When you [the Cuban Government] are caught, you destroy evidence”</u> (R124:14531)</p> <p><u>(H) [Buchner, the defense radar expert] “had 75,000 reasons to make that stuff up.”</u> (R124:14533)</p> <p><u>(I) They [spies] “infiltrated Congress”</u> (R124:14488; 14476)</p> <p>– “Don't look at me, look at these other people, forget I am a spy infiltrating the FBI, the United States Congress” (R124:14476)</p> <p>– “They infiltrated Congress” (R124:14488).</p>	<p>Yes (“Misstates the evidence”)– Sustained (R124:14472)</p> <p>Yes – Sustained (R73:7807)</p> <p>Yes (“It is a misstatement. He plotted both the longitude and the latitude on the map”) – Sustained (R124:14523)</p> <p>Yes (“It is so far outside of our case”) – Sustained (R124:14531)</p> <p>Yes (“There is no evidence he got \$75,000”) – Sustained (R124:14533)</p> <p>No</p> <p>No</p> <p>No</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>3. Misstating the law/ distorting or attempting to vitiate the jury instructions (as to Count 3)</p> <p><i>Romine Hall High</i></p>	<p><u>Initial Closing:</u> –“The evidence does show that the plan was to shoot down the aircraft, period, and if that meant in international air space, that was agreeable to the plan” (R122:14112)</p> <p>–“We know the shutdown in international air space was contemplated from the fact that it actually occurred in international air space. [A] conspiracy does not need to have succeed for this to be a conspiracy, but when it does succeed as this one” (R122:14112)</p> <p><u>Rebuttal:</u> – “The United States must prove there was a conspiracy to kill and we have proven a conspiracy to kill” (R124:14514)</p> <p>– “How else do you know that there was a conspiracy to kill here?” (R124:14515)</p> <p>–“We have jurisdiction in this Court, in this United States District Court because it occurred in international air space” (R124:14517)</p> <p>– “There is an element that requires the proof of the crime occurring in international air space” (R124:14517)</p> <p>– “Ladies and gentlemen, you read the instructions” (R124:14517)</p> <p>– “The United States of America has proven that the shutdown occurred in international air space “ (R124:14518)</p> <p>“I am merely telling the jury – ” (R124:14518)</p>	<p>Yes (“It is a misstatement of the law”) – Sustained (R122:14112)</p> <p>Yes (“It is a misstatement of the law” – Sustained (R122:14113)</p> <p>Yes (“They have to prove more than that”) – Sustained (R124:14515)</p> <p>Yes – Sustained (R124:14515)</p> <p>Yes – Sustained; defense seeks instruction to “disregard that mistake of law;” court grants motion to strike. **[Curative instruction by court arguably exacerbates prejudice, by telling jury the “statement regarding jurisdiction is not ... for the jury [and] is for the Court to determine.” (R124:14517)</p> <p>Yes (“It is a misstatement. It is an agreement”) – Sustained</p> <p>Yes (“He is now arguing with the Court what the instruction says”) – Sustained (R124:14517-18)</p> <p>Yes (“I object to this argument by counsel and I ask that it be stricken. That is not what must be proven”) – Sustained (R124:14518)</p> <p>Yes (“I object to him arguing with you about the law”) – Sustained (directing AUSA to “Move on”) (R124:14518)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes** (see ruling at left)</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>4. Urging jury nullification</p> <p><i>Funches</i> <i>Trujillo</i></p>	<p>Re: Count 3:</p> <p>– “If don’t think of an argument because I am not as smart as you guys, please if you have an argument in your head and it blows his arguments away, don’t be afraid to use it.” (R124:14510)</p> <p>Generally:</p> <p>– [Within first few words to the jury in rebuttal]: “Now you are ready in a short while on Monday to start talking among yourselves what the right decision is in this case.” (R124:14471)</p> <p>– [Last words to the jury]: “I know you will do the right thing.” (R124:14536)</p>	<p>No</p> <p>No</p> <p>No</p>	<p>No</p> <p>No</p> <p>No</p>
<p>5. Misleading the jury as to the nature of the defense/ suggesting defense is a last minute fabrication/ attacking counsel for arguing all grounds for acquittal</p> <p><i>Davis</i></p>	<p>Re: Count 3:</p> <p>– “There is one truth, just one truth, there is not multiple theories, not multiple choice tests. Truth comes in one package and this is a quest for the truth. Mr. McKenna told you in his opening the shooting was justified. The shoot downs of those planes were justified. He argues to you now his client didn’t know anything about it. It is not a multiple choice test. Somebody dies and it is justified, you are involved in it. If you don’t know anything about it, tell us from the beginning Mr. McKenna. Why do we spend months determining where the location of the shutdown was? If your guy doesn’t know anything about it, let’s go home. That is because he changes horses in the middle of the stream. He throws up what might be good day one and then uses what may be good day two.”(R124:14510-145111)</p> <p><i>Compare</i> McKenna’s Opening: “[S]eated right behind me is the scapegoat” (R29:1604); Cuba had “no need for my client to do anything” as to the shutdown. “That info was provided by the United States Government.” (R29:1618); “I think when you have heard all the evidence, you will come to a conclusion about what happened with respect to the Brothers to the Rescue and it is going to be A, that Mr. Hernandez had absolutely no involvement in the decision itself to shoot down the plane. He didn't do anything to help the Cubans. All that info had been given by the U.S. Government.” (R29:1624)</p>	<p>No</p>	<p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>6. Vouching</p> <p><i>Berger</i> <i>Young</i> <i>Eyster</i> <i>Butera</i> <i>Garza</i> <i>Hands</i> <i>Russell</i></p>	<p><u>For the fact that all of the defendants are spies:</u></p> <p><u>Opening:</u> – “This is a case about agents of the Cuban espionage service who came to this country to spy” (R29:1570)</p> <p>– “a sophisticated and highly motivated espionage cell operating in the midst of our community” (R29:1577)</p> <p><u>In trial:</u> AUSA comment in presence of jury reflecting belief that defendants committed espionage conspiracy (R:113:13127)</p> <p><u>Rebuttal:</u> – “I submit to you it is impossible to believe we would be better off with spies in our community in Tampa, in Fayetteville, North Carolina, in Norfolk, Virginia, on our military bases” (R124:14477)</p> <p>– “Ruben Campa ... a Cuban spy sent to the United States to destroy the United States” (R124:14481)</p> <p>– “It is not just the dead kids. How about the live people they have assumed identity of to escape from this county. Osvaldo Reina, ... Edwin Martinez, ... Daniel Cabrera. Look, they are Cuban spies.” (R124:14482)</p> <p>– “Let’s ask, why are you on military bases? Why are you in Key West Florida at Boca Chica Naval Air Station? Why are you in Fayetteville North Carolina?” (R124:14483)</p> <p>– “We know [Medina] was spying on the air force base because he kept a record” (R124:14484-14485).</p> <p>– “My G-d these guys are spies. What do you think they are doing in this country? (R124:14510)</p> <p>– “When the smoke clears, you can look at all of these Defendants for what they truly are ... spies, bent on the destruction of the United States of America” (R124:14535)</p>	<p><i>See #1 supra</i> re: Campa’s trial objections & court’s sustaining</p> <p>No</p> <p>No</p> <p>Yes – Sustained; remark stricken (113:13127); motion for mistrial denied – R113:13130</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes. Sustained. (R124:14483). Motion for mistrial denied (R124:14483, 14538-14545), although court states “it is close. I don’t disagree with your concern.” (R124:14544).</p> <p>No</p> <p>No</p> <p>No</p>	<p><i>See #1</i></p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>6. Vouching (continued)</p> <p><i>Berger Young</i></p>	<p><u>For fact the “spies” were “bent on destroying the U.S.”</u></p> <p><u>For credibility of FBI, government witnesses, and Basulto:</u></p> <p>– “[The FBI] did a fabulous job. They are the best of the best and they have set quite a high mark for future performances in other cases. The surveillances, the searches that were involved all with the approval of the United States District Judges; the decrypted disks, the preservation of all the available evidence, an extraordinary job, worthy of the highest praise.” (R124:14472)</p> <p>– “Every case that Mr. Mendez brought before you resulted in somebody getting arrested and prosecuted. It sounds like the FBI does do their job.” (R124:14471-14472)</p> <p>– “Whether you disagree or agree with Jose Basulto ... he was bent on the overthrow of the communist country of Cuba as he is today, he wants to see Democracy restored” (R124:14475)</p> <p>– “The FBI isn’t invited back to pursue that stuff” (R124:14493)</p> <p>– “When the bosses in Havana decide that they want to share evidence with the United States of America (R124:14493)</p> <p>– When “they want to allow witnesses to be interviewed in Cuba, then that process will take place” (R124:14493)</p> <p>– Re: Stu Hoyt: “ I submit to you he was a superb witness with impeccable credentials” (R124:14503)</p> <p><u>For the fact that there was no “credible evidence’ of exiles planting bombs in Havana (as the defense maintained):</u></p> <p>– “Bombs in Havana. Absolutely wrong. If there is evidence, credible evidence that was prosecutable in this district or I hope any other district where there is a capable prosecutor and capable investigators, they should bring those charges against people if they are responsible from this community or any other community in the United States. I will find out and prosecute the case.” (R124:14492)</p>	<p><i>See supra # 2.</i></p> <p>No</p> <p>Yes – Sustained (R124:14472)</p> <p>No</p> <p>Yes – Sustained (R124:14493)</p> <p>Yes – Sustained (R124:14493)</p> <p>Yes – Sustained (R124: 14493)</p> <p>No</p> <p>No</p>	<p><i>See # 2</i></p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>6. Vouching (continued)</p> <p><i>Berger Young</i></p>	<p><u>For fact that Hernandez supports “goon squads” to brutalize anyone who complains about the Cuban government:</u></p> <p>– “What is Hernandez all about? ... Does he say let’s send the goon squad and give this guy a tune up? What did he say in the document? You need to send out some people from the department and talk to this guy. What do you think ‘go see this guy’ means in Cuba, somebody who talks about Fidel Castro?” (R124:14495)</p>	<p>No</p>	<p>No</p>
<p>7. Burden-shifting/ complaining defendants went to trial and cross- examined witnesses</p> <p><i>Cunningham Simon Blankenship Blakey</i></p>	<p>– “It is lawyer talk getting up here and saying we don’t dispute it [false identities]. Sure they dispute it; they pled not guilty” (R124:14480)</p> <p>– “They forced us to prove their guilt beyond a reasonable doubt. They received the ablest of counsel who argued every point and called many witnesses and cross-examined our witnesses.” (14482)</p> <p>– “As Mr. McKenna has amply demonstrated to you they have no burden of proof but he absolutely has subpoena power. He called a number of witnesses.” (R124:14525)</p> <p>– “The defense has the same subpoena power – ” (R124:14525)</p> <p>– “It is not – ” (R124:14525)</p>	<p>No</p> <p>No</p> <p>Yes (“Object to the shifting of the burden”) – Sustained (R124:14525)</p> <p>Yes (“It is shifting – ”) – Sustained (R124:14525)</p> <p>Sustained (“Move on Mr. Kastrenakes”) (R124:14525)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>
<p>8. Personally attacking the defendants</p> <p><i>Blakey Hall Hands Wilson Rodriguez Barker Young Darden</i></p>	<p><u>Bent on destroying the US</u></p> <p><u>They sponsor book bombs</u></p> <p><u>Re: Hernandez:</u></p> <p><u>In trial:</u> Testimonial reference (second) to Hernandez’s noting that a taxi driver was criticizing the Cuban government, to align Hernandez with repression in Cuba (R46:3970-71)</p> <p><u>Rebuttal:</u> “What is Hernandez all about? He never loses an opportunity to spy or report on people. ... Does he say let’s send the goon squad and give this guy a tune up? What did he say in the document? You need to send out some people from the department and talk to this guy. What do you think ‘go see this guy’ means in Cuba, somebody who talks about Fidel Castro?” (R124:14495)</p>	<p><i>See supra #2</i></p> <p><i>See supra # 2</i></p> <p>Yes – overruled. (R46:3971).</p> <p>No</p>	<p><i>See # 2</i></p> <p><i>See # 2</i></p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>9. Attacking defendants for having court-provided counsel</p> <p><i>Goodwin</i> <i>Wilk</i> <i>Rodriguez</i></p>	<p>– Defendants received the “ablest of counsel who argued every point: These are for people bent on destroying the United States, paid for by the American taxpayer” (R124:14482)</p> <p>“Mr. Blumenfeld made that statement to the jury” (R124:14482)</p> <p><i>See also:</i> [Buchner, the defense radar expert] “had 75,000 reasons to make that stuff up, folks. 75,000 reasons” (R124:14533)</p>	<p>Yes (McKenna: “Objection;” Mendez: “I have a motion”) – Sustained (R124:14482)</p> <p>Sustained (R124:14482)</p> <p>Yes – Sustained (R124:14533)</p>	<p>No</p> <p>No</p> <p>No</p>
<p>10. Personally attacking defense counsel</p> <p><i>McLain</i> (plain error) <i>Friedman</i></p>	<p><u>Attacks on the Defense Attorneys (Severally) During Closing/Rebuttal:</u></p> <p>– It’s “time now for the propaganda to end” (R122:14119)</p> <p>– “I wonder why they say those sorts of things [focus your attention on the exile extremist activity]” (R124:14471)</p> <p>– “In this trial you have heard invented the Disney world defense put before you (GC: 14476)</p> <p>– “It is lawyer talk getting up here and saying we don’t dispute it [false identities].” (R124:14480)</p> <p>– Defense of monitoring “Cuban exile groups” is “a fallacy” (R124:14483)</p> <p>– “Was this the provocations of a terrorist counterrevolutionary group? No. The Cuban government doesn’t say that. That is lawyer talk in a courtroom five years later.” (R124:14523)</p> <p><u>Attacks on Defense Attorneys (Individually) During Rebuttal:</u></p> <p>Blumenfeld/Ct. 2: – “When you are the defense attorney you have to dance around plain English ... ignore your common sense” (R124:14501) – “What Mr. Blumenfeld told is not the evidence, it is lawyer talk.”(R124:14509)</p> <p>Horowitz: – “Well, Mr. Horowitz, I am sorry ... Not lawyer talk, evidence.” (R124:14489)</p> <p>– “Mr. Horowitz’ argument is, it is ridiculous” (R124:14492)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>10. (cont'd) Personally attacking defense counsel</p> <p><i>McLain</i> (plain error) <i>Friedman</i></p>	<p><u>Attacks on Defense Attorneys (Individually) During Rebuttal (cont'd):</u></p> <p>Norris: – “The hollow words of Mr. Norris he is sorry that his client stole the identity of some child is not enough. ... Mr. Norris’ words ring very hollow.” (R124:14481-14482)</p> <p>McKenna/Ct3: -- “It doesn’t matter in the world of George Buchner who [the shutdown victims] are. All that matters to George Buchner and Mr. McKenna is Jose Basulto. What kind of justification is that to shoot people out, or in Mr. McKenna’s word, the final solution. I heard that word before in the history of mankind.” (R124:14474)</p> <p>– “Mr. McKenna told you in his opening the shooting was justified. The shoot downs of those planes were justified. He argues to you now his client didn’t know anything about it. It is not a multiple choice test. Somebody dies and it is justified, you are involved in it. If you don’t know anything about it, tell us from the beginning Mr. McKenna. Why do we spend months determining where the location of the shutdown was? If your guy doesn’t know anything about it, let’s go home. That is because he changes horses in the middle of the stream. He throws up what might be good day one and then uses what may be good day two.”(R124:14510-14511)</p> <p>– “You don’t dance around it, you don’t throw up ideas that are false and come up with some other ideas. You tell the truth.” (R124:14511)</p> <p>– McKenna’s law is “the law of the jungle.” (R124:14514)</p> <p>– “Mr. McKenna, what you forgot to tell the jury, what the longitude was because if you look at it, ...” (R124:14523)</p> <p>– “[Y]ou will see that argument for what it is, a total falsehood, a total unmitigated falsehood, nothing to do except to mislead you.” (R124:14524)</p> <p>– “If you believe this malarky ... acquit” (R124:14530)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes (“It is a misstatement. He plotted both the longitude and the latitude on the map”) – Sustained (R124:14523)</p> <p>No</p> <p>No</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>11. Appealing to patriotism, passions, morals, fears, and concern for human rights in Cuba</p> <p><i>Cunningham Cole Barker</i></p>	<p><u>Opening:</u> –“a sophisticated and highly motivated espionage cell operating in the midst of our community” (R29:1577)</p> <p>–“attempting ... to discredit ... Cuban community in Miami” (R29:1591-1592)</p> <p><u>During Trial:</u> – Government recognizes BTTR as “humanitarian” despite discontinuance of BTTR rafter reporting following U.S.-Cuba migration accord of 1995 (R29:1589)</p> <p>– FBI witness describes Cuban agency as “an intelligence pyramid” headed by Fidel Castro. (R44:3699-3700)</p> <p>– Government’s BTTR representative witness, Iglesias, receives directions/signals from BTTR lawyer during testimony; BTTR attorney – first warned during testimony of BTTR witness, Lares, R55:5515-16 – expelled from courtroom after continuing with visible gesturing in aid of government examination of witness. (R56:5605)</p> <p>– While testifying, government’s BTTR witness, Iglesias, admonished by court for repeatedly engaging in prejudicial courtroom demonstrations when attorneys were distracted by attending side bar conferences during his testimony. (R56:5629; R58:5902, 5949)</p> <p>– Government’s Cuban dissident witness, Leonel Morejon, repeatedly makes reference to repression and his imprisonment in Cuba despite court order to government to avoid such testimony. (R58:5997; R60:6195)</p> <p>– Prosecutor highlights Cuba as “repressive,” R80:8748, “dictatorship.” R80:8754. Americans, not Cubans, have “freedom of choice” R80:8754.</p> <p>– Witness Basulto (called by defense, but aligned with government and later lauded by government as “freedom fighter”) accuses defense counsel of collaborating with the Cuban government – “Are you doing the work of the intelligence government of Cuba ... ?” (R81:8945)</p> <p>– Government asks Basulto about “tense time in this community” during 1962 missile crisis (R83:9241)</p> <p>– Impermissible government publishing of United Nations findings and condemnation of shutdown. R88:10027.</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes – Sustained (R56:5605)</p> <p>Yes – Sustained (R58:5949)</p> <p>Yes – Sustained (R60:6195))</p> <p>No</p> <p>Yes – Sustained (R81:8947). Denial of motion for mistrial, but partial granting of curative instruction request.</p> <p>Yes – Sustained (R83:8955)</p> <p>Yes – Sustained; but motion for mistrial denied (R88:10027)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Yes (R81:8955: counsel is “doing his job”)</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>11. Cont'd (appealing to patriotism, passions, morals, fears, and concern for human rights in Cuba)</p> <p><i>Cunningham Cole</i></p>	<p><u>Initial Closing:</u> – I don't know if you saw the old movie Invasion of the Body Snatchers. This is a movie where the planet is being taken over by pod people and at the end is a scene of a truck driving off with new pods in it ready to be sown. That is what this is, new identifies ready to be used and ready to be sown by the Cuban Intelligence Service.” (R121:13939-40)</p>	No	No
	<p>– It's “time now for the propaganda to end” (R122:14119)</p>	No	No
	<p><u>Rebuttal:</u></p>		
	<p>– “This is an extremely important case. Your decision is extremely important” (R124:14471)</p>	No	No
	<p>– “A bureau that sees the United States of America as its prime and main enemy.” (R124:14475)</p>	No	No
	<p>– “These are not the rules of Cuba. ...” (R124:14475)</p>	No	No
	<p>– “They [spies] are everywhere, come on.” (R124:14477)</p>	No	No
	<p>– Spies “bent on destroying the U.S.” (R124:14481-82, 14536)</p>	Yes – Sustained (R124:14482)	No
	<p>– “[Judge] will do her job if you do your job” (R124:14487)</p>	No	No
	<p>– “Cuba [is] friends with our enemies” (R124:14512)</p>	No	No
	<p>– “If their own people see that planes dropping leaflets people inside those planes are going to be murdered brutally, mercilessly and nothing happens, what people in Cuba are going to stand up for their rights? Zero.” (R124:14520)</p>	No	No
	<p>– “Does the Cuban government have a stake in this case? A huge one.” (R124:14532)</p>	No	No
	<p>– “When the bosses in Havana decide ...” (R124:14493)</p>	Yes – Sustained (R124:14493)	No
<p>– “I want you to remember that when you think how long this trial has lasted, from Thanksgiving to Memorial Day, a day we commemorate people who have fought for our country and Thanksgiving, a day we cherish to be with our families and this will never happen again for these families because he with his blood promotion to Captain, Captain Hernandez” (R124:14535)</p>	No	No	
<p>– “I know you will do the right thing” (R124:14536)</p>	No	No	

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>12. Introducing purely inflammatory evidence/making purely inflammatory arguments</p> <p><i>Hands Bowen Frost North Martin v. Parker</i></p>	<p><u>Invoking the name of G-d on the side of the prosecution:</u> – “We are not operating under the Rules of Cuba, thank G-d” (R124:14475) – “My G-d these guys are spies. What do you think they are doing in this country?” (R124:14510) – [Re: Cuban witnesses]: “Adlai Stevenson said it best about lies. He said lies are an abomination unto the Lord but a very pleasant help in a time of trouble. Aren’t they?” (R124:14530)</p> <p><u>Comparing shutdown to Hitler’s “Final Solution:”</u> – “All that matters to [Buchner and McKenna] is Jose Basulto. What kind of justification is that to shoot people out, or in Mr. McKenna’s word, the final solution. I heard that word before in the history of mankind.” (R124:14474).</p> <p><i>Compare</i> McKenna’s closing (arguing based on premise that Cuban radar showed military shutdown occurred in Cuban air space) (R124:14433); “last resort” jury instruction: R125:14610.</p> <p><u>Persistent References to “the Dead Babies”</u></p> <p><u>Opening:</u> – “The evidence will show that the real Ruben Campa died in California in infancy ... sadly, the real Luis Medina died in infancy in California” (R29:1570-71) – “birth certificates for the real but unfortunately deceased infants whose identity they assumed” (R29:1581)</p> <p><u>During trial:</u> – Despite motion and offer to stipulate, government asks first witness, “look around the courtroom and tell us if you see your [deceased] son” (R30:1711, 1716), after asking witness, Reverend Medina, to describe son’s death: “He became very ill so we took him to the hospital to find out what was wrong with him. ... They discovered he had a spinal problem and after a few days, he passed away.” (R30:1709-10); later government questioning (unobjected-to): “Does Florida law allow you to obtain driver's licenses and false identifications under the name of a dead baby?” (R33:2164)</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>Following opening statement Campa moves <i>in limine</i> arguing “emotional testimony regarding deceased son will be unfairly prejudicial” given defense stipulation to identity-related facts (DE787:3); Govt. refuses stipulation, court overrules objection – R30:1715</p> <p>Defense objects to continued asking of “macabre” question (re: dead child in courtroom) – objection partially sustained, but government permitted to present – via three witnesses – evidence re: death of family members;</p>	<p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p> <p>No</p>

Misconduct/ Case Law	Specific Instances: Comments/Arguments/Evidence	Defense Objection? How Did the Court Rule?	Curative Instruction?
<p>(cont'd – 12. inflammatory evidence, argument)</p>	<p><u>Closing:</u></p> <ul style="list-style-type: none"> – “These are the driver’s licenses in the names of the three illegal officers, that they were using ... having appropriated these identities from infants who once died” (R121:13929) – “For the main identities the illegal officers used these dead babies’ identities” (R121:13930) <p><u>Rebuttal:</u></p> <ul style="list-style-type: none"> – “They killed 4 innocent people and they use in these identities dead babies, dead children to establish who they are ... “you talk about stealing the memories of families. Reverend Medina lost a child 30 years ago. ... They don’t care.” (R124:14480) 	<p>No</p> <p>No</p> <p>No</p>	<p>No</p> <p>No</p> <p>No</p>