

NO. 01-17176

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

PETITION FOR PANEL REHEARING BY
APPELLANT GERARDO HERNANDEZ

PAUL A. McKENNA, ESQ.
McKenna & Obront
Attorneys for Hernandez
2940 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Tel. No. (305) 373-1040

THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

TABLE OF CONTENTS

TABLE OF CITATIONS ii

CERTIFICATE OF TYPE SIZE AND FONT iii

PETITION FOR PANEL REHEARING 1

I. The Court’s should reconsider its *de novo* appraisal of all of the evidence where the inference of guilt is insubstantial, posing a great risk of conviction without culpability 1

II. The Court should consider the entirety of Hernandez’s free-standing prosecutorial misconduct claim *de novo* given the closeness of the evidence on Count 3 4

III. The Court should remand for resentencing given: the government’s waiver of any harmless error argument, the discretionary natureof the concurrent sentence doctrine, and the reasonable possibility that Hernandez would not receive a life sentence at resentencing particularly given downward departure grounds 5

CONCLUSION 6

CERTIFICATE OF SERVICE

APPENDIX A — *United States v. Campa*, 529 F.3d 980 (11th Cir. June 4, 2008)

APPENDIX B — Chart of U.S. and Cuban radar tracking in ICAO shootdown report

APPENDIX C — Transcript excerpt, government closing argument as to Hernandez’s counsel

TABLE OF CITATIONS

CASES:

Alejandre v. Republic of Cuba,

996 F.Supp. 1239 (S.D. Fla. 1997) 2

Davis v. Zant,

36 F.3d 1538 (11th Cir. 1994) 3, 4

United States v. Adkinson,

158 F.3d 1147 (11th Cir. 1998) 1

United States v. Alvarez-Moreno,

874 F.2d 1402 (11th Cir.1989) 5

United States v. Davis,

730 F.2d 669 (11th Cir.1984) 5

United States v. Fuentes-Jimenez,

750 F.2d 1495 (11th Cir. 1985) 5

United States v. Hamblin,

911 F.2d 551 (11th Cir. 1990) 1

United States v. Hands,

184 F.3d 1322 (11th Cir. 1999) 5

United States v. Kenyon,

397 F.3d 1071 (8th Cir. 2005) 5

United States v. McKinney,
954 F.2d 471 (7th Cir. 1992) 2

United States v. Pedro,
999 F.2d 497 (11th Cir. 1993) 1

United States v. Villegas,
911 F.2d 623 (11th Cir. 1990) 1

STATUTORY AND OTHER AUTHORITY:

22 U.S.C. § 6046 2

Uniform Code of Military Justice,
10 U.S.C. § 920, Chapter 47, § 892, Article 92 1

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PETITION FOR PANEL REHEARING

- I. The Court's should reconsider its *de novo* appraisal of all of the evidence where the inference of guilt is insubstantial, posing a great risk of conviction without culpability.

There is no more fundamental judicial role than deciding under *de novo* review whether inferences from circumstances capable of interpretive disagreement meet the level of substantial evidence that would satisfy a reasonable person beyond a reasonable doubt.¹ The government's case rests on a series of dependent circumstantial inferences; ambiguous communications and unclear information;² and a fluid historical context (including testimony by high-level U.S. officials who thought Cuba would confront BTTR planes with some risk, but not illegally). A conviction cannot be based on hindsight, virtually creating a respondeat inferior doctrine: blaming Hernandez for Cuban military actions as to BTTR planes, when, if Cuba had instead forced them to land or chased them off, Hernandez's actions would clearly be deemed innocent.³ Confrontation avoidance—an agency's desire to reduce risks of confrontation faced by its personnel—is common and well recognized in lawful military and law enforcement

¹ *U.S. v. Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990)(“intuition” is insubstantial); *U.S. v. Pedro*, 999 F.2d 497, 499 (11th Cir. 1993)(cannot presume shared knowledge by conspirators); *U.S. v. Villegas*, 911 F.2d 623, 628 (11th Cir. 1990)(reasonable, not possible, inferences required); *U.S. v. Mercer*, 165 F.3d 1331, 1333 (11th Cir. 1999)(need “substantial evidence” to affirm conspiracy charge); *U.S. v. Adkinson*, 158 F.3d 1147, 1152(11th Cir. 1998)(same).

² The government concedes, as the indictment alleged, that Cuban intelligence practiced “compartmentalization” of information, on a need-to-know basis. DE224:6; GB10 n.9.

³ The panel concedes the *literal* terms of messages to Lt. Hernandez were not unlawful. *Cf.* Uniform Code of Military Justice, 10 U.S.C. § 920, Chapter 47, § 892, Article 92 (any person who “violates or fails to obey any lawful general order or regulation ... shall be punished as a court-martial may direct”). In this context, it is essential to require a stringent level of proof.

operations.⁴ Nor could Hernandez's response to praise for Operation Venecia, relating to Roque, alter the fact that the messages he got did not alert him to any illegality.⁵ When he replied to the message sent in April 1996—*two months* post-shutdown—regarding an operation ending successfully, his government was strongly contesting U.S. shutdown location claims.⁶ At worst, it is *expected* that he would show support for Cuba's claim of defending itself.⁷

II. The Court should consider the entirety of Hernandez's free-standing prosecutorial misconduct claim *de novo* given the closeness of the evidence on Count 3.

Hernandez's initial brief raised a free-standing prosecutorial misconduct claim (Issue III) unlinked to any instructional or venue prejudice issues: that the rebuttal closing argument

⁴ The claim that “[a] forced landing, warning shots, or a forced escorted journey would not have placed agents in danger,” 529 F.3d at 1010, lacks precedent and record support.

⁵ The original panel opinion recognized that post-shutdown messages were directed not to the shutdown, but the return of Juan Roque to Cuba. 419 F.3d 1219, 1248 & n. 201 (“In late 1995 and early 1996, Hernandez participated in a plan to have Roque return to Cuba to undermine the BTTR. ... Hernandez was later recognized for his ‘decisive’ role in Operations Venecia and German, in which ‘the Miami right [was dealt] a hard blow.’”; “Operations Venecia and German involved Roque’s extraction from the United States and return to Cuba to denounce BTTR.”). The indictment states Hernandez was recognized for “Operation German.” DE224:15. In closing, the government contended that “Operation Venecia was linked and part of the events of February 24, 1996,” not a codeword for shutdown. DE124:14098-99; *see* Gov’t Ex. HF123-G3 (Hernandez was instructed on February 13, 1996 to help Roque return to Cuba flying Tampa-to-Cancun on February 23 or 27). Roque left Miami on February 23.

⁶ *See* R73:7689-91. The U.S.-Cuba dispute continued past the June 1996 ICAO Report finding “planes were shot down over international waters.” *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239, 1247 (S.D. Fla. 1997). *See* Appendix B (Cuban, U.S. claims in ICAO inquiry).

⁷ International tensions from the shutdown are seen in the March 12, 1996 law, 22 U.S.C. § 6046, urging Fidel Castro’s indictment. In the post-shutdown period, it approaches treason for Lt. Hernandez to reject Cuba’s claim of lawful action. *See Campa*, 529 F.3d at 1025 & n.5 (Kravitch, J., dissenting). *See U.S. v. McKinney*, 954 F.2d 471, 475 (7th Cir. 1992) (conversation between alleged conspirators after murder “was not a valid basis for a conspiracy conviction”).

impermissibly undermined the role of defense counsel—not by *inflaming prejudice*, but by distorting the process and urging the jury to discount a valid defense as fraud—in violation of *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994), focusing on assertions that counsel’s failure, in opening statement, to claim that Hernandez was unaware of the shutdown plan meant that the lack-of-knowledge defense argued in closing was phony, because it was raised late in the game, and thus should not be considered. *See* Hernandez Br. 48-55. Hernandez argued:

The prosecutorial abuses in this case are *remarkably similar* to those ... in *Davis v. Zant*, 36 F.3d 1538, 1546-51 (11th Cir. 1994), which [also] involved an *emotionally-wrenching murder* accusation. In *Davis*, ... the prosecutor’s closing ... was marked by misleading accusations, ... that “defense was a last minute fabrication,” “disparaging ... comments[,] highly improper commentary on the defense management of the trial,” and highlighting counsel’s failure to explain defense in opening statement⁸

These fundamentally improper (and false) government arguments undermined defense counsel’s credibility and ability to argue that his client did not know Cuba was planning illegal action as to BTTR and mirror those found warranting a new trial *due to the closeness of the evidence* in *Davis* (also a murder case). The attack on the Count 3 defense was the most harmful of the entire rebuttal, *compounding* the inflammatory, false claims that counsel had invoked “the final solution” and took “taxpayer” money to represent agents “sent to destroy” the U.S. To emphasize this *Davis* violation as the most significant, Hernandez’s reply brief lists it *first* among all instances of misconduct, after noting the government raised no claim of harmless error:

⁸ Hernandez Br. 53-54 (emphasis added); *see id.* at 50-51 (government claimed “counsel for Hernandez ... raised nothing but a false, last-minute, smokescreen defense—*see* [R124]:14511 (if Hernandez ‘was [not] involved in it [and did not] know anything about it, tell us from the beginning, Mr. McKenna;’ accusing counsel of ‘throw[ing] up ideas that are false’ because he failed to explain all defenses at the beginning of trial”); Reply Br. 28 (contending that government’s argument exceeded “personal attacks” and amounted to “burden-shifting”).

Tellingly ... 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.

... 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*;

Reply Br. 25 (emphasis added); *see* Appendix B (excerpt of pertinent rebuttal argument).

Under *de novo* review, the cumulative totality of the misconduct—and particularly the *Davis v. Zant* misconduct, given its effect on Hernandez’s Count 3 conviction—warrants reversal of *that* conviction, and the granting of a new trial. This issue was specifically identified as *remanded* by the en banc Court’s decision and has never been addressed, either factually (based upon the entirety of improper comments) or under the appropriate standard of review. The prosecutorial misconduct claim addressed by this Court is the very different issue (that this Court characterized as “procedural”) of whether the district court erred “when it declined to order a new trial or a mistrial” based upon venue-related prejudice and closing arguments specifically calculated to take advantage of this prejudice (which the en banc Court reviewed under the more deferential, abuse of discretion standard). 529 F.3d at 992.⁹

The consensus¹⁰ is that this was an extremely weak case, *at best*, for guilt on Count 3, a crucial factor in evaluating misconduct *de novo*. *Davis v. Zant*, 36 F.3d at 1551 (*de novo* review

⁹ The government raised “issue preclusion” based on “law of the case” in a supplemental brief. When the Court commenced oral argument it announced rejection of the law of the case claim. Counsel thus addressed the merits, noting no contemporaneous curative instruction for any improper comment. (At trial, an instruction—that lawyer arguments are not evidence—was given on the Monday after the Friday rebuttal closing.)

¹⁰ 529 F.3d at 1009 (evidence “circumstantial,” but “sufficient”); *id.* at 1019 (Birch, J., dissenting)(issue “very close”); *id.* at 1019 (Kravitch, J., dissenting)(case wholly insufficient).

of cumulative effect of misconduct, focusing on closeness of evidentiary contest); *U.S. v. Hands*, 184 F.3d 1322, 1333-34 (11th Cir. 1999) (same). *De novo* review of misconduct requires that the Court *not* use the “light most favorable to the government,” but rather, look at the evidence independently to determine if even a single comment, or at least multiple comments viewed cumulatively, could have tipped the jury in favor of conviction, when it might have been equally “reasonable” to acquit. *Id.* Here, a stream of comments directed to Hernandez, his counsel, and Count 3—viewed cumulatively—*could have* tipped the jury in favor of conviction, including that McKenna changed his defense, failed to raise the specific intent defense in opening statement, and manufactured false ideas, as well as all the inflammatory claims. Rehearing is warranted.

III. The Court should remand for resentencing given: the government’s waiver of any harmless error argument, the discretionary nature of the concurrent sentence doctrine, and the reasonable possibility that Hernandez would not receive a life sentence at resentencing particularly given downward departure grounds.

The government raised no harmless error argument as to Hernandez’s sentencing and has not disputed that erroneous calculation of the Count 2 guidelines or his departure eligibility would warrant resentencing.¹¹ Under the sentencing package doctrine,¹² multi-count sentencing focuses on the ultimate sentence, and when one part of the sentencing package is vacated,

¹¹ *U.S. v. Davis*, 730 F.2d 669, 671 n.2 (11th Cir.1984)(rejecting concurrent sentence doctrine where sentences “arose from an interrelated series of transactions” and government “made no affirmative showing that the likelihood of harm to the defendant in the form of adverse collateral consequences was so remote as to be insignificant”); *U.S. v. Kenyon*, 397 F.3d 1071, 1081 (8th Cir. 2005)(failure to claim harmless error is a waiver); *U.S. v. Fuentes-Jimenez*, 750 F.2d 1495, 1497 (11th Cir. 1985)(concurrent sentence doctrine discretionary).

¹² *U.S. v. Alvarez-Moreno*, 874 F.2d 1402, 1414 (11th Cir.1989) (“[M]ultiple count convictions present a district judge with the duty to produce a sentencing scheme which considers the total offenses and the defendant’s behavior.”).

remand for reconsideration of the sentencing package is required. Given the government's primary sentencing argument that Hernandez deserved a life sentence because of the entire *group* activity, rather than merely his individual conduct, *see* DE129:88 (prosecutor's final allocution: argues against departure grounds such as Hernandez's long solitary confinement, due to *overall* community harm done by the group: "This *group* has done *untold destruction to this community's sense of community and well-being.*") (emphasis added),¹³ the government cannot meet its burden to show that the original adverse departure rulings would be unaffected by correction of the Count 2 guideline and availability of a departure for reduced harm .¹⁴

CONCLUSION

Defendant Gerardo Hernandez respectfully requests that the Court grant rehearing to address these substantial issues concerning the Count 3 conviction and sentence.

¹³ The *en banc* Court's venue decision did not address this government admission at sentencing regarding the extraordinary impact of the underlying events of this case on the community.

¹⁴ In ordering that Hernandez "be imprisoned for concurrent life terms as to Counts 2 and 3," the district court treated the issue as a single set of sentencing concerns, did not distinguish the two life-eligible counts in downward departure motions, did not suggest that it would impose life based solely on Count 3, and stated merely that "issues not previously ruled on do not affect" the sentence imposed. DE129:91. The PSI reflects Count 2's guidelines (level 48) were *substantially* higher than Count 3's (level 43), and while the court gave Hernandez a 4-level role enhancement for Count 2, espionage conspiracy, no role enhancement was awarded as to Count 3. Indeed, left unresolved is whether Hernandez qualifies for minor/minimal role reduction on Count 3 given his lack of any control over such military decisions.

PAUL A. McKENNA, ESQ.
McKenna & Obront
Attorneys for Hernandez
2940 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Tel. No. (305) 373-1040

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 24th day of July, 2008 upon Caroline Heck Miller, Assistant United States Attorney, 99 NE Fourth Street, Miami, Florida 33132-2111.

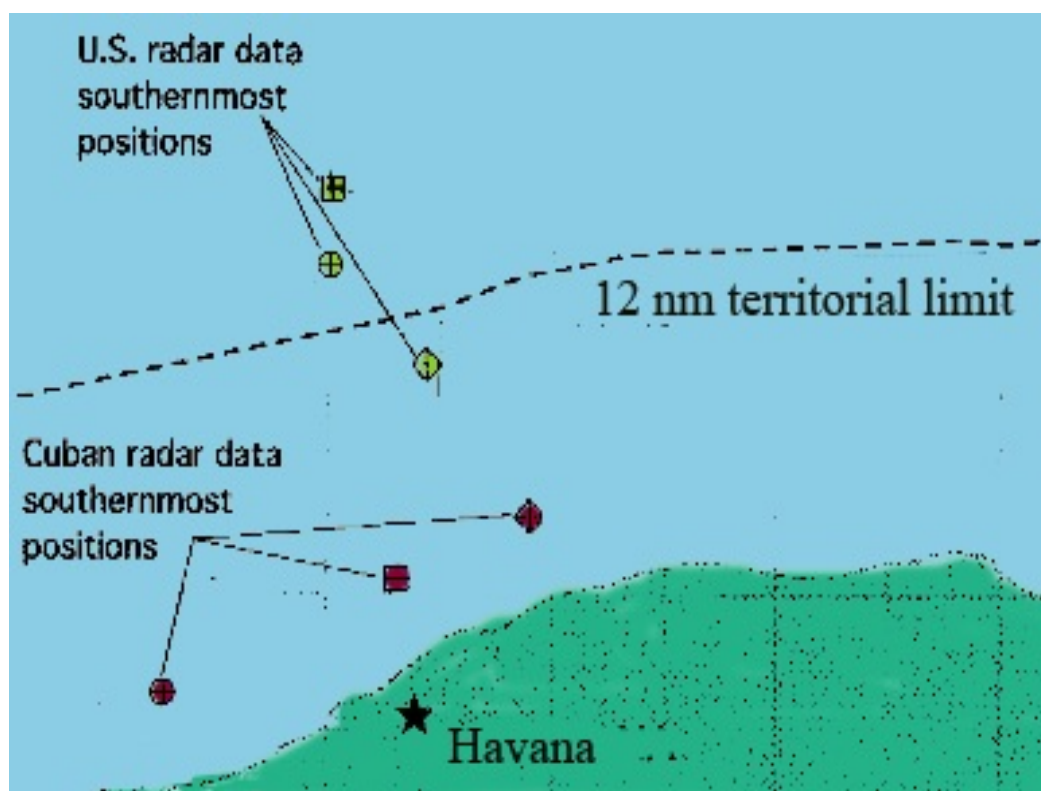
Paul A. McKenna

APPENDIX A

Panel decision – 529 F.3d 980

APPENDIX B

Competing U.S./Cuban radar evidence submitted to ICAO



APPENDIX C

Excerpt of prosecutor's rebuttal closing argument
Record Volume 124

EXCERPT OF GOVERNMENT REBUTTAL CLOSING ARGUMENT

[R124:14510] . . . 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 [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 shutdown was? If your guy doesn't know anything about it, let's go home. That is because he changes horses in the middle of the stream. He throws up what might be good day one and then uses what may be good day two. . . . 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. . . .