NO. 01-17176-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

GERARDO HERNANDEZ,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF THE GERARDO HERNANDEZ

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

United States v. Gerardo Hernandez
Case No. 01-17176-B

Appellee Gerardo Hernandez files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Armando Alejandre

Jack Blumenfeld

David Buckner

Ruben Campa

Carlos Costa

Orlando do Campo

Mario de la Peña

Hon. Robert L. Dubé

Rene Gonzalez

Antonio Guerrero

Caroline Heck Miller

Gerardo Hernandez

Phillip R. Horowitz

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Richard C. Klugh, Jr.

Hon. Joan A. Lenard

Guy A. Lewis

Paul A. McKenna

Luis Medina

Joaquin Mendez

Pedro Morales

William Norris

Barry Sabin

Anne R. Schultz

Leonard I. Weinglass

Kathleen M. Williams

STATEMENT REGARDING ORAL ARGUMENT

The defendant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

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STATEMENT ADOPTING BRIEFS OF OTHER PARTIES

Appellant Gerardo Hernandez, pursuant to Fed. R. App. P. 28(i), hereby adopts the following portions of the appellate briefs filed by co-appellants Luis Medina, Antonio Guerrero, Ruben Campa, and Rene Gonzalez:

BRIEF OF LUIS MEDINA: All portions of the brief relating to his Issue I (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count 2), Issue II (misapplication of U.S.S.G. § 2M3.1 in calculating the base offense level for count two, where no top secret information was gathered or transmitted), Issue III (sentencing guideline misapplication by the district court in sentencing on count two by failing to inquire into the nature of the harm involved and failing to permit the defense to employ appropriate guideline means to ensure reliable fact-finding in calculating the relevant guideline offense level and enhancements), Issue IV (erroneous failure to apply U.S.S.G. § 2X1.1 to the count two conspiracy conviction, where no national security harm occurred), Issue V (improper sentencing guideline adjustment for obstruction of justice under U.S.S.G. § 3C1.1), and Issue VI (erroneous application of the role in the offense guideline under U.S.S.G. § 3B1.1), including the statement of facts and proceedings, statement of

the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

BRIEF OF ANTONIO GUERRERO: All portions of the brief concerning his Issue I (improper denial of motion for change of venue) and Issue II (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count 2), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

BRIEF OF RUBEN CAMPA: All portions of the brief concerning Issue I (improper denial of motion for change of venue), Issue II (prosecutorial misconduct denying the defendants a fair trial), Issue III (improper use of the Classified Information Procedures Act to exclude defense counsel from relevant proceedings and to suppress material subject to discovery under Fed. R. Crim. P. 16, resulting in a violation of the defendants' due process rights and impairment of their ability to present a defense), and Issue IV (improper denial of motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any

reply argument as to those issues.

BRIEF OF RENE GONZALEZ: All portions of the brief concerning Issue I (Batson violation), Issue II (insufficiency of the evidence as to the count one conspiracy to violate 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq., and the counts alleging substantive violations of those provisions, specifically, as to Hernandez, counts 13, 15, 16, 19, and 22-24), Issue III (failure of the district court to instruct the jury regarding the specific intent element of both conspiracy to violate and substantive violation of 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq.), and Issue IV (prosecutorial misconduct and denial of motion for mistrial based on misconduct by a hostile witness), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any reply argument as to those issues.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal

was timely filed on December 18, 2001, from the final judgment and commitment order entered on December 14, 2001.

STATEMENT OF THE ISSUES

I.

Whether the district court erred in denying the motion to dismiss count three based on FSIA jurisdictional grounds.

II.

Whether the evidence was sufficient to support Hernandez's conviction for murder conspiracy in count three.

III.

Whether prosecutorial misconduct during closing argument substantially prejudiced the defendants and warrants a new trial.

IV.

Whether the jury instructions, in combination with the Government's closing argument, allowed the jury to convict on less than all of the elements of count three.

V.

Whether the evidence was sufficient to prove a conspiracy to transmit national defense information to Cuba.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the District Court

Appellant, GERARDO HERNANDEZ, was charged, in a second superseding indictment returned on May 7, 1999, with offenses relating to his actions as a member of a group of unregistered Cuban agents in the United States. (DE224). Hernandez proceeded to trial in Miami, Florida with four co-defendants in late 2000 and the jury returned a verdict of guilty on all counts on June 8, 2001. On December 12, 2001, the district court sentenced Hernandez to concurrent terms of life imprisonment on Counts 2 (espionage conspiracy under 18 U.S.C. § 794) and 3 (first degree murder conspiracy under 18 U.S.C. § 1117). The district court sentenced Hernandez to lesser terms of imprisonment on the remaining counts: failure of a foreign agent to register, Counts 13, 15-16, 19, and 22-24 (18 U.S.C. § 951 and 28 C.F.R. § 73.01); conspiracy to violate the agent registration provision and to defraud the United States, Count 1 (18 U.S.C. § 371); possession of a false passport, Counts 4 and 6 (18 U.S.C. § 1546); and possession of false identity documents, Count 5 (18 U.S.C. § 1028). (DE1430).

Statement of Facts

The instant brief principally addresses Hernandez's conviction of count three

of the indictment which charged Hernandez, under 18 U.S.C. § 1117, with conspiracy to commit first degree murder in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 1111. No other defendant was named in count three. The indictment described the conspiracy as an effort to support and help implement a plan for violent confrontation of U.S. aircraft by the government of Cuba with the object of the unlawful killing, with malice aforethought, of persons onboard the aircraft in airspace over the high seas.[1]

The Government's evidence fell into three categories. First, how and where the shootdown of two aircraft occurred, both of the aircraft being part of a three-plane squadron, owned and operated by a Miami political organization, Brothers to the Rescue ("BTTR"), that conducted, on February 24, 1996, a coordinated flight towards Cuba. The second category dealt with Cuba's reasons for shooting down the BTTR aircraft and the history of actions by BTTR and reactions by Cuba. The third category focused on Hernandez's purported role in Cuba's actions.

1. The shootdown.

The Government's evidence addressing the manner and location of the shootdown focused on radar data collected by

[1] Hernandez moved pretrial to dismiss count three on jurisdictional and due process grounds. (DE406). Additional grounds for dismissal of were raised in timely motions for acquittal at trial and in a post-verdict Fed.R.Crim.P. 29(c) motion. (DE1301). The court denied these motions in written orders. (DE505; DE1259; DE1391).

the 84th Radar Evaluation Squadron at Hill Air Force Base, Utah (RADES). Lanny Clelland, associate director of RADES, testified regarding the radar position of the downed planes and their distance from the Cuban shore. (DE1521:6527). The U.S. radar evidence indicated that the two BTTR aircraft were shot down on February 24, 1996 just outside (within 4.8 and 9.5 miles respectively) of Cuban territorial waters. (DE1522:6683,6688). These aircraft had flown behind the lead BTTR plane and, before the shootdown, came within 1.7 and 5.2 miles, respectively, of Cuban territory. (DE1522:6684;6689). The third BTTR aircraft, number N2506, piloted by Jose Basulto, the founder and leader of BTTR who spearheaded the mission, had traveled 2.1 miles into Cuban territory when the shootdown occurred. (DE1522:6686).2 The defense presented evidence of Cuban Air Force radar results, relied upon by the Cuban Air Force at the time of the shootdown, showing that all three planes in the BTTR group had penetrated Cuban airspace and were within Cuban territorial waters.

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[2] Basulto used the number 2506 to associate BTTR's flights with the Cuban exile brigade that led the Bay of Pigs invasion. (DE1537:8824-25). Basulto testified that after that invasion, he received CIA training and returned illegally to Cuba to assist in sabotage (bombing) of the Cuban government interests. (DE1537:8826-27). In 1962, Basulto traveled by boat to Cuba where he attacked, and partially destroyed, a Havana hotel, where foreign governmental officials were meeting, firing 16 times from a 20-millimeter cannon before escaping. (DE1537:8829). Basulto was never apprehended or prosecuted for the sabotage or the Cuban hotel attack, but he obtained substantial publicity for his actions. (DE1537:8831).

On the day of the shootdown, all three aircraft filed a flight plan with the Federal Aviation Administration (FAA) Miami flight services operation, and the planes departed out of Miami. GH-Ex. 60. The flight plans filed were not the flight plans flown, however. BTTR had filed a press release announcing that the flight would commemorate a Cuban revolutionary battle, "Grito De Baire." GH-Ex. 9. The flight was not a "rescue" flight to aid illegal Cuban immigrant rafters attempting entry into the U.S., i.e., the type of flight to which the Brothers to the Rescue name refers.

Approximately 20 minutes prior to the shootdown, all three aircraft simultaneously (at 3:00 P.M. and 3:01 P.M.) entered a restricted air traffic area controlled by Cuban Air Traffic Control just below the 24th parallel that prohibited low altitude VFR (visual flight rules) flights like those conducted by BTTR. At that time, the pilots were specifically warned by Cuban Air Traffic Control that after passing the 24th parallel they were putting themselves "in danger" by flying towards the area north of Havana which was then "activated" (for Cuban military operations, including the firing of air missiles). GH-Ex. 40, page 3. This warning was verbally acknowledged by BTTR, but disregarded.

This was the last in a long history of warnings to the BTTR pilots by the Havana air traffic control, the Cuban government, and several U.S. agencies, including specific written and verbal warnings that BTTR planes would be shot down for provocative violations of Cuban airspace. DE1534:8435-8559;

DE1563:12018-12025 (testimony of FAA enforcement officer Charles Smith regarding history of warnings to BTTR).

BTTR was not deterred. As the planes encountered Cuban Air Force interdiction, following Basulto's plane's incursion into Cuban airspace, Basulto laughed, "we have the Mig around. Hee, hee, hee." GH-Ex. 40, page 10 (audiotape of Basulto's cockpit radio traffic). Following the shootdown, the FAA revoked Basulto's pilot's license due to his actions; the FAA found that Basulto's reckless operation of his aircraft on February 24, 1996 contributed to the deaths of four members of BTTR in the shootdown. GH-Ex. 18MM.

2. Evidence of Cuba's reasons for intercepting the BTTR aircraft.

The Government's theory was that BTTR had made inroads in a struggle BTTR was waging against the Cuban government. As the Government argued in closing:

> There was a fear they [BTTR] were dropping leaflets, that they were spreading word about the universal declaration of human rights and these were floating onto the island of Cuba …The reason for the shootdown was the propaganda inroads that were being made.

(DE1581:14071).

The Government maintained the shootdown was a way to quell internal dissent and to discourage "Concilio Cubano," a Cuban dissident organization that

had planned activities for February 24-27, 1996. The Government argued that there was a linkage between eliminating BTTR (a staunch Concilio supporter), and, as the Government argued, putting a "dent in Concilio Cubano." (DE1581:14085).

3. United States' knowledge of Cuba's position regarding illegal BTTR flights and violations of Cuban sovereignty.

United States government agencies were acutely aware that BTTR was likely to violate Cuban airspace on February 24, 1996, and that Cuba was unlikely to show restraint on this occasion, as demonstrated by an FAA memo dated February 23, 1996, the eve of the shootdown, titled "**Cuba Alert**" and sent to several U.S. agencies:

> **We have received a call from State Dept. indicating that since Brothers to the Rescue (BTR) and its leader Basulto support and endorse Concilio Cubano, it would not be unlikely that the BTR attempted an unauthorized flight into Cuban airspace tomorrow, in defiance of the GOC [government of Cuba] and its policies against dissidents … State has also indicated that the GOC would be less likely to show restraint (in an unauthorized flight scenario) this time around …**

GH-Ex. 18(G) (emphasis added).

Even the White House point-man on Cuba, Richard Nuccio, was desperately trying to reach the President's National Security Advisor, Sandy Berger, to warn of

a possible BTTR provocation plan and Cuba's potential violent response. Nuccio testified extensively regarding warnings to BTTR. (DE1536:8679-8681).

As early as November 17, 1994–more than one year before the shootdown–the Cuban Ministry of Foreign Affairs filed a formal protest to the U.S. State Department, via the Swiss Embassy, complaining of a violation of Cuban airspace by BTTR, including two of the aircraft that were later involved in the shootdown (N-2506 and N-5485S). In the protest, Cuba complained that on November 10, 1994:

> The above-mentioned planes dropped on Cuban territory approximately 200 flyers containing enemy propaganda belonging to the self styled counter-revolutionary organization Brothers to the Rescue.

GH-Ex. 24.

Also, the defense presented evidence that earlier in the year, April 17, 1994, the same aircraft N-2506, once again piloted by Basulto, flew into restricted airspace and transmitted the following message to a Mig aircraft vectoring around the BTTR Cessna: "We wish to Cuba, the Cuban people, the armed forces, that you can make freedom for Cuba possible; and do everything you can to bring an end to Castro's regime." GH-Ex. 16(C).

These provocative flights became more aggressive, including a dangerous

BTTR multi-aircraft, rooftop-level buzzing of Havana on July 13, 1995, and culminated in two "missions" on January 9th and 13th, 1996, where BTTR dumped more than 500,000 propaganda leaflets over Cuban territory. After the second flight, Basulto appeared on a U.S. government-controlled and financed Radio Marti program that was broadcast into Cuba where Basulto bragged about the January 13th leaflet drop, proclaiming that Havana was the "target" and three miles from the center of the city was the "drop point." GH-Ex. 37, pages 1-8.

Basulto was asked on the program why Cuba had no military response for BTTR's actions. Basulto responded:

> We have been willing to take personal risks for this, they [the Cuban people] must be willing to do the same. Let them see that this regime is not invulnerable, that Castro can be penetrated, that many things can be done that are at our disposal.

GH-Ex. 37, page 8.

Cuba filed a formal diplomatic protest with the U.S. government for the violations of Cuban airspace on January 9 and 13, 1996. With the protest, Cuba provided radar data and radio transmissions establishing both BTTR aircraft had penetrated Cuban airspace on those dates. GH-Ex. 18(E). At trial, Basulto–a veteran of the "Bay of Pigs" invasion of Cuba and a former CIA operative who admitted having successfully undertaken a cannon attack on an occupied Cuban

hotel in the 1960s–denied prior radio-broadcast assertions that he had penetrated Cuban airspace for these BTTR missions. (DE1537:8825-31). The diplomatic notes stated that Cuba reserved the right to use force to intercept future unauthorized flights.

The FAA's State Department Liaison, Cecelia Capastany, fired off a strongly-worded E-mail dated January 22, 1996 to the FAA in Miami regarding these same BTTR airspace violations and stated as follows:

> We have received information from State Department that another unauthorized flight occurred Sat. 20 in the morning. The plane, according to State, did not/not [sic] overfly Havana nor did it drop propaganda. In light of last week's intrusions [January 9th and 13th] , this latest overflight can only be seen as further taunting of the Cuban government. State is increasingly concerned about Cuban reactions to these flagrant violations. They are also asking from the FAA what is this agency doing to prevent/deter these actions. As a matter of fact, the Undersecretary of State called Secretary Pena last week to check on our case against Basulto. The worst case scenario is that one of these days the Cubans will shoot down one of these planes and the FAA better have all its ducks in a row.

GH-Ex. 18(F).

4. Hernandez's awareness of risks to BTTR.

Hernandez was, from 1994 to 1998, an unregistered Cuban agent working for Cuban Intelligence in Miami. The Government's case as to Hernandez's knowledge of risks to BTTR pilots relied on decrypted high-frequency ("HF")

messages from the Cuban Directorate of Intelligence to its agents in Miami and similar message traffic found in searches of the defendants' computer files. (DE1482:2444). There was no testimony showing Hernandez received HF messages or had specific knowledge of their contents before the shootdown. Government exhibits DG133 and DG105 established that Hernandez left the U.S. for Cuba in late October 1995 and did not return until January 26, 1996.

The earliest HF messages concerning infiltration of BTTR by Cuban agents date to November 18, 1994, one day after the Cuban protest to the State Department regarding BTTR flights invading Cuban sovereignty. HF104. The subject of HF104 is that German (true name, Juan Roque, an unapprehended co-defendant charged as an unregistered Cuban agent) would return to Cuba in a BTTR aircraft. This was a recurring theme in the HF messages through late February 1996. The purpose of Roque's proposed return to Cuba was to embarrass BTTR and score a propaganda coup.

As things began to heat up in Cuba–with BTTR's territorial incursions and propaganda distributions, Cuba's diplomatic protests, and BTTR's broadcasts into Cuba over U.S. government-controlled Radio Marti–the HF message traffic between Cuban Intelligence Headquarters and Miami also picked up. HF108,

dated January 12, 1996, stated: "[P]ropaganda was dropped between Mantanzas-Varadero [Cuban cities] on the 9th. Equipment used not known. Necessary to find out who it was and what type of plane was used." BTTR flew a mission on January 9, 1996 and took credit for it in a preflight videotape, GH-Ex. 35(A), in which four BTTR members expressed fear that they would be forced down by the Cuban Air Force and captured. Although they stated that their "mission" would be in international waters, the leader, Basulto, stated: "[W]e might be made to land in Cuba, we would like to clarify that, under pressure, any human being may say anything against his beliefs." Id. The other BTTR members stated they feared becoming Cuban prisoners and discussed being forced down by the Cuban Air Force during their "mission."

By the end of January, HF115 begins a three-part message sent on January 29, 30, and 31, 1996. This series of messages, HF115-117 announced "Operation Escorpion," as follows:

> "#12 Ok 7 and 10. Superior Headquarters approved Operacion Escorpion in order to perfect the confrontation of CR [counter-revolutionary] actions of BTTR. Info from German and Castor should come with clear and precise specifications that allow to know without a doubt that Basulto is flying, whether or not activity of dropping of leaflets or violation of air space; if Castor and German are or are not flying, anticipated plan any type BTTR flights, in order to know about these activities ahead of time. If there is no access this should also be a priority. Always specify if agents are flying. Continues tomorrow.

29 Jan."

> "#13 In addition report types of planes flying, registration, pilots and passengers, permission for flight, day and time, altitude, distance, what type of action will be taken. If German and Castor are asked to fly at the last minute without being scheduled find excuse not to fly. If they cannot avoid it Castor will transmit over the airplane radio the slogan for the July 13 martyrs viva Cuba and German should call his neighbor Amelia and tell that he will call her on Wednesday. If he cannot call he should say over the radio long live Brothers to the Rescue and Democracia. Continues tomorrow. 30 Jan."

> "#14 Establish more than one route for German and Castor to contact you. Avoid arguments German used regarding confusion he had about your beeper number. Send info via Aguila extremely urgent. Priority for transmission of information is Esfera, Un. and Mex in order to instruct on Operacion Escorpion. Ok 11. Regarding Operacion Viamontes Castor should stress to Montoto, DEA, Customs that they should protect his identity and he will not testify nor should any activity disclose his identity. Extreme security measures in activities with him. Giro's [Hernandez's] household ok. Mailing to PO Box ok. Will reply later. 31 Jan."

These three messages form the premise of the Government's claim of a "premeditated plan to eliminate Brothers to the Rescue planes and obviously the pilots in them." (DE1581:14080). The Government argued, DE1581:14081, that the messages reflected an awareness of the danger of flying with BTTR and established linkage between Cuban Intelligence and the Cuban military because a coded radio message would be useful only if understood by the military.

As established by HF113, Hernandez was not to return to Miami until

January 26, 1996. Although the HF messages were sent to a radio signal associated with Hernandez's use, DG140, the evidence also established that A-4 (codename: Miguel) was the intended recipient and that A-4 was controlling the agents infiltrating BTTR at least until late January.

HF133, dated March 14, 1996 (seventeen days after the shootdown), established that Hernandez did not have the program for deciphering the encrypted HF message traffic. Although a message encryption program was found in Hernandez's apartment in September 1998, HF133 shows Hernandez did not pick up the encryptic program until after the shootdown:

> No. 34. Okay 27. As of this msg you can travel whenever you want. In activity with Ariel give day and flight of travel to CP. We will not make contact at airport. Go to hotel Neptuno. Mail that Manolo will pick up is encrypted with your program. Give Giro a copy of the program so he can decipher it. Give day and location you will contact M2 for info. Please inform results of Castor's meeting at BTTR. This is a priority. Castor should find out if Cuervo moved. 14 Mar.

The only link between Hernandez and advising the infiltrating BTTR pilots, Castor and German, not to fly with BTTR in late-February 1996 was a single document–DG104, sent February 13, 1996 to co-defendant Gonzalez (Castor)–which states:

> As we told you in the previous contact, we need to pinpoint in more detail everything related to new incursions by Brothers to the Rescue to be carried out in our country. In order to do that, the information must have the details

that I am explaining below.
- Very clear and precise specifications that will allow us to know without any doubt whether Marisol [Jose Basulto] is flying or not.
- Whether the activity is to drop leaflets or to violate the air space.
- Whether you are flying or not.
- The anticipated plan of any kind of Brothers to the Rescue flights in order to know about these activities ahead of time.
- If there is no access to the information, this should also be prioritized.
- Report on types of planes that will be flying, registrations, pilots and passengers.
- Flying permit, day and time, altitude, distance, what type of action will be taken.
- If they ask you to fly at the last minute without being scheduled, find an excuse and do not do it. If you cannot avoid it, transmit over the airplane's radio the slogan for the July 13 martyrs and "Via Cuba" (long live Cuba). If you are not able to call, say over the radio, "long live Brothers to the Rescue and Democracia."
That is all.

Miguel and Giro

February 13, 1996

(DG104). Significantly, DG104 expressly provides: "[W]e need to pinpoint in more detail everything related to **new incursions** by Brothers to the Rescue to carry out **in our country**," the unequivocal focus being Cuban airspace violations.

5. Congratulatory messages for Operation German/Venicia.

The Government offered three messages sent to either "A-4" or Hernandez by Cuban authorities. The first was HF128, dated March 1, 1996, stating: "on behalf of intelligence HQ receive together with Giraldo [Hernandez] our profound

recognition for Operation German. Everything turned out well. The commander in chief visited him twice. German [Roque] being able to exchange the details of the operation. We have dealt the Miami right a hard blow, in which your role has been decisive." This message referred to Roque's extraction from the U.S. and return to Cuba to denounce BTTR.

The second message, DG108, stated:

> Just as we informed you via radio, you were recognized by the head of the DI for Operation Venecia. Order from the Chief of the Directorate of Intelligence April 1, 1996. To grant recognition to personnel. Keeping in mind the outstanding results achieved on the job, I order first, recognition for the outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February, 1996. To the comrade Giraldo [Hernandez]. Second, give knowledge of the present order to the esteemed comrade and to the chiefs and officials that participate in its fulfillment. Third, annotate it in the comrade's service card. Chief Directorate of Intelligence, Brigadier General Eduardo Delgado Rodriguez.

Finally the Government offered HF136 which stated:

> #46 Okay, nine. Because of German's Operation Venecia, Giraldo was given recognition by the Head of the D.I. Congratulations on behalf of all the comrades here. M-15 Center informs having received your code regarding the mail to the P.O. Box. Lorient left today. Work with him was very positive. Edgardo. April 24th.

Hernandez responded to the third of these messages, referring to "No. 46," which is HF136 above, writing: "it is a great satisfaction and source of pride to us

that the operation in which we contributed a grain of salt ["German's Operation Venecia"] ended successfully." Evidence at trial showed that Operation Venecia related to the extraction of German (Roque) from the U.S. The evidence also showed that at all times Cuba has claimed, and still maintains, it acted lawfully in its interception of the BTTR aircraft and has vigorously disputed the U.S. claim that the shootdown occurred over the high seas, rather than in Cuban territory.

Standard of Review

The interpretation of a statutory provision is reviewed de novo as a question of law. United States v. Tinoco, 304 F.3d 1088, 1099, 1114 (11th Cir. 2002). Sufficiency of the evidence is a question of law subject to review de novo. United States v. Hernandez, 141 F.3d 1042, 1049 (11th Cir. 1998). "[T]he question is whether there is substantial evidence to support the verdicts." United States v. Russo, 796 F.2d 1443, 1455 (11th Cir.1986). Review of prosecutorial misconduct is de novo. United States v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997). This Court will reverse the conviction where the defendant's substantial rights are affected by prosecutorial misconduct. United States v. Castro, 89 F.3d 1443, 1450 (11th Cir. 1996). This Court reviews "jury instructions de novo to determine whether they misstate the law or mislead the jury to the prejudice of the"

defendant. United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992).

SUMMARY OF THE ARGUMENT

I. The Government's theory of prosecution as to count three was that Hernandez was a Cuban agent who received information indicating his government's intention to confront BTTR flights and that he followed his government's instructions to alert other Cuban agents to stay off BTTR planes. The prosecution thus was founded on Hernandez's connection to a sovereign country's planned actions outside the United States. There is no precedent for such a prosecution in the United States. The Foreign Sovereign Immunity Act (FSIA)– which exempts from federal criminal litigation the acts of sovereign countries– precludes maintenance of count three against Hernandez for the extraterritorial acts of a sovereign nation. Keller v. Central Bank of Nigeria, 277 F.3d 811 (6th Cir. 2002) (RICO prosecution, 18 U.S.C. § 1961, of foreign country and instrumentalities barred under FSIA).

II. The evidence was insufficient to establish Hernandez's guilt of count three of the indictment–conspiracy to commit premeditated murder within the special U.S. maritime and territorial jurisdiction. First, the Government failed to establish a conspiracy by Cuba to violate the relevant murder statute, 18 U.S.C. § 1111. Second, the prosecution failed to show Hernandez's knowledge of or agreement to join, with malice and premeditated intent, a conspiracy to: (1)

confront BTTR flights; (2) outside Cuban airspace and jurisdiction; (3) unlawfully; and (4) with premeditated intent to murder by shooting down the planes.

Regarding a Cuban government conspiracy, the evidence failed to show that Cuba acted with specific intent to violate U.S. law in confronting BTTR aircraft. Instead, the evidence showed that both the Cuban and U.S. governments deemed provocative BTTR flights to be illegal and, particularly when a BTTR squadron penetrated Cuban airspace, to violate Cuba's sovereignty. Thus, the U.S. government was aware of, and had engaged in diplomatic discussions with Cuba concerning, possible Cuban confrontation of BTTR aircraft, and Cuba had explained to the United States that it would not permit Basulto and his BTTR aircraft to continue to violate Cuban territorial sovereignty. Cuba's pronouncements on this point were open and well understood by the U.S. government. Given this open expression by Cuba of its perceived authority to protect its sovereignty, there is no evidence Cuba believed it was acting in violation of U.S. law in planning to confront BTTR flights. Nor was there evidence Cuba planned to confront BTTR aircraft absent a Cuban territorial incursion by the BTTR aircraft on February 24, 1996. Cuba took action against the BTTR squadron only after the lead plane illegally entered Cuban airspace. The Cuban radar reports indicated Cuba believed all three BTTR aircraft had entered

Cuban airspace. Nor had Cuba–throughout its history–ever before taken action against U.S. aircraft or vessels outside Cuban territory. The evidence failed to show a Cuban governmental intention to violate U.S. law.

The evidence concerning Hernandez's knowledge of and agreement to participate in an illegal plan to murder persons on board BTTR flights is wholly wanting. To attribute to Hernandez a level of intent and knowledge that was not within his rank as a field agent to possess reflects retributive vengeance–based on U.S. opposition to and condemnation of the Cuban government–but does not satisfy fundamental notions of due process, requiring substantial evidence that Hernandez himself acted with premeditated intent to commit murder.

Hernandez, like any other national government employee acting under direct instructions of his nation's lawful authorities, is entitled to the presumption that his government would not commit extraterritorial murder and that his government would act in accordance with basic international norms, particularly regarding events of such a serious nature that they could have provoked a war. Thus, even if Hernandez were found to have received a warning of a confrontation of unauthorized BTTR flights and to have known that "confront" meant attack without warning–an assumption beyond the limits of both the record and due process–there is still no evidence that Hernandez believed such a public Cuban

governmental action as the killing of U.S. citizens would occur outside Cuban territorial jurisdiction.

There is no evidence Hernandez thought his government would take any public action in violation of U.S. law or within the jurisdiction of U.S. authorities. Instead, evidence showed that Cuba sought to confront BTTR on Cuba's own turf and under Cuban jurisdiction. Nor did Hernandez know confronting BTTR flights would entail murder. Confrontation of such illegal flights was anticipated by U.S. authorities who exhaustively warned BTTR to desist from its provocative incursions into Cuban airspace, yet such an anticipation of confrontation did not extend to a shootdown, but rather a forced grounding of such aircraft under threat of law-enforcement action by Cuba. There is no evidence Hernandez knew the confrontations contemplated by Cuba went beyond those contemplated by BTTR itself, forced grounding under threat of Cuban police/military action.

Nor would Hernandez's knowledge of Cuban plans to confront BTTR flights and warnings to others not to participate in such at-risk BTTR flights constitute sufficient evidence to convict of murder, much less a conspiracy to murder outside Cuban jurisdiction. That a government employee follows a governmental direction to warn other government employees not to take actions that would interfere with the government's response to hostile actions of individuals does not make such an

employee guilty of the government's use of force following a violation of that nation's laws by the BTTR squadron. Such warnings to nationals of a given country are in accordance with ordinary practice and do not signal the employee's assent to his government's actions. Thus, even if Hernandez, upon reading of Cuba's plan to "confront" provocative BTTR flights, thought Cuba would, for the first time in history, deliberately attack U.S. citizens in international waters, he could not be deemed to have joined such a plan by taking such actions as warning other Cuban agents or passing on information regarding BTTR provocations. To extend liability that far to a governmental agent would eliminate any significance to the concept of personal liability inherent in due process.

III. The Government, in closing argument, repeatedly violated the district court's rulings regarding the scope and elements of count three, in order to convince the jury that the charged conspiracy–and Hernandez's guilt–were proven merely by the completed act of a shootdown in international waters. The prosecutor, in rebuttal, made twenty-eight arguments to which the district court sustained defense objections. The Government having failed, in its Emergency Petition for Writ of Prohibition filed during the jury charge conference, to change the district court's interpretation of the charged conspiracy, evaded the limits of the instruction and distorted the law, in arguing for conviction. The misconduct

included virulent personal attacks on the defendants as people bent on destroying the United States, in part by obtaining free counsel in this case in order to drag the Government through a trial. The Government's allusions to Nazi Germany and Pearl Harbor were made even more inflammatory by personal attacks on the defense lawyers and assurances of the Government's faith in its case and the danger posed by the defendants. The Government's actions were so directed and persistent and so infected the process that, particularly given the closeness of the evidence and the absence of any curative instruction, a new trial is necessary.

IV: Given the confusion caused by the prosecution's closing arguments as to count three, the jury instructions were rendered inadequate to guide the jury on the elements of the offense and, therefore, a new trial should be granted. In its Emergency Petition for Writ of Prohibition, the Government represented that the jury would be unduly confused by the specific intent instruction given by the district court. The Government made the same argument as to a lengthy, confusing instruction on the "rules" of international civil aircraft interception, acknowledging that the instruction would likely confound proof burdens. Absent any "constrain[t] from arguing" its lesser burden theories, see Gov't Pet. at 21, the Government's closing arguments rendered the jury instructions insufficient to limit the jury to the

elements necessary to convict, thereby compelling a new trial.

V: The Government failed to prove a conspiracy to violate the espionage act. The evidence overwhelmingly showed that the information-gathering by the Cuban network was directed to publicly-available matters, not national defense. The record lacks substantial evidence to sustain Hernandez's conviction of espionage conspiracy.

ARGUMENT AND CITATION OF AUTHORITIES

I.

The District Court Erred in Denying the Motion to Dismiss Count Three Based on FSIA Jurisdictional Grounds.

The Foreign Sovereign Immunities Act (FSIA) provides that "[s]ubject to existing international agreements ... a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

However, FSIA's jurisdictional grant is silent on the subject of criminal actions:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

In 2002, the Sixth Circuit held that FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating

otherwise. Keller v. Central Bank of Nigeria, 277 F.3d 811 (6th Cir. 2002) (Civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims may not proceed against foreign sovereign, as foreign state may not be indicted in United States for predicate crimes, given Foreign Sovereign Immunities Act's grant of immunity to foreign sovereigns from criminal prosecution).

Analyzing several cases in determining whether FSIA established criminal jurisdiction over foreign sovereigns, the Court in Keller first compared Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd., 750 F.Supp. 838, 844 (N.D.Ohio 1990), and Southway v. Central Bank of Nigeria, 198 F.3d 1210 (10th Cir. 1999). In finding that the Gould court applied a presumption relating to FSIA that was opposite to that applied in Southway, the Sixth Circuit explained that "Congress would have to create explicitly an exception to FSIA's general immunity in order to establish criminal jurisdiction over foreign sovereigns." 277 F.3d at 819. According to Keller, the Gould court correctly reasoned that the legislative history behind FSIA provides that FSIA "set[s] forth the sole and exclusive standards to be used in resolving questions of sovereign immunity" and "prescribes ... the jurisdiction of United States district courts in cases involving foreign states." Keller, 277 F.3d at 819 (citing S.Rep. No. 1310, 94th Cong., 2d Sess. 11-12,

reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6610) (emphasis added).

Of further significance to the Keller court was the Supreme Court's holding that FSIA's text and structure demonstrate Congress's intent that FSIA constitute "the sole basis for obtaining jurisdiction over a foreign state in our courts." Id. (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)). The court in Keller perceived, additionally, that "The Argentine Republic court did not limit its conclusion concerning the FSIA to civil cases." Keller, 277 F.3d at 819.

Persuaded by the reasoning employed in Gould concerning criminal jurisdiction, the Sixth Circuit in Keller noted FSIA's provision that a "'foreign state shall be immune from the jurisdiction of the courts of the United States,'" and does not limit this grant of immunity to civil cases. Keller, 277 F.3d at 819 (quoting 28 U.S.C. § 1604). The Keller court also pointed to the statute's authorization for the exercise of jurisdiction over a foreign sovereign only if there is a relevant international agreement or an exception listed in 28 U.S.C. §§ 1605-1607. Id. at 820.

Thus, because the plaintiff in Keller had not cited an international agreement regarding criminal jurisdiction over RICO claims or predicate offenses and FSIA

does not provide an exception for criminal jurisdiction, the claims were not cognizable. Id. As the Supreme Court has explained, "The subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" Keller, 277 F.3d at 820 (citing Argentine Republic, 488 U.S. 428 at 433 (1989)); see also 488 U.S. at 436, (stating, in the context of the Alien Tort Statute, that under FSIA, "immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions"); Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) (jurisdiction of lower federal courts is "limited to those subjects encompassed within the statutory grant of jurisdiction"). The Sixth Circuit concluded that FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise. Keller, 277 F.3d at 820.

In the instant case, the district court erred in denying Hernandez's motion to dismiss because FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." Argentine Republic, 488 U.S. at 434. Hernandez–as was clear in argument and evidence presented to the jury by the Government–was prosecuted as a part of the "instrumentalities" of Cuba–i.e., the Cuban Directorate of

Intelligence–in planning the extraterritorial confrontation of BTTR aircraft. Because the facts in this case do not fit within any exception to FSIA's general immunity, the district court lacked jurisdiction.

II.

The Evidence Was Insufficient To Support Hernandez's Conviction of Murder Conspiracy in Count Three.

Hernandez's conviction for conspiracy to commit first degree murder within the special United States maritime and territorial jurisdiction should be reversed because the Government's evidence and theories of prosecution were insufficient to prove Hernandez knowingly and intentionally entered into an agreement with Cuba to commit the substantive crime alleged. The Government's case is premised on speculative conspiratorial assumptions that this Court has rejected. This Court requires substantial evidence of the individual defendant's agreement to commit the specific object of a conspiracy. Contrary to this requirement, the Government argued inferences neither reasonable nor permissible, under this Court's precedents, in order to speculate that Hernandez: (1) was aware of an unlawful murder conspiracy by his government, (2) willfully joined the conspiracy, (3) with malice and premeditated intent, and (4) specifically agreed to the commission of an offense outside Cuban jurisdiction. Second, the Government relied on an

impermissible theory that an agent conspires with his government to commit a specific action merely by providing information as directed by his superiors and not disavowing his government's action. Third, the Government's evidence–even granting the inferences the Government asserted–fails to prove knowledge and willfulness.

1. The Government's reliance on speculative inferences cannot sustain Hernandez's murder conspiracy conviction.

To sustain a conspiracy conviction, the government must establish the defendant's guilt by "substantial evidence." United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.1979) (en banc) (emphasis in original). See United States v. Mercer, 165 F.3d 1331, 1333 (11th Cir. 1999) (question is whether there is "substantial evidence to support the conspiracy verdict"); United States v. Adkinson, 158 F.3d 1147, 1152 & n. 10 (11th Cir. 1998) ("government must have demonstrated with substantial proof" defendant's guilt of charged conspiracy).

The Government did not seek to present such substantial evidence here, but relied instead on a climate of secret activity and a strongly derogatory and antagonistic view of Cuba's government to theorize that Hernandez knew of and joined an unlawful murder conspiracy. Relying on speculation derived from sparse circumstantial evidence of radio transmissions, the Government failed to prove

Hernandez's knowledge of facts that were–in short–above his pay grade to know as a Cuban agent. See United States v. Toler, 144 F.3d 1423, 1427-28 (11th Cir. 1998) (rejecting argument that "slight evidence" can satisfy government burden in conspiracy case).

A mere possible inference is insufficient to prove guilty knowledge. United States v. Villegas, 911 F.2d 623, 628 (11th Cir. 1990) (reasonable, versus merely conjectural, inferences required to sustain conviction). Close association with conspirators, and unknowingly aiding or facilitating the actions of such persons, is insufficient to prove conspiracy. Id. Proof of knowledge must be based on an evidentiary foundation, not mere supposition. *United States v. Labarbera,*

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[3] The intentionality of the Government's actions and the urgency with which it viewed the jury instructions are seen in misstatements it made to this Court in the petition for prohibition, several of which were subsequently noted by the district court. DE1580:13918 (finding that Government made an "outrageous misrepresentation of fact ... to the Eleventh Circuit"); DE1580:14025 ("THE COURT: I am very disappointed that the government would have made such gross misrepresentations concerning both my findings ... and the status of the jury instructions before the Eleventh Circuit in its motion for stay ... .")

[4] McKenna, of course, had not used the term “final solution.”