NO. 01-17176-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

GERARDO HERNANDEZ, RUBEN CAMPA,
and RENE GONZALEZ,

Defendants/appellants.

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

JOINT SUPPLEMENTAL BRIEF OF THE APPELLANTS
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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

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

Appellants Gerardo Hernandez, Ruben Campa, and Rene Gonzalez file 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.

No additional interested parties have been added since the filing of the last certificate of interested persons.

STATEMENT REGARDING ORAL ARGUMENT

The defendants respectfully submit that they remain available for additional oral argument to the extent the Court deems it to be of assistance in the just resolution of this appeal.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF CITATIONS v

STATEMENT REGARDING ADOPTION OF BRIEFS viii

STATEMENT OF ISSUES 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

SUPPLEMENTAL ARGUMENT 4

I. Sufficiency of the Evidence 4

(a) Count 3 conspiracy to commit murder 4

(b) Count 2 conspiracy to commit espionage, i.e., to transmit closely-held national defense information to Cuba 17

(c) Count 7 possession of false passport by Campa 22

II. Improper Application of CIPA (Classified Information Procedures Act) Resulting in Procedural and Substantive Errors 23

(a) Defense request for unsealing of non-classified portions of *ex parte* proceedings 23

(b) Improper exclusion of counsel from proceedings relating to CIPA exclusion of material seized from the defendants 27

(c) Standard for determining whether material meets the threshold for overcoming a claim of CIPA protection 28

III. Batson Violations 34

IV. Instructional Errors 38

(a) Denial of defense theory instruction on justification defense 38

(b) Specific intent element of 18 U.S.C. § 951 41

V. Suppression of Fruits of Improperly Authorized and Executed FISA Searches 43

CONCLUSION 43

CERTIFICATE OF COMPLIANCE 45

APPENDIX A (excerpt of Hernandez Reply Brief)

APPENDIX B (excerpt of Gonzalez Reply Brief)

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES:

* *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) 2, 34, 38

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) 28-29, 31

Bui v. Haley, 321 F.3d 1304 (11th Cir. 2003) 37-38

* *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003) 12

* *Gorin v. United States*, 312 U.S. 19, 61 S.Ct. 429 (1941) 18

* *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963 (1957) 10

* *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673 (2000) 11

Lambert v. California, 355 U.S. 225, 78 S.Ct. 240 (1957) 42

Pinkerton v. United States, 328 U.S. 640, 60 S.Ct. 1180 (1946) 22

* *Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056 (1971) 14

United States v. Burston, 159 F.3d 1328 (11th Cir. 1998) 14

* *United States v. Fernandez*, 797 F.2d 943 (11th Cir. 1986) 9

* *United States v. Gonzalez*, 71 F.3d 819 (11th Cir. 1996) 14

* *United States v. Horton*, 646 F.2d 181 (5th Cir. 1981) 7

United States v. Horsley, 846 F.2d 1543 (11th Cir. 1989) 38

United States v. Klimavicius-Viloria, 144 F.3d 1249 (9th Cir. 1998) 26

* *United States v. Martinez*, 83 F.3d 371 (11th Cir. 1996) 8

* *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006) 23-27, 30-32

* *United States v. Mercer*, 165 F.3d 1331 (11th Cir. 1999) 6

* *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001) 37

* *United States v. Opdahl*, 930 F.2d 1530 (11th Cir.1991) 41

United States v. Pantelakis, 58 F.3d 567 (10th Cir. 1995) 11

* *United States v. Pedro*, 999 F.2d 497 (11th Cir. 1993) 6

United States v. Porter, 591 F.2d 1048 (5th Cir. 1979) 22

United States v. Rodriguez, 799 F.2d 649 (11th Cir. 1986) 29

* *United States v. Rosen*, 445 F.Supp.2d 602 (E.D. Va. 2006) 18

* *United States v. Ruiz*, 59 F.3d 1151 (11th Cir. 1995) 40

* *United States v. Squillacotte*, 221 F.3d 542 (4th Cir. 2000) 18

* *United States v. Vaghela*, 169 F.3d 729 (11th Cir. 1999) 6

United States v. Varca, 896 F.2d 900 (5th Cir. 1990) 31

* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464 (1994) . . 42

* *United States v. Witek*, 61 F.3d 819 (11th Cir. 1995) 13

United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989) 26, 30

STATUTORY AND OTHER AUTHORITY:

18 U.S.C. § 793(g) 18

18 U.S.C. § 794(a) 17-18

18 U.S.C. § 951 . . . . 2, 39, 41

18 U.S.C. § 1111 13

18 U.S.C. § 1117 13

18 U.S.C. App. § 4 (CIPA) 1, 3-4, 11, 19, 23-342, 34-35, 43

Fed. R. App. P. 28(i) viii

Fed. R. Crim. P. 16 . . . . 1, 25, 27

28 C.F.R. § 73.01 41

H.R. Rep. No. 96-831 (1980) 27

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLANTS

Appellants Gerardo Hernandez, Ruben Campa, and Rene Gonzalez, pursuant to Fed. R. App. P. 28(i), hereby adopt the supplemental appellate briefs filed in the instant appeal by co-appellants Antonio Guerrero and Luis Medina.

SUPPLEMENTAL STATEMENT OF THE ISSUES

I. Whether the evidence was insufficient to sustain conspiracy and other convictions, and, as to Count 3, whether the prosecution violated the Foreign Sovereign Immunity Act and whether the district court erroneously instructed the jury regarding the applicability of liability standards under the International Civil Aeronautics Organization.

II. Whether the district court erred both procedurally and substantively by: (1) conducting *ex parte* CIPA proceedings and excluding defense counsel from the crucial CIPA § 4 hearing to resolve disputed discovery issues, violating the statute and due process; (2) failing to disclose non-classified portions of the *ex parte* hearing; (3) failing to reconsider its rulings in light of trial defenses revealing the significance of CIPA evidence; and (4) permitting the government to suppress discoverable evidence in violation of CIPA, Fed.R.Crim.P. 16, and due process.

III. Whether the district court erred in overruling the defendants' *Batson* objections.

IV. Whether the district court erred in denying an instruction on the justification theory of defense and the wrongful intent element of 18 U.S.C. § 951.

V. Whether the district court erred in denying motions to suppress under the Foreign Intelligence Surveillance Act.

SUPPLEMENTAL STATEMENT OF THE CASE

The defendants were arrested in September 1998 and have each completed approximately 10 years of their prison sentences under federal calculations. Hence, while each appellate issue remains important to the just resolution of the appeal, and several issues present significant questions of law, including first impression issues, the defendants' most pressing concern is a resolution of the appeal that affords meaningful relief at this time.[1]

The interests of judicial economy and potential sentence mitigation would best be served by vacating the counts of conviction as to which the

[1] It is expected the defendants will seek certiorari from the *en banc* decision upon the Court's entry of judgment in this appeal; however, the filing of a certiorari petition will not ordinarily either stay this Court's mandate or afford immediate relief, given Supreme Court case calendaring.

evidence was insufficient, including Counts 2, 3, and 7, and granting a new trial as to the remaining counts based on arguments made in the instant brief and Guerrero's supplemental brief.

Alternatively, appellants pray that the Court grant the relief requested in Guerrero's supplemental brief: (1) reversing, and remanding for a new trial, on counts of conviction as to which evidence was highly contested, and (2) granting *de novo* resentencing as to the remaining counts, thereby affording defendants—including Rene Gonzalez, who has already completed most of his 15-year sentence—a meaningful opportunity for relief.

These resolutions would effectuate judicial economy and obviate the need to fully address CIPA or sentencing issues because, depending on the proceedings on remand, such issues may not resurface.

SUPPLEMENTAL ARGUMENT AND CITATIONS OF AUTHORITY

I. Sufficiency of the Evidence.

(a) Count 3 conspiracy to commit murder.

The insufficiency of the evidence to convict Gerardo Hernandez of conspiracy to commit first degree murder within the special maritime and territorial jurisdiction of the United States was extensively briefed. Hernandez-Br:2-16 (facts); Hernandez-Br:17-21 (argument summary); Hernandez-Br:26-43 (argument); Hernandez-Reply-Br:1-22 (reply argument). This issue was also a principal subject of oral argument before this Court in March 2004. Based on the prior arguments, Hernandez seeks relief from this conviction, which was premised on the Cuban military's actions in shooting down two Brothers to the Rescue (BTTR) planes and killing four persons on those planes. For ease of reference, attached as Appendix A (and added to this brief's word count) are excerpts of the Hernandez reply brief argument on insufficiency of the evidence to sustain this conviction.

Hernandez submits that of all of the issues in this appeal, none presents

a starker contravention of fundamental principles of criminal law than his conviction of this offense. His counsel argued in opening statement that he was being made a scapegoat by the prosecution, and nothing that transpired thereafter has changed that fact. Government arguments that he warned other agents of a possible attempt by Cuba to confront illegal BTTR incursions into Cuban territory in no way establish any element of the offense. The government's unique theory of *respondeat inferior*—which would disregard entirely Cuba as a sovereign nation with its own government, law enforcement and military hierarchy, and laws—is without legal support and would set an untenably dangerous precedent on this record, particularly in relation to litigation involving law enforcement officers and foreign nationals.

Hernandez offers the following *summary* of arguments in his briefs: Under the unique facts of this case—in which the prosecution sought to attribute Cuba's fatal decisions to an individual agent—the evidence failed to establish that Hernandez knew of and joined a plan to commit murder. Speculative inferences cannot sustain the government's burden to prove by "substantial evidence" the defendant's guilt of a murder conspiracy.

Hernandez-Br:27-29 (citing, *inter alia*, *United States v. Mercer*, 165 F.3d 1331, 1333 (11th Cir. 1999) (*substantial* evidence required to prove defendant's guilt of conspiracy); *United States v. Pedro*, 999 F.2d 497, 499 (11th Cir. 1993) (rejecting speculation as means of proving conspiratorial agreement)). And, as the government conceded in emergency filings attempting to reduce its burden of proof, the government failed to prove Hernandez's prior knowledge of any plan by Cuba to act outside the scope of it own sovereignty and territorial jurisdiction.[2] Hernandez-Br:29-33 (citing, *inter alia*, *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999) ("[t]o be guilty 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").

The government failed to prove that Hernandez—by acting as a Cuban

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[2] Unsuccessfully seeking jury instruction relief in this Court, the government conceded this point, representing that requiring proof of a plan to act beyond Cuban territorial jurisdiction "imposes an insurmountable barrier to this prosecution." Petition for Writ of Prohibition (No. 01-12887) at 27; *id*. at 21 ("in this trial, this presents an insurmountable hurdle for the United States").

field agent—*knew* of an unlawful plan by or became a *member* of a *conspiracy among high-level superiors* in his government. Nor was there any evidence of Hernandez's inclusion in a chain of *decisionmaking* regarding *how* Cuba would confront illegal BTTR flights. Hernandez-Br:33-35 (citing cases rejecting presumption of defendant's knowledge of illegal goal premised on defendant's employment relationship with actual criminal actors in either business or military context, *e.g.*, *United States v. Horton*, 646 F.2d 181, 185 (5th Cir. 1981) (rejecting argument that "intimate business relationship" implied defendant "must have known" of illegal plan of alleged co-conspirator)).

The prosecution did not establish Hernandez's knowledge of the essential conspiratorial objective, i.e., murder. Hernandez-Br:35-37 (explaining that government failed to call any witness to offer interpretation of messages or to assert that code was used, rather than ordinary words); *id*. at 20 (noting that general expectation of "confrontation" by Cuba of BTTR airspace incursions was "a forced grounding of such aircraft under *threat* of law-enforcement action by Cuba") (emphasis added); *see also* GH-Ex:8(E)

(Cuban notes of official protest to U.S. warning of future interdiction of BTTR territorial violations); R79:8713 (U.S. government interpreted Cuba's warnings as relating to "an attempt to force down the plane" which risked "an accident or some sort of crash or inadvertent encounter between planes"); GH-Ex:35(A) (BTTR pilots believed Cuban air force would confront future overflights and compel planes to land).

There is no evidence that Hernandez knew of, or intended to join, a conspiracy to engage in an *unlawful* "confrontation", much less murder. Hernandez-Br:37-39 (citing Eleventh Circuit decisions rejecting government's in-for-a-penny-in-for-a-pound premise for attributing unrevealed conspiratorial goals even where defendants were engaged in other joint criminal activity, *e.g.*, *United States v. Martinez*, 83 F.3d 371, 373-75 (11th Cir. 1996) (evidence insufficient to prove robbery conspirator joined drug conspiracy where defendant privy to discussion regarding drugs)). The government's speculative interpretation of plain language in messages from Cuba fails to justify attributing Cuba's actions to Hernandez. *If* Cuba

intended–from the beginning–to commit murder, Hernandez was not told of the plan. Hernandez-Reply-Br:8-10 (citing *United States v. Fernandez*, 797 F.2d 943, 949 (11th Cir. 1986) (proof of understanding of conspiratorial object requires more than vague language)). The government's attempt to stretch the words, "confrontation" of "incursions" into Cuban territory, to mean wanton murder of innocents, lacks any evidentiary foundation. Hernandez Reply Br. 16-20. The government has no basis to assert that Hernandez knew that the *rules of engagement* for this confrontation would include firing without any warning or justification on innocent flyers in international waters, particularly absent any prior such Cuban acts of aggression against U.S. citizens.

The evidence failed to show that Hernandez's agency actions—compliance with facially lawful requests by his government—were conducted with malice aforethought. Hernandez-Br:39-41. His sole supposed action was to warn another agent that Cuba intended to confront BTTR flights. And the only sign of *criminality* in Cuba's actions came *after the fact*,

when the U.S. government asserted, even as Cuba disputed, that planes were shot down in international airspace without justification.

The government's *post hoc* reasoning, speculating that Hernandez's commendations for good work are really thanks for joining a murder conspiracy, Gov't-Br:26, 45, rests on *speculation* that Cuba was talking about murder or that Cuba's mere post hoc words could somehow convert Hernandez into a guilty conspirator, by giving him a good work evaluation. Most importantly, the government's post hoc thesis is premised on a combination of passionate emotion and a proposition of law long rejected as to the legal effect of after-the-fact commentary about a *completed* offense. Hernandez-Reply-Br:20-23 (citing *Grunewald v. United States*, 353 U.S. 391, 403-05, 77 S.Ct. 963, 973-74 (1957) (rejecting imputation of guilt of conspiracy from actions and statements "after [the conspiracy's] central objectives have been attained")).

The government's failure of proof as to knowledge, willfulness, and every other element of the offense compels reversal. Hernandez-Br:41-44.

In addition to the above summary of his briefs, Hernandez notes:

1. The government has repeatedly focused on Hernandez's possible anticipation of a "confrontation" by Cuban authorities if BTTR aircraft again breached Cuban territorial sovereignty and the possibility that Hernandez informed Gonzalez that Cuba did not want him to participate in BTTR flights. Even if such were the case, the fact remains that in every anticipated law enforcement "confrontation," it is routine that undercover agents are warned to stay away. Common sense reflects that "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, 120 S.Ct. 673, 680 (2000) (Stevens, J., concurring) (emphasis added); *cf. United States v. Pantelakis*, 58 F.3d 567, 568 (10th Cir. 1995) ("The fact that he anticipated a confrontation does not ... convert what would otherwise be an intent to lawfully defend oneself into an intent to commit a felony.").

In Miami, the Elián Gonzalez raid by U.S. law enforcement was an

armed confrontation that depended on surprise, in which U.S. law enforcement authorities would have warned off undercover agents who could have gotten caught up in the confrontation. But only conspiracy theorists would assume or believe that such warnings implied an intent to commit any unlawful act in that incident or any other government enforcement action. *See Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir. 2003) (holding that doctrine of *respondeat superior* did not apply to mere foreseeability that excessive force might be employed in armed law enforcement confrontation–the Elián raid).

2. If the government had been afforded its requested jury instruction proposing the theory of a conspiracy to confront illegal BTTR flights *within* Cuba, that would have presented an additional set of legal problems for the prosecution, in that the government would have asserted jurisdiction over a foreign sovereign's military or law enforcement effort to confront, within its own borders, an unlawful incursion by a hostile foreign faction that was seeking, at a minimum, to destabilize the government, a prosecutorial reach that is plainly beyond the scope of the statutory enactment relating to the

special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. §§ 1111, 1117. After the government conceded to the district court that it was not prepared to address the legality of a Cuban confrontation of BTTR aircraft within Cuba, R120:13869 (government concedes it does not "know what the law in Cuba is" or under what conditions Cuba's actions would have been unlawful had a confrontation occurred in Cuban airspace), the district court rejected the government's requested expansive instruction.

This Court denied the government's petition for an extraordinary writ to obtain such an instruction. *See* Order Denying Petition (No. 01-12887), May 25, 2001. And the government *failed* to raise any further challenge to the instructions either in its answer brief or at oral argument.

The attempt by the government to revive the sovereignty/jurisdiction issue in a letter of supplemental authority two weeks *following* oral argument in March 2004 was plainly untimely, as would be any attempt to do so now. *See, e.g.*, *United States v. Witek*, 61 F.3d 819, 824 n. 7 (11th Cir. 1995) (appellee-government waived contention by failing to raise it prior to oral argument);

United States v. Gonzalez, 71 F.3d 819, 828 n. 19 (11th Cir. 1996) (government waived challenge it raised in district court to defendant's standing by failing to properly raise the "issue in this Court"); *United States v. Burston*, 159 F.3d 1328, 1334 n. 10 (11th Cir. 1998) (government implicitly conceded—by not briefing issue—that defendant preserved objection to exclusion of evidence). Thus, the government's abandoned instructional claim is does not present a cognizable argument for the government either in relation to sufficiency of the evidence or the application of the Foreign Sovereign Immunity Act. *See also Rewis v. United States*, 401 U.S. 808, 814, 91 S.Ct. 1056, 1060 (1971) (criminal conviction cannot be affirmed on basis of theory not presented to jury).

Nevertheless, it is important to recognize that the district court based the jury instructions on both the case as tried and the government's express admissions, not, as the government claimed, on a general rejection of case law concerning jurisdiction in conspiracy cases. R120:13790-13898 (charge conference as to Count 3); R121:14025 (district court rules government's

petition for writ of prohibition made "gross misrepresentations" concerning court's application of governing case law to facts of this case). The government's belated post-oral argument attempt to raise a unique legal claim as to extraterritorial offenses involving hostile territorial incursions by foreign factions—where another sovereign's military or law enforcement response, within its own territory, is concerned—ignored that the issue was not an abstract question, but a specific, fact-bound determination by the district court, premised on trial evidence and arguments, as the final day-long charge conference and the court's express rulings revealed. *See* Gov't Pet. for Writ of Prohibition (No. 01-12887) at 26 (government concedes that district court's ruling was based in part on concern "that the location issue could bear on a defense claim of justification or use of deadly force"); *id*. at 32 (government concedes "extensive evidence regarding alleged prior violent acts by" Jose Basulto, "including prior incursions into Cuban airspace").

The government acknowledged at oral argument in March 2004 that it (1) was not contesting Cuba's sovereignty over its own territory—with the

implications that such sovereignty carries on the facts here—*see* Hernandez-Br:30-33; Hernandez Reply Br. 1; and (2) had not raised as an issue on appeal any jury instruction error, noting instead that it only "mentioned" its prior dispute over jury instructions "in a footnote."

Ultimately, the territorial sovereignty element, as the government describes it, is not essential to Hernandez's arguments on insufficiency of the evidence. However, the government's belated contesting of the instructions represents but another facet of the speculative weakness underlying the prosecution of Hernandez for the BTTR shootdown, a prosecution that, as defense counsel argued from the very beginning of the case, seeks to make Hernandez a scapegoat for what Cuba did. R29:1624.

With respect to Hernandez's subsidiary claims relating to the Foreign Sovereign Immunity Act and instructional error in the Count 3 instructions given to the jury, which lowered the standard for finding a violation of the underlying murder statute and precipitated improper government closing arguments, Hernandez refers the Court to the arguments in his initial brief at 23-26, 55-58, his reply brief at 23-24, 29-30, and Guerrero's supplemental brief.

(b) Count 2 conspiracy to commit espionage, i.e., to transmit closely-held national defense information to Cuba.

The insufficiency of the evidence that these defendants conspired to gather classified documents or other closely-held U.S. government secrets was extensively briefed, and the defendants re-adopt their arguments. *See* Guerrero-Br:38-54; Guerrero-Reply-Br:15-27; Medina-Br:4-17, 19-35; Medina-Reply-Br:3-13; Hernandez-Br:58-59; Hernandez-Reply-Br:30. Since the filing of the briefs, there have been no new decisions in any circuit regarding prosecutions under 18 U.S.C. § 794(a) and apparently no reported prosecutions under that statute.

Nevertheless, in one recent district court decision, the court conducted an extensive analysis of the history and judicial interpretation of § 794(a)'s criminalization of the transmission of "information relating to the national defense" to a foreign nation, as prohibited in § 794(a), ultimately reading the statutory terms in a manner consistent with that advocated here by the appellants:

> Thus, the phrase "information relating to the national defense," while potentially quite broad, is limited and clarified by the

> requirements that the information be a *government secret*, i.e., that it is closely held by the government, and that the information is the type which, if disclosed, could threaten the national security of the United States.

United States v. Rosen, 445 F.Supp.2d 602, 622 (E.D. Va. 2006) (interpreting the key terms of 18 U.S.C. §§ 793(g) and 794(a)) (emphasis added); *id*. at 625 ("government in this case must prove beyond a reasonable doubt that the defendants knew the information was [national defense information], i.e., that the information was closely held by the United States and that disclosure of this information might potentially harm the United States").

The *Rosen* court's statement of the law comports with the Supreme Court and circuit precedent previously cited by appellants. Hernandez-Br:58 (citing *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 434 (1941)); Guerrero Br. 38-39 (citing circuit cases, including *United States v. Squillacotte*, 221 F.3d 542 (4th Cir. 2000)); *see Squillacotte*, 221 F.3d at 577 (holding that under *Gorin*, "the central issue is the secrecy of the information, which is determined by the government's actions").

That these defendants, though admittedly foreign agents, neither

obtained nor attempted to obtain such "government secrets" is both clear from the record and confirmed by the absence of any substantive espionage charges in this case, despite years of investigation and FISA surveillance, extensive seizures of records and communications, and exhaustive study of the results. In particular, the record, viewed as a whole, demonstrates that Guerrero's actions consisted of transmitting military information derived from visual observation and non-secret sources at a public-access military base, actions which, at worst, constitute transmission of "open-source intelligence," not espionage.

The government's principal argument—that the literal reading of a handful of directives to Guerrero over the course of his years on the base, such as "get 'anything else that you can related to that building,'" Gov't-Br:34 (quoting GX:DG141:16), permits an inference that no limits were placed on Guerrero and that Cuba was thereby authorizing him to breach government protections securing closely-held material—fails to take into consideration the surrounding communications and context that reflect unequivocally that Guerrero was not to engage in security breaches, because he was a long-term

eyes-and-ears agent, whose value to Cuba lay not in becoming a 007 operative trying to spirit away classified information, but in observing open military movements at the base. Thus, the government's theory ignores its own documentary and testimonial evidence that Guerrero's overarching instruction by his Cuban government supervisors was to "take advantage of open public activities, anytime that it is justified, and *without violating any security measures*." R52:4890 (emphasis added); GX:DG141.

Guerrero's superiors were well aware that "he does not have possibilities of obtaining information about military plans except for those that might be detected by signs." R52:4862. And the proof of the limitations is Guerrero's actual conduct. Guerrero was on the base for five years, from 1993-1998. The government, in reviewing five years of his communications, has failed to cite any but a handful of instances involving more than visual observations of matters that any visitor could take in by driving through the base, and points to no instances at all of actual espionage. Gov't-Br:14-15. Moreover, after discovering his foreign-agent status, the government left Guerrero on the base for more than 18 months, *see* Gov't-Br:16-17, and at no

time did he compromise any of the base's security regulations. The nature of his agreement with Cuba simply did not reach the level of an espionage conspiracy.

Similarly, any discussion by Cuban agents regarding having an agent seek employment at or near the SouthCom facility, *without* seeking a security clearance, had plainly not reached the point of an agreement to obtain government secrets, as opposed to open-source intelligence relating to goings-on at SouthCom. *See*, *e.g.*, R41:3339 (key government witness, the charged co-conspirator who was to obtain SouthCom-related employment, "*never* had any discussion about getting secret information or anything like that" and was never instructed by Cuba or the defendants to seek "national security defense information") (emphasis added).

The legal landscape as to the proof requirements of this offense remains unchanged from the time of the prior briefing. Hence, appellants rely on their briefs and oral argument concerning these issues and request that the Count 2 convictions be vacated or that a new trial be granted as requested in the Guerrero supplemental brief.

(c) Count 7 possession of false passport by Campa.

Evidentiary deficiencies as to Count 7, charging Campa with possessing a false passport prepared by Cuba as an emergency "escape" document and found in Hernandez's residence, where Campa had not been for over a year, warrant reversal. Campa Br. 60-63; Campa Reply Br. 28-30. While Hernandez had constructive possession of this document, found hidden in his house, and Cuban officials intended the document to be available for possible future use by Campa, the evidentiary link to *Campa's* actual personal knowledge of the existence and location of that document, and constructive possession of it, is missing. Nor did the government proceed on a *Pinkerton v. United States*, 328 U.S. 640, 60 S.Ct. 1180 (1946), vicarious liability theory to attribute Hernandez's possession to Campa. *See United States v. Porter*, 591 F.2d 1048, 1055-56 n. 6 (5th Cir. 1979) (conviction cannot be affirmed on theory not presented to jury). Campa rests on the prior briefs as to this issue and requests that the Count 7 conviction be vacated or that a new trial be granted as requested in the Guerrero supplemental brief.[3]

[3] Gonzalez adopts and relies on his prior briefing of the insufficiency of the evidence as to Count 1 conspiracy to defraud. Gonzalez Br. 24-31.

II. Improper Application of CIPA (Classified Information Procedures Act) Resulting in Procedural and Substantive Errors.

The procedural and substantive claims relating to CIPA were briefed by Ruben Campa, at pages 18-44 of his initial brief and further addressed at pages 14-20 of his reply brief. Similarly, the CIPA issues were the subject of oral argument in March 2004. Appellants rely on their prior arguments as to this issue.

(a) Defense request for unsealing of non-classified portions of *ex parte* proceedings.

In a recent comprehensive decision, the D.C. Circuit addressed several of the procedural and substantive components of the CIPA issues raised in the present case, including the important distinction between sealing classified material submitted *ex parte* to the district court and sealing "the government's efforts to protect those documents" from disclosure. *United States v. Mejia*, 448 F.3d 436, 454 (D.C. Cir. 2006). In issuing an order to show cause directing the government to explain how disclosure of the government's effort to validate a CIPA discovery privilege would prejudice the government, the D.C. Circuit emphasized that the need for *in camera* review of classified material by the

district court is solely to prevent unwarranted "disclosure of the underlying classified documents." Given this limited scope for sealing of submissions under CIPA, the *Mejia* court ordered unsealing of government filings that "did not disclose anything about the *materials* that were reviewed by the district court and subject to its protective order." *Id*. (emphasis added).

The *Mejia* court's differentiation between "classified material" and government presentations that do not disclose classified information is precisely the distinction raised by the appellants in the instant case in requesting provision of a redacted transcript or substitute information as to the half-day-long *ex parte* CIPA hearing conducted by the district court with the participation of the prosecution team. *See* Campa Br. 31-34 (contending district court erred in failing to unseal non-classified portions of *ex parte* hearing to allow defense counsel to effectively litigate discovery issues); Campa Reply Br. 20 ("government has never explained why unsealing" of non-classified portions of hearing would prejudice the government).

Clearly, not everything that took place in the non-statutory *ex parte* hearing conducted months prior to trial in appellants' case constituted the

revelation of classified materials. Presumably, the provision of any classified information at the hearing was primarily by handing documents to the district judge; otherwise, the district judge would have had great logistical difficulty in performing a careful evaluation of the materials. In support of their redacted transcript request, the appellants submitted to the district court a list of 16 categories of non-classified information that a transcript would reveal to assist defense counsel in effectively litigating the withholding of material otherwise discoverable under Fed.R.Crim.P. 16. *See* Campa Br. 32-33.

Fully consistent with appellants' argument, the *Mejia* court recognized the need for well-informed participation of defense counsel within the limits of CIPA's restrictions, noting that "the views of the defense regarding the legal issues at stake would be useful to the court." *Id*.

While the *Mejia* court did not have occasion to reach the need for disclosure of the non-classified portions of an *ex parte* hearing, it was only because the government had not, in *Mejia*, gone beyond the literal limits of CIPA § 4 (18 U.S.C. App. § 4). Instead, the government presented its CIPA submission in writing, as contemplated by the statute. *See Mejia*, 448 F.3d at

455 (noting that CIPA § 4 provides that "'[t]he court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone'"). As argued in Campa's initial brief, pages 28-31, and reply brief, 14-18, the district court's decision in the instant case to go beyond the statutory framework of a written submission and to conduct a lengthy, half-day-long hearing, particularly without having determined that there were special circumstances rendering a written submission inadequate, *see United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) ("hearing is appropriate *if the court has questions* about the confidential nature of the information or its relevancy") (emphasis added), is itself erroneous. But even if it were not, the *Mejia* show-cause and production orders confirm appellants' argument that maintaining under seal an entire *ex parte* record, apart from the classified material itself, constitutes error.[4]

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[4] The D.C. Circuit's analysis of CIPA § 4 in *Mejia* undercuts the government's reading of *United States v. Yunis*, 867 F.2d 617, 619-620 (D.C. Cir. 1989), as upholding face-to-face, CIPA § 4 *ex parte* hearings. In *Mejia*, the court did not read *Yunis* in that fashion, *see* 448 F.3d at 455-56, and instead treated *Yunis* as approving *ex parte* written CIPA submissions where shown to be appropriate. *See also* Campa Reply Br. 18 ("The propriety of proceeding by in-person hearings was not at issue in *Yunis*.").

(b) Improper exclusion of counsel from proceedings relating to CIPA exclusion of material seized from the defendants.

On another procedural component of the appellants' CIPA argument, *Mejia* offers important support: *Ex parte* submissions are appropriate only as to "'*discovery*'" by the defense of the materials as to which CIPA protection is sought. 448 F.3d at 457 (quoting CIPA § 4) (emphasis added by the court).

Quoting the legislative history on this crucial provision of CIPA, the *Mejia* court explained that the allowance of *ex parte* written submissions is contemplated only as to material as to which there is not pre-existing "'defense knowledge.'" *Id*. (quoting H.R. Rep. No. 96-831, pt. 1, at 27 n. 22 (1980)). It is only to that extent that "'a procedure is set out where ... the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera.'" *Id*. (quoting Fed.R.Crim.P. 16 advisory committee's note).

The government implied during trial that most of the CIPA material debated at the *ex parte* hearing related to material taken *from the defendants*. R36:2665. As appellants have argued, however, such material is already within the scope of the defendants' knowledge, and the only preclusion

effected by the *ex parte* treatment relates to barring defense *counsel* from discovering the evidence in question. An *ex parte* hearing in this context therefore does not prevent discovery by the defendants, the only "discovery" contemplated by CIPA § 4, but rather discovery by defense counsel, for whom the concept of relevance to the issues at trial is actually meaningful and who can evaluate the utility of the withheld evidence to trial preparation, cross-examination, and presentation of defense evidence. Thus, the entire rationale under CIPA § 4 for barring the defense from seeing the *ex parte* written submission does not apply to barring counsel who are granted security clearances from reviewing matters of which their clients already have knowledge and which were in fact seized from the defendants.

(c) Standard for determining whether material meets the threshold for overcoming a claim of CIPA protection.

While the appellants' CIPA argument contains both substantive and procedural components, the principal underlying concern is preserving the defendant's right to present at trial or sentencing evidence that is helpful to defense counsel's handling and presentation of the case, a standard lower than the *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), test of *materiality*

to guilt or punishment, but clearly encompassing both any evidence that might call into question the credibility of prosecution evidence or theories *and* evidence that could support theories of defense or sentence mitigation or otherwise allow for more effective and intelligent presentation of the defense. *See* Campa Br. 38 (citing *United States v. Rodriguez*, 799 F.2d 649, 652 (11th Cir. 1986), for proposition that disclosure standard is lower than relevance and arguing that question is whether the information would be "helpful to the defense").

Regarding the substantive ruling on disclosure of material as to which the government sought CIPA protection–granting the government's motions for court approval of the withholding of evidence arguably relevant to the appellants' case–the district court stated during trial that it had applied the standard of *materiality* to the defense, a standard that is more akin to the higher *Brady* standard than the more inclusive CIPA standard. *See* R35:2469 ("THE COURT: ... I can assure counsel that if it was information that was *material* to the defense, either there was a substitution made or it was

provided to you in another form.") (emphasis added).

The applicable standard, however, is less focused on terms such as materiality, which relate generally to admissibility of evidence under the Federal Rules of Evidence, and is directed instead to whether it would useful to defense counsel to know certain information in order to avoid pitfalls or organize a defense case with knowledge of the factual parameters of the underlying events. *See Yunis*, 867 F.2d at 622 (applying "at least helpful" standard). Thus, while individual pieces of evidence may not appear "material" to the expected defense of the case, knowledge of integral facts, such as the entirety of the communications between Cuba and these defendants, would be helpful to the defense and allow for more effective cross-examination of government witnesses who were granted full access to the evidence, such as FBI witnesses Hoyt and Giannotti.

The *Mejia* court offers support for appellants' characterization of the relatively low standard for disclosure of such information. First, as the *Mejia* court recognized (and as the appellants here have argued), CIPA "does not

itself create a privilege against discovery of classified material." 448 F.3d at 455. The *Mejia* court surveyed the various circuit decisions and concluded that in all circuits, the standard for disclosing even matters of which the defendants do not have prior knowledge is whether the material is "helpful." *See Mejia*, 448 F.3d at 456 & n. 17 (quoting, inter alia, the Fifth Circuit standard that the information be *either* "exculpatory" *or*, "in some way, helpful to the defense," *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990)). "While *Brady* information is plainly subsumed within the larger category of information that is 'at least helpful' to the defendant, information can be helpful without being 'favorable' in the *Brady* sense." *Id*. at 456-57.

Because the D.C. district court considering the CIPA submission in *Mejia* applied a *Brady* standard, rather than the broader "helpful" standard, the court of appeals in *Mejia* conducted *de novo* review of the materials to determine if the defense handling of the case or presentation of its own evidence could have been in some way helped by knowledge of the evidence at issue. *Id*. at 456-57, 459 (absent a specific district court finding on the lesser

"helpful" standard, appellate court applies *de novo* review of the material). The court explained further that where defense counsel has been excluded from the process, the courts should err on the side of the arguable helpfulness if resolution of the issue of the helpfulness of the information to the defense is uncertain. *Mejia*, 448 F.3d at 458 "For that reason, we have applied the 'at least helpful' test in a fashion that *gives the defendants the benefit of the doubt*.") (emphasis added).

Likewise, in the present case, not all of the CIPA-suppressed material would have necessarily disproved elements of the charged offenses, but it is probable that access to the information would have assisted the defense in navigating the wide-ranging presentation of prosecution evidence–which varied from political themes to murder–and in advancing the defense presentation of its specific intent arguments and counter-arguments. *See* Campa Br. 38-40.

To the extent that the Court proceeds as outlined above by vacating counts of conviction for which the evidence is insufficient, granting a new trial on closely-contested counts of conviction, and ordering a resentencing as

to remaining counts, appellants suggest that the court may choose to remand the CIPA issues as well to the district court for further proceedings as to the possible utility of redacted or suppressed material in relation to the issues at resentencing or retrial. Substantive questions of importance to resentencing include: Were there undisclosed classified reports by the government indicating the nature of the threat, if any, posed by these defendants? Was there any classified assessment of intelligence-related damage pertaining to these defendants that would be relevant to sentencing? Were there additional reports regarding the activities of groups involved in terrorist threats to Cuba? In regard to the latter question, there are recent news reports of government destruction of files confirming allegations by the defense of terrorist activity directed from South Florida to Cuba.[5]

Consequently, whether considered as part of the relief requested in the Guerrero and Medina supplemental briefs or, alternatively, as a separate

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[5] Ann Louise Bardach, "Why the FBI Is Coming After Me," *Washington Post*, at B3 (Nov. 12, 2006) (citing FBI statements regarding actions of Miami FBI agent in charge, Hector Pesquera, who supervised instant investigation).

claim for a new trial, the district court's substantive and procedural errors in the handling of CIPA evidence warrant reversal.

III. *Batson* Violations.

The appellants adopt the *Batson*[6] argument presented in the initial brief of Rene Gonzalez, at pages 18-22, and in the Rene Gonzalez reply brief, at pages 26-27.

To narrow the focus of the *Batson* issue at this point in the case, appellants ask that the Court base its resolution of this claim on whether the district court erred in finding facially neutral and ultimately non-discriminatory the government's explanation for its strike of juror Kenneth McCollum, an African-American corrections officer, R23:46, after the district court had concluded that the government's disproportionate strikes of African-Americans established a *prima facie* case of discrimination. R28:1498.

The government explained the strike by stating that a government witness was currently in prison and the government did not want jurors who

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[6] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

interacted with prisoners. R28:1500 ("MR. KASTRENAKES: He is a corrections officer and I guess the defense's argument [is] he should be somebody the government would want. We do not want *somebody intimately familiar with the prison system*. We are calling witnesses who are incarcerated and we do not want *a person who guards persons* on this jury.") (emphasis added).

But, as the defense immediately pointed out, the government had strongly opposed, *see* R24:387, the striking of another prison employee, Frank Sabater, who worked in the very prison in which the witness whom the government was calling was incarcerated, the Federal Detention Center in Miami, and who was familiar with defendants in the case. R24:298-99 (Sabater: "[T]here is a posted picture file a lot of the defendants are on. I recognize several of the attorneys here from being there."). Sabater, who was white, also made it abundantly clear that he had experienced direct contact with inmates as a corrections officer with "the Florida Department of Corrections," R24:323, just as was the case with McCollum.[7]

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[7] Sabater also had a relative, his nephew, who was then on trial for a crime, but the government was unconcerned about that as well. R24:323.

The defense contended that the government's explanation of the strike of juror McCollum was *not* facially neutral and, in any event, insufficient to overcome the *prima facie* case of discrimination and that, in light of the record with respect to other jurors, the proffered reason instead betrayed the discriminatory exercise of a peremptory challenge. R28:1500-01 (defense counsel: "The point is, when we had somebody that knew the defendants and worked at the Federal Detention Center, obviously familiar with prisoners and movement within the prison obviously far more than Mr. McCollum, they didn't have a problem with him. Now they say they have a problem with Mr. McCollum?"). Clearly, there was a much greater chance that a correctional employee such as Sabater who was potentially in contact with the very witness in question, and who had close contact with inmates (even noting he had been "assaulted" by them in his career, R24:323), might have some adverse perspective on an incarcerated witness than there was any remote chance that state correctional officer McCollum, who had nothing to do with the witness in question or any federal inmates, might have some

generic prejudice against such a witness.

The government's argument, in short, was on its face not a non-discriminatory reason but a grasp at a straw of nonexistent distinction that could not dispel the *prima facie* case of discrimination. There simply were no "*relevant* differences between the struck jurors and the comparator jurors," under the test this Court employs to evaluate whether a proffered explanation is non-discriminatory. *United States v. Novaton*, 271 F.3d 968, 1004 (11th Cir. 2001) (emphasis added). Where jurors share some traits, but the minority-group juror has other traits that make such a juror problematic, then the mere fact of the shared traits can be overlooked. *Id*. But where the only distinctions that can be divined from the record make the non-struck juror *more* problematic than the struck juror, the inference of discrimination among jurors with shared traits has not been dispelled. At best for the government, the prosecutor's explanations left the issue in equipoise, which does not suffice for the government to meet its burden of overcoming the *prima facie* showing of racial discrimination. *See Bui v. Haley*, 321 F.3d 1304, 1317-18 (11th

Cir. 2003) (absent adequate explanation for strike of one black juror, government failed to rebut prima facie discrimination); *United States v. Horsley*, 846 F.2d 1543, 1545-46 (11th Cir. 1989) (prosecutor's "feeling" about one black juror represented a "vague explanation" that was "legally insufficient to refute a prima facie case of purposeful racial discrimination"). In light of this *Batson* violation, reversal and remand for a new trial are warranted.

IV. Instructional Errors.

Appellants adopt their prior arguments. *See* Guerrero-Br:54-58; Gonzalez-Br:34-38; Gonzalez-Reply-Br:1-14; Campa-Br. (No. 03-11087) at 5-16. For ease of reference, attached hereto as Appendix A is an excerpt of appellants' reply brief argument on justification. In summary, appellants contend:

(a) Denial of defense theory instruction on justification defense.

This issue poses two central questions: (1) whether it is possible under the law of justification that circumstances could legally excuse acting as an

agent of a foreign government in the United States without prior notification; and (2) whether there was trial evidence that the terrorism facing Cuba, including bombings and other violent and destructive acts, was sufficiently imminent and life-threatening to justify a foreign agent's acting to stop the terrorism without notifying the U.S. government.[8]

The government places the major weight of its argument on the second question, contending the threat was not sufficiently imminent and that there were other, more "reasonable" options available. Gov't-Br:68 ("impending threat" to Cuba was "insufficient"). The government implicitly concedes, as logic dictates, that failure to give notice as an agent would be justified if the threat is sufficiently imminent and if the effectiveness of the foreign agency action depended on non-notification to the U.S. government.[9] While the

[8] The district court ultimately did not dispute the terrorist threat, but found that it did not justify failing to register as an agent. *See*, *e.g.*, R131:42 (in sentencing Gonzalez for § 951 offenses, court reasons that "terrorist acts by others cannot excuse the wrongful and illegal conduct of this defendant or any other").

[9] An example the government would likely accept would be a foreign agent in Canada engaging in hot pursuit of a terrorist and crossing the border into the United States to protect either Canadians or Americans. Such actions

government disputes whether the *preponderance* of the evidence, *see* Gov't-Br:67, showed that the ongoing and continuous threat to Cubans satisfied the test of an "imminent" threat, the question instead is whether there was *any* evidence in the record[10] that (1) the threat to Cuba of violent terrorist groups in Miami was real and imminent; (2) the Cuban agent defendants, or at least some of them, had no reasonable, effective alternative to stopping this imminent threat other than infiltration of the terror groups; and (3) notification to the U.S. government was not an effective option because it would have caused expulsion of the Cubans and likely public disclosure, and thwarting, of their efforts. The prosecution argued that the U.S. government would itself have addressed such terrorism if it had really existed.[11] But that argument begged jury resolution of the government's premise. Hence, the

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would be justified even if, while maintaining pursuit, the Canadian officer did not give notice to the U.S. government of his or her presence in this country.

[10] *See United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) ("threshold burden" for defense-theory instruction is "extremely low;" "any foundation in the evidence").

[11] R124:14492 (government closing argument assuring jury that the government would prosecute all Cuba-related terrorism cases).

justification instruction was warranted. *See United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir.1991) (reversal required where district court refuses defense theory instruction supported by some evidence, even if such evidence is "weak, insufficient, inconsistent, or of doubtful credibility"). Denying the instruction based on the weight of the evidence, as the district court did, is a flawed means of addressing the theory of defense.

(b) <u>Specific intent element of 18 U.S.C. § 951</u>.

Appellants adopt the previously articulated argument on erroneous withdrawal of specific intent from the jury instruction on acting as a foreign agent without notification. *See* Gonzalez Br. 34-38; Gonzalez Reply Br. 1-2, 10-14. The government's argument—that one violates the statute by knowingly acting as an agent without knowing that there is anything wrong with that, much less knowing that notification to the U.S. government is required under the current regulations issued by the Attorney General, 28 C.F.R. § 73.01, *et seq.*—sweeps too broadly in a globalized market, with international government-business activity forming an essential part of daily life. The

statute applies equally to friend and foe countries and carries a 10-year sentence. Applying it in near strict liability fashion runs contrary to common sense in an internationally-interdependent world. The government's mere assurance that the statute will be applied only when it is in the government's interest to do so is no guarantee of fair notice and no answer to the standard principles of *mens rea* interpretation repeatedly reinforced by the Supreme Court. *Cf. Lambert v. California*, 355 U.S. 225, 228-230, 78 S.Ct. 240, 242-44 (1957) (due process barred application of criminal penalties for failure of felon to register with city police department; "Where a person did not know of the duty to register ... he may not be convicted consistently with due process."). Particularly as to Gonzalez, a U.S. citizen whom the government charged engaged in political and expressive conduct, failure to require a showing of wrongful intent violates *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 472 (1994) (in light of First Amendment implications of criminal statute, "[i]t is ... incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of

Congress”).

V. Suppression of Fruits of Improperly Authorized and Executed FISA Searches.

The defendants rely on the prior briefing of the FISA issues, addressing whether the Foreign Intelligence Surveillance Act searches complied with non-criminal investigation and surveillance mitigation requirements. *See* Campa-Br:44-52; Campa-Reply-Br:20-22. Due to the restrictions on discovery applied under CIPA, it is impossible for the defense to fully evaluate whether the government’s searches exceeded FISA limits and cannot measure categories or classes of withheld information, including material seized from the defendants.[12]

CONCLUSION

Appellants request that the Court reverse the defendants’ convictions and remand for entry of a judgment of acquittal, on counts for which the evidence is insufficient, and a new trial on the remaining counts.

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[12] The government argues that lesser review standards apply to consideration of FISA searches affecting non-U.S. citizen targets, but ignores that both Guerrero and Gonzalez are U.S. citizens. *See* Gov’t-Br:66.

Alternatively, appellants request that the Court grant new-trial relief requested in Antonio Guerrero's supplemental brief, remanding for resentencing on any counts of conviction that are not reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief, including Appendices A & B. attached hereto, 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 13,999 words.

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Orlando do Campo

APPENDIX A

(Excerpt from pages 1-22 of Hernandez Reply Brief)

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.[13] 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:

- On February 24, 1996, the lead airplane of the three-plane BTTR squadron invaded Cuban territory, penetrating Cuba's territorial border

[13] 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).

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.[14] (R84:9391;R104:12018-12025).

- 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

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

sovereignty.[15] (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 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

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[15] 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).

conspirator regarding Cuba's military actions.[16]

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 fact statement ... 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."[17] The defendants presented numerous witnesses and documents to show the

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

[17] 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

context of their actions in the U.S. and to dispute government claims regarding Cuba's actions in the BTTR shootdown. ...

... Thus, the government's brief completely omits reference to the invasion of Cuban airspace by BTTR moments 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.[18] GB28.

The government's fact statement fails to note substantial evidence at trial of:

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viewing evidence in government-favorable light).

[18] 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).

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.[19]

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.[20]

A fair reading of the complete record shows that Hernandez is not responsible

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[19] The government—adopting a local community view—suggests BTTR's activities were "humanitarian." GB6;R54:5352. But Cuba viewed 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 G**X**:HF115;GH-Ex. 37.

[20] 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).

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 in their official confrontation with BTTR–exceeds any fair reading of the record or the law.[21]

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.

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

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[21] 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.").

agents in Miami.[22] 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 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

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

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. The 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.[23] GB47.

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.

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

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, 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).[24]

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,

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

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 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 <u>if</u> 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 <u>confrontation</u> 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 <u>legal</u> and <u>nonlethal</u> situations in all aspects of life: from international disputes to law enforcement to ideological battles. Cuba had peacefully confronted–with the <u>threat</u> 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).[25]

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 between planes."); R58:5924

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[25] 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.

("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. <u>See</u> 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, <u>see</u> 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.[26] 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 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

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

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 G**X**:DG127:1 (referring to G**X**:HF136). The government errs significantly in misciting "G**X**:HF136" as referring to anything other than Roque's return. GB28 (confusing G**X**:HF136 with G**X**: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.").

APPENDIX B

(Excerpt from pages 4-8 of Gonzalez Reply Brief)

REPLY ARGUMENT

I.

THE DISTRICT COURT ERRED IN DENYING DEFENSE-REQUESTED JURY INSTRUCTIONS.

* * *

A. Theory of defense.

* * *

Imminent threat. The government gives short shrift to extensive evidence of contemporaneous terrorism, murder, sabotage, and destruction wrought on the people and government of Cuba by opponents of the Castro regime residing, training, planning, and funding such operations, in the Miami area. See Gov't-Br:67 (referring to "defense evidence relating to alleged acts of terrorism by Miami-based Cuban exiles"). The government refers to such terrorists merely as Cuban exiles, but evidence at trial showed terrorist groups that, by operating as fringe-element paramilitary and political organizations, were able to work under the protection and

cover of the broader, innocent exile community, to commit terrorist acts against Cuba. See R117:13561-76 (Appendix A, attached hereto) (addressing record evidence of terrorist bombing campaigns peaking in 1997 with nearly daily bombings of Havana tourist hotels and restaurants); see also Campa-Brief (No. 03-11087) at 5-12 (detailing terrorist bombing; showing terrorism increasing from 1993 to 1997); id. at 13-16 (evidence linking defendants' operations "Neblina," "Paraiso," "Morena," and "Arcoiris," to obtaining intelligence on planned and actual terrorist actions by specific exile paramilitary organizations in Miami). The defense evidence was strong and was consistent with public knowledge of many attacks emanating from such fringe groups in Miami.[1]

The government does not expressly concede the fact of this terrorism, but does not dispute the reasonableness of defendants' and the Cuban government's perception of these terrorist groups in the Miami area.[2] See Gov't-Br:10 (conceding Cuban

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[1] See, e.g., James LeMoyne, "Cuban Linked to Terror Bombings Is Freed by Government in Miami," N.Y. Times, July 18, 1990, at A1; Ann Louise Bardach & Larry Rohter, "A Cuban Exile Details 'Horrendous Matter' of a Bombing Campaign," N.Y. Times, July 12, 1998, at A10-11; Juan O. Tamayo, "Anti-Castro Plots Seldom Lead to Jail in U.S.," Miami Herald, July 23, 1998, at 11A.

[2] Neither does the government contest the sincerity of the defendants' belief that their actions were necessary to stop imminent life-threatening terrorist acts in Cuba. See, e.g., R97:11254-320 (Cuban message traffic seized by the government detailing more than 25 intelligence messages focused on terrorist investigations); cf., R131:19-20 (sentencing allocution of appellant Gonzalez, emotionally explaining defendants' subjective belief that their actions were compelled by humane necessity).

intelligence's "focus on 'counterrevolutionary' activity reflected concern about Cuban-exile organizations' ... perceived violence against Cuba"); Gov't-Br68 (discussing "bombings of hotels and other tourist facilities in Cuba which, in their view, were instigated or directed by Miami exiles").

The government argues that evidence of "generalized future perils to Cuban nationals is patently insufficient to demonstrate the requisite present and impending threat." Gov't-Br:68 (citing United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989)). Contrary to the government, the threat to Cuba was not a generalized threat as in Aguilar. In Aguilar, individual Central American illegal immigrants to the U.S. claimed fear of violent conditions in their home countries, but offered no evidence that they or their families were personally targeted. 883 F.2d at 693. That generalized threat was therefore not imminent to those individuals. Here, however, Cuba was the target; it was not just one among many Caribbean nations facing terrorism on a daily basis. It was the only such nation. The threat to Cuba was specific, not generalized. And near-daily attacks were sufficiently imminent to warrant jury resolution of the case. The term "imminent" should be interpreted in light of the reality of modern terrorism, as the U.S. has recently explained. See The National Security Strategy of the United States of America 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (describing present terrorist threat to U.S. as "imminent threat"). Defendants proved—with photographs, videotapes, and

testimony as to the death and destruction menacing Cuba in the period covered by the indictment—that the violence was not merely perceived, but real, not merely generalized, but specific, and not merely potential, but imminent. See R117:13561-76.

No tenable alternative. The most politically-charged of the evidentiary disputes regarding the necessity defense in this case was whether Cuba had a viable alternative. The defense introduced evidence that when Cuba revealed to the United States information concerning prospective terrorist actions, the U.S. reacted by arresting or deporting the persons who had provided such information to Cuba.[3] Similarly, defendants introduced evidence of the impossibility—due to political and social constraints of the exile community, and fear of retaliation by violent groups—of reliance on voluntary provision of information even by exiles opposed to Miami-based terrorist activities. See R117:13561-76; see also R99:11559 & Juan Gomez deposition at 66 (evidence of threats to kill persons who informed on Miami-based groups). In the present case, "'a history of futile attempts revealed the illusionary benefit of the alternative.'" United States v. Hill, 893 F.Supp. 1044, 1047 (N.D. Fla. 1994) (quoting United States v. Gant, 691 F.2d 1159, 1164 (5th Cir.1982)).

[3] For example, on June 17, 1998, Cuban officials provided FBI agents a comprehensive dossier of information about exile terrorist activity for use in prosecution and to prevent future acts of violence. See R93:10839-40. Shortly thereafter, appellants and other Cuban informants were arrested.

While the government argued that the U.S. government had both the political will and the investigative capacity to address the problem, R124:14471, the jury, viewing this record of waves of seemingly interminable terrorism from Miami to the nearby island of Cuba, should have had the opportunity to determine whether the government's suggested alternative was truly a reasonable means of avoiding the threat.

Causal relationship in defusing terrorism. The government, disputing that Cuba's self-help measures could cause a reduction in Miami-based terrorism, Gov't-Br:68, ignores record evidence of the success of exactly such undercover Cuban investigations in Miami. For example, another Cuban agent, Percy Godoy, acting in the same manner as the defendants in infiltrating radical elements in Miami, succeeded in 1994 in preventing the bombing of the famous Cabaret Tropicana, a popular Havana nightclub and tourist attraction. R95:11012; Percy Godoy deposition at 45-55. Similarly, actions by Cuban agent Juan Gomez—who was recruited by would-be Miami terrorists—succeeded in uncovering plots to explode bombs in tourist hotels and at a political memorial in Santa Clara, Cuba. R99:11559; Gomez deposition at 16-20. This evidence was essentially undisputed by the government, undermining the government's claim of "no factual basis" for a causal relationship between the undercover actions and stopping imminent terrorism. Gov't-Br31.

* * *

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 20th day of November, 2006, upon Anne Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111; William Norris, Esq., 7685 S.W. 104th Street, Suite 220, Miami, Florida, 33156; and Leonard I. Weinglass 6 West 20th Street, New York, NY 10011.

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Orlando do Campo