**NO. 01-17176-B**
**NO. 03-11087-B**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**
**Plaintiff/appellee,**

**v.**

**GERARDO HERNANDEZ,**
**Defendant/appellant.**

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

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# REPLY BRIEF OF THE APPELLANT GERARDO HERNANDEZ

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**THIS CASE IS ENTITLED TO PREFERENCE**
**(CRIMINAL APPEAL)**

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## STATEMENT REGARDING ORAL ARGUMENT

The defendant renews his request for oral argument. The government's brief omits substantial portions of the record and recharacterizes others, particularly regarding the conspiracy allegations in counts two and three – espionage and first degree murder, respectively. The government's newly-raised claims regarding issue preservation, invited error, and asserted justifications for inflammatory closing arguments also present disputes best resolved with oral argument. Given the extensive record in this case – including a trial that lasted more than six months – oral argument is essential to the just resolution of the appeal. Due to the nature of the case and the record, the defendant requests that the Court grant additional time for oral argument.

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## REPLY ARGUMENT

### 1. Undisputed facts and summary of reply argument.

The government's murder conspiracy argument rests on attributing to defendant Hernandez responsibility for Cuba's actions in response to violations of its airspace by Brothers-to-the-Rescue (BTTR). The government does not dispute Cuba's right as a sovereign nation to confront such violations by BTTR, including the right–if pilots of such aircraft failed to heed warnings to desist from invading Cuba–to force the planes to land and, if met with resistance, to down the planes over Cuban territory as a last resort.[1] Instead, the government's argument hinges on speculation that Hernandez knew Cuba would exceed the broad limits of its sovereignty in confronting illegal BTTR flights. The record does not establish Hernandez's knowledge of, or specific criminal intent to commit, the charged murder conspiracy.

The government does not dispute that:

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[1] Cuba's sovereignty over its own territory is well-established. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); see also Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (nation's legitimate exercise of sovereignty within its own borders is not a basis for individual liability). Recognizing this sovereignty principle, the U.S. has authorized shooting down non-military aircraft involved in drug running. See, e.g., Juan Forero, "U.S. Backs Colombia on Attacking Drug Planes," New York Times A1 (Aug. 20, 2003).

! On February 24, 1996, the lead airplane of the three-plane BTTR squadron invaded Cuban territory, penetrating Cuba's territorial border by more than two miles before the Cuban military took any action. (R63:6686).

! As the BTTR squadron crossed the 24th parallel, approaching Cuba, Cuban air officials warned the BTTR pilots of possible Cuban military action, but the pilots disregarded the warnings, responding with defiant radio transmissions. (R56:5670;R73:7815).

! Both U.S. and Cuban government officials repeatedly gave public warnings to BTTR that Cuba would confront such unlawful invasions, and Cuba deemed BTTR's leader, Jose Basulto–who publicly admitted committing terrorism in Cuba, including firing a cannon on an occupied tourist hotel and carrying out sabotage–to be a terrorist.[2] (R84:9391;R104:12018-12025).

[2] Basulto also admitted designing explosive devices for BTTR aircraft in Cuba-related flights. (R81:8920-8929).

! Cuba publicly acknowledged the shootdown, explaining–with Cuban radar documentation provided to news media and international forums–that BTTR's planes were inside Cuban territory when fired upon, that BTTR's pilots refused to obey warnings to turn back, and that Cuba was therefore authorized to act in defense of its national sovereignty.[3] (R73:7772,7685).

! Due to Basulto's illegal BTTR flight on February 24, 1996–not merely invading Cuban airspace, but filing false flight plans to deceive the U.S. government regarding his flight into Cuba–the Federal Aviation Administration sanctioned Basulto with license revocation. (GH-Ex. 18MM).

These undisputed facts show a heated geopolitical situation that tragically resulted in the deaths of BTTR personnel, but the facts do not justify blaming Hernandez for Cuba's actions, nor do they prove that he conspired to commit first degree murder in the special U.S. maritime and territorial jurisdiction. To speculate–given this international dispute and Cuba's claim that it acted within its territory and in its own defense–that Hernandez conspired to murder is to ignore

[3] See also R73:7688-89,7716 (government aviation expert relates Cuban radar reports and acknowledges BTTR's prior violations of Cuban law by invading Cuba and engaging in dangerous low-level flights over heavily-populated areas).

that he was simply a Cuban government intelligence field employee, who could not know either the course of these international events before they unfolded or that Cuba's military would choose to take criminal action. Whether or not some Cuban officials engaged in a murder conspiracy–or merely acted precipitously, erroneously, or overly aggressively–Hernandez did not have the knowledge or intent to make him a murder conspirator regarding Cuba's military actions.[4]

In addition, in light of Cuba's shootdown of what the Miami Cuban exile community regarded as a humanitarian rescue organization–and given the denial of a change of venue, the failure to afford Hernandez full disclosure of Cuban communications relevant to his actions, pursuant to the Classified Information Procedures Act (CIPA), and the overzealousness of prosecutorial jury appeals that both enhanced venue prejudice and, with government-requested, erroneous jury instructions, impermissibly lowered the government's proof burden–Hernandez was deprived of a fair determination of the government's unbounded conspiracy theory.

**2. Application of appellate and circuit rules.**

The government's brief violates this Court's rules and the Federal Rules of Appellate Procedure in failing to provide either an accurate and complete statement

[4] See R75:8070 (prosecutor concedes "shootdown was a military operation most of whose plans were set afoot in Cuba").

of facts or a coherent summary of argument. The government's fact statement omits reference to defense evidence and witnesses, evidence elicited on cross-examination, and the context and sequence of relevant message traffic involving Hernandez, and repeatedly employs unsubstantiated speculative argument in lieu of record facts. The government thus violates 11th Cir. R. 28-1(i)(ii)'s requirement that the statement of facts "state the facts accurately, those favorable and those unfavorable to the party" and that "[i]nferences from facts must be identified as such."[5] The defendants presented numerous witnesses and documents to show the context of their actions in the U.S. and to dispute government claims regarding Cuba's actions in the BTTR shootdown. No such evidence is alluded to by the government.[6]

These rules violations have a tactical effect. Thus, the government's brief completely omits reference to the invasion of Cuban airspace by BTTR moments

[5] Although on sufficiency claims–but not trial errors–evidence and reasonable inferences are viewed in a government-favorable light, this Court still considers not only government-favorable evidence but the record as a whole. See U.S. v. Williamson, 339 F.3d 1295, 1297 (11th Cir. 2003) (conducting "independent review of the entire record of trial" on sufficiency claim); U.S. v. Hands, 184 F.3d 1322, 1330 n.23 (11th Cir. 1998) (trial errors analyzed upon review of record without viewing evidence in government-favorable light).

[6] The government also violates Fed.R.App.P. 28's argument-summary rule, by merely repeating argument headings, GB30, without summarizing any argument.

before the shootdown and, in fact, reads as if only two, rather than three, planes in the BTTR squadron approached Havana. See GB27-28; cf. R75:8067 (trial prosecutor concedes "Basulto's plane entered Cuban air space"). Likewise, the government omits reference to BTTR's violation of its false flight plan and its pilots' defiant responses to Cuban warnings minutes before the shootdown, and condenses radio communications by Cuban pilots, erroneously implying they sought to down the planes as soon as they spotted them, rather than after additional communications and maneuvers and a prior Cuban verbal warning.[7] GB28.

The government's fact statement fails to note substantial evidence at trial of: the years-long history of terrorist attacks against Cuba by South Florida residents such as Orlando Bosch, Ramon Saul, and others; Basulto's mini-bombs and other terrorist activity; and criminal activities of BTTR and related organizations. See Campa Brief (No. 03-11087) at 4-20.[8]

[7] Cuba also issued specific warnings immediately prior to the BTTR flight which the U.S. State Department conveyed to BTTR through the FAA. R77:8394; see also R72:7639 (Basulto announces to Cuba minutes before shootdown that he does not recognize authority of Cuban government, claiming he is free "of any restriction" by Cuban authorities as he invaded Cuban airspace); R73:7788 (Cuban submissions showed BTTR defiantly ignoring MiG warnings; MiG pilots claimed to have made warning passes to deter invasive flight of BTTR planes, but planes continued toward Havana).

[8] The government—adopting a local community view—suggests BTTR's activities were "humanitarian." GB6;R54:5352. But Cuba viewed

By failing to acknowledge any scope of permissible sovereign action for Cuba and omitting any reference to U.S. State Department warnings that BTTR incursions into Cuban territory invited a Cuban military response over which the U.S. would have no jurisdiction, see R77:8394, the government's brief unfairly elevates Hernandez's place in these international events to make him, rather than the persons who decided to down the planes–officials above, and uncontrolled by, him–appear responsible.[9]

A fair reading of the complete record shows that Hernandez is not responsible for the shootdown and was not high enough in any level of official knowledge or authority to knowingly conspire to murder BTTR pilots or to take any action in U.S. jurisdiction. The government's unique theory of respondeat inferior–in the excessive use of force by Hernandez's Cuban government superiors

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BTTR as a criminal organization, violating Cuban airspace, seeking to undermine Cuba's government by exposing its vulnerability to BTTR "penetrations," facilitating illegal immigration that had previously sparked international disputes with the U.S., and potentially facilitating terrorism, as Basulto had engaged in previously. See GX:HF115;GH-Ex. 37.

[9] The government claims the jury "heard testimony that the last entry of BTTR into Cuban airspace was July 1995," such that it could conclude Cuba's concern was not with territorial incursions. GB42. Radar records–and Basulto's own public admissions–established Cuba's concern with multiple BTTR violations of Cuban airspace in January 1996. GH-Ex. 18(E).

in their official confrontation with BTTR–exceeds any fair reading of the record or the law.[10]

Hernandez is not merely a convenient scapegoat for the actions of decision-makers in Cuba; the evidence–which the government abandons its core responsibility to fully address on appeal–shows Hernandez's actual innocence of the charge.

[10] The government fails to address Hernandez's citation of Gonzalez v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003) (holding that doctrine of respondeat superior did not apply to mere foreseeability of use of excessive force in an armed law enforcement confrontation–the Elián raid). See Coleman v. Houston Independent School District, 115 F.3d 528, 534-35 (5th Cir. 1997) ("Such an unprecedented rule of vicarious liability would impose individual liability upon subordinates for the acts and omissions of superiors, over whom they have neither control nor authority, thereby creating a new liability theory of respondeat inferior. ... [I]n light of the federal courts' refusal to recognize even traditional respondeat superior liability under [42 U.S.C. §] 1983, the district court erred in endorsing a new theory of respondeat inferior liability.").

### 3. Government's speculative interpretation of plain language in messages sent to persons other than Hernandez fails to justify attributing Cuba's actions to him.

The government rests its case on erroneous and misleading interpretations of message traffic between officials of Cuba's Directorate of Intelligence and field agents in Miami.[11] Notwithstanding the government's interpretive speculation, such messages do not prove Hernandez's knowledge of, or agreement to join, a conspiracy to commit first degree murder in the special U.S. maritime and territorial jurisdiction.

Indeed, there is no evidence that Hernandez personally reviewed the messages. The government concedes another agent, "A-4," was a likely recipient, but argues that Hernandez might also have reviewed the messages because of the agents' mutual access to a decrypting program and relevant computer files. GB42 n.29. The government ignores evidence, GX:HF133, that Hernandez did not have access to the decrypting program until March 14, 1996, seventeen days after the shootdown. The government also claims Hernandez "conveyed" specific Cuban government requests that other agents not fly with BTTR, GB27; but the evidence does not support that claim, which the government incorrectly presents as record fact. Similarly groundless, and inflammatory, are the government's claims that

[11] The government offered no expert witness to explain the messages.

because Cuba had Hernandez assist another agent in returning to Cuba, Hernandez acted to "help implement the GoC's planned propaganda spin for the shootdown," GB26, and that Hernandez had a "role in the planning" of the shootdown. GB40. The government provides no record support for these propositions, nor is there evidence that Hernandez knew a shootdown was planned, much less that he planned it or helped implement a "propaganda spin" for it.

Moreover, assuming Hernandez received, or subsequently reviewed, messages regarding BTTR, those messages said only that Cuba intended to confront BTTR incursions into Cuban territory. Thee sole pre-shootdown BTTR-related message the government attributes to Hernandez was a request to another agent to "pinpoint in more detail everything related to new incursions by Brothers to the Rescue to be carried out in our country." GX:DG-104 (emphasis added). The government's brief ignores this critical fact, omitting that clear specification when quoting its exhibit, GX:DG-104, thereby wrongly implying that the only document even partially attributable to Hernandez did not relate to incursions into Cuba.[12] GB47.

[12] The government erroneously claims Hernandez worked at DI headquarters in January 1996. GB24 (citing GX:DG103). The cited document instead confirms that Hernandez was on annual leave then. The government argues that additional messages potentially accessible by Hernandez might have related to BTTR flights other than those violating

Weak links to ambiguous statements are not sufficient to prove a defendant's guilt of a conspiracy. U.S. v. Fernandez, 797 F.2d 943, 949 (11th Cir. 1986). The government's attempt–without even weak links–to claim Hernandez's pre-shootdown knowledge of something other than interdiction of BTTR's illegal Cuban incursions is meritless.

**4. Each element of the offense went unproved.**

The evidence showed Hernandez may or may not have received and/or disseminated information communicated by his employer, Cuba's interior ministry, limited to BTTR's flight plans and Cuba's intent to "confront" BTTR aircraft in the course of illegal BTTR flights. Even assuming such facts, they do not establish that Hernandez knew either that Cuba planned to unlawfully shoot down the planes or that Cuba lacked a valid legal justification for confrontation of BTTR's illegal activity. Nor does the fact that planes were later shot down demonstrate Hernandez's prior knowledge or agreement to take such action.

To support a conviction for conspiracy, the government has a three-fold obligation: it must prove that two or more persons agreed to commit a crime, that the defendant knew the illegality of the agreement, and that he voluntarily joined the conspiracy. U.S. v. Roper, 874 F.2d 782, 787 (11th Cir. 1989). In this case,

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Cuban territory. GB47 (citing GX:HF108,111). But the cited documents make no reference to such flights.

because the agreement is alleged to be between Hernandez and his government, more must be shown than the Hernandez's mere subservience and behavior in conformity with protecting other agents from confrontations between Cuba and BTTR–the sum and substance of the government's argument here. A heightened, not a lowered, standard of proof of Hernandez's knowledge that his government both intended to and did take actions in violation of international and U.S. law–consisting, here, of a planned murder in U.S. jurisdiction–is required. That is the law of this Court for any employer-employee conspiracy claim. See U.S. v. Doherty, 233 F.3d 1275, 1284-85 (11th Cir. 2000) (to sustain conviction, employees must be proven to understand illegality of employer's intended actions; reversing conviction where employer's tax scheme not facially evident); U.S. v. Martinez, 83 F.3d 371, 374 (11th Cir. 1996) (persons involved in one conspiracy cannot be presumed to share knowledge of separate conspiratorial goal of group's leader); U.S. v. Brown, 40 F.3d 1218, 1222 (11th Cir. 1994) (that defendant worked for fraudulent company did not constitute substantial evidence of his guilt of company's fraud); U.S. v. Horton, 646 F.2d 181, 185 (5th Cir. 1981) (rejecting argument that "intimate business relationship" implied defendant's knowledge of illegality of alleged coconspirator's actions).[13]

[13] The government does not claim Hernandez was expressly advised of an intent to shoot down planes or confront BTTR over international waters.

The government must demonstrate that the defendant acted with the same state of mind required for the first degree murder alleged to be the object of the conspiracy, i.e., with malice aforethought, premeditation, and specific intent to unlawfully cause the death of a human being. U.S. v. Feola, 420 U.S. 671, 686 (1975) (citing Ingram v. U.S., 360 U.S. 672, 678 (1959)). None of that was proved here; at most, Hernandez complied with his country's law enforcement authorities regarding a confrontation of illegal acts that Cuba had publicly proclaimed it intended to confront and which the U.S. recognized Cuba's authority to confront.

Given the terms of the indictment, the jury instructions, see GB46, and the territorial limits of Cuba's sovereignty, see R125:14610 (acknowledging Cuba's "complete and exclusive sovereignty over the airspace above its territory"), the government was required to show Hernandez knew of Cuba's intent to confront BTTR planes over international waters, rather than in Cuban territory. Hernandez never had knowledge of such illegal intent. Intelligence agencies–such as that of which Hernandez was an employee–are necessarily discrete about sharing information other than on a need-to-know basis. See GB10 n.9 (government concedes that "compartmentalization and secrecy ... are hallmarks of intelligence

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The government's argument that evidence-insufficiency cases cited by Hernandez "do not support his argument," because he "appreciated the charged crime," GB45, does not, therefore, actually distinguish such cases.

networks"). The government, however, ignores such compartmentalization in attributing to Hernandez knowledge of the highest levels of secret decision-making in Cuba's government. See GB25-26,41-43.

Contrary to the government's brief, the fact that Cuba apparently wanted information regarding actions Basulto was planning to take, such as whether he planned illegal airdrops over Cuba, in addition to specific flight plans, does not imply Cuba's intent to take action even if BTTR did not violate Cuban airspace. GB47. Seeking such "action" information reflects attention to overflights of Cuba, because at that time–pre-shootdown–Basulto had never stated that he could launch objects into Cuba from 12 miles offshore. In fact, he had stated the contrary on Radio Marti just days before the shootdown. GH-Ex. 37:1-8 (Basulto claims "drop point" for January 1996 airdrop was three miles from center of Havana). If Hernandez reported to Cuba on BTTR's planned activities, such information would just as likely contribute to the legality of any action by Cuba by helping to insure that Cuba knew what BTTR was doing before taking action. As events transpired, Basulto's squadron, after deviating from its false flight plan, headed straight for Havana, with the lead plane entering Cuban airspace, contradicting any Cuban intent to take action without a BTTR incursion.

Neither did U.S. officials and experts believe that Cuba would leave its own territorial jurisdiction to confront BTTR flights. See R798713("Q. [by prosecutor] Was there ever any warning from the Cubans they might shoot down a plane in international air space? A. [by U.S. Special Presidential Advisor Richard Nuccio] No. Q. Was there ever any statement by the Cubans they might take action against a vessel in international waters? A. No. We would have considered such a warning announcement as an act of war.") (emphasis added); R79:8714 ("A. [by Nuccio] Actually ... my personal worst case scenario involved an attempt to force down the plane that either resulted in an accident or some sort of crash or inadvertent encounter between planes. Q. [by prosecutor] That worst case scenario is one that might have occurred in Cuban air space or Cuban territorial waters; is that correct? A. That was my unstated assumption in all of those. ... Q. You did not game plan out a scenario in which the Cubans were shooting down aircraft in international air space, did you, Mr. Nuccio? A. No. As I say, I am not sure I would have been involved in that because we would have been talking about a war. Cuba had no right and has no right to exercise sovereignty outside of its territorial limits.").

After conceding in two prior pleadings in this Court that no evidence showed Hernandez's knowledge of an intended attack on BTTR in international

waters, the government now contradicts its prior representations by claiming that the evidence establishes his "geographical conspiratorial intent." GB46. The government was very explicit the last time it came before this Court on this issue: "In light of the evidence presented in this trial, [proof of this element] presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution on this count." Gov't Pet. for Writ of Prohibition (No. 01-12887) at 21 (emphasis added). The government contends it should not be estopped from taking directly contrary positions in this Court. GB46 n.34. But such duplicitous representations are not explained away by the government's claim that its prior argument of an "insurmountable hurdle" to conviction meant only that the hurdle was a minor obstacle to the government's "best" jury argument. Id. "Insurmountable" does not mean "not the best;" it means unachievable, impossible, and in this case, unproven. The government should be deemed estopped.

Significantly, in its argument on the conspiracy to murder count, GB40-48, the government fails to advise the Court of any precedent–citing not a single case from this or any other court–as to sufficiency of the evidence on, or the elements of, either murder or conspiracy to murder; and the government offers no coherent murder conspiracy theory on which to attribute the actions of the Cuban military to

Hernandez. Ignoring all questions of intent and knowledge, the government posits that Hernandez played a "critical role" in the shootdown. GB43. But even that contention is belied by the record, which shows that any "role" attributed to Hernandez by the government was, at most, superfluous, relating to cumulative information available from multiple sources, including news media and public warnings by the FAA and the State Department. GB40. Thus, contrary to the government's brief, Cuba's Miami agents were aware from public sources that Cuba would likely take action against future BTTR incursions. Nor, contrary to the government, was BTTR informant, agent Gonzalez, at serious risk of a BTTR confrontation; he had not flown with BTTR since 1994. (R30:1700). Cuba also knew, independently of its agents, of BTTR flight plans coinciding with Concilio Cubano on the day of the shootdown and received advance word of BTTR flights from the U.S. government which hoped, by being cooperative, to dissuade Cuba from taking severe enforcement actions against BTTR on February 24, 1996. See generally R77:8373-8428. Thus, the government's backstage-role theory is wanting, both factually and legally. On the legal issue, notwithstanding the government's argument that Cuba used Hernandez to obtain and disseminate intelligence, such a "role" in Cuba's actions does not reflect his foreknowledge or

intent with respect to any illegal acts. Contrary to the government's brief, GB46, Hernandez never learned of a murder plan.

**5. "Confrontation".**

The government places the weight of its entire case on the concept that if Hernandez received a January 1996 message from Cuba, GX:HF115, he learned that Cuba intended to confront illegal BTTR flights into Cuba. GB41. On the word "confrontation," the government places the weight of a murder conspiracy charge. GB46 ("Hernandez was told of the GoC's plan to bring about–that is, 'perfect'–a confrontation with BTTR.") (emphasis added). The government implicitly speculates that Hernandez understood the word "confrontation" to mean a confrontation that would be not merely coercive (e.g., leading to a forced grounding of the BTTR aircraft or a chasing away of the planes from Cuban territory) or violent (e.g., including warning shots), but also cold-bloodedly murderous. GB45.

Confrontations, however, occur most frequently in legal and nonlethal situations in all aspects of life: from international disputes to law enforcement to ideological battles. Cuba had peacefully confronted–with the threat of force–other incursions into its territory, such as the 1995 confrontations of Movimiento Democracia and BTTR in Cuban waters. R54:5354-57;R57:5865. Such

"confrontations" are not only fully consistent with law enforcement and border control, but also with Cuba's request to its own undercover agents to stay off BTTR planes during confrontations because, of necessity, such confrontations carried the threat of forcing BTTR planes out of Cuban airspace or forcing the planes to land, with a risk of resistance by BTTR. Clearly, "where there is criminal activity there is also a substantial element of danger–either from the criminal or from a confrontation between the criminal and the police." Illinois v. Wardlow, 528 U.S. 119, 131-32 (2000) (Stevens, J., concurring) (emphasis added).[14]

Thus, a "confrontation" of criminal acts is not indicative of an illegal agreement, much less a conspiracy to murder. See R73:7791,7805 (government aviation expert, Charles Leonard, concedes many types of lawful confrontation of BTTR aircraft that Cuba could have employed); R79:8714 (A. [by U.S. Presidential Advisor Nuccio] "Actually I think as I may have mentioned, my personal worst case scenario involved an attempt to force down the plane that either resulted in an accident or some sort of crash or inadvertent encounter

[14] That "confrontation" is a law-enforcement term is seen in cases addressing law-enforcement confrontations of criminal activity, particularly qualified immunity and excessive force cases and arrest and stop scenarios. Indeed, confrontation is a concept imbedded in our constitution–the Sixth Amendment right of confrontation.

between planes."); R58:5924 ("Q. [by prosecutor] Did you ever believe or have a fear that anything worse than being forced to land would happen ... ? A. [by Basulto co-pilot] Not at all.").

In the language it employed in the indictment, the government converted the actual term "confrontation" (translated from the Spanish word "enfrentamiento," contained in a message sent out by Cuban intelligence) to "violent confrontation." R224:14;GB24. But, contrary to the government, "confrontation" does not mean "violent confrontation"; they are different concepts, and Hernandez was not advised of any intent to use unjustified force as the means of confrontation. Here, all of the speculation on Basulto's and the other BTTR pilots' part was that they would be "forced down" by identifiable, official Cuban forces, i.e., directed to land their planes in Cuba so that they could be taken prisoner and prosecuted. See GH-Ex. 35(A) (BTTR pilots' television interview in which BTTR pilots speak, at length, of this as the risk of confrontation by Cuban MiGs; "[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."). Such a force-down would be a classic "confrontation" with Cuban military officials.

If forced to land, the BTTR pilots likely would have been prosecuted and imprisoned, see GH-Ex. 35(A), meaning that any Cuban agents on board would

either be exposed, by not being imprisoned, or simply taken out of action if they were imprisoned, in either event destroying their value as agents. Thus, a direction to Hernandez to advise agents not to fly with Basulto, rather than suggesting illegality on Cuba's part, would imply the common, and prudent, law enforcement practice to avoid potential risks to undercover agents or confidential informants when an arrest or other confrontation occurs, both to avoid danger to the undercover agents and to minimize the risk of "blowing their cover" and exposing their true status. Key to the message concerning the confrontation was the concept of a potential Cuban response to "possible" provocations by BTTR. Given the ultimate unpredictability of BTTR's actions and its reaction to radio directives by Cuban authorities, it would have been reckless for Cuban agents to board BTTR planes when a confrontation was anticipated.

At trial, see, e.g., R75:8066, although, significantly, not in its brief, the government argued that the name of Cuba's BTTR operation, "Operacion Escorpion," indicated an illegal confrontation. The government's abandonment of that argument in its brief is sensible given the U.S. military's use of the same term, "Operation Desert Scorpion," to apply to lawful, non-violent arrest of opponents in post-war Iraq. See Appendix B (news reports of U.S. Army Operation Desert

Scorpion and Operation Desert Sidewinder). There is nothing in the term "escorpion" or the term "confront" that implied unlawful action by Cuba.

**6. Post-hoc reasoning.**

The government's reliance on post-shootdown events such as Cuba's commending Hernandez for assisting in extracting agent Roque from the U.S., and Hernandez's routine, one-grade promotion four months later, see GB26,45 (contending that assistance of Roque implies foreknowledge of murder plan), lacks legal or factual support, particularly given that Roque's return to Cuba was a long-planned event that was to occur regardless of whether BTTR ever flew again.[15] Indeed, Roque had left the U.S. and was already in Cuba before Basulto made his February 1996 flight over Cuban territory.

The government's additional argument–that Hernandez's comment, months after the shootdown, that he contributed no more than a "grain of salt" to effecting Roque's return to Cuba, GB28,45, was actually a veiled acknowledgment of involvement in a murder conspiracy–is equally without merit, resting on the

[15] The promotion occurred as part of an annual review in which many agents were promoted, according to the government-cited exhibit. See GB29 (citing GX:HF140).

government's conflation of unrelated messages and speculation as to possible post-hoc motivations.

Moreover, even assuming with the government that Hernandez was commended by Cuba, after the fact, for following instructions given him before the shootdown, that would not make Hernandez a murderer. He cannot travel back through time to undo compliance with ostensibly-lawful Cuban requests simply because, post-shootdown, the U.S. disputed Cuba's assertions of lawful sovereign action, nor, given Cuba's claim that it acted lawfully in its own territory, was there occasion for Hernandez to rebuke his Cuban government superiors for the shootdown. Even assuming the worst, a post-hoc recognition that one's service as a Cuban agent was deemed by Cuba to have contributed somehow to a military action would not convert the agent into a coconspirator. See Grunewald v. U.S., 353 U.S. 391, 403 (1957) (rejecting imputation of guilt from post-offense actions and statements supporting completed conspiracy).

Most importantly, however, the communications here expressly refer to Roque's return, rather than the shootdown. See GX:DG127:1 (referring to GX:HF136). The government errs significantly in misciting "GX:HF136" as referring to anything other than Roque's return. GB28 (confusing GX:HF136 with GX:DG108:34-35). Further, the government admits that the pre-operation plans

for meetings with Basulto about news reports of Roque's re-defection to Cuba reflect that Roque's re-defection was a goal independent of any Cuban confrontation of BTTR incursions. GB45.

From all available evidence, Cuba's stated pre-shootdown objective regarding BTTR was to exercise Cuban sovereignty to confront illegal flights, without interference from the U.S.; notice of that objective was given to the U.S. and the public, including Hernandez. GB43 n.31 (citing R76:8204-05). The numerous conflicting versions of events in this case; the mutual U.S.-Cuba political distrust; the undisputed illegality of Basulto's incursion into Cuba immediately before the shootdown and BTTR pilots' defiance of Cuban warnings–both historically and on radio transmissions just before the shootdown; BTTR's false flight plan and sudden change to head straight for Havana, R86:9759;R72:7630; and the absence of any rational motive for Cuba's risking war with the U.S. by taking action against BTTR beyond Cuba's sovereign authority; are among many politically-charged events and statements that undermine the substantiality of the government's post-shootdown theory that Hernandez knew, pre-shootdown, that Cuba intended to act unlawfully.

Contrary to the government's post-hoc approach, the whole world–especially our own government–knew what Hernandez knew when BTTR flew

that day: that Cuba might take action if Basulto invaded again, as he had threatened to do. But there is no evidence–from words or actions either pre- or post-shootdown–that Hernandez or anyone else outside of Cuba knew that in confronting BTTR, Cuba would attack planes without justification in international waters. Rather, the government's intent theory constitutes nothing more than piling inference upon inference, a practice condemned by the Supreme Court. See Direct Sales Co. v. U.S., 319 U.S. 703, 713 (1943); see also Grunewald, 353 U.S. at 404 ("Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.").

**7. Foreign sovereign immunity.**

The government mistakenly argues that absent a direct reference to criminal prosecution immunity in the 1948 Foreign Sovereign Immunity Act (FSIA), such immunity does not exist. GB47-48. The government ignores that sovereign immunity–in civil and criminal contexts–predates FSIA. See Altmann v. Austria, 317 F.3d 954, 962 (9th Cir. 2002) (holding FSIA exceptions retroactively applicable to pre-FSIA sovereign immunity), cert. granted, Austria v. Altmann, 2003 WL 21692136 (U.S. Sep. 30, 2003). The government's citation of U.S. v.

Noriega, 117 F. 3d 1206 (11th Cir. 1997), as holding that FSIA creates no criminal sovereign immunity is inapposite. See GB48. Noriega does not suggest sovereign immunity was created by FSIA, and caselaw rebuts that proposition. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-88 (1983) (FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity."). Nor was a sovereign immunity claim raised in Noriega, where the defendant's head-of-state immunity claim was unavailing.[16]

The government fails to note Hernandez's reliance on Keller v. Central Bank of Nigeria, 277 F.3d 811, 819 (6th Cir. 2002) (sovereign immunity extends to criminal prosecutions; FSIA bars RICO prosecution of foreign country and instrumentalities). Keller holds that FSIA's failure to reference criminal immunity demonstrates that FSIA created no exceptions to such immunity. Id.

The government argues waiver, relying on civil pleading rules. However, Hernandez's only timing limitation was Fed.R.Crim.P. 12's specification of required pretrial motions. Because FSIA immunity here depended on trial of the underlying issue, Hernandez properly raised his sovereign immunity claim with his Fed.R.Crim.P. 29 acquittal motion. The government's citation of 28 U.S.C. 1605, allowing money damages claims for "extrajudicial killing [i.e., in violation of

[16] See U.S. v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (holdings "can reach only as far as the facts and circumstances presented").

international law], aircraft sabotage," undercuts the theory of no criminal sovereign immunity. Because the statute permits only money damages claims, a criminal indictment remains an inappropriate and unauthorized means of grading Cuba's compliance with international norms in defense of its national sovereignty.

**8. Prosecutorial misconduct.**

The government fails to either defend individual instances of overzealous prosecutorial closing argument or address potential prejudice. GB72-76. Tellingly, as to prejudice, the government does not contend that evidence of guilt was overwhelming or even substantial, and does not claim the misconduct here could be found mere harmless error. Nor was any curative instruction given.

Instead, the government argues that there was "no government misconduct," GB72, despite a litany of improper prosecutorial remarks, including:

- personal attacks on defense counsel's integrity and shifting to the defense the burden to announce proffered evidence and theories of innocence at the beginning of trial;
- inflammatory appeals to God, patriotism, anti-communism, and fundamental fears of destruction of the United States;
- telling the jury their decision should be influenced by how "extremely important" the case was to the U.S. and that "repressive"

Cuba, described as America's enemy and a friend of America's enemies, had a "huge" stake in the case;

- use of unfairly prejudicial mental images of dead children;
- invoking the Holocaust in attributing to Hernandez's counsel (and to Cuba) a disregard for life;
- accusing the defendants of harming this country by forcing the government to prove their guilt at trial with defense counsel "paid for by the American taxpayer;"
- repeatedly understating the government's proof burden on the murder conspiracy count;
- linking the jurors' duty to convict to honoring the memory of Pearl Harbor;
- warning the jury that dissidents in Cuba would not "stand up for their rights" if Hernandez were not punished; and
- vouching for the prosecutors' belief in the defendants' guilt and the quality of the prosecution.

See Appendix A (attached hereto) (excerpts of closing argument by prosecutor, highlighted in part as to improper comments and sustained objections).

Further, the government argues–without record or legal support–that these abusive and distorting prosecutorial tactics were well-deserved either as a response to the defense case or because the U.S. really was the "'enemy' in appellants' eyes." GB73-74. The government's position on abuse of a defendant's right to a fair trial is contrary to the law, factually unfounded, and serves merely to prove that excesses engaged by the government were brought on by the very tenuousness of both the evidence and the theories of prosecution.[17]

Rather than suggest how such comments could have failed to prejudice the defendants, the government argues that the district court's decision not to grant relief from the misconduct is afforded deference on appeal. GB75 (citing U.S. v. Cordoba-Mosquera, 212 F.3d 1194 (11th Cir. 2000)). Contrary to the government, this Court has long exercised de novo review over prosecutorial misconduct, as the government concedes in the standard-of-review section of its brief. See GB30 (citing U.S. v. Delgado, 56 F.3d 1357, 1363 (11th Cir. 1995)). In Cordoba-Mosquera, the Court observed that the district court had given curative instructions

[17] See Davis v. Zant, 36 F.3d 1538, 1546-51 (11th Cir. 1994). Regarding the government's comment on taxpayer-funded counsel, precedent supports finding reversible error on that issue alone. Goodwin v. Balkcom, 684 F.2d 794, 806 (11th Cir. 1982) ("reminding a jury that [counsel's] undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused"); here, the government magnified that prejudice by arguing the impropriety of "taxpayer" funding of counsel for people "bent on destroying" the U.S. (R124:14482).

and had undertaken a special jury poll to make sure, juror-by-juror, that the panel was not improperly affected by the relatively mild misconduct in that case. See 212 F.3d at 1198 ("Immediately after the prosecutor's closing argument, the court instructed the jury to disregard the comments, and asked them individually if they would do so."). In that context, deference was appropriate; however, no such record exists here, neither curative instructions, nor a jury poll, nor did the district court make any findings gauging the effect on the jury of the train of abusive comments in this case.[18]

[18] The government misstates the misconduct claim, arguing Hernandez claimed "misconduct" in the government's portraying the defendants as Castro agents. GB76. No defendant made such a claim of misconduct–at trial or on appeal–and the government, unsurprisingly, gives no record citation for this argument. Id. Apparently the government is referring to appellants' brief on denial of the motion for new trial, which notes that the government's trial strategy–of linking the defendants to Castro–exacerbated the prejudice of the Miami venue. See Joint Appellants' Brief (No. 03-11087) at 20. The government's brief not only mixes up these separate arguments, but also mischaracterizes the new trial argument as a direct quote, rather than an encapsulation of the prosecutorial strategy of treating the defendants as enemy Castro agents. Id. Ironically, on appeal, the government argues the defendants were such "enem[ies]" and thus deserved such prosecutorial tactics. GB74.

Despite 27 sustained objections to its closing argument, the government maintains the record shows the defendants' "silence in the face of virtually all of what they now claim is misconduct." GB76. While not every comment in the stream of personal attacks, vouching, burden-shifting, and emotional appeals to patriotic and religious feelings was caught by the defense, the defendants sufficiently preserved the issue for this Court's plenary review. U.S. v. Wilson, 149 F.3d 1298, 1302 (11th Cir. 1998). Given the thinness of the evidence, the risk of community hostility to these defendants even without prosecutorial misconduct, and the government's utter failure on appeal to justify, point-by-point, its vitriolic, prejudicial, and plainly effective attacks, see App. A, reversal of the convictions is compelled in the interest of justice.

On prosecutorial misconduct in misstating the murder conspiracy jury instructions, the government misreads the record, asserting that its misstatement of proof obligations, see App. A at 3-4, was due to interruptions by defense counsel's objections (and, apparently, the district court's sustaining of those objections). GB75. Thus, the government takes wholly out of context its closing argument that Hernandez was "[a]bsolutely" guilty of being a "partner" with Cuba, in order to claim that such statement cured repeated misstatements of its proof burden. Id. The quoted statement–made as part of the government's misleading "in-for-a-

penny-in-for-pound" argument–was not contemporaneous with the government's repeated misstatement of the offense elements, R124:14514-14517, but came four pages later at R124:14520, during another series of inflammatory attacks on Hernandez. See App. A at 4. Rather than curing the problem, it simply added to the prejudice.

**9. Jury instructions.**

Failing to defend on the merits the erroneous and prejudicial International Civil Aviation Organization (ICAO) instruction the government obtained over defense objection at trial–the confusing nature of which the government previously conceded in this Court, see Petition for Writ of Prohibition (No. 01-12887) at 31-33–the government claims, erroneously, that defendant Hernandez requested the instruction. GB75. The record, R117:13520-24, refutes that claim.

The government cannot defend the merits of the instruction because, as noted, it used its success in obtaining the instruction to argue in its prohibition petition in this Court that the instructions, even if correct on the elements, were hopelessly confusing given the ICAO instruction. Pet. at 33 (conceding that the instruction "abdicates to the jury to divine and the attorneys to argue the legal significance of those provisions in the ICAO"). The instruction was highly prejudicial, leaving the jury with the impression that Hernandez could be convicted

of murder conspiracy based on conclusions in an ICAO investigation of the BTTR shootdown, which included that Cuba had violated international law by taking such action over international waters. The government laid the groundwork for the impermissible instruction in examining its aviation expert at trial. R73:7792-98 (government emphasizes ICAO conclusions of technical wrongdoing by Cuba in shootdown); R73:7780-90 (government focuses on ICAO report rejecting Cuban version of events, despite sustained defense objections); R73:7807 (government asks its ICAO expert, "The penalty for [tossing leaflets out of an airplane] would not be death, would it?"). The government's use at trial of the ICAO report allowed the jury to use the ICAO instruction to reach a verdict of guilty based merely on finding an international law violation. See Griffin v. U.S., 502 U.S. 46, 52 (1991) (due process "requires a verdict to be set aside" where verdict may be based on improper theory).

**10. The evidence was insufficient to prove Count II.**

The government cites no comparable precedent for concluding the evidence sufficient to prove Hernandez's participation in an espionage conspiracy. The government disputes the significance of the fact that no espionage occurred and fails to place that fact in context, where defendant operated for years engaging in

non-classified investigations. Hernandez adopts his codefendants' arguments on this issue.

## CONCLUSION

Appellant requests that the Court reverse the judgment below.

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## CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 6998 words.

Paul A. McKenna, Esq.

# APPENDIX A

Excerpts of prosecutor's closing argument
Record Volume 124

# EXCERPT OF CLOSING ARGUMENT BY AUSA KASTRENAKES

[R124:14471] ... MR. KASTRENAKES: This is an **extremely important case**. ...The FBI [pursues] cases involving violent Cuban exile groups. Every case that Mr. Mendez brought before you resulted [R124:14472] in somebody getting arrested and prosecuted. ...

MR. MENDEZ: Objection, misstates the evidence.

THE COURT: **Sustained.**

MR. KASTRENAKES: [The **FBI] did a fabulous job**. ... [A]n extraordinary job, worthy of the highest praise. ... But of course in the **world of criminal defense attorneys**, law enforcement never does exactly the right thing. ... [T]his case [R124:14473] is about intent. The **intent of the Cuban intelligence bureau** ... . ... Let's talk about **Jose Basulto**. ... [R124:14474] ... 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**. ... [R124:14475] ... They took the action and decision to join a **hostile intelligence bureau** ... that sees the United States of America as its **prime and main enemy**. ... These are not the **rules of Cuba**. ... **We are not operating under the rules of Cuba, thank God.** ... 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 ... . [R124:14476] ... In this trial you have heard invented the **Disney World defense** ... . * * * [R124:14480] ... They sponsor **book bombs,** they sponsor **threats,** telephone threats of **car bombs,** they sponsor **sabotage.** They **killed four innocent people** and they use in these identities **dead babies,** [R124:14481] **dead children** to establish who they are. ... They plead not guilty, but there is more than just that. ... [Ruben Campa is] a **Cuban spy sent to the United States to destroy the United States.** ... [R124:14482] ... It is not just the **dead kids**. ... **Look, they are Cuban spies.** [T]hey **got the fairest trial** that they could have gotten. ... **They forced us to prove their guilt beyond a reasonable doubt.** They received the able[st] of **counsel who argued every point** and called many witnesses and **cross-**

**examined our witnesses.** These are **for people bent on destroying the United States, paid for by the American taxpayer** --

MR. McKENNA: Objection.

MR. MENDEZ: I have a motion.

COURT: **Sustained**.

* * *

[R124:14487] MR. KASTRENAKES: ... [L]et's talk about motives. Rodolfo Frometa ... had a motive. **Fidel Castro wiped out his entire family**. ... [W]hen you find someone guilty, [the judge] takes into account all other factors that may be relevant for what would be the appropriate sentence.

MR. MENDEZ: Objection.

THE COURT: **Sustained**.

MR. KASTRENAKES: ... Do not nullify a guilty verdict because you don't trust Judge Lenard to do her job. She will do her job if you **do your job**. Mr. McKenna made reference on several occasions to the Cuban Government's point of view. The **Cuban Government's point of view** with respect to why they do this and **send spies into our country** is something that is **not proper for your decision** [R124:14488] **making**. * * * [R124:14493] The FBI isn't invited back to pursue that stuff --

MR. MENDEZ: There is no evidence of that.

THE COURT: **Sustained**.

MR. KASTRENAKES: When **the bosses in Havana** decide that they want to share evidence with the United States of America --

MR. MENDEZ: Objection.

THE COURT: **Sustained**.

MR. KASTRENAKES: [When] they want to allow witnesses to be interviewed in Cuba, then that process will take place --

MR. MENDEZ: Objection, there is no evidence of that.

THE COURT: **Sustained**.

MR. KASTRENAKES: ... [R124:14495] ... What is Hernandez all about? ... [A] Cuban working in Havana ... makes some statement about ... **Fidel Castro**. Does he say **let's**

**send the goon squad and give this guy a tune up**? ... **What do you think go see this guy means in Cuba, somebody who talks about Fidel Castro?** * * * [R124:14499] ... Antonio Guerrero ... signs an oath saying he is loyal to the United States which is completely false; I submit to you that alone shows you what his intent is, it is to gather military secrets, closely held military information. ...[R124:14501] ... **When you are a defense attorney, you have to dance around plain English** ... . * * * [R124:14510] ... Antonio Guerrero ... is a spy. **My God, these guys are spies. What do you think they are doing here in this country.** ... If I don't think of an argument because I don't have enough time and I am not as smart as you guys, please, **if you have an argument in your head that blows his [Mr. McKenna's] arguments [on Count III] away, don't be afraid to use it** ... . Mr. McKenna told you in his opening the shooting was justified. The shoot downs of those planes were justified. He [R124:14511] 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 shootdown 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.** ... Sophocles made the best statement about the truth and the truth is always the strongest argument. It is. 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 jury the truth and you go and that is what they make their decision on. You make a decision based on truth. ... [R124:14512] ... **The government of Libya–Cuba is not alone by the way. Cuba has been proven in this case to have friends such as the Chinese and the Russians**. They have radar interception. They are **cooperating with the Chinese**. They are not alone. **They are friends with our enemies.** ... [R124:14514] ... The United States must prove there was a conspiracy to kill and have we proven the conspiracy to kill – [R124:14515]

MR. McKENNA: Objection, they have to prove more than that.

THE COURT: **Sustained**.

MR. KASTRENAKES: ... [R124:14517] We have **jurisdiction** in this Court, in this United States District Court because it occurred in international air space --

MR. McKENNA: Objection.

THE COURT: **Sustained**.

MR. McKENNA: I ask the jury to be instructed to disregard that mistake of the law. ...

THE COURT: ... The statement regarding jurisdiction is not at issue for the jury to determine. It is for the Court to determine. ... You are instructed to disregard it.

MR. KASTRENAKES: There is an element that requires the proof of the crime occurring in international air space.

MR. McKENNA: Objection, it is a misstatement. It is an agreement.

THE COURT: **Sustained**.

MR. KASTRENAKES: Ladies and gentlemen, you read the instructions --

MR. McKENNA: He is now arguing with the Court what the instruction says.

[R124:14518] THE COURT: **Sustained**.

MR. KASTRENAKES: You will be given a copy of the instructions. I ask you to go back and read them closely concerning the crime and the elements that are charged. The United States of **America has proven that the shootdown occurred in international air space** --

MR. McKENNA: I object to this argument by counsel and I ask it be stricken. That is not what must be proven.

THE COURT: **Sustained**.

MR. KASTRENAKES: I am merely telling the jury --

MR. McKENNA: I object to him arguing with you about the law.

THE COURT: **Sustained**. ...

[R124:14519] MR. KASTRENAKES: ... The [BTTR] leaflets ... told people in Cuba that they had rights and you may not have liked the messenger, Basulto, but the message is something that everybody can identify with;...and what did that mean to the country of Cuba, that **repressive regime who doesn't believe in any of those rights**, that meant trouble and they had to stop that, they had to stop that at all costs ... . [R124:14520] ... **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.**

... [R124:14521] [Was **Hernandez] a partner in the conspiracy to shoot those planes down in international air space? Absolutely. In for a penny, in for a pound. Everybody has a**

**role in a conspiracy, everybody.** ... **Is he capable of conspiring to kill people? Absolutely.** ... A Roman philosopher said **he who profits by crime commits it. Did the defendant profit by the murder of those four people? Absolutely. He was promoted.** ... [R124:14522] Operation Venecia has been a success. The **Commander-in-chief Fidel Castro** ... **Fidel Castro**, he is meeting with them on this operation. ... He **was very pleased** with the job done. ... [R124:14523] **He who profits by crime commits it. He who performs a role in a conspiracy is a co-conspirator**. ... * * * [R124:14530] ... Garbage in, garbage out but that is the Cuban radar they decided to put that shows this position here. ... If you don't believe ... the U.S. radar and you don't believe the oil slick ..., acquit. If you believe this malarky–if you believe this evidence, acquit. ... This information isn't worth the paper it was written on. It is bogus. It is a lie. Adlai Stevenson said it best about lies. ... It is not because of the Cuban Government that I am asking you to disbelieve their stuff. ... It is not credible [R124:14531] evidence. ... **What did the Cuban Government do in our case?** ... Hand plotted positions. This evidence is not worthy of belief ... . Folks, the **Cuban Government would like you to believe** that this pristine battery charger stayed gently inside of its velcro straps as a plane was exploded. ... [R124:14532] This never happened. A bag search mission. Think about it. ... **Does the Cuban Government have a stake in this case? A huge one.** ... [R124:14533] ... [The defense radar expert] had 75,000 reasons to make that stuff up, folks. 75,000 reasons --

MR. McKENNA: Objection. There is no evidence he got $75,000.

THE COURT: **Sustained**.

MR. KASTRENAKES: You decide the motives he had to come up with the incredible testimony that he did. We talked about **in for a penny, in for a pound** and the [R124:14534] concept that **anybody who joins into a conspiracy is liable for the results of that conspiracy** ... . [R124:14535] Without Gerardo Hernandez, those MIGs don't go up in the air and **Pearl Harbor is also a good analogy** because this was a sneak attack on two defenseless planes who had no idea they were going to get shot down on February 24, 1996. ... **February 24, 1996 like December 7, 1941 is a day that will live in the hearts and minds of these families, these four families forever destroyed. I want you to remember that when you think about 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, according to the Cuban Government, has earned recognition for his actions in destroying these lives. He has earned his conviction for that recognition.** When all is said and done and **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** [R124:14536] **America**. They are conspirators, three of them in espionage and **Gerardo Hernandez has the blood of four people on his hands**. Thank you for so much of your time. I know you will do the right thing.

THE COURT: Ladies and gentlemen, this now concludes the closing arguments in this case.

# APPENDIX B

News reports of Operations Desert Scorpion and Desert Sidewinder