UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-721-Cr-LENARD (s)(s)
Magistrate Judge Garber

UNITED STATES OF AMERICA,

v.

JOHN DOE No. 3, a/k/a
Ruben Campa,
Defendant

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GOVERNMENT'S RESPONSE TO MEMORANDUM IN AID OF RESENTENCING RUBEN CAMPA

The United States respectfully responds to defendant Ruben Campa's Memorandum in Aid of Sentencing ("Memorandum"), Docket Entry ("DE") 1770, as follows:

Amendment to the PSR

The Memorandum suggests that the Pre-Sentence Report ("PSR") needs to be amended, to reflect changes ordered by the court at defendant Campa's original sentencing, December 17-18, 2001. However, the modifications ordered by the court were in fact substantially accomplished. The court instructed, *see* DE 1453:39-40, that certain headings be reworded and moved; that paragraphs 56 through 65 of the then-current PSR[1] be stricken from the victim-impact section; and that paragraph 55 be revised to delete reference to Count 3, which did not concern this defendant. Following the sentencing, the PSR was revised as of December 21, 2001. This is the latest version (other than the post-appeal Addendum prepared in September, 2009, by the Probation Office in anticipation of this resentencing) of the PSR, and is noted, at the bottom of every page, as "Rev. 12/21/01." The 12/21/01 revision made the heading-changes as instructed, and deleted paragraphs 56 through 65 of the former PSR, as instructed.

[1] This version bore the notation, at the bottom of every page, "Rev. 12/11/01."

The court's final instruction, to modify the language of Paragraph 55 so as to eliminate reference to a count not concerning this defendant, appears to have been overlooked. Accordingly, the United States respectfully suggests that the court's original instruction as to Paragraph 55 be carried out, by modifying that paragraph as follows:

> The second superseding Indictment filed on May 7, 1999, contained 26 counts, all of which are violations of Title 18. ~~However, of those charges only Count Three involves specified victims other than the United States.~~ Although the United States was the primary victim *of the defendant's counts of conviction*, the Government did not suffer any specified economic harm and no agents were physically harmed during the surveillance and investigative period.

That is, the new proposed language for Paragraph 55 would be:

> The second superseding Indictment filed on May 7, 1999, contained 26 counts, all of which are violations of Title 18. Although the United States was the primary victim of the defendant's counts of conviction, the Government did not suffer any specified economic harm and no agents were physically harmed during the surveillance and investigative period.

With this relatively minor modification, the United States respectfully submits that the court's instructions of December 17, 2001, would be fully carried out. The Memorandum also requests deletion of paragraphs 14 - 20 of the PSR, but there was no such request previously, and the court gave no such instruction. The December, 2001, defense objection and request related to inclusion of the BTTR incident in this defendant's victim-impact analysis, not to references to BTTR in general. The United states respectfully submits that the minor modification it has suggested *supra* is sufficient to meet any arguable need for amendment of the PSR.

Concurrent vs. Consecutive Sentencing

The defendant's Memorandum seeks to persuade the court to change its original sentencing program of consecutive sentencing, but Defendant's arguments are not well taken, and the court's original plan was, and remains, sound.

The court conducted eight detailed and thorough sentencing hearings in this case. *See* DE 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1460. The defendant, and counsel, attended all the hearings preceding and including his own sentencing, which occurred December 17-18, 2001. *See*

DE 1448-1454. Although the original sentencing occurred prior to the regimen of advisory-guideline sentencing, *see United States v. Booker*, 543 U.S. 220 (2005), the parties argued, and this court explicitly considered and based its sentence on, the sentencing factors set forth in Title 18, United States Code, §3553. While sentencing defendant Campa, the court articulated its reference to 18 U.S.C. §2553, *see* DE1454:130, foreshadowing and consistent with *Booker* principles. The points Defendant raises now as requests for departure or variance[2] from a guideline sentence all were previously presented to, and carefully resolved by, the sentencing court, with correct determinations that should not now be changed.

Before making his variance argument, however, Defendant devotes considerable attention to suggesting that his original sentencing was somehow unfair and incorrect in the way the court dealt with grouping issues, and that this caused him to be wrongly sentenced to excessive consecutive terms of incarceration. *See* Memorandum 4-13. These claims – none of which he raised on appeal – are wholly wrong.

Defendant puts great weight on an argument that the court's Probation Office originally recommended that he be sentenced concurrently, but that the court ordered that his PSR be changed in a way that exposed him to five years additional consecutive sentencing. The PSR did not recommend concurrent sentencing, nor does a PSR typically include sentencing recommendations, but rather analyzes and reports to the court sentencing considerations including guideline calculations. The 12/11/01 PSR addressed, at ¶¶ 69- 72, offense-level and grouping issues. As it

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[2] Defendant uses both terms, *see* Memorandum at 3, while suggesting that his concerns may best be treated under the *Booker* analysis, presumably referring to a variance from the advisory guideline range. *See* also Memorandum at 13: "**C. Request for a Downward *Variance*"** (emphasis added). Defendant acknowledges that the Probation Officer's calculation, in the September, 2009, Second Addendum, of an advisory guideline range of 33-41 months, is correct. Memorandum at 2-3. This reinforces that he is arguing for a variance from the advisory guideline range, not a departure within the guidelines that would alter the guideline calculation. As to the difference between departure and variance, *see, e.g., Irizarry v. United States,* 128 S.Ct. 2198 (2008), *United States v. Kapordelis*, 569 F.3d 1291, 1316 (11th Cir. 2009).

noted, *id.* at ¶ 71, Count One is a dual-object conspiracy: One object was agreement to violate 18 U.S.C. §951 [acting in U.S. as agent of a foreign government without notification to Attorney General], a statutory offense for which there is no specific sentencing guideline; the other object was to defraud the United States.[3] Thus, the dual-object conspiracy's first prong was subject to non-guidelines, discretionary sentencing. (Or, as the PSR put it, *id*., "the first part of the conspiracy contained in Count One is a violation for which there is no specific guideline.") As to the conspiracy's second prong – conspiracy to defraud the United States – the 12/11/01 PSR grouped its illegal acts with Counts Seven and Eight, the identity-fraud counts. *See* ¶¶71-73. The PSR did not group the illegal acts comprising the first conspiracy-prong with any other offenses, and they remained subject to non-guidelines, discretionary sentencing.

Nonetheless, when the United States recommended that the court sentence the defendant for Counts Seven and Eight, the guidelines counts, consecutively with Counts One, 16 and 17, the non-guidelines counts, defendant Campa argued that this amounted to a tardy government objection to the PSR because the government's recommendation treated Count One as a non-guidelines count, whereas the PSR grouped Count One with guideline Counts Seven and Eight. *See* DE 1453:25. But the PSR only grouped Count One's illegal acts comprising the second prong; the illegal acts for the first prong were not grouped. As the government stated, *id.* at 26, its position was not inconsistent with the PSR, which recognized that the first part of Count One's conspiracy is a violation without a guideline. The illegal acts comprising that first prong of the conspiracy were an independent basis for non-guidelines sentencing on Count One and were, properly, not grouped; the prong-one agreement to commit the §951 non-guideline offenses constituted a complete conspiracy conviction for which the defendant faced five years' sentencing exposure, apart from the illegal acts comprising the second prong which he argues should have been grouped. The defendant should not get a windfall by being relieved from the first prong's non-guidelines impact simply because he had

[3] It is definite that defendant Campa was convicted as to both objects of the conspiracy, the jury having said so in a special interrogatory verdict form.

entered into a wider conspiracy that also included a second goal that he argues was groupable with guideline offenses. As the government originally argued, "It cannot be the case that by committing additional crimes the defendant is entitled to a benefit he would not otherwise be entitled to," *id.* at 27.

In resolving the matter, the court harkened back to previous sentencing hearings, attended by Defendant and his counsel, at which the issue of grouping and Count One had been addressed. *See* DE1453:38.[4] Count One, the court determined, had dual objects, and one was within the guidelines and one was not within the guidelines. The court noted that in the previous sentencings in the case, Count One was not included within the guideline computation. The court directed that the defendant's PSR be modified so as not to group Count One with Counts Seven and Eight. This was done, and is reflected in the 12/21/01 revised PSR, ¶¶ 59-63.

The court's determination was correct, and was not unfairly hasty, as the Memorandum suggests. As early as November 26, 2001, the United States had put the defendant on notice that it would recommend consecutive sentencing of guidelines and non-guidelines counts. *See* DE 1380:3 n.1. On December 12, 2001, and again on December 13, 2001, Defendant and counsel attended

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[4] The court said:

> As far as Count 1 is concerned, I believe this issue came up in the sentencing of Mr. Hernandez and in fact I brought up the issue to Ms. Speas whether Count 1 should be included in group A and after hearing from all sides and probation, determined that Count 1 would not be included in group A. It was not referenced that way in the presentence investigation report because of the dual objects of the conspiracy, one of which was within the guidelines and one of which was not within the guidelines.
>
> For all the defendants thus far that I have sentenced, Count 1 has not been included within the guideline computation.
>
> For purposes of this sentencing and this presentence investigation report, for consistency purposes as to each and every defendant and Mr. Mendez was present at the sentencing hearing of Mr. Hernandez during which this issue came up; I will order the modification of this presentence investigation report such that Count 1 is not included within the grouping and the base offense level within paragraph 73.

sentencing proceedings that considered grouping issues as to Count One, *see* DE 1450:7-8, and other lengthy discussions of the significance of Count One's dual guidelines/ non-guidelines objects, *see* DE 1451:90 ff.[5] Defendant's counsel was keenly attentive and noted, at the close of the December 12, 2001, hearing, that he had learned quite a bit from the hearing, and that it had alerted him to parallels as to his own client. DE 1450:130. This also vitiates the Memorandum's suggestion that decisions the court made as to co-defendants were not fair when applied to Campa; clearly, counsel had the opportunity to foresee application to Campa, and to argue accordingly. Nor is it reasonable to suggest that the court should, or could, issue legal rulings as to some defendants, and vary them for others. The Memorandum's claim of unfair surprise is unconvincing, especially when coupled with the defendant's omission to raise any of these issues on appeal.[6]

The Memorandum's discussion of the law concerning consecutive and concurrent sentencing also is misplaced. Defendant argues that there is a statutory presumption in favor of concurrent

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[5] These and other sentencing proceedings included discussions whose premise was that guidelines and non-guidelines counts, and principles, had to be treated distinctly, rather than have the court create an unprecedented hybridized sentencing system. Accordingly, and also because non-guideline offenses have no articulated guideline base offense level or specific offense characteristics, guidelines and non-guidelines counts could not be meaningfully grouped, as the Memorandum seeks, *see* p. 12, in asking that Counts 7, 8, 16 and 17 be grouped. This principle of confining guidelines application to guidelines counts has worked to the defendant's advantage in certain regards, and if it were to be undone, those advantages also would unravel. For instance, if Counts 7, 8, 16 and 17 were to be grouped, not only would a base-offense level and specific offense characteristics for Counts 16 and 17 have to be determined, but also the defendant's undoubted managerial/supervisory role with regard to Count 16 and 17 activity would have to be added as a three-level guideline enhancement.

[6] Lower court rulings that were not challenged on a first appeal may properly be viewed as law of the case, or waived. *See United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997). The law-of-the-case doctrine is a matter of practice and discretion – not a limit on the court's power – that posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 815-816 (1988); *see also* 18B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure, §§4478, 4478.1 (2nd ed. 2009). It is especially pertinent when a defendant had, but did not use, the opportunity to appeal the court's decision, *see United States v. Escobar-Urrego, supra.*

sentencing, Memorandum at 4, quoting 18 U.S.C. §3584(a) ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."). This is incorrect. The quoted provision of 18 U.S.C. §3584(a) does not create a presumption in favor of either concurrent or consecutive sentencing, nor prescribe in any way which type of sentence a court should impose; rather it is a rule of construction for when a court fails to specify. *See* S. Rep. No 225, 98th Cong. 2d Sess 127 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3310 (provision "is intended to be used a rule of construction in the cases in which the court is silent as to whether sentence are consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively."). Defendant cites no authority for his argument, and the caselaw is to the contrary. *See United States v. Wills*, 881 F.3d 823, 826 (9th Cir. 1989)(§3584 is not a presumption in favor of one type of sentencing but rather a rule of construction for cases where the court has not specified); *United States v. Scott*, 1988 WL 142126, *1 (D. Md. 1988)(unreported).[7]

Thus, the court retains full discretion as to whether to sentence concurrently or consecutively. U.S.S.G. §5G1.2(d), also cited by Defendant, expresses the principle that in multi-count cases, the court should determine the total appropriate punishment, and if the highest statutory maximum for a single count is less than the total appropriate punishment, then the court should (indeed, §5G1.2(d)

[7] Defendant's argument, Memorandum at 5, that 18 U.S.C. §3584(a) prescribes concurrent sentences for his conspiracy and substantive convictions also is wrong. The statute provides that terms not run consecutively for an attempt and for another offense that was the sole objective of the attempt. There is no such provision for conspiracies and substantive offenses, which Congress certainly knew how to include had it agreed with Defendant's argument that all inchoate offenses should be so treated. In any event, Defendant's Count Seven and Eight offenses were not the sole objective of the Count One conspiracy. The Court of Appeals rejected co-defendant Rene Gonzalez's challenge to consecutive sentencing for his conspiracy and substantive offenses, and found that he was properly sentenced to consecutive maximum terms for his two counts of conviction. *See United States v. Campa, et al,* 529 F.3d 980, 1011-1012 (11th Cir. 2008), *cert. denied,* 129 S.Ct. 2790 (2009)

says "shall") run sentences consecutively to produce a combined sentence equal to the total punishment. While the application of U.S.S.G. §5G1.2(d) to non-guidelines sentencing could be debated, the principle at work remains the same in this case of combined guidelines and non-guidelines counts: The court's essential task is to determine total appropriate punishment, and then to sentence so as to reach that total appropriate punishment, ordering consecutive terms if needed to reach that total.

The parties differ as to what is total appropriate punishment. Defendant Campa argues that it is a term no longer than the 180 months he faces on the non-guidelines counts. The government respectfully submits that it is a term of incarceration, within the 33-41 month advisory guideline range for Counts Seven and Eight, consecutive to the defendant's 180-month sentence on the non-guidelines counts. The government already has stated its position on statutory sentencing factors, in its Memorandum in Aid of Resentencing, DE 1769; it will here address the defense Memorandum's requests for variances, which are not warranted, and discussion of sentencing factors.

Sentencing Factors and Variances

Defendant essentially repeats his trial arguments, and original sentencing arguments (which were previously stated both as allocution and as argument for a lesser-harms downward departure), that his sentence should be mitigated because his purpose in committing the offenses was to monitor Miami-based activism against Cuba and to protect his homeland from terrorists. But his arguments paint an unduly benevolent picture of his activity with regard to this aspect of his activity, and wholly ignore other significant areas of his activity, such as helping to oversee the Government of Cuba's persistent, long-terms efforts to penetrate United States military installations.

With regard to his role in overseeing penetration of so-called "counter-revolutionary" activity in Miami, the defendant asks the court essentially to endorse vigilantism conducted covertly by a foreign power on American soil. Defendant, and Cuba's Directorate of Intelligence ("DI"), are not content to let United States law enforcement and United States jurisprudence address what the DI deems to be illicit activity within United States territory. Defendant acknowledges that persons he

considers inimical have been prosecuted by the United States, *see* Memorandum at 15, but claims for himself (as directed by the DI) the right to determine whether the outcomes of United States legal process are adequate, and to act, clandestinely within our borders, to address what the DI considers inadequate.[8] For instance, the Memorandum notes, page 16, that Defendant participated in the spy group's reconnaissance of what was believed to be a "yacht bomb" on the Miami River, and that the options the group considered included tipping off the F.B.I. as to the dangerous vessels. What is unmentioned, however, is that a main concern of the group was how to inflict damage on the boat, and that another option they considered for dealing with it was to burn it with a mixture of gasoline and oil, providing the DI could either furnish fire retardant, to allow a getaway from the arson, or a recipe for making fire-retardant in Miami. *See* Defense Exhibit R64, pages 15-19. This, obviously, would not be an outcome consistent with United States law enforcement, yet the defendant was committed to taking his direction in this regard from the DI, not the F.B.I.

Other "counter-revolutionary" projects in the United States were also less than benevolent. The Memorandum mentions, *see* page 16, Operation Giron, and describes it as essentially a program to monitor the Cuban American National Foundation ("CANF") which supposedly supported violent attacks against Cuba. But according to Government Exhibit DAV-118, the defendant's "work directive" from the DI, Operation Giron had three objectives, and penetration of the CANF was only one, DAV-118:2. The other two were to penetrate federal Cuban-American Congresspersons, and

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[8] Defendant told the court's Probation Officer, "I am not repentant for what I did." *See* PSR, ¶ 58, page 35. The defendant was present at the December 14, 2001, sentencing of Rene Gonzalez, when the court stated, "Whether terrorism is committed against innocents in the United States or Cuba, Israel or Jordan, Northern Ireland or India, it is evil and it is wrong; but the terrorist acts by others cannot excuse the wrongful and illegal conduct of this defendant or any other," DE 1452:42-43. However, his own self-justifying allocution a few days later, *see* DE 1454:89-107, shows that he does not accept or agree with what the court said, and that he considers that Cuba has the right, and the duty, to act in the United States as he did: "I sincerely trust some day Cuba will have no further need for individuals like me who voluntarily and out of love for their country and its people must come to this country to fight terrorism. Every self respecting man must act on the basis of his principles." *Id*. at 107.

to penetrate local Florida politicians, "especially right-wingers of Cuban origin who have links with the federal congresspersons of Cuban origin or who in some way have or could have an impact on formulating policy toward Cuba," *id.* It is clear that what was contemplated was not some First-Amendment protected activity of political dissent, but rather the clandestine insertion of pretended adherents into Congressional and local political activity and organizations for the purpose of spying and facilitating a foreign power's secret meddling in domestic United States politics.[9] This extended to endeavoring to penetrate congressional electoral activity, and in Defense Exhibit R26, this defendant instructed Miami sub-agents to penetrate the re-election campaign of United States Congressman Lincoln Diaz-Balart; the subagents' participation in the Diaz-Balart campaign was described as their main goal from the DI, *id.* at 2,4. The defendant devoted himself to this tasking, and sought to bring about the desired clandestine injection of the Government of Cuba into United States political activity. *See* Defense Exhibit R26 (Defendant instructs subagents, including, *id.* at 2, to forge links with Diaz-Balart campaign and "take advantage of . . . relationships . . . so we can get on the team"). The defendant's willing participation in efforts of a foreign government to create a hidden shadow presence in United States political life is a serious, and intolerable, component of his conduct.

Wholly omitted from the Memorandum is discussion of the defendant's activities other than monitoring "counter-revolutionaries." For instance, the Memorandum fails to acknowledge the defendant's fraudulent-identity activity which is the subject of Counts Seven and Eight, including not only his own use of false identities but his support of the DI's Operation Texaco to cultivate

[9] Later in the DAV-118 document, *id.* at 5, the "implications of this work directive" are further set forth as "what do we want to achieve: 1-. Obtain information, via penetration of plans, specifically those related to Cuba - and vulnerabilities of the Congresspersons; that is, information that will enable us to act in time in order to neutralize these plans, as well as information that will give us an opportunity to harass them. This is the most important point. 2-. A secondary level would be to try to have access to local politicians and structures in Florida which directly or indirectly have to do with the formulation of Cuban policy or acts of political influence against our country in the United States. At the same time, penetration at this level should allow us to have access to information on Point 1."

more false identities for future activity. At trial, Defendant's counsel argued to the jury, *see* DE 1582:14160, that he needed to use false identity to monitor the groups, like a law-enforcement agent operating undercover, but in fact false identities were not used by the spy ring in this way. Line agents – like co-defendants Guerrero and Rene Gonzalez – who carried out operational activity did so in their true identities. The false identities and counterfeit documentation, however, were relied on by the illegal officers, like Defendant, who were the DI's long-term career professionals working clandestinely in the United States to oversee, rather than personally conduct, operational activity. The false identities are the hallmark, and the tool, not of operational activity but of the DI's entrenched covert presence, at a managerial level, in the United States.

The Memorandum also fails to address the defendant's conduct against United States military installations and during his service in the United States on behalf of the DI before coming to south Florida in October, 1997.[10] In his oversight for penetration of United States military facilities,

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[10] Prior to his second "tour of duty" here, the defendant was described by the DI as "one of our I.O.s with experience in the USA territory and with good work results," DAV-116 p. 6. Yet his only proven residence in the United States prior to coming to south Florida in October, 1997 was several years spent living in North Carolina, *see* Government Exhibit 744 (comp)(North Carolina drivers license data); DE 1525:6925 ff., which is not at all a center for anti-Castro "counter-revolutionary" activity. Further, the evidence shows that in January, 1998 the defendant traveled to Norfolk, Virginia "to contact 'Roberto'", DG-117:18; something about that trip caused Defendant to fly there, but take the bus back. Norfolk is the home of Atlantic Command of the United States military, which had oversight for Cuba before Southern Command, and this defendant, moved to Miami. *See* DA-113:14, 18, 20; DG-123:11; DE 1531:7905; DE 1536:8643. Further suggestive of Defendant's association with the DI's interest in military information is the fact that during his Miami stint, he reported directly to and from "Saul" at the DI, *see, e.g.,* reports at DAV-102:1 ff.; DAV-109:1 ff.; DAV-119:1 ff., DAV-129:1 ff. Saul was a DI specialist in military matters, *see* DG-108:31 (DI has Lorient [co-defendant Antonio Guerrero] meet with "Comrade Saul, our specialist on military subjects;" DS-103:8 ("Saul. (Military)"). And of course, as discussed in the government's Memorandum in Aid of Resentencing, *see* DE 1769:8 n.8, the defendant's assignments in south Florida from the DI included assuming co-defendant Medina's role in overseeing efforts to penetrate United States military facilities at the Boca Chica Naval Air Station ("NAS") in Key West, and the Southern Command in Miami.

Contrary to the Memorandum's argument, the defendant's oversight for military matters (continued...)

Defendant betrayed an animus to the United States, not to "counter-revolutionary" groups. *See, e.g.,* DL-101: 1, where the defendant tells co-defendant Antonio Guerrero (code-name: "Lorient") that the defendant is proud of "the comrades who, like yourself, are carrying out missions in enemy territory;" Lorient's mission was penetration of Boca Chica Naval Air Station, ["NAS"], and the "enemy territory" of his mission was not "counter-revolutionary" Miami-Dade county, but a United States military installation in Key West. *See also* DAV-129, Defendant's communications plan, which is replete with references to the F.B.I. as the "enemy," *id.* at pp. 14, 17, 39, 41.

Defendant's work overseeing penetration of United States military facilities was far from trivial, and quite avid. Southern Command was a priority for the DI, which was concerned about the lagging pace toward penetration and looked to this defendant to improve the situation.[11] The

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[10](...continued)
implicating national security is based on evidence, not innuendo. The district court did not admonish the government at sentencing for linking the defendant to uncharged espionage activity, as claimed by the Memorandum, *see* page 9. At sentencing the court inquired as to the government's decision not to include the defendant in the Count 2 conspiracy to commit espionage, DE 1454:111, but did not disapprove the government's explanation that the defendant's activity of overseeing penetration of military facilities was in furtherance of Count 1, with which he was charged, and that such penetration was among Count 1's overt acts, *id.* at 111-112. In sentencing the defendant, the court noted that he violated laws enacted to protect the national security of the United States, *see* DE 1454:130.

[11] DAV-109 is a detailed memorandum of instructions to defendant Campa, from the DI, on the eve of the defendant's summer 1998 assignment in Miami. It is replete with evidence that Defendant was sent here not only to assume co-defendant Luis Medina's oversight for achieving penetration of Southern Command – co-defendants Joseph and Amarylis Santoses' assignment – but to accelerate the pace and manage the operation even more aggressively. *See, e.g.,* DAV-109:3 (Defendant is to "[i]ncrease operational work, the search and transference of most frequent information to the CP [DI headquarters], utilizing the whole operational base and available resources of the different operations he will direct, especially about 'Southcom' to obtain as soon as possible a direct or indirect penetration of the objective. The agents and the case ["case" denotes illegal officer, according to testimony at DE 1491:3756; here, the defendant] . . . have to be more aggressive in their actions . . . . The case must increase demands and impart, in every single contact, precise instructions and the requirements they should inform on in each of the following contacts. . . ." The defendant's instructions included that "the operational base, especially Mario-Julia [the Santoses' code names] . . ., must increase their search for information about the military and civilian personnel
(continued...)

defendant took this admonition seriously, and tried to spur the agents, Joseph and Amarylis Santos, on to achieve the desired penetration.[12] His oversight of co-defendant Antonio Guerrero ("Lorient") at NAS was equally avid. At DAV-102:15 ff., Defendant reports to Saúl concerning a July 29, 1998 meeting with Lorient: Defendant and Lorient discussed not only NAS but also SouthCom; Defendant "emphasized that everything related to SouthCom was of extreme importance and for him to keep abreast of every bit of news," *id.* at 17. Defendant exhorted Lorient to report more, and they discussed the prospect of more frequent contact between them, *id.* at 18. Defendant reported to the DI his concern that Lorient's attachment to his wife was interfering with his work.[13] Defendant's report includes and restates Lorient's latest reporting on observations at NAS (including of the greenhouse and its radio frequencies, *id.* at 22-23, which were established as in part non-public, *see*

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[11](...continued)
that work or has some type of relationship with the objective . . . . [t]hat Mario [Joseph Santos] or another S/A [special agent] visit Tony Roma's and Homestead Village more often, to deepen the study of Southcom and its personnel"); *id.* at 7 ([instructions to Defendant re Southcom:]"It's necessary, to speed up where possible, the search of information that will allow us (or permit us to see the light) the much hoped for penetration, either direct or indirect even if it's 'through the side door'. . . . We received some information [about Southcom] . . . . Alert the special agents and try to expand and search for more information regarding this new route that's opening up for us for a future penetration."

[12] *See* DAV-109 pp. 29 - 33: "I explained to [the Santoses] the importance and priority of this [SouthCom] operation; they already knew about this and I emphasized to them not to overlook any sign or information no matter how simple or unimportant it may seem. We talked about the need to keep our study of the operational situation current. . . . I explained the need for them to report an any changes they notice in the area, as well as providing current photographs showing the new businesses of buildings cropping up in the area. I spoke to them about new construction going up on 97th Street which so far has no signs identifying it. . . . I told them that it was important to stay on top of those changes. I instructed them to visit area businesses . . . and start determining what Latin personnel is working in those places, which nationality predominates and anything they can find out about them. . . . I tried to stimulate them and explained the importance of providing any new detail no matter how insignificant it might seem."

[13] "I personally believe that if we want to speed up communications with Lorient we must very tactfully insist with him on the need for him to gain more independence from his wife. For now his life has become too stable with her to the point that he can't slip away without what he feels is drawing attention to himself." *Id.*

DE 1531:7949 - 7953, testimony of Capt. Linda Hutton). Materials seized from Lorient's residence included a disk with Defendant's report to Lorient at the time of this same meeting, *see* DL-103, in which Defendant indicated he had reviewed Lorient's past reports, *id.* at 1; urged Lorient to shorten the time lag between getting information at NAS and conveying it to headquarters, *id.* at 2; and passed on the verbatim instructions for Lorient from Saúl, *id.* at p. 3 ff., which note that Lorient's information is being passed on to Cuba's Directorate of Military Intelligence, *id.* at p. 5. In DL-103, Defendant also noted that he was current on Lorient's beeper code for reporting aircraft movements; at the time of his arrest, Defendant had in his wallet a paper, Government Exhibit SAV-30, with handwritten notations correlating aircraft identifications and coded telephone numbers matching Lorient's codes reflected at DAV-122, *see also* 1495:4328 ff. The evidence amply supports the government's position that the defendant's activity in the United States encompassed significant efforts at military penetration as well as monitoring domestic anti-Castro activity.

This does not mean that the defendant was, or will be, sentenced "as if he had engaged in espionage," as the Memorandum claims, *see* page 10. An espionage sentence would carry a far higher sentencing guideline than the defendant faces, and a far higher sentencing range than if he were to receive the consecutive sentences the government recommends. Rather, the defendant should be sentenced for his total offense conduct, including, in the words of the indictment, *see* DE 244:3-4, his participation in "gathering and transmitting information to the Cuban government concerning United States military installations, government functions and private political activity . . . ."

Comparison with the sentence of Rene Gonzalez, the other trial defendant who was not charged with conspiracy to commit espionage, is telling. Gonzalez received 180 months incarceration. The defendant asks for the same sentence, yet as an illegal officer he was more senior within the spy group's structure. He also committed additional serious identity-fraud offenses, whereas Gonzalez operated under his true identity and was charged, and convicted, of only two offenses: Count One's conspiracy, and a substantive charge of acting as an agent of a foreign government without notification to the Attorney General. To give this defendant the same sentence

as Gonzalez would be to deprecate – indeed, to nullify – the significance of the defendant's having participated in efforts to penetrate United States military installations; having committed additional serious identity-fraud offenses encompassing his own use of false identity and counterfeit documentation as well as the sinister Operation Texaco; and being senior in the conspiracy.[14]

Accordingly, and for the above-stated reasons, the United States respectfully submits that the defendant's sentencing recommendation in its Memorandum is not well founded and is not reasonable. The United States respectfully recommends that the court sentence the defendant within the advisory guidelines range – 33 to 41 months – on Counts 7 and 8, and that his sentence on Counts 7 and 8 run consecutively to his 180-month sentence on Counts 1, 16 and 17.

Respectfully submitted,

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By: /s/ Caroline Heck Miller

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[14] The Memorandum also cites Defendant's clean prison record, and family concerns. The government does not deprecate in any way the suffering of families and friends when a loved one is incarcerated. Sadly, this is a feature of many incarcerations, and to reduce a term on that basis would vitiate uniformity of sentencing for the universe of defendants. As for Defendant's clean prison record, it is satisfactory and what one would expect of a disciplined, prudent and trained intelligence officer. Statutes governing post-sentence administration recognize good behavior with a year-by-year credit of approximately 15 % reduction in incarceration. *See* 18 U.S.C. §3624(b). To grant further reduction on that basis would be double-counting and would, again, vitiate fairness and uniformity of sentencing with regard to the large population of inmates without access to resentencing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 7, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Caroline Heck Miller

CAROLINE HECK MILLER
ASSISTANT U. S. ATTORNEY