IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. _____

IN RE: UNITED STATES OF AMERICA,

Petitioner,

- versus -

GERARDO HERNANDEZ, a/k/a Manuel Viramontez, a/k/a "Giro," a/k/a "Giraldo"; JOHN DOE No. 2, a/k/a Luis Medina III, a/k/a "Allan," a/k/a "Johnny," a/k/a "Oso"; RENE GONZALEZ, a/k/a "Castor," a/k/a "Iselin"; ANTONIO GUERRERO, a/k/a "Lorient"; and JOHN DOE No. 3, a/k/a Ruben Campa, a/k/a "Vicky," a/k/a "Camilo," a/k/a "Oscar,"

Respondents.

ON PETITION FOR WRIT OF PROHIBITION
FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

EMERGENCY PETITION FOR WRIT OF PROHIBITION

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In re United States of America, Case No. _____

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Armando Alejandre

Jack Blumenfeld

David M. Buckner

John Doe No.3, a/k/a Ruben Campa

Carlos Costa

Mario de la Peña

Rene Gonzalez

Antonio Guerrero

Caroline Heck Miller

Gerardo Hernandez

Philip Horowitz

John S. Kastrenakes

Hon. Joan A. Lenard

Guy A. Lewis

Paul A. McKenna

John Doe No. 2, a/k/a Luis Medina

In re United States of America, Case No. _____

Certificate of Interested Persons (continued)

Joaquin Mendez

Pedro Morales

William M. Norris

Barry Sabin

Anne R. Schultz

Barry Sabin
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Statement of Jurisdiction

The district court has jurisdiction under 18 U.S.C. § 3231 over "all offenses against the laws of the United States." This Court's jurisdiction to issue a writ of prohibition to a district court is invoked under the All Writs Act, 28 U.S.C. § 1651, and under Rule 21 of the Federal Rules of Appellate Procedure.

Issues Presented

1. Whether a foreign spy is exempt from the notification requirement of 18 U.S.C. § 951 simply because he may be an "official of a foreign government on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of that foreign government."

2. Whether defendant Gerardo Hernandez is entitled to a jury instruction which requires that the government prove that the jurisdictional element of 18 U.S.C. § 1117 regarding the location of the murders formed part of his *mens rea*.

3. Whether the district court improperly approved an instruction requiring the government to prove the elements of first degree murder where the indictment only charged second degree murder.

4. Whether the district court improperly granted defendant Hernandez's request for a theory of defense instruction that is not a legally-cognizable defense to homicide.

Statement of the Case

The defendants/respondents in this case (Gerardo Hernandez; John Doe No. 2, a/k/a Luis Medina, III; John Doe No. 3, a/k/a Ruben Campa; Antonio Guerrero; and Rene Gonzalez) were arrested on September 12, 1998 and charged with various offenses relating to their work in the United States as spies of the government of the Republic of Cuba.[1] The defendants/respondents were charged, *inter alia*, with the

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[1] The second superseding indictment charging these various offenses is included (continued...)

following offenses. Hernandez, John Doe No. 2, and Guerrero were charged with conspiracy to commit espionage relating to their efforts to penetrate the United States Southern Command and the Boca Chica Naval Air Station, in violation of 18 U.S.C. § 794 (Count 2). Hernandez was charged with conspiracy to commit murder for his role in the 1996 downing, over international waters north of Cuba, of two aircraft flown by members of an organization known as Brothers to the Rescue, in violation of 18 U.S.C. § 1117 (Count 3). All of the defendants were charged with acting as agents of the Republic of Cuba without notifying the Attorney General, pursuant to a notice requirement imposed by 18 U.S.C. § 951,[2] and Hernandez, John Doe No. 2,

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[1](...continued)
with this petition in the attached Appendix.

[2] 18 U.S.C. § 951 reads in relevant part:

> (a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification of the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.
>
> (b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.
>
> * * *
>
> (d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official, except that such term does not include–
>
> * * *

(continued...)

and John Doe No. 3 were also charged with aiding and abetting other agents in their failure to notify the Attorney General (Counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25). These three latter defendants were additionally charged with various fraudulent document offenses.[3]

Sometime during the morning hours of May 25, 2001, following six days of argument, the trial court finalized the instructions to be given to the jury in this matter.[4] After 1 p.m. that same day, the United States received a draft copy of those instructions from the district court. The United States objected to several of these instructions. In particular, the government objected to, and seeks relief from this Court regarding, the following instructions or parts thereof:

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[2](...continued)

> (2) any officially and publicly acknowledged and sponsored official or representative of a foreign government; [or]
>
> (3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen . . . .

18 U.S.C. § 951(a), (b), (d)(2)-(3).

[3] The trial of this matter has spanned nearly seven months. Accordingly, this statement of the case sets forth only those facts necessary to understand the issues presented in this petition; it does not contain a complete recitation of all of the evidence presented at trial. *See* Fed. R. App. 21(a)(2)(B)(iii).

[4] A draft copy of the district court's instructions – the product of the district court's rulings at the charge conferences – is included with this petition in the attached Appendix. The court has informed the government that these instructions are final, but may require some typographical editing.

prohibition[5] under the All Writs Act, 28 U.S.C. § 1651, prohibiting the district court from giving clearly erroneous jury instructions. The United States files this petition fully aware of the numerous obstacles it must overcome. First, "mandamus is an extraordinary remedy, which is available only to correct a clear abuse of discretion or usurpation of judicial power." *In re Vicki Lopez-Lukis*, 113 F.3d 1187, 1187-88 (11th Cir. 1997). Second, as petitioner, the United States has the burden of establishing that its right to issuance of the writ is clear and indisputable. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976); *Lopez-Lukis*, 113 F.3d at 1188; *United States v. Wexler*, 31 F.3d 117, 128 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995); *In re Ford*, 987 F.2d 334, 341 (6th Cir.), *cert. denied*, 506 U.S. 862 (1992). Third, because the United States is bringing this action in the midst of an on-going criminal case, it must demonstrate that issuance of a writ of mandamus will not offend the policies behind the Criminal Appeals Act, the Double Jeopardy Clause, and the defendants' right to a speedy resolution of the charges against them. *See Will v. United States*, 389 U.S. 90, 96-97 (1967).

A rare combination of international politics, criminal acts, and clearly erroneous jury instructions have combined to create exceptional circumstances that

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[5] The distinct writs of prohibition and mandamus are often discussed interchangeably. *See In re Justices of the Superior Court Dept. of the Mass. Trial Court*, 218 F.3d 11, 15 n.3 (1st Cir. 2000) (citing *United States v. Horn*, 29 F.3d 754, 769 n.18 (1st Cir. 1994)). The two writs derive from the same statutory basis and incorporate the same standards, so we will refer to them interchangeably. *Id.*

meet each of the requirements set forth above. The crimes at issue in this case – directly impacting upon vital United States security concerns – have ramifications on a national and international level, and this case could set a devastating precedent by making prosecution of such offenses a virtual impossibility.

The courts generally consider five factors, none of which is determinative, in deciding whether to grant a petition for mandamus: 1) whether the petitioner has other adequate means, such as by direct appeal, to gain relief; 2) whether the petitioner will be prejudiced in a way not correctable on appeal; 3) whether the district court's order is clearly erroneous as a matter of law; 4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and 5) whether the district court's order raises new and important problems or issues of first impression. *See In re Glass Workers, Molders, Pottery, Plastics & Allied Workers International Union*, 983 F.2d 725, 727 (6th Cir. 1993). *Accord United States v. Amlani*, 169 F.3d 1189, 1193-94 (9th Cir. 1999). "Although all five factors need not be satisfied, it is clear that the third factor, the existence of a clear error as a matter of law, is dispositive." *Calderon v. United States District Court for the Nothern District of California*, 98 F.3d 1102, 1105 (9th Cir. 1996), *cert. denied*, 520 U.S. 1233 (1997) (citation omitted).

The jury instructions in this case unfairly and unlawfully imperil the affected counts in the current prosecution. The government has no other avenue of relief and will be prejudiced in a manner not correctable on appeal. The jury might well acquit

the defendants of two of the three major conspiracy charges in the indictment based on instructions that contravene settled legal precedent and frequently utilized pattern instructions. In short, the injury to the government will be irremediable and the damage long lasting. *See United States v. United States District Court for the Central District of California*, 858 F.2d 534, 537 (9th Cir. 1988) (government's inability to appeal acquittal or conviction supports court's exercise of mandamus jurisdiction). The damage will be long-lasting, not only in the outcome of this case, but in the hobbling of the United States in how it deals with the prospect of such future prosecutions.

The United States relies principally on *United States v. Wexler, supra,* where the Third Circuit granted a writ of mandamus to prevent the giving of legally incorrect jury instructions. The defendant had been charged with criminal tax fraud. The district court, in a pre-trial order, adopted a jury instruction on "genuine indebtedness" that, in the government's view, undermined a well-settled prohibition against deducting certain interest payments. If given, the instruction would have completely undermined the prosecution's theory and severely prejudiced it in other tax fraud prosecutions. The government sought rehearing, but the trial judge refused to entertain it. The government sought mandamus.

The Court of Appeals determined that the proposed instruction was clear error as a matter of law, that jury deliberations would be guided by an improper instruction which would likely result in an acquittal, and that mandamus was the proper remedy

for the government to pursue. 31 F.3d at 128-29. The Court expressly rejected the defendant's argument that issuance of the writ would serve as either a substitute for appeal or bring the case piecemeal to the Court "for the simple reason that appeal from the erroneous instruction is not an option for the government." *Id.* at 128. Nor did the Court accept the defendant's argument that mandamus lies only where a district court exceeds its lawful jurisdiction or declines to exercise a non-discretionary power. The court stated:

> Indeed, we have observed that "courts have not confined themselves to any narrow or technical definition of the term 'jurisdiction'" in using the writ to regulate proceedings in the district court. . . . Accordingly, mandamus may issue to correct clear abuses of discretion, to further "supervisory and instructional goals", and to resolve "unsettled and important" issues. . . . While appellate courts must be parsimonious with the writ, it is also true that "[s]ome flexibility is required if the extraordinary writ is to remain available for extraordinary situations."

Id. at 129 (citations omitted). Accordingly, the court concluded that the district court's

> adoption of a clearly erroneous jury instruction that entails a high probability of failure of a prosecution – a failure the government could not then seek to remedy by appeal or otherwise – constitutes the kind of extraordinary situation in which we are empowered to issue the writ of mandamus.

Id.

The United States recognizes that a distinction between *Wexler* and our case is that in *Wexler* mandamus was sought prior to the commencement of trial whereas the government is requesting that this Court briefly stay the trial pending its ruling

on this mandamus petition. *Wexler* did not rest its decision on that fact although, in finding that the government had no alternative avenue of relief, it noted that the government "will not be able to interrupt the trial by filing an appeal or a renewed petition for mandamus when the district judge commences to give the erroneous instruction." *Id.* at 128. This statement was clearly dicta and not essential to the holding that was based on factors fully present in our case: clear error in the proposed instructions; no adequate means of relief other than mandamus; and irreparable injury that will result from the error. *Id.* Furthermore, given the fact that this case has been pending over two years and in trial for seven months, a brief stay to consider this petition will not undermine the defendants' right to a speedy trial or their protection against double jeopardy. This is all the more true in light of the several continuances sought or agreed to by the defendants during the course of the trial that caused delays in the proceedings ranging from one to several days, including a continuance for the entire week of May 21. Nor has the district court here yet commenced to give the erroneous instructions; indeed, one concern of the government's is that the court's delphic and erroneous murder instruction will give rise to jury instructions that the court will then answer, based on its erroneous conclusion of law, in a short time-frame when no further relief will be possible.

The *Wexler* court also rejected the argument that issuance of a writ of mandamus would contravene the Criminal Appeals Act, 18 U.S.C. § 3731, and *Will v. United States*, 389 U.S. 90 (1967), "which held that 'mandamus may never be

employed as a substitute for appeal in derogation of the' principle that the 'Criminal Appeals Act is strictly construed against the Government's right of appeal.'" *Wexler*, 31 F.3d at 128 n.16 (quoting *Will*, 389 U.S. at 96-97). The *Wexler* court concluded:

> *Will*, however, does not preclude the use of mandamus to review an interlocutory order that expresses an erroneous, preliminary jury instruction. In *Will*, the Court stated that it would not "say that mandamus may never be used to review procedural orders in criminal cases." *Id.* at 97, 88 S.Ct. at 275. Moreover, the Court stated that "it need not decide under what circumstances, if any," a court may review "an interlocutory procedural order ... which did not have the effect of a dismissal." *Id.* at 98, 88 S.Ct. at 275. While it might be difficult to characterize a jury instruction as procedural, still under *Will* the mandamus door is open far enough to include jury instructions. Accordingly, while we do not attempt to set forth the exact parameters of when mandamus is available to address interlocutory orders in criminal cases, we do find that on the facts of this case mandamus is appropriate. Accepting the government's assertion that our failure to exercise mandamus review over the order would hamper the government's ability to enforce the tax laws, we find that this interlocutory order presents a special situation which militates in favor of mandamus review. We must acknowledge, however, that our granting the writ in this context does not authorize use of mandamus whenever the government objects to criminal jury instructions. Rather, our decision is limited to the facts of this case.

Wexler, 31 F.3d at 128 n.16.

In our case, we have the additional fact that erroneous instructions will threaten national security and future prosecutions under § 951. In *Will*, the Supreme Court acknowledged that it had granted mandamus where unwarranted judicial action threatened "'to embarrass the executive arm of the government in conducting foreign relations.'" *Will*, 389 U.S. at 95 (quoting *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) (judicial seizure of vessel of friendly foreign state is so serious a

challenge to its dignity and may so affect friendly relations with it, that courts are required to accept and follow the executive determination that vessel is immune)). In this case, unwarranted judicial action threatens to give unfriendly foreign states judicial approval to, in essence, clandestinely send their agents to the United States to conduct the official business of spying as long as the agents' stay in the United States is temporary. Armed with such an instruction, Fidel Castro, and leaders of other foreign states including those, like, who are designated state sponsors of terrorism by the Department of State, can seek to insulate their operatives from prosecution in the United States under 18 U.S.C. § 951. Those operatives will seek to assert that they had a good faith belief that they fell within an exception to § 951 based upon the district court's ruling in this case. Mandamus is the United States' only avenue of relief. If this Court does not exercise its jurisdiction to review the government's petition, this clearly erroneous jury instruction will never be subject to review by any court. Thus, this case could set a devastating precedent by making prosecution of such offenses a virtual impossibility. Under these unique circumstances, the broad view of mandamus espoused by the *Wexler* court should be relied on to subject the district court's lawless actions to review by this Court.[6]

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[6] The chilling effect on § 951 prosecutions and the threat to national security present a "compelling need" for issuance of mandamus. Therefore, this case is distinguishable from *United States v. Margiotta*, 662 F.2d 131, 134 n.8 (2d Cir. 1981), where the Second Circuit held that mandamus was not available to review jury instructions in a mail fraud case.

I. A Foreign Spy Is Not Exempt from the Notification Requirements of 18 U.S.C. § 951 Simply Because He May Be an "Official of a Foreign Government on a Temporary Visit to the United States for the Purpose of Conducting Official Business Internal to the Affairs of That Foreign Government."

The district court has ruled in this case that the jury will be instructed that the defendants are exempt from the notice requirements of 18 U.S.C. § 951 – regardless of the covert nature of their activities in the United States – if they are officials of the Cuban government who are on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of Cuba. According to those jury instructions, a defendant who meets that so-called exemption to § 951 must be acquitted on the § 951 charges.

The district court has expressly approved the following jury instruction regarding the § 951 charges in the indictment, including the italicized portions to which the United States had objected:

> Title 18, United States Code, Section 951, makes it a Federal crime or offense for a person knowingly to act in the United States as an agent of a foreign government without prior notification to the Attorney General.
>
> In order to establish a violation of these counts of the indictment, the government must prove all of the following beyond a reasonable doubt:
>
> *First,* that the defendant acted as an agent of a foreign government, in this case the government of Cuba;
>
> *Second,* that the defendant failed to notify the Attorney General that he would be acting as an agent of the government of Cuba in the United States prior to so acting;

Third, that the defendant acted knowingly, and knew that he had not provided prior notification to the Attorney General; and

Fourth, that the defendant acted, at least in part, as an agent for the government of Cuba in the Southern District of Florida.

An "agent" means an individual acting as a representative of, or on behalf of, a foreign government or official, and who is subject to the direction or control of that foreign government or official.

However, an agent of a foreign government does not include any officially and publicly acknowledged and sponsored official or representative of a foreign government. The meaning of any "officially acknowledged and sponsored official or representative of a foreign government" includes any official of a foreign government on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of that foreign government.

The notification under the statute shall be effective only if it is made by the agent in the form of a letter, telex or facsimile addressed to the Attorney General prior to the agent commencing the services in the United States on behalf of the foreign government.

You are instructed that you must return a verdict of not guilty as to any count charging the defendant with acting as a foreign agent, unless the government proves beyond a reasonable doubt that the defendant was not an officially and publicly acknowledged and sponsored official or representative of a foreign government.

Use of the foregoing instruction, however, is fraught with error. Misinterpreting and misapplying an administrative regulation (28 C.F.R. § 73.1(e)) contrary to clearly expressed congressional intent, the instruction creates a "safe harbor" for foreign agents engaged in covert activities, in direct contravention of the plain language of the statute (18 U.S.C. § 951) which ostensibly enabled the promulgation of 28 C.F.R. § 73.1(e). Moreover, no § 951-exemption instruction of any kind is warranted where, as here, foreign agents were admittedly and indisputably

acting within the United States in a covert capacity, and where the defendants failed to come forward with any evidence triggering a § 951 exemption, that is, that they were officially and publicly acknowledged and sponsored officials or representatives of a foreign government.

A. 28 C.F.R. § 73.1(e) Does Not Exempt Foreign Agents Engaged in Covert Activities from the Notifications Provisions of 18 U.S.C. § 951.

Under the pertinent provisions of 18 U.S.C. § 951(d) defining who is subject to the notification requirements of § 951, the following are excluded from § 951's notification requirements:

> (2) any officially and publicly acknowledged and sponsored official or representative of a foreign government; [or]
>
> (3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen . . . .

These provisions are addressed further at 28 C.F.R. § 73.1(e), which interprets "an officially and publicly acknowledged and sponsored" person to include "an official of a foreign government on a temporary visit to the United States, for the purpose of conducting official business internal to the affairs of that foreign government."

This regulation, 28 C.F.R. § 73.1(e), and the enabling statutory provision, 18 U.S.C. § 951, must be read together and harmonized because regulations cannot alter or expand the terms of the statute, for that is a power exclusive to the legislative

branch.[7] Within this statutory scheme, Congress expressed its strong and clear intent that § 951 apply to covert spies, providing by statute for only four classes of exceptions from its notification requirements: (1) accredited diplomatic and consular officials recognized by the Department of State; (2) officially and publicly acknowledged and sponsored officials and representatives of a foreign government; (3) officially and publicly acknowledged and sponsored employees of persons described in (1) and (2); and (4) persons engaged in legal commercial transactions.

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[7] "[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *see also Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).A regulation simply cannot "trump" a statute or broaden its exceptions beyond the bounds clearly set by the statute. *See, e.g., United States v. Higgins*, 128 F.3d 138, 141 (3d Cir. 1997); *Idahoan Fresh v. Advantage Produce*, 157 F.3d 197, 202 (3d Cir. 1998); *United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir. 1986) (court declines to "construe a regulation in a manner that would place it in conflict with the statute by which it is authorized"); *Georgia v. Heckler*, 768 F.2d 1293, 1299 (11th Cir. 1985). A regulation "'must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (quoting *Trustees of Indiana University v. United States, 223 Ct. Cl. 88,* 618 F.2d 736, 739 (1980)); *see also Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990). For 28 C.F.R. § 73.1(e) to be consistent with 18 U.S.C. § 951(d), it cannot be read to exempt from the notification requirements a person who is not officially and publicly acknowledged and sponsored by a foreign government. Nor does the regulation require or permit any reading that would present the absurd result of exempting from the statute the very category of persons most at issue – covert spies – for the regulation itself references "*officially and publicly acknowledged and sponsored*" individuals.

18 U.S.C. § 951(d).[8,9]

The common-sense construction of the regulation within this statutory scheme is that it defines types of individuals who fall within the class of *officially and publicly acknowledged and sponsored* persons. This is also the legally indicated construction, as it harmonizes the regulation with the statute. Were the regulation construed otherwise, to encompass persons who were not *officially and publicly acknowledged and sponsored,* it would be in conflict with the statute itself. To that extent, the regulation would be, in the words of the cases, a "nullity." Thus, the instruction adopted by the district court cannot stand.

Here, the defendants are undisputably covert agents of the Republic of Cuba and not persons who were "officially and publicly acknowledged and sponsored" by Cuba. Indeed, Hernandez, John Doe No. 2, and John Doe No. 3 have acknowledged in open court, through counsel, that they were operating in the United States as covert

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[8] The fourth category is, by statute, unavailable to agents of Cuba. *See* 18 U.S.C. § 951(e)(2)(A).

[9] The modern legislative history of § 951 makes clear that Congress intended to exempt from the statute only those individuals who were officially acknowledged and sponsored agents of a foreign government, with the goal of facilitating legitimate interaction between such persons and individuals in the United States. Pub. L. 103-199, 1993 U.S.C.C.A.N. 2972 ("The statute makes exception from this registration requirement for accredited diplomats and other officially acknowledged government representatives, and members of their staffs who are not United States citizens and makes exceptions for persons engaged in legal commercial transactions.")

agents of the Republic of Cuba.[10] *See* Tr. 12377 ("There is no dispute he [John Doe No. 2][11] is conducting the affairs, the internal affairs of the Government of Cuba in a covert way. We are not suggesting that he is overt at all."); Tr. 13724 ("They have to prove that Mr. Gonzalez [12] was an agent and the defense is not that, yes, he is an agent, but he was also an official of a foreign government.").

Under the circumstances, the defendants in this case simply cannot claim a safe harbor under 28 C.F.R. § 73.1(e). The defense-requested instruction approved by the district court is unavailable.

B. The Defendants Failed to Come Forward with Evidence Triggering a § 951 Exemption, And, Thus, The Defense-Requested "Safe Harbor" Instruction Is Not Warranted.

There is no evidence that any defendant in this case was an "officially and publicly acknowledged and sponsored official or representative of a foreign government," and all the evidence is powerfully to the contrary: the defendants sought at all costs to hide and conceal any relationship to the government of Cuba,

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[10] In fact, the alleged true identities of John Doe No. 2 and John Doe No. 3 were not revealed until opening statements by their defense counsel. With regard to Gerardo Hernandez, the government was able to ascertain his true identity prior to trial because he was recognized by an individual who knew him in Cuba. Prior to that, Hernandez operated in the United States under the identity of Manuel Viramontez. The real Manuel Viramontez, Luis Medina, III, and Ruben Campa were individuals, born in the United States, who died in infancy.

[11] Counsel for John Doe No. 2 refers in the transcript to Ramon Labaniño, the alleged true name of John Doe No. 2.

[12] Counsel for John Doe No. 3 refers in the transcript to the alleged true name of his client, Fernando Gonzalez.

which did not acknowledge or officially and publicly sponsor them in any way; the defendants operated with great secrecy; and several operated with false identities. Defendants John Doe No. 2, a/k/a Luis Medina, III, John Doe No. 3, a/k/a Ruben Campa, and Gerardo Hernandez lived under false identities, each backed by a different false identity in the event he had to flee. Concealing their true identities, and their association with the Government of Cuba, was one of the dominant imperatives of their lives, as witnessed by the elaborate legends each was given, the painful care each took to obtain false identity documentation, *see* DA-125A, and the insistence on countersurveillance. Defendant John Doe No. 2's surreptitious and heavily counter-surveilled meeting with a Cuban U.N. Mission diplomat, captured on videotape, *see* Exhibits 381 - 386, graphically shows the lengths taken to conceal his association with any official Cuban government functionary. The inviolable need to avoid official association with the government of Cuba is explicit in DG-126, in which defendant Gerardo Hernandez is instructed that "under no circumstances will Giraldo [defendant Hernandez] ever admit to being part of, or linked to Cuban intelligence or any other Cuban government organization."

Similarly, although the defendants claim that they were conducting official business internal to the affairs of the Republic of Cuba while in the United States, their work involved spying on Cuban-Americans living in Miami – a great many of whom are permanent residents or citizens of the United States – whom the government of Cuba unilaterally considers to be part of, and whose affairs it believes

internal to, the Republic of Cuba.[13] Accordingly, the defendants seek to argue to the jury that they are not agents of a foreign government within the meaning of § 951. *See* Tr. 13725 ("The definition of what it means to be an agent of a foreign government and the fact persons who are temporarily here or officials who are temporarily here are not agents of a foreign government . . . ").

Having failed to come forward with evidence establishing that they satisfied the necessary conditions to exempt them from the notice requirement of § 951, the defendants are not entitled to the instruction approved by the district court. *See, e.g.*, *United States v. Hill*, 935 F.2d 196 (11th Cir. 1991) (defendant has burden to show applicability of statutory exception, and failure to meet burden requires that no instruction on exception be given).

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[13] Tr. 12616 ("[T]here is evidence to support that [the defendants] fall within the reach of the official of a foreign government on a temporary visit."); Tr. 12621 ("These people [the defendants] are coming in for internal political reasons. They are dealing with matters of Cuban politics. That's the issue here."); Tr. 12622 ("I think we are applying American law. I think part of the question is the question of dealing with, is the evidence before this Court and will the jury as a matter of fact decide that this is something that is internal to the Cuban Government, that this is a "Cuban" problem, that it deals with questions of Cuban politics, albeit outside of the Cuban territory. It is something that the Cuban Government is attempting to deal with and that's clear here."); Tr. 12626 ("It goes to the functions of investigating and -- with respect to the nongovernmental organizations such as Alpha 66 committing the terrorists acts and the thought and the theory that that is part of a Cuban Civil War, so to speak, and that it relates to the internal affairs of Cuba.").

II. Defendant Gerardo Hernandez Is Not Entitled To A Jury Instruction Which Requires That The Government Prove That The Jurisdictional Element of 18 U.S.C. § 1117 Regarding The Location Of The Murders Formed Part Of His Mens Rea.

Count three of the second superseding indictment charges defendant Gerardo Hernandez with conspiracy to commit murder arising from the killings of four men on February 24, 1996, by a Cuban MiG 29 over international waters. Contrary to *United States v. Feola*, 420 U.S. 671 (1975), and the Eleventh Circuit cases that follow it, the district court has converted the jurisdictional element regarding the location of the homicide into a scienter element, and has concluded that the United States must prove that defendant Hernandez agreed that the four murders charged in count three would be perpetrated in the special maritime and territorial jurisdiction of the United States.

While the court's oral pronouncement clearly indicates its view that such a nexus between the agreement and the jurisdictional element must be proven, Tr. 13874-77, the actual instruction approved by the district court is merely a restatement of the pattern instruction on substantive homicide and the pattern conspiracy instruction, with no instruction to the jury on how to reconcile these two patterns. By so doing, the court has abdicated its constitutional duty and role to charge the jury clearly on the applicable law and left for the attorneys and jury to divine the legal relationship between the crimes of criminal conspiracy and homicide. Given the likelihood of juror confusion as a result, and the district court's pronouncements regarding the jurisdictional requirement, it is highly probable that the jury will request

further elaboration on this issue, at which time the district court will inform them of its clearly erroneous ruling. In any event, counsel for defendant Hernandez will be free to argue that the United States has not proven this element, and the government will be constrained from arguing that by law it need not do so, given the district court's ruling. Tr. 13874-77. In light of the evidence presented in this trial, this presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution on this count.

The United States proposed jury instructions for count three sought to meld the Eleventh Circuit pattern instruction regarding the substantive offense of murder (18 U.S.C. § 1111) with general conspiracy principles. After presentation of the principles of *Feola* to the district court, and several days of argument regarding how the jurisdictional requirement of § 1111 should be addressed, the government offered the following alternative instructions for the jurisdictional element:

> That at least one of the killings occurred within the special maritime and territorial jurisdiction of the United States.
>
> That one of the unlawful killings that was the object of the conspiracy occurred within the special maritime and territorial jurisdiction of the United States.

Defendant Hernandez objected, and insisted that the instructions must require the jury to find that he intended that the murders take place in the special maritime and territorial jurisdiction of the United States. The district court agreed with defendant Hernandez.

The district court's ruling is contrary to *Feola*. *Feola* stands for two

propositions relevant to the issue presented by count three. First, with regard to jurisdictional elements of substantive offenses, the defendant need not know of facts which establish the federal jurisdictional element of the offense, so long as his conduct is otherwise wrongful and he is aware that it is so. Second, to sustain a charge of conspiracy, the government "must prove at least the degree of criminal intent necessary for the substantive offense itself." *Feola*, 420 U.S. at 686. In that case, the defendants conspired to assault, and assaulted, individuals who turned out to be federal officers posing as narcotics buyers. The trial court instructed the jury that, with regard to both the substantive assault and the conspiracy, they need not find that the defendants were aware that their targets were federal officers. The Supreme Court found first that the statutory requirement that the victims be federal officers was jurisdictional only, and an element as to which there was no scienter requirement in the substantive offense. It noted that the statute "cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer." *Id.* at 684.[14] "The concept of criminal intent does not extend so far as to require that the actor understand the nature of his act but also its consequence for the choice of a judicial forum." *Id.* at 685.

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[14] The Court noted that this did not present a trap for the unwary, because one conspiring to commit an assault (or, for that matter, a murder) knows that his planned conduct is wrongful, and thus is not in a situation where legitimate conduct becomes unlawful solely because of the identity of the victim.

In considering inchoate crimes like conspiracy, the Court found that no more knowledge or intent regarding jurisdictional elements is required for conviction on these offenses than is necessary to prove the underlying substantive offense. The Court noted that, "a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibited conduct. Then where, as here, the substantive statute does not require that an assailant know the official status of his victim, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge." *Id.* at 687.[15]

The cases that follow *Feola* further elaborate on the mens rea requirement with respect to jurisdictional prerequisites. In a variety of contexts, they collectively stand for the proposition that, with regard to conspiracy offenses, the government need not prove knowledge by the defendant of the fact or facts that establish federal jurisdiction. *See United States v. Smith*, 934 F. 2d 270, 274-75 (11th Cir. 1991)

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[15] The government's proposed instructions, directing the jury to determine whether the murders actually occurred in the special maritime and territorial jurisdiction of the United States, if answered in the affirmative work to insure that any possible question of federal jurisdiction is clearly resolved. *See Feola*, 420 U.S. at 696 ("To summarize, with the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."); *see also United States v. Rosa*, 17 F. 3d 1531 (2d Cir. 1994) (interstate travel element of conspiracy to receive stolen property may be supplied in several ways, including proof that goods actually did travel in interstate commerce, whether or not defendants knew of such travel because "knowledge that the goods have traveled interstate or internationally is irrelevant to the essential nature of that agreement").

(proof of conspiracy to commit mail fraud need include only proof of specific intent to defraud, not specific intent to use mails); *United States v. Petit*, 841 F. 2d 1546, 1551 (11th Cir. 1988) (knowledge that goods moved in interstate commerce not required to sustain conviction for conspiracy to receive stolen goods); *United States v. Sorrow*, 732 F. 2d 176, 177 (11th Cir. 1984) (proof of intent to defraud sufficient to support conviction under 18 U.S.C. § 371 without showing that defendant was aware of federal interest which might be affected); *United States v. Bankston*, 603 F. 2d 528, 532 (5th Cir. 1979) (proof to support conviction for conspiracy to kidnap need not include evidence of defendant's knowledge of the interstate nature of the plan); *United States v. Franklin*, 586 F. 2d 560, 566 (5th Cir. 1978) (knowledge that stolen goods were to be shipped in interstate commerce irrelevant to proof of conspiracy); *United States v. Beil*, 577 F. 2d 1313, 1314 (5th Cir. 1978) (same); *United States v. Boyd*, 566 F. 2d 929, 938 (5th Cir. 1978) (conspiracy to conduct gambling business conviction does not require proof that defendant knew that five or more persons would be involved in enterprise); *see also United States v. Jannotti*, 673 F. 2d 578, 592 (3d Cir. 1982) ("The appropriate inquiry then is not whether the defendants' perceptions can invest the courts with federal jurisdiction, as the district court viewed the issue, but whether the defendants' conduct constituted a sufficient threat to interstate commerce so as to implicate an 'area of federal concern' sufficient to give rise to federal jurisdiction."); *United States v. Alvarez*, 755 F. 2d 830, 843 (11th Cir. 1985) ("[E]ven a claim of self-defense based on lack of knowledge of the

victim's federal status does not make knowledge an element of the crime under section 111," noting that the government can negate such a claim by proving that the defendant was the aggressor or used excessive force even in the absence of knowledge of the victim's federal employment).[16]

The case cited by the district court in support of its position is distinguishable from the case at bar. The defendants in *United States v. Conroy*, 589 F. 2d 1258 (5th Cir. 1979), were charged with conspiracy to import marijuana into the United States. Importation into the United States is an element of the substantive offense upon which that conspiracy is based. Indeed, the importation is an essential part of the offense, for without the importation into the United States or the conspiracy to do so there is no criminal conduct. Further, there was no proof in *Conroy*, as there is here, that the jurisdictional element was actually satisfied, given that the vessel carrying the contraband was undisputedly intercepted in Haitian waters. In the instant case, the United States can satisfy the jurisdictional element in several ways, including proof of the actual location of the murders. *See Rosa*, 17 F. 3d at 1546 (in conspiracy to receive stolen goods, jurisdictional element satisfied if goods actually moved in interstate commerce, whether defendants knew or not, or if at least one defendant

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[16] The case at bar does not suffer from the issue discussed in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), where proof of a particular element (the minor status of individuals portrayed in sexually explicit materials) was required to avoid the criminalization of otherwise "innocent" conduct. *See United States v. Smithen*, 213 F. 3d 1342 (11th Cir. 2000); *United States v. Robinson*, 137 F. 3d 652 (1st Cir. 1998).

believed that goods traveled in interstate commerce); *see also Feola*, 420 U.S. at 695-96. The United States has proposed a jury instruction which would require that the jury make such a finding, and if the jury finds that the facts support a conclusion that the murders occurred in the special maritime and territorial jurisdiction of the United States, the jurisdictional element will have been satisfied. Proof of the defendant's knowledge in this regard is not necessary to establish jurisdiction, and not required for any other purpose.

In imposing the knowledge-of-location requirement, the court stated that it was concerned that the location issue could bear on a defense claim of justification or use of deadly force. Importantly, however, the defense has vigorously, and successfully, resisted government efforts to have the jury instructed on justification and use of deadly force. The United States requested such an instruction, both with regard to the court's proposed Count 3 instruction and with regard to the defense's successful request that the jury be instructed on International Civil Aviation Organization principles of air "sovereignty", *see* discussion *infra*, but the defense objected and the court denied the government's request. Instead, the defense has pursued, and the court has acquiesced in, a policy of suggesting to the jury that there is some basis to justify four homicides as lawful, based on where they occurred or were planned to occur, while preventing the jury from being instructed as to the only proper framework to assess the lawfulness or unlawfulness of killings, the framework of the venerable and precious standards of justification, self-defense, and use of deadly

force.

The court's instruction abdicates a legal issue of importance which has been passed on by the Supreme Court and this court, and instead leaves the jury to flounder and improvise as to the critical legal issue of what intent and knowledge is required in a conspiracy to commit murder. Any questions by the jury will be met with the wrong answer – that is requires agreement that the killings would occur in the special maritime and territorial jurisdiction – and with no answer as to the severe safeguards and limitations imposed on the decision to take human life.

In light of these cases, and the government's proposed instruction regarding the actual location of the murders in this case, the government should not be required to prove that defendant Hernandez agreed that the murders would occur in the special maritime and territorial jurisdiction of the United States. The instructions as proposed by the United States with the additional element noted permit a finding by the jury that will support federal jurisdiction. The contrary proposition, urged by defendant Hernandez and accepted by the district court, imposes an insurmountable barrier to this prosecution in contravention of the established law in this area.

III. The District Court Improperly Approved an Instruction Requiring the Government to Prove the Elements of First Degree Murder Where the Indictment Only Charged Second Degree Murder.

The district court will instruct the jury that it must determine whether defendant Hernandez conspired to commit first-degree murder, over the objection of the government. The indictment does not so charge; instead, it tracks the statutory

language for second-degree murder.

18 U.S.C. § 1111 – the statute for the offense agreed to have been committed – provides:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;
>
> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

The second superseding indictment charged that this was a conspiracy "to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought, in the special maritime and territorial jurisdiction of the United States, in violation of Title 18, United State Code, Section 1111." This is an averment of second-degree murder, and Count 3 charges a conspiracy to commit second-degree murder. As to conspiracies to commit second-degree murder, *see United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986); *United States v. Branch*, 91 F.3d 699, 732, 734-5 (5th Cir. 1996). The instruction approved by the district court requires that the

jury find that the defendant conspired to commit a "killing with 'premeditated intent.'"

Two cases – *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985) and *Chagra* – taken together show that the proper jury instruction in a charge of conspiracy-to-murder pursuant to 18 U.S.C. §1117 depends on how the offense is charged. Where it is charged as a conspiracy to commit first degree murder, with an averment of premeditation, as in *Harrelson*, the instruction must encompass premeditation. Where it is charged as a conspiracy to commit second-degree murder, with an averment of malice aforethought but not premeditation, as in *Chagra* and as in this case, the instruction must encompass malice aforethought, but not premeditation. Here, the district court's instruction is inconsistent with the second superseding indictment on its face, and improperly raises the burden of proof faced by the United States.

The District Court distinguished *Chagra* because there the government gave the defense advance warning that it was charging a conspiracy to commit second-degree murder, and here the defendants claims to have been "surprised" to find out that the government is proceeding on a theory of conspiracy to commit second-degree murder and not first-degree murder. The District Court also noted that the indictment, government's opening statement and proof all alluded to facts that showed planning of the shootdowns, consistent with first- and not second- degree murder. This echoes the defense claim, rejected in *Chagra*, that there is no such thing as a conspiracy to

commit second degree murder, because one cannot plan the unplannable. But *Chagra* rejected this syllogism, finding instead that the distinction between first- and second-degree murder lies in the impulsivity of the killing, and therefore of the plan to kill. Further, the issue of supposed surprise to the defendant is not a basis to distinguish and reject *Chagra*. The defendant here has been on notice of the terms of the indictment since spring, 1999, when it was filed; of the government's opening statement since autumn, 2000, when it was delivered; of its proof since January - March of this year, and of the government's explicit reliance on second-degree murder conspiracy since February, 2001, when its proposed jury instructions were filed.

IV. The District Court Improperly Granted Defendant Hernandez's Request For A Theory Of Defense Instruction That Is Not A Legally-Cognizable Defense To Homicide.

To further compound the district court's series of clearly erroneous instructions on the law pertaining to the conspiracy to commit murder as charged in Count III, the court fashioned, over strenuous objection of the United States, a theory of defense instruction regarding certain provisions of the International Civil Aviation Organization ("ICAO").[17]

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[17] The district court approved over the government's objection the following theory of defense instruction with regard to Count Three of the indictment, the conspiracy to commit murder:

> State Territorial Rights: You are instructed that every nation has complete and exclusive sovereignty over the airspace above its territory.

(continued...)

The instruction fails to provide the jury any guidance as to how those provisions fit into the framework of federal criminal law; rather, they are a bare recitation of certain internationally recognized aviation provisions. It provides no legal instruction to the jury of how concepts such as "sovereignty" relate to criminal law, leaving the potential for jury misunderstanding that somehow "sovereignty" equates to a substantive right for government actors to take any action, under the label of "sovereignty", free of any standards or consequences under federal criminal law.

As with the court's erroneous instruction on the substantive provisions relating to Count Three dealing with the relation between conspiracy and murder, this instruction abdicates to the jury to divine and the attorneys to argue the legal significance of those provisions in ICAO. The theory of defense instruction approved by the district court seems to suggest – and indeed was offered by defendant Hernandez for the proposition that somehow ICAO rules permitted the shoot downs to occur. This is wholly without legal support or basis. Nowhere in ICAO rules is there any prescription for any lawful shooting down of aircraft. On the contrary,

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[17](...continued)

> The territory of every state consists of the land areas and territorial waters adjacent thereto under the sovereignty and protection of such state. Every nation also has complete and exclusive sovereignty and control over its territorial airspace extending 12 nautical miles out to sea. International rules applicable to civil aircraft are not applicable to state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft. No state aircraft are permitted to fly over the territory of another nation without authorization.

ICAO rules are replete with the principle that safety of aviation is of primary concern. Given the consistent defense position with regard to this charge, it can be easily and readily ascertained that "exclusive sovereignty over a nation's airspace" as delineated by ICAO will be argued by counsel as an exclusive right to kill human beings within the sovereign territory unrestrained by basic precepts of common law.[18] Further, the court admitted extensive evidence regarding alleged prior violent acts by one of the intended victims, Jose Basulto, including prior incursions into Cuban airspace, ostensibly to support a justifiable homicide theory of defense.

The theory of defense instruction approved by the district court has no basis in the common law and is not a cognizable legal defense to murder. Even with the balancing provisions offered by the government after its objections were overruled,[19]

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[18] Counsel repeatedly referred in his opening statement that the homicides were "justified". Further, defense expert George Buchner testified "that governments will do what they can get away with within the context of sovereignty". Tr. 9961. In the current state of the instructions, this is the only "legal" principle guiding the jury as to how sovereignty relates to the right to kill human beings.

[19] Interception of Civil Aircraft:

> The International Civil Aviation Organization ("ICAO") has among its provisions the following:
> The aims and objectives of ICAO are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to insure the safe and orderly growth of international civil aviation throughout the world.
> Due regard shall be had by States when developing regulations and administrative directives to principles including the following:
> Interception of civil aircraft will be undertaken only as a last resort;

(continued...)

[19](...continued)

If undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome; navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established.

States shall publish a standard method that has been established for the maneuvering of aircraft intercepting a civil aircraft. Such method shall be designed to avoid any hazard for the intercepted aircraft.

Special procedures shall be established in order to ensure that:

air traffic services units are notified if a military unit observes that an aircraft which is, or might be, a civil aircraft is approaching, or has entered, any area in which interception might become necessary;

all possible efforts are made to confirm the identity of the aircraft and to provide it with the navigational guidance necessary to avoid the need for interception.

As soon as an air traffic services unit learns that an aircraft is being intercepted in its area of responsibility, it shall take such of the following steps as are appropriate in the circumstances:

attempt to establish two-way communication with the intercepted aircraft on any available frequency, including the emergency frequency 121.5 MHz, unless such communication already exists;

inform the pilot of the intercepted aircraft of the interception;

establish contact with the intercept control unit maintaining two-way communication with the intercepting aircraft and provide it with available information concerning aircraft;

relay messages between the interception aircraft or the intercept control unit and the intercepted aircraft, as necessary;

in close coordination with the intercept control unit take all necessary steps to ensure the safety of the intercepted aircraft; and

inform air traffic services units serving adjacent flight information regions if it appears that the aircraft has strayed from such adjacent flight information regions.

Defendant Hernandez then requested, and the court agreed to give, again over the

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the theory of defense instruction still suffers from this infirmity, and tacitly invites the jury to find that a state's sovereignty over its airspace gives it the right to murder whomever it likes, and that anyone who participates in that murder can be absolved of that crime by claiming the umbrella of that sovereignty. No authority was cited by defendant Hernandez or the district court for this proposition,[20] which is counter to the most basic precepts of self-defense and use of deadly force.

It is axiomatic that a theory-of-defense instruction may be given only where the proposed instruction has legal support, as well as a foundation in the evidence. *United States v. Paradies*, 98 F.3d 1266, 1287 (11th Cir. 1996); *United States v. Silverman*,

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[19](...continued)
government's objection, the following instruction:

> Whether or not an aircraft acted as a state aircraft or as a civil aircraft is an issue of fact for you to determine

[20] The authority originally cited by defendant Hernandez for this proposed instruction include only cases dealing with the act-of-state doctrine and Foreign Sovereign Immunity Act. These doctrines do not apply to criminal cases, and these cases provide no guidance or substantive law on so critical an issue as when homicide is lawful or justified. *See United States v. Noriega*, 117 F. 3d 1206, 1212 (11th Cir. 1997) ("The FSIA 'contains a comprehensive set of legal standards governing claims of immunity in every *civil action* against a *foreign state or its political subdivisions, agencies, or instrumentalities*,'" noting that "the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context") (emphasis in original) (quoting *Verlinden B.V.*, 461 U.S. at 488, 103 S.Ct. at 1967); *United States v. Hendron*, 813 F. Supp. 973, 974-76 (E.D.N.Y. 1993); *see also Southway v. Central Bank of Nigeria*, 198 F. 3d 1210, 1214 (10th Cir. 1999) (refusing to conclude that Congress intended FSIA to apply to district court's jurisdiction in criminal matters); *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F. 2d 817, 831-32 (11th Cir. 1984) (act of state doctrine is "completely inapplicable in the investigatory or criminal context.").

745 F.2d 1386, 1399 (11th Cir. 1984)("The requested instruction must be a legally cognizable defense to the indictment;" theory-of-defense instruction properly denied); *United States v. Toney*, 27 F.3d 1245 (7th Cir. 1994); *United States v. Johnson*, 767 F.2d 1259, 1267 (8th Cir. 1985); *United States v. McQuarry*, 726 F.2d 401, 402 (8th Cir. 1984)(theory of defense instruction properly rejected; is was unsupported by case law, and no American case allowed such an instruction); *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987).

The court, compounding its clear error in giving this unlawful instruction and giving the jury and the attorney a platform to argue an erroneous conclusion as to what is a lawful or unlawful homicide, refused to couple this instruction with a justifiable use of deadly force instruction proposed by the United States.[21] This

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[21] **JUSTIFICATION/SELF DEFENSE/USE OF DEADLY FORCE**

For a conviction under Count 3, the United States must prove beyond a reasonable doubt that the conspiracy was one to commit the unlawful killing of one or more human beings. There are certain circumstances in which killing may be justified and lawful.

If the defendant had reasonable grounds to believe that either he or other individual(s) was in imminent danger of death or serious bodily harm which could be prevented only by using deadly force against his assailant, he had the right to employ deadly force in order to defend himself or others.

The circumstances under which the defendant acted must have been such to produce in the mind of a reasonably prudent person similarly situated the reasonable belief that the other person(s) was then about to kill him or do him serious bodily harm. In addition, the defendant must actually believe that he was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.

The defendant must do everything in his power consistent with his safety to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked in a manner which threatens him with death or great bodily

(continued...)

refusal, based on defense objection, is clearly erroneous and amounts to the court rendering a misleading and incomplete charge on homicide. The court's instructions relating to the substantive provisions of Count Three clearly, and lawfully, require the government to prove beyond a reasonable doubt that the killing(s) were "unlawful". The court's refusal to define when a killing is lawful or unlawful, either in conjunction with the theory of defense instruction or with a proper instruction on

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[21](...continued)
injury, he must avoid the attack if it is possible to do so, and the right of self defense does not arise until he has done everything in his power to prevent its necessity.

Now, if the defendant did not provoke the attack, or if the defendant was not the aggressor and if he had reasonable grounds to believe, and actually did believe, that he was in imminent danger of death or serious bodily harm, and that deadly force was necessary to repel such danger, he would not necessarily be required to retreat or to consider whether he could safely retreat; but if the defendant could have safely retreated and did not do so, his failure to retreat is a circumstance which you may consider together with the other circumstances in the case, in determining whether he went further in repelling the danger, real or apparent, that he was justified in doing under the circumstances.

By deadly force is meant force which is likely to cause death or serious bodily harm. In order for the defendant to have been justified in the use of deadly force in self-defense, he must not have provoked the assault on him or been the aggressor. Mere words, without more, do not constitute provocation or aggression.

If evidence of self defense is present, the government must prove beyond a reasonable doubt that the defendant did not act in self defense. If you find that the government has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

United States v. Blevins, 555 F.2d 1236, 1239 (5th Cir. 1977)
United States v. Alvarez, 755 F.2d 830, 846-47 (11th Cir. 1985)

The Court also refused this instruction in the context of an instruction on the substantive provisions of conspiracy to commit homicide as charged in Count Three.

Count Three, amounts to an abdication to the jury of the court's constitutional duty to determine and appropriately charge the jury with a correct statement of the law. A justifiable use of deadly force instruction, as previously approved by this Circuit as delineated herein is clearly required in order for the court to fulfill its constitutional obligations.

Defendant Gerardo Hernandez has offered no case law in support of his theory of defense on killing in defense of national borders. He has alluded to provisions of the International Civil Aviation Organization, but with no specificity. Justification for homicide, use of deadly force, and self-defense are not topics unknown to United States law, including federal law. *See, e.g., Brown v. United States,* 256 U.S. 335, 343 (1921); *United States v. Alvarez,* 755 F.2d 830, 842-45 (11th Cir. 1985); *United States v. Blevins*, 555 F.2d 1236, 1238 - 39 (5th Cir. 1977). No defendant can simply "opt out" of this legal framework, with its stringent standards as to proportionality of amount of force used; when there is a duty to retreat before using force; the requirement of reasonableness as to a defendant's belief that force must be used; and a host of other standards that have evolved over centuries of the common law. These are critical safeguards and balances in the jurisprudence surrounding what may be the most fundamental tenet of a system of criminal law: the proposition that human life is precious.

As discussed, the court permitted into evidence extensive evidence of prior acts by one of the alleged victims, including his prior unauthorized incursions into Cuban

airspace. That evidence is only admissible to lay a foundation for a defense of justification, as argued repeatedly by the defendant. To refuse an instruction on justifiable use of deadly force and leave open for argument lawless precepts of sanctioned vengeance or retribution based on "sovereignty" is clear error.

Relief Sought

For the foregoing reasons, it is respectfully submitted that the government's petition for writ of prohibition should be granted as follows:

1. That the district court be prohibited from giving the following parts of its approved instruction regarding 18 U.S.C. § 951:

> *However, an agent of a foreign government does not include any officially and publicly acknowledged and sponsored official or representative of a foreign government. The meaning of any "officially acknowledged and sponsored official or representative of a foreign government" includes any official of a foreign government on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of that foreign government.*
>
> * * *
>
> *You are instructed that you must return a verdict of not guilty as to any count charging the defendant with acting as a foreign agent, unless the government proves beyond a reasonable doubt that the defendant was not an officially and publicly acknowledged and sponsored official or representative of a foreign government.*

2. That the district court be ordered to instruct the jury that it is not necessary for the jury to find that defendant Hernandez or his co-conspirators in Count Three of the indictment agreed that the murders would occur in the special maritime and territorial jurisdiction of the United States.

3. That the district court be prohibited from giving the pattern jury instruction on first degree murder and from instructing the jury that it must find that defendant Hernandez conspired to commit premeditated

murder, and instead that the district court be ordered to give an instruction that requires only malice aforethought as the scienter element, as charged in the indictment.

4. That the district court be prohibited from giving a theory of defense instruction to the jury as to Count Three that includes provisions of the ICAO conventions and annexes without also giving an instruction on the justifiable use of deadly force.

Respectfully submitted,

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Certificate of Service

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Hon. Joan A. Lenard
United States District Judge
301 North Miami Avenue, 7th Floor
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(Hand-delivered to Chambers)

Barry Sabin
First Assistant United States Attorney

(1) that part of the instructions regarding 18 U.S.C. § 951 that instructs the jury that a foreign agent conducting covert operations within the United States is not required to comply with the notification provisions of § 951 if he is an "official of a foreign government on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of that foreign government";

(2) those instructions regarding the conspiracy to commit murder that require the government to prove that the conspirators agreed on the jurisdictional location of the murders;

(3) the instruction requiring that the government prove premeditated, first degree murder when the indictment charged only a conspiracy to commit second degree murder; and

(4) the theory of defense instruction as to Count Three, which is not a legally-cognizable defense to homicide.

Reasons for Granting the Petition

The United States of America, faced with erroneous jury instructions that jeopardize national security and constructs nearly insurmountable barriers for a prosecution involving foreign agents, one of whom conspired to murder American citizens, takes the unprecedented step of petitioning this Court for a writ of