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 OF THE APPELLANT GERARDO HERNANDEZ FOR REHEARING EN BANC

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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

Appellant 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.

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Alejandre, Armando

Bandstra, Ted E.

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STATEMENT OF COUNSEL

I express a belief based on reasoned and studied professional judgment that the panel's affirmance of the murder conspiracy conviction of Gerardo Hernandez, based on the Cuban government's shooting down of planes operated by a Cuban-exile group in 1996, presents issues of vital legal significance in this Circuit and conflicts with the precedents of this Court and the Supreme Court as follows:

a. The panel erroneously failed to afford deference to the district court's rulings on the scope of the conspiracy charge in relation to the case as tried (specifically that the prosecution was limited to the theory that the defendant conspired to shoot down planes over international waters), despite the government's waiver on appeal of the right to seek affirmance on a theory other than that on which the jury was instructed–and the panel consequently expanded the theories of liability after the defense had relied, in closing argument, on the district court's ruling. This error requires rehearing, and a remand for a new trial, as a violation of the constitutional rule barring affirmance on theories not presented to the jury and to which the defense had no opportunity to respond and no notice of the obligation to defend, as well as the law of the case doctrine. *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005)(requiring accused to defend against charge as to which district court found insufficient evidence is prejudicial per se, regardless of whether the insufficiency finding was in error); *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991)(affirmance of conviction on legal and factual

theories different from those tried to jury deprives defendant of right to jury trial); *United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976)(law of the case doctrine requires that court of appeals evaluate sufficiency challenge in light of instruction given jury on governing law).

b. The panel majority's interpretation of *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255 (1975), as dispensing with any analysis of whether a conspiracy was directed to the commission of acts that are actually unlawful (under some applicable law, even if not within the scope of federal jurisdiction) is erroneous, in light of *United States v. Fields*, 500 F.3d 1327, 1332-33 (11th Cir. 2007)(government must prove defendant's knowledge of facts constituting offense in order to establish willful violation of law)(relying on *Bryan v. United States*, 524 U.S. 184, 194-96, 118 S.Ct. 1939,1946-47 (1998), and *Morrisette v. United States*, 342 U.S. 246, 271, 72 S.Ct. 240, 254(1952)); *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir. 1979)(government bears burden of proving accused's knowledge that object of conspiracy violates law in the United States); *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999)(to establish guilt of conspiracy, "parties must have agreed to commit an act that is itself illegal–parties cannot be found guilty of conspiring to commit an act that is not itself against the law"), and *Feola*, 420 U.S. at 685-86, 95 S.Ct. at 1264 (while intent to commit underlying offense may be inferred from scope of conspiracy, there must be proof in the first instance that the conspiracy was to commit an unlawful act), and in light of the rule of lenity.

c. The panel majority's expansion of 18 U.S.C. §§ 1111 and 1117 liability to reach a conspiracy by the Cuban government or others to take action in Cuba violates Circuit and Supreme Court precedent concerning extraterritorial statutory application and principles of exclusive territorial sovereignty with respect to foreign criminal law jurisdiction. *United States v. Lopez-Vanegas,* 493 F.3d 1305 (11th Cir. 2007)(reversing convictions where object of charged conspiracy–possession of drugs outside of U.S. with intent to distribute them outside of U.S.–violated no U.S. law); *United States v. Arbane,* 446 F.3d 1223, 1230 (11th Cir. 2006)(reversing drug importation conspiracy conviction where government established conspiracy to engage in drug activity in South America, and thus failed to meet burden to prove agreement to commit a U.S. crime); *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir. 1979)(to sustain conspiracy conviction, government required to prove defendant's knowledge that object of conspiracy violated U.S. law; thus, in drug importation prosecution, government bore burden of establishing importation was "directed at the United States")*; Munaf v. Geren*, __ U.S. __, 128 S.Ct. 2207, 2220-22 (2008) (recognizing foreign sovereign nation's jurisdiction within its own territory is necessarily exclusive and absolute and that "exemptions" from this principle must be derived from the consent of the sovereign of the territory); *Wilson v. Girard*, 354 U.S. 524, 529, 77 S.Ct. 1409, 1412 (1957)(affirming that "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction").

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C-1

STATEMENT OF COUNSEL i

TABLE OF CITATIONS vi

CERTIFICATE OF TYPE SIZE AND FONT viii

STATEMENT OF THE ISSUE FOR EN BANC REHEARING 1

STATEMENT OF THE CASE 1

ARGUMENT AND CITATIONS OF AUTHORITY FOR EN BANC REHEARING 1

A. The theory on which the panel sustained the conviction–conspiracy to shoot down planes violating Cuban airspace–contradicts the theory on which the case was argued and on which the jury was instructed, as the government expressly conceded on appeal 1

1. The government waived alternative theories on appeal 2

2. Constitutional violation and violation of law of the case doctrine to affirm conviction on theory ruled out of the case 3

B. The en banc Court should grant rehearing because the panel's expansion of the extraterritorial application of 18 U.S.C. § 1117 and novel interpretation of *Feola* contravenes *Feola's* express language as well as established precedent of the Supreme Court and this Circuit 6

C. The panel majority's conspiracy analysis contravenes well-settled Supreme Court and Circuit authority premised on fundamental principles of criminal culpability 9

CONCLUSION 9

CERTIFICATE OF SERVICE

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

TABLE OF CITATIONS

CASES:

Bouie v. City of Columbia,

378 U.S. 347, 84 S.Ct. 1697 (1964) 5

Eaton v. City of Tulsa,

415 U.S. 697, 94 S.Ct. 1228 (1974) 4

McCormick v. United States,

500 U.S. 257, 111 S.Ct. 1807 (1991) 2, 4

Munaf v. Geren,

__ U.S. __, 128 S.Ct. 2207 (2008) 5, 8

Pinkerton v. United States,

328 U.S. 640, 66 S.Ct. 1180 (1946) 6

Schooner Exchange v. McFadden,

7 Cranch 116 (1812) 5

Smith v. Massachusetts,

543 U.S. 462, 125 S.Ct. 1129 (2005) 4, 8

U.S. v. Simmons,

368 F.3d 1335 (11th Cir. 2004) 4

United States v. Arbane,

446 F.3d 1223 (11th Cir. 2006) 6

United States v. Campa,

459 F.3d 1121 (11th Cir. 2006) 1

United States v. Cole,

333 U.S. 196, 68 S.Ct. 514 (1948) 2, 4

United States v. Conroy,

589 F.2d 1258 (5th Cir. 1979) 6, 7, 9

United States v. Feola,

420 U.S. 671, 95 S.Ct. 1255 (1975) 1, 5-9

United States v. Fields,

500 F.3d 1327 (11th Cir. 2007) 6, 7

United States v. Gallo-Chamorro,

48 F.3d 502 (11th Cir. 1995) 6

United States v. Lopez-Vanegas,

493 F.3d 1305 (11th Cir. 2007) 3, 5

United States v. Spletzer,

535 F.2d 950 (5th Cir. 1976) 4

United States v. Vaghela,

169 F.3d 729 (11th Cir. 1999) 7

United States v. Webb,

139 F.3d 1390 (11th Cir. 1998) 6

United States v. Yermian,

468 U.S. 63, 104 S.Ct. 2936 (1984) 9

Wilson v. Girard,

354 U.S. 524, 77 S.Ct. 1409 (1957) 5

STATUTORY AND OTHER AUTHORITY:

18 U.S.C. § 1001 9

18 U.S.C. § 1111 . . . . 5, 6, 9

18 U.S.C. § 1117 5

18 U.S.C. § 228 7

18 U.S.C. § 751 4

CERTIFICATE OF TYPE SIZE AND FONT

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STATEMENT OF THE ISSUE FOR EN BANC REHEARING

Was the evidence sufficient to prove that the defendant wilfully joined a murder conspiracy?

STATEMENT OF THE CASE

The en banc Court resolved venue issues in this prosecution of five defendants charged as Cuban government agents and remanded to the panel to consider the remaining issues. *United States v. Campa*, 459 F.3d 1121, 1126 n.1 (11th Cir. 2006). On remand, the panel affirmed the convictions, including that of Gerardo Hernandez for murder conspiracy in the 1996 Brothers to the Rescue (BTTR) shootdown; found sentencing error as to Hernandez, Antonio Guerrero, Luis Medina, and Ruben Campa; and remanded for resentencing of three of those defendants –all but Hernandez. The panel opinion is attached, Appendix A, and reported at 529 F.3d 980.

ARGUMENT AND CITATIONS OF AUTHORITY FOR EN BANC REHEARING

The en banc Court should rehear the murder conspiracy issues based on the compelling reasons stated in Judge Kravitch's dissenting opinion and the following: (1) the panel erred in affirming on a theory that contradicts the trial court's ruling and jury instruction–unchallenged by the government on appeal–that the evidence would not sustain a theory of a criminal conspiracy to confront aircraft over Cuban territory and that the government must prove the conspiracy's goal was a shootdown in international waters; (2) the panel's decision conflicts with this Court's extraterritorial jurisdiction precedents, the statutory interpretation holding of *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255 (1975), and Supreme Court precedent on the scope of foreign sovereignty; and (3) the decision conflicts with precedent precluding reliance on speculative inferences and requiring substantial evidence under *de novo* review.

A. The theory on which the panel sustained the conviction–conspiracy to shoot down planes violating Cuban airspace–contradicts the theory on which the case was argued and on which the jury was instructed, as the government expressly conceded on appeal.[1]

At trial, the district court, in lengthy charge conference hearings addressing the murder conspiracy allegations, evidence, and underlying statute, narrowed the legal issues for the parties and the jury by concluding, in what effectively constituted a partial judgment of acquittal on Count 3, that the government had not presented a case sufficient to go to the jury on the theory of a conspiracy to commit murder by shooting down planes over Cuban airspace. R120:13876-77. The panel's *sua sponte* affirmance on grounds that *reverse* the district court's ruling and retroactively expand the theories of liability, *after* the parties presented the case to the jury in accordance with the district court's ruling, violates the constitutionally-based prohibition of sufficiency affirmance on theories not argued to the jury and to which the defense, at trial, had no opportunity to respond and no notice of the obligation to defend, *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807 (1991); *United States v. Cole*, 333 U.S. 196, 68 S.Ct. 514 (1948), and here, also violates the prohibition of affirmance on a theory of prosecution waived or abandoned on appeal by the government.

[1] *See* Gov't Br:48 n.34 (conceding that government "unsuccessfully" sought relief from jury instruction and that district court applied same ruling as to acquittal motions), Gov't Supp. Br. 33 & n.30 (conceding district court ruled and instructed jury: "the murder conspiracy also required proof that Hernandez agreed that the shootdown occur in international airspace"; government argued only that theory to the jury); R120:13876 (court rules that government had presented case based solely on intent to shoot down in international waters and had limited its evidence and arguments to that theory: "Here the government has presented their case and indicated from the very start of this case in opening statement, that the final task of the Wasp Network was to bring about murders over international waters; and the presentation of their evidence proceeded from there as that was the plan, the object of the conspiracy.").

1. The government waived alternative theories on appeal. Responding to the panel's request, following the en banc decision, for distillation of the remaining issues, the government expressly conceded that: at trial, the parties followed the district court's ruling that the government's burden included showing the defendant intended an attack in international airspace; the jury instruction enforced that ruling; and the government's arguments were in fact limited to the theory that the defendant conspired "to shoot those planes down in international air space" and "that the shootdown was planned, and anticipated by Hernandez, to occur in international airspace." Gov't Supp. Br. 33 n. 30. In *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), the Court restated its long-time rule that when the government abandons a theory of prosecution on appeal, the conviction may not be sustained on such theory. Here, the government waived any claim for affirmance on a theory of conspiracy to confront planes outside of international waters. *See Lopez-Vanegas,* 493 F.3d at 1310 n. 6 & cases cited therein.

2. Constitutional violation and violation of law of the case doctrine to affirm conviction on theory ruled out of the case. The panel's affirmance, rejecting the law on which the jury was charged and the case tried, violates fundamental constitutional strictures and the law of the case. The trial court, after excluding the foreign-airspace conspiracy theory, instructed the jurors accordingly, R125:14596, and the defense strategy–including whether to concede or contest facts in argument to the jury[2]–focused on that instruction and limitation.

The panel apparently relied on the general rule that a judgment may be affirmed on any

[2] The government, in rebuttal closing, claimed Hernandez's counsel changed his theory of defense (to match the instruction). R124:14510-11. This personal attack–nearly a full page of trial transcript–was false and improper, but implies the defense reliance on the jury instruction.

record-supported basis, *see U.S. v. Simmons*, 368 F.3d 1335, 1342 (11th Cir. 2004), but the rule has recognized limitations: law of the case and due process. *See U.S. v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976)(jury instruction that specific intent was element of charged offense of escape under 18 U.S.C. § 751 was law of the case, requiring court of appeals to evaluate sufficiency challenge under instruction given, regardless of whether § 751 always requires specific intent).

The Supreme Court has long condemned affirming a conviction on the basis of legal or factual theories ruled out of the case at trial. *See McCormick*, 500 U.S. at 270, 275-76, 111 S.Ct. at 1818 (appellate affirmance of conviction on basis of legal and factual grounds that differed from those on which the case was tried and the jury instructed fails to satisfy defendant's right to jury trial; reversal required where appellate court failed to "examine the record in light of the instructions given the jury ... but considered the evidence in light of its own standard"); *Cole*, 333 U.S. at 201-202, 68 S.Ct. at 517 (due process requires that conviction be reviewed on appeal "on consideration of the case as it was tried and as the issues were determined in the trial court"); *Eaton v. City of Tulsa*, 415 U.S. 697, 94 S.Ct. 1228 (1974)(affirmance of contempt conviction on basis neither alleged in the information nor found by trial court, but instead gleaned by appellate court from trial record, deprived defendant of due process). *See also Smith v. Massachusetts,* 543 U.S. 462, 125 S.Ct. 1129 (2005)(where trial court finds evidence insufficient, Constitution prohibits requiring accused to further defend against charge, even if evidence later found sufficient; trial court ruling's impact on defense is prejudicial per se).

As in *McCormick*, affirmance of the conviction based on a legal theory at odds with that applied at trial, even if the panel were correct on the law, requires vacating the conviction and

ordering a new trial under the newly-stated legal standard. *See McCormick*, 500 U.S. at 270, 111 S.Ct. at 1815 (even if court of appeals' legal interpretation was correct, "the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered").[3]

B. The en banc Court should grant rehearing because the panel's expansion of the extraterritorial application of 18 U.S.C. § 1117 and novel interpretation of *Feola* contravenes *Feola's* express language as well as established precedent of the Supreme Court and this Circuit.

______The panel's decision expanding extraterritorial application of 18 U.S.C. § 1117 under a novel reading of *Feola* that improperly dispenses with the requirement of a legally culpable state of mind in conspiracy cases is contrary to: *Feola*'s express language as well as 30 years of this Court's *Feola*-related precedent and *Munaf v. Geren*, 128 S.Ct. at 2220-22, which holds the jurisdiction of a foreign nation is "exclusive and absolute" within its territory and "exemptions" from this rule "'must be derived from the consent of the sovereign of the territory.'" (quoting *Schooner Exchange v. McFadden*, 7 Cranch 116, 136, 143, 146 (1812); citing *Wilson v. Girard*, 354 U.S. 524, 529, 77 S.Ct. 1409, 1412 (1957)("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction").

The panel's interpretation of 18 U.S.C. § 1111 and § 1117 as defining murder offenses in Cuba and criminalizing conspiracies to take actions in Cuba violates principles of statutory interpretation regarding extraterritorial application of the law and exclusive territorial sovereignty with respect to the criminal law. *See Lopez-Vanegas,* 493 F.3d at 1313 (federal drug

[3] Retroactive expansion of liability also violates the due process right of fair warning. *Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 1707 (1964)(affirming convictions on appeal on basis of unforeseeable interpretation of statutory language violated due process).

statute did not apply extraterritorially; failure to prove object of conspiracy–possessing drugs outside of U.S., with intent to distribute outside of U.S.–violated any U.S. law compelled reversal); *United States v. Arbane,* 446 F.3d 1223, 1230 (11th Cir. 2006)(*accord*); *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir. 1979)(conspiracy to import drugs required proof of agreement with intended purpose of violating U.S. law; "government must meet the burden of showing that the conspiracy to import was directed at the United States").

Contrary to the panel, *Feola* is not inconsistent with this line of authority. The panel quoted the statement in *Feola* that "'[f]ederal jurisdiction always exists where the substantive offense is committed in the manner therein described.'" 529 F.3d at 108 (quoting *Feola*, 420 U.S. at 696, 95 S.Ct. at 1269). But this statement must be viewed in the context of *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180 (1946)(imposing liability for substantive offense *for those proved to be knowing members of conspiracy*); *see also United States v. Gallo-Chamorro*, 48 F.3d 502, 507 (11th Cir. 1995)("narrow scope" of *Pinkerton* liability "requires defendant's participation in a conspiracy"). This Court has recognized the limited nature of *Feola*, which "concerned merely the interpretation of a conspiracy statute in order to divine and effectuate congressional intent." *Conroy*, 589 F.2d at 1270. *Conroy* perceived that the holding in *Feola*, that 18 U.S.C. § 1111 does not require that an assailant know his victim is a federal officer, was based on the Supreme Court's desire to give effect to congressional intent as to that particular statute, an intent to accord "maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts." *Id.* at 1270 (quoting *Feola*, 420 U.S. at 684, 95 S.Ct. at 1264); *United States v. Fields*, 500 F.3d 1327, 1330 (11th Cir. 2007)(*accord*);

United States v. Webb, 139 F.3d 1390, 1394 n.3 (11th Cir. 1998)(same). Thus, under *Feola*, whether "individuals know that their planned joint venture violates federal as well as state law seems totally irrelevant to that purpose of conspiracy law which seeks to protect society from the dangers of concerted criminal activity." *Feola*, 420 U.S. at 693, 95 S.Ct. at 1268; *see Conroy*, 589 F.2d at 1270 (if defendant's plan was only to participate in exporting drugs outside the U.S., "there would be no criminal intent ... cognizable in an American court").

The panel's interpretation of *Feola* as dispensing with any analysis of whether a conspiracy was directed to conduct that was actually unlawful (under some applicable law, even if not federally) is erroneous, in light of *Fields*, 500 F.3d at 1332 (failure to prove defendant's lack of knowledge of facts constituting offense–that child resided in another state and defendant failed to pay child support–precluded conviction under 18 U.S.C. § 228 for willful failure to pay child support obligation to child residing in another state; recognizing "unless the defendant has knowledge of the facts constituting the offense, he cannot be said to have acted with the requisite willfulness to violate the law"); *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999)("parties must have agreed to commit act that is illegal–parties cannot be found guilty of conspiring to commit an act that is not itself against the law"), and *Feola* (while intent to commit underlying offense may be inferred from scope of conspiracy, there must be proof first that the conspiracy was to commit an unlawful act, 420 U.S. at 684), as well as the rule of lenity.

Indeed, the district court expressly invoked *Feola*'s recognition that knowledge may be relevant, predicating its ruling that the government was required to prove an international-waters plan in light of the fact that the government had presented its case solely on that specific

theory. *See* R120:13876 (recognizing that, under *Feola*, a defendant's reasonable interpretation of a victim's unlawful use of force and mistake of fact may negate the existence of mens rea). In making this ruling, the court afforded Hernandez the functional equivalent of a partial judgment of acquittal, finding that the government failed to furnish sufficient evidence that Hernandez conspired to shoot down planes illegally in Cuban airspace. *Id.* The panel, in concluding that the government did not have to prove Hernandez's mens rea with respect to a plan to commit murder in international waters and that, in any event, there was sufficient evidence to support that theory, therefore affirmed the conviction on a wholly improper basis. *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005) (defendant cannot permissibly be ensnared at trial by a retroactive decision undermining the finding of insufficiency).

As the district court perceived, the limitations noted by the Supreme Court in *Feola* apply to the instant prosecution, where the government failed to offer any proof that a shootdown would have been unlawful had it occurred in Cuban airspace, and where a confrontation in Cuban airspace of BTTR pilots who had repeatedly penetrated Cuban airspace unlawfully, in violation of settled sovereignty principles of international law and United States regulations, including once on the very day of the shootdown, was clearly lawful. *See also Munaf v. Geren*, 128 S.Ct. at 2221-2222 ("[T]he jurisdiction of the nation within its territory is necessarily exclusive and absolute.'")(citing *Schooner Exchange*, 7 Cranch at 136 & other cases cited therein). These circumstances, involving principles of sovereignty that require a court "to proceed with the circumspection appropriate when ... adjudicating issues inevitably entangled in the conduct of international relations," *Munaf,* 128 S.Ct. at 2218, differ crucially from *Feola*,

where the defendant, involved in a "classic narcotics 'rip-off'" that led to an assault of an undercover federal agent, knew from the outset he was engaged in an illegal "planned course of conduct," regardless of the federal identity of the victim. 420 U.S. at 674, 685, 95 S.Ct. at 1259, 1264.[4]

Instead, Hernandez's lack of a proven illegal intent "negates the very existence of mens rea."[5] *Id*. at 685, 95 S.Ct. at 1264. Because the *only* circumstance in which a confrontation plan could be considered unlawful was where it was to be carried out in international, rather than Cuban, airspace–and thus a belief that BTTR planes were unlawfully infringing Cuban sovereignty "would not be consistent with criminal intent," *Id*. at 686, 95 S.Ct. at 1264–proof of Hernandez's knowledge remained an element of the offense on which the government bore the burden of proof, pursuant to long-held principles of conspiracy law, including *Feola*.

C. The panel majority's conspiracy analysis contravenes well-settled Supreme Court and Circuit authority premised on fundamental principles of criminal culpability.

For the reasons stated in Judge Kravitch's dissent, 529 F.3d at 1020-26, the panel's conspiracy analysis unduly lessens the stringency of sufficiency review and erodes precedent.

CONCLUSION

Defendant Gerardo Hernandez respectfully requests rehearing *en banc*.

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[4] *Cf. U.S. v. Yermian*, 468 U.S. 63, 75, 104 S.Ct. 2936, 2942 (1984)(in 18 U.S.C. § 1001 false statement offense, *actual* knowledge agency involved is federal not required; explaining statute's wide scope rests on Congress's clear power and intention to reach such conduct). Congress did not intend to, nor could it, regulate Cuban airspace. *See Conroy*, 589 F.2d at 1270 (noting lack of congressional intent, if not power, to criminalize foreign conspiratorial object).

[5] 18 U.S.C. § 1111(a): "Murder is the *unlawful* killing of a human being ..."(emphasis added).

____
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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