No. 08-___

IN THE

Supreme Court of the United States

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A. ISELIN, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF APPELLEE,

v.

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, , DEFENDANTS-APPELLANTS.

[Decided: June 4, 2008
Filed: June 4, 2008]

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Before: BIRCH, PRYOR, and KRAVITCH, Circuit Judges.

OPINION

PRYOR, Circuit Judge:

Five agents of the Cuban Directorate of Intelligence who were members of *La Red Avispa* (in English, "The Wasp Network") challenge their convictions and sentences for their espionage against the military of the United States and Cuban exiles in southern Florida. A special mission of the Cuban network, Operacion Escorpion, led to the murder of four men when Cuban military jets shot down two private aircraft over international waters in 1996. Each Cuban agent was convicted of espionage charges, and one agent was convicted of conspiracy to murder, following a trial in Miami that lasted more than six months. Our Court, en banc, affirmed the denial of the Cuban agents' motions for a change of venue and a new trial and remanded this appeal to this panel for consideration of the remaining issues. *United States v. Campa,* 459 F.3d 1121, 1154-55 (11th Cir.2006) (en banc).

The Cuban agents raise a host of issues on appeal. The Cuban agents challenge rulings about the suppression of evidence from searches conducted

under the Foreign Intelligence Surveillance Act, sovereign immunity, discovery of information under the Classified Information Procedures Act, the exercise of peremptory challenges, alleged prosecutorial and witness misconduct, jury instructions, the sufficiency of the evidence in support of their convictions, and several sentencing issues. We conclude that the arguments about the suppression of evidence, sovereign immunity, discovery, jury selection, and the trial are meritless, and sufficient evidence supports each conviction. We also affirm the sentences of two defendants, but we remand in part for resentencing of the other three defendants.

I. BACKGROUND

Before we address the merits of this appeal, we review four matters. First, we review the relevant facts in the trial record. Second, we review the procedural history in the district court. Third, although we have previously described the details of the trial, *Campa,* 459 F.3d at 1126-42, we describe the details that are relevant to the issues that are now before this panel. Finally, we review the convictions and sentences of each Cuban agent.

A. Facts

The primary intelligence agency of Cuba, the Directorate of Intelligence, maintained an organization for espionage in South Florida known as *La Red Avispa.* Gerardo Hernandez, Ruben Campa (also known as Fernando Gozales-Llort), and Luis Medina III (also known as Ramon Labañino-Salazar) were intelligence officers in the Wasp Network. They supervised network agents, including Rene Gonzalez

and Antonio Guerrero. Among other things, the Wasp Network reported information to Cuba about the operation of military facilities, political and law enforcement activities, and activities of organizations based in the United States who support a change in the regime of Cuba.

One organization that the Wasp Network targeted is known as "Brothers to the Rescue," which is a Miami-based organization that flew small aircraft over the Florida straits in efforts to rescue rafters fleeing Cuba. Gonzalez and an unarrested codefendant, Juan Pablo Roque, successfully infiltrated the Brothers organization. In January 1996, aircraft of Brothers twice dropped leaflets over Havana. Some of these leaflets contained excerpts from the Universal Declaration of Human Rights of the United Nations.

Because the Cuban government believed that, during some flights, pilots of Brothers intentionally violated Cuban airspace, the Cuban government launched a special mission codenamed "Operation Scorpion" "in order to perfect the confrontation of" the "[counterrevolutionary] actions of [Brothers]." Cuban intelligence officers transmitted encrypted radio messages that directed Hernandez to instruct Gonzalez and Roque to determine the flight plans of Brothers. Hernandez was instructed to inform Cuban intelligence officials when Gonzalez and Roque would be flying in aircraft of Brothers. Gonzalez and Roque were not to fly from February 24 through 27, and they were instructed to use code phrases during radio communication with Cuban air traffic control if they could not avoid flying on those dates.

On February 24, 1996, three aircraft of Brothers

flew toward Cuba, but two did not return. While the planes were flying away from Cuba in international airspace, Cuban military jets shot down two of the aircraft and killed two pilots, Mario de la Peña and Carlos Costa, and two passengers, Armando Alejandre and Pablo Morales. A third plane, flown by Jose Basulto, the founder and leader of Brothers, escaped.

In addition to his infiltration of Brothers, Gonzalez performed several other functions for the Cuban government under Hernandez's supervision. Gonzalez acted as a fraudulent informant to the Federal Bureau of Investigation. He monitored the activities of other Cuban-American organizations in Florida, and he sought for his wife, who was also an agent of the Cuban Directorate of Intelligence, the assistance of a Member of Congress to enter the United States.

Medina and Campa also engaged in other activities. Medina and Campa constructed false identities, which they corroborated with numerous fraudulent identification documents such as United States passports. Medina and Campa supervised attempts by other agents to penetrate the Miami facility of Southern Command, which plans and oversees operations of all military forces of the United States in Cuba, Latin America, and the Caribbean.

Under the supervision of Medina, Campa, and Hernandez, Guerrero obtained employment as a laborer at the Key West Naval Air Station. Guerrero sent his supervisors frequent and detailed reports about the movement of aircraft and military personnel, and comprehensive descriptions of the

layout of the facility and its structures. Guerrero reported on the renovations of buildings that were to be used for top-secret activities, and he was urged to determine the purpose for which new top-secret facilities would be used.

B. Procedural History

Much of the evidence that the government introduced at trial was obtained through searches that were conducted under the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1845 (2000), and approved by the court created by that Act. Campa moved to suppress this evidence and argued that the government had failed to adhere to the requirements of the Act. After the Attorney General filed an affidavit that stated that an adversary hearing on the motion to suppress would harm national security, the district court reviewed the motion and affidavit *in camera*. *See* 50 U.S.C. § 1806(f). The district court denied the motion to suppress.

Before trial, the government requested and received an ex parte hearing under section four of the Classified Information Procedures Act, which allows the district court to permit the government to provide substitutes in place of classified information that would otherwise be discoverable. 18 U.S.C. app. 3 § 4. The district court denied defense counsel's request to participate in this hearing. After the trial ended, the defendants argued that the district court did not have the authority to hold the hearing and moved to have the records of the hearing unsealed. The district court denied this motion.

Before trial, the defendants requested a change of venue. The district court denied this request.

Before, during, and after the trial, the defendants challenged the fairness of the proceedings and sought new trials. They argued that, because of the pervasiveness of anti-Castro sentiment in the area, it was impossible for the defendants to receive a fair trial in Miami-Dade County. The defendants argued that the fairness of the trial was further undermined by prosecutorial misconduct that occurred during the trial and by statements made by Jose Basulto, a defense witness, which we describe below.

During the jury selection process, the government used nine of its eleven peremptory challenges. The defendants objected to seven of these challenges and argued that the government excluded the jurors because they were black. The district court asked the government to provide a race-neutral reason for each challenged strike, and the court found that the reasons proffered by the government were race neutral. The jury that was seated included three black jurors and one black alternate juror.

After the government closed its case, Hernandez moved to dismiss the murder conspiracy count. He argued that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, deprived the court of jurisdiction. The district court disagreed and denied the motion.

C. Trial and Closing Arguments

The defendants were charged in a 26-count indictment. They were convicted after a jury trial that lasted more than six months. We described the details of the indictment and the trial in our en banc opinion. *Campa*, 459 F.3d at 1127-42.

During the course of the trial, attorneys for the

government and witnesses made several statements that the defendants allege were improper. In response to our request at oral argument, defense counsel filed a chart that listed each instance of alleged misconduct, whether an objection was raised, and the response by the court. The chart includes several allegations that were not raised in the initial briefs of the defendants, but any issues arising out of these allegations were abandoned. *See United States v. Levy,* 416 F.3d 1273, 1275 (11th Cir.2005) ("[P]arties cannot properly raise new issues at supplemental briefing...." (quoting *United States v. Nealy,* 232 F.3d 825, 830 (11th Cir.2000))). Because we address the allegations of misconduct that the defendants raised in their initial briefs, we describe those facts that give rise to these allegations.

The government on several occasions asked questions of witnesses and otherwise referred to the presence of military facilities in Fayetteville, North Carolina, where Campa once lived. The district court instructed the government to avoid this line of questioning because the government had presented no evidence that connected Campa to those facilities. After counsel for the government persisted with this line of comments and questions and defense counsel objected, the court instructed the jury that the suggestion "that Mr. Campa's presence in North Carolina was related to a military installation" was "improper" and "to completely disregard" it. The government again connected Campa with military bases in Fayetteville in its closing argument, but the district court sustained Campa's objection to the remarks by the government.

We described in our en banc opinion as follows

an instance of misconduct by a witness, Jose Basulto:

> During the defendants' case, Hernandez called as a hostile witness Jose Basulto, founder of Brothers to the Rescue and the pilot of the only plane that escaped the February 24, 1996, shootdown. After a series of questions about Basulto's travel outside of the United States, in which Hernandez's counsel suggested that Basulto had attempted to smuggle weapons into Cuba, Basulto retorted, "Are you doing the work of the intelligence government of Cuba [?]"... The court struck Basulto's remark, admonished him, and instructed the jury to disregard the comment, noting that the remark was "inappropriate and unfounded" and that Hernandez's counsel was properly providing a "vigorous defense for his client."

Campa, 459 F.3d at 1138 (footnotes omitted) (alteration in original).

During closing arguments, the government uttered several statements that the defendants now challenge. In reference to the shootdown, the government said, "What kind of justification is that to shoot people out, or in [defense attorney] Mr. McKenna's word, the final solution, I heard that word before in the history of mankind." In his closing argument, Mr. McKenna had stated that "finally, somebody in a command bunker was given authority to exercise the final option and the final option was exercised," but there was no reference to the "final solution" in Mr. McKenna's closing argument. The government said that the Cuban Directorate of Intelligence sponsored "book bombs," "threats," and "sabotage," and that they used the identities of "dead

babies" to construct false identification documents. The government argued, "My God, these guys are spies""bent on the destruction of the United States of America" and said that Campa was sent "to destroy the United States." The government also said that the date of the shootdown, "February 24, 1996[,] like December 7, 1941[,] is a day that will live in the hearts and minds of these families, these four families forever destroyed." The defendants did not object to any of these statements in closing arguments.

After defense counsel mentioned in closing argument that counsel was appointed and said that "[w]e are working and serving the [C]onstitution of the United States," the government said that the defendants "forced us to prove their guilt beyond a reasonable doubt" and that the defendants who were "bent on destroying the United States" received "able counsel who argued every point and cross-examined our witnesses,""paid for by the American taxpayer." The defendants objected to these arguments. Campa also objected to the statement that the court "takes into account all other factors that may be relevant for what would be the appropriate sentence," which the government made in closing argument after Campa's attorney said that Campa is "looking at ten years in prison." The district court sustained all these objections.

D. Convictions and Sentences

After the trial, Hernandez was convicted of 13 counts: one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c); eight counts of acting as an agent of a foreign government without notifying the Attorney General,

18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; two counts of fraud and misuse of documents, 18 U.S.C. § 1546(a); one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3); and one count of conspiracy to murder, 18 U.S.C. § 1117. Hernandez was sentenced to concurrent terms of life imprisonment on the counts of conspiracy to murder and conspiracy to gather and transmit national-defense information. On the other counts, Hernandez was sentenced to shorter terms of imprisonment, which run concurrently with one another and with his life sentences.

Campa was convicted of five counts: two counts of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; one count of fraud and misuse of documents, 18 U.S.C. § 1546(a); and one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). He was sentenced to a total of 228 months of imprisonment.

Medina was convicted of ten counts: four counts of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c); two counts of fraud and misuse of documents, 18 U.S.C. § 1546(a); one count of making a false statement in a passport application, 18 U.S.C. § 1542; and one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). Medina was sentenced to life imprisonment on the

conspiracy charge. On the other charges he was sentenced to shorter terms of imprisonment that run concurrently with his life sentence.

Rene Gonzalez was convicted of two counts: one count of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371. He was sentenced to five years of imprisonment on the conspiracy count and a consecutive term of ten years of imprisonment on the substantive count.

Antonio Guerrero was convicted of three counts: one count of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; and one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c). Guerrero was sentenced to life imprisonment for conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c). For each of the other counts, Guerrero was sentenced to shorter terms of imprisonment, which run concurrently with Guerrero's life sentence.

II. STANDARDS OF REVIEW

The multiple issues in this appeal are governed by several standards of review. We review the denial of a motion to suppress evidence obtained under the Foreign Intelligence Surveillance Act *de novo*, *see United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir.2000), but our scope of review is no greater than that of the court that approved the searches and surveillance, *United States v. Badia,* 827 F.2d 1458, 1463 (11th Cir.1987). We review *de novo* the interpretation of the Classified Information

Procedures Act, *see United States v. Gilbert,* 130 F.3d 1458, 1461 (11th Cir.1997), but we review discovery rulings for abuse of discretion, *see United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir.1997).

We review the denial of a motion for a mistrial based on improper testimony for abuse of discretion. *United States v. Mendez,* 117 F.3d 480, 484 (11th Cir.1997). Allegations of prosecutorial misconduct present mixed questions of law and fact that we review *de novo. United States v. Noriega,* 117 F.3d 1206, 1218 (11th Cir.1997). We review jury selection under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *de novo,* but we review underlying factual findings for clear error. *United States v. Allen-Brown,* 243 F.3d 1293, 1296-97 (11th Cir.2001). We review a determination whether participation by a foreign state in litigation is so extensive as to waive a defense of sovereign immunity for abuse of discretion. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.,* 727 F.2d 274, 278 (2d Cir.1984); Restatement (Third) of Foreign Relations Law § 456 reporters' note 4 (1987).

We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the party who objects to them. *United States v. Grigsby,* 111 F.3d 806, 814 (11th Cir.1997). If the instructions accurately reflect the law, the district court enjoys "wide discretion as to the style and wording employed in its instruction [s]." *Bogle v. McClure,* 332 F.3d 1347, 1356 (11th Cir.2003). We review the sufficiency of the evidence *de novo* and view the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in favor of the government to

determine whether a reasonable jury could convict. *United States v. Khanani,* 502 F.3d 1281, 1293 (11th Cir.2007); *United States v. Keller,* 916 F.2d 628, 632 (11th Cir.1990). We review the application of the Sentencing Guidelines *de novo,* but we review the factual determinations of the district court for clear error. *United States v. Bradford,* 277 F.3d 1311, 1316 (11th Cir.2002).

III. DISCUSSION

The defendants present several arguments about the procedural rulings made by the district court and the jury instructions, and each defendant challenges the sufficiency of the evidence in support of his convictions and his sentence. We first discuss the five procedural issues: (1) whether the district court erred when it denied the defendants' motion to suppress under the Foreign Intelligence Surveillance Act; (2) whether the district court erred about the discovery of classified information; (3) whether the district court was required to grant a new trial or declare a mistrial based on alleged prosecutorial and witness misconduct; (4) whether the government exercised its peremptory challenges to prospective jurors on the basis of race; and (5) whether the Foreign Sovereign Immunities Act deprived the court of jurisdiction of the charges against Hernandez. We then turn to the three issues about the jury instructions: (1) whether the district court instructed the jury erroneously about the offense of acting as a foreign agent without notifying the Attorney General; (2) whether the district court erred when it declined to instruct the jury on the defense of necessity; and (3) whether the district court instructed the jury erroneously about Hernandez's murder-conspiracy charge. We then

address the sufficiency of the evidence in support of each defendant's conviction. Finally, we address whether the district court correctly sentenced each defendant.

A. The District Court Did Not Err When It Denied the Defendants' Motion to Suppress.

Hernandez, Medina, Campa, and Guerrero argue that the district court erred by denying their motion to suppress evidence obtained from searches and surveillance conducted under the Foreign Intelligence Surveillance Act. 50 U.S.C. §§ 1801-1845 (2000). Although the defendants concede that they do not know why the searches and surveillance were approved by officials in the executive branch and the FISA Court, whether the district court determined that the searches and surveillance were for proper purposes, or whether the minimization procedures of the Act were met, the defendants argue that the searches did not comply with the Act. Because only Campa challenged this evidence in the district court, we review the arguments of his codefendants for plain error. *See United States v. Gray,* 626 F.2d 494, 501 (5th Cir.1980). In 2001, after the searches were approved, Congress amended the Act and relaxed some of its standards, but we assume that the more stringent standards imposed by the earlier version of the Act governed the applications in this appeal. *See United States v. Hammoud,* 381 F.3d 316, 333 n. 6 (en banc) (4th Cir.2004), *vacated and remanded,* 543 U.S. 1097, 125 S.Ct. 1051, 160 L.Ed.2d 997, *opinion reinstated in part,* 405 F.3d 1034 (4th Cir.2005). No plain or other error occurred.

The district court must grant a motion to suppress the fruits of a search or surveillance if it

determines that the search or surveillance "was not lawfully authorized or conducted." 50 U.S.C. §§ 1806(g), 1825(h) (2000). An application for a search or surveillance under the Act must contain certifications by a designated official of the executive branch, such as the Director of the Federal Bureau of Investigation, that the information sought is foreign-intelligence information, 50 U.S.C. §§ 1804(a)(7)(A), 1823(a)(7)(A); the purpose of the searches and surveillance is "to obtain foreign intelligence information," 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B); and the information sought cannot "reasonably be obtained by normal investigative techniques,"50 U.S.C. §§ 1804(a)(7)(C), 1823(a)(7)(C). The certification also must designate the "type of foreign intelligence information being sought,"50 U.S.C. §§ 1804(a)(7)(D), 1823(a)(7)(D); and include a statement that describes the basis for the certifications that the information sought is the type designated and that the information could not reasonably be obtained by normal investigative techniques, 50 U.S.C. §§ 1804(a)(7)(E), 1823(a)(7)(E).

When, as here, the applications contain the required certifications, they are subject "only to minimal scrutiny by the courts." *Badia,* 827 F.2d at 1463; *United States v. Duggan,* 743 F.2d 59, 77 (2d Cir.1984). The reviewing court has no greater authority to review the certifications of the executive branch than the FISA court has. *Badia,* 827 F.2d at 1463. We have explained that, in the absence of a prima facie showing of a fraudulent statement by the certifying officer, procedural regularity is the only determination to be made if a non-United States person is the target. *Id.* (quoting H.R.Rep. No. 95-

1283, pt. 1, at 92-93 (1978)). The defendants have not identified a fraudulent statement, but at least one of the targets of the searches and surveillance, Guerrero, is a "United States person" because he is a citizen, 50 U.S.C. § 1801(i).

Because a United States person was a target, we must determine whether at least some of the certifications in the application are clearly erroneous. When we make this determination, we review the statement contained in the application of the basis for the certifications and any other information furnished in connection with the application. 50 U.S.C. § 1824(a)(5). Our independent review of all the applications satisfies us that the certifications were not clearly erroneous, so we need not decide whether the other defendants are United States persons or whether the clearly erroneous standard of review applies to them.

The defendants argue that the searches were conducted for purposes not allowed under the Act, but we disagree. A designated executive official certified that the purpose of each search and surveillance was "to obtain foreign intelligence information," 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B). We have reviewed the information contained in the applications and conclude that each certification is not clearly erroneous.

The defendants next argue that, with respect to surveillance, the government "may have" violated the procedures that FISA requires to minimize the "acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." *See* 50 U.S.C. §§ 1801(h), 1804(a)(5), 1823(a)(5). The

defendants base this argument on a factual finding by another court in an unrelated case, which in turn was based on concessions made by the government that it had erred in several applications and had violated its own rules about information sharing. *See In re All Matters Submitted to Foreign Intelligence Surveillance Court,* 218 F.Supp.2d 611, 620-21 (FISA Ct.), *rev'd on other grounds, In re Sealed Case,* 310 F.3d 717 (FISA Ct. Rev.2002). These findings tell us nothing about the searches or surveillance at issue in this appeal, and they do "not establish that the government failed to appropriately minimize surveillance." *Hammoud,* 381 F.3d at 334.

Finally, Campa argues that the evidence against him must be suppressed because the government did not know of his existence or identity when it submitted applications under the Act. This argument fails. The applications named other defendants as targets, and, as the Court of Appeals for the Second Circuit has explained, when "the proper preconditions are established with respect to a particular target, there is no requirement in FISA that all those likely to be overheard engaging in foreign intelligence conversations be named." *Duggan,* 743 F.2d at 79.

B. The District Court Did Not Err In Its Rulings About the Discovery of Classified Information.

Hernandez, Medina, Campa, and Guerrero challenge the manner in which the district court managed the discovery of classified information by the defense. They present three arguments: (1) the district court should not have held an ex parte hearing under section four of the Classified Information Procedures Act, 18 U.S.C. app. § 4; (2)

the court should have unsealed the records of that hearing after the trial; and (3) the government used the Act to violate its discovery obligations under Federal Rule of Criminal Procedure 16. These arguments fail. We address each argument in turn.

The district court did not err when it held an ex parte hearing under section four of the Act. Although it does not expressly provide for a hearing, section four "contemplates an application of the general law of discovery in criminal cases to the classified information area," *United States v. Yunis,* 867 F.2d 617, 621 (D.C.Cir.1989). The broad authority of the district court to regulate discovery includes the power to hold hearings. *See, e.g.,* Fed.R.Crim.P. 16(d); 2 Charles Alan Wright, *Federal Practice and Procedure* § 258 (3d ed.2000). Nothing in section four circumscribes this power. As the Ninth Circuit has explained, "a hearing is appropriate if the court has questions about the confidential nature of the information or its relevancy." *United States v. Klimavicius-Viloria,* 144 F.3d 1249, 1261 (9th Cir.1998). The district court did not abuse its discretion when it held a hearing.

The district court also did not err by holding the hearing ex parte. Section four, which concerns only "[d]iscovery of classified information by defendants,"18 U.S.C. app. 3 § 4, expressly calls for an "ex parte showing." "[W]hile these statutes specify written submissions, they do not rule out hearings in which government counsel participate." *Klimavicius-Viloria,* 144 F.3d at 1261. When the discovery obligations of the government would otherwise require it to disclose documents that contain

classified information, section four allows the district court to permit the government either to redact the classified information or to substitute a summary or a statement of factual admissions in place of the classified documents. 18 U.S.C. app. 3 § 4. If the government provides adequate redacted documents or substitutions and obtains the permission of the district court, section four gives the government the right to keep defense counsel from seeing the original documents. The right that section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel's view. *See United States v. Mejia,* 448 F.3d 436, 457-58 (D.C.Cir.2006); H.R.Rep. No. 96-831, pt. 1, at 27 n.22 (1980) ("[S]ince the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.").

The defendants argue that the ex parte hearing prejudiced them and violated their due-process rights, but we disagree. Ordinarily, the government alone determines whether material in its possession must be turned over to a defendant. When the defendant requests exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for example, "the government decides which information must be disclosed." *United States v. Jordan,* 316 F.3d 1215, 1252 n. 81 (11th Cir.2003) (citing *Pennsylvania v. Ritchie,* 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987))."Unless the defense counsel becomes aware

that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Id.* (quoting *Ritchie,* 480 U.S. at 59, 107 S.Ct. at 1002) (internal quotation marks omitted). In contrast with this ordinary rule of unreviewability, neither the decision of the prosecutor nor the decision of the district court, under section four, is final. Any information that the government withholds under section four must be replaced with redacted documents or substitutes. A defendant can examine these redacted documents and substitutes and, if he believes that they are inadequate, move for an order compelling discovery. Fed R.Crim. P. 16(d). The defendants do not argue that this remedy was either inadequate or unavailable to them. We conclude that the district court did not abuse its discretion by holding an ex parte hearing.

The defendants next argue that the district court erred when it declined to unseal the records of its ex parte hearing after the trial, but again we disagree. Section four requires the statement of the government to be "sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal." 18 U.S.C. app. 3 § 4. The statute has no provision for the unsealing of this statement or other sealed records. The right of the government to keep some classified information from defense counsel would be ineffective if, after the trial, the government had to expose the very information that a court ruled the government had a right to keep secret before the trial. The district court did not err when it declined to unseal the records.

Finally, the defendants argue that the government used the Act to violate its discovery obligations under Federal Rule of Criminal Procedure 16 by withholding classified documents and tangible items that were seized from the defendants. This argument also fails. The defendants' bare assertion that they did not receive unspecified information does not establish a discovery violation. *See Jordan,* 316 F.3d at 1250. The defendants are entitled to discovery of these items upon a motion under Federal Rule of Criminal Procedure 16(a)(1)(E), *see Id.*, and if the government has not provided adequate substitutes under section four of the Act. The defendants do not argue either that they filed a motion under Rule 16(a)(1)(E) or that the government failed to provide adequate substitutes under section four, and they do not identify any error in a discovery ruling by the district court. If the government was required to disclose more about the information seized from the defendants, then the defendants who earlier possessed that information should have been able to explain to the district court why the disclosure was inadequate. Without more, we cannot say that the government violated its discovery obligations.

C. The District Court Did Not Err When It Declined to Order a New Trial or a Mistrial.

Hernandez, Medina, Campa, and Guerrero challenge statements made by a witness and by the government during the trial and statements of the government during closing arguments. The defendants argue that the statements improperly appealed to "the fears and passions of the jury" and require a new trial. We disagree.

The parties dispute whether we resolved this

issue in our en banc decision, when we affirmed the denial of the defendants' motions for new trials under Federal Rule of Criminal Procedure 33. *Campa,* 459 F.3d at 1153. In its order denying the motions, the district court addressed two separate arguments: (1) that the venue was prejudicial; and (2) that the government engaged in prejudicial misconduct. The district court addressed the statements of the government during trial and closing argument that connected Campa with military bases in North Carolina and other closing arguments by the government that the defendants contend were improper. The district court found no prejudicial misconduct, and we affirmed.

The decision of the en banc Court resolved these issues of prosecutorial misconduct. We explained that "the prosecution's closing arguments did not prejudice the defendants because the court granted the defendants' objections and specifically instructed the jury to disregard the improper statements. These alleged incidents of government misconduct 'were so minor that they could not possibly have affected the outcome of the trial.'" *Id.* (quoting *United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir.1985)). Because our en banc Court expressly decided this issue, we will not reconsider it. *See Hester v. Int'l Union of Operating Eng'rs,* 941 F.2d 1574, 1581 n. 9 (11th Cir.1991).

Our en banc decision also resolved any issue of witness misconduct by Jose Basulto. The misconduct of a witness does not require the district court to "vitiate the trial" in the absence of prejudice, *Spach v. Monarch Ins. Co. of Ohio,* 309 F.2d 949, 953 (5th Cir.1962); *see also* 66 C.J.S. *New Trial* § 29, at 113

(1998) ("[V]olunteered statements by a witness, *where prejudicial,* may under the circumstances warrant a new trial." (emphasis added)), and no prejudice occurred here. We explained in our en banc decision, "Basulto's comment that Hernandez's counsel was a spy for Cuba did not prejudice the defendants because it was merely a single remark during a seven-month trial by the defense's own witness, which the court struck and instructed the jury to disregard." *Campa,* 459 F.3d at 1153.

Hernandez argues that the closing argument by the government prejudicially misstated its burden of proof for the count of murder conspiracy. Contrary to the argument of the government, we did not address this prosecutorial-misconduct argument in our en banc decision. *Id.* at 1126 n. 1. We address it now and conclude that it fails.

During closing argument, the government said that an element of the murder-conspiracy charge "requires the proof of the crime occurring in international airspace" and that the government "has proven that the shootdown occurred in international air space." The government also said, "[T]he United States must prove there was a conspiracy to kill[,] and we have proven the conspiracy to kill." Hernandez objected to each of these statements, and the district court sustained each objection but declined to grant Hernandez's motions for judgment of acquittal and a new trial. The district court did not err.

We subject allegations of prosecutorial misconduct to a "two-part test." *United States v. Obregon,* 893 F.2d 1307, 1310 (11th Cir.1990). We "assess (1) whether the challenged comments were

improper and (2) if so, whether they prejudicially affected the substantial rights of the defendant." *United States v. Castro,* 89 F.3d 1443, 1450 (11th Cir.1996) (citing *Obregon,* 893 F.2d at 1310). The statements by the government were neither improper nor prejudicial. The jury instructions required proof of one of the overt acts included in the indictment, and one of the overt acts alleged was the killing of individuals in the special maritime and territorial jurisdiction of the United States. The statements by the government were accurate and did not misstate the burden borne by the government.

D. The Government Did Not Engage in Racial Discrimination in Its Exercise of Peremptory Challenges.

The defendants argue that the government violated the Constitution by engaging in a "systematic pattern of striking black jurors." We disagree. The district court did not err when it found that the peremptory strikes by the government were not discriminatory.

"Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, [the Constitution] forbids the prosecutor to challenge potential jurors solely on account of their race...." *Batson,* 476 U.S. at 89, 106 S.Ct. at 1719 (quoting *United States v. Robinson,* 421 F.Supp. 467, 473 (D.Conn.1976)). The procedure for evaluating an objection to a peremptory challenge involves three steps: "(1) the objector must make a *prima facie*

showing that the peremptory challenge is exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination." *Allen-Brown,* 243 F.3d at 1297.

In response to the defendants' challenges, the district court required the government to give race-neutral explanations for its peremptory challenges. We understand the district court to have ruled implicitly that the defendants had made a prima facie showing of racial discrimination because "a district court cannot ignore the prima facie showing requirement." *Id.* at 1297. The government stated the reasons for each challenged strike, and the district court found that the proffered reasons were race neutral.

We may affirm the decision of the district court on any ground that finds support in the record, *United States v. Simmons,* 368 F.3d 1335, 1342 (11th Cir.2004), and we conclude that the defendants did not establish a prima facie case of discrimination. Our well-established precedent, *United States v. Dennis,* 804 F.2d 1208 (11th Cir.1986), controls this issue. In *Dennis,* the government exercised some of its peremptory challenges to remove black venire members; it did not use all of its peremptory challenges; and the jury that was seated included two black persons. *Id.* at 1209, 1211. We concluded, as a matter of law, that there had been no *Batson* violation:

> It is thus obvious that the government did not attempt to exclude all blacks, or as many

> blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors or alternates.

Id. at 1211.

As occurred in *Dennis,* the government did not attempt to exclude as many black persons as it could from the jury. The government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror. No *Batson* violation occurred.

E. The District Court Did Not Err in Its Instruction of the Jury.

The defendants argue that the district court erred in three of its jury instructions: (1) the instruction about acting as a foreign agent without notifying the Attorney General; (2) the instruction about the offense of conspiracy to murder; and (3) the instruction about the defense of necessity. Each argument fails. We address each argument in turn.

1. Acting as a Foreign Agent Without Notifying the Attorney General

Hernandez, Medina, Campa, Gonzalez, and Guerrero argue that the district court erroneously instructed the jury about the elements of the offense of acting as a foreign agent without notifying the Attorney General. 18 U.S.C. § 951. The defendants argue that the statute requires the government to prove that the defendants knew that they were

required to register with the Attorney General and that the district court erred when it declined to instruct the jury on this requirement. We disagree.

The language of the statute is silent about mens rea:

> 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 to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 951(a). The accompanying regulations, promulgated under subsection (b), explain who is required to notify the Attorney General and describe the procedures for notification. *See*28 C.F.R. §§ 73.1-.6. These regulations are also silent about mens rea.

The silence of the statute is dispositive: "Where no specific intent element is apparent on the face of the statute, the crime is one of general intent." *United States v. Ettinger,* 344 F.3d 1149, 1158 (11th Cir.2003). "[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes." *United States v. Phillips,* 19 F.3d 1565, 1576-77 (11th Cir.1994). We join the Seventh Circuit and hold that section 951 does not require proof that the defendant knew of the requirement to register. *See United States v. Dumeisi,* 424 F.3d 566, 581 (7th Cir.2005) ("Knowledge of the requirement to register is not an element of § 951.").

The defendants cite several decisions in support of their argument that the government must prove a

heightened mens rea under section 951. These decisions are inapposite because they interpret statutory language that expressly requires a heightened mens rea. *See United States v. Adames,* 878 F.2d 1374, 1377 (11th Cir.1989) ("willfully"); *United States v. Frade,* 709 F.2d 1387, 1391-92 (11th Cir.1983) ("willfully"); *United States v. Hernandez,* 662 F.2d 289, 291-92 (5th Cir. Oct.1981) ("willfully"); *United States v. Warren,* 612 F.2d 887, 890 (5th Cir.1980) ("knowingly" and "willfully"). This language is absent from section 951.

The defendants' argument that general principles of criminal law and the doctrine of constitutional doubt require a mens rea of specific intent for section 951(a) also fails. The government was required to prove a mens rea of general intent. The district court instructed the jury that the defendants must have acted "knowingly," and that they must have known "that [they] had not provided prior notification to the Attorney General," to be found guilty under section 951. The defendants' request for an instruction that requires the government to prove that the defendants knew that they were required to register is not an argument for a mens rea requirement but an argument for a heightened mens rea requirement. A heightened requirement has no basis in the statutory language and would be contrary to the ordinary rule, "deeply rooted in the American legal system," *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991), that ignorance of the law is no defense to a criminal prosecution. The district court did not err when it declined to require proof of more than general intent. *See United States v.*

Knight, 490 F.3d 1268, 1271 (11th Cir.2007) (a general intent requirement is "sufficient to separate proper conduct from improper actions").

2. Conspiracy to Murder

Hernandez argues that the jury instructions allowed the jury to convict him on a finding of fewer elements than required for the charge of conspiracy to murder, but we disagree. The district court gave the instruction that the defense requested during the charge conference. "It is well established in this Circuit that to invite error is to preclude review of that error on appeal." *United States v. Silvestri,* 409 F.3d 1311, 1337 (11th Cir.2005).

Hernandez attempts to evade the invited error doctrine by arguing that other instructions that were given about International Civil Aviation Organization guidelines and arguments that the government made in closing argument somehow lowered the government's burden. This argument fails. Nothing that Hernandez identifies in other instructions or in closing argument suggests that the government bore a burden lower than the burden stated in the murder-conspiracy instruction that the defendants requested.

3. Necessity

Guerrero argues that the district court erred when it declined to instruct the jury on the defense of necessity. We disagree. Guerrero did not establish that he was entitled to that instruction.

Guerrero argues that his illegal actions and those of his codefendants were necessary as "a last-resort means of impeding continuing actions and threats-by virulently anti-Castro Cuban-exile groups

in south Florida-that had terrorized Cuba." We have explained that a defendant has the burden of establishing his entitlement to an instruction on his theory of defense "separate and apart from instructions given on the elements of the charged offense." *United States v. Ruiz,* 59 F.3d 1151, 1154 (11th Cir.1995). This burden is low. "[A] defendant is entitled to have the court instruct the jury on his theory of the case, 'as long as it has some basis in the evidence and has legal support.'" *United States v. Presley,* 487 F.3d 1346, 1350 (11th Cir.2007) (quoting *United States v. Nolan,* 223 F.3d 1311, 1314 (11th Cir.2000) (per curiam)).

Guerrero has identified no basis in the evidence for a necessity instruction. A defense of necessity requires some evidence that the threat of harm that makes the criminal activity necessary was "unlawful ... present, imminent, and impending," and that "there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." *United States v. Deleveaux,* 205 F.3d 1292, 1297 (11th Cir.2000). Even if we accept Guerrero's interpretation of the facts on appeal, he has not established that the Cuban exile groups posed any imminent threat, nor has he established any causal relation between the conduct that gave rise to his convictions-espionage against the military of the United States-and the avoidance of any harmful activities of Cuban exile groups.

F. Hernandez Waived Any Defense Under the Foreign Sovereign Immunities Act.

Hernandez argues that the court did not have jurisdiction over the criminal action against him because he is entitled to sovereign immunity under

the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The Supreme Court has stated that the Act governs "claims of immunity in every civil action" against foreign states. *Verlinden B.V. v. Cent. Bank of Nig.,* 461 U.S. 480, 488, 103 S.Ct. 1962, 1968, 76 L.Ed.2d 81 (1983). We have stated in dicta that the Act does not address "foreign sovereign immunity in the criminal context," *United States v. Noriega,* 117 F.3d 1206, 1212 (11th Cir.1997), but some of our sister circuits disagree about whether the Act affects the jurisdiction of federal courts in criminal actions. *Compare Keller v. Cent. Bank of Nig.,* 277 F.3d 811, 820 (6th Cir.2002) ("[T]he FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."), *with Southway v. Cent. Bank of Nig.,* 198 F.3d 1210, 1214 (10th Cir.1999) ("If Congress intended defendants ... to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state."). We need not address the availability of sovereign immunity as a defense, under the Act, to the criminal jurisdiction of federal courts if we conclude that Hernandez waived any sovereign immunity.

A foreign state (or its agent or instrumentality) may waive its sovereign "immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). "[A]n appearance ... in an action, without challenge to the jurisdiction of the court, is a waiver of immunity from jurisdiction to adjudicate that action." Restatement (Third) of Foreign Relations Law § 456(2)(c) & cmt. b (1987). This principle applies whether the party asserts immunity from criminal or civil jurisdiction. *Id.* § 421(3) & cmt. b.

Hernandez waived any defense of sovereign immunity. Hernandez first appeared before the district court on September 14, 1998, but first raised the defense of sovereign immunity more than two years later at the close of the evidence presented by the government. During this interim, Hernandez appeared before the court on numerous occasions, filed several motions, which included motions to dismiss on other grounds, responded to motions by the government, agreed to a trial date, and appeared at trial. Hernandez's long and active participation in the action waived any defense of sovereign immunity. *See Id.* § 456 reporters' note 4. We recognize that district courts ordinarily "have discretion ... to determine when the participation of a party in ... litigation is so extensive as to constitute a waiver," *Id.*; *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.,* 727 F.2d 274, 278 (2d Cir.1984), but Hernandez's participation was so extensive by the time he first raised the defense that we conclude as a matter of law that he waived any defense, *see Richardson v. Fajardo Sugar Co.,* 241 U.S. 44, 46-47, 36 S.Ct. 476, 477, 60 L.Ed. 879 (1916) (holding that a defendant who appeared, filed answers to an original and several amended complaints, set a trial date, and first raised the defense of sovereign immunity eight months after the action began waived the defense). We do not decide whether the defense would have been available to Hernandez if it had been timely raised. *See Id.*

G. Sufficient Evidence Supports the Convictions of Each Defendant.

Gonzalez, Campa, Hernandez, Medina, and Guerrero each argue that the evidence at trial was

insufficient to support their respective convictions. We disagree. We address the arguments of each defendant in turn.

1. Sufficient Evidence Supports Gonzalez's Convictions.

Gonzalez argues that the evidence introduced at trial was insufficient to convict him of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and conspiracy to violate section 951 and to defraud the United States, 18 U.S.C. § 371. We disagree. Sufficient evidence supports each conviction.

Gonzalez concedes that evidence presented at trial established that he and his codefendants acted as "emissaries of the Government of Cuba," but he argues that the evidence is insufficient to establish that he violated section 951(a) and that he conspired to do so because the evidence implies that Gonzalez "was never instructed as to the reporting requirements." Gonzalez's argument is based on a misunderstanding of the law. As we have previously explained, section 951 establishes a general intent crime, so the government was required to prove the intent only to do the acts that the law proscribes. *Phillips,* 19 F.3d at 1576. The government was not required to prove that Gonzalez knew of the registration requirement, so Gonzalez's argument fails.

Gonzalez's argument that the evidence introduced at trial was insufficient to prove three of the overt acts alleged in the indictment also fails. To sustain a conviction for conspiracy, "the Government must prove the existence of an agreement to achieve

an unlawful objective, the defendant's knowing and voluntary participation in the conspiracy, and the commission of an overt act in furtherance of it." *United States v. Suba,* 132 F.3d 662, 672 (11th Cir.1998). The government does not need to prove that the defendants accomplished the purpose of the conspiracy. "The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy." *Iannelli v. United States,* 420 U.S. 770, 786 n. 17, 95 S.Ct. 1284, 1293 n. 17, 43 L.Ed.2d 616 (1975). "While it is error to submit to the jury an overt act as to which there is a total lack of proof, questions of whether or not a proven overt act is in furtherance of the conspiracy are ordinarily for the jury to decide." *United States v. Fontenot,* 483 F.2d 315, 322 (5th Cir.1973) (citations omitted). The government presented sufficient evidence to establish that the overt acts that Gonzalez challenges furthered the conspiracy. We address each challenged act in turn.

The twelfth overt act alleged in the indictment charges that Gonzalez provided Hernandez with a report about a letter that Gonzalez solicited from a "United States Congressional Representative" seeking the admission of Gonzalez's wife into the United States. Gonzalez argues that the evidence introduced in support of this overt act does not prove that Gonzalez's efforts were "tantamount to the interference with any governmental function." Gonzalez's argument misunderstands the law.

The purpose of the conspiracy, as alleged in the indictment, included "sowing disinformation ... in dealings with United States private and public

institutions." The report that Gonzalez sent to Hernandez described his efforts to secure his wife's entry into the United States and explained that Gonzalez's efforts were "designed more to give an appearance, rather than to seek action to have my family leave." A reasonable jury could have found that this report furthered the conspiracy by keeping other members of the conspiracy informed about Gonzalez's efforts. Whether this report actually interfered with any governmental function is irrelevant.

The fifteenth overt act alleged in the indictment, which Gonzalez also challenges, charges that Gonzalez "met with the FBI in the guise of a cooperating individual." Gonzalez concedes that evidence established that he met with the FBI, and the government introduced communications from Cuba that directed Gonzalez to meet with FBI agents and specifically instructed him how to act during the meetings. The government also introduced reports from Gonzalez to Hernandez that described Gonzalez's meetings with the FBI and opined that Gonzalez's performance was convincing. A reasonable jury could have found based on this evidence that the overt act furthered the conspiracy.

Gonzalez's challenge to the twentieth overt act alleged in the indictment, which charges that Gonzalez reported to Hernandez that "Gonzalez had been flying close to Homestead Air Base with the aim of observing any strange movement," also fails. The government introduced a report in which Gonzalez wrote to Hernandez, "As you told me to do, I have been flying in the vicinity of Homestead Air Base in order to be able to observe any strange movement,"

and described Gonzalez's observations of aircraft, their movement, and their positioning. The report supports the finding that this overt act furthered the conspiracy.

2. Sufficient Evidence Supports Campa's Convictions.

Campa presents two arguments that the evidence introduced at trial was insufficient to convict him, but both fail. Campa first adopts the arguments of Gonzalez with respect to his convictions for acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so. For the reasons we have previously explained, these arguments fail. Campa next argues that the government failed to offer sufficient evidence to support his remaining convictions for fraud and misuse of documents, 18 U.S.C. § 1546(a), and possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). These convictions are based on an allegation that Campa possessed a fraudulent passport. Campa argues that there is insufficient evidence that he possessed this passport, but we disagree.

Two counts of the indictment charged that Campa knowingly possessed a passport that bore Campa's likeness along with the name of someone else. We have explained that "[t]he government need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence. Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise

dominion or control." *United States v. Greer,* 440 F.3d 1267, 1271 (11th Cir.2006) (citation omitted).

The government introduced into evidence a document that appears to be a standard United States passport. The document bears Campa's photograph and the name and signature of "Osvaldo Reina." A government expert testified that the document was a counterfeit passport. An agent of the Federal Bureau of Investigation, who was present when the counterfeit passport was seized, testified that the counterfeit passport was found along with a social security card, a Florida driver's license, business cards for an agent of a Spanish book publishing company, and a membership card for a Florida club, all bearing the name of Reina. Some of these other documents also bear Campa's photograph. These items were found hidden inside a concealment device in a notebook that was found in a dresser in Hernandez's apartment.

The government also introduced into evidence an encrypted report found in Campa's residence of "work directives," which contains descriptions of primary, "intermediate," and "reserve" legends. The primary legend is in the name of Ruben Campa and contains biographical data associated with that name. The reserve legend is in the name of Osvaldo Reina and includes the biographical data that appears on the counterfeit passport. The government also introduced an "escape plan," found at Campa's residence, which instructs Campa to "change identity, assuming the one in your reserve documentation" in the event of a situation that "might demand an emergency exit from the country."

From this evidence a reasonable jury could have

found that Campa had the power and intent to exercise dominion or control over the counterfeit passport. Campa's argument that "the government proceeded simply on the legally unsustainable theory of possession due to past temporary stay in another's premises" fails. Although mere presence in an area where an item is found is insufficient to support a conviction based on possession of that item, *United States v. Rackley,* 742 F.2d 1266, 1271 (11th Cir.1984), the government introduced evidence of much more than presence. A reasonable jury could have inferred from the appearance of Campa's photograph on the passport and accompanying identity documents in the context of the other evidence that Campa was aware of the documents and that they were created for his use. A reasonable jury could have inferred from the instructions that Campa possessed, which contained the Ruben Campa legend that Campa used regularly in addition to the Reina legend, that Campa intended to use the Reina legend if an "emergency exit" became necessary. A reasonable jury could have inferred from Campa's stay at Hernandez's apartment (which Campa concedes) that Campa had access to the counterfeit passport when he needed it. Sufficient evidence supports Campa's convictions.

3. Sufficient Evidence Supports the Convictions of Guerrero, Medina, and Hernandez.

The remaining arguments about sufficiency of the evidence pertain to the convictions of Guerrero, Medina, and Hernandez. The relevant offenses are acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so, conspiracy to transmit national-defense

information, and conspiracy to murder. These defendants were convicted of all except the last charge. Only Hernandez was convicted of that charge.

a. *Convictions for Acting as an Agent of a Foreign Government Without Notifying the Attorney General and Conspiracy to Do So*

Guererro, Medina, and Hernandez argue that the evidence introduced at trial was insufficient to convict them of acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so, but we disagree. Each defendant adopts the arguments of Gonzalez with respect to his convictions for these offenses. For the reasons we have previously explained, these arguments fail.

b. *Convictions for Conspiracy to Transmit National-Defense Information*

Guererro, Medina, and Hernandez next argue that their convictions for conspiracy to transmit national-defense information, 18 U.S.C. § 794(c), were not supported by sufficient evidence. We disagree. The government introduced sufficient evidence to support the convictions.

The indictment charges that Hernandez, Medina, and Guerrero conspired "to communicate, deliver and transmit ... to ... the Republic of Cuba ... information relating to the national defense of the United States ... intending ... that the same would be used to the injury of the United States and to the advantage of a foreign nation." The defendants concede that they conspired to transmit information to Cuba but argue that the information that they conspired to transmit

was not "information relating to the national defense" under section 794. We disagree.

The government introduced sufficient evidence to establish that the defendants conspired to transmit to Cuba "information relating to the national defense." "National defense," the Supreme Court has explained, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Gorin v. United States,* 312 U.S. 19, 28, 61 S.Ct. 429, 434 (1941). As the government concedes, in the light of the mens rea requirement of the statute, "information relating to the national defense" under section 794 is limited to information that the government has endeavored to keep from the public. *See Id.* at 27-28, 61 S.Ct. at 434; *Squillacote,* 221 F.3d at 575-80; *United States v. Heine,* 151 F.2d 813, 816 (2d Cir.1945) (L. Hand, J.).

Joseph Santos, a codefendant of Hernandez, Medina, and Guerrero, testified that he received instructions from Medina to penetrate the facility of the Southern Command in Miami to gather information. Santos testified that there was no limitation placed on the information that he was to gather. Santos also testified that, as part of his training for penetration work, he was instructed that "the most important thing to gather" was "the type of information that is not readily available through conventional means. It is information that is classified as either restricted, classified, or secret." The government also introduced correspondence from Medina to Santos that included a chart that described the performance of Medina, Santos, and Santos's wife, Amarylis. The chart includes a blank

entry corresponding to "secret info." of a military nature. Santos testified that the entry was blank because Santos was "unable to penetrate the Southern Command."

The government also introduced evidence that Guerrero was assigned to gather intelligence from the Naval Air Station at Key West, Florida. Guerrero discovered that a command post building at the station was being remodeled for use that involves "top secret activities." The Chief of Naval Operations at the Pentagon testified that the ability to store classified documents at the Key West facility is not made known to the general public.

Correspondence from a Cuban military specialist directed Hernandez, among other things, to instruct Guerrero to obtain "anything else that you can get related to the use of that building." In a communication to Hernandez, Guerrero described the security features of the structure. A construction manager at the Department of Defense testified that many of these security features did not appear on the publicly available floor plan.

The government also introduced correspondence from Medina to Guerrero that includes a chart similar to the chart that summarized Santos's performance. The chart includes a tally of both military and other "secret info." and "public info." The tally includes a positive numeric score for secret military information.

The government also introduced a report from Guerrero to Medina that describes the radio frequency settings that Guerrero observed while he was working on a repair job in the "greenhouse"-an

alternate air control tower-at the Key West station. The Chief of Naval Operations at the Pentagon testified that, although the main frequencies that the Navy uses to control civilian and military aircraft are published, Guerrero's report included frequencies that are not published. The naval officer testified that these frequencies are not published because they are used when the Navy does not want the public to know what frequencies the Navy is using to communicate. A reasonable jury could have found based on this evidence that Hernandez, Medina, and Guerrero conspired to transmit to Cuba information relating to the national defense.

The defendants argue that the evidence proves that they conspired to gather only public information, but we disagree. The defendants contend that they transmitted only public information, so the government failed to prove that they conspired to do more. This argument is based on a misunderstanding of the law. As we have previously explained, to sustain the charge of conspiracy, the government did not have to prove that the conspirators achieved their goal. *See Iannelli v. United States,* 420 U.S. at 786 n. 17, 95 S.Ct. at 1294 n. 17. The government presented ample evidence that the purpose of the conspiracy was to transmit secret information relating to the national defense. That the conspirators were often prevented from achieving their goal is immaterial.

c. *Conspiracy to Murder*

Hernandez argues that his conviction for conspiracy to murder, 18 U.S.C. §§ 1111, 1117, is not supported by sufficient evidence. Hernandez argues that his conviction should be reversed because the government failed to prove that he intended the

murder to occur within the jurisdiction of the United States, failed to prove that he knew of the object of the conspiracy, and failed to prove that he acted with malice aforethought. Each of these arguments fails. We address each argument in turn.

First, Hernandez argues that the government was required to prove that he intended the murder to occur within the special maritime and territorial jurisdiction of the United States. Hernandez contends that, because the government did not prove that there was a plan to "confront" Brothers in international, as opposed to Cuban, airspace, his conviction for conspiracy to murder should be reversed. We disagree.

Whether sections 1111 and 1117 require proof that Hernandez intended the murder to occur within the special maritime and territorial jurisdiction of the United States "is a question of statutory construction." *Staples v. United States,* 511 U.S. 600, 606, 114 S.Ct. 1793, 1796, 128 L.Ed.2d 608 (1994). The language of the statute, the starting place of our inquiry, *Id.,* provides, "Murder is the unlawful killing of human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree." 18 U.S.C. § 1111(a). Section 1111(b) provides, "Within the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life." Section 1117 provides a penalty of "imprisonment for any term of years or for life" for a conspiracy to violate section

1111.

Although the statute explicitly describes the mens rea required for murder, the statute is silent about mens rea that the murder occur in the special jurisdiction of the United States. Ordinarily, we interpret statutes that are silent as to mens rea to require proof of general intent. *Ettinger,* 344 F.3d at 1158. This rule is subject to an exception when the nature of the statute is such that "congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Staples,* 511 U.S. at 607, 114 S.Ct. at 1798. An exception applies to section 1111.

When a criminal statute is otherwise silent, no proof of mens rea is necessary for elements that are "jurisdictional only." *United States v. Feola,* 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 1260 n. 9, 43 L.Ed.2d 541 (1975). As the Supreme Court has explained, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *Id.* "[K]nowledge of jurisdictional facts is not required in determining guilt...." *United States v. Muncy,* 526 F.2d 1261, 1264 (5th Cir.1976). In *Feola,* the Court held that a statute that prohibits assault of a federal officer does not require knowledge that the victim is a federal officer because the victim's status as a federal officer is a fact that is jurisdictional only. 420 U.S. at 686, 95 S.Ct. at 1264-65. The *Feola* Court explained that its holding "poses no risk of unfairness to defendants" because "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency

affected." *Id.* at 685, 95 S.Ct. at 1264.

Hernandez argues that the requirement that the murder occur in the special jurisdiction of the United States is more than a jurisdictional requirement. Hernandez argues that, because the government did not introduce evidence that Cuban law prohibits murder, the jurisdictional language in section 1111(a) distinguishes between potentially legitimate conduct (murder in Cuba under Hernandez's theory) and conduct that is unlawful (murder in the special jurisdiction of the United States). We disagree.

The interpretation of sections 1111 and 1117 is a question of law, *United States v. Wilk,* 452 F.3d 1208, 1221 n. 19 (11th Cir.2006), that does not depend on whether the government introduced evidence of Cuban law at trial. The discussion in *Feola* about fairness to defendants was part of an explanation by the Court for its inference that Congress intended the "federal officer" element of the assault statute to be jurisdictional only. 420 U.S. at 684-85, 95 S.Ct. at 1264. The statutory language did not expressly designate the "federal officer" requirement as jurisdictional. *See*18 U.S.C. § 111(a). In contrast, we know that the requirement that a murder occur "[w]ithin the special maritime and territorial jurisdiction of the United States" is jurisdictional based on the plain language of the statute. 18 U.S.C. § 1111(b). Because it expressly defines the mens rea requirement for murder but is silent as to the mens rea requirement for the jurisdictional element, the statute "unambiguously dispenses with any requirement" that the government prove intent that the murder occur in the special jurisdiction of the United States. *United States v. Yermian,* 468 U.S. 63,

69-70, 104 S.Ct. 2936, 2939-40, 82 L.Ed.2d 53 (1984) (government need not prove knowledge of federal agency jurisdiction under false statements statute).

We hold that intent that the murder occur within the special maritime and territorial jurisdiction of the United States is not an element of section 1111. Because this intent is not an element of the substantive murder offense, it need not be proved to establish a conspiracy to murder, 18 U.S.C. § 1117:

> [W]ith 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, ... 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.

Feola, 420 U.S. at 696, 95 S.Ct. at 1269; *see also Muncy,* 526 F.2d at 1264. Hernandez does not argue that facts other than knowledge of the location of the shootdown are insufficient to render his conspiracy a matter of federal concern, and, in *Feola,* the Court explained that "[f]ederal jurisdiction always exists where the substantive offense is committed in the manner therein described." 420 U.S. at 696, 95 S.Ct. at 1269. The evidence established that the shootdown actually occurred in the special maritime or territorial jurisdiction of the United States.

Second, Hernandez argues that the government did not introduce sufficient evidence to establish that

he knew the object of the conspiracy. This argument also fails. Sufficient evidence supports Hernandez's conviction.

According to the indictment, "[i]t was the object of the conspiracy to support and help implement, including with Miami-based information, a plan for violent confrontation of aircraft of Brothers to the Rescue (a Miami-based Cuban exile group ...), with decisive and fatal results." As we have previously explained, the government had to prove that Hernandez's participation in the conspiracy was "knowing and voluntary." *United States v. Suba,* 132 F.3d 662, 672 (11th Cir.1998). The government satisfied its burden.

The government introduced encrypted messages that were broadcast to Hernandez's call sign soon after Brothers dropped over Havana leaflets containing excerpts from the United Nations Declaration on Human Rights in January of 1996. A message dated January 19 said that "superior headquarters approved operacion escorpion in order to perfect the confrontation of [counterrevolutionary] actions of [Brothers]." The message instructed Hernandez that he should obtain information from Gonzalez and Juan Pablo Roque, a codefendant who along with Gonzalez had infiltrated Brothers, about several matters related to flights of Brothers: (1) whether Jose Basulto, the leader of Brothers, would be flying; (2) whether the "activity of dropping of leaflets or violation of air space" was planned; and (3) whether Roque and Gonzalez would be flying. The message instructed Hernandez to "always specify if agents are flying."

Additional messages to Hernandez stated that it

was important for Cuban officials to know when Cuban agents would be on board flights of Brothers. A January 30 message instructed Hernandez that, if Roque and Gonzalez were asked to fly at the last minute without being scheduled, they should find an excuse not to fly. If they could not avoid flying, the message instructed that they should transmit code words over the airplane radio to alert Cuba that the agents were on board. Hernandez relayed these instructions to Gonzalez in correspondence dated February 13. A message transmitted on February 18 instructed Hernandez that "under no circumstances" should Roque or Gonzalez fly with Brothers "on days 24, 25, 26 and 27 ... in order to avoid any incident of provocation that they may carry out and our response to it. Immediately confirm when you instruct both of them." An expense report from Hernandez states that Hernandez met with Roque on February 22 and Gonzalez on February 23. The shootdown occurred on February 24.

The government offered proof that Hernandez and the Cuban regime considered the operation a success. The government introduced correspondence from Hernandez written after the shootdown that says, "[I]t's a great satisfaction and source of pride to us that the operation to which we contributed a grain of salt ended successfully." The government also introduced an order from the chief of the Cuban Directorate of Intelligence that granted Hernandez "recognition for the outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February of 1996."

Hernandez argues that the government did not

prove that he received the messages before the shootdown, and he argues that the government called no witnesses to interpret the English translations of the messages. These arguments fail. The government offered ample proof about these matters.

The government introduced evidence that the encrypted messages were transmitted to Hernandez's call sign. The messages were decrypted with materials found at Hernandez's apartment. From this evidence, Hernandez's instructions to Gonzalez, the timing of Hernandez's meetings with Roque and Gonzalez, and the timing of the shootdown, a reasonable jury could have found that Hernandez received the messages that the government introduced.

The government did not need to call an expert witness to interpret the English translations of the messages that Hernandez received because the meaning of the messages was evident in the light of the other evidence that the government presented. The messages describe a plan to "perfect the confrontation" with Brothers aircraft and repeatedly instruct that Cuban agents should avoid flying, especially on February 24, 25, 26, and 27, the days of and after the shootdown. A reasonable jury could have inferred that Hernandez understood that agents were not to fly because the "confrontation" planned with Brothers was a shootdown, which would cause the death of the Cuban agents if they were on board Brothers aircraft. *See United States v. Garcia,* 405 F.3d 1260, 1269 (11th Cir.2005) (recognizing that the government may prove that a defendant knowingly and voluntarily joined a conspiracy with circumstantial evidence).

Hernandez argues that his status as a "mere agent" of the Cuban Directorate of Intelligence makes him ineligible for prosecution for "choices made by higher-ups in his government," but we disagree. Because the evidence is sufficient to establish that Hernandez "knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a minor role in the overall scheme." *Suba,* 132 F.3d at 672. A reasonable jury could have found based on the evidence that Hernandez knowingly and voluntarily participated in a conspiracy to shoot down aircraft of Brothers.

Third, Hernandez argues that the government failed to prove that Hernandez acted with malice aforethought. We disagree. Sufficient evidence supports this element.

"Malice aforethought" is a legal term of art that describes the several mental states that are associated with murder. *See* George P. Fletcher, *Rethinking Criminal Law* § 4.3.2, at 270 (2000); James Fitzjames Stephen, *Digest of the Criminal Law*§ 223(a)-(b), at 165-66 (4th ed. 1887). Malice aforethought is an element of both murder under section 1111 and conspiracy to murder under section 1117. *See Feola,* 420 U.S. at 686, 95 S.Ct. at 1265 ("[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."). Malice aforethought ordinarily describes several kinds of murder. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.1(a), at 416-18 (2d ed.2003). This appeal concerns only one kind because the jury was instructed that malice aforethought

requires proof that the killing was intentional.

The intent-to-kill form of malice aforethought can be established, as it is here, by proof that the defendant acted with the desire that the death would occur or knowledge "that such a result is substantially certain to occur, whatever his desire concerning that result." *Id.* § 14.1(a), at 428. The totality of the evidence, which includes the numerous messages to Hernandez that stressed the importance of warning Cuban agents not to fly and of warning the agents to alert Cuba if they could not avoid flying and Hernandez's statements after the shootdown that the operation "ended successfully," is sufficient to support a finding beyond a reasonable doubt that Hernandez acted with knowledge that the death of the persons on board the planes of Brothers was substantially certain.

The dissent contends that the government failed to introduce sufficient evidence that the object of the conspiracy was a shootdown and that Hernandez agreed to a shootdown in international, as opposed to Cuban, airspace. The dissent acknowledges that the evidence establishes an agreement to "confront" aircraft of Brothers but contends that "there are many ways a country could 'confront' foreign aircraft. Forced landings, warning shots, and forced escorted journeys out of a country's territorial airspace are among them-as are shoot downs." *Post* at 1025.

When the evidence is viewed in the light most favorable to the government, there are at least two reasons to conclude that the government proved that a shootdown was contemplated. First, the instructions that Hernandez received from the Cuban Directorate of Intelligence and relayed to the agents

who had infiltrated Brothers support an inference that a shootdown was planned. Second, the correspondence from Hernandez written after the shootdown that recognizes that the operation "ended successfully" establishes Hernandez's guilt.

A reasonable jury could infer that Hernandez recognized that the Cuban Directorate of Intelligence instructed him to specify when Cuban agents were flying, tell the agents not to fly unscheduled or on the days of and around the shootdown, and tell the agents to transmit code words on the radio if they could not avoid flying because the Directorate wanted to ensure that the lives of Cuban agents were not placed in danger. A forced landing, warning shots, or a forced escorted journey would not have placed the agents in danger even if they had been on board the aircraft at the time. A reasonable jury could find that agents were not to fly because a shootdown was planned.

The dissent contends that "[i]t is just as reasonable to conclude that the Directorate of Intelligence did not want its agents flying on those days because of the dangers inherent in any confrontation involving airplanes."*Post* at 1025 n.4. This inference, which is at odds with the verdict of the jury, is irrelevant under our standard of review. "The jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial," *United States v. Molina,* 443 F.3d 824, 828 (11th Cir.2006), but we do not enjoy the same freedom. We "must accept all reasonable inferences ... made by the jury." *Id.* The inference the jury drew from the evidence that Hernandez understood that a shootdown was planned is

reasonable. Other reasonable inferences the evidence might support are immaterial. *Id.*

Even if the communications that Hernandez received in advance of the shootdown were not enough, Hernandez's correspondence written afterward that endorsed the shootdown as a success also establishes Hernandez's guilt. The dissent characterizes this correspondence as an "acknowledg[ment of] participation" in a plan to confront Brothers, *post* at 1025, but this statement proves more. Again, we must consider the evidence in the light most favorable to the government and draw all reasonable inferences in its favor, *Khanani,* 502 F.3d at 1293, and Hernandez's statement need be taken only at face value. Success means "[t]he prosperous achievement of something attempted" or, stated differently, "the attainment of an object according to one's desire." XVII *The Oxford English Dictionary* 93 (2d ed.1989). A reasonable jury was entitled to find that, when Hernandez said the operation ended successfully, he meant it. Hernandez and his co-conspirators succeeded when the aircraft were shot down.

The argument by the dissent that the government did not meet its burden because it failed to prove that Hernandez intended for the shootdown to occur in international airspace also fails. The dissent accepts Hernandez's argument that the killing that occurred would not have been unlawful had it occurred in Cuban airspace, but, even if we assume that this argument is correct and that an agreement to commit a justified killing would not be prohibited by the conspiracy statute, 18 U.S.C. § 1117, ample evidence establishes that Hernandez

conspired to commit the unlawful murder that actually occurred. Hernandez's statement after the shootdown that the operation ended successfully alone allows a finding by a reasonable jury that the conspirators intended to commit an unlawful killing. If the plan had been to prepare Cuba to defend itself with a justified shootdown over Cuba, then the plan would have failed. What occurred, and what Hernandez called a success, was an unjustified killing in the special maritime and territorial jurisdiction of the United States. A reasonable jury could take Hernandez at his word and find that what occurred was what Hernandez intended. Additionally, an order from the chief of the Cuban Directorate of Intelligence granted Hernandez "recognition for the outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February of 1996." These statements support a finding that when the planes were shot down, everything, including the unjustified killing in the jurisdiction of the United States, went according to plan. Hernandez's conviction for conspiracy to murder is affirmed.

H. Sentences.

Gonzalez, Campa, Hernandez, Medina, and Guerrero each argue that the district court erred when it imposed their respective sentences. Some of these arguments have merit, and others fail. We address the arguments of each defendant in turn.

1. Gonzalez's Sentence.

Gonzalez received a sentence of ten years of imprisonment for his conviction for acting as an

agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and a consecutive sentence of five years of imprisonment for his conviction for conspiracy to violate section 951 and to defraud the United States, 18 U.S.C. § 371. Gonzalez argues that the district court erred by imposing consecutive sentences for his two counts of conviction. We disagree. The sentence imposed by the district court was not erroneous.

The government and Gonzalez agree that section 951 is "a felony ... for which no guideline expressly has been promulgated." United States Sentencing Guidelines § 2X5.1 (Nov.2001). Nor has any Guideline been promulgated for a conspiracy to violate section 951. Because "there is not a sufficiently analogous guideline,"*Id.,* the general purposes of sentencing, 18 U.S.C. § 3553, control the discretion of the district court. U.S.S.G. § 2X5.1.

The district court considered the purposes of sentencing described in section 3553(a)(2) and expressly recognized its obligation to "impose a sentence sufficient, but not greater than necessary, to comply with" those purposes. 18 U.S.C. § 3553(a). The district court selected a sentence of ten years of imprisonment, the statutory maximum, for the conviction under section 951 and a consecutive sentence of five years of imprisonment, also the statutory maximum, for the conspiracy conviction. Gonzalez's argument that the district court erred by imposing consecutive sentences fails.

Gonzalez argues that the district court should have followed the section of the Guidelines that governs the imposition of a sentence on a defendant subject to an undischarged term of imprisonment,

U.S.S.G. § 5G1.3, but we disagree. We have explained that "[a] guideline's meaning is derived first from its plain language and, absent ambiguity, no additional inquiry is necessary." *United States v. Mandhai,* 375 F.3d 1243, 1247 (11th Cir.2004). Section 2X5.1 is plain and unambiguous. Where "no guideline expressly has been promulgated" and "there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b)... control, except that any guidelines and policy statements that can be applied meaningfully ... shall remain applicable." U.S.S.G. § 2X5.1. Section 5G1.3(b) cannot be applied meaningfully to Gonzalez in this appeal because he is not subject to an undischarged term of imprisonment. The district court has discretion to impose consecutive sentences to comply with the requirements of section 3553. *See*18 U.S.C. § 3584(a)-(b); *see also*U.S.S.G. § 5G1.2(d) (permitting the district court to order consecutive sentences "to the extent necessary to produce a combined sentence equal to the total punishment"). The district court did not err by selecting consecutive sentences.

Gonzalez also argues that the district court ignored mitigating evidence that he presented. Gonzalez's sentencing hearing spanned two days, during which the district court heard extensive argument from defense counsel about mitigating factors. The court considered Gonzalez's arguments that he played a minor role in the offense; that he held steady employment; that policies of the United States toward Cuba are "bizarre"; that Gonzalez's targets in the United States were Cuban exile groups, instead of the government of the United States; and that Gonzalez had no criminal record.

The court also considered Gonzalez's family connections and that he was separated from his family because he was housed in the special housing unit at the federal detention center.

The district court considered the arguments of counsel made in court and in written objections to the presentence investigation report, along with the purposes of sentencing described in section 3553, when the court imposed Gonzalez's sentence. We cannot say that the sentence was, as a matter of law, greater than necessary to further those purposes. The district court did not err.

Finally, Gonzalez argues that the sentencing court ignored the Guideline section that applies to the conspiratorial object of defrauding the United States. U.S.S.G. § 2C1.7. The district court does not appear to have calculated Gonzalez's sentence under section 2C1.7, but we need not consider this argument because the district court imposed the statutory maximum penalty under the conspiracy statute based on the other object-a violation of section 951. The Guideline calculation under section 2C1.7 would not affect Gonzalez's sentence.

2. Campa's Sentence

Campa argues that the district court erred when it applied an enhancement of three offense levels under section 3B1.1(b) of the Guidelines based on a finding that Campa was a "manager or supervisor." We agree with Campa. The factual findings by the district court do not support this enhancement.

We have held that "a section 3B1.1 enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy." *United States v.*

Glover, 179 F.3d 1300, 1303 (11th Cir.1999). The enhancement is unwarranted in the absence of a finding that the defendant asserted control or influence over "at least one other participant" in the crime. *Id.* at 1302. The district court explained that its decision to apply the adjustment under section 3B1.1(b) was "based on [Campa's] managing the assets of the search by [Medina] to obtain death certificates that would subsequently be utilized for false identification documents." Under *Glover,* this finding is inadequate to support an enhancement under section 3B1.3(b).

The government concedes that the district court acted in "apparent contravention" of *Glover,* but argues that Campa never raised the issue before the district court and that the error is not reversible. We disagree. Campa preserved the argument, and the government has not established that the error was harmless.

Before the district court imposed Campa's sentence, Campa argued that "[t]he [c]ourt in order to sustain this enhancement must find vis-a-vis someone, [Campa] played this managerial role. There is no evidence he had any control over Mr. Medina nor did he have any control or supervisory responsibilities over anyone who has been identified to this court." Campa did not cite *Glover* in the district court, but he raised this argument in sufficiently "clear and simple language" to preserve the issue. *See United States v. Zinn,* 321 F.3d 1084, 1087 (11th Cir.1986).

Because Campa properly preserved this issue, a remand is required unless the government can establish that the error is harmless under the

standard stated in *Kotteakos v. United States,* 328 U.S. 750, 762-66, 66 S.Ct. 1239, 1246-48, 90 L.Ed. 1557 (1946). *See United States v. Mathenia,* 409 F.3d 1289, 1292 (11th Cir.2005). A sentencing error, under the Guidelines, is harmless if a court considers the proceedings in their entirety and determines that the error did not affect the sentence "or had but very slight effect." *Kotteakos,* 328 U.S. at 764, 66 S.Ct. at 1248. If we can say "with fair assurance" that the sentence was not "substantially swayed by the error," we may affirm. *Id.* at 765, 66 S.Ct. at 1248. We have explained that this standard for review of harmless error "is as difficult for the government to meet ... as it is for a defendant to meet the third-prong prejudice standard for plain error review." *Mathenia,* 409 F.3d at 1292.

The government has not satisfied its burden. The government argues that there is evidence that would support a finding that Campa managed another participant, but we cannot say with fair assurance that the district court would have made that finding. As the United States Supreme Court explained, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos,* 328 U.S. at 765, 66 S.Ct. at 1248. Whether Campa managed or supervised one or more participants is a question of fact, and the *Kotteakos* standard does not allow us to assume the role of the factfinder. *See Id.* at 765, 66 S.Ct. at 1246. Remand is necessary to allow the district court to consider whether to apply the enhancement under section 3B1.1 based on findings other than Campa's management of assets.

Campa also adopts the argument of Medina that

the district court erred by increasing his offense level for obstruction of justice and the argument of Gonzalez that the district court erred by imposing consecutive sentences. As we explain elsewhere, these arguments fail. The district court did not err by applying the adjustment for obstruction of justice or by imposing consecutive sentences.

3. Medina's Sentence

Medina argues that the district court committed three errors when it calculated his sentence: (1) the court selected an incorrect base offense level, which it erroneously adjusted based on offense conduct; (2) the court erred when it enhanced his offense level for obstruction of justice; and (3) the court erred when it declined to depart downward based on his minor role in the offense. We address each argument in turn.

Medina argues that the district court selected the incorrect base offense level for several reasons. First, Medina argues that the district court followed an incorrect Guideline section to compute his base offense level. Section 2X1.1(c) of the Guidelines explains that "[w]hen a [ ] ... conspiracy is expressly covered by another offense guideline section, apply that guideline section." The district court applied section 2M3.1, the Guideline applicable to violations of a federal statute, 18 U.S.C. § 794, that expressly covers both the gathering of national-defense information to aid a foreign government and conspiracy to do so.

Medina argues that the district court should have applied section 2X1.1(a), which applies to conspiracies not covered by a specific offense Guideline to determine his base offense level. We

disagree. Our precedent, *United States v. Thomas,* 8 F.3d 1552, 1564-65 (11th Cir.1993), guides our resolution of this issue.

Medina's conspiracy offense is analogous to a conspiracy to violate the Hobbs Act. In *Thomas* we held that the district court correctly refused to apply section 2X1.1(a) to a Hobbs Act conspiracy because "[a] conspiracy to violate the Hobbs Act is a violation of the Hobbs Act itself." *Id.* at 1564. Based on the reasoning of *Thomas,* the district court correctly applied section 2M3.1 because a conspiracy to violate section 794 is also a violation of section 794.

Medina's argument that the district court should not have followed *Thomas* because the decision from the Second Circuit, *United States v. Skowronski,* 968 F.2d 242, 250 (2d Cir.1992), that we found persuasive in *Thomas* is no longer followed in that circuit, *see United States v. Amato,* 46 F.3d 1255, 1261 (2d Cir.1995), fails. *Thomas* remains good law in this Circuit, and, in the absence of a contrary opinion of the Supreme Court or of this Court sitting en banc, we cannot overrule a decision of a prior panel of this Court. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1230 (11th Cir.2007). The district court was correct to apply section 2M3.1.

Medina next argues that the district court erred when, under section 2M3.1(a)(1), it selected a base offense level of 42, which is appropriate "if top secret information was gathered or transmitted," instead of a base offense level of 37, which is appropriate "otherwise," § 2M3.1(a)(2). We agree with Medina. The district court did not find that top secret information was gathered or transmitted; it based its selection of the base offense level on the finding that

the object of the conspiracy was to obtain top secret information. Under section 2M3.1(a)(2), a base offense level of 37 is appropriate based on this finding.

Our precedent in *United States v. Chastain,* 198 F.3d 1338 (11th Cir.1999), is instructive on this issue. *Chastain* involved an enhancement under section 2D1.1(b)(2), which provides, "If the defendant unlawfully imported or exported a controlled substance under circumstances in which an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, ... increase by two levels." *Id.* at 1353 (quoting U.S.S.G. § 2D1.1(b)(2)) (omission in original) (internal quotation marks omitted). The district court enhanced the sentence based upon a finding that the defendants had planned to use a private plane to import narcotics. *Id.* We reversed. We explained that "[w]hen the language of the guideline is clear, it is not necessary to look elsewhere for interpretation. Here, the language of the guideline clearly contemplates a completed event, an actual importation." *Id.*

The district court erred. Like the Guideline that we interpreted in *Chastain,* section 2M1.3 clearly contemplates a completed event: the actual gathering or transmission of top secret information. Because the district court did not find that top secret information was gathered or transmitted, we remand for resentencing.

Medina next argues that the district court erred when it declined to order a consultation with an "authorized designee" of the President so that Medina could take advantage of application note 3,

which allows the court to depart from the Guidelines upon a representation by the President that the imposition of a non-Guideline sentence is "necessary to protect national security or further the objectives of the nation's foreign policy." U.S.S.G. § 2M3.1 cmt. n.3. We disagree. Nothing in the Guideline section or the application notes empowers the district court to require the President or his designee to express any view about a sentence.

Medina next argues that the district court erred when it declined to grant a downward departure that "may be warranted" when revelation of "the information at issue" "is likely to cause little or no harm." U.S.S.G. § 2M3.1 cmt. n.2. The district court based its decision not to depart downward on its finding that the object of the conspiracy was to gather or transmit "top secret information" under section 2M3.1(a)(1). The district court held that application note 2 is inapposite when 2M3.1(a)(1) applies because top secret information, by definition, "reasonably could be expected to cause exceptionally grave damage,"U.S.S.G. § 2M3.1 cmt. n.1. We do not consider whether a departure under application note 2 was appropriate. We remand to the district court to consider in the first instance whether a departure is appropriate in the light of our conclusion that section 2M3.1(a)(1) is inapplicable in the absence of a finding that top secret information was gathered or transmitted.

Medina next argues that the district court erred when it applied a two-offense-level upward adjustment for obstruction of justice under section 3C1.1 of the Guidelines. The adjustment was based on a finding that Medina gave a false name to the

magistrate judge at his pretrial detention hearing. Medina, whose real name is Ramon Labanino, concedes that he "stood by his legend and stated that he was Luis Medina," but argues that his deception was part of the offense, instead of the "investigation, prosecution, or sentencing," U.S.S.G. § 3C1.1 cmt. n.1. He also argues that the evidence did not establish that he had the requisite mens rea or that his conduct significantly hindered the prosecution or investigation of the offense. Each of these arguments fails.

Section 3C1.1 applies to "obstructive conduct" that "occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction." U.S.S.G. § 3C1.1 cmt. n.1. Medina relies on language in an Eighth Circuit decision that explains that "[s]ection 3C1.1 does not apply to conduct that is part of the crime itself," *United States v. Lloyd,* 947 F.2d 339, 340 (8th Cir.1991), and argues that his use of the legend "Luis Medina" before the magistrate judge was part of the crime of espionage. We disagree.

Application note 1 does not exclude from the scope of section 3C1.1 conduct that relates to the offense of conviction. To the contrary, it expressly requires a relationship between the obstructive conduct and that offense or "an otherwise closely related case." *See* U.S.S.G. § 3C1.1 cmt. n.1(B). The relevant question is whether the obstructive conduct occurred during the course of the investigation, prosecution, or sentencing. Medina's false statement clearly occurred within the scope of application note 1.

Providing a false name to a magistrate at a

detention hearing qualifies as obstructive conduct. Application note 4(f) lists "providing materially false information to a judge or magistrate" as an example of the kind of conduct to which section 3C1.1 applies. "[I]f believed," a false name "would tend to influence or affect the issue[s] under determination" by a magistrate judge in a detention hearing. U.S.S.G. § 3C1.1 cmt. n.6. The magistrate judge must consider, among other things, the family ties, financial resources, residence, past conduct, criminal history, record of appearance at court proceedings, and probationary status of the person before the magistrate judge in a detention hearing. *See*18 U.S.C. § 3142(g)(3). A false name, if believed, would tend to affect the magistrate judge's assessment of these factors. *See United States v. Tran,* 285 F.3d 934, 940 (10th Cir.2002) ("It is plain that [the defendant's] misidentification of himself was an attempt to obstruct or impede the administration of justice, and that this attempt might well have borne fruit at his detention hearing if the court had decided to release him based on his apparent lack of a criminal history."); *United States v. Charles,* 138 F.3d 257, 267 (6th Cir.1998); *United States v. Berrios,* 132 F.3d 834, 840 (1st Cir.1998); *United States v. Mafanya,* 24 F.3d 412, 415 (2d Cir.1994); *United States v. Blackman,* 904 F.2d 1250, 1259 (8th Cir.1990).

Medina next argues that the evidence does not establish that Medina acted with the mens rea required under section 3C1.1. This argument is specious. Medina concedes that he deliberately gave a false name to maintain the legend that he had previously adopted for the purpose of deception. This conduct established that Medina "consciously act[ed]

with the *purpose* of obstructing justice." *United States v. Burton,* 933 F.2d 916, 918 (11th Cir.1991) (quoting *United States v. Stroud,* 893 F.2d 504, 507 (2d Cir.1990)) (internal quotation mark omitted).

Medina next argues that the district court must explain how Medina's conduct significantly hindered the prosecution or investigation of the offense, but this argument misreads the application notes of section 3C1.1. Note 5(a) explains that "providing a false name or identification document *at arrest*" ordinarily does not warrant application of the adjustment unless "such conduct actually resulted in a significant hindrance to the investigation or prosecution of the ... offense." U.S.S.G. § 3C1.1 cmt. n.5(a) (emphasis added). Medina's adjustment was based on the provision of a false name to a magistrate judge at a detention hearing. The adjustment was appropriate whether or not a significant hindrance occurred. U.S.S.G. § 3B1.1 cmt. n.4(f).

Finally, Medina argues that the district court erred when it declined to adjust his offense level downward because Medina was a "minimal" or "minor" participant under Guideline section 3B1.2. In support of this argument, Medina says little more than that "[h]e simply was a small cog in a big machine." Medina's argument fails. Medina's role is measured not against the totality of conduct by the Cuban regime, but "against the relevant conduct for which [he] has been held accountable." *United States v. Rodriguez De Varon,* 175 F.3d 930, 940 (11th Cir.1999). We cannot say that the district court clearly erred when it declined to find that Medina was "substantially less culpable than the average participant" in the conduct for which Medina is

responsible. U.S.S.G. § 3B1.2 cmt. n.3(A).

4. Guerrero's Use of a Special Skill

Guerrero argues that the district court erred when it found that he "used a special skill[ ] in a manner that significantly facilitated the commission or concealment of the offense" and applied a two-offense-level adjustment under section 3B1.3 of the Sentencing Guidelines. U.S.S.G. § 3B1.3. Guerrero argues that he did not use a special skill and his skills did not significantly facilitate the commission of the offense. We disagree.

Guerrero argues that his training is indistinguishable from his criminal conduct and inadequate to support a special-skill adjustment, but this argument fails. A "special skill" is "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." U.S.S.G. § 3B1.3 cmt n.3. The district court found that Guerrero was specially trained in radio intelligence, radio and computer encryption and decryption, and civil engineering.

Courts have held that "[t]he skill must be a 'legitimate' skill turned to evil purposes." *See* Roger W. Haines, Jr. et al., *Federal Sentencing Guidelines Handbook* 1079 (2007) (footnote omitted). The Ninth Circuit, for example, has held that "[s]tanding alone, [a defendant's] ability to manufacture methamphetamine cannot be the basis of a special skill enhancement." *United States v. Mainard,* 5 F.3d 404, 405 (9th Cir.1993). The District of Columbia Circuit followed similar reasoning when it held that proof that the defendant "knew how to commit the base offense of manufacturing PCP" was "insufficient

to justify a special skill enhancement under § 3B1.3." *United States v. Young,* 932 F.2d 1510, 1515 (D.C.Cir.1991).

Skills in civil engineering, radio technology, and computer technology are legitimate skills that Guerrero turned to criminal purposes. *See United States v. Malgoza,* 2 F.3d 1107, 1110 (11th Cir.1993) (radio operation); *United States v. Prochner,* 417 F.3d 54, 62 (1st Cir.2005) (computer skills); *United States v. Sain,* 141 F.3d 463, 476 (3d Cir.1998) (civil engineering). Unlike skill in the art of methamphetamine or PCP manufacture, which cannot easily be put to legitimate use, Guerrero's skills have legitimate value independent of the criminal activity of which Guerrero was convicted. The district court did not err by finding that Guerrero possessed a "special skill."

Guerrero also challenges the finding that his skills significantly facilitated the commission of the offense by enabling him to craft and report a mental blueprint of facilities that he observed while working at the Naval Air Station at Key West, but we disagree. We have explained that "significant facilitation" occurs when a "person in the position of trust has an advantage in committing the crime because of that trust and uses that advantage in order to commit the crime." *United States v. Barakat,* 130 F.3d 1448, 1455 (11th Cir.1997). This formulation applies when a special skill is involved. The district court could have reasonably found that Guererro, because of his training in civil engineering, had an advantage in composing and transmitting a mental blueprint, and he used that advantage to commit the crime of conspiracy to gather and

transmit national-defense information.

5. The Sentences of Guerrero and Hernandez

Guerrero and Hernandez both adopt several arguments of Medina. They adopt Medina's arguments that the district court erred when it declined to order a consultation with the President's authorized designee, when it applied section 2M3.1 to determine their base offense level, when it increased their offense level for obstruction of justice, and when it declined to depart downward based on their roles in the offense. As we explained earlier, these arguments fail.

Two of Medina's arguments that Hernandez and Guerrero adopt have merit, but a remand is necessary for Guerrero only. As we explained before, the district court erred when it applied section 2M3.1(a)(1) instead of section 2M3.1(a)(2) in the absence of a finding that top secret information was gathered or transmitted, and this error undermines the basis for the conclusion by the district court that it did not have authority to depart under application note 2 of section 2M3.1. We remand to allow the district court to resentence Guerrero in the light of our ruling, but we need not remand for resentencing of Hernandez. Because he was sentenced to life imprisonment on his murder-conspiracy conviction, any error in the calculation of Hernandez's concurrent sentence for conspiracy to gather and transmit national-defense information is "irrelevant to the time he will serve in prison." *United States v. Rivera,* 282 F.3d 74, 77-78 (2d Cir.2000). Hernandez need not be resentenced because the errors under Guideline section 2M3.1 are harmless with respect to him. *See* Fed.R.Crim.P. 52(b); *Williams v. United*

States, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992); *United States v. Pierre,* 484 F.3d 75, 91 (1st Cir.2007); *Rivera,* 282 F.3d at 77; *United States v. Nguyen,* 46 F.3d 781, 783 (8th Cir.1995); *see also United States v. Jones,* 28 F.3d 1574 (11th Cir.1994) (recognizing our discretion to decline to review sentencing errors under the "concurrent sentence doctrine"), *vacated,* 516 U.S. 1022, 116 S.Ct. 663, 133 L.Ed.2d 515 (1995), *opinion reinstated in part,* 74 F.3d 275 (11th Cir.1996); *United States v. Segien,* 114 F.3d 1014, 1021 (10th Cir.1997). *But see United States v. Kincaid,* 898 F.2d 110, 112 (9th Cir.1990) (rejecting the concurrent sentence doctrine and its application to sentencing errors).

IV. CONCLUSION

We AFFIRM the convictions of each defendant and the sentences of Gonzalez and Hernandez. We VACATE the sentences of Campa, Medina, and Guerrero and REMAND for resentencing proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED in part.

BIRCH, Circuit Judge, specially concurring:

I concur in Judge Pryor's opinion for the court. As evident from the dissent on the issue of conspiracy to commit murder, this issue presents a very close case. However, given our standards of review with

regard to Hernandez's conviction on Count 3, I conclude that the conviction should be affirmed.

I remain convinced, for all the reasons and facts set out in my prior dissent that the motion for change of venue should have been granted. *See United States v. Campa,* 459 F.3d 1121, 1155 (11th Cir.2006) (en banc). The defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed. The Supreme Court has not addressed the law concerning Fed.R.Crim.P. 21 motions for change of venue since *Patton v. Yount,* 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Given the technological advances and 24-hour news cycle that have become prevalent in our nation since 1984, I respectfully suggest that this case provides a timely and appropriate opportunity for the Court to address the issue of change of venue in this internet and media permeated century.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion with the exception of section 3.c. (the court's affirmance of Count 3, conspiracy to commit murder), from which I respectfully dissent. In my view, the Government failed to present evidence sufficient to prove beyond a reasonable doubt that Hernandez agreed to participate in a conspiracy, the object of which was to shoot down BTTR planes over international airspace, resulting in the deaths of several pilots.

I. FACTS

Brothers to the Rescue ("BTTR") repeatedly and knowingly had violated Cuban airspace since 1994. Jose Basulto, BTTR's founder and leader, testified that on April 17, 1994 he flew with Bernadette Pardo-a television news reporter-close to the coast of Cuba. Consistent with BTTR's customary practice, a few other BTTR aircraft accompanied Basulto's plane. The news reporter videotaped the flight and portions were played for the jury.

The videotape showed a Cuban military aircraft "MiG" circle the BTTR planes and fly in front of Basulto's. Basulto radioed the MiG pilots, stating, "On behalf of the Cuban exiles, the group that makes the work of Brothers to the Rescue possible, we wish to Cuba, the Cuban people, the armed forces that you could make freedom for Cuba possible and to do everything you can to bring an end to Castro's regime." The MiG's pilots did not respond to Basulto's encouragement to defect from Castro's Government and did not fire any shots.

Basulto testified that on the next occasion of knowingly violating Cuban airspace, he flew over a small town where his father had been born near Guantanamo Naval Base and dropped BTTR bumper stickers. This incursion was on November 10, 1994. Once again, the Cuban Government did not respond with violence.

On July 13, 1995, BTTR escalated its efforts. To commemorate Cuba's sinking of a tugboat full of people (ostensibly leaving Cuba) within Cuba's territorial waters a year earlier, BTTR planned a demonstration in association with Democracia, a

related anti-Castro group. Prior to July 13th, BTTR notified both U.S. and Cuban officials of its plan to commit "civil disobedience" within Cuban territorial waters. Cuba prepared itself, placing gun boats in the water and preparing MiGs. The United States State Department issued a public announcement, which Basulto saw, stating that pilots should not violate Cuban airspace.

Despite the warning, on July 13th, BTTR flew four planes into Cuban airspace and Democracia drove a boat (also named "Democracia") into Cuban territorial waters. Basulto, the pilot in one of the planes, testified that as he approached Cuban airspace, Havana Air Traffic Control told him to leave. He ignored those warnings.

Basulto further testified that MiGs were in the air-passing and circling over him-and he saw gun boats in the water. Basulto dropped a smoke canister out of his window at the point where the tugboat was believed to have been sunk. Then he flew over a Cuban gun boat, dropping leaflets.

He also flew the plane low over downtown Havana for approximately 13 minutes, dropping nearly 20,000 leaflets and religious medals. Basulto testified that he flew over Havana to divert attention away from the Democracia as those on board had notified Basulto via radio that a Cuban gun boat had rammed it.

Despite this run-in with the Cuban military, all participants returned safely to Miami. In an interview with the news media, Basulto told reporters that he "engaged in an act of civil disobedience and I did it to show the Cuban people

they could do the same thing."

Following the July 13, 1995 incident, a Cuban official sent a letter to the Federal Aviation Administration ("FAA") notifying the FAA of the "violations of the Cuban aeronautical laws" committed by BTTR that day. The letter stated that the aircraft deviated from the routes described in their flight plans and ignored Cuba's warnings. The letter also stated that these actions "may bring grave consequences" and asked that American officials "adopt whatever measures are necessary" to avoid "provocation" of Cuban sovereignty. The letter ended with a quotation from a public declaration Cuba released the day after the July 13th airspace violations: "Any craft proceeding from the exterior that invades by force our sovereign waters could be sunk and any aircraft downed."

The United States Department of State then issued a statement warning pilots to avoid penetrating Cuban airspace. The statement quoted the Cuban declaration that any boat from abroad can be sunk and any airplane downed and stated that "[t]he Department takes this statement seriously."

Despite the warnings from both Cuba and the United States, BTTR flew again in January of 1996. Over the course of two flights-on the 9th and 13th-BTTR escalated its efforts even further, dropping nearly 500,000 leaflets over Havana and nearby communities. The parties disputed at trial whether BTTR planes violated Cuban airspace on these flights, but viewing the facts in the light most favorable to the Government-as we must-none of the BTTR planes entered into Cuban airspace in January. According to Basulto, after taking into

consideration wind speed and altitude, BTTR dropped these flyers in international airspace calculating that they would drop in or near Havana.

BTTR did not entirely ignore the warnings. In fact, Basulto and other BTTR members specifically contemplated that if they violated Cuban airspace the Cuban military might confront them and force them to land. Before the flight on January 9, 1996, BTTR made a videotape that it left behind in case the pilots did not return. Basulto stated, "If anything happens, being that we might be made to land in Cuba, we would like to clarify that, under pressure, any human being may say anything against his beli[efs]." Arnaldo Iglesias, another BTTR member, stated on the tape that he habitually blinked his eyes and that "[I]n case they were to make us land in Cuba, I'm going to make a great effort not to blink. Which means that what I'm saying, I don't really feel." Billy Schuz, another BTTR member, then told the camera that he would do the opposite: that if captured and forced to land in Cuba, he would "blink continually."

On January 15, 1996-two days after the last leaflet dropping-Basulto appeared via telephone on "En Vivo," a Cuban radio program. Basulto acknowledged responsibility on behalf of BTTR for the leaflet droppings. Portions of the conversation are relevant here:

> [Host 1]: You were not attacked, the planes, nothing, right?
>
> [Basulto]: That's right. We were not .... uh, we have not received any type of, of attack

from the Cuban government, up to now it has only been verbal.

...

[Host 1]: [W]hat was the objective sought, that you seek with this, with this action[?]

[Basulto]: Several objectives, one of them, the first is to give a message of solidarity. One of the messages in the flyers says uh, "Not comrades, brothers," which is the same theme we've used before. Others say: "I am change," implying that the main role for change in Cuba belongs to the Cuban people, who are the ones who have to act to change this regime.... All those pamphlets had, in the back, one or more of the chapters of the Universal Declaration of Human Rights, and in the back they also said: "Cuban, fight for your rights." ... [W]e are urging our people, on the thirteenth of every month, they use, and I say thirteenth of every month because we use it as a reminder of the incident that happened on March thirteenth, the sinking of that boat, which was so tragic, and we use the thirteenth from now on so that on every month, all of us Cubans on the thirteenth do something, uh, some act of opposition, uh, of direct civic action against the government ... until we are able to gain enough strength to stop that government....

...

> [Host 1]: Basulto, to what do you attribute the fact that the Cuban government did not have, did not have a military response against you, lack of organization, surprise[ ]?
>
> [Basulto]: That is the same question that our compatriots on the island should asks [sic] themselves when they go to fear the government at a time they plan on doing something against it. We've been willing to take personal risks for this, they must be willing to do the same. Let them see that this regime is not invulnerable, that Castro can be penetrated, that many things can be done that are at our disposal. The thing is that we must, once and for all, do away with that internal police that we carry with us, that we think we're always being watched. Well, we're asking our people to meditate upon the possible things that can be done there, and for them to carry them out on the thirteenth day of each month.

Basulto's testimony at trial was consistent with his "En Vivo" interview: he wanted his incursions into Cuban airspace to serve as an example to Cubans. He testified that he wanted to inspire Cubans to imitate his defiance of the Cuban Government and topple Castro's regime.

Also on January 15, 1996, the Cuban Government again sent a letter to the FAA,

informing the FAA that two of the same planes that crossed into Cuban airspace in July again crossed into Cuban airspace on January 13th. The letter quoted a public declaration that "Cuba has the necessary measures to guarantee integrity of [its] national territory" and that "violators [of Cuban airspace] should also be prepared to face the consequences." The letter stated that such incursions into Cuban airspace could result in "serious consequences" for the crews and, again, Cuba appealed to the United States to adopt the necessary measures to prevent BTTR planes from violating Cuban airspace.

On February 24, 1996, three BTTR planes flew in international airspace close to Cuban territorial waters. As the planes approached Cuba, they were warned that they were "in danger" and that they were flying into an area that was "activated." Basulto, however, ignored these warnings and his plane crossed into Cuban territory. The other two planes did not enter Cuban territory but were shot down 4.8 and 9.5 miles away from Cuban territorial airspace, respectively. When the shoot down occurred, Basulto's plane was 2.1 miles into Cuban territorial airspace.

Basulto testified that at no time in his almost 2000 BTTR flights prior to February 24th did a MiG approach BTTR planes in international airspace. He also conceded at trial that he had been hearing the "warnings regarding the dangers of violating Cuban airspace for a long time" and that "we knew" a consequence of entering Cuban airspace could be a shoot down.

Within this context, we examine the evidence

against Hernandez. The Government points to three intercepted communications between the Cuban Government and Hernandez to demonstrate the alleged conspiracy to commit murder. The first communication was sent on January 29, 1996, two weeks after the 500,000 leaflet dropping but before the shoot down. It is undisputed that prior to this date, there is no evidence linking Hernandez to a murder conspiracy. The January 29th message read:

> Superior Headquarters approved Operacion Escorpion in order to perfect the confrontation of [counter-revolutionary] actions of BTTR. Info from [Roque] and [Gonzalez] should come with clear and precise specifications that allow to know without a doubt that Basulto is flying, whether or not activity of dropping of leaflets or violation of air space; if [Roque] or [Gonzalez] are or are not flying, anticipated plan any type BTTR flights, in order to know about these activities ahead of time. If there is not access this should also be a priority. Always specify if agents are flying....

The next day, the Cuban Directorate of Intelligence[1] added:

> In addition report types of planes flying, registration, pilots and passengers, permission for flight, day and time, altitude, distance, what type of action will be taken. If

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[1] The intelligence gathering body within the Cuban government for whom the defendants worked.

> [Roque] and [Gonzalez] are asked to fly at the last minute without being scheduled find excuse not to fly. If they cannot avoid it [Gonzalez] will transmit over the airplane radio the slogan for the July 13 martyrs viva Cua and [Roque] should call his neighbor Amelia and tell her that he will call her on Wednesday. If he cannot call he should say over the radio long live Brothers to the Rescue and Democracia....

The last relevant intercepted message (sent on February 18) read:

> MX instructs that under no circumstances should [Roque] nor [Gonzalez] fly with BTTR or another organization on days 24, 25, 26, and 27, coinciding with celebration of Concilio Cubano in order to avoid any incident of provocation that they may carry out and our response to it. Immediately confirm when you instruct both of them....

Evidence showed that Hernandez met with both Roque and Gonzalez and relayed the messages received from the Directorate of Intelligence. These three messages are the extent of the evidence that the Government presented against Hernandez relating to his knowledge and conduct prior to the shoot down of the BTTR planes.

The Government also points to three other intercepted messages that occurred after the shoot down. A communication to Hernandez from Cuban officials stated, "We have dealt the Miami right a hard blow in which your role has been decisive." One from Hernandez stated, "That the operation to which

we contributed a grain of salt ended successfully." Third, the head of the Directorate of Intelligence recognized Hernandez "[f]or outstanding results achieved on the job, during the provocations carried out by the government ... this past 24th of February."

II. DISCUSSION

Hernandez was convicted of conspiring with the Cuban Government to commit murder in violation of 18 U.S.C. § 1117, which, inter alia, makes it a crime to conspire to violate 18 U.S.C. § 1111. Section 1111 states "(a) Murder is the unlawful killing of a human being with malice aforethought."[2]

To obtain a conviction for conspiracy, the Government must prove beyond a reasonable doubt: (1) an agreement by two or more persons to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the agreement; and (3) an overt act committed in furtherance of the conspiracy. *See United States v. Adkinson,* 158 F.3d 1147, 1153 (11th Cir.1998) (emphasis added). The evidence must establish a common agreement to violate the law. *United States v. Parker,* 839 F.2d 1473, 1478 (11th Cir.1988). The defendant need not know that the conduct is unlawful, but the conspirators must agree to commit unlawful conduct. *United States v. Feola,* 420 U.S. 671, 687, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). Such an agreement may be proven with circumstantial evidence, but

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[2] Subsection (b) of that statute states both the jurisdictional requirement and the punishment for violations of subsection (a).

inferences are only permitted when "human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts." *United States v. Villegas,* 911 F.2d 623, 628 (11th Cir.1990). "[C]harges of conspiracy are not to be made out by piling inference upon inference." *Ingram v. United States,* 360 U.S. 672, 680, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959). "[T]he ultimate burden on the government is the ability to draw a reasonable inference, and not a speculation, of guilt." *Villegas,* 911 F.2d at 628. Knowledge of the criminal act "must be clear, not equivocal." *See Ingram,* 360 U.S. at 678-80, 79 S.Ct. 1314.

Furthermore, "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." *United States v. Vaghela,* 169 F.3d 729, 732 (11th Cir.1999). Also, the language in the substantive offense-Section 1111-states that "[m]urder is the *unlawful* killing ..." (emphasis added). And conspiracy to commit a particular offense "cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram,* 360 U.S. at 680, 79 S.Ct. 1314.

A country cannot lawfully shoot down aircraft in international airspace, in contrast to a country shooting down foreign aircraft within its own territory when the pilots of those aircraft are repeatedly warned to respect territorial boundaries, have dropped objects over the territory, and when the objective of the flights is to destabilize the country's political system. Thus, the question of whether the Government provided sufficient evidence to support Hernandez's conviction turns on whether it presented

sufficient evidence to prove that he entered into an agreement to shoot down the planes in international, as opposed to Cuban, airspace.

The majority opinion discusses the airspace issue, but it does so in the context of a different analytical framework: whether the *mens rea* requirement in subsection (a) of Section 1111 carries over to subsection (b). The opinion fails to address, however, whether the Government produced sufficient evidence to prove beyond a reasonable doubt that Hernandez agreed to commit an unlawful act. Such a discussion is necessary because our conspiracy law requires that those entering into a conspiracy have an agreement to commit an unlawful act and the substantive murder offense requires that the killing be unlawful. A shoot down in Cuban airspace would not have been unlawful; thus, Hernandez could not have been convicted of conspiracy to murder unless the Government proved beyond a reasonable doubt that he agreed for the shoot down to occur in international, as opposed to Cuban, airspace.[3]

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[3] The majority opinion relies heavily on *United States v. Feola,* 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). In that case, Feola was convicted of assaulting federal officers and conspiring to assault federal officers. *Id.* at 674, 95 S.Ct. 1255. On appeal, Feola argued that while he and his co-conspirators agreed to an assault, they did not know that the victims of that assault were federal officers, and that, to sustain his conviction, the Government had to show that he knew those victims were federal officers. *Id.* at 674-77, 95 S.Ct. 1255. The Court disagreed. It concluded that the Government did not

Here, the Government failed to provide sufficient evidence that Hernandez entered into an agreement to shoot down the planes at all. None of the intercepted communications the Government provided at trial show an agreement to shoot down the planes. At best, the evidence shows an agreement to "confront" BTTR planes. But a "confrontation" does not necessarily mean a shoot down. BTTR's

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need to show that Feola knew that his victims were federal officers: the Government needed only to demonstrate that Feola had the intent to assault (for the substantive offense) and agreed to the assault (for the conspiracy offense). *Id.* at 684-85, 694-96, 95 S.Ct. 1255.

Thus, the *Feola* opinion states that the *mens rea* required in the non-jurisdictional elements of an offense do not apply to the jurisdictional element as well. I agree that *Feola* controls here for the limited purpose of the *mens rea* analysis: the Government did not need to prove that Hernandez knew the shoot down would occur in international airspace within this framework because the *mens rea* in § 1111(a) is not imputed to § 1111(b). But where I disagree with the majority opinion is that I do not think the analysis stops there. The first element of conspiracy requires an agreement to commit an unlawful act, and the underlying murder statute requires that the killing be "unlawful." Within these two analytical frameworks, which are separate and distinct from the *mens rea* framework, the Government must show that Hernandez agreed to an unlawful killing-that he agreed to a shoot down in international, as opposed to Cuban, airspace. As discussed below, because there is no evidence that Hernandez agreed to such a shoot down, I dissent.

videotape on January 9th clearly shows that BTTR members seriously contemplated that MiGs would "confront" them by forcing them to land. Richard Nuccio-an advisor to President Clinton on Cuban affairs-also thought BTTR's repeated violations of Cuban airspace would result in a forced landing. He testified (and documents show) that conversations within the State Department suggested the same. *Id.* And Basulto testified that on the day of the shoot down he thought MiGs would fire warning shots. This evidence demonstrates the obvious: there are many ways a country could "confront" foreign aircraft. Forced landings, warning shots, and forced escorted journeys out of a country's territorial airspace are among them-as are shoot downs. But the Government presented no evidence that when Hernandez agreed to help "confront" BTTR that the agreed confrontation would be a shoot down.[4] To

[4] The majority states that the fact that the Directorate of Intelligence did not want agents flying with BTTR on certain days shows that Hernandez knew a shoot down was going to occur. This argument assumes that the Directorate of Intelligence believed "confrontations" other than shoot downs are safe for those on board. It is just as reasonable to conclude that the Directorate of Intelligence did not want its agents flying on those days because of the dangers inherent in any confrontation involving airplanes. (Indeed, Nuccio testified that he feared a forced landing would result in a crash.) Because so much evidence points toward a "confrontation" other than a shoot down, I cannot say that a reasonable jury-given all the evidence-could conclude beyond a reasonable doubt that Hernandez agreed to a shoot down.

conclude that the evidence does show this goes beyond mere inferences to the realm of speculation.

Moreover, even assuming that Hernandez agreed to help Cuba shoot down the BTTR planes, the Government presented no evidence that Hernandez agreed to a shoot down in international airspace. It is not enough for the Government to show that a shoot down merely *occurred* in international airspace: the Government must prove beyond a reasonable doubt that Hernandez *agreed* to a shoot down in international airspace. Although such an agreement may be proven with circumstantial evidence, here, the Government failed to provide either direct or circumstantial evidence that Hernandez agreed to a shoot down in international airspace. Instead, the evidence points toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act.

Basulto testified that in his nearly 2000 BTTR flights, MiGs never confronted him in international airspace. Further, every communication between Cuba and the FAA discussed the consequences for invading Cuba's sovereign territory, including the letter Cuba sent on January 15th-only a month before the tragic events of February 24th. The evidence also shows that American officials at the White House and in the State Department never contemplated a confrontation in international airspace. And the intercepted communications between Cuba and Hernandez speak of a confrontation only if BTTR "provokes" Cuba. Further, the fact that the intercepted communications after the shoot down show that Hernandez was congratulated for his role and that he acknowledged

participation and called it a "success" does not clearly establish an agreement to a shoot down in international airspace. [5] The Government cannot point to *any evidence* that indicates Hernandez agreed to a shoot down in international, as opposed to Cuban, airspace.

At most, the evidence demonstrates that Hernandez agreed to a confrontation in either Cuban *or* international airspace. But such an agreement is not enough to sustain a conspiracy conviction. *See United States v. Fernandez,* 892 F.2d 976, 986 (11th Cir.1990) (where discussion between alleged co-conspirators was susceptible to "either an illegal or legal interpretation," evidence that the conversation occurred is insufficient to meet the Government's burden to establish the unlawful-objective element of criminal conspiracy); *United States v. Wieschenberg,* 604 F.2d 326, 335-36 (5th Cir.1979) ("mere association of two or more persons to accomplish legal and possibly illegal goals, accompanied by discussions to promote those goals, but with no discernible direction toward either the legal or the illegal objectives" cannot support a conspiracy conviction).[6]

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[5] The majority focuses on Hernandez's referring to the incident as a "success." The fact that a spy refers to a shoot down of a perceived enemy plane as a "success" is not evidence that the spy agreed to help shoot down the plane in international, as opposed to Cuban, airspace.

[6] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth

I would therefore affirm Hernandez's convictions and sentences on Counts 1, 2, 4, 5, 6, 15, 16, 19, 22, 23, and 24, but I would reverse the conviction and sentence with regard to Count 3, conspiring to commit murder in violation of 18 U.S.C. § 1117.

Circuit handed down prior to close of business on September 30, 1981.

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A. ISELIN, A.K.A. CASTOR, GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, RENE GONZALEZ, A.K.A. ISELIN, A.K.A. CASTOR, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, DEFENDANTS-APPELLANTS.

[Decided: Aug. 9, 2006
Filed: Aug. 9, 2006]

Before: EDMONDSON, Chief Judge, and TJOFLAT, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR and KRAVITCH,* Circuit Judges.

OPINION

WILSON, Circuit Judge:

This case involves the Miami trial and conviction of five defendants for acting and conspiring to act as unregistered Cuban intelligence agents working within the United States and for conspiring to commit murder. The defendants, Ruben Campa, Rene Gonzalez, Gerardo Hernandez, Luis Medina, and Antonio Guerrero, appealed their convictions and sentences, arguing that the pervasive community prejudice against the Cuban government and its agents and the publicity surrounding the trial that existed in Miami prevented them from obtaining a fair and impartial trial. We reviewed this case en banc to determine whether the district court abused

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* Senior Circuit Judge Kravitch elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

its discretion when it denied their multiple motions for change of venue and for new trial. We now affirm.[1]

I. BACKGROUND

A. The Indictments

On September 12, 1998, the five defendants were arrested, and were subsequently indicted on October 2, 1998, for acting and conspiring to act as agents of the Republic of Cuba without prior notification to the Attorney General of the United States in violation of 18 U.S.C. §§ 951(a) and 2 and 28 C.F.R. § 73.1 et seq., and of defrauding the United States concerning its governmental functions, in violation of 18 U.S.C. § 371.[2] The indictment alleged:

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[1] The defendants raised the following additional issues on appeal: prosecutorial misconduct regarding the testimony of a government witness and during closing argument; improper use of the Classified Information Procedures Act; improper denial of a motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act; *Batson* violations; insufficiency of the evidence regarding the conspiracy to transmit national defense information to Cuba, violations of the Foreign Services Registration Act, and conspiracy to commit murder; improper denial of a motion to dismiss Count 3 based on Foreign Sovereign Immunities Act jurisdictional grounds; improper denial of jury instructions regarding specific intent, necessity, and justification; and sentencing errors. We remand this case to the panel for consideration of these outstanding issues.

[2] R1-224. The government filed a second superceding indictment on May 7, 1999. *Id.*

> [The defendants] function[ed] as covert spies serving the interests of the government of the Republic of Cuba within the United States by gathering and transmitting information to the Cuban government concerning United States military installations, government functions and private political activity; by infiltrating, informing on and manipulating anti-Castro Cuban political groups in Miami-Dade County; by sowing disinformation within these political groups and in dealings with United States private and public institutions; and by carrying out other operational directives of the Cuban government.[3]

Hernandez, Medina, and Guerrero were also charged with conspiring to deliver to Cuba "information relating to the national defense of the United States, ... intending and having reason to believe that the [information] would be used to the injury of the United States and to the advantage of [Cuba]," in violation of 18 U.S.C. §§ 794(a), (c), and 2.[4] Hernandez was also indicted for conspiracy to perpetrate murder in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 1111 and 2, in connection with the Cuban military's shootdown of two United States-registered civilian aircraft on February 24,

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[3] *Id.* at 3-4.

[4] *Id.* at 11-13.

1996, in violation of 18 U.S.C. §§ 1117 and 2.[5] Hernandez, Medina, and Campa were indicted for possession of a counterfeit United States passport, in violation of 18 U.S.C. §§ 1546(a) and 2, and possession of fraudulent identification documents in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), (c)(3), and 2.[6] Medina was indicted for making a false statement to obtain a United States passport, in violation of 18 U.S.C. §§ 1542 and 2.[7] Hernandez, Medina, and Campa were indicted for causing individuals they oversaw to act as unregistered foreign agents without prior notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 and 28 C.F.R. § 73.1 et seq.[8] Their trial was set to proceed in the Southern District of Florida in Miami.

Shortly after the indictments were returned and upon the government's motion, on October 20, 1998, the court entered a gag order ordering all parties and their attorneys to abide by Southern District of Florida Local Rule 77.2.[9] The parties and their attorneys were ordered to "refrain from releasing 'information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation' where ' such dissemination will interfere with a fair trial or

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[5] *Id.* at 13-16.

[6] *Id.* at 16-22.

[7] *Id.* at 20.

[8] *Id.* at 23-31.

[9] 2SR1-122 at 1.

otherwise prejudice the due administration of justice.'"[10]

B. Pretrial Change of Venue Motions

On August 16, 1999, Medina filed a motion for authorization of funds to conduct a survey of the Miami-Dade County community, as a predicate for a motion for change of venue.[11] Medina requested authorization to engage Florida International University Psychology Professor Gary Patrick Moran for $9,500 to conduct a poll of a representative sample of the population of Miami-Dade County to determine whether it was a fair venue for the trial.[12] Moran proposed a "standard" telephone poll of 300 people.[13] The district court granted Medina's motion.[14]

In January of 2000, Campa, Gonzalez, Guerrero, and Medina each moved for a change of venue out of the Southern District of Florida.[15] They argued that they would be denied due process and a fair trial with an impartial jury as a result of the pervasive community prejudice in Miami against anyone associated with the Cuban government.[16] In support

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[10] *Id.* at 1-2 (quoting S.D. Fla. L.R. 77.2(A)(1)).

[11] R1-275.

[12] R1-280 at 3.

[13] *Id.*

[14] R2-303.

[15] R2-317, 321, 324, 329, 334; R3-397, 455.

[16] *See Id.* Later, at oral argument on the motions, they agreed that they would be satisfied with a

of their motions, they submitted the results of Professor Moran's survey and numerous news articles.[17]

Moran's survey consisted of 11 opinion and 21 demographic questions designed "to examine prejudice against anyone alleged to have assisted the Castro Cuban government in espionage activities."[18] Focus On Miami, a data collection company located in Miami-Dade County, was retained to conduct the survey by telephone.[19] In Section 1 of the survey, the interviewer made a series of 11 statements and questions regarding the defendants' alleged illegal conduct and general statements about Cuba and Castro to which the respondent was instructed to answer either "agree strongly," "agree," "disagree," "disagree strongly," or "don't know." [20] In Section 2 of the survey, the

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transfer of the case within the Southern District of Florida from the Miami Division to the Fort Lauderdale Division. R5-586 at 2, n.1.

[17] See *Id.*

[18] R2-321, Ex.A at 16.

[19] *Id.* at Ex.C at 1.

[20] *Id.* at Ex.D at 1-3. The interviewer began each survey by stating, "We are conducting a survey of south Florida voters to see how they feel about the upcoming trial of some people charged in federal court with spying for Castro's Cuba. Your house has been randomly selected to provide a participant for this survey." *Id.* at 1. The interviewer then asked whether the interviewee was "aware of the case involving the alleged Cuban spies who were arrested in Miami?" *Id.* The interview then proceeded with

interviewer asked a series of 21 demographic

Section 1 of the survey, which included the following statements and questions:

1. Cuban born persons carrying false identification documents and engaging in intelligence gathering activities in south Florida are Castro spies.

2. These defendants are charged with setting up the ambush of the Brothers to the Rescue planes in which four people were killed. This type of activity is characteristic of the Castro regime.

3. The aim of Castro is to undermine legitimate Cuban exile organizations.

4. An aim of Castro is to infiltrate U.S. military bases in South Florida.

5. Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades.

6. Castro's Cuba is an enemy of the United States.

7. Castro poses a real threat to the lives of Cuban [sic] exiles.

8. Castro's spies should not be given a public trial if this threatened national security.

9. Because of my feelings and opinions about Castro's government I would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies.

10. You have told me that you would find it (difficult/not difficult) to be a fair and impartial juror. Are there any circumstances that would change your opinion? If so, what?

11. Suppose your jury found these spy defendants not guilty. How worried would you be that you might be criticized in your community?

Id. at 2-3.

questions designed to gather information about the respondent's background, lifestyle, media exposure, and involvement in pro- or anti-Cuba groups.[21]

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[21] *Id.* at 3-5. Section 2 of the survey asked the following questions:

12. In what community do you live?

13. What is your zip code?

14. In what country were you born?

15. How long have you lived in South Florida?

16. Do you subscribe to, buy, or read a daily newspaper?

17. If you read a daily newspaper is it in English or Spanish?

18. Do you regularly listen to the news on the radio?

19. If you listen to the news on the radio is it in English or Spanish?

20. Do you regularly watch the news on the television?

21. If you watch the news on television is it in English or Spanish?

22. Do you have close friends or family members in Cuba now?

23. Are you an active member of any Pro-Cuba/Anti-Castro groups?

24. Do you donate money to Pro-Cuba/Anti-Castro groups or causes?

25. What is (was) your occupation?

26. What is your age today?

27. What is your marital status today? ...

28. What is the highest level of education that you have COMPLETED? ...

According to Professor Moran, the results of the survey indicated that 69% (with a sampling error of 5.3%) of eligible jurors were prejudiced.[22] Around 40% of the respondents (60% of the Hispanic respondents) "indicate[d] that they would find it difficult to be impartial."[23] Around 90% "would not change their minds under any circumstances."[24] Finally, approximately one-third of the respondents were "at least somewhat worried about community criticism in the event of a 'not guilty' verdict."[25] Based on these results, Professor Moran concluded the following:

> I conclude ... to a reasonable scientific certitude that a change of venue from the Miami Division of the Southern Federal District of Florida is the only viable means of assuring the defendant a fair and impartial jury. The results of the survey suggest that a jury chosen from the District

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29. Aside from the political party with which you are registered, how would you describe your current political views or beliefs? ...

30. Which [ethnicity] best describes your background? ...

31. Which [monetary range] best describes your total household annual income ....

32. Respondent's sex.

Id.

[22] *Id.* at Ex.A at 16.

[23] *Id.*

[24] *Id.*

[25] *Id.*

> will hold firm opinions prejudicial to this defendant that cannot be put aside. A reasonable likelihood of prejudice endangering the right to a fair trial exists.[26]

Moran further noted that two prior surveys from the early 1980's and from 1997, which also evaluated the Southern District of Florida, reached similar conclusions.[27] According to Moran, this suggested that prejudicial opinions in the Southern District of Florida were "fixed" and "[could not] be set aside."[28]

In addition to Moran's survey, the defendants also submitted numerous newspaper articles on their case and other Cuba-related issues.[29] They argued that these articles demonstrated that the community atmosphere is "so pervasively inflamed" that "resort to questioning in the cool reflection of a courtroom is not sufficient to cleanse the record."[30]

The government opposed the defendants' change of venue motion and maintained that an extensive voir dire of prospective jurors would ensure a fair and impartial jury.[31] It disputed that pervasive community prejudice existed and instead argued that the Miami-Dade population was "heterogenous" and "highly diverse."[32] It further noted that many of the

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[26] *Id.*

[27] *Id.* at 8-11, 16.

[28] *Id.* at 11.

[29] R2-317, 321, 324, 329, 334; R3-397, 455.

[30] R2-317 at 3.

[31] R3-443 at 3.

[32] *Id.* at 11.

news articles that the defendants submitted either did not relate to the instant case, or were accurate, objective, and unemotional.[33] The news coverage "pale[d] in comparison" with the biased coverage and sensationalism found in the rare cases in which previous courts had found presumed prejudice.[34]

The government further argued that Professor Moran's survey was unreliable due to numerous flaws in his procedures and conclusions.[35] In particular, it disputed Professor Moran's reliance on the two surveys that were used in prior, unrelated cases, which concluded that a substantial prejudice existed in the Southern District of Florida against defendants alleged to have helped the Castro government.[36] The first was the survey put forth in support of an unsuccessful change of venue motion in *United States v. Fuentes-Coba,*[37] a case involving illegal shipments of goods in violation of the Trading with the Enemy Act. We affirmed the district court's refusal to change venue, after the court reviewed the survey, determined no pervasive community prejudice had been shown, and conducted a thorough voir dire, thus ensuring a fair and impartial jury.[38] The government argued here that the court should follow this course of action by proceeding to voir dire

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[33] *Id.* at 5, n. 3.

[34] *Id.*

[35] *Id.* at 6-12.

[36] *Id.* at 6-9.

[37] 738 F.2d 1191, 1194 (11th Cir.1984).

[38] *Id.* at 1195.

to explore any potential jury bias.[39] The second survey that Moran relied on was the one he designed for *United States v. Broder,*[40] another Trading with the Enemy Act case involving Cuba in which the district court denied the defendants' motion for change of venue. One of the *Broder* defendants proceeded to trial and was acquitted of all charges, disproving Moran's conclusion that the Miami-Dade jury pool was hopelessly prejudiced against defendants charged with associating with Castro's Cuba.[41] In other words, the government argued that the very surveys which Moran relied upon in the instant case discredited his theory and instead demonstrated that Miami-Dade jurors would base their verdict on evidence, not prejudices.[42]

The government argued that Moran's survey was not well-designed, did not measure prejudice accurately, and engaged in broad, unsupported characterizations of the South Florida community.[43] For example, the government noted the near-verbatim similarity between Moran's *Broder* survey and affidavit and his survey and affidavit in the present case, suggesting that Moran's conclusions revealed "the foreordained conclusions of a predisposed and partisan expert, who has not even bothered to change the wording of his purportedly

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[39] R3-443 at 7.

[40] No. 97-267 (S.D.Fla.1997).

[41] R3-443 at 7.

[42] *Id.*

[43] *Id.* at 8-9.

scientific results."[44] Many of ***1131** the questions were ambiguous or were written in non-neutral terms, which demonstrated Moran's failure to follow scientific procedures.[45] To further support its position, the government submitted the affidavit and

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[44] *Id.* at 8. The government noted the close similarity between the two surveys and the "echo-like nature" of Moran's affidavit by referencing the following example. *Id.* In Moran's 1997 *Broder* affidavit, Moran concluded:

Inability to be Fair and Impartial

Finally, note item 14:

"Because of my feelings and opinions about the U.S. trade embargo on Cuba, I would find it difficult to be a fair and impartial juror in a case about an alleged violation of the Cuban embargo."

Circa 59% of the respondents are unable to agree that they can be impartial. This is very unusual!

Id. at Ex.A at 15. By comparison, Moran's affidavit in the present case uses similar language and structure:

Inability to be Fair and Impartial

Finally, note item 9:

"Because of my feelings and opinions about Castro's government, I would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies."

Circa 39.6% (57.4% of the Hispanic subsample) of the respondents are unable to affirm that they would be impartial and fair. This is very unusual!

R2-321, Ex.A at 12.

[45] R4-443 at 9-11.

curriculum vitae of Professor J. Daniel McKnight[46] who opined that Professor Moran's *Broder* survey "lack[ed] empirical rigor, scientific validity and provide[d] no estimation of its scientific reliability."[47] Although McKnight's analysis was of the *Broder* survey and affidavit, McKnight's evaluation was germane to the instant case given the striking similarities between two sets of surveys and affidavits.[48]

Following extensive oral argument, on June 27, 2000, the district court denied the defendants' motion without prejudice, finding that they had failed to present sufficient evidence "to raise a presumption of prejudice against [them] as would impair their right to a fair trial by an impartial jury in Miami-Dade County."[49] The court found that most of the news articles related to events other than the defendants' alleged activities, and that except for articles regarding the codefendants' sentences and one editorial noting the Brothers to the Rescue shootdown anniversary, the articles about the shootdown were more than one year old and were largely factual.[50] Accordingly, the court found that

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[46] *Id.* at Ex.B at 1. Professor McKnight is a social psychologist specializing in social perception, research methodology, and psychometrics. *Id.*

[47] *Id.* at Ex. B at 2.

[48] *Id.* at 9.

[49] R5-586 at 16.

[50] *Id.* at 11. Brothers to the Rescue is a Miami-based Cuban exile group founded in 1991 to rescue rafters fleeing Cuba in the Straits of Florida and to bring

pretrial publicity was not sufficiently pervasive and inflammatory to raise a presumption of prejudice.[51]

The court also found Professor Moran's survey and affidavit insufficient to establish pervasive community prejudice for six reasons.[52] The court faulted the survey for: (1) including respondents who were completely unaware of this case in quantifying alleged community prejudice against the defendants; (2) failing to measure prejudice toward a particularized group of people, i.e., a "social target," making prejudice calculations "unreliable" and "without substantial support"; (3) failing to use neutral terminology, contrary to standard scientific procedure; (4) asking ambiguous questions; and (5) using an inadequate sample size, representing only 0.003% of eligible Miami-Dade jurors.[53] "[M]ost significantly," Professor Moran relied on the same study that we rejected in *Fuentes-Coba* to bolster his conclusion that community prejudice existed in

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them to the United States. *See Id.* at 2; R80 at 8836-37. On February 24, 1996, three Brothers to the Rescue planes flew into the Florida Straits, toward Cuba, in search of reported rafters. R83 at 9161-70. When the three planes reached international airspace between the United States and Cuba, Cuban military ground control authorized Cuban aircraft to fire on and destroy the Brothers to the Rescue planes. *Id.* at 9181-85; Govt. Ex. 483 at 8-16. The Cuban military aircraft shot down two of the planes, but one escaped. *Id.*

[51] R5-586 at 11.

[52] *Id.* at 13-15.

[53] *Id.*

Miami-Dade.[54] Under these circumstances, the court was unwilling to afford the survey and Professor Moran's conclusion the weight attributed by the defendants. [55] However, the court promised a thorough voir dire and invited the defendants to renew their motions if voir dire showed "that a fair and impartial jury [could not] be empaneled."[56]

C. Voir Dire

The case proceeded to voir dire. The court held two status conferences to develop the voir dire questions. [57] Although the defendants stipulated to the government's proposed questions, [58] the parties argued at length regarding the terminology of the

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[54] *Id.* at 15.

[55] *Id.* at 13-14.

[56] *Id.* at 17. On September 15, 2000, Campa moved for reconsideration of the denial of the motion for change of venue, arguing that the court failed to consider how the defendants' theory of defense affected their ability to receive a fair trial in Miami. R5-656. The court denied reconsideration without prejudice, stating that it had previously addressed the defendants' arguments. R6-723 at 2. The court explained that it could explore any potential bias during voir dire examination and carefully instruct the jurors during the trial. *Id.* The court again invited the defendants to renew their motion for change of venue, if it determined after voir dire that a fair and impartial jury could not be empaneled. *Id.* at 2-3.

[57] 1SR1; 1SR2.

[58] 1SR1 at 42.

questions and made suggestions for revisions.[59] The court deliberated extensively and carefully over the questions, keeping in mind the defendants' unsuccessful motions for change of venue: "I promised you all and [e]specially the defendants when I denied your motions for change of venue, that I would consider extensively your request for voir dire ...." [60] Ultimately, the court developed an exhaustive list of questions for a two-phase voir dire.[61] The court noted, "[m]ore questions are being

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[59] 1SR1; 1SR2. One of the most heated debates was whether and how the court should question prospective jurors' support of pro- or anti-Castro political groups, and whether the court should specifically delineate nine of those groups, a question suggested by the defendants. 1SR2 at 63-74; 1SR1 at 48-55. Over the government's objection that such a question improperly implied an association between the Brothers to the Rescue and other historically violent groups, the court decided to include the question. 1SR1 at 51-54. Another debate centered around whether and how the court should question prospective jurors who formerly lived in Cuba regarding how they came to live in the United States. 1SR1 at 29-36. The defendants suggested that the court ask whether they had an exit visa because those who left Cuba illegally would have a different outlook on the case than those who left the country legally. 1SR1 at 29-30, 35. The government objected, arguing that such questions would make the prospective jurors feel extremely uncomfortable, but the court decided to ask the question anyway. 1SR1 at 32-33, 35.

[60] 1SR2 at 73-74.

[61] 1SR1 at 5.

asked of this jury as far as their background than questions that are ever asked or have been asked of jurors that certainly have appeared before me in cases; but I have agreed that this is a case that requires additional inquiry and certainly there is additional inquiry here ...."[62]

Phase one would consist of the general questioning of the voir dire, which was aimed at determining the jurors' qualifications to serve in the case.[63] During this phase, panels of approximately 34 prospective jurors would be in the courtroom at a time.[64] The court would ask the group a set of 16 general questions, and then each juror would read aloud to the court their answers to a 28-question written questionnaire.[65] It would ask additional, follow-up questions when necessary.[66] The court rejected the parties' requests for attorney-conducted voir dire, and determined that it would ask all of the questions during both phases of the voir dire.[67] The court did, however, promise to inquire whether there were any additional questions that the parties wished the court to ask any individual juror, or the panel as a whole, after the completion of the general questions and the questionnaires.[68] The parties would

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[62] 1SR1 at 29.

[63] *Id.* at 5.

[64] *Id.* at 9.

[65] *Id.* at 5; R6-766.

[66] 1SR1 at 5.

[67] *Id.* at 4.

[68] *Id.*

then exercise challenges for cause and hardship for each panel.[69]

Once the court had questioned several venire panels of 34 prospective jurors, it would proceed to phase two with the remaining jurors who had not been challenged for cause or for hardship.[70] During phase two, small groups of approximately ten jurors would be instructed to be present in the lobby of the courtroom at staggered times throughout the day, and one-by-one the jurors would enter the courtroom for individual questioning. [71] The court would individually pose a set of 20 "community impact" questions[72] and 7 "pretrial publicity" questions[73] to

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[69] *Id.* at 5.

[70] *Id.*

[71] *Id.* at 7.

[72] The "community impact" questions consisted of the following:

1. The charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability fairly and impartially to consider the evidence in this case and the court's instructions?

2. Witnesses may be called in this case who have admitted to spying as agents for Cuba or who are members of the Cuban military or government. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or physical evidence in this case?

3. Do you know of any reason why you may be prejudiced for or against the United States or the

defendants because of the nature of the charges? Or because of any other reason?

4. Have you ever lived in Cuba? Under what circumstances did you come to the United States? When did you leave? Did you have an exit visa?

5. Have any of your family members or close friends lived in Cuba? Under what circumstances did they come to the United States?

6. Do you have family or close friends living in Cuba at this time?

7. Do you have any relatives or close friends who were ever politically involved in Cuba? When? What did they do?

8. Have you, a member of your family, or a close friend traveled to Cuba?

9. If you are chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of *your* community might view you?

10. Can you return a verdict in this case based only on the evidence and the court's instructions, without being concerned over the impact the verdict might have on any individuals or community, in the United States, in Cuba, or anywhere?

11. Do you have an opinion about the current government of Cuba? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind?

12. Do you have an opinion about the way the United States handles its relations with Cuba? (for example the embargo against Cuba, the immigration policy or diplomatic relations) What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's

instructions in this case fairly and with an open mind?

13. Are you or a relative or close friend a member of a group whose principal purpose is to advocate a position about Cuba or American policy towards Cuba? What group? Have you ever contributed money or time to this group?

14. Have you contributed money or time or do you support any of the following groups:

P.U.N.D.

Antonio Maceo Brigade

Alpha 66

Cuban Workers Alliance

Omega 7

Miami Committee for Lifting the Cuban Embargo

The Democracy Movement

Brothers to the Rescue

Cuban American National Foundation

15. Do you have an opinion about the Cuban exile community in the United States? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind?

16. Do you have an opinion about the Elian Gonzalez case? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind? Do you understand that the facts in that case have nothing to do with the facts in this case?

17. As a result of the Elian Gonzalez matter, certain members of the South Florida community, including

some elected officials, publicly voiced their displeasure with the United States government's actions in that case. Will those statements, or your own feelings about the case, affect your ability to give either the defendants or the United States a fair trial in this case? If so, how?

18. Can you listen to and fairly evaluate the testimony of an individual who is or was closely allied with the current government of Cuba? Or who perhaps is or was a member of the communist party in Cuba?

19. If you have negative feelings about any of these issues, can you put those feelings aside and decide this case based on the evidence presented and the instructions of law as given by the court?

20. If you were the United States Attorney prosecuting this case, or if you were any of the defendants, or their counsel, do you know of any reason why you should not select yourself as a juror?

Gov't Br. at App. G.

[73] The "pretrial publicity" questions consisted of the following:

1. What do you remember hearing, reading or seeing about this case in the news media?

2. What was the source of the information? Which newspaper/radio station/tv station[?]

3. Has anyone ever talked to you about the facts of this case? What additional information did you get from this source?

4. Based on what you have heard or seen, have you formed any opinion as to whether the defendants are guilty or not guilty? What is that opinion? Have you ever expressed an opinion as to the guilt or non-guilt of the defendants? To whom?

each juror. These questions centered around more sensitive subjects, such as the jurors' media exposure, knowledge and opinions of the case, connections to Cuba, the United States policy toward Cuba, and the Cuban exile community in the United States.[74] After the individual questioning, the parties would be permitted to exercise additional challenges for cause and hardship, if there were any, and peremptory challenges.[75]

On November 27, 2000, the trial began, and the voir dire proceeded as planned.[76] During phase one, the court questioned 168 jurors through the oral voir

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5. A jury in a criminal case must base its verdict solely on the evidence presented at trial, and the instructions provided by the Court. Can you put whatever statements you may have seen, heard or read out of your mind, and consider this case with an open mind, based solely on the evidence presented at trial and the instructions provided by the Court?

6. Jurors in this case will be instructed that they must not read, listen to or otherwise allow themselves to be exposed to any information, news reports, or public or private discussions about this case, unless and until they have been permanently discharged by Judge Lenard from serving on the jury. Will you be able to follow such an instruction?

7. If you are chosen as a juror in this case will you be able to return a verdict of guilty or not guilty unaffected by the possibility that any verdict would receive news media attention?

Id.

[74] *See Id.*

[75] 1SR1 at 7.

[76] *See* R21.

dire and the written questionnaire to screen for language, hardship, and scheduling problems.[77] The court questioned whether the jurors knew any of the parties, attorneys, or witnesses in the case, and questioned the jurors on their ability to reach a verdict based solely on the evidence and the court's instructions.[78] Based on these generalized questions, the court struck 49 jurors for cause; 10 due to the court's concern over their ability to be fair and impartial because of their opinions regarding Cuba or their acquaintance with persons involved in the case, and the remaining 39 for hardship, health, or language problems.[79]

In phase two, the court individually questioned 82 prospective jurors.[80] Jurors who had heard media accounts about the case were asked to provide details regarding their exposure.[81] The court asked probing questions to potential jury members who acknowledged having opinions about Cuba to determine whether those opinions would affect their ability to weigh the evidence and follow the court's instructions. [82] As promised, the court asked additional, follow-up questions sua sponte and when the parties requested.[83] At the conclusion of phase

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[77] R21-R24.

[78] *Id.*

[79] *Id.*

[80] R25-28.

[81] *Id.*

[82] *Id.*

[83] *Id.*

two, the court struck an additional 30 potential jurors for cause: 22 were struck for Cuba-related animus and the remaining 8 were dismissed for reasons unrelated to attitudes about Cuba or the defendants.[84]

The court and the parties then proceeded to peremptory challenges. The court twice granted the defendants' requests for additional peremptory challenges, giving the defendants a total of 18 and the government 11, and 2 each for alternates.[85] However, the defendants exercised only 15 of their 18 challenges to the jury pool, as well as their two allotted alternate challenges, to excuse jurors whose answers revealed biases against them.[86] The defendants struck every Cuban-American prospective juror, notwithstanding the government's reverse-*Batson* objection.[87]

The voir dire lasted seven days. On each day of the voir dire, before every recess, and at the end of every day, the court admonished prospective jurors not to discuss the case amongst themselves or with others, not to have contact with anyone associated with the trial, and not to expose themselves, read, or listen to anything related to the case.[88]

During the lunch break on the first day of voir dire, the court observed that the family members of

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[84] *Id.*

[85] 1SR2 at 75; 1SR1 at 5-6, 11; R27 at 1382.

[86] R28 at 1513.

[87] *Id.* at 1508-11.

[88] *See* R21-28.

the victims of the Brothers to the Rescue shootdown were congregated in front of the press, immediately outside the courthouse.[89] The family members' statements were "fairly innocuous" in that they merely commented that "they were looking forward to the jury process going forward."[90] Some of the jurors were approached by the media as they were leaving the courthouse,[91] but they were not interviewed.[92] Regardless, the court instructed that it would no longer permit the victims' families to be present during voir dire "if there are efforts made to pollute the jury pool"[93] and instructed the government to speak to the victims' families regarding their conduct.[94] The court entered a sequestration order precluding witnesses from speaking with each other and with the media about the case.[95] It also extended the gag order to "all [trial] participants, lawyers, witnesses, family members of the victims" and clarified that it covered all "statements or information which is intended to influence public opinion or the jury regarding the merits of the case."[96] The court thereafter instructed the jurors to remove their juror tags as they left the

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[89] R7-978 at 3.

[90] R23 at 194.

[91] R21 at 111-12; R62 at 6575-76.

[92] R23 at 194.

[93] R21 at 113.

[94] *Id.*

[95] *Id.* at 117-19.

[96] R7-978 at 3, 7; R64 at 6759-60.

courtroom, and instructed the marshals to accompany the jurors out of the building.[97] The court sealed the voir dire questions during the jury selection so as to prevent the media from accessing them.[98]

Later that day, when a copy of the Miami Herald, which contained an article about the case, was found in the jury assembly room, the court ordered the newspaper removed.[99] The following day, Guerrero's counsel reported that he had viewed one of the potential jurors reading the article while in the courtroom.[100] The district court responded that "[t]he issue is not whether [venire] persons have read or been exposed to publicity about the case of the defendants, but whether they have formed an opinion based upon what they have read. We will go into all of this as we go through individual voir dires."[101] Later, a potential juror who evidenced prejudice was isolated and removed from the venire so as to eliminate contact with other potential jurors.[102]

The court also issued assigned seating in the courtroom.[103] The government agents were assigned

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[97] R21 at 112.

[98] R24 at 625-26.

[99] R21 at 171.

[100] R23 at 195-97. This juror was later stricken for cause as a result of his personal knowledge of Jose Basulto, a Brothers to the Rescue pilot and witness in this case. R24 at 537-40.

[101] R23 at 197.

[102] *Id.* at 300-10.

[103] R25 at 717.

to the first row, the victims' families were seated in the second row and were removed from the government attorneys, the defendants' families were seated in the third row, and the back row was designated for the media.[104]

At the conclusion of voir dire, the district court empaneled the jury without objection. [105] The defendants did not renew their motions for change of venue, despite the court's prior invitations.[106] Instead, Medina's counsel complimented the manner in which the court conducted the voir dire stating, "The Court's conduct of this voir dire both in terms of its planning and its execution has been extraordinary. What we have accomplished here in the last seven days or six days has been more than I think the defense anticipated we would be able to do."[107] He added, "quite frankly, if Professor Moran could interrogate his pool members the way this Court has interrogated some of the prospective jurors, the social sciences wouldn't be soft sciences, they would be hard sciences."[108] He admitted, "[g]enerally ... the people who prejudged or who had strong opinions were candid about them."[109] Later in the trial, when faced with the prospect of a juror being dismissed due to scheduling problems, the defendants vigorously

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[104] *Id.*

[105] R29 at 1564.

[106] R5-586 at 17; R6-723 at 2-3.

[107] R27 at 1373.

[108] *Id.* at 1374.

[109] *Id.* at 1375.

objected without even knowing the juror's identity.[110] The court retained the juror at the defendants' insistence. [111] The defendants reiterated their satisfaction with the voir dire stating, "[w]e worked very hard to pick this jury and we got a jury we are very happy with."[112]

D. The Trial

At trial, the government presented evidence[113] that revealed that the Directorate of Intelligence, Cuba's primary intelligence collection agency, maintained a spy operation in South Florida known as "La Red Avispa," or the "The Wasp Network."[114] Campa, Hernandez, and Medina were illegal intelligence officers of the operation and supervised agents, including agents Gonzalez and Guerrero.[115] The Wasp Network reported information to Cuba on the activities of anti-Castro organizations in Miami-Dade County, [116] the operation of United States military installations,[117] and United States political

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[110] R104 at 12094.

[111] *Id.*

[112] *Id.* at 12092.

[113] The original panel of this court will consider the remaining issues on appeal, including whether the government presented sufficient evidence to support the defendants' convictions. This brief discussion of the evidence is only meant to aid in the discussion of the change of venue and new trial issues.

[114] R44 at 3703-07.

[115] *Id.* at 3711-13, 3719-23.

[116] R45 at 3870-71.

[117] R74 at 7910, 7920-21; R46 at 4009-10.

and law enforcement activities.[118] The operation was also directed to intimidate Cuban-American individuals and organizations with anonymous letters and threatening telephone calls; [119] to penetrate United States Congressional election activity;[120] to scout and assess potential sources of information and possible new recruits;[121] and to carry communications, cash, and other items between Miami and other United States-based Directorate of Intelligence officers and agents. [122] None of the defendants notified the United States Attorney General that they were acting as agents of the Cuban government.[123]

During the defendants' case, Hernandez called as a hostile witness Jose Basulto, founder of Brothers to the Rescue and the pilot of the only plane that escaped the February, 24, 1996, shootdown.[124] After a series of questions about Basulto's travel outside of the United States, in which Hernandez's counsel suggested that Basulto had attempted to smuggle weapons into Cuba, [125] Basulto retorted, "Are you doing the work of the intelligence government of

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[118] R103 at 11907-08, 11911-13.

[119] R45 at 3793-99.

[120] Govt. Ex. HF 143.

[121] Govt. Exs. DG 141 at 6-7; DAV 118 at 14-19.

[122] Govt. Exs. 384, 865.

[123] R61 at 6404-15.

[124] R80 at 8836-37.

[125] R81 at 8944-45.

Cuba [?]"[126] Campa's attorney argued that Basulto's insinuation was "precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue ...."[127] He argued, "This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is doing his job, of being a communist .... These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community ... are going to ... accuse them of being Castro sympathizers ...."[128] The court struck Basulto's remark, admonished him, and instructed the jury to disregard the comment, noting that the remark was "inappropriate and unfounded" and that Hernandez's counsel was properly providing "a vigorous defense for his client."[129]

Throughout the trial, the defendants twice renewed their motions for change of venue through motions for a mistrial based on community events and trial publicity.[130] In February 2001, Campa moved for a mistrial based on activities during the weekend of February 24, 2001, to honor the fifth anniversary of the Brothers to the Rescue shootdown, including commemorative flights, as well as television interviews and newspaper articles

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[126] *Id.* at 8945.

[127] *Id.* at 8947.

[128] *Id.* at 8947-48.

[129] *Id.* at 8945-46, 8955.

[130] R70 at 7130-36; R8-1009.

regarding that event.[131] He argued that "some news events ... are so great and are so explosive ... that any amount of instructing the jury cannot cure the taint."[132] The government objected, noting that there was nothing in the record to indicate that the jury had ignored the court's repeated admonitions that they not read or view case-related news accounts.[133] The court granted the defendants' request for a juror inquiry, and asked if any one of them had seen, heard, read, or been spoken to about any media accounts related to this case, seeking a show of hands.[134] The trial continued after no juror responded affirmatively.[135]

On May 24, 2001, the district court denied the pending motions on the basis of its earlier orders

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[131] R70 at 7130.

[132] *Id.* at 7131.

[133] *Id.*

[134] *Id.* at 7136.

[135] *Id.* Two weeks later, on March 1, 2001, the defendants again filed a joint motion for a mistrial and change of venue, arguing that the events surrounding the anniversary of the Brothers to the Rescue shootdown "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial." R8-1009 at 2. They maintained that "[n]o amount of voir dire or instructions to the jury [could] cure the taint, whose ripple effects are difficult to measure." *Id.* at 5. They also requested a mistrial "so that their trial can be conducted in a venue where community prejudices against the defendants are not so deeply embedded and fanned by the local media." *Id.*

denying a change of venue and finding that "the February 24th issues and events as well as the reporting of these events do not necessitate and did not necessitate a change of venue ...."[136] The court noted that "[t]he jurors were instructed each and every day ... at each and every break and at the conclusion of the day ... not to read or listen or see anything reflecting on this matter in any way and there has been no indication that the jurors did not comply with that directive by the Court ...."[137]

During closing arguments, the government commented that Hernandez's attorney called the Brothers to the Rescue shootdown "the final solution" and noted that such terminology had been "heard ... before in the history of mankind."[138] It argued that the defendants were "bent on destroying the United States" and were "paid for by the American taxpayer."[139] It summarized that the defendants had joined a "hostile intelligence bureau ... that sees the United States of America as its prime and main enemy" and that the jury was "not operating under the rule of Cuba, thank God."[140] The defense objections throughout the closing arguments were sustained.[141] The district court instructed the jury to consider only the evidence admitted during the trial,

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[136] R120 at 13894-95.

[137] *Id.* at 13895.

[138] R124 at 14474.

[139] *Id.* at 14482.

[140] *Id.* at 14475.

[141] *Id.* at 14482, 14483, 14493.

and to remember that the lawyers' comments were not evidence.[142]

For deliberations, the jury was moved to another floor of the courthouse with controlled access.[143] No one but the court staff was permitted on the floor.[144] The court also denied the media's request for the names of the twelve jurors.[145] When the jurors were filmed leaving the courthouse one day during deliberations, the court modified the jurors' entry and their exit from the courthouse to prevent further exposure to the media.[146] The court provided the jurors transportation to and from their vehicles or mass transit and brought them up to their secured floor through the courthouse garage.[147] The jury deliberated for five days.[148] The defendants were convicted on June 8, 2001.[149]

E. Post-Trial Motions for Change of Venue and for New Trial

In July and August of 2001, the defendants reasserted their claims of improper venue in post-trial motions for judgment of acquittal and for new trial.[150] They argued a new trial was merited "in the

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[142] R125 at 14583.

[143] R124 at 14546-47; R125 at 14624.

[144] R125 at 14624.

[145] R126 at 14643-44.

[146] *Id.* at 14645-47.

[147] *Id.* at 14647.

[148] R125-R126.

[149] R126 at 14668-69.

[150] R12-1338, 1342, 1343, 1347.

interest of justice" because of the prejudice inured to them from the venue and the prosecution's misconduct.[151] Guerrero argued that, although he did "not seek to criticize the Court's voir dire procedure nor could he," the jurors' responses in voir dire were "'politically correct,'" in that they "all agreed that they would be fair and impartial."[152] Medina similarly argued that, "[d]espite the extraordinary care this Court exercised in the jury selection process," a fair and impartial jury could not be seated in Miami-Dade County.[153] Campa and Gonzalez argued that witness Jose Basulto's remarks were highly prejudicial because they implied that Defendant Hernandez's counsel was a spy for the Cuban government.[154] Campa also asserted that the jury's quick verdicts without asking a single question in the complex, almost seven-month trial indicated that the jury was subject to community pressure and prejudice.[155] He further argued that the government prejudiced the defendants by stating in closing argument that they "were 'people bent on destroying the United States' whose defense had been 'paid for by the American taxpayer.'"[156]

On November 28, 2001, the district court denied the motions for new trial in a detailed written

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[151] R12-1338 at 2-3.

[152] *Id.* at 2.

[153] R12-1347 at 1.

[154] R12-1342 at 3; R12-1343 at 3-4.

[155] R12-1343 at 1-3.

[156] *Id.* at 8.

order.[157] It referenced its prior orders denying a change of venue and denying reconsideration of the denial of the change of venue, and stated that because it was "[a]ware of the impassioned Cuban exile-community residing within this venue, the Court implemented a series of measures to guarantee the Defendants' right to a fair trial."[158] These efforts included a searching, seven-day voir dire process, daily instructions to the jury not to speak with the media about the case or to read or listen to any reports about the case, and gag orders on all trial participants.[159] The court also struck witness Jose Basulto's statement and instructed the jury to disregard it.[160] The court found that the jury's prompt, inquiry-free verdict at most was speculative, circumstantial evidence of the venue's impact on the jury.[161] The court concluded that "any potential for prejudice ... was cured" "through the Court's methodical, active pursuit of a fair trial from voir dire, to the presentation of evidence, to argument, and concluding with deliberations and the return of verdict."[162] As to the defendants' claims of prosecutorial misconduct, the court found that it upheld each of defense counsel's objections and specially instructed the jury that it was to disregard

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[157] R13-1392.

[158] *Id.* at 14.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 15.

[162] *Id.*

the improper statements.[163] In light of the entire record, the interests of justice did not merit a new trial.[164]

On November 12, 2002, the defendants renewed their motion for a new trial on two grounds: newly discovered evidence and the interests of justice.[165] They argued that they were entitled to a new trial based on the government's motion for change of venue filed June 25, 2002, in the case of *Ramirez v. Ashcroft*,[166] a Title VII action brought by a Hispanic employee of the INS.[167] Ramirez alleged he was subjected to a hostile work environment, unlawful retaliation, and intimidation by his employer as a result of the INS's removal of Elian Gonzalez from the United States and his return to his father in Cuba on April 22, 2000.[168] According to the defendants, the government's decision to seek a change of venue in *Ramirez,* based upon the alleged prejudicial effect of the pervasive community sentiment following the custody battle over Elian Gonzalez, constituted newly discovered evidence of

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[163] *Id.* at 15-16.

[164] *Id.* at 17. In December 2001, Guerrero, Hernandez, and Medina were sentenced to life, Campa was sentenced to 228 months, and Gonzalez was sentenced to 15 years. R14-1430, 1435, 1437, 1439, 1445. After sentencing, the defendants appealed.

[165] R15-1635, 1638, 1644, 1647, 1650, 1651.

[166] No. 01-4835 (S.D. Fla. June 25, 2002).

[167] R15-1635 at 8-11.

[168] R15-1636 at Ex.2 at 1-2.

prosecutorial misconduct because the same United States Attorney opposed the defendants' repeated motions for change of venue in the instant case and misrepresented the pervasive community prejudice in the Miami community.[169] In support of this argument, the defendants filed the government's *Ramirez* motion for change of venue, in which it argued that "the Miami-Dade community has developed and maintains strong emotional feelings and opinions regarding the handling of the Elian Gonzalez affair by INS and the Attorney General's office."[170] The government asserted, "it is extremely unlikely that a venire from Miami-Dade County would be able to put aside such deeply held opinions and feelings and afford the [government] a fair trial ...."[171]

The defendants further argued that a new trial should be granted in the interests of justice.[172] They argued that surveys of the Miami-Dade community, the responses given by prospective jurors during voir dire, and the atmosphere surrounding the voir dire demonstrated that a fair and impartial jury could not be selected in this case.[173] In support, they filed an affidavit by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Anthropology Dr. Lisandro

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[169] R15-1635 at 8-11.

[170] R15-1636 at Ex. 2 at 16.

[171] *Id.*

[172] R15-1635 at 12-32.

[173] *Id.*

Pérez.[174] Dr. Brennan evaluated Professor Moran's survey and concluded that it "accurately reflect[ed] profound existing bias against those associated with the Cuban government in Miami-Dade County."[175] Dr. Pérez concluded that "the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero."[176] The defendants also supported their interests of justice argument with news articles and reports by Human Rights Watch, which addressed the harassment, intimidation, and violence that Miami Cuban exiles suffered for expressing moderate political views toward Castro or Cuban relations.[177]

The district court denied the renewed motion for new trial holding that the government's decision to move for a change of venue in *Ramirez* did not constitute newly discovered evidence of prosecutorial misconduct with respect to the government's opposition to the defendants' motions for change of venue in this case.[178] The court reasoned that *Ramirez* differed from this case in that it "related directly to the INS's handling of the removal of Elian Gonzalez from his uncle's home, an event which, it is arguable, garnered much more attention here in

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[174] R15-1636 at Exs. 4,5.

[175] *Id.* at Ex. 4 at 8.

[176] *Id.* at Ex. 5 at 2-3.

[177] *Id.* at Exs. 7-10, 12.

[178] R15-1678 at 8.

Miami and worldwide than this case." [179] The government's position in *Ramirez*"was premised specifically upon the facts of that case," including the fact that Ramirez "had stirred up extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit ...."[180] The court also ruled that it lacked jurisdiction to grant a new trial based on the defendants' interests of justice argument because such a motion must be filed within seven days after the guilty verdict, or within an extension of time granted by the trial judge.[181] This time period had expired more than 19 months before the motion was filed, and therefore, the court declined to consider that argument, or any of its supporting exhibits.[182]

In a published opinion addressing only the motions for change of venue and motions for a new trial, a panel of this court concluded that the defendants were entitled to a pretrial change of venue and were denied a fair trial because of the "perfect storm" created by the pretrial publicity surrounding this case, the pervasive community sentiment, and the government's closing arguments. [183] We vacated the panel opinion and granted the government's petition for rehearing en banc to consider whether the defendants were denied

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[179] *Id.* at 8-9.

[180] *Id.* at 9.

[181] *Id.* at 5.

[182] *Id.* at 6.

[183] *United States v. Campa,* 419 F.3d 1219 (11th Cir.) (per curiam), *reh'g granted, vacated,* 429 F.3d 1011 (11th Cir.2005) (per curiam).

a fair and impartial trial.[184]

II. DISCUSSION

On appeal, we first consider whether the district court abused its discretion in denying the defendants' Rule 21 motion for change of venue for failure to make a sufficient showing of prejudice due to either pretrial publicity or pervasive community prejudice. The second issue we consider is whether the court abused its discretion in denying their Rule 33 motions for new trial based on newly discovered evidence and the interests of justice.

A. Denial of Motions for Change of Venue

We review a district court's denial of a Rule 21 motion for change of venue for an abuse of discretion.[185] Rule 21 provides that, "[u]pon the defendant's motion, the court must transfer the proceeding ... to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."[186] A defendant can establish that prejudice against him prevented him from receiving a fair trial and necessitated a change of venue by two methods. He can demonstrate that a fair trial was impossible because the jury was actually prejudiced against

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[184] *Id.*

[185] *United States v. Smith,* 918 F.2d 1551, 1556 (11th Cir.1990).

[186] Fed.R.Crim.P. 21(a).

him.[187] Or, he can show that juror prejudice should have been presumed from prejudice in the community and pretrial publicity.[188] Here, the defendants argue that a presumption of prejudice was warranted because of the pervasive community prejudice against the Cuban government and its agents and the pretrial publicity that existed in Miami.

A district court must presume that so great a prejudice exists against the defendant as to require a change of venue under Rule 21 if the defendant shows: (1) that widespread, pervasive prejudice against him and prejudicial pretrial publicity saturates the community where he is to be tried and (2) that there is a reasonable certainty that such prejudice will prevent him from obtaining a fair trial by an impartial jury.[189] The presumed prejudice

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[187] *Irvin v. Dowd,* 366 U.S. 717, 727, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961).

[188] *Rideau v. Louisiana,* 373 U.S. 723, 726-27, 83 S.Ct. 1417, 1419-20, 10 L.Ed.2d 663 (1963).

[189] *See Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."); *Pamplin v. Mason,* 364 F.2d 1, 5 (5th Cir.1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.").

principle is " 'rarely' applicable" and is reserved for an "extreme situation."[190] "[T]he burden placed upon the [defendant] to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one."[191] Once the defendant puts forth evidence of the pervasive prejudice against him, the government can rebut any presumption of juror prejudice by demonstrating that the district court's careful and thorough voir dire, as well as its use of prophylactic measures to insulate the jury from outside influences, ensured that the defendant received a fair trial by an impartial jury.[192]

1. The News Articles

Here, the district court concluded that the defendants failed to present evidence sufficient to raise a presumption of prejudice against them that would impair their right to a fair trial by an impartial jury.[193] In support of their motion for change of venue, the defendants first relied on numerous news articles, which they argued demonstrated that the community atmosphere was "so pervasively inflamed" that it would impair any

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[190] *Mayola v. Alabama,* 623 F.2d 992, 997 (5th Cir.1980) (citing *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683, 694 (1976), *Hale v. United States,* 435 F.2d 737, 747 (5th Cir.1970)).

[191] *Coleman v. Kemp,* 778 F.2d 1487, 1537 (11th Cir.1985).

[192] *See Id.* at 1541, n. 25; *Mayola,* 623 F.2d at 1000-01.

[193] R5-586 at 16.

juror's ability to reach a fair verdict.[194]

The district court did not abuse its discretion in finding that the pretrial publicity was not "'so inflammatory and pervasive as to raise a presumption of prejudice.'" [195] Prejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged.[196] In fact, we are not aware of any case in which any court has ever held that prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant.[197]

Moreover, the Supreme Court has ruled that we cannot presume prejudice in the absence of a "trial atmosphere ... utterly corrupted by press coverage."[198] The Court distinguished between publicity that is "largely factual publicity" and "that which is

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[194] R2-317 at 3.

[195] R5-586 at 11 (quoting *Ross v. Hopper,* 716 F.2d 1528, 1541 (11th Cir.1983)).

[196] *See United States v. Awan,* 966 F.2d 1415, 1428 (11th Cir.1992); *see also Meeks v. Moore,* 216 F.3d 951, 963 n. 19, 967 (11th Cir.2000) (ruling that only media reports linked directly to the defendant had "evidentiary value" in assessing his presumed prejudice claim, which failed absent a showing that "bias played any part in his convictions").

[197] *See Awan,* 966 F.2d at 1428.

[198] *Dobbert v. Florida,* 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344, 362 (1977) (alteration in original) (internal quotation marks omitted) (quoting *Murphy v. Florida,* 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975)).

invidious or inflammatory," in *Murphy v. Florida*,[199] a case in which the Court ruled that the defendant was not denied due process when he was denied a change of venue, despite extensive publicity about the defendant's crime and criminal history. The Court found that there was no inflamed community atmosphere because the news articles appeared seven to twenty months before the jury was selected and the articles were largely factual in nature.[200] The Court also distinguished between jurors' "mere familiarity [with the defendant and his past crimes] and an actual predisposition against him."[201] Some of the jurors had a vague recollection of the alleged crime, but none believed that the defendant's past crimes were connected to the present case, nor did

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[199] 421 U.S. 794, 800 n. 4, 95 S.Ct. 2031, 2036 n. 4, 44 L.Ed.2d 589.

[200] *Id.* at 802, 95 S.Ct. at 2037; *see also Spivey v. Head,* 207 F.3d 1263, 1270-71 (11th Cir.2000) (ruling that the defendant failed to establish that pretrial publicity was sufficiently prejudicial or inflammatory to require a change of venue because the numerous newspaper articles that the defendant put forth were either published years before the trial or only obliquely mentioned his case, and because the prejudicial articles were not typical or widespread); *United States v. De La Vega,* 913 F.2d 861, 865 (11th Cir.1990) (ruling that the 330 articles submitted by the defendants were largely factual and could not have created an inflamed community atmosphere sufficient to presume prejudice in the Miami-Dade community of 1.8 million people).

[201] *Murphy,* 421 U.S. at 800 n. 4, 95 S.Ct. at 2036 n. 4.

the voir dire indicate that the jurors were prejudiced against him.[202] Therefore, the defendant failed to show that the trial was "inherently prejudicial" or that the jury selection process permitted an "inference of actual prejudice."[203]

Here, the news materials submitted by the defendants fall far short of the volume, saturation, and invidiousness of news coverage sufficient to presume prejudice. Of the numerous articles submitted, very few related directly to the defendants and their indictments.[204] The articles primarily concerned subjects such as the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter.[205] Of the articles about the Brothers to the Rescue shootdown, most were published approximately one year before the court first ruled on the change of venue motion.[206] Therefore, the few articles that did relate to the defendants and their alleged activities in particular were too factual and too old to be inflammatory or prejudicial. Moreover, the record reflects that not a single juror who deliberated on this case indicated that he or she was in any way influenced by news coverage of the case.[207] Nor does

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[202] *Id.* at 800-01, 95 S.Ct. at 2036.

[203] *Id.* at 803, 95 S.Ct. at 2037.

[204] *See* R2-317, 321, 324, 334, 329; R3-397, 455.

[205] *See Id.*

[206] *See Id.*

[207] *See* R21-28.

the record reflect that any one of them had formed an opinion about the guilt or innocence of the defendants before the trial began.[208] In fact, most of the venire revealed that they were either entirely unaware of the case, or had only a vague recollection of it.[209] "To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent." [210] Accordingly, the defendants have failed to demonstrate that this trial was "utterly corrupted by press coverage."[211]

2. The Moran Survey

The district court also considered the results of the random survey of 300 registered Miami-Dade voters conducted by Professor Moran, which was purportedly designed to examine prejudice against anyone alleged to have assisted the Cuban government in espionage activities.[212] According to Professor Moran, the survey indicated that "the only viable means of assuring the defendant a fair and impartial jury" was to transfer the case out of the Miami District of the Southern District of Florida.[213]

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[208] *See Id.*

[209] *See Id.*

[210] *Murphy,* 421 U.S. at 800 n. 4, 95 S.Ct. at 2036 n. 4.

[211] *See Id.* at 798, 95 S.Ct. at 2035.

[212] R5-586 at 13-15.

[213] R2-321 at Ex. A at 16.

The court declined to afford the survey and Professor Moran's conclusions substantial weight in determining whether to change the venue, but invited the defendants to renew their motions for change of venue if the voir dire showed that an impartial jury could not be empaneled.[214]

It was entirely within the district court's prerogative to reject outright Professor Moran's survey as a basis upon which to grant a motion to change venue. The record reflects that the district court carefully considered the survey and Professor Moran's conclusions, finding six specific reasons why the survey was unpersuasive. [215] The strongest support for the court's conclusion was the fact that Moran relied on the very same survey that we previously rejected in *Fuentes-Coba* as a basis for his conclusion that a substantial prejudice existed in the Southern District of Florida against defendants alleged to have helped the Castro government. [216] Moreover, the survey was riddled with non-neutral questions, such as the question that asked the respondent to agree or disagree whether "Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades."[217] The survey was too ambiguous to be reliable. For example, it asked if there are "any circumstances" that would

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[214] R5-586 at 13-15.

[215] *Id.*

[216] *Id.*

[217] *Id.*

change the respondent's "opinion," but it did not clarify to which "opinion" the question refers.[218] Moreover, only two questions in the entire survey directly referenced the defendants.[219]

Our deferential standard of review requires us to affirm the district court's conclusion that the Moran survey was not sufficiently persuasive to support a motion for change of venue. "The well established rule vests substantial discretion in the district court as to the granting or denying of a motion for transfer ...."[220] "The trial court is necessarily the first and best judge of community sentiment and the indifference of the prospective juror. Appellate courts ... will interfere only upon a showing of manifest probability

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[218] *Id.*

[219] *See* R2-321 at Ex. D. The dissent argues that the district court focused its analysis solely on prejudicial publicity and failed to make any findings regarding prejudice within the community. We disagree with this characterization of the district court's ruling. The court "construe[d][the][d]efendants' Motions [for change of venue] as directed *primarily* toward the issue of 'pervasive community prejudice' ...." R5-586 at 10, n.2 (emphasis added). And, while the court did not go so far as to find the community was "heterogenous" and "highly diverse," as the government argued, R3-443 at 3, the court did make a specific finding as to prejudice in the community: that the defendants' evidence did not demonstrate that community prejudice warranted a change of venue under Rule 21. R5-586 at 16.

[220] *United States v. Williams,* 523 F.2d 1203, 1208 (5th Cir.1975).

of prejudice."[221]

Furthermore, the court's decision to deny the defendants' pretrial change of venue motions without prejudice in favor of proceeding to voir dire was a well-supported exercise of discretion. When a defendant alleges that prejudicial pretrial publicity would prevent him from receiving a fair trial, it is within the district court's broad discretion to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity. [222] Once the court has conducted an appropriate voir dire examination, it also has the broad discretion to rule whether prejudice resulted from the pretrial publicity such that the defendant would be denied a fair trial.[223] Indeed, we have ruled that a trial court's method of holding its decision on a Rule 21 motion for change of venue in abeyance until the conclusion of the voir dire "is clearly the preferable procedure." [224] Even the defendants themselves admitted that the district court's voir dire more thoroughly evaluated the sentiment of the Miami-Dade community. They admitted, "quite frankly, if Professor Moran could interrogate his pool members the way this Court has interrogated some of the prospective jurors, the social sciences wouldn't be

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[221] *Bishop v. Wainwright,* 511 F.2d 664, 666 (5th Cir.1975).

[222] *See United States v. Nix,* 465 F.2d 90, 96 (5th Cir.1972).

[223] *See Id.*

[224] *Williams,* 523 F.2d at 1209 n. 10.

soft sciences, they would be hard sciences."[225]

3. The Voir Dire

The voir dire in this case was a model voir dire for a high profile case. The court conducted a meticulous two-phase voir dire stretching over seven days.[226] In contrast to the generalized, pre-fabricated, and sometimes leading questions of Professor Moran's survey were the detailed and neutral voir dire questions that the court carefully crafted with the parties' assistance.[227] In the first phase of voir dire, the court screened 168 prospective jurors for hardship and their ability to reach a verdict based solely on the evidence.[228] In the second phase, the court extensively and individually questioned 82 prospective jurors outside the venire's presence regarding sensitive subjects, such as involvement in pro- and anti-Castro political groups and immigration into the United States from Cuba.[229] Phase two questioning revealed that most of the prospective jurors, and all of the empaneled jurors, had been exposed to little or no media coverage of the case.[230] Those who had been exposed to media coverage of the case vaguely recalled a "shootdown," but little else.[231] Ultimately, the court struck 32 out of 168 potential

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[225] R27 at 1374.

[226] R21-28.

[227] Gov't Br. at App. G.

[228] R6-766; R21-R24.

[229] R25-28.

[230] *See Id.*

[231] *See Id.*

jurors (19%) for Cuba-related animus, which was well within an acceptable range.[232] Qualified jurors need not be totally ignorant of the facts and issues involved:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[233]

At the conclusion of the voir dire, the defendants

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[232] *Compare Patton v. Yount,* 467 U.S. 1025, 1029, 1035, 104 S.Ct. 2885, 2888, 2891, 81 L.Ed.2d 847, 853, 856 (1984) (holding that the trial court did not err in finding that the jury was impartial, even though "77% [of the venire] admitted they would carry an opinion in to the jury box," because the "relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially"), *and Murphy,* 421 U.S. at 803, 95 S.Ct. at 2038 (holding that excusing 20 out of 78 prospective jurors [or, 26%] "by no means suggests a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no animus of their own"), *with Irvin,* 366 U.S. at 727, 81 S.Ct. at 1645 (reversing the defendant's conviction because 268 of the 430 venirepersons, or 62%, had fixed opinions regarding the defendant's guilt).

[233] *Irvin,* 366 U.S. at 722-23, 81 S.Ct. at 1642-43.

failed to express any dissatisfaction with the selected jurors in terms of their ability to serve fairly and impartially,[234] and even complimented the court's voir dire as "extraordinary"[235] and stated that they were "very happy with" the jury.[236] The court's voir dire was so effective in screening potential jurors that the defendants did not exercise all of their peremptory challenges.[237] We have ruled that a defendant's failure to use all peremptory challenges "indicates the absence of juror prejudice."[238] Moreover, the defendants failed to renew their change of venue motions at the end of the voir dire, despite the court's invitation to do so, further indicating their satisfaction with the jury and a lack of juror prejudice.[239] Accordingly, the court's careful and thorough voir dire rebutted any presumption of jury prejudice.[240]

"A trial court's finding of juror impartiality may 'be overturned only for manifest error.'"[241] We owe the

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[234] R29 at 1564.

[235] R27 at 1373.

[236] R104 at 12092.

[237] R28 at 1513.

[238] *United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir.1985).

[239] *United States v. Yousef,* 327 F.3d 56, 155 (2d Cir.2003).

[240] *See Coleman,* 778 F.2d at 1541 n. 25; *Mayola,* 623 F.2d at 1000-01.

[241] *Mu'Min v. Virginia,* 500 U.S. 415, 428, 111 S.Ct. 1899, 1907, 114 L.Ed.2d 493, 508 (1991) (quoting *Patton,* 467 U.S. at 1031, 104 S.Ct. at 2889).

district court "wide discretion" in "conducting voir dire in the area of pretrial publicity and in other areas that might tend to show juror bias."[242] "The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation any of such claim his own perception of the depth and extent of news stories that might influence a juror."[243]

In sum, the record in this case amply demonstrates that the district court took extraordinary measures to carefully select a fair and impartial jury. The court extensively and individually questioned the prospective jurors, repeatedly cautioned them not to read anything or talk to anyone about the case, insulated the jurors from media publicity, provided the defendants with extra peremptory challenges, struck 32 persons for cause,

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[242] *Id.* at 427, 111 S.Ct. at 1906.

[243] *Id.* The dissent suggests that the "plethora of media" and "ubiquitous electronic communications devices" that characterize this "high-tech age" spread community prejudice across the district, necessitating a change in venue. We think, however, that such advances in communication technology support the opposite conclusion. If prejudice could be spread through multiple forms of media, the spread of such prejudice would not stop at district lines, but would extend across the state of Florida. Following that rationale, the district court should have refused to change venue because a district outside Miami-Dade would have been no more capable of producing a panel of impartial jurors than Miami-Dade itself. This is why we afford deference to the district court's assessment of juror credibility and impartiality.

and struck all of the Cuban-Americans over the government's *Batson* objection. [244] Under these circumstances, we will not disturb the district court's broad discretion in assessing the jurors' credibility and impartiality.

4. The Trial

A review of the record reveals that this trial "comported with the highest standards of fairness and professionalism."[245] The court maintained strict control over the proceedings by employing various curative measures to insulate the jury from any outside influence, from the beginning of the trial to the jury's verdict. From the commencement of the case, the parties, counsel, and witnesses were under a strict gag order, as well as a sequestration order, which prohibited them from releasing information or opinion that would interfere with the trial or otherwise prejudice the defendants.[246] On each day of the trial, before every recess, and at the end of every day, the court admonished the jurors not to discuss

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[244] The government objected to the striking of all Cuban-Americans, the district court denied the *Batson* challenge, and the government has not raised that issue in any way. Accordingly, we have no opportunity to review the propriety of striking all the members of a particular nationality. We simply note that although the defendants challenge their convictions based on an alleged pervasive anti-Cuban sentiment in the Southern District of Florida, every Cuban-American was struck from the venire.

[245] *Alvarez,* 755 F.2d at 859.

[246] 2SR1-122 at 1; R21 at 117-19; R7-978 at 3, 7; R64 at 6759-60.

the case amongst themselves or with others, not to have contact with anyone associated with the trial, and not to expose themselves, read, or listen to anything related to the case.[247] The court maintained control over the seating in the courtroom as well, designating certain rows to certain groups and requiring the media to sit in the back row.[248] The court prevented the media from accessing the voir dire questions by sealing them during jury selection.[249]

The court fiercely guarded the jury from outside intrusions. From the first day of trial, the court instructed the marshals to accompany the jury, with their juror tags removed, as they left the building.[250] The court rejected the media's request for the twelve jurors' names.[251] The court took extra steps to insulate the jurors during their deliberations, arranging for them to enter the courthouse by a private entrance and providing them with transportation to their vehicles or mass transit.[252]

5. Supreme Court Precedent

This case was nothing like the cases in which the Supreme Court has previously found that defendants were denied a fair trial by an impartial jury because of pretrial publicity or pervasive community

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[247] *See* R21-28.

[248] R25 at 717.

[249] R24 at 625-26.

[250] R21 at 112.

[251] R126 at 14643-44.

[252] *Id.* at 14645-47.

prejudice. The record reflects that the pretrial community atmosphere in this case was unlike that which existed in *Irvin v. Dowd.* In that case, the rural, Indiana community of 30,000 where the defendant was tried was subjected to a barrage of inflammatory publicity immediately before trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders, including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence.[253] The Supreme Court ruled that the defendant was entitled to a change of venue because the prejudice against him was "clear and convincing," as reflected by the fact that eight of the twelve jurors had formed an opinion that he was guilty before the trial began.[254]

Also distinguishable from this case is *Rideau v. Louisiana*,[255] a case in which the police illegally obtained a confession from the defendant, which a local television station filmed and broadcast three times in the community where the crime and the trial occurred. "[W]ithout pausing to examine a particularized transcript of the voir dire examination of members of the jury," the Supreme Court overturned the conviction, holding that the widespread dissemination of this highly damaging material rendered the defendant's trial nothing more than "a hollow formality."[256] The Court ruled that the

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[253] *Irvin,* 366 U.S. at 725-27, 81 S.Ct. at 1644-45.

[254] *Id.*

[255] 373 U.S. at 724, 83 S.Ct. at 1418.

[256] *Id.* at 726-27, 83 S.Ct. at 1419-20.

"kangaroo court proceedings" deprived the defendant of due process.[257]

The district court's implementation of numerous curative measures to insulate the jury from disruptive influences in this case also sits in stark contrast to the "carnival atmosphere" that warranted a reversal of the defendant's conviction in *Sheppard v. Maxwell*.[258] In *Sheppard,* the judge did not adequately direct the jury not to read or listen to anything concerning the case, but merely suggested that the jury not expose themselves to media reports.[259] The jurors were "thrust into the role of celebrities by the judge's failure to insulate them from the reporters and photographers," when numerous pictures of the jurors and their addresses appeared in the newspaper.[260] Likewise, in *Estes v. Texas*,[261] the defendant was denied his due process rights because the courtroom was a "mass of wires, television cameras, microphones, and photographers." At least twelve cameramen were allowed to photograph the proceedings, "[c]ables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others

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[257] *Id.* at 726, 83 S.Ct. at 1419.

[258] 384 U.S. 333, 358, 86 S.Ct. 1507, 1520, 16 L.Ed.2d 600 (1966).

[259] *Id.* at 353, 86 S.Ct. at 1517.

[260] *Id.*

[261] 381 U.S. 532, 550, 85 S.Ct. 1628, 1636, 14 L.Ed.2d 543, 554 (1965).

were beamed at the jury box and the counsel table."[262]

The rare instances in which the Supreme Court has presumed prejudice to overturn a defendant's conviction are far different from this case. In those cases, the "kangaroo court proceedings" in combination with the "circus atmosphere" generated by sensational pretrial publicity deprived the defendant of a fair trial. Here, the district court carefully and meticulously evaluated the defendants' evidence of pretrial publicity and then made specific factual findings to discount that evidence. At trial, the court used numerous curative measures to prevent any publicity from affecting the jury's deliberations.

In sum, to establish a presumption of juror prejudice necessitating Rule 21 change of venue, a defendant must demonstrate that (1) widespread, pervasive prejudice and prejudicial pretrial publicity saturates the community, and (2) there is a reasonable certainty that the prejudice prevents the defendant from obtaining a fair trial. We find that the defendants in this case failed to meet this two-pronged test. They failed to show that so great a prejudice existed against them as to require a change of venue under Rule 21, in light of the court's effective use of prophylactic measures to carefully manage individual voir dire examination of each and every panel member and its successful steps to isolate the jury from every extrinsic influence. Under these circumstances, we will not disturb the district

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[262] *Id.* at 536, 85 S.Ct. at 1629.

court's broad discretion in ruling that this is not one of those rare cases in which juror prejudice can be presumed.

B. Denial of Motions for New Trial

We review a district court's denial of a motion for new trial for abuse of discretion.[263] Rule 33 of the Federal Rules of Criminal Procedure provides:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
>
> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.[264]

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[263] *United States v. Vallejo,* 297 F.3d 1154, 1163 (11th Cir.2002).

[264] Fed.R.Crim.P. 33. Rule 33 was amended December 1, 2002, "as a part of the general restyling of the Criminal Rules to make them more easily

Thus, there are two grounds upon which a court may grant a motion for new trial: one based on newly discovered evidence, which must be filed within three years of the verdict pursuant to Rule 33(b)(1); and the other based on any other reason, typically the interest of justice, which must be filed within seven days of the verdict, pursuant to Rule 33(b)(2).[265]

"Motions for a new trial based on newly discovered evidence are highly disfavored in the Eleventh Circuit and should be granted only with great caution. Indeed, the defendant bears the burden of justifying a new trial."[266] Newly discovered evidence need not relate directly to the issue of guilt or innocence to justify a new trial, "but may be probative of another issue of law."[267] For instance, the existence of a *Brady* violation, as well as questions regarding the fairness or impartiality of a jury, may

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understood and to make style and terminology consistent throughout the rules. These changes [were] intended to be stylistic only." *See*Fed.R.Crim.P. 33 advisory committee's note 2002. We apply the current version of Rule 33, even though the defendants' new trial motions were filed before the 2002 amendments were effective.

[265] *See* Fed.R.Crim.P. 33; *United States v. Devila,* 216 F.3d 1009, 1015 (11th Cir.2000) (per curiam) *vacated in part on other grounds,* 242 F.3d 995, 996 (2001) (per curiam).

[266] *Devila,* 216 F.3d at 1015-16 (quotations and citations omitted).

[267] *United States v. Beasley,* 582 F.2d 337, 339 (5th Cir.1978) (per curiam).

be grounds for a new trial.[268]

The defendants are not entitled to a new trial on the basis of newly discovered evidence under Rule 33(b)(1) because the government's decision to move for a change of venue in *Ramirez* does not constitute newly discovered evidence of prosecutorial misconduct with respect to the government's earlier opposition to the defendants' motions for change of venue in this case. *Ramirez* was entirely different from this case in that it was a Title VII employment discrimination case arising out of the INS's role in the removal of Elian Gonzalez from his uncle's home, whereas this case involved agents of the government of Cuba operating unlawfully in the United States and conspiring to commit espionage and murder.[269] Moreover, Ramirez's conduct in procuring and exploiting partisan media coverage of the evidence and the issues in his case distinguished *Ramirez* from the instant case. On the day Ramirez filed his lawsuit, he held a press conference on the steps of the courthouse, during which he displayed one of the

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[268] *Id.* at 339; *United States v. Williams,* 613 F.2d 573, 575 (5th Cir.1980) (stating that a motion for new trial is appropriate if the newly discovered evidence "afford[ed] reasonable grounds to question the fairness of the trial or the integrity of the verdict," but affirming the denial of a new trial because there was no reasonable likelihood that a juror's ex parte contact with the district judge impugned the integrity of the jury's verdict (citing *S. Pac. Co. v. Francois,* 411 F.2d 778, 780 (5th Cir.1969))).

[269] R15-1660 at 7-8.

items featured in his complaint, an example of a cup holder with a picture of the Cuban flag and the international "no symbol." [270] *The Miami Herald* quoted Ramirez saying that the INS was "the most corrupt agency in the country" with a "deep hatred toward Hispanics."[271] He appeared on several radio and television shows, local rallies, and protests, and his photograph appeared on banners carried by protestors demonstrating outside of the INS building.[272] On one television show, Ramirez disclosed a document produced during a videotaped deposition taken during discovery and caused the deposition itself to be broadcast on the show, in violation of Local Rule 77.2.[273]

The defendants' argument that the government's subsequent legal position in the *Ramirez* case constituted prosecutorial misconduct that warrants a new trial is essentially a claim of judicial estoppel. Judicial estoppel bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, related proceeding.[274] It "is designed to prevent parties from making a mockery of justice by inconsistent pleadings." [275]

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[270] *Id.* at 10.

[271] *Id.*

[272] *Id.* at 11.

[273] *Id.*

[274] *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968, 977 (2001).

[275] *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1285 (11th Cir.2002) (internal quotation marks omitted) (quoting *Am. Nat'l Bank of Jacksonville v.*

Courts consider two factors in determining whether to apply the doctrine: whether the "allegedly inconsistent positions were made under oath in a prior proceeding" and whether such inconsistencies were "calculated to make a mockery of the judicial system."[276] Judicial estoppel is not applicable here because *Ramirez* was not a related proceeding, but rather an employment discrimination lawsuit. Moreover, the position that the government took in *Ramirez* occurred subsequent to-not before-its position in this case. The government filed its motion for change of venue in *Ramirez* on June 25, 2002, more than one year after the defendants were convicted. [277] Therefore, the defendants' argument that the government should have been estopped from opposing its change of venue motions in a prior proceeding is chronologically unsound, and the court did not abuse its discretion in denying the defendants' motion for new trial based on newly discovered evidence.

Nor are the defendants entitled to a new trial in the interests of justice under Rule 33(b)(2). The defendants timely filed their initial motion by the court-extended August 1, 2001, deadline[278] for filing

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Fed. Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir.1983)).

[276] *Id.* at 1285 (quotations and citations omitted).

[277] R15-1636 at Ex. 2.

[278] R126 at 14672. The district court extended the seven-day time period within which the defendants could file post-trial motions, including a Rule 33 interests of justice motion, to August 1, 2001, in

post-trial motions, arguing that a new trial was warranted in the interests of justice due to the prejudice inured to them from the venue and the prosecution's misconduct at trial.[279] The district court denied the motion, citing the numerous curative measures it implemented to guarantee the defendants' right to a fair trial.[280] The record reflects that any potential for prejudice against the defendants was cured by the court's methodical pursuit of a fair trial. Basulto's comment that Hernandez's counsel was a spy for Cuba did not prejudice the defendants because it was merely a single remark during a seven-month trial by the defense's own witness, which the court struck and instructed the jury to disregard.[281] Moreover, the prosecution's closing arguments did not prejudice the defendants because the court granted the defendants' objections and specifically instructed the jury to disregard the improper statements.[282] These alleged incidents of government misconduct "were so minor that they could not possibly have affected the outcome of the trial."[283]

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accordance with the version of Rule 33 in effect at the time, which permitted the court to grant a motion filed "within such further time as the court sets during the 7-day period." *See*Fed.R.Crim.P. 33 advisory committee's note 2005.

[279] R12-1338, 1342, 1343, 1347.

[280] R13-1392.

[281] R81 at 8945-46, 8955.

[282] R124 at 14482, 14483, 14493.

[283] *Alvarez,* 755 F.2d at 859.

Thereafter, in November 2002, the defendants filed a renewed motion for new trial on both newly discovered evidence and interest of justice grounds.[284] The defendants based their renewed motion almost entirely on the interests of justice argument, devoting 20 of the 32 pages of the motion and 7 of the 12 supporting exhibits to that issue.[285] The defendants filed an affidavit and a survey from two new experts, an additional affidavit from Professor Moran defending his survey, and additional news articles and reports by the Human Rights Watch.[286] None of these materials were presented to the district court for consideration with the initial new trial motions. The district court declined to consider the defendants' renewed interests of justice argument and supporting materials, ruling that because "the seven-day period ... expired more than nineteen months ago," it lacked jurisdiction to grant the motion on that basis.[287]

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[284] R15-1635, 1638, 1644, 1647, 1650, 1651.

[285] R15-1635, R15-1636.

[286] R15-1636 at Exs. 4, 5, 7-10, 12.

[287] R15-1678 at 5. The district court relied on our precedent that states that "[t]here is no question that the seven-day time limit provided for in Rule 33 is jurisdictional." *United States v. Renick,* 273 F.3d 1009, 1019 (11th Cir.2001) (per curiam). The court did not have the benefit of *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 403, 163 L.Ed.2d 14, 17 (2005) (per curiam) (internal quotation marks omitted), which clarified that Rule 33 is "an inflexible claim-processing rule," rather than a rule "governing subject-matter jurisdiction." The Court noted that this "is an error shared among the circuits .... caused in large part by imprecision in

The district court did not abuse its discretion in refusing to consider the defendants' renewed motion based on the interests of justice. A court may not consider motions for new trial based on any other argument than newly discovered evidence outside the 7-day period.[288] "This deadline is rigid .... [C]ourts 'may not extend the time to take any action under [Rule 33], except as stated' in Rule 33 itself."[289] Nor does a district court have the power to regard an untimely motion for new trial as a supplement to a timely motion.[290] The time for the defendants to present the entirety of their interests of justice argument was when they initially filed it in July and August of 2001, within the court-extended August 1st deadline. The defendants' renewed motion for new trial based on the interests of justice was essentially the defendants' attempt to relitigate the merits of the venue issue that the court had previously considered four times. The defendants could have commissioned Drs. Brennan and Pérez to provide affidavits in support of their position during any one of those times when the court previously considered the issue. We will not permit, nor does Rule 33 permit, the defendants to take a second-or fifth-"bite at the

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[the Supreme Court's] prior cases." *Id.* at 407. Here, any error by the district court in characterizing Rule 33 new trial motions as jurisdictional was harmless.

[288] *See* Fed.R.Crim.P. 33(b)(2).

[289] *Eberhart,* 126 S.Ct. at 403 (quoting Fed.R.Crim.P. 45(b)(2)).

[290] *United States v. Hall,* 854 F.2d 1269, 1271 (11th Cir.1988).

apple."[291] Because the defendants' renewed interest of justice motion was filed outside the extended time period during which a court may consider new trial motions, and because the government preserved its argument that the claim was untimely,[292] the court did not abuse its discretion in declining to consider the issue.

Accordingly, because neither newly discovered evidence nor the interests of justice warrant a new trial, we affirm the court's decision to deny the defendants' motions for new trial.

III. CONCLUSION

Based on our thorough review of this case, we rely on the trial judge's judgment in assessing juror credibility and impartiality. The trial judge, as a member of the community, can better evaluate whether there is a reasonable certainty that prejudice against the defendant will prevent him from obtaining a fair trial. The judge brings to the courtroom her own perception of the depth and extent of community prejudice and pretrial publicity that might influence a juror.

Miami-Dade County is a widely diverse, multi-racial community of more than two million people. Nothing in the trial record suggests that twelve fair

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[291] *United States v. Geders,* 625 F.2d 31, 33 (5th Cir.1980).

[292] *Eberhart,* 126 S.Ct. at 406 (ruling that the government forfeits its defense of untimeliness if it fails to raise the defense before the district court reaches the merits of the Rule 33 motion).

and impartial jurors could not be assembled by the trial judge to try the defendants impartially and fairly. The broad discretion the law reposes in the trial judge to make the complex calibrations necessary to determine whether an impartial jury can be drawn from a cross-section of the community to ensure a fair trial was not abused in this case. Although it is conceivable that, under a certain set of facts, a court might have to change venue to ensure a fair trial, the threshold for such a change is rightfully a high one. The defendants have not satisfied it.

For the reasons given, we AFFIRM the district court's denial of the defendants' motions for change of venue and for new trial. Having decided these issues upon which we granted en banc review, we REMAND this case to the panel for consideration of the remaining issues.

BIRCH, Circuit Judge, dissenting in which KRAVITCH, Circuit Judge, joins:

I respectfully dissent. I remain convinced that this case is one of those rare, exceptional cases that warrants a change of venue because of pervasive community prejudice making it impossible to empanel an unbiased jury. The defendants, as admitted agents of the Cuban government of Fidel Castro, were unable to obtain a fair and impartial trial in a community of pervasive prejudice against agents of Castro's Cuban government, whose prejudice was fueled by publicity regarding the trial and other local events. Accordingly, I would reverse their convictions and remand for a new trial.

I am convinced that, based on circuit precedent, our consideration of the denial of a motion for change of venue requires an independent review of the totality of the circumstances surrounding the trial. Therefore, in Part I, I consider in the "Background" the facts (omitted from the *en banc* opinion) that I conclude are essential to an understanding of the intense community pressures in this case. My review of the evidence at trial is more extensive than is typical for consideration of an appeal involving the denial of a motion for change of venue because I conclude that the *trial evidence itself* created safety concerns for the jury which mandate venue considerations. In Part II, I discuss the law and the application of the law to the facts in this case. In Part III, I present my conclusion. Moreover, in this media-driven environment in which we live, characterized by the ubiquitous electronic communications devices possessed by even children (*e.g.*, the cell phone, the I-

pod, the laptop, etc.), this case presents a timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age. Given the multiple resources for almost instantaneous communication and the plethora of media extant today, the considerations embraced by the Court in earlier times fail to address these developments.

I. BACKGROUND

Included in with the charges forming the basis for the defendants-appellants' arrests and subsequent indictments were allegations that they, as agents of the Republic of Cuba, had infiltrated the United States military and reported on United States military activities, and that one of them, Gerardo Hernandez, had conspired to commit murder by supporting and implementing a plan in 1996 to shoot down United States civilian aircraft outside of Cuban and United States airspace.

The 1996 shootdown involved planes piloted by and carrying members of the Brothers to the Rescue ("BTTR"), a Cuban-exile group headquartered in Miami-Dade County. As a result of the Cuban government's military shootdown of two United States-registered civilian aircraft, four members of BTTR died. [1] Their deaths were condemned as murders by the international community. Statements deploring Cuba's excessive use of force were issued by the United Nations and other international

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[1] *United States v. Hernandez,* 106 F. Supp. 2d 1317, 1318 (S.D.Fla.2000).

organizations and legislation was passed in the United States "strongly" condemning the shootdown as an "act of terrorism by the Castro regime."[2] The deceased were heralded as martyrs and their funerals were attended by numerous people within the community. Memorials were subsequently erected in their honor, and streets within the Miami-Dade County community were renamed for them.

The defendants' arrests, therefore, generated intense interest within the community. Shortly after the arrests, the district court entered a gag order governing the parties and their attorneys.[3] That order, however, did not prevent leakage. In the early fall of 1999, the district court reminded the parties and their attorneys that they were to refrain from releasing information or opinions that could interfere with a fair trial or prejudice the administration of justice.[4] The district judge stated that she was "increasingly concerned" that various persons connected with the case were not following her order based on the "parade of articles appearing in the media about this case."[5] In particular, she commented that an article about defendant Medina's pending motion to incur expenses to poll the community "was the lead story in the local section on Saturday in the Miami Herald."[6] She warned all

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[2] *Alejandre v. Republic of Cuba,* 996 F. Supp. 1239, 1247 (S.D.Fla.1997); 22 U.S.C. § 6046(1).

[3] R7-978 at 3; R21 at 117.

[4] R18 at 14.

[5] *Id.*

[6] *Id.* at 15.

counsel and agents associated with the case that appropriate action would be taken and that the U.S. Attorney's Office would be held responsible.[7] She directed that "[t]his case ... not ... get advertised anywhere in the media for any reason whatsoever."[8] The motion to incur expenses was filed in August 1999 and was subsequently granted by the district court.[9]

A. Motion for Change of Venue

As the *en banc* opinion notes, Campa, Gonzalez, Guerrero, and Medina moved for a change of venue in January 2000, arguing that they were unable to obtain an impartial trial in Miami as a result of pervasive prejudice against anyone associated with Castro's Cuban government.[10] The motions for change

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[7] *Id.* at 14-15

[8] *Id.* at 17.

[9] R1-280 at 2-3; R2-303; R18 at 11-12.

[10] R2-317 (Guerrero), 321 (Medina), 324 (Gonzalez), 329 (Campa); R3-397 (Campa). Medina requested a change of venue "in light of evidence of pervasive community prejudice against the accused" as documented by Professor Gary Moran's survey which showed "public sentiment against persons alleged to be agents of Fidel Castro's Communist government in Cuba." R2-321 at 1-2. Moran concluded that, while there had been "several bursts of newspaper articles ... and other media attention" surrounding the Cuban spies' arrests, the basis for the motion was the "[v]irulent anti-Castro sentiment" in the community. *Id.* at 3.

Although Campa, Gonzalez, Guerrero, and Medina had originally argued that the case should be moved to another judicial district, during oral argument on

of venue were based on both the pretrial publicity and on the "virulent anti-Castro sentiment" which had existed in Miami as "a dominant value ... for four decades." [11] The motions were supported by news articles and Moran's poll to substantiate "an atmosphere of great hostility towards any person associated with the Castro regime" and "the extent and fervor of the local sentiment against the Castro government and its suspected allies."[12]

The evidence submitted in support of the motions for change of venue was massive. At that time, there were more than 700,000 Cuban-Americans living in Miami. [13] Of those Cuban-Americans, 500,000 remembered leaving their homeland, 10,000 had a relative murdered in Cuba, 50,000 had a relative tortured in Cuba, and thousands were former political prisoners. [14] These Cuban-Americans considered Cuban-related matters " 'hot-button issues.'"[15]

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the motions, they agreed that they would be satisfied with a transfer of the case within the district from the Miami division to the Fort Lauderdale division. R5-586 at 2 n.1.

[11] R2-321 at 3; R2-316 at 2; R2-317 at 2; R2-324 at 1; R2-329 at 1; R2-334 (containing news articles which detail the history of anti-Castro sentiment in Miami); R3-397 at 1; R3-453 at 1-2; R3-455 at 2; R3-461 at 2-3.

[12] R2-329 at 1, 3; R2-334; R3-397; R3-455.

[13] R15-1636, Ex. 9.

[14] *Id.*

[15] R15-1636, Exh. 9.

Professor Moran's survey results showed that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons charged with engaging in the activities named in the indictment.[16] A significant number, 57 percent of the Hispanic respondents and 39.6 percent of all respondents, indicated that, "[b]ecause of [their] feelings and opinions about Castro's government," they "would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies."[17] Over one-third of the respondents, 35.6 percent, said that they would be worried about criticism by the community if they served on a jury that reached a not-guilty verdict in a Cuban spy case.[18] The respondents who indicated an inability to be fair and impartial jurors were also asked whether there were any circumstances that would change their opinion.[19] Of those respondents, 91.4 percent of the Hispanics and 84.1 percent of the others answered "no."[20]

The articles submitted by the defendants included articles that related directly to the charged crimes and to the defendants and their codefendants. [21] Other articles documented

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[16] R2-321, Ex. A at 10.

[17] *Id.* at Ex. A at 12; *see Id.* at Ex. E at 3.

[18] *Id.* at Ex. A at 11-12.

[19] *Id.* at Ex. A at 13; *Id.* at Ex. E at 3.

[20] *Id.* at Ex. A at 13.

[21] The following articles specifically addressing the conspiracy and the indicted defendants were attached as exhibits in support of the motions for change of venue: George Gedda, *Federal officials say*

10 arrested, accused of spying for Cuba, MIAMI HERALD, Sept. 14, 1998, R2-334, Ex.; Manny Garcia, Cynthia Corzo, Ivonne Perez, *Spies among us: Suspects attempted to blend in, Miami,* MIAMI HERALD, Sept. 15, 1998, at A1, R2-334; David Lyons, Carol Rosenberg, *Spies among us: U.S. cracks alleged Cuban ring, arrests 10,*MIAMI HERALD, Sept. 15, 1998, at A1, R2-329, Ex. A; R2-334, Ex.; *Spies among us,* MIAMI HERALD, Sept. 15, 1998, at 14A, R2-329, Ex. F; Fabiola Santiago, *Big news saddens, angers exile community,* MIAMI HERALD , Sept. 15, 1998, R2-334, Exh.; Juan O. Tamayo, *Arrest of spy suspects may be switch in tactics,* MIAMI HERALD, Sept. 15, 1998, R2-334, Exh.; Javier Lyonnet, Olance Nogueras, *Cae red de espionaje de Cuba/FBI viró al revés casa de supuesto cabecilla* and Pablo Alfons, Rui Ferreira, *Cae red de espionaje de Cuba/Arrestan a 10 en Miami,* NUEVO HERALD, Sept. 15, 1998, at A1, R2-329, Exh. B; *La Habana Contra El Pentagono* ("Havana versus the Pentagon") / *Estructura de la Red de Espionaje,* NUEVO HERALD, Sept. 15, 1998, R2-329, Exh. C; *Arrest of alleged Cuban spies demands vigorous prosecution,* SUN-SENTINEL, Sept. 16, 1998, at 30A, R2-329, Exh. G; Juan O. Tamayo, *Miscues blamed on military's takeover of Cuban spy agency,* MIAMI HERALD, Sept. 17, 1998, at 13A, R2-334, Exh.; David Kidwell, *Motion could delay trials of alleged 10 Cuban spies,* MIAMI HERALD, Oct. 6, 1998, at B1, R2-334, Exh.; David Lyons, *Cuban couple pleads guilty in spying case,* MIAMI HERALD, Oct. 8, 1998, at A1, R2-334, Exh.; David Kidwell, *Three more accused spies agree to plead guilty,* MIAMI HERALD, Oct. 9, 1998, at 4B, R2-329, Exh. H; R2-334, Exh.; Carol Rosenburg, *Couple admits role in Cuban spy ring,* MIAMI HERALD, Oct. 22, 1998, at 5B, R2-329, Exh. H; Juan O. Tamayo, *U.S.-Cuba spy agency contacts began a decade ago,* MIAMI HERALD, Oct. 31, 1998, R2-334, Exh.; David Kidwell, *U.S. tries to tie espionage case to planes' downing,* MIAMI

community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases in which Cuban-American

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HERALD, Nov. 13, 1998, at A1, R2-334, Exh.; Carol Rosenberg, *Identities of 3 alleged spies still unknown,* Nov. 14, 1998, at B1, R2-334, Exh.; Juan O. Tamayo, *Spies Among Us/Castro Agents Keep Eye on Exiles,* MIAMI HERALD, Apr. 11, 1999, R2-329, Exh. D; R2-334, Exh.; Carol Rosenberg, *Shadowing of Cubans a classic spy tale,* MIAMI HERALD, Apr. 16, 1999, at A1, R2-329, Exh. E; R2-334, Exh.; *Cuban spy indictment/Charges filed in downing of exile fliers/The Brothers to the Rescue Shootdown:* David Lyons, *Castro agent in Miami cited by U.S. grand jury,* Juan O. Tamayo, *Brothers to the Rescue Shootdown/Top spy planned Brothers ambush,* and Elaine de Valle, *Relatives: Charges fall short,* MIAMI HERALD, May 8, 1999, R2-334, Exh.; *Confessed Cuban spy receives seven years,* MIAMI HERALD, Jan. 29, 2000, at B1, R2-355 at C-2; *Contrite Cuban spy couple sentenced,* MIAMI HERALD, Feb. 3, 2000, at B5, R3-355 at D-2; *Miami Spy-Hunting,* MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. G-1; Carol Rosenberg, *Confessed Cuban spies sentenced to seven years,* MIAMI HERALD, Feb. 24, 2000, at 1B, R3-397, Exh. I-1; *Terrorism must not win in Brothers to the Rescue shoot-down,* MIAMI HERALD, Feb. 24, 2000, at 8B, R3-397, Exh. J-1 ("More than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down."); *Brothers Pilots Remembered* (photo), MIAMI HERALD, Feb. 25, 2000, at B1, R3-397, Exh. K-1; Marika Lynch, *Shot-down Brothers remembered,* MIAMI HERALD, Feb. 25, 2000, at 2B, R3-397, Exh. L-1.

issues were involved, including the Elian Gonzalez matter.[22] One of the articles, which addressed a bomb

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[22] R3-397, Exs.; R4-483, Exs.; R4-498, Exs.

During the same period of time in which the motions for change of venue were pending, and ultimately the trial was conducted, there was a substantial amount of publicity regarding other matters of interest in the Cuban community including the conditions in Cuba and high profile legal events occurring in Miami: the Elian Gonzalez matter; the arrest of an United States immigration agent, Mariano Faget, who was accused of spying for Cuba; and a city-county ban on doing business with Cuba.

As to the general anti-Castro sentiments and the conditions in Cuba: Juan O. Tamayo, *Former U.S. Pows Detail Torture by Cubans in Vietnam/Savage beatings bent captives to will of man dubbed "Fidel",* MIAMI HERALD, Aug. 22, 1999, at A1, R2-329, Ex. I; Juan O. Tamayo, *Cuba toughens crackdown/ "Biggest wave of repression so far this year",* MIAMI HERALD, Nov. 11, 1999, at A1, R2-329, Ex. K; Juan O. Tamayo, *Witnesses link Castro, drugs,* MIAMI HERALD , Jan. 4, 2000, at B3, R2-329, Ex. J; Marika Lynch, *Castro-challenging pilot is offered parade, honors,* Jan. 4, 2000, at B1, R2-329, Ex. M; Jim Morin, *Cuba: I cannot speak my mind* (cartoon), MIAMI HERALD, Jan. 20, 2000, R2-329, Ex. P.

As to Elian Gonzalez: Juan O. Tamayo, *Castro Ultimatum/Return boy in 72 hours or migration talks at risk,* MIAMI HERALD, Dec. 6, 1999, at 1A, R2-329, Ex. N; Sara Olkon, Gail Epstein Nieves, Martin Merzer, *The Saga of Elian Gonzalez/Protest and Passion Spread to the Streets/Sit-ins block intersections and disrupt Dade traffic* and *Politicians, lawyers work to halt 6-year-old's return,* MIAMI HERALD, Jan. 7, 2000, 1A, *I see no basis for reversing decision, Reno says* and Sara Olkon,

Anabelle de Gale, Marika Lynch, *Pained Cuban exiles disagree on what's best for Elian,* MIAMI HERALD, Jan. 7, 2000, at 17A, *U.S. Preparations for boy's return start slowly,* The Miami Herald, Jan. 7, 2000, at 18A, R2-329, Ex. O; *Peaceful Rally* (photo), MIAMI HERALD, Jan. 9, 2000, at 1A, R2-329, Ex. N; Jay Weaver, *3rd judge gets high profile in Elian case,* MIAMI HERALD, Feb. 23, 2000, at 1B, R3-397, Ex. A-1; Sandra Marquez Garcia, *Mary "appears" near Elian,* MIAMI HERALD , Mar. 26, 2000, at 1B, R4-483, Ex. E-3; Alfonso Chardy, *Authorities keep watch on exile groups,* MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. C-3; *Vigilant protestors,* MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. I-3; Andres Viglucci, Jay Weaver, and Frank Davies, *Dad gets visa, but no guarantees for Elian's transfer,* MIAMI HERALD, Apr. 5, 2000, at 1A, R4-483, Ex. D-3; Elaine de Valle, *Media watch events closely-and get watched in return/Hot words on radio scrutinized,* and Terry Jackson, *Media watch events closely-and get watched in return/TV talk, news shows flocking to South Florida,* MIAMI HERALD, Apr. 5, 2000 at 15A, R4-483, Ex. B-3; Karen Branch, *Crowds target Reno's home,* MIAMI HERALD , Apr. 6, 2000, at 2B, R4-483, Ex. A-3; *The saga of Elian/Reno wants Elian today/Boy must be at airport by 2 P.M./Defiant family refusing to comply:* Andres Viglucci, Jay Weaver, and Ana Acle, *Great-uncle challenges U.S. to take boy "by force",* and Carol Rosenberg, *The Attorney general followed "instinct" as final mediator,* MIAMI HERALD, Apr.13, 2000, at 1A, R4-483, Ex. F-3; *The saga of Elian/Family defies order/Crowd swells at Little Havana home/Judge dismisses family's custody case/Panel will weigh request for a stay/U.S. takes no action to remove Elian:* Ana Acle, *In a show of solidarity, VIPs flock to visit boy,* and Andres Viglucci and Jay Weaver, *Reno: U.S. will explore all peaceful solutions,* MIAMI HERALD, Apr. 14, 2000, at 1A, R4-483, Ex. G-3; *Saga*

of Elian/Standoff over custody/A show of solidarity (photo), MIAMI HERALD, Apr, 14, 2000, at 20A, R4-483, Ex. H-3; Karl Ross, *W. Dade home of attorney general on alert,* and *Police say an anonymous caller phoned in bomb threat April 13,* MIAMI HERALD , Apr. 16, 2000, R4-498, Ex. A-4; *Raid's Prelude: How talks failed/Missed signals helped doom deal* and Sara Olkon, Diana Marrero, and Elaine de Valle, *Thousands protest seizure/Separate rally backs Reno's actions,* MIAMI HERALD , Apr. 30, 2000, at 1A, R4-498, Exh. C-4; Carol Rosenberg, *INS agent targeted by death threats,* MIAMI HERALD, May 6, 2000, R4-498, Exh. B-4; and *In memory of mothers who died at sea* (photo), MIAMI HERALD, R4-498, Exh. D-4.

As to Mariano Faget: Elaine de Valle, Fabiola Santiago, and Marika Lynch, *FBI: Official in INS spied for Cuba,* MIAMI HERALD, Feb. 18, 2000, at A1, R3-397 at C-1; Amy Driscoll, Juan Tamayo, *Spy bait taken instantly/Alleged Cuban agent phoned contact after receiving false FBI information,* Fabiola Santiago, *Aloof suspect with high clearance was ideally positioned to do harm,* and *Tracking Faget* (photos), MIAMI HERALD, Feb. 19, 2000, at A1, R3-397 at B-1; Don Bohning, *Faget's father was a brutal Batista official,* MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. G-1; Frank Davies, *Cuba, U.S. still fight Cold War,* MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. H-1; Juan O. Tamayo, *Cuban diplomat expelled over spy link,* MIAMI HERALD , Feb. 20, 2000, at A1, R3-397, at D-1; Liz Balmaseda, *Spy case boosts worst suspicions,* MIAMI HERALD, Feb. 21, 2000, at B1, R3-397, at F-1; Juan O. Tamayo, *Cuban diplomat linked to Elian, INS spy case,* MIAMI HERALD , Feb. 22, 2000, at A1, R3-397, at E-1; Juan O. Tamayo, *More exiles maneuvering for business with Cuba,* MIAMI HERALD, Mar. 5, 2000, at A-1, R3-455 at A-2; Ana Radelat and Jan O. Tamayo, *FBI agents expel defiant Cuban envoy,* MIAMI HERALD, at A-1, R3-455 at B-2.

As to the business ban: Marika Lynch, Fernando Almanzar, *Protest, taping set to follow Van Van*

threat against the Attorney General of the United States following a collapse of talks in the Elian Gonzalez case, recited a history of anti-Castro exile group violence in the Miami-Dade community:

> Scores of bomb threats and actual bombings have been attributed to anti-Castro exile groups dating back to the 1974 bombings of a Spanish-language publication, Replica. Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence.
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> In the early 1980s, the Mexican and Venezuelan consular offices were bombed in retaliation for their government's establishing relations with Cuba.
>
> Since then, numerous small businesses-those promoting commerce, travel, or humanitarian

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show, MIAMI HERALD, Sept. 28, 1999, at 3B, and Tyler Bridges, Andres Viglucci, *Miami may bar Van Van next time/County's Penelas also opposed,* MIAMI HERALD, Oct. 13, 1999, at B1, R2-329, Exh. L; Don Finefrock, *Ban on business with Cuba tightened,* MIAMI HERALD, Feb. 25, 2000, at 2A, R3-397, Exh. M-1; Jordan Levin, *Miami-Dade threatens to cancel film fest grant/Cuban movie collides with county law,* MIAMI HERALD, Feb. 25, 2000, at 1A, R3-397, Exh. N-1; Jordan Levin, *Groups "warned" on Cuba resolution,* MIAMI HERALD, May 15, 2000, at 1B, R4-498, Exh. E-4; *Decenas De exiliados se congregaron ante la Corte Federal para reclamar el derecho de Elian Gonzalez a permanecer en EU,* R3-455, Exh. E-2.

aid to Cuba-have been targeted by bombers.[23]

The government responded to the change of venue motions that the Miami-Dade Hispanic population was a "heterogeneous," "highly diverse, even contentious" "group" immune from the influences which would preclude a fair trial. [24] Following oral arguments on 26 June 2000, the district court denied the motion without prejudice, finding that the defendants had failed to demonstrate that a change of venue was necessary to provide them with a fair trial by an impartial jury.[25] The district court "construed" the motions "as directed primarily toward the issue of 'pervasive community prejudice' " and focused its analysis on "the third inquiry set forth in" *Ross v. Hopper,* 716 F.2d 1528, 1541 (11th Cir.1983). [26] This third inquiry was defined as "sufficient evidence that the pretrial publicity has been 'so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice.'"[27] The court

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[23] R4-498, Ex. A-4.

[24] R3-443 at 11.

[25] *Hernandez,* 106 F. Supp. 2d at 1317-18; R5-586.

[26] *Id.* at 1321 n. 2.

[27] *Id.* at 1323-24. By limiting its analysis to the third inquiry of *Ross,* the district court necessarily limited its review of the defendants' evidence to consideration of whether that evidence demonstrated the prejudicial effect of pretrial publicity. *See Ross,* 716 F.2d at 1540. Further, as the en banc opinion states, the district court rejected the defendants' community survey and thus focused its analysis

"decline[d] to afford the survey and Professor Moran's conclusions the weight attributed by Defendants" finding, *inter alia,* that the "size of the statistical sample ... [wa]s too small to be representative of the population of potential jurors in Miami-Dade County."[28]

In September 2000, Campa moved for reconsideration of the denial of the motion for change of venue. In support of the reconsideration motion, he submitted news articles containing information that he provided the court both during an *ex parte* sidebar within the change of venue motion hearing and in his motion for leave to file his motions for foreign witness depositions *ex parte.* [29] He explained in the reconsideration motion that the information had been previously provided to the court *ex parte* because it disclosed the defendants' theory of defense and that he sought the foreign witnesses to support that theory.[30] He argued that the news articles discussing "the defendants' tacit admission that they were

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solely on the submitted articles. Contrary to the en banc opinion's statement in n. 219 that the district court made a specific finding as to prejudice in the community, this finding was limited to its prior finding that the defendants' evidence demonstrated "that the pretrial publicity has not been 'so inflammatory and pervasive as to raise a presumption of prejudice' among the potential jury venire in the case." *Hernandez,* 106 F. Supp. 2d at 1322, 1324.

[28] *Id.*

[29] R5-656 at 2-3.

[30] *Id.* at 2.

keeping an eye on several extremist anti-Castro groups on behalf of the Cuban government, and that Cuban citizens and officials [we]re prepared to testify on behalf of the defendants" had aggravated the prejudice in the Miami community.[31] He noted that the articles characterized the defendants as Cuban agents who would call Cuban officials and citizens to testify on their behalf.[32] The district court denied reconsideration and invited the defendants to renew their motion after *voir dire*.[33]

B. Voir Dire

The trial began with jury selection on 27 November 2000.[34] In phase one, 168 jurors were screened for problems such as language and hardship through a written questionnaire and oral *voir dire*

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[31] *Id.* at 3 (internal punctuation omitted).

[32] *Id.* The following articles were included as exhibits: Rui Ferreira, *Cuba helps defense at spy trial,*MIAMI HERALD, Aug. 18, 2000, at 1B, R5-656, Ex. A; Rui Ferreira, *Funcionarios cubanos irán al juicio de los espias,*NUEVO HERALD, Aug. 18, 2000, at 17A, R5-656, Exh. B; *Cuba colaborará en juicio por espionaje,*NUEVO DIARIO, Aug. 19, 2000, at 61, R5-656, Exh. C; Rui Ferreira, *Un misterioso coronel cubano se suma al caso de los espias,*NUEVO HERALD, Aug. 21, 2000, at 21A, R5-656, Exh. D; *To the point/Mr. President, define "handshake",*MIAMI HERALD, Sept. 11, 2000, at 6B, R5-656, Exh. F; and *Accused spy seeks release of U.S. documents,*MIAMI HERALD , Sept. 12, 2000, at 33, R5-656, Exh. E.

[33] R6-723 at 2-3.

[34] R6-765.

questions. [35] In phase two, the 82 remaining prospective jurors were individually questioned regarding media exposure, knowledge and opinions of the case, the Castro government, the United States policy toward Cuba, the Elian Gonzalez case, the Cuban exile community and its reaction to the case, including a possible acquittal.[36]

The district court's concern for the media attention became an issue on the first day of *voir dire.* After learning that the jurors were exposed to a press conference held by the victims' families on the courthouse steps during the lunch break and that some of the jurors were approached by members of the press, the district court addressed isolating the jurors. [37] Acknowledging that there was a "tremendous amount of media attention" in the case, the district judge instituted a number of protections for the jury including instructing the government to speak to the victims' families about their conduct, extending the gag order to cover the witnesses and jurors, instructing the marshals to accompany the jurors as they left the building, and sealing the *voir dire* questions.[38]

Some venire members were clearly biased against Castro and the Cuban government and were

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[35] R6-766; R22.

[36] The district court disqualified 79 of the 168 venire persons for cause, 32(19%) in Phase 1 and 22(27%) in Phase 2 for Cuba-related animus.

[37] R22 at 111-16; R62 at 6575-76.

[38] R7-978 at 2-3, 7; R21 at 111-13, 117-19; R22 at 115, 119; R64 at 6459-60.

excused for cause.[39]

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[39] *See* R25 at 782, 789 (potential juror stated that she would not believe any witness who admitted that he had been a Cuban spy); R26 at 1068-70 (potential juror admitted that he "would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba-anything dealing with communism they are against," he would suspect that "they would have a strong opinion" on the trial. He explained that he

"probably would have a great deal of difficulty dealing with listening to the testimony .... would probably be a nervous wreck, ... and would have some trouble dealing with the case." He said that he "would be a little bit nervous and have some fear, actually fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large."); R27 at 1277 (potential juror expressed concern that, "no matter what the decision in this case, it is going to have a profound effect on lives both here and in Cuba." He believed that the Cuban government was "a repressive regime that needs to be overturned," was "very committed to the security of the United States," and "would certainly have some doubt about how much control [a member of the Cuban military] would have over what they would say [on the witness stand] without some tremendous concern for their own welfare."); R26 at 1057, 1059, 1073 (a potential juror who was a banker and senior vice president in charge of housing loans was "concern [ed] how ... public opinion might affect [his] ability to do his job" because he dealt with a lot of developers in the Hispanic community and knew that the case was "high profile enough that there

Other venire members indicated negative beliefs regarding Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury.[40] Three of these jurors ended up

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may be strong opinions" which could "affect his ability to generate loans."); R27 at 1166, 1168 (potential juror said that he did not like the Cuban government and asked "how could you believe" the testimony of an individual connected with the current Cuban government); R28 at 1452-53 (potential juror believed that "Fidel Castro is a dictator" and that there were "things going on in Cuba that the people are not happy about."); R26 at 1001-02 (potential juror thought that Castro had "messed up" Cuba which was "a very bad government ... perhaps one of the worst governments that exist ... on the planet.")

[40] *See* R25 at 880 (potential juror said she held a "[v]ery strong" opinion and did not believe in the Cuban system of government but did not feel that it would affect her ability to render a verdict); R25 at 829-31, 51-52 (potential juror thought she could be impartial, but admitted that "it would be difficult" and that she did not know if she "could be fair." She said that the case was discussed "every time my [Cuban born] parents have visitors over" and that she knew she would be "a little biased" in favor of the United States as she did not agree with "communism."); R27 at 1240-47 (potential juror, who was born in Cuba and immigrated to the United States with her family in the late 1950s-early 1960s, had three relatives who were involved in the Bay of Pigs invasion and her husband had participated in the 1980 Mariel boat lift to rescue his sister and her family from Cuba. Although she stated that she would be impartial, she said that she saw "Castro as a dictator."); R25 at 790-96 (potential juror, a Cuban

immigrant, said that she did "not approve of the regime ... in Cuba" and was "against communism" but believed she could serve impartially. She remembered the news from the television and the Miami Herald about the planes being shot down); R27 at 1227-32 (potential juror said that, although her father left Cuba because of communism and she believed that the Cuban government was "oppressive," she believed that she would not be prejudiced); R27 at 1148-50 (potential juror who was born in Cuba and immigrated to the United States with her family stated that she was "always for the U.S." and "against the Republic of Cuba," did not like Cuba being a communist country, and had relatives living in Cuba. She had a problem with the case because it involved "espionage against the U.S." but indicated that she could set aside her feelings to serve on the jury); R26 at 1011-13, 1018-19 (potential juror commented that he had "no prejudices" but "live[d] in a neighborhood where there [we]re a lot of Cubans" and was "acquainted with people that come from Cuba. That is universal in Dade County." When asked whether he would be concerned about community sentiment if he were chosen as a juror, he "answer[ed] ... with some care .... [i]f the case were to get a lot of publicity, it could become quite volatile and ... people in the community would probably have things to say about it." He stated that "it would be difficult given the community in which we live""to avoid hearing somebody express an opinion" on the case and to follow a court's instruction to not read, listen to, or otherwise expose himself to information about the case. His opinion about the Cuban government was "not favorable" as it was "not a democracy" and was "guilty of assorted [human rights] crimes."); R26 at 1021-28, 1030, 10323223, (potential juror initially said that he did not "think he would have any sort of prejudice[ ]" against defendants who were agents of

the Cuban government but could not say for certain because of "[t]he environment that we are in. This being Miami. There is so much talk about Cuba here. So many strong opinions either way." He later, however, admitted to having biases against the Cuban government, which he believed was "anti-American" and "tyrannical," and to having "an obvious mistrust ... of those affiliated with the [Cuban] government." He also indicated that he would be concerned about returning a not guilty verdict because "a lot of the people [in Miami] are so right wing fascist," because he would face "personal criticism" and media coverage, and because he had concerns for what might happen after a verdict was returned. He believed the case to be "a high profile case" and that he had been videotaped by the media when leaving the courthouse.); R27 at 1139-48 (potential juror who was born in Cuba and immigrated to the United States with his parents initially stated that he did not think he "could make a fair judgment" in the case and would be prejudiced because he had "a lot of family ties in Cuba" including uncles, aunts, and cousins but later answered that he could set aside his concerns if selected for the jury. He was troubled about returning a verdict in the case based on his concern for something happening to his "family ... in Cuba" and the notoriety of the case in Miami. He also said that he had "heard a lot about the case ... on the news [and from] people talking about" it); R28 at 1424-25, 1433 (potential juror believed that Castro was "a very bad person" and, when asked whether her opinion regarding the Cuban government would affect her ability to fairly weigh the evidence, answered "I don't think so .... I don't know. I have lived in South Florida for 36 years and I have seen many changes." She had known one of the passengers in one of the BTTR planes on the day of the shoot-down and who was named as a

seated on the jury, and one served as the foreperson.[41] The district court denied the defendants'

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government witness, for about eight years. She also knew that the witness was "very involved with the Brothers to the Rescue and very strongly keeping the Cuban community together in Miami."); R25 at 818-22 (potential juror did not think that it would affect his ability to be impartial but he "was not happy" with United States-Cuban relations following the Mariel boat lift. He did not like the freedom that Cubans had to immigrate to the United States because immigrants from other countries were treated differently and "sometimes [he felt like] a stranger in [his] own country" when he needed to ask someone to speak English instead of Spanish); R27 at 1118-28, 1175-77 (potential juror had "many close Cuban friends," including her husband's business partner who was a member of a group that rescued Cubans fleeing the island. She believed that she could be impartial but had concerns about returning a verdict in Miami "because of the Cuban population here." She "was a little distressed with the way that the [Cuban] exile community handled" the Elian Gonzalez matter because she did not "like the crowd mentality, the mob mentality that interferes with what I feel is a working system." She strongly believed that the Cuban government was an oppressive dictatorship. She remembered news reports regarding "the planes being shot down" and several men dying, and that it was a "very bad situation" and frightening because of the possibility of military action. Leilani Triana testified that, although her parents were from Cuba and her grandfather had been politically involved in Cuba before Castro, she could be impartial).

[41] *See* R24 at 555, 561-62, 571, 590; R25 at 741-49. David Buker, who served as jury foreperson, stated that he believed that "Castro is a communist dictator

request to excuse one potential juror, who admitted that she knew the daughter of one of the downed pilots, had visited the pilot's home, and had attended his funeral.[42]

Finally, other venire members espoused indifference toward Castro or the Cuban government.[43]

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and I am opposed to communism so I would like to see him gone and a democracy established in Cuba." Although the government notes that Campa's attorney commented that Buker was "uninvolved or personally disconnected from the experience [of a Cuban]" and that his "general philosophical problem with communism" was "perfectly okay," Campa's attorney's comment was made in the context of his argument concerning striking for cause another juror whose responses were "rooted in personal experience." R25 at 851.

Both Sonia Portalatin, who had a "strong" opinion about the Cuban government because she was "against communism," R24 at 619; R25 at 858-65, and Eugene Yagle, who admitted having "a strong opinion" about the Cuban government as he could not "reconcile [him]self to that form of Government," R22 at 144, 165-67; R27 at 1294-1300; R28 at 1517-20; R29 at 1553-57, 1601-02, 1638, were seated on the jury.

[42] R24 at 519-22, 534-36. The potential juror was the principal of the predominantly (90 percent) Cuban high school attended by the daughter of one of the killed BTTR pilots. She visited the pilot's home and attended his funeral. Despite her relationship with the pilot's daughter, she thought she "could be fair" although "it would be a little difficult."

[43] *See* R25 at 841-43, 846 (potential juror had traveled to Cuba with his family "to take goods" and

Some of the potential jurors who had personal contact with the victims, their family members, BTTR, government witnesses, or the parties were not questioned during Phase II or were excused for cause. [44] Following *voir dire,* Medina's attorney

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medicines to friends and had friends who frequently traveled to Cuba; he knew of no reasons why he should not serve on the jury. He remembered hearing or reading "years back" "something about Brothers to the Rescue" and someone in the group who was a spy for the Cuban government); R27 at 1300-08 (potential juror who had family in Cuba thought he could be fair, but was unable to say whether he would be able to believe a witness who was a member of the communist party in Cuba); R27 at 1134-39 (potential juror whose parents and grandparents had immigrated from Cuba and who had distant relatives who remained in Cuba but he had no opinions regarding the Cuban government, the trial, or the publicity surrounding it); R26 at 990-06 (potential juror felt sympathy for the people living in Cuba but believed that she would be impartial as a juror. She knew from the media that "airplanes were shot down in Cuba a couple of years ago" and that "some families ... gathered to remember the anniversary of the incident" a few weeks before *voir dire*); R26 at 938, 945 (potential juror had concerns about community reaction to a verdict because she did not "want rioting and stuff to happen like what happened with the Elian case. I thought that got out of hand.").

[44] *See* R21 at 139; R23 at 251, 254; R24 at 373, 385-86, 458, 508-10 (three potential jurors knew government witness Jose Basulto, another knew a widow of one of the killed BTTR pilots, and a third knew the daughter of one of the BTTR victims); R25 at 776-70, 809-12; R26 at 937-41 (potential juror who

complimented the district court on the conduct of *voir dire* but indicated his concerns that there were three women seated on the jury who exemplified Professor Moran's opinion that certain community members who were subjected to community pressures were unable to admit their underlying prejudices.[45]

From the beginning of *voir dire* until the completion of the trial, the prospective and actual jurors were admonished not to discuss the case with anyone and to have no contact with media accounts or anything else related to the case.[46] The jurors were also instructed about the presumption of innocence.[47] The district court limited the sketching of witnesses for their protection.[48] It permitted, however, the media "access to all the evidence admitted into the trial record."[49]

C. The Evidence at Trial

As the *en banc* opinion states, the defendants were members of a Cuban government intelligence

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was a former national bank examiner had assisted the United States Attorney's office in Miami for three years during a grand jury investigation); R25 at 655, 690, 709 (potential juror knew many of the named witnesses, and had helped raise money for BTTR while working for one of the local Cuban radio stations).

[45] R27 at 1373-76.

[46] R21 at 44-45; R22 at 119; R116 at 13492-93.

[47] R21 at 26.

[48] R9-1126.

[49] *Hernandez*, 124 F. Supp. 2d 698, 704 (S.D. Fla.2000); R7-808.

operation that maintained a spy operation in South Florida. Campa, Hernandez, and Medina falsely identified themselves through elaborate "legends," or biographies, and back-up or "reserve" identities when they dealt with United States border and law enforcement personnel and when they obtained driver licenses, passports, and other identification.[50] Some of their assigned duties included infiltrating, monitoring, and disrupting the work of certain militant Cuban exiles in South Florida, reporting on anti-Castro organizations in Miami-Dade County, and infiltrating United States military and government agencies and reporting on operations at certain United States military installations.[51]

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[50] R33 at 2145; R34 at 2321-40; R44 at 3724-26; R49 at 4677-78; R66 at 6833-35; R69 at 6981-7016 Govt. Exs. 4; 5-1; 5-2; 5-3; 5-4; 5-6; 6; 7; 9; 8-1; 8-3; 8-4; 11; 12-3; 12-4; 12-5; 12-8; DAV 110 at 2, 118 at 7-14; DG 105 at 2-16; DG 125; DG 126 at 9-10; DG 135 at 3-11; DG 136; SF 14; SF 15; SG 34; SG 53. Under their false identities, Campa was also known as Fernando Gonzalez Llort, Oscar, or Vicky, R101 at 11714; Gonzalez was known as Agent Castor; Guerrero was known as Lorient, Govt. Exs. DAV 102 at 1; DAV 129 at 2; Hernandez was known as Girardo, Giro, or Manuel; and Medina was known as Allan or Ramon Labanino; R101 at 11721-23.

[51] R45 at 3870-71; Govt. Exs. DAV 109 at 6-7; DG 101 at 2; DG 102 at 30; DG 107 at 12-20, 58-67; DG 108 at 2-3; DG 117; DG 129; DG 137 at 2; HF 103. The Cuban government maintains the following intelligence operations: the Directorate of Military Intelligence ("DIM") under the Ministry of Revolutionary Armed Forces, and the Directorate of Intelligence ("DI") and the Directorate of

The Cuban exile groups of concern to the Cuban government included Alpha 66, [52] Brigade 2506,

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Counterintelligence ("DCI") under the Ministry of the Interior. R44 at 3700-05, 3707. The DI collects intelligence outside of Cuba, focusing primarily on the United States; the DCI is responsible for intelligence regarding counter-revolutionary activities inside of Cuba. R44 at 3704, 3707. The DI is organized into many operational components, including M-I which handles non-military United States government agency intelligence, M-III which handles the collecting, correlating, and reporting of gathered information, M-V which handles the operation and support of "illegal" intelligence officers ("IO" s) who enter the United States illegally with a false identity and identification, M-XIX which handles counter-revolutionary individuals and organizations outside of Cuba. R44 at 3708-11, 3713; R46 at 3957.

[52] Orlando Suarez Pineiro, a Cuban-born permanent resident of the United States, served as a captain in Alpha 66 for about six years. R90 at 10373-74. On 20 May 1993, he and other Alpha 66 members were arrested while on board a boat with weapons in the Florida Keys. *Id.* at 10391-92, 10397-401, 10415-16. The weapons included pistols with magazines and ammunition, 50 caliber machine guns with ammunition, rifles with clips, and an RK. *Id.* at 10397-400. Pineiro was tried and found not guilty of possession of a Norinko AK 47 rifle and two pipe bombs. *Id.* at 10424. Pineiro and other Alpha 66 members were also stopped and released while on board a boat on 10 June 1994, but their weapons and boat were seized. *Id.* at 10409, 10411-14. The seized weapons included a machine gun and AK 47s. *Id.* at 10411-14.

United States Customs Agent Ray Crump testified that, on 20 May 1993, he participated in the arrest of

several men whose boat was moored at a marina in Marathon, Florida. *Id.* at 10429. The boat held: several handguns; automatic rifles, including one fully automatic rifle; four grenades; two pipe bombs; a 40 millimeter grenade launcher; a 50 caliber Baretta semiautomatic rifle; and a bottle printed with "Alpha 66" which contained "Hispanic propaganda ..., ... crayons, razors, stuff of that nature." *Id.* at 10431-33, 10434. He also participated in an investigation of a vessel south of Little Torch Key, about ten miles south of Marathon, Florida, on 11 July 1993. *Id.* at 10433-34. The vessel was carrying four men, numerous weapons, and "Alpha 66 type propaganda." *Id.* at 10434. The weapons on the vessel included an AR 15, two 7.6 millimeter rifles and ammunition magazines. *Id.* at 10438. Following this investigation, the men were not arrested, and the weapons and vessel were not seized. *Id.* at 10438-39.

United States Customs Agent Rocco Marco said that he encountered four anti-Castro militants on 27 October 1997, after their vessel, the "Esperanza", was stopped in waters off Puerto Rico. R90-10449. He explained that U.S. Coast Guard officers searched the vessel and found weapons and ammunition "hidden in a false compartment underneath the stairwell leading to the lower deck." The officers found food, water bottles, camouflage military apparel, night vision goggles, communications equipment, binoculars, two Biretta 50 caliber semiautomatic rifle with 70 rounds of ammunition, ten rounds of 357 hand gun ammunition, and magazines and clips for the firearms. R90 at 10453-59. The leader of the group, Angel Manuel Alfonso of Alpha 66, confessed to Rocco that they were on their way to assassinate Castro at ILA Marguarita, where he was scheduled to give a speech. *Id.* at 10452, 10467. Alfonso explained to Rocco that "his purpose in life was to kill [Castro]" and that it did not "matter if he went to jail or not. He would come back and accomplish the mission." *Id.* at 10468.

Debbie McMullen, the chief investigator with the Federal

BTTR, Independent and Democratic Cuba ("CID"), Commandos F4,[53] Commandos L, CANF,[54] the Cuban

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Public Defender's Office, testified that Ruben Dario Lopez-Castro was an individual associated with a number of anti-Castro organizations, including PUND and Alpha 66. R97 at 11267. Lopez and Orlando Bosch planned to ship weapons into Cuba for an assassination attempt on Castro. *Id.* at 11254. Bosch had a long history of terrorist acts against Cuba, and prosecutions and convictions for terrorist-related activities in the United States and in other countries. Campa Exh. R77 at 18-35.

[53] Rodolfo Frometa testified that, although he was born in Cuba, he was a citizen of the United States. R91 at 10531. He explained that he was a United States representative of a Cuban organization called Commandos F4, which was organized "to bring about political change in a peaceful way in Cuba" and included members both inside of and exiled from Cuban. *Id.* at 10532. He identified himself as the Commandate Jefe, or commander-in-chief, of F4 in the United States. *Id.* at 10534. He stated that, since 1994, all F4 members must sign a pledge that they will "respect the United States laws" and not violate either Florida or federal law. *Id.* at 10535.

> Frometa stated that, before Commandos F4, he was involved with Alpha 66, another organization supporting political change in Cuba, from 1968 to 1994 and served as their commander "because of his firm and staunch position ... against Castro." R91 at 10541-42. As a member of Alpha 66, Frometa was stopped by police officers and questioned regarding his possession of weapons. He was first stopped on 19 October 1993, while in a boat which had been towed to Marathon, Florida, and was questioned regarding the onboard weapons. *Id.* at 10564-66. The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini 14 rifle caliber 223 with a scope. *Id.* at 10564-66. On 23 October 1993, he was again stopped while he and others were driving a truck which was pulling a boat

toward the Florida Keys. *Id.* at 10542-44. Frometa explained that they were carrying weapons to conduct a military training exercise in order to prepare for political changes in Cuba or in the case of a Cuban attack on the United States, and once the officers determined that their activities were legal, they were sent on their way. *Id.* at 10544-48, 10563. The weapons were semi-automatic and included an R15, an AK 47, and a 50 caliber machine gun. *Id.* at 10545-47. Frometa and several other Alpha 66 members were once more stopped and released on 7 February 1994 for having weapons on board his boat. Because a photograph of the group was "published in the newspapers" "[e]verybody in Miami" knew that they were released. *Id.* at 10569. On 2 June 1994, Frometa, by then a member of F4, was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" in order to kill Castro and his close associates in Cuba. *Id.* at 10571-72, 10574-76, 10579-80. Frometa acknowledged that the use of the C4 explosive could have injured Cubans who worked at a military installation, *Id.* at 10579, but that they had caused the "death of four U.S. citizens, the 41 people including 20 or 21 children who died; the mother of the child Elian, plus thousands and thousands who have died in the Straits of Florida." *Id.* at 91-10581.

[54] Percy Francisco Alvarado Godoy and Juan Francisco Fernandez Gomez testified by deposition. R95 at 11012; R99 at 11558-59. Godoy, a Guatemalan citizen residing in Cuba, described attempts between 1993 and 1997 by affiliates of the CANF to recruit him to engage in violent activities against several Cuban targets. 2SR-708, Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64. He said that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. *Id.* at 44-46. In connection with the same plot, he flew to Guatemala in November 1994 to obtain the explosives and detonators to be

American Military Council ("CAMCO"), the Ex Club, Partido de Unidad Nacional Democratica ("PUND") or the National Democratic Unity Party ("NDUP"), and United Command for Liberation ("CLU"). [55]

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used and met with, among others, Luis Posada Carriles, a Cuban exile with a long history of violent acts against Cuba. *Id.* at 49, 52, 56-58. Unknown to the CANF members, Godoy was cooperating with the Cuban authorities, denounced their plans, and later testified at the trial of one of the conspirators in Cuba. *Id.* at 22, 24, 26, 31, 58-59, 65, 70, 76, 81-82, 86, 90, 109.

> Gomez, a citizen and resident of Cuba, described numerous attempts between 1993 and 1997 by persons associated with the CANF to recruit him to engage in violent activities against several Cuban targets. Gomez also testified that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. In 1996 and 1998, Gomez was approached by Borges Paz of the anti-Castro organization the Ex Club, 2SR-708, Att. 1 at 9, 12-14, 20, 39; Gomez said that Paz invited him to join their organization to build and place bombs at tourist hotels and at the Che Guevara Memorial in Santa Clara, Cuba. *Id.* at 16, 19, 22. After returning to Cuba, Gomez informed the Cuban authorities of the Ex Club's plans. *Id.* at 20, 35-36. As a result of his work for the United States government, Gomez said that he was estranged from his family in the United States, including a daughter in Florida, and had received threatening phone calls. *Id.* at 64-66.

[55] R83 at 9162, 9165-67; R90 at 10373-74, 10391-92, 10397-10401, 10409, 10411-14, 10415-16, 10429, 10431-34, 10449, 10452-59, 10467-68; R91 at 10541-42, 10544-48, 10563-66, 10571-72, 10574-76, 10579-80; R97 at 11267, 11291-97; 2SR-708, Att. 1 at 9, 12-14, 16, 19-20, 22, 35-36, 39; Att. 2 at 10-13, 21-24,

Alpha-66 ran a paramilitary camp training participants for an invasion of Cuba, had been involved in terrorist attacks on Cuban hotels in 1992, 1994, and 1995, had attempted to smuggle hand grenades into Cuba in March 1993, and had issued threats against Cuban tourists and installations in November 1993. Alpha-66 members were intercepted on their way to assassinate Castro in 1997. Brigade 2506 ran a youth paramilitary camp.[56] BTTR flew into Cuban air space from 1994 to 1996 to drop messages and leaflets promoting the overthrow of Castro's government. CID was suspected of involvement with an assassination attempt against Castro. Commandos F4 was involved in an assassination attempt against Castro. Commandos L claimed responsibility for a terrorist attack in 1992 at a hotel in Havana. CANF planned to bomb a nightclub in Cuba. The Ex Club planned to bomb tourist hotels and a memorial. PUND planned to ship weapons for an assassination attempt on Castro. Following each attack, Cuba had advised the United States of its investigations and had asked the United States' authorities to take action against the groups operating from inside the United States.[57]

The BTTR's flights over Cuba were of particular concern to the Cuban government, and the Cuban government had communicated that concern and its

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27-28, 33-34, 44-46, 61, 63-64; Campa Exs. R-29D, R-29F, R-29G, R-29H.

[56] R97 at 11296-97.

[57] Campa Exs. R-29C; R-29F; R-29H; GH Exs. 16C, 24.

plan to use force to interrupt the flights to the Federal Aviation Administration ("FAA"), which shared that information with BTTR.[58] BTTR's flights, however, continued until the shootdown in February 1996.[59] The downing of the two BTTR planes was observed both by occupants of a fishing boat and by the crew and passengers onboard a cruise ship.[60] The bodies of the people in the aircraft, three of whom were United States citizens, were never recovered. Both planes were in international airspace, flying away from Cuba, when they were shot down; they had not entered Cuban airspace.[61]

Lieutenant Colonel Roberto Hernandez Caballero, of the Ministry of Cuba Department of State Security, testified that he investigated a number of terrorist acts in Havana and in other

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[58] R76 at 8198-99, 8203-05; R83 at 9166-67; GH Exs. 18E, 18F.

[59] R58 at 5919, 5922-23; R83 at 9161-65, 9167-70, 9181-83; GH Exs. 18E, 37 at 2-4, 6-8; Govt. Exs. 475A at 2-3, 478, 479, 483 at 8-11, 14-16; HF 108 at G-3, 113 at G-3.

[60] R53 at 5109-14, 5117-18; Govt. Ex. 483 at 5-7, 11, 13, 17-18, 20. The cruise ship was Royal Caribbean's "Majesty of the Seas" with about 2,600 passengers and 800 crew. R53 at 5084-86. The first officer on the ship explained that they were on the last leg of a weekly cruise about 24 nautical miles off the north coast of Cuba during the shootdowns. *Id.* at 5087-89, 5109-14. A videotape of the shootdowns made by a cruise ship passenger was apparently "played on TV many times." *Id.* at 5124.

[61] R53 at 5113-21, 5131-33; Govt Exs. 440, 469B, 484.

locations at Cuban-owned facilities during 1997.[62] He advised Medina of the attacks in April and directed that he search for any connection between the attacks and CAMCO.[63] In September, Hernandez notified the Cuban authorities that he had received information that one of the perpetrators of one of the bombings was available to meet for lunch and that he

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[62] R93 at 10750-51, 10754-55, 10783-832. The acts included an explosion on 12 April 1997 which destroyed the bathroom and dance floor at the discotheque Ache in the Media Cohiba Hotel, *Id.* at 10755, 10757, 10759; a bombing on 25 April 1997 at the Cubanacan offices in Mexico, R97 at 11318-19; the 30 April 1997 explosive device found on the 15th floor of the Cohiba Hotel, R93 at 10766-69, 10771; the 12 July 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies and did significant damage inside the hotels, *Id.* at 10786-88, 10795-801; the 4 August 1997 explosion at the Cohiba Hotel which created a crater in the lobby and destroyed furniture; *Id.* at 10802-05; explosions on 4 September 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant, *Id.* at 10807-09, 10820; and, the discovery of explosive devices at the San Jose Marti International Airport in a tourist van in the taxi dispatch area on 19 October 1997 and underneath a kiosk on 30 October 1997, *Id.* at 10824-30. The explosions on 4 September killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused property damage at all locations. *Id.* at 10809-13, 10815-20, 10822-23.

[63] R97 at 11316-18; Campa Exs. R57(a), R57(b) at 2, 59.

understood that another large building in Cuba was targeted for the next week.[64] Hernandez's contact was instructed to elaborate on the information that he had obtained.[65] As a result of the investigations, Caballero said that the Cuban Department of State Security arrested some individuals, but that they believed some of the individuals responsible for financing, planning, and organizing the explosions lived in the United States and had not been arrested.[66] He explained that he provided FBI agents with documentation and investigation materials regarding the terrorist acts between 1990 and 1998, and received the FBI's findings in March 1999. During the trial, the government described the Cuban intelligence operations as "an intelligence pyramid" headed by Fidel Castro.[67] It suggested that the Cuban government applied the death penalty for throwing things out of airplane windows,[68] and was

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[64] R97 at 11320-21.

[65] *Id.* at 11321; Campa Ex. R63 at 1.

[66] R93 at 10832, 10839, 10842.

[67] R44 at 3699-700. The U.S. Attorney asked government witness Stuart Hoyt to describe the structure of the Cuban intelligence system by questioning "who is at the top of the Cuban intelligence system." R44 at 3699. Hoyt responded by stating that "Fidel Castro" was at the top as "Commander-in-Chief", "[P]resident", "Council Minister", and "head of the Cuban Communist Party." *Id.*

[68] R73 at 7806-07.

"repressive"[69] and a "dictatorship."[70]

D. Renewed Motions for Change of Venue

During the trial, the motions for change of venue were renewed through motions for a mistrial based on community events and trial publicity and a government witness's insinuation that a defense attorney was a spy or a communist.[71] In February

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[69] R80 at 8748. After a defense witness explained on cross-examination that the tone of the dissenters within Cuba was "more respectful" than that of Cuban exile organizations located outside of Cuba, the government attorney asked whether such an answer was relevant when it was a "[p]articularly repressive government." R80 at 8748. Late, after the witness stated that, if he had been a dictator, he would have tried to stop the BTTR flight, the government attorney questioned whether "[w]e live in a dictatorship." *Id.* at 8754. After the witness replied "Fortunately we don't," the government attorney commented, "And people do have that freedom of choice." *Id.*

[70] *Id.* at 8754.

[71] R70 at 7130-36; R81 at 8947-49. Although the district court did not overtly deny these motions, the motion based on community events and publicity was apparently resolved by "no response" to an inquiry to the jury as to whether they had "seen, heard, read, or [spoken to anyone] about any media accounts related" to the case following the trial's last recess. R70 at 7136. The motion based on the witness's insinuation was resolved by an instruction to the jury that the defense attorney's "job [wa]s to provide a vigorous defense for his client." R81 at 8955. "[The witness]'s statement regarding [the defense attorney] was inappropriate and unfounded." *Id.* at 8949.

2001, Campa moved for a mistrial and renewed his motion for a change of venue based on the commemorative flights honoring the fifth anniversary of the shootdown and the related television interviews and newspaper articles during the weekend of 24 February 2001.[72] He argued that the newspapers included "an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act" and articles including quotations from CANF members discussing "at length" the facts of the trial.[73] He maintained that a jury instruction would not cure the taint of these events and publicity.[74] The court reserved ruling pending supplementation of the record and then, upon the defendants' request, questioned the jury as to their exposure to the news articles.[75] When none of the jurors responded in any way, the case proceeded.[76]

Two weeks later, Campa, Gonzalez, Hernandez, and Medina filed a joint motion for a mistrial and change of venue arguing that the 24 February weekend events were so prejudicial that it could not be cured by voir dire or instructions [77]

Defense witness Basulto responded to questioning by asking Hernandez's defense counsel

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[72] R70 at 7130.

[73] *Id.* at 7130-31.

[74] *Id.* at 7131.

[75] *Id.* at 7134-36.

[76] *Id.* at 7136.

[77] *Id.* at 5.

whether he was "doing the work" of the Cuban intelligence community. [78] At the request of Hernandez's attorney, the trial judge struck the comment and the jury was instructed to disregard the comment.[79] Following a recess, Campa's counsel argued that Basulto's insinuation was:

> precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue, and ... in the aftermath of the events of February 24, 2001, we renewed our motion for ... a change of venue based on the pretrial publicity, the publicity that has been generated during the course of the trial and our concern with our ability to obtain a fair trial in this community given that background.
>
> This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is doing his job, of being a communist. It is unfortunate, it is the type of red baiting we have seen in this community before and we are concerned how it affects the jury. Here we are asking the jury to make a decision based on the evidence and only based on testimony and we are left and they are left with wondering what will they be accused. *These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who*

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[78] R81 at 8945.

[79] *Id.*

> *hold positions of authority in this community, who have access to the media, are going to call them of being Castro sympathizers, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial.*
>
> When someone can on the stand gratuitously and maliciously accuse [Hernandez's attorney] of being a spy[, it] sends a message to these ladies and gentlemen if they don't do what is correct, they will be accused of being communists too. These people have to go back to their homes, their jobs, their community and you can't function in this town if you have been labeled a communist, specially by someone of Mr. Basulto's stature.[80]

He asked that the court consider this event and the other events in its consideration of the pending motion for change of venue.[81]

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[80] *Id.* at 8947-49 (emphasis added). Basulto, the founder, president, and director of BTTR, was a Cuban-American who had worked with the Central Intelligence Agency to infiltrate the Cuban government. He was a prominent person in Miami, and made frequent appearances in Spanish-language media. During the trial, he testified that his work for the CIA was "dedicated to promot[ing] democracy in Cuba." R80 at 8822, 8825.

[81] *Id.* at 8949. In the alternative, counsel for Campa and Hernandez requested a jury instruction

In May 2001, the district court denied the pending motions for change of venue on the basis of its earlier orders denying a change of venue and upon its finding that the 24 February events and the publicity surrounding it did not necessitate a change of venue because of its instructions to the jury.[82]

During closing arguments, the government made a number of comments to which the defendants objected. It stated that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they convicted the "Cuban sp[ies] sent to ... destroy the United States."[83] It maintained that the Cuban government sponsored "book bombs," "telephone threats of car bombs," and "sabotage," and "killed four innocent people."[84] It suggested that the Cuban government used "goon squads" to torture its critics.[85] It asserted that the Cuban government had their agents falsify their identities by using the identification of "dead babies" and "stealing the

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addressing Basulto's attack on Hernandez's counsel's credibility. R81 at 8949-53. The court found that the statements could affect "how the jurors view" Hernandez's counsel and instructed the jury that Hernandez's attorney's "job is to provide a vigorous defense for his client. Mr. Basulto's statement regarding [Hernandez's counsel] was inappropriate and unfounded." *Id.* at 8955.

[82] R120 at 13894-95.

[83] *Id.* at 14532, 14481.

[84] *Id.* at 14480.

[85] *Id.* at 14495.

memories of families."[86] It contended that the defense argument that the agents were in the United States to keep an eye on the Cuban exile groups was false because they were on United States military bases, spying on United States military, the FBI, and Congress.[87] The government implied that the government of Cuba was not cooperating with the FBI.[88] It commented that Cuba "was not alone" in shooting down civilian aircraft as they "are friends with our enemies," including "the Chinese and the Russians," and compared the BTTR shootdown to the 1986 Libyan shootdown of a civilian aircraft.[89] It maintained that the government of Cuba did not care about the occupants of the planes, and that it shot down the planes even though they could have forced Basulto's plane to land.[90] It argued that Cuba was a "repressive regime [that] doesn't believe in any [human] rights."[91] It summarized that the defendants had joined an "intelligence bureau ... that sees the United States of America as its prime and main enemy" and that the jury was "not operating under the rule of Cuba, thank God."[92] The defendants' objections were sustained, and the jury was instructed to consider only the evidence admitted

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[86] *Id.* at 14480-81.

[87] *Id.* at 14483-85, 14488.

[88] *Id.* at 14493.

[89] *Id.* at 14512-13.

[90] *Id.* at 14513.

[91] *Id.* at 14519.

[92] *Id.* at 14475.

during the trial and to remember that the lawyers' comments were not evidence.[93]

E. Jury Conduct and Concerns During the Trial

Five months into the trial, when one seated juror had a two-day conflict, the court discussed the possibility of removing that juror and seating one of the alternates.[94] Hernandez's attorney requested a recess, arguing that the parties and the court had worked very hard to select "a jury we are very happy with" and maintained that it would be unreasonable to refuse to accommodate the juror after her length of service and her request to complete the trial.[95] The district court granted the recess.[96]

In early February 2001, a small protest related to the trial was held outside of the courthouse, but the jury was protected from contact with the protestors and from exposure to the demonstration.[97] On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building.[98] Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during

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[93] *Id.* at 14482, 14483, 14493; R125 at 14583.

[94] R104 at 12091-92.

[95] *Id.* at 12091-94.

[96] *Id.* at 12094-95.

[97] R59 at 6096-108, 6145-49. The 20 protestors carried signs stating "take Castro down," "[f]air trial wanted," and "spies to be killed." *Id.* at 6145.

[98] R81 at 9005.

the deliberations and that footage was televised.[99] Some of the jurors indicated that they felt pressured; therefore, the district court again modified the jurors' entry and their exit from the courthouse and transportation.[100] However, the Metrorail Center, where the jurors using public transportation were taken, is the site of a prominently displayed monument to the shootdown victims.

As the *en banc* opinion states, the jurors were again filmed entering and leaving the courthouse "all the way to their cars" during the deliberations.[101] The district judge arranged for their entrance into the courthouse by private entrance and guarded transportation to their vehicles or to mass transit. The electronic eyes of the community were focused upon them and the jury could not help but understand that focus.

F. *Post-Trial Motions for New Trial*

Following the trial, in late July and early August 2001, Campa, Gonzalez, Guerrero, and Medina moved for a new trial and renewed their motions for a change of venue, arguing that their fears of presumed prejudice remained.[102] The district court denied the motions, concluding that "any potential for prejudice was cured""through the Court's methodical, active pursuit of a fair trial from voir dire ... to ... the

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[99] R126 at 14644-47.

[100] *Id.* at 14645-47.

[101] R126 at 14643-46.

[102] R12-1338 at 2-3; R12-1342 at 2-3; R12-1343 at 1-4; R12-1347 at 1-2.

return of verdict."[103]

In November 2002, Guerrero renewed his motion for a new trial based on newly discovered evidence and in the interests of justice; the motion was adopted by Campa, Gonzalez, Hernandez, and Medina.[104] Guerrero argued that a new trial was warranted because of "misrepresentations of fact and law made by the United States Attorney in opposing the ... motion for change of venue" and that the government's position regarding change of venue was contradicted by its position in a motion for change of venue which the government filed in *Ramirez v. Ashcroft,* No. 01-4835-Civ-Huck (S.D.Fla.) on 25 June 2002. In the *Ramirez* motion, the government argued that:

> the Elian Gonzalez matter was an incident which highly aroused the passions of the community and resulted in numerous demonstrations
>
> ....
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> 5. While the Elian Gonzalez affair has received national attention[,] the exposure in Miami-Dade County has been continuous and pervasive. Indeed, even now, more than a year after the return of Elian to his father [in April 2000], there continues

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[103] *Id.* at 15.

[104] R15-1635, 1638, 1644, 1647, 1650, 1651. The National Jury Project, the National Lawyers Guild, the International Association of Democratic Lawyers sought and were granted leave to file briefs as amicus curiae in support of this motion. R15-1640, 1653, 1654, 1655, 1677.

to be extensive publicity ... which will arouse and inflame the passions of the Miami-Dade community.

...

8. Historically, media articles relating to Elian Gonzalez and the handling of his return to his father have persisted from November 1999 to the present [June 2002].[105]

The government, borrowing arguments advanced by the defendants in this case, declared that

[i]t cannot be disputed that the return of Elian Gonzalez to his father in Cuba created a serious rift in this community, a rift which continues to the present. This rift exists not only between Hispanics and non-Hispanics, but also between Cubans a[n]d non-Cubans and within the Cuban community itself. It is beyond dispute that virtually every person in Miami-Dade county [sic] has a strong opinion, one way or another, regarding the INS and the U.S. Attorney General's Office, and the manner in which the Elian Gonzalez matter was handled. The effect of the media coverage ... serves to foment and revive these feelings on an ongoing basis .... As such the media accounts cannot do anything other than create the general state of mind where the inhabitants of Miami-Dade County are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the instant case solely on the

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[105] R15-1636, Ex. 2 at 2-3, 11.

> evidence presented in the courtroom .... Under such circumstances and strongly held emotions, and in light of the media coverage ..., it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County.[106]

The government requested "a change in the location/venue" "outside of Miami Dade County to ensure that the Defendant ... receive a fair and impartial trial on the merits of the case."[107] They noted that, "[w]hile not requested," the court also had the discretion to transfer the trial to another judicial district.[108] The government orally argued that there were no incidents "since 1985 that so polarized the community. That so affected every individual in the community as the Elian Gonzalez affair."[109] When the district court asked whether a transfer of the case to the Fort Lauderdale division courthouse would be sufficient, the government responded that "[t]he demonstrations occurred in Miami. They are predominantly conducted by citizens of Miami Dade county [sic]. As you move the case out of Miami Dade you have less likelihood there are going to be deep-

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[106] *Id.* at 14-15.

[107] *Id.* at 17, 16.

[108] *Id.* at 16 n. 1.

[109] R15-1636, Ex. 3 at 24. I note that the Elian Gonzalez matters occurred between the 1998 indictment of the defendants in this case and the beginning of their trial in 2000. The first anniversary protests of Elian Gonzalez's return to Cuba occurred during these defendants' trial.

seated feelings and deep-seated prejudices in the case."[110]

In support of the interests of justice argument, the defendants included an affidavit by Professor Moran, news articles, reports by Human Rights Watch regarding threats to the freedom of expression within the Miami Cuban exile community, a public opinion survey conducted by legal psychologist Dr. Kendra Brennan, and a study by Florida International University's Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez.[111]

The district court denied the motion, improperly finding that the government's position in *Ramirez* was not newly discovered evidence and that it lacked jurisdiction to consider the interests of justice argument. It did not, therefore, consider any of the exhibits attached to the motion.[112]

II. DISCUSSION

A. *Denial of Motion for Change of Venue*

This case presents the opportunity to clarify circuit law to conform with Supreme Court precedent. The district court misfocused its inquiry under Federal Rule of Criminal Procedure 21(a).

Our review of the denial of a motion for change of venue is multi-level. We review the district court's interpretation of the Federal Rules of Criminal

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[110] *Id.* at 25.

[111] R15-1636, Exs. 4, 5, 7-10, 12.

[112] R15-1678 at 5, 6 n.3, 8.

Procedure *de novo*[113] and its application of Rule 21(a) for an abuse of discretion.[114] Under an abuse of discretion standard, we will not disturb a decision which was made within the "range of possible conclusions" available to the district court, was not an error of judgment, or was not the misapplication of law.[115] A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.[116] "When a criminal defendant alleges that pretrial publicity precluded a trial consistent with the standards of due process, it is the duty of a reviewing court to undertake an independent evaluation of the facts established in support of such an allegation."[117]

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[113] *See United States v. Noel,* 231 F.3d 833, 836 (11th Cir.2000) (per curiam).

[114] *See United States v. Williams,* 523 F.2d 1203, 1208 (5th Cir.1975). In *Bonner v. City of Prichard, Ala.,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to 1 October 1981.

[115] *United States v. Frazier,* 387 F.3d 1244, 1259 (11th Cir.2004) (*en banc*) (internal citation omitted).

[116] *Ameritas Variable Life Ins. Co. v. Roach,* 411 F.3d 1328, 1330 (11th Cir.2005) (per curiam).

[117] *Williams,* 523 F.2d at 1208; *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) ("Appellate tribunals have the duty to make an independent evaluation of the circumstances.").

A district court's consideration of a federal criminal defendant's motion for change of venue is guided by Rule 21(a), which directs that the court must transfer the proceedings "if the court is satisfied that so great a prejudice against the defendant exists ... that the defendant cannot obtain a fair and impartial trial."[118] To show *presumed,* rather than *actual* prejudice, the defendant must show that "outside influences affecting the community's climate of opinion as to a defendant are inherently suspect" and that "the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue."[119] In reviewing whether the outside influences operated to deprive the defendants of a fair trial, we may "widen our breadth of consideration" and may consider the combined effect of various factors.[120] Courts, therefore, look at not only the pretrial publicity, but will also consider "inherent community prejudice,"[121] the government's

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[118] Fed.R.Crim.P. 21(a).

[119] *Pamplin v. Mason,* 364 F.2d 1, 5 (5th Cir.1966); *See also Sheppard,* 384 U.S. at 362, 86 S.Ct. at 1522 ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.")

[120] *Williams,* 523 F.2d at 1209.

[121] *Jordan v. Lippman,* 763 F.2d 1265, 1266, 1267, 1269, 1279 (11th Cir.1985) (finding that, in a state habeas corpus proceeding, a new trial based on a change of venue was required when "extensive publicity" was coupled with the community's "long history of racial turbulence" and the involved institution's "economic and social impact" on community).

closing argument, [122] an "inflamed community atmosphere," [123] the connection between the community prejudice and the trials,[124] the interplay between the crime and the economic life of the community,[125] and a familiarity with unpopular or ill-reputed groups with whom the defendant was associated.[126] In cases alleging pervasive community prejudice, publicity or intense media coverage evidence is not the focus; it is one form of evidence proffered to show the prejudice within the

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[122] *Williams,* 523 F.2d at 1209.

[123] *Coleman v. Kemp,* 778 F.2d 1487, 1489 (11th Cir.1985).

[124] *Meeks v. Moore,* 216 F.3d 951, 967 (11th Cir.2000).

[125] *United States v. Farries,* 459 F.2d 1057, 1061 (3rd Cir.1972).

[126] *United States v. Angiulo,* 897 F.2d 1169, 1181-82 (1st Cir.1990). Other courts have considered how the charged crime reinforced "deeply-rooted passions" and "deeply-held prejudice" within the community, *United States v. Holder,* 399 F. Supp. 220, 227-28 (D.S.D.1975), how the charged crimes related to the community reputation, *United States v. Wheaton,* 463 F. Supp. 1073, 1078 (S.D.N.Y.1979), the defendants' state citizenship and community racial bias, *United States v. Washington,* 813 F. Supp. 269, 274, 275 (D.Vt.1993), "extreme community hostility," the defendant's prominence in the community, the victim's position as a public servant, and the defendant's position as a community "outsider." *State v. Koedatich,* 112 N.J. 225, 548 A.2d 939, 963 (1988).

community. [127] "[P]ervasive [community] prejudice may not be presumed simply from the context of [news] articles alone" but must be supported by evidence of the influence of that publicity.[128]

We review the "special facts" of each case alleging prejudicial publicity[129] and the totality of the circumstances of cases alleging presumed prejudice. [130] The totality of the circumstances includes all of the circumstances and events occurring before and during the trial and their cumulative effect, [131] including an extensive *voir dire.* [132] Where the community sentiment is strong, courts should place "emphasis on the feeling in the community rather than the transcript of voir dire," which may not "reveal the shades of prejudice that may influence a verdict." [133] A court does not undertake a totality of the circumstances' review by confining itself to community publicity which relates only to the guilt or innocence of the defendant. It may, therefore, consider the effect of the publicity

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[127] *United States v. Capo,* 595 F.2d 1086, 1090 (5th Cir.1979).

[128] *Mayola v. Alabama,* 623 F.2d 992, 999 (5th Cir.1980).

[129] *Marshall v. United States,* 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) (per curiam).

[130] *See Murphy v. Florida,* 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975).

[131] *See Williams,* 523 F.2d at 1206 n. 7.

[132] *See Patton v. Yount,* 467 U.S. 1025, 1029, 1034, 104 S.Ct. 2885, 2888, 2890, 81 L.Ed.2d 847 (1984).

[133] *Pamplin,* 364 F.2d at 7.

and the timing of the trial during a hotly contested election involving the prosecutor and judge, [134] publicity during a Presidential election in which a similar crime was a subject of debate,[135] the extent of the dissemination of the publicity,[136] the character of that publicity,[137] the proximity in time of the publicity to the trial,[138] the familiarity of the jury with the charged crime, [139] and the setting and kind of community in which the coverage and trial took place.[140] I recognize that publicity which is unrelated

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[134] *Sheppard,* 384 U.S. at 352, 354, 86 S.Ct. at 1517-18.

[135] *Mu'Min v. Virginia,* 500 U.S. 415, 429, 111 S.Ct. 1899, 1907, 114 L.Ed.2d 493 (1991).

[136] *Williams,* 523 F.2d at 1209.

[137] *Id.* at 1209; *Murphy,* 421 U.S. at 802, 95 S.Ct. at 2037.

[138] *Murphy,* 421 U.S. at 802, 95 S.Ct. at 2037; *Williams,* 523 F.2d at 1210.

[139] *Murphy,* 421 U.S. at 800, 95 S.Ct. at 2036; *Williams,* 523 F.2d at 1210. As the *en banc* opinion correctly notes, the defendants used only 15 of their 18 challenges to the jury pool to excuse jurors whose answers revealed their potential bias against them. Although a defendant's failure to use all available preemptory challenges may indicate a lack of juror prejudice, *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985), such a fact is merely one factor to be considered in the totality of the circumstances determination. *United States v. Gorel,* 622 F.2d 100, 103-04 (5th Cir.1979); *Dobbert v. Florida,* 432 U.S. 282, 302-03, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977).

[140] *See Sheppard,* 384 U.S. at 354-55, 86 S.Ct. at 1518; *Mu'Min,* 500 U.S. at 429, 111 S.Ct. at 1907.

to the defendant or to the matters at trial may not have the evidentiary weight necessary to establish prejudicial pretrial publicity, but also note that publicity that does not "directly relate" to the defendant or the charge offense may be significant to the trial.[141]

In this case, however, the district court focused solely on the prejudicial publicity prong of the analysis. [142] *It made no findings regarding the prejudice within the community.* In denying a change of venue, the district court ignored its own recognition of the substantial likelihood of prejudice as a result of witnesses' press events and the unsequestered jury's exposure, [143] the community

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[141] *Jordan,* 763 F.2d at 1279 ("[E]ven to the extent that the publicity did not directly relate to the [defendant's] case, it would be naive to underestimate its significance in the context of the trial .... [W]e cannot blind ourselves to the significant [prejudicial] overtones in the news media coverage" of community events.).

[142] *Hernandez,* 106 F. Supp. 2d at 1319, 1321 n. 2, 1322. Further, there is no indication that the district court considered the community and the events ongoing in the community within a totality of the circumstances analysis in either the rulings on the a change of venue or the motions for a new trial.

[143] R7-978 at 9 n. 5 ("Articles about this case have appeared daily in the *Miami Herald* and *El Nuevo Herald* [,] weekly in the national and international press [and that] local televised news programs, particularly those affiliated with the Spanish-speaking channels, have featured coverage of the trial since it began."); *Id.* at 15, 17 (finding "significant" "local and national media coverage"

events and memorials honoring the victims of the shootdown, and the fear created in the minds of the jurors from the evidence of spies and weapons in their neighborhoods, and the history of violence practiced by some members of the Cuban-exile community.

Despite the district court's numerous efforts to ensure an impartial jury in this case, I am not convinced that empaneling such a jury in this community was possible because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami. Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue-some of which focused on the defendants in this case and the government for whom they worked but others which focused on relationships between the United States and Cuba-flooded Miami both before and during this trial.[144] The trial required consideration of the BTTR shootdown and the martyrdom of those persons on the flights. During the trial, there were both "commemorative flights" and public ceremonies to mark the anniversary of the shootdown. Moreover,

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since the indictment that had "only intensified as the trial has progressed"... and that "[s]ince the trial began, this case has been the daily bread for the local press and media").

[144] Without determining the validity of Professor Moran's poll, I note that the district court approved the expenditures related to the poll, including the size of the statistical sample.

the Elian Gonzalez matter, which was ongoing at the time of the change of venue motion, concerned these relationships between the United States and Cuba and necessarily raised the community's awareness of the intense and emotional concerns of the Cuban exile community. It is uncontested that the publicity concerning Elian Gonzalez continued during the trial, "arous [ing] and inflam[ing]" passions within the Miami-Dade community. [145] Despite the district court's thorough and extensive *voir dire* and its many efforts aimed at protecting the jurors' privacy, *voir dire* highlighted the community's awareness of this case and also that of Elian Gonzalez. The district court's gag order failed to restrain the widespread publicity of the shootdown anniversary memorials and demonstrations. The jurors continued to be concerned about their exposure to the press into their deliberations. With the emotional intensity of the events in the community and the publicity of those events, which relate both directly and indirectly to these defendants, the "jurors may well have been affected even if they were attempting to follow the court's instructions."[146] In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or *voir dire;* thus, a change of venue was mandated. The evidence at trial validated the media's publicity regarding the "Spies Among Us" by disclosing the clandestine activities of not only the defendants but also of the various Cuban exile groups and their paramilitary camps that continue to

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[145] R15-1636, Exh. 2 at 2-3.

[146] *Jordan,* 763 F.2d at 1279.

operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable. Further, the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions. "[I]t would be blinking reality not to recognize the extreme prejudice inherent" in this unique circumstance.[147]

B. *Denial of New Trial*

A district court is authorized to grant a new trial on the basis of newly discovered evidence if a motion for new trial is filed within three years of the verdict.[148] The newly discovered evidence must satisfy a five-part test: (1) the evidence was newly discovered after the trial; (2) the movant shows due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court; and (5) the evidence is of such a nature that a new trial would reasonably produce a new result.[149] Newly discovered evidence is not limited to just the question of the defendant's innocence but can include other issues of

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[147] *Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965).

[148] *See* Fed.R.Crim.P. 33(a) and (b)(1).

[149] *See United States v. DiBernardo,* 880 F.2d 1216, 1224 (11th Cir.1989).

law,[150] including questions of the fairness of the trial.[151]

The government's motion in *Ramirez* meets these criteria. Although the facts in *Ramirez* differ from the facts in this case, there are remarkable similarities, including the plaintiff's [or, in this case, the government's witnesses] exploitation of the media's coverage of the evidence and the issues at trial. In *Ramirez,* a civil employment discrimination case, the government was defending the INS against a Hispanic plaintiff. More significant, however, is that the underlying facts for the government's motion in *Ramirez* regarding the pervasive community prejudice were based on publicity and events that occurred before and during the trial of this case, "November 1999 to the present [June 2002],"[152] and which were much closer in temporal proximity. The newly discovered evidence, therefore, was not the facts on which the government's *Ramirez* motion was based but was the government's position on the events which were occurring during the trial of these defendants and its legal position as to the applicability of *Pamplin.*[153]

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[150] *See United States v. Beasley,* 582 F.2d 337, 339 (5th Cir.1978) (per curiam).

[151] *See United States v. Williams,* 613 F.2d 573, 575 (5th Cir.1980).

[152] R15-1636, Exh. 2 at 1-2

[153] In response to the defendants' motion for a change of venue in this case, the government had argued that *Pamplin* did not apply where the alleged

Attorneys representing the United States are burdened both with an obligation to zealously represent the government and, as a "representative of a government dedicated to fairness and equal justice to all," an "overriding obligation of fairness" to defendants.[154] That obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction."[155] A trial may be rendered fundamentally unfair by the prosecution's use of factually contradictory theories.[156] A prosecutor's

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prejudice was the "community's internal attitudes" as opposed to an outside influence. R3-443 at 6.

[154] *United States v. Wilson,* 149 F.3d 1298, 1303 (11th Cir.1998).

[155] *United States v. Crutchfield,* 26 F.3d 1098, 1103 (11th Cir.1994) (internal citation omitted).

[156] *See Smith v. Groose,* 205 F.3d 1045, 1051-52 (8th Cir.2000) (holding that the prosecution's use of contradictory theories for different defendants in a murder trial violated due process). Our adversary system is "poorly served when a prosecutor, the state's own instrument of justice, stacks the decks in his favor." *Id.* at 1051.

I recognize that that judicial equitable estoppel generally bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, *related* proceeding. *See New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001). Judicial equitable estoppel, however, is not applicable here because *Ramirez,* a civil case, was unrelated to this criminal prosecution. However, because the doctrine seeks to prevent a "party from 'playing fast and loose' " with the courts, the guidance that it provides may be helpful to parties considering a change in their subsequent position in unrelated litigation based upon the same set of facts. *See*18B Charles Alan Wright, Arthur R. Miller & Edward H.

reliance on a legal position despite "knowing full well" that it is wrong is "reprehensible" in light of his duty "by virtue of his oath of office."[157] Further, when the government has sought to foreclose the submission of evidence, an evidentiary hearing is warranted on a motion for new trial when the newly discovered evidence "might likely lead" to a new trial.[158]

We do not know when the government changed its position regarding both the application of *Pamplin* and the pervasive community prejudice in Miami-Dade County because there was no evidentiary hearing. Because the government's timing on its change of position might lead to a new trial, an evidentiary hearing was warranted.

Here, a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the prosecutor's improper prosecutorial references and position regarding a change of venue. Moreover, the evidence at trial strongly suggested not only adverse economic consequences for jurors voting for acquittal, but the prospect of violence from an already impassioned and emotional community possessed of firearms and bombs. The district court's instructions to the jury only generally reminded the jury that

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Cooper, *Federal Practice and Procedure* § 4477 (2d ed.2002).

[157] *United States v. Masters,* 118 F.3d 1524, 1525 & n. 4 (11th Cir.1997) (per curiam).

[158] *United States v. Espinosa-Hernandez,* 918 F.2d 911, 914 (11th Cir.1990) (per curiam).

statements by the attorneys were not evidence to be considered. The community's displeasure with the Elian Gonzalez controversy paled in comparison with its revulsion toward the BTTR shootdown. In a civil case which arose out of the same facts as this criminal prosecution, the BTTR shootdown was described as an "outrageous contempt for international law and basic human rights" perpetrated by the Cuban government in murdering "four human beings" who were "Brothers to the Rescue pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys."[159] In *Ramirez,* the government not only recognized the effect of the Elian Gonzalez matter on the community but also argued that the publicity continued through 2002. If the effect of those inflamed passions is clear in an employment discrimination action against the agency that contributed to Elian Gonzalez's removal and that failed to support the Cuban exiles' position, it is manifest in a criminal case against admitted Cuban spies who were alleged to have contributed to the murder of "humanitarians" working to rescue rafters such as Elian Gonzalez.

III. CONCLUSION

In light of the foregoing discussion, I can only conclude that the defendants' convictions should be reversed and the case should be remanded for a new trial.

I am aware that, for many of the same reasons

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[159] *Alejandre,* 996 F. Supp. at 1242.

discussed above, the reversal of these convictions would be unpopular and even offensive to many citizens. However, I am equally mindful that those same citizens cherish and support the freedoms they enjoy in this country that are unavailable to residents of Cuba. One of our most sacred freedoms is the right to be tried fairly in a noncoercive atmosphere and thus be afforded a fair trial. In the final analysis, we are a nation of laws in which every defendant, no matter how unpopular, must be treated fairly-a concept many consider alien to the current Cuban regime. Our Constitution requires no less.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A. ISELIN, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF APPELLEE,

v.

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT, RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A. CAMILO, A.K.A. OSCAR, , DEFENDANTS-APPELLANTS.

[Decided: Aug. 9, 2005

Filed: Aug. 9, 2005]

Before: BIRCH, KRAVITCH, and OAKES[*], Circuit Judges.

OPINION

PER CURIAM:

The defendant-appellants, Ruben Campa, Rene Gonzalez, Gerardo Hernandez, Luis Medina and Antonio Guerrero, were convicted and sentenced for various offenses charging each of them with acting as unregistered Cuban intelligence agents working within the United States. Hernandez was also convicted of conspiracy to commit murder by supporting and implementing a plan to shoot down United States civilian aircraft outside of Cuban and United States airspace. They appeal their convictions, sentences, and the denial of their motion for new trial arguing, *inter alia,* that the pervasive community prejudice against Fidel Castro and the Cuban government and its agents and the publicity surrounding the trial and other community events combined to create a situation where they were unable to obtain a fair and impartial trial.[1] We agree,

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[*] Honorable James L. Oakes, United States Circuit Judge for the Second Circuit, sitting by designation.

[1] The defendants raise numerous other issues unrelated to the change of venue. Campa, Gonzalez,

and REVERSE their convictions and REMAND for a retrial.

Our consideration of a motion for change of venue requires a review of the totality of the circumstances surrounding the trial. Therefore, in Part I, we consider the Background: the indictments, the motions for change of venue, voir dire, the court's interactions with the media, general facts regarding the trial, the evidence presented at trial, jury conduct and concerns during the trial, and the motions for new trial. Our review of the evidence at trial is more extensive than is typical for consideration of an

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Guerrero, Hernandez, and Medina argue prosecutorial misconduct regarding the misconduct of a government witness and during closing argument, improper use of the Classified Information Procedures Act, improper denial of a motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act, *Batson* violations, insufficiency of the evidence regarding the conspiracy to transmit national defense information to Cuba, improper denial of a jury instruction regarding specific intent, and sentencing errors. Campa, Gonzalez, and Medina contend that the evidence was insufficient on the counts relating to violations of the Foreign Services Registration Act. Campa and Guerrero maintain that the district court improperly denied their jury instruction on necessity and justification. Hernandez raises the denial of a motion to dismiss Count III based on Foreign Sovereign Immunities Act jurisdictional grounds and insufficiency of the evidence for conspiracy to commit murder. Because we reverse their convictions based on the denial of their motions relating to change of venue, we do not address these additional issues.

appeal involving the denial of a motion for change of venue. This is so because the trial evidence itself created safety concerns for the jury which implicate venue considerations. In Part II, we discuss the law and our application of the law to the facts in this case. In Part III, we present our conclusion.

I. BACKGROUND

A. The Indictments

Campa, Gonzalez, Guerrero, Hernandez, and Medina were arrested on a criminal complaint on 12 September 1998, and were subsequently indicted with nine codefendants for conspiring to act as agents of the Republic of Cuba without registering with the Attorney General of the United States and to defraud the United States, in violation of 18 U.S.C. § 951(a)[2]

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[2] Section 951 states:

(a) Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to 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.

18 U.S.C. § 951(a) and (b).

In 28 C.F.R. § 73.1, the Attorney General set forth definitions for the terms used in the statute:

(a) The term agent means all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official, and who are not specifically excluded by the terms of the Act or the regulations thereunder.

(b) The term foreign government includes any person or group of persons exercising sovereign de facto or de jure political

jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been regarded by the United States as a governing authority.

(c) The term prior notification means the notification letter, telex, or facsimile must be received by the addressee named in § 73.3 prior to commencing the services contemplated by the parties.

28 C.F.R. § 73.1(a)-(c).

Foreign agents are to provide notification to the Attorney General as follows:

(a) Notification shall be made by the agent in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the Registration Unit of the Criminal Division, except for those agents described in paragraph[ ] (b) ... of this section. The document shall state that it is a notification under 18 U.S.C. § 951, and provide the name or names of the agent making the notification, the firm name, if any, and the business address or addresses of the agent, the identity of the foreign government or official for whom the agent is acting, and a brief description of the activities to be conducted for the foreign government or official and the anticipated duration of the activities. Each notification shall contain a certification, pursuant to 28 U.S.C. § 1746, that the notification is true and correct.

(b) Notification by agents engaged in law enforcement investigations or regulatory agency activity shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of Interpol-United States National Central Bureau. Notification by agents engaged in intelligence, counterintelligence, espionage, counter-espionage or counterterrorism assignment or service shall be in the form of a letter, telex, or facsimile addressed to the Attorney General,

and 28 C.F.R. § 73.1*et seq.,* and numerous overt acts, in violation of 18 U.S.C. § 371 (Count 1). They were alleged to have "function[ed] as covert spies ... by gathering and transmitting information to Cuba[ ] concerning United States military installations, government functions, and private political activity; by infiltrating, informing on and manipulating anti-Castro political groups in Miami-Dade County [Florida]; by sowing disinformation" within these

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directed to the attention of the nearest FBI Legal Attache. In case of exceptional circumstances, notification shall be provided contemporaneously or as soon as reasonably possible by the agent or the agent's supervisor. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

...

(d) Any subsequent change in the information required by paragraph (a) of this section shall require a notification within 10 days of the change.

(e) Notification under 18 U.S.C. § 951 shall be effective only if it has been done in compliance with this section, or if the agent has filed a registration under the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611, et seq., which provides the information required by paragraphs (a) and (d) of this section.

28 C.F.R. § 73.3(a), (b), (d), (e).

Under 18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

groups and in dealings with other private and public groups within the United States, "and by carrying out other operational directives of the Cuban government.[3] Guerrero, Hernandez, and Medina were also charged with conspiring to deliver to Cuba information "relating to the national defense of the United States,"[4] in violation of 18 U.S.C. §§ 794(a), (c), and 2 (Count 2).[5] Gonzalez was charged with

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[3] R1-224 at 3-4.

[4] *Id.* at 11.

[5] *Id.* 18 U.S.C. § 794(a) provides that:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power (as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

18 U.S.C. § 794(c) states:

acting as an agent of the Republic of Cuba without prior notification to the Attorney General, and Hernandez and "John Doe 4 a/k/a Albert Manuel Ruiz" were charged with causing Gonzalez to act as an unregistered agent, in violation of 18 U.S.C. §§ 951 and 2 (Count 15).[6] Guerrero was charged with acting as an agent of the Republic of Cuba without notification to the Attorney General, and Hernandez, Medina, and Campa were charged with causing Guerrero to act as an unregistered agent, in violation of 18 U.S.C. §§ 951 and 2 (Count 16).

Hernandez was charged with conspiracy to murder, in violation of 18 U.S.C. §§ 1111 and 2, and overt acts related to that conspiracy, in violation of 18 U.S.C. §§ 1117 and 2 (Count 3),[7] possession of a

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If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

Under 18 U.S.C. § 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[6] *Id.* at 23.

[7] 18 U.S.C. § 1111 states:

(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

counterfeit passport, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 4),[8] possession of five or more

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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, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; 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.

Conspiracy to murder is addressed in 18 U.S.C. § 1117:

If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

[8] Fraud and misuse of passports and visas is governed by 18 U.S.C. § 1546:

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have

been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact-

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10

fraudulent identification documents, in violation of 18 U.S.C. §§ 1028(a)(3) and 2 (Count 5), possession of a fraudulent identification document, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 6), acting as a foreign agent for the Republic of Cuba without notification to the Attorney General (Count 13), and having caused Juan Pablo Roque (Count 19), Alejandro Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) to have acted as unregistered foreign agents, in violation of 18 U.S.C. §§ 951 and 2.

Campa was charged with possession of a counterfeit passport, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 7), possession of false identification documents, in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), and (c)(3), and 2 (Count 8)[9], and acting as an agent of the Republic of Cuba without

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years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

[9] 18 U.S.C. § 1028(a)(3) provides:

Whoever, in a circumstance described in subsection (c) of this section-

....

(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents

....

shall be punished as provided in subsection (b) of this section.

prior notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 (Count 17).

Medina was charged with possession of a counterfeit passport (Count 9) and possession of a passport obtained by use of a false statement (Count 11), in violation of 18 U.S.C. §§ 1546(a) and 2, making a false statement on his passport application, in violation of 18 U.S.C. §§ 1542 and 2 (Count 10), possession of fraudulent identification documents, in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), and (c)(3), and 2 (Count 12), acting as an agent of the Republic of Cuba without notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 (Count 14), and having caused Joseph Santos (Count 25) and Amarylis Silverio Santos (Count 26) to have acted as unregistered agents.[10] A gag order was subsequently entered governing the parties and their attorneys.[11]

B. Change of Venue

In August 1999, Medina's attorney moved to incur expenses under the Criminal Justice Act to poll

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[10] FN10. Codefendants Albert Manuel Ruiz (Count 18), Juan Pablo Roque (Count 19), John Doe No. 5 a/k/a Ricardo Villareal (Count 20), John Doe No. 6 a/k/a Remijio Luna (Count 21), Alejandro Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) were also charged with having acted as unregistered agents, in violation of 18 U.S.C. §§ 951 and 2. Ruiz was also charged with causing Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) to act as unregistered agents, in violation §§ 951 and 2. Roque remains unapprehended.

[11] R7-978 at 3; R21 at 117.

the Miami-Dade County community to determine whether it was a fair and unbiased venue for the trial. [12] Medina explained that the traditional methodology for addressing pretrial publicity was not appropriate and proposed that Florida International University Psychology Professor Gary Patrick Moran conduct a telephone poll with a "sample of 300 people."[13] The district court granted the motion.[14]

In January 2000, Campa, Gonzalez, Guerrero, and Medina moved for a change of venue, arguing that they were unable to obtain an impartial trial in Miami as a result of pervasive prejudice against anyone associated with Castro's Cuban government.[15] The motions for change of venue were based on pretrial publicity and "virulent anti-Castro sentiment" which had existed in Miami as "a

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[12] R1-280 at 2; R18 at 11-12.

[13] R1-280 at 3.

[14] R2-303.

[15] R2-317 (Guerrero), 321 (Medina), 324 (Gonzalez), 329 (Campa); R3-397 (Campa). Medina requested a change of venue "in light of evidence of pervasive community prejudice against the accused" as documented by Professor Gary Moran's survey which showed "public sentiment against persons alleged to be agents of Fidel Castro's Communist government in Cuba." R2-321 at 1-2. Moran concluded that, while there had been "several bursts of newspaper articles ... and other media attention" surrounding the Cuban spies' arrests, the basis for the motion was the "[v]irulent anti-Castro sentiment" in the community. *Id.* at 3.

dominant value ... for four decades."[16] The motions were supported by news articles and Moran's poll to substantiate "an atmosphere of great hostility towards any person associated with the Castro regime" and "the extent and fervor of the local sentiment against the Castro government and its suspected allies."[17]

Although Campa, Gonzalez, Guerrero, and Medina had originally argued that the case should be moved to another judicial district, during oral argument on the motions, they agreed that they would be satisfied with a transfer of the case within the district from the Miami division to the Fort Lauderdale division. R5-586 at 2 n. 1.

The evidence submitted in support of the motions for change of venue was massive.[18] In 2000, a

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[16] R2-321 at 3; R2-316 at 2; R2-317 at 2; R2-324 at 1; R2-329 at 1; R2-334 (containing news articles which detail the history of anti-Castro sentiment in Miami); R3-397 at 1; R3-453 at 1-2; R3-455 at 2; R3-461 at 2-3.

[17] R2-329 at 1, 3; R2-334; R3-397; R3-455.

[18] The following articles specifically addressing the conspiracy and the indicted defendants were attached as exhibits in support of the motions for change of venue: George Gedda, *Federal officials say 10 arrested, accused of spying for Cuba,* MIAMI HERALD, Sept. 14, 1998, R2-334, Ex.; Manny Garcia, Cynthia Corzo, Ivonne Perez, *Spies among us: Suspects attempted to blend in, Miami,* MIAMI HERALD, Sept. 15, 1998, at A1, R2-334; David Lyons, Carol Rosenberg, *Spies among us: U.S. cracks alleged Cuban ring, arrests 10,*MIAMI HERALD, Sept. 15, 1998, at A1, R2-329, Ex. A; R2-334, Ex.; *Spies among us,* MIAMI HERALD, Sept. 15, 1998, at 14A, R2-329, Ex. F; Fabiola Santiago, *Big news saddens, angers exile community,*

MIAMI HERALD , Sept. 15, 1998, R2-334, Ex.; Juan O. Tamayo, *Arrest of spy suspects may be switch in tactics,* MIAMI HERALD, Sept. 15, 1998, R2-334, Ex.; Javier Lyonnet, Olance Nogueras, *Cae red de espionaje de Cuba/FBI viró al revés casa de supuesto cabecilla* and Pablo Alfons, Rui Ferreira, *Cae red de espionaje de Cuba/Arrestan a 10 en Miami,* NUEVO HERALD, Sept. 15, 1998, at A1, R2-329, Ex. B; *La Habana Contra El Pentagono* ("Havana versus the Pentagon")*/Estructura de la Red de Espionaje,*NUEVO HERALD, Sept. 15, 1998, R2-329, Ex. C; *Arrest of alleged Cuban spies demands vigorous prosecution,*SUN-SENTINEL, Sept. 16, 1998, at 30A, R2-329, Ex. G; Juan O. Tamayo, *Miscues blamed on military's takeover of Cuban spy agency,* MIAMI HERALD, Sept. 17, 1998, at 13A, R2-334, Ex.; David Kidwell, *Motion could delay trials of alleged 10 Cuban spies,* MIAMI HERALD, Oct. 6, 1998, at B1, R2-334, Ex.; David Lyons, *Cuban couple pleads guilty in spying case,* MIAMI HERALD, Oct. 8, 1998, at A1, R2-334, Ex.; David Kidwell, *Three more accused spies agree to plead guilty,* MIAMI HERALD, Oct. 9, 1998, at 4B, R2-329, Ex. H; R2-334, Ex.; Carol Rosenburg, *Couple admits role in Cuban spy ring,* MIAMI HERALD, Oct. 22, 1998, at 5B, R2-329, Ex. H; Juan O. Tamayo, *U.S.-Cuba spy agency contacts began a decade ago,* MIAMI HERALD, Oct. 31, 1998, R2-334, Ex.; David Kidwell, *U.S. tries to tie espionage case to planes' downing,* MIAMI HERALD, Nov. 13, 1998, at A1, R2-334, Ex.; Carol Rosenberg, *Identities of 3 alleged spies still unknown,* Nov. 14, 1998, at B1, R2-334, Ex.; Juan O. Tamayo, *Spies Among Us/Castro Agents Keep Eye on Exiles,* MIAMI HERALD, Apr. 11, 1999, R2-329, Ex. D; R2-334, Ex.; Carol Rosenberg, *Shadowing of Cubans a classic spy tale,* MIAMI HERALD , Apr. 16, 1999, at A1, R2-329, Ex. E; R2-334, Ex.; *Cuban spy indictment/Charges filed in downing of exile fliers/The Brothers to the Rescue Shootdown:* David Lyons, *Castro agent in Miami cited by U.S. grand jury,* Juan O. Tamayo, *Brothers to the Rescue Shootdown/Top spy planned Brothers ambush,* and Elaine de Valle, *Relatives: Charges fall short,* MIAMI HERALD , May 8, 1999, R2-334, Ex.; *Confessed Cuban spy receives seven years,* MIAMI HERALD, Jan. 29, 2000, at B1, R2-355 at C-2; *Contrite Cuban spy couple sentenced,* MIAMI HERALD, Feb. 3, 2000, at B5, R3-355 at D-2; *Miami*

prominent Cuban-American attorney in Miami explained that Cuban-related matters were " 'hot-button issues' " as there were over 700,000 Cuban-Americans living in Miami. [19] Of those Cuban-Americans, 500,000 remembered leaving their homeland, 10,000 had a relative murdered in Cuba, 50,000 had a relative tortured in Cuba, and thousands were former political prisoners.[20] Professor Moran's survey results showed that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons charged with engaging in the activities named in the indictment.[21] A significant number, 57 percent of the Hispanic respondents and 39.6 percent of all respondents, indicated that, "[b]ecause of [their] feelings and opinions about Castro's government," they "would find it difficult to be a fair and impartial juror in a

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Spy-Hunting, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. G-1; Carol Rosenberg, *Confessed Cuban spies sentenced to seven years,* MIAMI HERALD , Feb. 24, 2000, at 1B, R3-397, Ex. I-1; *Terrorism must not win in Brothers to the Rescue shoot-down,* MIAMI HERALD, Feb. 24, 2000, at 8B, R3-397, Ex. J-1 ("More than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down."); *Brothers Pilots Remembered* (photo), MIAMI HERALD, Feb. 25, 2000, at B1, R3-397, Ex. K-1; Marika Lynch, *Shot-down Brothers remembered,* MIAMI HERALD, Feb. 25, 2000, at 2B, R3-397, Ex. L-1.

[19] R15-1636, Ex. 9.

[20] *Id.*

[21] R2-321, Ex. A at 10.

trial of alleged Cuban spies."[22] Over one-third of the respondents, 35.6 percent, said that they would be worried about criticism by the community if they served on a jury that reached a not-guilty verdict in a Cuban spy case.[23] The respondents who indicated an inability to be a fair and impartial juror were also asked whether there were any circumstances that would change their opinion.[24] Of those respondents, 91.4 percent of the Hispanic respondents and 84.1 percent of all respondents answered "no."[25] Many of the articles submitted by the defendants also documented the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, including the Elian Gonzalez matter.[26]

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[22] *Id.* at Ex. A at 12; *see Id.* at Ex. E at 3.

[23] *Id.* at Ex. A at 11-12.

[24] *Id.* at Ex. A at 13; *Id.* at Ex. E at 3.

[25] *Id.* at Ex. A at 13.

[26] R3-397, Exs.; R4-483, Exs.; R4-498, Exs.

During the same period of time in which the motions for change of venue were pending, and ultimately the trial was conducted, there was a substantial amount of publicity regarding other matters of interest in the Cuban community including the conditions in Cuba and high profile legal events occurring in Miami: the Elian Gonzalez matter; the arrest of an United States immigration agent, Mariano Faget, who was accused of spying for Cuba; and a city-county ban on doing business with Cuba.

As to the general anti-Castro sentiments and the conditions in Cuba: Juan O. Tamayo, *Former U.S. Pows Detail Torture by Cubans in Vietnam/Savage beatings bent captives to will of man dubbed "Fidel",* MIAMI HERALD, Aug. 22, 1999, at

A1, R2-329, Ex. I; Juan O. Tamayo, *Cuba toughens crackdown/"Biggest wave of repression so far this year",* MIAMI HERALD, Nov. 11, 1999, at A1, R2-329, Ex. K; Juan O. Tamayo, *Witnesses link Castro, drugs,* MIAMI HERALD , Jan. 4, 2000, at B3, R2-329, Ex. J; Marika Lynch, *Castro-challenging pilot is offered parade, honors,* Jan. 4, 2000, at B1, R2-329, Ex. M; Jim Morin, *Cuba: I cannot speak my mind* (cartoon), MIAMI HERALD, Jan. 20, 2000, R2-329, Ex. P.

As to Elian Gonzalez: Juan O. Tamayo, *Castro Ultimatum/Return boy in 72 hours or migration talks at risk,* MIAMI HERALD, Dec. 6, 1999, at 1A, R2-329, Ex. N; Sara Olkon, Gail Epstein Nieves, Martin Merzer, *The Saga of Elian Gonzalez/Protest and Passion Spread to the Streets/Sit-ins block intersections and disrupt Dade traffic* and *Politicians, lawyers work to halt 6-year-old's return,* MIAMI HERALD, Jan. 7, 2000, 1A, *I see no basis for reversing decision, Reno says* and Sara Olkon, Anabelle de Gale, Marika Lynch, *Pained Cuban exiles disagree on what's best for Elian,* MIAMI HERALD, Jan. 7, 2000, at 17A, *U.S. Preparations for boy's return start slowly,* The Miami Herald, Jan. 7, 2000, at 18A, R2-329, Ex. O; *Peaceful Rally* (photo), MIAMI HERALD, Jan. 9, 2000, at 1A, R2-329, Ex. N; Jay Weaver, *3rd judge gets high profile in Elian case,* MIAMI HERALD, Feb. 23, 2000, at 1B, R3-397, Ex. A-1; Sandra Marquez Garcia, *Mary "appears" near Elian,* MIAMI HERALD , Mar. 26, 2000, at 1B, R4-483, Ex. E-3; Alfonso Chardy, *Authorities keep watch on exile groups,* MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. C-3; *Vigilant protestors,* MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. I-3; Andres Viglucci, Jay Weaver, and Frank Davies, *Dad gets visa, but no guarantees for Elian's transfer,* MIAMI HERALD, Apr. 5, 2000, at 1A, R4-483, Ex. D-3; Elaine de Valle, *Media watch events closely-and get watched in return/Hot words on radio scrutinized,* and Terry Jackson, *Media watch events closely-and get watched in return/TV talk, news shows flocking to South Florida,* MIAMI HERALD, Apr. 5, 2000 at 15A, R4-483, Ex. B-3; Karen Branch, *Crowds target Reno's home,* MIAMI HERALD , Apr. 6, 2000, at 2B, R4-483, Ex. A-3; *The saga of Elian/Reno wants Elian today/Boy must be at airport by 2 P.M./Defiant*

family refusing to comply: Andres Viglucci, Jay Weaver, and Ana Acle, *Great-uncle challenges U.S. to take boy "by force",* and Carol Rosenberg, *The Attorney general followed "instinct" as final mediator,* MIAMI HERALD, Apr.13, 2000, at 1A, R4-483, Ex. F-3; *The saga of Elian/Family defies order/Crowd swells at Little Havana home/Judge dismisses family's custody case/Panel will weigh request for a stay/U.S. takes no action to remove Elian:* Ana Acle, *In a show of solidarity, VIPs flock to visit boy,* and Andres Viglucci and Jay Weaver, *Reno: U.S. will explore all peaceful solutions,* MIAMI HERALD, Apr. 14, 2000, at 1A, R4-483, Ex. G-3; *Saga of Elian/Standoff over custody/A show of solidarity* (photo), MIAMI HERALD, Apr, 14, 2000, at 20A, R4-483, Ex. H-3; Karl Ross, *W. Dade home of attorney general on alert,* and *Police say an anonymous caller phoned in bomb threat April 13,*MIAMI HERALD , Apr. 16, 2000, R4-498, Ex. A-4; *Raid's Prelude: How talks failed/Missed signals helped doom deal* and Sara Olkon, Diana Marrero, and Elaine de Valle, *Thousands protest seizure/Separate rally backs Reno's actions,* MIAMI HERALD , Apr. 30, 2000, at 1A, R4-498, Ex. C-4; Carol Rosenberg, *INS agent targeted by death threats,* MIAMI HERALD, May 6, 2000, R4-498, Ex. B-4; and *In memory of mothers who died at sea* (photo), MIAMI HERALD , R4-498, Ex. D-4;

As to Mariano Faget: Elaine de Valle, Fabiola Santiago, and Marika Lynch, *FBI: Official in INS spied for Cuba,* MIAMI HERALD, Feb. 18, 2000, at A1, R3-397 at C-1; Amy Driscoll, Juan Tamayo, *Spy bait taken instantly/Alleged Cuban agent phoned contact after receiving false FBI information,* Fabiola Santiago, *Aloof suspect with high clearance was ideally positioned to do harm,* and *Tracking Faget* (photos), MIAMI HERALD, Feb. 19, 2000, at A1, R3-397 at B-1; Don Bohning, *Faget's father was a brutal Batista official,* MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. G-1; Frank Davies, *Cuba, U.S. still fight Cold War,* MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. H-1; Juan O. Tamayo, *Cuban diplomat expelled over spy link,* MIAMI HERALD, Feb. 20, 2000, at A1, R3-397, at D-1; Liz Balmaseda, *Spy case boosts worst suspicions,* MIAMI HERALD, Feb. 21, 2000, at B1, R3-397, at F-1; Juan O.

One of the articles, which addressed a bomb threat against the Attorney General of the United States following a collapse of talks in the Elian Gonzalez case, recited a history of anti-Castro exile group violence in the Miami-Dade community.

Scores of bomb threats and actual bombings have been attributed to anti-Castro exile groups dating back to the 1974 bombings of a Spanish-language publication, Replica. Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence.

In the early 1980s, the Mexican and Venezuelan

Tamayo, *Cuban diplomat linked to Elian, INS spy case,* MIAMI HERALD, Feb. 22, 2000, at A1, R3-397, at E-1; Juan O. Tamayo, *More exiles maneuvering for business with Cuba,* MIAMI HERALD, Mar. 5, 2000, at A-1, R3-455 at A-2; Ana Radelat and Jan O. Tamayo, *FBI agents expel defiant Cuban envoy,* MIAMI HERALD , at A-1, R3-455 at B-2.

> As to the business ban: Marika Lynch, Fernando Almanzar, *Protest, taping set to follow Van Van show,* MIAMI HERALD, Sept. 28, 1999, at 3B, and Tyler Bridges, Andres Viglucci, *Miami may bar Van Van next time/County's Penelas also opposed,* MIAMI HERALD, Oct. 13, 1999, at B1, R2-329, Ex. L; Don Finefrock, *Ban on business with Cuba tightened,* MIAMI HERALD, Feb. 25, 2000, at 2A, R3-397, Ex. M-1; Jordan Levin, *Miami-Dade threatens to cancel film fest grant/Cuban movie collides with county law,* MIAMI HERALD, Feb. 25, 2000, at 1A, R3-397, Ex. N-1; Jordan Levin, *Groups "warned" on Cuba resolution,* MIAMI HERALD, May 15, 2000, at 1B, R4-498, Ex. E-4; *Decenas De exiliados se congregaron ante la Corte Federal para reclamar el derecho de Elian Gonzalez a permanecer en EU,* R3-455, Ex. E-2.

consular offices were bombed in retaliation for their government's establishing relations with Cuba.

Since then, numerous small businesses-those promoting commerce, travel, or humanitarian aid to Cuba-have been targeted by bombers.[27]

The government responded that the Miami-Dade Hispanic population was a "heterogeneous," "highly diverse, even contentious" "group" immune from the influences which would preclude a fair trial.[28] Following oral arguments on 26 June 2000, the district court denied the motion without prejudice, finding that the defendants had failed to demonstrate that a change of venue was necessary to provide them with a fair trial by an impartial jury.[29] The court "decline[d] to afford the survey and Professor Moran's conclusions the weight attributed by Defendants" finding, *inter alia,* that the "size of the statistical sample ... [wa]s too small to be representative of the population of potential jurors in Miami-Dade County."[30]

In September 2000, Campa moved for reconsideration of the denial of the motion for change of venue. In support of the reconsideration motion, he submitted news articles containing information that he provided the court both during an *ex parte* sidebar within the change of venue motion hearing and in his

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[27] R4-498, Ex. A-4.

[28] R3-443 at 11.

[29] *United States v. Hernandez,* 106 F.Supp.2d 1317 (S.D.Fla.2000); R5-586.

[30] *Hernandez,* 106 F.Supp.2d at 1323-24.

motion for leave to file his motions for foreign witness depositions *ex parte*.[31] He explained in the reconsideration motion that the information had been previously provided to the court *ex parte* because it disclosed the defendants' theory of defense and that he sought the foreign witnesses to support that theory.[32] He argued that the news articles discussing "the defendants' tacit admission that they were keeping an eye on several extremist anti-Castro groups on behalf of the Cuban government, and that Cuban citizens and officials [we]re prepared to testify on behalf of the defendants" had aggravated the prejudice in the Miami community.[33] He noted that the articles characterized the defendants as Cuban agents who would call Cuban officials and citizens to testify on their behalf.[34] The district court denied reconsideration, stating that it had previously addressed the defendants' arguments.[35] It again

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[31] R5-656 at 2-3.

[32] *Id.* at 2.

[33] *Id.* at 3 (internal punctuation omitted).

[34] *Id.* The following articles were included as exhibits: Rui Ferreira, *Cuba helps defense at spy trial,* MIAMI HERALD, Aug. 18, 2000, at 1B, R5-656, Ex. A; Rui Ferreira, *Funcionarios cubanos irán al juicio de los espias,* NUEVO HERALD, Aug. 18, 2000, at 17A, R5-656, Ex. B; *Cuba colaborará en juicio por espionaje,* NUEVO DIARIO, Aug. 19, 2000, at 61, R5-656, Ex. C; Rui Ferreira, *Un misterioso coronel cubano se suma al caso de los espias,* NUEVO HERALD, Aug. 21, 2000, at 21A, R5-656, Ex. D; *To the point/Mr. President, define "handshake",* MIAMI HERALD, Sept. 11, 2000, at 6B, R5-656, Ex. F; and *Accused spy seeks release of U.S. documents,* MIAMI HERALD , Sept. 12, 2000, at 33, R5-656, Ex. E.

[35] R6-723 at 2.

explained that it could explore any potential bias during a voir dire examination and carefully instruct the jurors during the trial. Moreover, the district court noted that if it determined "that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time."[36]

The trial began with jury selection on 27 November 2000.[37] During the trial, the motions for change of venue were renewed through motions for a mistrial based on community events and trial publicity and a government witness's insinuation that a defense attorney was a spy or a communist.[38] In February 2001, Campa moved for a mistrial and renewed his motion for a change of venue based on the activities during the weekend of 24 February 2001, including the "commemorative flights marking the fifth anniversary of the shoot down of the

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[36] *Id.* at 2-3 (internal quotations omitted).

[37] R6-765.

[38] R70 at 7130-36; R81 at 8947-49. Although the district court did not overtly deny these motions, the motion based on community events and publicity was apparently resolved by "no response" to an inquiry to the jury as to whether they had "seen, heard, read, or [spoken to anyone] about any media accounts related" to the case following the trial's last recess. R70 at 7136. The motion based on the witness's insinuation was resolved by an instruction to the jury that the defense attorney's "job [wa]s to provide a vigorous defense for his client." R81 at 8955. "[The witness]'s statement regarding [the defense attorney] was inappropriate and unfounded." *Id.* at 8949.

Brothers to the Rescue aircraft and the number of television interviews and the number of newspaper articles concerning that event."[39] He argued that the newspapers included "an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act" and articles including quotations from CANF members discussing "at length" the facts of the trial.[40] He maintained that "some news events are so great and are so explosive ... that any amount of instructing the jury cannot cure the taint."[41] The court reserved ruling pending supplementation of the record and then asked whether an inquiry of the jury was requested.[42] Campa answered "[y]es" and, after the inquiry was discussed, the jury was subsequently questioned as to their exposure to the news articles.[43] When none of the jurors responded in any way, the case proceeded.[44]

Two weeks later, on 1 March 2001, Campa, Gonzalez, Hernandez and Medina filed a joint motion for a mistrial and change of venue arguing that the

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[39] R70 at 7130. Brothers to the Rescue ["BTTR"] is "a Miami-based Cuban exile group", *Hernandez,* 106 F.Supp.2d at 1318, founded by Jose Basulto in 1991 to rescue rafters fleeing Cuba in the Straits of Florida and to bring them to the United States. R80 at 8836-37.

[40] *Id.* at 7130-31.

[41] *Id.* at 7131.

[42] *Id.* at 7133.

[43] *Id.* at 7134-36.

[44] *Id.* at 7136.

events during the weekend of 24 February "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial."[45] They maintained that "[n]o amount of voir dire or instructions to the jury c[ould] cure the taint, whose ripple effects are difficult to measure."[46] They also requested a mistrial "so that their trial can be conducted in a venue where community prejudices against the defendants are not so deeply embedded and fanned by the local media."[47] In May 2001, the district court denied the pending motions for change of venue on the basis of its earlier orders denying a change of venue and finding that

> the February 24th issues and events as well as the reporting of those events do not necessitate and did not necessitate a change of venue in this matter .... The jurors were instructed each and every day ... at each and every break and at the conclusion of the day ... not to read or listen or see anything reflecting on this matter in any way and there has been no indication that the jurors did not comply with that directive by the Court.[48]

C. Voir Dire

The court held two status conferences to work

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[45] R8-1009 at 2.

[46] *Id.* at 5.

[47] *Id.*

[48] R120 at 13894-95.

out a two-phase plan for voir dire.[49] In phase one, 168 jurors were screened for problems such as language and hardship through a written questionnaire and oral voir dire questions.[50] In phase two, the 82 remaining prospective jurors were individually questioned regarding media exposure, knowledge and opinions of the case, the Castro government, the United States policy toward Cuba, the Elian Gonzalez case, the Cuban exile community and its reaction to the case, including a possible acquittal.[51]

On the first day of voir dire, the district court addressed isolating the jurors following their exposure to a press conference held by the victims' families on the courthouse steps and their approach by members of the press.[52] The trial judge instructed that she would no longer permit the victims' families to be present during voir dire "if there are efforts made to pollute the jury pool"[53] and instructed the government to speak to the victims' families regarding their conduct.[54] The court also noted that,

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[49] 1SR1 at 5; 1SR2.

[50] R6-766; R22.

[51] The district court disqualified 79 of the 168 venire persons for cause, 32(19%) in Phase 1 and 22(27%) in Phase 2 for Cuba-related animus.

[52] R22 at 111-16; R62 at 6575-76.

[53] R22 at 113.

[54] R22 at 111-16. During the trial, Hernandez moved to enforce the gag order and alleged that two of the government witnesses had violated the order by holding a press conference with the family of one of the victims. R7-938. The district court issued a "narrowly tailored gag order" applicable to the "all

because some of the potential jurors were approached by news media with cameras, she would question them regarding their discussions with the media and instruct the marshals to accompany the jury, with their juror tags removed, as they left the building.[55] The district court then extended the gag order to cover the witnesses and the jurors.[56]

Later that same day, a copy of the Miami Herald which contained an article about the case was found in the jury assembly room.[57] The next day, after Hernandez's attorney commented that the previous day's article was "disturbing," Guerrero's counsel mentioned that he had viewed one of the potential jurors reading the article while in the courtroom.[58] The district judge responded that "the issue is not whether [venire]persons have read or been exposed to publicity about the case of the defendants, but whether they have formed an opinion based upon what they have read. We will go into all of this as we go through individual voir dires."[59] As voir dire

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[trial] participants, lawyers, witnesses, family members of the victims" clarifying that the order extended to "statements or information which is intended to influence public opinion or the jury regarding the merits of the case." R7-978 at 7; R64 at 6759-60.

[55] R22 at 111-12.

[56] R7 at 978 at 2-3; R21 at 117-19; R22 at 119.

[57] R21 at 171.

[58] R23 at 195, 196-97. This juror was later stricken for cause as a result of his personal knowledge of Basulto. R24 at 537-40.

[59] R23 at 197.

continued, a potential juror who evidenced substantial prejudice was isolated and removed from the venire so as to eliminate contact with other potential jurors.[60]

During voir dire, the venire members were questioned about their political opinions and beliefs. Some venire members were clearly biased against Castro and the Cuban government. Peggy Beltran was excused for cause after stating that she would not believe any witness who admitted that he had been a Cuban spy.[61] When asked about the impact any verdict in the case might have, David Cuevas stated that he "would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba-anything dealing with communism they are against," he would suspect that "they would have a strong opinion" on the trial.[62] He explained that he

> probably would have a great deal of difficulty dealing with listening to the testimony. I would probably be a nervous wreck, if you want to know the honest truth. I could try to be as objective as possible and be as open minded as possible, but I would have some

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[60] *Id.* at 300, 302-04, 307, 310.

[61] R25 at 782, 789.

[62] R26 at 1068-69.

> trouble dealing with the case. I guess I would be a little bit nervous and have some fear, actually fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large.[63]

James E. Howe, Jr. expressed concern that, "no matter what the decision in this case, it is going to have a profound effect on lives both here and in Cuba."[64] He believed that the Cuban government was "a repressive regime that needs to be overturned," was "very committed to the security of the United States," and "would certainly have some doubt about how much control [a member of the Cuban military] would have over what they would say [on the witness stand] without some tremendous concern for their own welfare."[65] Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, was "concern[ed] how ... public opinion might affect [his] ability to do his job" because he dealt with a lot of developers in the Hispanic community and knew that the case was "high profile enough that there may be strong opinions" which could "affect his ability to generate loans."[66] Potential juror Luis Mazza said that he did not like the Cuban government and asked "how could you believe" the testimony of an individual connected with the current Cuban

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[63] *Id.* at 1070.

[64] R27 at 1277.

[65] *Id.* at 1278, 1274, 1273.

[66] R26 at 1057, 1059, 1073.

government.[67] Jenine Silverman believed that "Fidel Castro is a dictator" and that there were "things going on in Cuba that the people are not happy about." [68] Jose Teijeiro thought that Castro had "messed up" Cuba which was "a very bad government ... perhaps one of the worst governments that exist ... on the planet."[69]

Other venire members indicated negative beliefs regarding Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury. Belkis Briceno-Simmons said she held a "[v]ery strong" opinion and did not believe in the Cuban system of government but did not feel that it would affect her ability to render a verdict.[70] Ileana Briganti thought she could be impartial, but admitted that "it would be difficult" and that she did not know if she "could be fair."[71] She said that the case was discussed "every time my [Cuban born] parents have visitors over" and that she knew she would be "a little biased" in favor of the United States as she did not agree with "communism." [72] David Buker stated that he believed that "Castro is a communist dictator and I am opposed to communism so I would like to see him gone and a democracy

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[67] R27 at 1166, 1168.

[68] R28 at 1452-53.

[69] R26 at 1001-02.

[70] R25 at 880.

[71] *Id.* at 829-31, 834-39.

[72] *Id.* at 829, 831, 834.

established in Cuba."[73] Haydee Duarte, who was born in Cuba and immigrated to the United States with her family in the late 1950s-early 1960s, had three relatives who were involved in the Bay of Pigs invasion and her husband had participated in the Mariel boat lift[74] to rescue his sister and her family from Cuba.[75] Although she stated that she would be impartial, she said that she saw "Castro as a dictator."[76] Maria Gonzalez, a Cuban immigrant, said that she did "not approve of the regime ... in Cuba" and was "against communism" but believed she could serve impartially.[77] She remembered the news from the television and the Miami Herald about the planes being shot down. [78] Rosa Hernandez said that,

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[73] *Id.* at 743. Buker was subsequently seated on the jury and named as its foreperson. Although the government notes that Campa's attorney commented that Buker was "uninvolved or personally disconnected from the experience [of a Cuban]" and that his "general philosophical problem with communism" was "perfectly okay," Campa's attorney's comment was made in the context of his argument concerning striking for cause another juror whose responses were "rooted in personal experience." *Id.* at 851.

[74] The Mariel boatlift was a "freedom flotilla" in 1980 in which at least 114,900 Cuban political refugees left Cuba through the harbor of Mariel on boats for resettlement in the United States. *See United States v. Frade,* 709 F.2d 1387, 1389 (11th Cir.1983).

[75] R27 at 1240-41.

[76] *Id.* at 1242-47.

[77] R25 at 790-96.

[78] *Id.* at 795.

although her father left Cuba because of communism and she believed that the Cuban government was "oppressive," she believed that she would not be prejudiced.[79] Sister Susan Kuk was the principal of the predominantly (90 percent) Cuban high school attended by the daughter of one of the killed BTTR pilots.[80] She visited the pilot's home and attended his funeral.[81] Despite her relationship with the pilot's daughter, Kuk thought she "could be fair" although "it would be a little difficult."[82] Lilliam Lopez, was born in Cuba and immigrated to the United States with her family, stated that she was "always for the U.S." and "against the Republic of Cuba," did not like Cuba being a communist country, and had relatives living in Cuba.[83] She had a problem with the case because it involved "espionage against the U.S." but indicated that she could set aside her feelings to serve on the jury.[84] John McGlamery commented that he had "no prejudices" but "live[d] in a neighborhood where there [we]re a lot of Cubans" and was "acquainted with people that come from Cuba. That is universal in Dade County."[85] When asked whether he would be concerned about community sentiment if

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[79] R27 at 1227-32.

[80] R24 at 519-21.

[81] *Id.* at 520-21.

[82] *Id.* at 521-22. The district court denied the defendants' request that Sister Kuk be excused for cause. *Id.* at 534-36.

[83] R27 at 1148-50.

[84] *Id.* at 1149, 1151-58.

[85] R26 at 1011, 1012.

he were chosen as a juror, he "answer[ed] ... with some care .... [i]f the case were to get a lot of publicity, it could become quite volatile and ... people in the community would probably have things to say about it."[86] He stated that "it would be difficult given the community in which we live" "to avoid hearing somebody express an opinion" on the case and to follow a court's instruction to not read, listen to, or otherwise expose himself to information about the case.[87] His opinion about the Cuban government was "not favorable" as it was "not a democracy" and was "guilty of assorted [human rights] crimes."[88] Hans Morgenstern initially said that he did not "think he would have any sort of prejudice[ ]" against defendants who were agents of the Cuban government but could not say for certain because of "[t]he environment that we are in. This being Miami. There is so much talk about Cuba here. So many strong opinions either way."[89] He later, however, admitted to having biases against the Cuban government, which he believed was "anti-American" and "tyrannical," and to having "an obvious mistrust ... of those affiliated with the [Cuban] government."[90] He also indicated that he would be concerned about returning a not guilty verdict because "a lot of the people [in Miami] are so right wing fascist," because he would face "personal criticism" and media

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[86] *Id.* at 1012

[87] *Id.* at 1018-19.

[88] *Id.* at 1013.

[89] *Id.* at 1021-22.

[90] *Id.* at 1023, 1027-28, 1032.

coverage, and because he had concerns for what might happen after a verdict was returned.[91] He believed the case to be "a high profile case" and that he had been videotaped by the media when leaving the courthouse.[92] Angel De La O, who was born in Cuba and immigrated to the United States with his parents, initially stated that he did not think he "could make a fair judgment" in the case and would be prejudiced because he had "a lot of family ties in Cuba" including uncles, aunts, and cousins but later answered that he could set aside his concerns if selected for the jury.[93] He was troubled about returning a verdict in the case based on his concern for something happening to his "family ... in Cuba" and the notoriety of the case in Miami.[94] He also said that he had "heard a lot about the case ... on the news [and from] people talking about" it.[95] Connie Palmer believed that Castro was "a very bad person" and, when asked whether her opinion regarding the Cuban government would affect her ability to fairly weigh the evidence, answered "I don't think so.... I don't know. I have lived in South Florida for 36 years and I have seen many changes."[96] Palmer had known Sylvia Iriondo, who had been a passenger in Basulto's airplane on the day of the shoot-down and who was

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[91] *Id.* at 1024-27, 1030.

[92] *Id.* at 1026.

[93] R27 at 1139-41, 1143-48.

[94] *Id.* at 1142.

[95] *Id.* at 1140, 1146-47 (O remembered reading about the case but did not remember specific information).

[96] R28 at 1424-25.

named as a government witness, for about eight years.[97] She also knew that Iriondo was "very involved with the Brothers to the Rescue and very strongly keeping the Cuban community together in Miami."[98] Joseph Paolercio did not think that it would affect his ability to be impartial but he "was not happy" with United States-Cuban relations following the Mariel boat lift.[99] He did not like the freedom that Cubans had to immigrate to the United States because immigrants from other countries were treated differently and "sometimes [he felt like] a stranger in [his] own country" when he needed to ask someone to speak English instead of Spanish.[100] Barbara Pareira had "many close Cuban friends," including her husband's business partner who was a member of a group that rescued Cubans fleeing the island.[101] She believed that she could be impartial but had concerns about returning a verdict in Miami "because of the Cuban population here."[102] She "was a little distressed with the way that the [Cuban] exile community handled" the Elian Gonzalez matter because she did not "like the crowd mentality, the mob mentality that interferes with what I feel is a

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[97] *Id.* at 1433.

[98] *Id.* at 1437. The district court denied the defendants' request to strike Palmer for cause. R28 at 1442.

[99] R25 at 818-22.

[100] *Id.* at 820.

[101] R27 at 1118-19, 1121-23, 1175-76.

[102] *Id.* at 1119-28, 1177.

working system."[103] She strongly believed that the Cuban government was an oppressive dictatorship.[104] Pareira remembered news reports regarding "the planes being shot down" and several men dying, and that it was a "very bad situation" and frightening because of the possibility of military action.[105] Sonia Portalatin had a "strong" opinion about the Cuban government because she was "against communism."[106] Leilani Triana testified that, although her parents were from Cuba and her grandfather had been politically involved in Cuba before Castro, she could be impartial.[107] Eugene Yagle admitted having "a strong opinion" about the Cuban government as he could not "reconcile [him]self to that form of Government."[108]

Finally, other venire members espoused indifference toward Castro or the Cuban government. John Gomez had traveled to Cuba with his family "to take goods" and medicines to friends and had friends who frequently traveled to Cuba; he knew of no reasons why he should not serve on the jury.[109] He remembered hearing or reading "years

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[103] R27 at 1120, 1122.

[104] *Id.* at 1120.

[105] *Id.* at 1126, 1176-77.

[106] R25 at 861. Portalatin was subsequently seated as a juror.

[107] R27 at 1249-50.

[108] *Id.* at 1296-97. Yagle was subsequently seated as a juror.

[109] R25 at 841-43.

back" "something about Brothers to the Rescue" and someone in the group who was a spy for the Cuban government.[110] Luis Hernandez, who had family in Cuba, thought he could be fair, but was unable to say whether he would be able to believe a witness who was a member of the communist party in Cuba.[111] Miguel Hernandez's parents and grandparents had immigrated from Cuba and he had distant relatives who remained in Cuba but he had no opinions regarding the Cuban government, the trial, or the publicity surrounding it.[112] Florentina McCain felt sympathy for the people living in Cuba but believed that she would be impartial as a juror.[113] She knew from the media that "airplanes were shot down in Cuba a couple of years ago" and that "some families ... gathered to remember the anniversary of the incident" a few weeks before voir dire.[114] Michelle Peterson also had concerns about community reaction to a verdict because she did not "want rioting and stuff to happen like what happened with the Elian case. I thought that got out of hand."[115]

After one potential juror was excused for cause because he had attended the funeral for a victim of the shoot-down, Hernandez moved to have another potential juror, Sister Kuk, excused for the same

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[110] *Id.* at 846.

[111] R27 at 1301-08.

[112] *Id.* at 1134-39.

[113] R26 at 990-96.

[114] *Id.* at 995.

[115] R26 at 938, 945.

reason. The government opposed this request to strike,[116] maintaining that Sister Kuk attended the service as a professional, and that "[t]here were masses after the shoot-down all over town and numerous people attended."[117]

Many of the potential jurors who had personal contact with the victims, their family members, and BTTR were not questioned during Phase II or were excused for cause.[118] For example: potential juror Jessica de Arcos knew Rita and Jose Basulto;[119] potential juror Daniel Fernandez knew Jose Basulto;[120] potential juror Tim Heatly knew Jose Basulto;[121] potential juror Sister Kuk knew government witness Marlene Alejandre, the widow of one of the killed BTTR pilots;[122] potential juror Caroline Rodriguez knew Marlene Diaz, the daughter of one of the BTTR victims.[123] The defendants also used a peremptory challenge to excuse Lazaro Barreiro, a former national bank examiner, who had assisted the United States Attorney's office in Miami

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[116] R24 at 534.

[117] *Id.* at 535.

[118] The victims' family members attended the trial, and were seated in a designated area in the courtroom. R25 at 717-18.

[119] R21 at 139; R23 at 251.

[120] R24 at 458, 508-10.

[121] R21 at 139; R23 at 254.

[122] R24 at 458.

[123] *Id.* at 373, 385-86.

for three years during a grand jury investigation.[124] Potential juror Placencia knew many of the named witnesses, and had helped raise money for BTTR while working for one of the local Cuban radio stations.[125] The district court granted the defendants additional peremptory challenges, for a total of 18, due to the "number of very close decisions made by the Court" on challenges for cause on jurors whose claims of impartiality were difficult to believe.[126] The defendants used 16 of their peremptory challenges to excuse jurors whose answers revealed biases against them.[127] The government exercised its peremptory challenges as to the three prospective jurors who failed to express negative views toward Cuba.[128] Each of the Cuban-American prospective jurors was eliminated, despite the government's reverse *Batson* challenge.[129] Following voir dire, although complimenting the district court on the conduct of voir dire, Medina's attorney indicated his concern that there were three women seated on the jury who exemplified Professor Moran's opinion that certain

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[124] R25 at 655, 690, 709.

[125] *Id.* at 682-84.

[126] R27 at 1254, 1382.

[127] *Id.* at 1375-84; R28 at 1513; R29 at 1564; 1SR1 at 5-6, 11.

[128] R25 at 776-70, 809-12; R26 at 937-41.

[129] R28 at 1508-11; *see Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (holding that the Equal Protection Clause guarantees that members of a defendant's race are not excluded from a defendant's jury on the basis of race).

community members who were subjected to community pressures were unable to admit their underlying prejudices.[130]

From the beginning of voir dire until the completion of the trial, the prospective and actual jurors[131] were admonished not to discuss the case with anyone and to have no contact with media accounts or anything else related to the case.[132] The jurors were also instructed about the presumption of innocence.[133]

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[130] R27 at 1373-76.

[131] The selected jurors were Diana Barnes, R24 at 601-02; R25 at 800-05; Foreperson David Buker, R24 at 555, 561-62, 571, 590; R25 at 741-49; Richard Campbell, R22 at 60; R26 at 1032-39; Migdalia Cento, R22 at 69-70; R27 at 1128-33; R29 at 1556, 1559-62; Omaira Garcia, R25 at 659-61, 885-91; Sergio Herran, R22 at 147-52; R27 at 1219-25; Wilfred Loperena, R22 at 41-43, 88; R26 at 969-75; Juanito Millado, R22 at 15, 66; R27 at 1105-17; R28 at 1517-19; Gil Page, R25 at 556, 574, 583-87; R25 at 737-41; Elthea Peeples, R22 at 38-40; R26 at 956-62; Sonia Portalatin, R24 at 619; R25 at 858-65; and Deborah Vernon, R22 at 125, 142-43, 147, 153; R27 at 1233-39. Alternates were Marjorie Hahn, R22 at 131; R23 at 204-05, 250-51; R27 at 1342-50; Beverly Holland, R23 at 210-14, R27 at 1355; Miguel Torroba, R23 at 204; R27 at 1334-42; and Eugene Yagle, R22 at 144, 165-67; R27 at 1294-1300; R28 at 1517-20; R29 at 1553-57, 1601-02, 1638. Millado was excused due to family illness before the jurors were empaneled; Yagle was seated in his place. R29 at 1550-57, 1601-02, 1638.

[132] R21 at 44-45; R22 at 119; R116 at 13492-93.

[133] R21 at 26.

D. The Media

Throughout the trial, the district court worked at controlling media access. During a discovery hearing, the district court reminded the parties and their attorneys that they were to refrain from releasing information or opinions which could interfere with a fair trial or prejudice the administration of justice.[134] The district judge stated that she was "increasingly concerned" that various persons connected with the case were not following her order based on the "parade of articles appearing in the media about this case."[135] In particular, she commented that an article about Medina's pending motion to incur expenses to poll the community "was the lead story in the local section on Saturday in the Miami Herald."[136] She warned all counsel and agents associated with the case that appropriate action would be taken and that the U.S. Attorney's Office would be held responsible.[137] She directed that "[t]his case ... not ... get advertised anywhere in the media for any reason whatsoever."[138]

As the case proceeded to trial, media attention expanded. On the first day of voir dire, the district court observed that one of the victims' families conducted a press conference which was filmed outside of the courthouse during the lunch break and

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[134] R18 at 14.

[135] *Id.*

[136] *Id.* at 15.

[137] *Id.* at 14-15.

[138] *Id.* at 17.

that some of the jurors were approached by the media.[139] She then acknowledged that "[t]here is a tremendous amount of media attention for this case."[140]

The district court extended the sequestration order to cover the jury and witnesses to ensure that they had no contact with the media,[141] sealed voir dire questions during the jury selection,[142] and limited the sketching of witnesses for their protection.[143] It permitted, however, the media "access to all the evidence admitted into the trial record."[144]

E. The Trial

The case proceeded to a jury trial on 27 November 2000. On 30 November, Hernandez's attorney raised the issue of the seating in the courtroom, specifically, the prejudice resulting from the assigned seating of the victims' families and the lack of seating available for the defendants' families.[145] He argued that, as witnesses, the victims' families should not be seated behind the government.[146] The district court then reassigned the

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[139] R21 at 111, 117-19; R22 at 111-16.

[140] *Id.* at 115.

[141] R22 at 119.

[142] R24 at 625-26.

[143] R9-1126.

[144] *Hernandez,* 124 F.Supp.2d at 704; R7-808.

[145] R25 at 712-13.

[146] *Id.* at 714.

seating, so that the victims' families were seated in a row removed from the government and the defendants' families were given assigned seats.[147]

Defense witness Jose Basulto, a Cuban-American who had worked with the Central Intelligence Agency to infiltrate the Cuban government, testified that he was "dedicated to promot[ing] democracy in Cuba."[148] When questioned about his activities during 1995, he responded by asking Hernandez's defense counsel whether he was "doing the work" of the Cuban intelligence community. [149] At the request of Hernandez's attorney, the trial judge struck the comment and the jury was instructed to disregard the comment.[150] Following a recess, Campa's counsel argued that Basulto's insinuation was

> precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue, and ... in the aftermath of the events of February 24, 2001, we renewed our motion for ... a change of venue based on the pretrial publicity, the publicity that has been generated during the course of the trial and our concern with our ability to obtain a fair trial in this community given that background.
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> This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is

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[147] *Id.* at 717-18.

[148] R80 at 8822, 8825.

[149] R81 at 8945.

[150] *Id.*

doing his job, of being a communist. It is unfortunate, it is the type of red baiting we have seen in this community before and we are concerned how it affects the jury. Here we are asking the jury to make a decision based on the evidence and only based on testimony and we are left and they are left with wondering what will they be accused. These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community, who have access to the media, are going to call them of being Castro sympathizers, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial.

When someone can on the stand gratuitously and maliciously accuse [Hernandez's attorney] of being a spy[, it] sends a message to these ladies and gentlemen if they don't do what is correct, they will be accused of being communists too. These people have to go back to their homes, their jobs, their community and you can't function in this town if you have been labeled a communist, specially by someone of Mr. Basulto's stature.[151]

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[151] *Id.* at 8947-49.

He asked that the court consider this event and the other events in its consideration of the pending motion for change of venue.[152]

F. The Evidence at Trial

Campa, Gonzalez, Guerrero, Hernandez, and Medina, as well as others, were members of a Cuban government intelligence operation identified as "La Red Avispa," or the Wasp Network, which was charged with infiltrating, monitoring, and disrupting the work of certain militant Cuban exiles in South Florida. [153] Directorate Intelligence ("DI") Officers

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[152] *Id.* at 8949. In the alternative, counsel for Campa and Hernandez requested a jury instruction addressing Basulto's attack on Hernandez's counsel's credibility. R81 at 8949-53. The court found that the statements could affect "how the jurors view" Hernandez's counsel and instructed the jury that Hernandez's attorney's "job is to provide a vigorous defense for his client. Mr. Basulto's statement regarding [Hernandez's counsel] was inappropriate and unfounded." *Id.* at 8955.

[153] Govt. Exs. DAV 109 at 6-7; DG 101 at 2, 102 at 30, 117, 137 at 2. The Cuban government maintains the following intelligence operations: the Directorate of Military Intelligence ("DIM") under the Ministry of Revolutionary Armed Forces, and the Directorate of Intelligence ("DI") and the Directorate of Counterintelligence ("DCI") under the Ministry of the Interior. R44 at 3700-05, 3707. The DI collects intelligence outside of Cuba, focusing primarily on the United States; the DCI is responsible for intelligence regarding counter-revolutionary activities inside of Cuba. R44 at 3704, 3707. The DI is organized into many operational components, including M-I which handles non-military United

Hernandez, Medina, and Campa supervised agents, including agents Gonzalez and Guerrero.[154] The Wasp Network reported information to Cuba on: (1) the activities of anti-Castro organizations in Miami-Dade County;[155] (2) the operation of United States military installations including those at Boca Chica Naval Air Station ("NAS"), [156] MacDill Air Force Base

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States government agency intelligence, M-III which handles the collecting, correlating, and reporting of gathered information, M-V which handles the operation and support of "illegal" intelligence officers ("IO" s) who enter the United States illegally with a false identity and identification, M-XIX which handles counter-revolutionary individuals and organizations outside of Cuba. R44 at 3708-11, 3713; R46 at 3957.

[154] Govt. Exs. DG 107 at 23; DAV 116 at 6. The IOs, as intelligence officers, were full-time employees of the DI who were trained in all aspects of intelligence work. R44 at 3719-20. Agents were individuals who worked as support for the IOs by providing information. The agents were paid for that information, but were not employees of the DI. R44 at 3720. The agents were supervised by other agents or legal or illegal officers. *Id.*

Guerrero functioned as both an IO and, in penetrating the Naval Air Station ("NAS") at Key West, Florida, as an agent. Govt. Ex. DAV 122 at 6, 10. While working at the NAS, he traveled at least twice to the DI headquarters in Cuba for training and debriefing on military matters. Govt. Exs. DG 108 at 31-33; DL 101 at 4; DL 103 at 13; DL 104 at 4; HF 136.

[155] R45 at 3870-71; Govt. Exs. DG 107 at 58-67, 129

[156] The NAS is the southernmost military base in the continental United States and is located about 90 miles from Cuba. R74 at 7910, 7920-21. It has an active airfield and several

("MacDill"), Barksdale Air Force Base ("Barksdale"), and the United States Southern Command ("SouthCom");[157] and (3) United States political and law enforcement activities.[158] The group was also charged with intimidating Cuban-American individuals and organizations with threatening letters and telephone calls;[159] penetrating United States Congressional election activities;[160] scouting and assessing potential sources of information and possible new recruits;[161] and carrying communications, cash, and other items between

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complexes of buildings used by the Air Force, Army, Coast Guard, Marines, and Navy. *Id.* at 7908-10. The public has access to the base roadways, but not to its buildings. *Id.* at 7912-13, 7915-17. The base is the primary United States military installation for conflicts in the Caribbean, and is used for national defense including intermediate and advanced combat air training and drug interdiction. *Id.* at 7910-11, 7920-22.

[157] Govt. Exs. HF 103; DG 107 at 12-20; DG 108 at 2-3. Southcom is one of the United States Department of Defense's five centralized geographic command centers for unified military operations within an area of responsibility ("AOR"). R46 at 4009-10. As of 1987, Southcom's AOR covered the Caribbean, including Cuba, and Latin America. *Id.* at 4012-14. Southcom's Miami headquarters is a secure, tightly-controlled facility housing "open storage" classified top secret, secret, and confidential materials. R46 at 4018-19.

[158] R103 at 11907-08, 11911-13.

[159] R45 at 3793-99; Govt. Exs. DG 108 at 28-29; DG 127 at 7-8; DC 101 at 11-19; Dho 101 at 2-6.

[160] Govt. Ex. HF 143.

[161] Govt Exs. DG 141 at 6-7; DAV 118 at 14-19.

Miami and other United States-based DI officers and agents.[162] None of the Wasp Network members notified the United States Attorney General that they were acting as agents of the Cuban government.[163] Members of the Wasp Network and the DI frequently communicated and delivered items through the Cuban delegations' diplomatic cover.[164]

The Wasp Network members evaded detection through the use of false identities and code names, counter surveillance for contacts and communications, and DI decrypted written and broadcast communications.[165] Campa, Hernandez, and Medina falsely identified themselves through elaborate "legends," or biographies, which were supported by documents provided by the DI, and used these documents when they dealt with United States border and law enforcement personnel and when they obtained drivers licenses, passports, and other identification.[166] They also had back-up, or "reserve,"

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[162] Govt. Exs. 384, 865.

[163] R61 at 6404-15.

[164] R73 at 7821-46; R74 at 7871-78; Govt. Ex. HF-144.

[165] R40-3197; R43 at 3628-29; R44 at 3731-32, 3764-65; Govt. Exs. 1A; DAV 101 at 29; DAV 121; DG 118 at 2-3; HF 101-144.

[166] R33 at 2145; Govt. Exs. 4; 5-1; 5-2; 5-3; 5-4; 8-1; 8-3; 8-4; 11; 12-3; 12-4; 12-5; 12-8; DAV 118 at 7-12; DG 105 at 2-16; DG 125; DG 135 at 3-11; DG 136. Under their false identities, Campa was also known as Fernando Gonzalez Llort, Oscar, or Vicky, R101 at 11714; Gonzalez was known as Agent Castor; Guerrero was known as Lorient, Govt. Exs. DAV 102

false identities in which the agents used the names and other identification of United States citizens who had visited Cuba. The agents used these back-up identities when they traveled or if their primary "legend" was compromised.[167]

The Cuban exile groups of concern to the Cuban government included Alpha 66,[168] Brigade 2506,

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at 1; DAV 129 at 2; Hernandez was known as Girardo, Giro, or Manuel; and Medina was known as Allan or Ramon Labanino; R101 at 11721-23.

[167] R34 at 2321-40; R44 at 3724-26; R49 at 4677-78; R66 at 6833-35; R69 at 6981-7016; Govt. Exs. 5-6; 6; 7; 9; DAV 110 at 2; DAV 118 at 12-14; DG 126 at 9-10; SF 14; SF 15; SG 34; SG 53.

[168] Orlando Suarez Pineiro, a Cuban-born permanent resident of the United States, served as a captain in Alpha 66 for about six years. R90 at 10373-74. On 20 May 1993, he and other Alpha 66 members were arrested while on board a boat with weapons in the Florida Keys. *Id.* at 10391-92, 10397-401, 10415-16. The weapons included pistols with magazines and ammunition, 50 caliber machine guns with ammunition, rifles with clips, and an RK. *Id.* at 10397-400. Pineiro was tried and found not guilty of possession of a Norinko AK 47 rifle and two pipe bombs. *Id.* at 10424. Pineiro and other Alpha 66 members were also stopped and released while on board a boat on 10 June 1994, but their weapons and boat were seized. *Id.* at 10409, 10411-14. The seized weapons included a machine gun and AK 47s. *Id.* at 10411-14.

United States Customs Agent Ray Crump testified that, on 20 May 1993, he participated in the arrest of several men whose boat was moored at a marina in Marathon, Florida. *Id.* at 10429. The boat held: several handguns; automatic rifles, including one fully automatic rifle; four grenades; two pipe bombs; a 40 millimeter grenade launcher; a 50 caliber Baretta semiautomatic rifle; and a bottle printed with "Alpha 66" which contained "Hispanic propaganda ..., ... crayons, razors, stuff of

that nature." *Id.* at 10431-33, 10434. He also participated in an investigation of a vessel south of Little Torch Key, about ten miles south of Marathon, Florida, on 11 July 1993. *Id.* at 10433-34. The vessel was carrying four men, numerous weapons, and "Alpha 66 type propaganda." *Id.* at 10434. The weapons on the vessel included an AR 15, two 7.6 millimeter rifles and ammunition magazines. *Id.* at 10438. Following this investigation, the men were not arrested, and the weapons and vessel were not seized. *Id.* at 10438-39.

United States Customs Agent Rocco Marco said that he encountered four anti-Castro militants on 27 October 1997, after their vessel, the "Esperanza", was stopped in waters off Puerto Rico. R90-10449. He explained that U.S. Coast Guard officers searched the vessel and found weapons and ammunition "hidden in a false compartment underneath the stairwell leading to the lower deck." The officers found food, water bottles, camouflage military apparel, night vision goggles, communications equipment, binoculars, two Biretta 50 caliber semiautomatic rifle with 70 rounds of ammunition, ten rounds of 357 hand gun ammunition, and magazines and clips for the firearms. R90 at 10453-59. The leader of the group, Angel Manuel Alfonso of Alpha 66, confessed to Rocco that they were on their way to assassinate Castro at ILA Marguarita, where he was scheduled to give a speech. *Id.* at 10452, 10467. Alfonso explained to Rocco that "his purpose in life was to kill [Castro]" and that it did not "matter if he went to jail or not. He would come back and accomplish the mission." *Id.* at 10468.

Debbie McMullen, the chief investigator with the Federal Public Defender's Office, testified that Ruben Dario Lopez-Castro was an individual associated with a number of anti-Castro organizations, including PUND and Alpha 66. R97 at 11267. Lopez and Orlando Bosch planned to ship weapons into Cuba for an assassination attempt on Castro. *Id.* at 11254. Bosch had a long history of terrorist acts against Cuba, and prosecutions and convictions for terrorist-related activities in the United States and in other countries. Campa Ex. R77 at 18-35.

BTTR, Independent and Democratic Cuba ("CID"), Comandos F4,[169] Commandos L, CANF,[170] the Cuban

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[169] Rodolfo Frometa testified that, although he was born in Cuba, he was a citizen of the United States. R91 at 10531. He explained that he was a United States representative of a Cuban organization called Comandos F4, which was organized "to bring about political change in a peaceful way in Cuba" and included members both inside of and exiled from Cuban. *Id.* at 10532. He identified himself as the Commandate Jefe, or commander-in-chief, of F4 in the United States. *Id.* at 10534. He stated that, since 1994, all F4 members must sign a pledge that they will "respect the United States laws" and not violate either Florida or federal law. *Id.* at 10535.

> Frometa stated that, before Comandos F4, he was involved with Alpha 66, another organization supporting political change in Cuba, from 1968 to 1994 and served as their commander "because of his firm and staunch position ... against Castro." R91 at 10541-42. As a member of Alpha 66, Frometa was stopped by police officers and questioned regarding his possession of weapons. He was first stopped on 19 October 1993, while in a boat which had been towed to Marathon, Florida, and was questioned regarding the onboard weapons. *Id.* at 10564-66. The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini 14 rifle caliber 223 with a scope. *Id.* at 10564-66. On 23 October 1993, he was again stopped while he and others were driving a truck which was pulling a boat toward the Florida Keys. *Id.* at 10542-44. Frometa explained that they were carrying weapons to conduct a military training exercise in order to prepare for political changes in Cuba or in the case of a Cuban attack on the United States, and once the officers determined that their activities were legal, they were sent on their way. *Id.* at 10544-48, 10563. The weapons were semi-automatic and included an R15, an AK 47, and a 50 caliber machine gun. *Id.* at

10545-47. Frometa and several other Alpha 66 members were once more stopped and released on 7 February 1994 for having weapons on board his boat. Because a photograph of the group was "published in the newspapers" "[e]verybody in Miami" knew that they were released. *Id.* at 10569. On 2 June 1994, Frometa, by then a member of F4, was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" in order to kill Castro and his close associates in Cuba. *Id.* at 10571-72, 10574-76, 10579-80. Frometa acknowledged that the use of the C4 explosive could have injured Cubans who worked at a military installation, *Id.* at 10579, but that they had caused the "death of four U.S. citizens, the 41 people including 20 or 21 children who died; the mother of the child Elian, plus thousands and thousands who have died in the Straits of Florida." *Id.* at 91-10581.

[170] Percy Francisco Alvarado Godoy and Juan Francisco Fernandez Gomez testified by deposition. R95 at 11012; R99 at 11558-59. Godoy, a Guatamalan citizen residing in Cuba, described attempts between 1993 and 1997 by affiliates of the CANF to recruit him to engage in violent activities against several Cuban targets. 2SR-708, Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64. He said that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. *Id.* at 44-46. In connection with the same plot, he flew to Guatemala in November 1994 to obtain the explosives and detonators to be used and met with, among others, Luis Posada Carriles, a Cuban exile with a long history of violent acts against Cuba. *Id.* at 49, 52, 56-58. Unknown to the CANF members, Godoy was cooperating with the Cuban authorities, denounced their plans, and later testified at the trial of one of the conspirators in Cuba. *Id.* at 22, 24, 26, 31, 58-59, 65, 70, 76, 81-82, 86, 90, 109.

Gomez, a citizen and resident of Cuba, described numerous attempts between 1993 and 1997 by persons associated with the CANF to recruit him to

American Military Council ("CAMCO"), the Ex Club, Partido de Unidad Nacional Democratica (PUND) or the National Democratic Unity Party (NDUP), and United Command for Liberation (CLU).[171] Alpha-66 ran a paramilitary camp training participants for an invasion of Cuba, had been involved in terrorist attacks on Cuban hotels in 1992, 1994, and 1995, had attempted to smuggle hand grenades into Cuba in March 1993, and had issued threats against Cuban tourists and installations in November 1993. Alpha-66 members were intercepted on their way to

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engage in violent activities against several Cuban targets. Gomez also testified that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. In 1996 and 1998, Gomez was approached by Borges Paz of the anti-Castro organization the Ex Club, 2SR-708, Att. 1 at 9, 12-14, 20, 39; Gomez said that Paz invited him to join their organization to build and place bombs at tourist hotels and at the Che Guevara Memorial in Santa Clara, Cuba. *Id.* at 16, 19, 22. After returning to Cuba, Gomez informed the Cuban authorities of the Ex Club's plans. *Id.* at 20, 35-36. As a result of his work for the United States government, Gomez said that he was estranged from his family in the United States, including a daughter in Florida, and had received threatening phone calls. *Id.* at 64-66.

[171] R83 at 9162, 9165-67; R90 at 10373-74, 10391-92, 10397-10401, 10409, 10411-14, 10415-16, 10429, 10431-34, 10449, 10452-59, 10467-68; R91 at 10541-42, 10544-48, 10563-66, 10571-72, 10574-76, 10579-80; R97 at 11267, 11291-97; 2SR-708, Att. 1 at 9, 12-14, 16, 19-20, 22, 35-36, 39; Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64; Campa Exs. R-29D, R-29F, R-29G, R-29H.

assassinate Castro in 1997. Brigade 2506 ran a youth paramilitary camp.[172] BTTR flew into Cuban air space from 1994 to 1996 to drop messages and leaflets promoting the overthrow of Castro's government. CID was suspected of involvement with an assassination attempt against Castro. Comandos F4 was involved in an assassination attempt against Castro. Commandos L claimed responsibility for a terrorist attack in 1992 at a hotel in Havana. CANF planned to bomb a nightclub in Cuba. The Ex Club planned to bomb tourist hotels and a memorial. PUND planned to ship weapons for an assassination attempt on Castro. Following each attack, Cuba had advised the United States of its investigations and had asked the United States' authorities to take action against the groups operating from inside the United States.[173]

The BTTR's flights over Cuba were of particular concern to the Cuban government. Sometime after 13 July 1995, the Federal Aviation Administration ("FAA") conveyed the Cuban government's threats to the BTTR that unauthorized planes flying into Cuban airspace would be forced to land or shot down.[174] On 9 and 13 January 1996, BTTR dropped thousands of leaflets into Cuba, which were printed with portions of the United Nations' Universal Declaration of Human Rights and which encouraged

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[172] R97 at 11296-97.

[173] Campa Exs. R-29C; R-29F; R-29H; GH Exs. 16C, 24.

[174] R83 at 9166-67.

Cubans to fight for their rights.[175] In January 1996, BTTR President and Director Jose Basulto appeared on a United States-controlled Radio Marti program broadcast into Cuba claiming responsibility for dropping leaflets earlier that month and stating that BTTR advocated the use of civil disobedience.[176] The Cuban government protested to the United States about the airspace violations, complained that the measures used by the FAA to impede such flights were insufficient, and noted that unauthorized flights would be interrupted by force.[177]

On 22 January 1996, the FAA's liaison to the State Department wrote the regional FAA office in Miami regarding these Cuban airspace violations. She stated that she had been advised of another unauthorized flight on 20 January, and that

> this latest overflight can only be seen as further taunting of the Cuban Government. State is increasingly concerned about Cuban reaction to these flagrant violations. They are also asking from the FAA what is this agency doing to prevent/deter these actions ... [and] our case against Basulto. Worst case scenario is that one of these days the Cubans will shoot down one of these planes and the FAA better have all its ducks in a row.[178]

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[175] R58 at 5919, 5922-23; Govt. Exs. HF 108 at G-3, 113 at G-3.

[176] GH Ex. 37 at 2-4, 6-8.

[177] GH Ex. 18E.

[178] GH Ex. 18F.

In early February 1996, a member of a delegation reviewing Cuban military activities was advised by the Cuban military that it was frustrated by the lack of a favorable response from the United States considering its repeated protests regarding the light civilian airplane flights from Florida which were violating Cuban airspace. [179] Thereafter, the delegation member met with officials from the United States Departments of Defense and State and advised them of what he perceived as a warning that Cuba was considering shooting down the flights.[180]

On 23 February 1996, the FAA issued a "Cuba Alert" to several United States agencies. In the alert, the FAA advised they had

> received a call from State Dept. indicating that since Brothers to the Rescue [BTTR] and its leader Basulto support and endorse the Concilio Cubano [an umbrella dissent organization] it would not be unlikely that the BT[T]R attempted an unauthorized flight into Cuban airspace tomorrow, in defiance of the GOC [Government of Cuba] and its policies against dissidents. State Dept. cannot confirm this will happen and is in touch with local law enforcement agencies to better determine what's the situation. I've reiterated to State that the FAA cannot PREVENT flights such as this potential one, but that we'll alert our folks in case it happens and we'll document it

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[179] R76 at 8198-99, 8203-04.

[180] *Id.* at 8204-05.

> (as best we can) for compliance/enforcement purposes.
>
> State has also indicated that the GOC would be less likely to show restraint (in an unauthorized flight scenario) this time around ….[181]

On 24 February 1996, Basulto scheduled a flight into the Florida Straits, toward Cuba, in search of reported rafters.[182] The flight plans were filed with the FAA and transmitted to Cuba.[183] At approximately 1:15 P.M., three BTTR aircraft departed from the Opa-Locka, Florida, airfield: N2506, carrying Basulto and others; N2456, piloted by Carlos Costa and carrying Pablo Morales; and N5485, piloted by Mario de la Pena and carrying Armando Alejandre.[184] At approximately 3:00 P.M., the planes crossed the 24th parallel, which marks the boundary between the Miami and Havana Flight Information Regions and is in international airspace. At this point, they communicated by radio with Havana Air Traffic Control ("Havana ATC") identifying themselves and their flights.[185] Within minutes of the crossing, Cuban military jet fighter aircraft sighted and pursued Costa's plane in international airspace.[186] At 3:20 P.M., Cuban

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[181] Def. Hernandez Ex. GH, composite 18G.

[182] R83 at 9161-65, 9167-70.

[183] *Id.*

[184] *Id.* at 9168-70; Govt. Exs. 478, 479.

[185] R83 at 9181-83; Govt. Ex. 475A at 2-3.

[186] Govt. Ex. 483 at 8-9.

military ground control radioed that the Cuban aircraft were "authorized to destroy." *Id.* Accordingly, the Cuban military aircraft fired on and destroyed the plane.[187] A few moments later, the Cuban fighter jet sighted the plane piloted by de la Pena and shot it down.[188] The shoot downs of the two BTTR planes were observed both by occupants of a fishing boat and by the crew and passengers onboard a cruise ship.[189] The bodies of the people in the aircraft, three of whom were United States citizens, were never recovered. Both planes were in international airspace, flying away from Cuba, when they were shot down; they had not entered Cuban airspace.[190]

Lieutenant Colonel Roberto Hernandez Caballero, of the Ministry of Cuba Department of State Security, testified that he investigated a number of terrorist acts in Havana and in other locations at Cuban-owned facilities during 1997.[191]

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[187] *Id.* at 10-11.

[188] *Id.* at 14-16.

[189] R53 at 5109-14, 5117-18; Govt. Ex. 483 at 5-7, 11, 13, 17-18, 20. The cruise ship was Royal Caribbean's "Majesty of the Seas" with about 2,600 passengers and 800 crew. R53 at 5084-86. The first officer on the ship explained that they were on the last leg of a weekly cruise about 24 nautical miles off the north coast of Cuba during the shootdowns. *Id.* at 5087-89, 5109-14. A videotape of the shootdowns made by a cruise ship passenger was apparently "played on TV many times." *Id.* at 5124.

[190] R53 at 5113-21, 5131-33; Govt. Exs. 440, 469B, 484.

[191] R93 at 10750-51, 10754-55, 10783-832. The acts included an explosion on 12 April 1997 which destroyed the bathroom and dance floor at the

He advised Medina of the attacks in April and directed that he "[s]earch for active information on [the acts] that [the Cubans with ties to the Cuban American Military Council ('CAMCO')] have, or any attempt for future similar actions [in Cuba] by CAMCO."[192] In September, Hernandez notified the Cuban authorities that he had received information that "one of the two brothers who had something to do with the bomb on [an Italian tourist who was

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discotheque Ache in the Media Cohiba Hotel, *Id.* at 10755, 10757, 10759; a bombing on 25 April 1997 at the Cubanacan offices in Mexico, R97 at 11318-19; the 30 April 1997 explosive device found on the 15th floor of the Cohiba Hotel, R93 at 10766-69, 10771; the 12 July 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies and did significant damage inside the hotels, *Id.* at 10786-88, 10795-801; the 4 August 1997 explosion at the Cohiba Hotel which created a crater in the lobby and destroyed furniture; *Id.* at 10802-05; explosions on 4 September 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant, *Id.* at 10807-09, 10820; and, the discovery of explosive devices at the San Jose Marti International Airport in a tourist van in the taxi dispatch area on 19 October 1997 and underneath a kiosk on 30 October 1997, *Id.* at 10824-30. The explosions on 4 September killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused property damage at all locations. *Id.* at 10809-13, 10815-20, 10822-23.

[192] R97 at 11316-18; Campa Exs. R57(a), R57(b) at 2, 59.

killed]" was available to meet for lunch and that "next week they [the terrorists] would try to place a bomb in one of the largest buildings [associated with tourism] in Cuba which is visited most by [Castro]."[193] Hernandez's contact was instructed to elaborate on the information that he had obtained.[194] As a result of the investigations, Caballero said that the Cuban Department of State Security arrested some individuals, but that he believed some of the individuals responsible for financing, planning, and organizing the explosions lived in the United States and had not been arrested.[195] Caballero explained that, in June 1998, he provided FBI agents with documentation and investigation materials regarding the terrorist acts between 1990 and 1998, and received the FBI's findings in March 1999.[196]

Hernandez worked in the United States from 1994 to 1998, supervising unregistered Cuban agents Juan Roque and Rene Gonzalez who both infiltrated the BTTR organization, and Operation Aeropuerto which was Guerrero's penetration of the NAS. In late 1995 and early 1996, Hernandez participated in a plan to have Roque return to Cuba to undermine the BTTR. He also directed an agent to apply for a job with Southcom,[197] and later supervised Operation

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[193] R97 at 11320-21.

[194] *Id.* at 11321; Campa Ex. R63 at 1.

[195] R93 at 10832, 10839, 10842.

[196] *Id.* at 10839-41; Campa Ex. R-33-MM.

[197] R40 at 3231-32, 3238-40; R46 at 4012-14; Govt. Exs. DG 103 at 3-4, HF 104 at G-3.

Suroc which was the agents' penetration of Southcom.[198] In late January 1996, he received a series of messages from the Cuban government announcing "Operacion Escorpion," which involved confronting the counter-revolutionary efforts of the BTTR in late January 1996.[199] In the messages, Roque and Gonzalez were directed to provide Cuba with specific information through codes regarding the BTTR flying missions; Roque and Gonzalez were advised not to fly on these missions.[200] Hernandez was later recognized for his "decisive" role in Operations Venicia and German, in which "the Miami right [was dealt] a hard blow."[201]

Hernandez also participated in the spread of disinformation. He was asked to mail DI-furnished letters, purporting to be from a "counterrevolutionary" organization which threatened members of Congress who supported lifting the embargo on Cuba in order to provoke the defeat of members of Cuban-American descent.[202] Hernandez suggested a number of projects in south Florida: making threatening phone calls to a newspaper publisher which appeared to come from a

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[198] Govt. Exs. DG 107 at 23-24, DG 108 at 2.

[199] Govt. Ex. HF 115 at G-3.

[200] *Id.;* Govt. Exs. 112 at 10; DG 104 at 2; HF 116 at G-3; HF 120 at G-3, 121 at G-3; HF 122 at G-3; HF 123 at G-3.

[201] Govt. Exs. HF 128-G03; DG 108 at 6, 8; HF 136-G-3. Operations Venicia and German involved Roque's extraction from the United States and return to Cuba to denounce BTTR.

[202] R49 at 4611-12; DG 102 at 42.

CANF supporter; testing BTTR's airplane security for sabotage feasibility; and publishing a book suggesting that BTTR founder Basulto knew in advance that his BTTR followers would be shot down over Cuba. [203] He asked Gonzalez to provide information to M-III[204] about funding for anti-Castro sabotage, disagreements in the Miami-Cuban community about the Pope's visit to Cuba, and disagreements within CANF over its internal leadership succession and future terrorist plans.[205] In August 1998, Hernandez reported to the Cuban government on information that he had learned from a newspaper article that Alpha 66 camp participants, armed with rifles and semiautomatic machine guns, simulated an attack on a Cuban air base, and that an identified individual had claimed to have participated in Cuban hotel bombings in 1992, 1994, and 1995.[206] He also shared the news from the article that Alpha 66 continued to prepare for attacks against Cuba, that some of the group's arsenal was located on an island behind Andrews Air Force Base, and that the group was attempting to obtain C-4 explosives to use during its next attack.[207]

Medina worked with Guerrero and assumed his

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[203] R49 at 4614-16; Govt. Exs. DG 107 at 52; DG 127 at 5; DG 139 at 10-11.

[204] *See supra* note 137.

[205] Govt. Ex. DC 101 at 19-21.

[206] R97 at 11291-93, 11295.

[207] *Id.* at 11294.

supervision from Hernandez in June 1997.[208] He also supervised Operation Suroc and worked with agents who had been recruited by Hernandez to penetrate Southcom.[209] In May 1997, Medina was asked by the DI to gather information regarding infiltrating various local, state, and federal agencies located in Florida, including military bases, the Coast Guard, the Immigration and Naturalization Service ("INS"), and the Federal Bureau of Investigation ("FBI").[210]

At some point, Campa took over supervision of several operations from Hernandez and Medina, including Operation Aeropuerto and Operation Suroc.[211] Campa admitted that he and several of his codefendants worked secretly on behalf of the Cuban government to gather and relay information concerning the activities of numerous local, extremist anti-Castro groups and individuals who had previously conducted terrorist acts against Cuba.[212] He was also directed to work on a number of operations, including Operation Rainbow/Arcoiris,

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[208] Ex. R52 at 4; Govt. Exs. DAV 123 at 47, 49; DG 109 at 17; DG 110 at 1.

[209] R40 at 3231-32, 3238-40; R41 at 3317; R46 at 4012-14; Govt. Exs. DG 108; DS 103 at 2, 4, 11; DG 110.

[210] Govt. Ex. DAV 113 at 1, 3-4.

[211] R49 at 4618-19; R31 at 3; R43 at 3; R51 at 9; R52 at 5-10; R84 at 20-27; R97 at 11242, 11252-53, 11277, 11279; Campa Exs. R22 at 26; R24 at 65, 74; Govt. Exs. DAV 118 at 1-5; DG 108 at 28-29; DG 127 at 7-8; HF 143.

[212] R91 at 10592-93.

Operation Brown/Morena, Operation Fog/Neblina, Operation Paradise/Paraiso, Operation Giron, and others. Operation Rainbow involved filming a meeting between CANF leader Orlando Bosch, Alpha 66 and PUND leader Ruben Dario Lopez and a Cuban agent to plan a shipment of weapons into Cuba for the proposed assassination of Castro; other participants included Campa, Hernandez, and two other Cuban agents.[213] Operation Brown required Campa to keep an eye on Bosch in order to learn his relationships and movements, and the places he frequented.[214] Operation Fog involved Campa and Medina monitoring the activities of Roberto Martin Perez, a member of the board of directions for the CANF, which the Cuban government believed was responsible for two July 1997 hotel bombings.[215] In Operation Paradise, Campa and others, including Rene Gonzalez and other Cuban agents, gathered information on the paramilitary activities of Cuban exile groups operating in the Bahamas, including CANF, Alpha 66, Cuba 21, BTTR, and individuals in those organizations.[216] Operation Giron was an attempt to infiltrate CANF, which involved Medina and later Campa as a temporary replacement for Medina.[217] Some of the unnamed operations included

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[213] R97 at 11253-55; Campa Ex. R24 at 8-9.

[214] R97 at 11268-69; Campa Exs. R22 at 26, R24 at 15-16, 19.

[215] *Id.* at 11263, 11270-71, 11273.

[216] *Id.* at 11274-77; Campa Ex. R24 at 21.

[217] R97 at 11277; Campa Exs. R19 at 11-13, 20-23, R20 at 2-4, R35 at 16, 20.

identifying and videotaping boats in the Miami River, obtaining information concerning Cuban exile paramilitary camps, and surveillance of various anti-Castro persons and groups. In July 1998, Campa and Hernandez, working with other Cuban agents, identified and videotaped two boats in the Miami River which were believed to contain weapons and explosives destined for Cuba.[218] The agents were instructed to consider disabling the boats by burning or damaging them or anonymously notifying the FBI about the boats.[219] Campa and Hernandez also unsuccessfully tried to locate the Comandos L camp F-4, near Clewiston, Florida, with directions provided to them by the Cuban government.[220]

The agents supervised by Campa and Medina operated with a separate small budget requiring approval by the authorities in Cuba, and the officers shared housing to economize.[221] Campa lived in an apartment owned by Hernandez from November 1997 until February 1998, and in an apartment shared with Medina from July until September 1998.[222]

Guerrero was listed as a part of a different operative base which carried out M-V[223] missions,

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[218] R97 at 11284-86, 11289.

[219] *Id.* at 11285, 11288-89.

[220] *Id.* at 11290-91.

[221] Campa Ex. R32 at 2-3; Govt. Exs. DAV 102 at 1; 109 at 1-2, 5-6; 116 at 3, 7; 118 at 2; 124 at 8; 126 at 21; 129 at 3, 59.

[222] R97 at 11277-78; R101 at 11714, 11721-23.

[223] See *supra* note 137.

including those targeting United States military installations. [224] Under Operation Aeropuerto, Guerrero achieved "long-term" penetration of the NAS through his employment in the Public Works Department in 1993. He was employed in maintaining the sewage lift-off stations and had access to many areas of the NAS. [225] Although he executed several United States loyalty affidavits as conditions of that employment, he was also fulfilling a DI work plan to obtain military information, to conduct visual intelligence of the NAS, and to search for operational resources.[226]

Guerrero delivered frequent detailed reports to Campa, Hernandez, and Medina regarding the deployment of United States military assets at the NAS from 1994 through 1997.[227]

Gonzalez worked in a number of operations and "active measures." He was furnished with proposed text for anonymous letters and telephone calls by Hernandez and was directed to consider ways to harass and cause dissension among the counter-revolutionary organizations by disseminating rumors that Basulto was disparaging various members. [228] Gonzalez was directed to study BTTR's airplane

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[224] Govt. Exs. DAV 102 at 1; 129 at 62.

[225] R74 at 7918; Govt. Ex. DG 120 at 2-3.

[226] R74 at 7959; Govt. Ex. 122 at 5-8, 10.

[227] Govt. Exs. DAV 101 at 9-28; DAV 102 at 17-29; DG 121; DL 102 at 11; DG 141 at 19.

[228] R49 at 4583-91, 4598-604, 4612-13; R60 at 6277-83; Govt. Ex. DC 101 at 11-19, 701, 701A, 702.

hangar, to consider burning down its warehouse and spreading rumors that BTTR had burned the warehouse for insurance money, to disable BTTR equipment and antennae, and to threaten a United States government agent with execution and send him a book bomb-appearing device.[229]

Gonzalez was also instructed to act as an FBI informant. [230] Shortly after the BTTR shootdown, Gonzalez told his FBI contact that he felt betrayed by Roque.[231] After the disks found in the Avispa officers' apartments were decrypted, the FBI again approached Gonzalez based on his BTTR association; Hernandez warned Gonzalez to act torn between his opposition to terrorism and his loyalty to the anti-Castro "brothers" and not to act like a "Castro agent."[232] Gonzalez reported that he had told the FBI that ethically he could not inform on the BTTR, but assured the FBI that he would contact its agents if he learned of anything that would affect United States security.[233]

During the trial, the government described the Cuban intelligence operations as "an intelligence pyramid" headed by Fidel Castro.[234] It suggested that

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[229] Govt. Ex. DHo101 at 2-6.

[230] Govt. Exs. HF 105 at G-3, 125 at G-3.

[231] R69 at 7044, 7077-78.

[232] Govt. Ex. DG-107 at 58-60.

[233] *Id.* at 65-67.

[234] R44 at 3699-700. The U.S. Attorney asked government witness Stuart Hoyt to describe the structure of the Cuban intelligence system by questioning "who is at the top of the Cuban

the Cuban government applied the "penalty" of death for throwing things out of airplane windows,[235] and was "repressive"[236] and a "dictatorship".[237]

G. Closing Arguments

During closing arguments, the government commented that Hernandez's attorney had called the shootdown "the final solution" and noted that such terminology had been "heard ... before in the history of mankind."[238] It argued that the defendants had voluntarily joined "a hostile intelligence bureau" that saw "the United States as its prime and main

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intelligence system." R44 at 3699. Hoyt responded by stating that "Fidel Castro" was at the top as "Commander-in-Chief", "[P]resident", "Council Minister", and "head of the Cuban Communist Party." *Id.*

[235] R73 at 7806-07.

[236] R80 at 8748. After a defense witness explained on cross-examination that the tone of the dissenters within Cuba was "more respectful" than that of Cuban exile organizations located outside of Cuba, the government attorney asked whether such an answer was relevant when it was a "[p]articularly repressive government." R80 at 8748. Late, after the witness stated that, if he had been a dictator, he would have tried to stop the BTTR flight, the government attorney questioned whether "[w]e live in a dictatorship." *Id.* at 8754. After the witness replied "Fortunately we don't," the government attorney commented, "And people do have that freedom of choice." *Id.*

[237] *Id.* at 8754.

[238] R124 at 14474.

enemy."[239] It stated that "the Cuban government" had a "huge" stake in the outcome of the case, and that the jurors would be abandoning their community unless they convicted the "Cuban sp[ies] sent to ... destroy the United States."[240] It maintained that the Cuban government sponsored "book bombs," "telephone threats of car bombs," and "sabotage," and "killed four innocent people."[241] It suggested that the Cuban government used "goon squads" to torture its critics.[242] It asserted that the Cuban government had their agents falsify their identities by using the identification of "dead babies" and "stealing the memories of families."[243] It argued that the defendants were "bent on destroying the United States" and were "paid for by the American taxpayer."[244] It contended that the defense argument that the agents were in the United States to keep an eye on the Cuban exile groups was false because they were on United States military bases, spying on United States military, the FBI, and Congress.[245] The government implied that the government of Cuba was not cooperating with the FBI.[246] It commented that Cuba "was not alone" in shooting down civilian

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[239] *Id.* at 14475.

[240] *Id.* at 14532, 14481.

[241] *Id.* at 14480.

[242] *Id.* at 14495.

[243] *Id.* at 14480-81.

[244] *Id.* at 14482.

[245] *Id.* at 14483-85, 14488.

[246] *Id.* at 14493.

aircraft as they "are friends with our enemies," including "the Chinese and the Russians," and compared the BTTR shootdown to the 1986 Libyan shootdown of a civilian aircraft.[247] It maintained that the government of Cuba did not care about the occupants of the planes, and shot down the planes even though they could have forced Basulto's plane to land.[248] It argued that Cuba was a "repressive regime [that] doesn't believe in any [human] rights."[249] It summarized that the defendants had joined an "intelligence bureau ... that sees the United States of America as its prime and main enemy" and that the jury was "not operating under the rule of Cuba, thank God."[250]

Campa and Hernandez's objections throughout the closing arguments were sustained.[251] The jury was subsequently instructed to consider only the evidence admitted during the trial, and to remember that the lawyers' comments were not evidence.[252]

H. Jury Conduct and Concerns During the Trial

Five months into the trial, when one seated juror had a conflict, the court discussed the possibility of removing a juror who had a two-day conflict and seating one of the alternates.[253] Hernandez's attorney

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[247] *Id.* at 14512-13.

[248] *Id.* at 14513.

[249] *Id.* at 14519.

[250] *Id.* at 14475.

[251] *Id.* at 14482, 14483, 14493.

[252] R125 at 14583.

[253] R104 at 12091-92.

requested a recess, arguing that the parties and the court had worked very hard to select "a jury we are very happy with" and, with Gonzalez, Guerrero, and Medina's attorneys, maintained that it would be unreasonable to refuse to accommodate the juror after her length of service and her request to complete the trial.[254] The district court granted the recess.[255]

In early February 2001, a small protest related to the trial was held outside of the courthouse, but the jury was protected from contact with the protestors and from exposure to the demonstration.[256] On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building.[257] Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during the deliberations and that footage was televised.[258] Some of the jurors indicated that they felt pressured; therefore, the district court again modified the jurors' entry and their exit from the courthouse and transportation.[259]

For deliberations, the jury was moved to another

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[254] *Id.* at 12091-94.

[255] *Id.* at 12094-95.

[256] R59 at 6096-108, 6145-49. The 20 protestors carried signs stating "take Castro down," "[f]air trial wanted," and "spies to be killed." *Id.* at 6145.

[257] R81 at 9005.

[258] R126 at 14644-47.

[259] *Id.* at 14645-47.

floor of the courthouse with controlled access.[260] During the deliberations, members of the jury were filmed entering and leaving the courthouse, and the media requested the names of the jurors.[261] The jurors expressed concern that they were filmed "all the way to their cars and [that] their license plates had been filmed."[262] To protect the jurors' privacy, the district court arranged for the jurors to come into the courthouse by private entrance and provided them with transportation to their vehicles or to mass transit.[263] The jury spent five days in deliberations and, during that period of time, asked for and was given a comprehensive list of all of the admitted evidence.[264]

I. Motions for New Trial

In late July and early August 2001, following the trial, Campa, Gonzalez, Guerrero, and Medina moved for a new trial and renewed their motions for a change of venue, arguing that their fears of presumed prejudice remained despite the district court's efforts during voir dire.[265] Campa asserted that the jury's failure to ask questions and its quick verdicts in the complex, almost seven-month trial suggested that it

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[260] R124 at 14546-47; R125 at 14624.

[261] R126 at 14643-46.

[262] *Id.* at 14644-45.

[263] *Id.* at 14645-47.

[264] R125 at 14625; R126 at 14640-43.

[265] R12-1338 at 2-3; R12-1342 at 2-3; R12-1343 at 1-4; R12-1347 at 1-2.

was subject to community pressure and prejudice.[266] Campa and Gonzalez also maintained that the jury was unduly prejudiced by the remarks of witness Jose Basulto. According to Campa and Gonzalez, Basulto's testimony implied that Hernandez's counsel was "either a spy, a representative of the Cuban Government, a communist, or in the employ of the Cuban intelligence service." [267] The district court denied the motions for new trial. It referenced its prior orders denying a change of venue and denying reconsideration of the denial of the change of venue, and stated that because it was "[a]ware of the impassioned Cuban exile-community residing within this venue, the Court implemented a series of measures to guarantee the Defendants' right to a fair trial."[268] The court concluded that "any potential for prejudice was cured" "through the Court's methodical, active pursuit of a fair trial from voir dire ... to ... the return of verdict."[269]

In December 2001, Guerrero, Hernandez, and Medina were sentenced to life, Campa was sentenced to 228 months, and Gonzalez was sentenced to 15 years.[270]

In November 2002, Guerrero renewed his motion for a new trial based on newly discovered evidence; the motion was adopted by Campa, Gonzalez,

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[266] R12-1343 at 1-3.

[267] R12-1342 at 3; R12-1343 at 3-4.

[268] R13-1392 at 14.

[269] *Id.* at 15.

[270] R14-1430, 1435, 1437, 1439, 1445.

Hernandez, and Medina.[271] Guerrero argued that a new trial was warranted because of "misrepresentations of fact and law made by the United States Attorney in opposing the ... motion for change of venue" and submitted an appendix to support his argument.[272] He also argued that the government's position regarding change of venue was contradicted by its position in a motion for change of venue which the government filed in *Ramirez v. Ashcroft,* No. 01-4835-Civ-Huck (S.D.Fla. 25 June 2002).

In *Ramirez,* the plaintiff, a Hispanic employed by the INS, alleged a hostile work environment, unlawful retaliation, and intimidation from his non-Hispanic fellow employees' hostility resulting from

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[271] R15-1635, 1638, 1644, 1647, 1650, 1651. The National Jury Project, the National Lawyers Guild, the International Association of Democratic Lawyers sought and were granted leave to file briefs as amicus curiae in support of this motion. R15-1640, 1653, 1654, 1655, 1677.

[272] R15-1635 at 1, 1636. On appeal, Hernandez mentions that the government also made other misrepresentations related to this case in a petition for writ of prohibition and motion to stay in another case filed in this court, *In re United States of America,* No. 01-12887 (11th Cir. May 25, 2001) regarding the district court's rulings in this case. The district judge commented on both statements made by the government and alleged by Hernandez to be misrepresentations, calling one "an outright misrepresentation of fact" and another an "erroneous statement" and "gross misrepresentation[ ]." R121 at 13918, 14025.

the INS's 22 April 2000 removal of Elian Gonzalez from the United States and his return to his father in Cuba.[273] Within the *Ramirez* motion for change of venue, the government noted that

> [T]he Elian Gonzalez matter was an incident which highly aroused the passions of the community and resulted in numerous demonstrations ....
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> 5. While the Elian Gonzalez affair has received national attention[,] the exposure in Miami-Dade County has been continuous and pervasive. Indeed, even now, more than a year after the return of Elian to his father [in April 2000], there continues to be extensive publicity ... which will arouse and inflame the passions of the Miami-Dade community.
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> ...
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> 8. Historically, media articles relating to Elian Gonzalez and the handling of his return to his father have persisted from November 1999 to the present [June 2002].[274]

The government argued that

> [i]t cannot be disputed that the return of Elian Gonzalez to his father in Cuba created a serious rift in this community, a rift which continues to the present. This rift exists not only between Hispanics and non-Hispanics,

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[273] R15-1636, Ex. 2 at 1-2.

[274] *Id.* 2-3, 11.

> but also between Cubans a[n]d non-Cubans and within the Cuban community itself. It is beyond dispute that virtually every person in Miami-Dade county [sic] has a strong opinion, one way or another, regarding the INS and the U.S. Attorney General's Office, and the manner in which the Elian Gonzalez matter was handled. The effect of the media coverage ... serves to foment and revive these feelings on an ongoing basis .... As such the media accounts cannot do anything other than create the general state of mind where the inhabitants of Miami-Dade County are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the instant case solely on the evidence presented in the courtroom .... Under such circumstances and strongly held emotions, and in light of the media coverage ..., it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County.[275]

The government requested "a change in the location/venue" "outside of Miami Dade County to ensure that the Defendant ... receive a fair and impartial trial on the merits of the case."[276] They noted that, "[w]hile not requested," the court also had the discretion to transfer the trial to another judicial

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[275] *Id.* at 14-15.

[276] *Id.* at 17, 16.

district.[277] The government orally argued that there were no incidents "since 1985 that so polarized the community. That so affected every individual in the community as the Elian Gonzalez affair."[278] When the district court asked whether a transfer of the case to the Fort Lauderdale division courthouse would be sufficient, the government responded that "[t]he demonstrations occurred in Miami. They are predominantly conducted by citizens of Miami Dade county [sic]. As you move the case out of Miami Dade you have less likelihood there are going to be deep-seated feelings and deep-seated prejudices in the case."[279]

The appendix filed in support of the motion for new trial included an affidavit by Professor Moran, news articles, and reports by Human Rights Watch regarding threats to the freedom of expression within the Miami Cuban exile community.[280] Moran stated that he had previously had contact with the district judge in an earlier, unrelated litigation in which she had "excoriated" him for interviewing jurors after a trial and threatened the attorneys who had retained him.[281] Guerrero included a letter from Moran to the district court in which he offered "assist[ance]" to the district court "regarding (change of venue)

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[277] *Id.* at 16 n. 1.

[278] R15-1636, Ex. 3 at 24.

[279] *Id.* at 25.

[280] R15-1636, Exs. 7-10, 12.

[281] R15-1636, Ex. 7 at 7.

surveys."[282] In Moran's affidavit, he explained that he did not provide a copy of his letter to the district judge to Guerrero's counsel because he was upset that he was not timely paid for his work by the district court.[283] The news articles addressed the numerous incidents of violence and threats by anti-Cubans in the decade preceding the trial.[284] The

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[282] R15-1636, Ex. 1 at 1.

[283] R15-1636 at 4-7.

[284] Jim Mullin, *Frank Talk About Free Speech,* MIAMI NEW TIMES, May 25, 2000, R15-1636, Ex. 9 ("The reason that the issues related to Cuba are the hot-button issues ... is that we can't escape the fact that in this town there are 700,000 Cuban Americans. There are 10,000 people in this town who had a relative murdered by Fidel Castro. There are 50,000 people in this town who've had a relative tortured by Fidel Castro. There are thousands of former political prisoners in this town. For these people and for the 500,000 Cuban Americans who are old enough to remember having to leave their homeland, the issues related to Fidel Castro are not a historical note; they are living, breathing wounds."); Jim Mullin, *The Burden of a Violent History,* MIAMI NEW TIMES, Apr. 20, 2000, R15-1636, Ex. 10 ("Lawless violence and intimidation have been hallmarks of el exilio for more than 30 years. Given that fact, it's not only understandable many people would be deeply worried, it's prudent to be worried.").

We also take judicial notice of an editorial: Luis Botifol, *The Cuban Spies' Case vs. Credibility of the U.S. Judiciary,* MIAMI HERALD, May 16, 2001 at 9B ("[T]he media's reports generate unfavorable comments in the [Cuban exile] community, which attributes the judge's permissiveness as stemming from an association with prominent members of the past administration who don't sympathize with the exile community .... [T]he defense surely has received ample cooperation from the Castro regime .... [T]he judge has permitted the defense a broad investigation ... [T]rials like this

Human Rights Watch reports covered harassment and intimidation suffered by Miami Cuban exiles in expressing moderate political views as to Cuban relations or Fidel Castro's government.[285] The motion for new trial was also supported by a public opinion survey conducted by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez.[286] By affidavit, Dr. Brennan characterized the results of a poll of Miami Cuban-Americans as reflecting "an attitude of a state of war ... against Cuba."[287] She reviewed Moran's survey and stated that it "accurately reflects profound existing bias against those associated with the Cuban government in

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one diminish the trust and credibility of the judiciary upon which our democracy rests."). Hernandez's Br., App. F.

[285] Americas Watch/The Fund for Free Expression/Divisions of Human Rights Watch, *Dangerous Dialogue/Attacks on Freedom of Expression in Miami's Cuban Exile Community,* Aug. 1992, R15-1636, Ex. 12 ("Miami's Cuban exile community ... has long been dominated by fiercely anti-Communist forces who are strongly opposed to contrary viewpoints, even if-especially if-expressed simply in terms of the desirability of a dialogue with, or opening to, the Castro regime."); Human Rights Watch/Americas Human Rights Watch Free Expression Project, *United States Dangerous Dialogue/Threats to Freedom of Expression Continue in Miami's Cuban Exile Community,* Nov. 1994, R15-1636, Ex. 8.

[286] R15-1636, Exs. 4, 5.

[287] R15-1636, Ex. 4 at 1, 3.

Miami [-]Dade County" where "[p]otential jurors ... would be impervious to traditional methods of detecting and curing bias through voir dire and court instruction."[288] Brennan determined that, although 49.7 percent of the local Cuban population strongly favored direct United States military action to overthrow the Castro regime, only 26 percent of the local non-Cuban population and 8.1 percent of the national population favored such action.[289] Similarly, 55.8 percent of the local Cuban population strongly favored military action by the exile community to overthrow the Cuban government but only 27.6 percent of the local non-Cuban population and 5.8 percent of the national population favored such action.[290] She concluded that there was "an attitude of a state of war between the local Cuban community against Cuba" which had "spilled over to the rest of the community" and had a "substantial impact on the rest of the Miami-Dade community."[291] She found that the documented community bias showed a "deeply entrenched body of opinions [so entrenched as to often not be consciously held] that would hinder any jury in Miami-Dade County from reaching a fair and impartial decision in this case."[292]

Dr. Pérez concluded that "the possibility of selecting twelve citizens of Miami-Dade County who

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[288] *Id.* at 8.

[289] *Id.* at 3.

[290] *Id.*

[291] *Id.*

[292] *Id.* at 7.

can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero ... even if the jury were composed entirely of non-Cubans, as it was in this case."[293] His conclusion was based on a number of factors, including the demographics of the area and the cohesiveness, political impact, interests, and emotional concerns of the Cuban community. Specifically, he noted that "persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in the venue group in Miami-Dade County, comprising two out every seven residents."[294] He explained that the Cubans created a "true ethnic enclave" which exercised strong economic and political influence within the Miami-Dade County community as evidenced by the establishment of major institutions such as the Cuban American National Foundation, the Hispanic Builders Association, the Latin Chamber of Commerce, and the Latin Builders Association and the election of numerous Cuban-American public officials including the Miami mayor, city and county managers, city commissioners, state legislators, members of the United States Congress, mayors and city commissioners and councilpersons in other local cities and towns, and leaders at local universities. [295] The Cuban community's "most overriding concern: the ongoing struggle for the recovery of their homeland" had been "injected" into the Miami-Dade County community to the extent

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[293] R15-1636, Ex. 5 at 2-3.

[294] *Id.* at 3-4.

[295] *Id.* at 6-7.

that it took "center stage."[296] Pérez stated that the issue was characterized by an "uncompromising hostility towards the Cuban government" and included an intolerance toward opposing views which brought economic, political, social pressure on the dissenting individual or group.[297] He reported that "[t]here was a long history of threats, bomb scares, actual bombings, and even murders directed at" individuals and groups perceived to have a "softness" toward Castro's regime.[298] He also noted that, while many Cubans and non-Cubans had expressed dissenting views on the fate of Elian Gonzalez and on the United States policy toward Cuba, the defendants' case concerned "[t]he 1996 shootdown [which] was uniformly repudiated in Miami" and thus approached a "taboo, a position that no one would want to take, or even appear to take."[299]

The district court denied the motion, stating that "the situation in *Ramirez* differed from the facts of this case in numerous ways" because it "related directly to the INS's handling of the removal of Elian Gonzalez from his uncle's home, an event which, it is arguable, garnered more attention here in Miami and worldwide."[300] Also, the district court noted that the government's position in *Ramirez*"was premised specifically upon the facts of that case, including that

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[296] *Id.* at 7.

[297] *Id.* at 8.

[298] *Id.* at 8-9.

[299] *Id.* at 12-13.

[300] R15-1678 at 8-9.

the plaintiff had ... stirred up extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit."[301] It concluded that the government's arguments "in *Ramirez* do not in any way demonstrate prosecutorial misconduct in the instant case."[302] The district court did not consider the "interests of justice" issue and thus declined to consider any of the exhibits submitted in support of this argument, including Dr. Brennan's survey and conclusions and Dr. Pérez's study.[303]

II. DISCUSSION

On appeal, Campa, Gonzalez, Guerrero, Hernandez, and Medina argue that the district court's denial of their motions for change of venue violated Federal Rule of Criminal Procedure 21(a), denied them a fair trial, and undermined the reliability of the verdicts.[304] They contend that the district court ignored the unique confluence of demographics, politics, and culture in the Miami community, the strong anti-Castro sentiment in that community, and the history of violence within the Cuban-exile community. They maintain that a new trial was warranted because of the government's use

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[301] *Id.* at 9.

[302] *Id.*

[303] *Id.* at 6 n. 3.

[304] The change of venue issue was briefed by Guerrero and Campa, and adopted by Gonzalez, Hernandez, and Medina. Campa also adopted the argument presented by Guerrero, while Guerrero adopted the argument presented by Campa on this issue.

of inflammatory statements during closing arguments. [305] Campa, Gonzalez, Guerrero, Hernandez, and Medina contend that the district court abused its discretion in denying the motion for new trial and change of venue because it failed to properly consider the newly discovered evidence which supported the argument that the defendants were unable to receive a fair trial before an impartial jury in Miami.[306] They posit that the district court abused its discretion by denying the requests for an evidentiary hearing to present additional evidence regarding irregularities with expert witness Moran.

A. Denial of Motion for Change of Venue

We conduct a multi-level review on the denial of a motion for change of venue. We review the district court's interpretation of the Federal Rules of Criminal Procedure *de novo, see United States v. Noel,* 231 F.3d 833, 836 (11th Cir.2000) (per curiam), and application of Rule 21(a) for abuse of discretion, *see United States v. Williams,* 523 F.2d 1203, 1208 (5th Cir.1975). [307] However, "[w]hen a criminal

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[305] The issue addressing prosecutorial misconduct during closing arguments was addressed by Hernandez and Campa, and adopted by Guerrero and Medina. Campa also adopted the arguments presented by Hernandez on this issue.

[306] The National Lawyers Guild also filed an amicus curiae brief on the motion for new trial based on newly discovered evidence.

[307] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to 1 October 1981.

defendant alleges that pretrial publicity precluded a trial consistent with the standards of due process," we are bound to "undertake an independent evaluation of the facts established in support of such an allegation." *Id.*

"A fair trial in a fair tribunal is a basic requirement of due process," requiring not only "an absence of actual bias," but also an effort to "prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *see also Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) ("Due process requires that the accused receive a fair trial by an impartial jury free from outside influences."). A juror's verdict "must be based upon the evidence developed at the trial""regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

A federal criminal defendant's motion for change of venue based on prejudice is governed by Federal Rule of Criminal Procedure 21. Upon such a motion,

> the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Fed.R.Crim.P. 21(a).[308] Our review of the denial of a change of venue motion is guided by a due process analysis. *See United States v. Fuentes-Coba,* 738 F.2d 1191, 1194 (11th Cir.1984).

When the jurors are to be drawn from a community which is "already permeated with hostility toward a defendant," whether that hostility is a result of prejudicial publicity or other reasons, the court should examine the various methods available to assure an impartial jury. *Groppi v. Wisconsin,* 400 U.S. 505, 509-10, 91 S.Ct. 490, 493, 27 L.Ed.2d 571 (1971). Those methods include granting a continuance to allow "the fires of prejudice [to] cool," the exercise of peremptory and for cause challenges to the venire to exclude jurors who exhibit

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[308] The 1966 Amendments eliminated earlier versions of Rule 21 which referenced transfers to "divisions" and clarified that "[t]transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial" under Rule 18. *See* Fed.R.Crim.P. 21 advisory committee's note. Under Rule 18, "[t]he court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice." Fed.R.Crim.P. 18. The 1966 Amendments vested the district court with " discretion ... to fix the place of trial at any place within the district .... If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where prejudice does not exist." Fed.R.Crim.P. 18 advisory committee's note.

> At the change of venue motion hearing, the defendants agreed that a transfer to the Fort Lauderdale division office would be acceptable.

the prejudices of their communities, and granting a change of venue when the community has been repeatedly and deeply exposed to prejudicial publicity. *See Id.* at 510, 91 S.Ct. at 493.

While a change of venue or a continuance should be granted when prejudicial pretrial publicity threatens to prevent a fair trial, a new trial should be ordered if publicity during the proceedings threatens the fairness of the trial. *See Sheppard,* 384 U.S. at 363, 86 S.Ct. at 1522. A fair trial is denied when a court refuses to grant a request for change of venue despite pretrial publicity and pervasive community exposure to the crime causes a trial to be a "hollow formality." *Rideau v. Louisiana,* 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). To ensure that a defendant will "be tried in an atmosphere undisturbed by ... a wave of public passion," *Irvin,* 366 U.S. at 728, 81 S.Ct. at 1645, a court is required, upon a criminal defendant's motion, to transfer the proceedings "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial." Fed.R.Crim.P. 21(a). It is unnecessary to determine whether prejudice is disclosed during voir dire if the evidence reflects a "generally hostile atmosphere of the community" which causes the jurors to "inherently suspect circumstances of ... prejudice against a particular defendant." *Pamplin v. Mason,* 364 F.2d 1, 6, 7 (5th Cir.1966). Further, where community hostility is prevalent, "[i]t is unnecessary to prove that local prejudice actually entered the jury box." *Id.* at 6. If community sentiment is strong, courts should place "emphasis on the feeling in the community rather

than the transcript of voir dire" which may not "reveal the shades of prejudice that may influence a verdict." *Id.* at 7; *see also Williams,* 523 F.2d at 1209 n. 10 (stating that although voir dire examination results "are an important factor in gauging the depth of community prejudice, continual protestations of impartiality ... are best met with a healthy skepticism from the bench").

In *Irvin,* the Supreme Court held that a defendant was entitled to a change of venue even though each individual juror had specifically claimed the capacity to be fair and impartial. It noted:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such as statement of impartiality can be given little weight.

Irvin, 366 U.S. at 728, 81 S.Ct. at 1645. "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Pamplin,* 364 F.2d at 5. Mindful that the first and best judge of community sentiment and juror indifference is the trial judge, an appellate court should "interfere only upon a showing of manifest probability of prejudice." *Bishop v. Wainwright,* 511 F.2d 664, 666 (5th Cir.1975).

Presumed prejudice has been found "where prejudicial publicity so poisoned the proceedings that

it was impossible for the accused to receive a fair trial by an impartial jury ... and the press saturated the community with ... accounts of the crime and court proceedings." *United States v. Capo,* 595 F.2d 1086, 1090 (5th Cir.1979). Factors to be considered in determining prejudice include the extent of the dissemination of the publicity, the character of that publicity, the proximity of the publicity to the trial, and the familiarity of the jury with the charged crime. [309] *See Williams,* 523 F.2d at 1209-10. Presumed prejudice may be rebutted where the jury is shown to be capable of sitting impartially. *See Knight v. Dugger,* 863 F.2d 705, 707, 723 (11th Cir.1988); *Coleman v. Kemp,* 778 F.2d 1487, 1542 n. 25 (11th Cir.1985).

If a movant "adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually

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[309] We also note that the American Bar Association recommends that a court's determination of a change of venue motion based on "dissemination of potentially prejudicial material" be based on "such evidence as qualified public opinion surveys or opinion testimony by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved." *ABA Standards for Criminal Justice: Fair Trial and Free Press,* 8-3.3(b) (1992). Where there is a substantial likelihood of prejudice from such publicity, Standard 8-3.3 also instructs: (1) that "[a] showing of actual prejudice" is not required; (2) the selection of an acceptable jury is not controlling; and (3) "the failure to exercise all available peremptory challenges" is not a waiver. *Id.* at 8-3.3(b), (c), and (d).

impossible a fair trial by an impartial jury drawn from that community, jury prejudice is presumed and there is no further duty to establish bias." *Mayola v. Alabama,* 623 F.2d 992, 997 (5th Cir.1980) (citation and internal quotations omitted). Although such presumed prejudice is only rarely applied, the successful movant need not show that the jury was actually prejudiced by the pervasive community sentiment or that the jurors were actually exposed to any publicity, but must show that, first, "the pretrial publicity was sufficiently prejudicial and inflammatory and second that the prejudicial pretrial publicity saturated the community where the trial was held." *Spivey v. Head,* 207 F.3d 1263, 1270 (11th Cir.2000); *Mayola,* 623 F.2d at 997. The movant bears the extremely heavy burden of proving that the pretrial publicity deprived him of his right to a fair trial. *See Coleman,* 778 F.2d at 1489, 1537. Just as issues involving prejudice from publicity require a review of the "special facts" of each case, *Marshall v. United States,* 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) (per curiam), a review of presumed prejudice requires a review of the totality of the circumstances. *See Murphy v. Florida,* 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975). Further, a court considering a change of venue motion must review all of the circumstances and events occurring before and during the trial and their cumulative effect. *See Williams,* 523 F.2d at 1206 n. 7.

One of the matters to consider in reviewing the totality of the circumstances is an extensive voir dire. *See Patton v. Yount,* 467 U.S. 1025, 1029, 1034, 104 S.Ct. 2885, 2888, 2890, 81 L.Ed.2d 847 (1984);

Jordan v. Lippman, 763 F.2d 1265, 1276 (11th Cir.1985) (noting "the fundamental importance of voir dire as a tool for insuring the right to an impartial jury"). Presumed prejudice can be shown through admitted prejudice or the demeanor and credibility of the venire. *See Patton,* 467 U.S. at 1029, 1038, 104 S.Ct. at 2888, 2892.

Where, however, the court reviewed an extensive public opinion survey of potential jurors and a purported jury prejudice expert's analysis of media coverage, where a thorough voir dire was conducted by the court and counsel, and where the jury panel was accepted by counsel without the renewal of a motion for change of venue, a defendant's rights were held to be sufficiently safeguarded. *See Fuentes-Coba,* 738 F.2d at 1194-95. Further, the presumption of prejudice was not found where, although "virtually every venireperson and actual juror had heard or read accounts of the case," only a few of the venirepersons indicated a preconceived opinion about the defendant's guilt or innocence, the venirepersons with preconceived opinions who did not believe that they could set their opinions aside were excused for cause, and the extensive publicity was neither inflammatory nor pervasive. *Ross v. Hopper,* 716 F.2d 1528, 1541 (11th Cir.1983). If a party fails to demonstrate either actual or pervasive community prejudice, the absence of juror prejudice may also be indicated by the failure of a party to use all of its allotted peremptory challenges. *See United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir.1985); *Dobbert v. Florida,* 432 U.S. 282, 303-04, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977). Further, a lack of juror prejudice can be

presumed when a defendant fails to challenge the district court's voir dire or move for a change of venue after the voir dire. *See United States v. Yousef,* 327 F.3d 56, 90 (2d Cir.2003). In assessing a change of venue request based on pretrial publicity, the existence of overwhelming evidence of guilt is not dispositive. *See Coleman,* 778 F.2d at 1541.

Despite the district court's numerous efforts to ensure an impartial jury in this case, we find that empaneling such a jury in this community was an unreasonable probability because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami. Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue-some of which focused on the defendants in this case and the government for whom they worked, but others which focused on relationships between the United States and Cuba-flooded Miami both before and during this trial.[310] The trial required consideration of the BTTR shootdown and the martyrdom of those persons on the flights. During the trial, there were both "commemorative flights" and public ceremonies to mark the anniversary of the shootdown. Moreover, the Elian Gonzalez matter, which was ongoing at the time of the change of venue motion, concerned these

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[310] Without determining the validity of Professor Moran's poll, we note that the district court approved the expenditures related to the poll, including the size of the statistical sample.

relationships between the United States and Cuba and necessarily raised the community's awareness of the concerns of the Cuban exile community. It is uncontested that the publicity concerning Elian Gonzalez continued during the trial, "arousing and inflaming" passions within the Miami-Dade community. Despite the district court's thorough and extensive voir dire and its many efforts aimed at protecting the jurors' privacy, voir dire highlighted the community's awareness of this case and also of that of Elian Gonzalez. In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire; thus, a change of venue was required. The evidence at trial validated the media's publicity regarding the "Spies Among Us" by disclosing the clandestine activities of not only the defendants, but also of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable. Further, the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions.

B. Denial of New Trial

We review a district court's denial of a motion for new trial for abuse of discretion. *See United States v. Fernandez,* 136 F.3d 1434, 1438 (11th Cir.1998). A district court is authorized to grant a new trial "if the interests of justice so require" in extraordinary circumstances and, if the motion is based on newly discovered evidence, if a motion for new trial is filed

within three years of the verdict. *See* Fed.R.Crim.P. 33(a) and (b)(1) (2002).[311] Newly discovered evidence must satisfy a five-part test: (1) the evidence was newly discovered after the trial; (2) the movant shows due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court; and (5) the evidence is of such a nature that a new trial would reasonably produce a new result. *See United States v. DiBernardo,* 880 F.2d 1216, 1224 (11th Cir.1989). The newly discovered evidence is not limited to just the question of the defendant's innocence, but can include other issues of law, *See United States v. Beasley,* 582 F.2d 337, 339 (5th Cir.1978) (per curiam), including questions of the fairness of the trial. *See United States v. Williams,* 613 F.2d 573, 575 (5th Cir.1980). Consideration of a motion for new trial based on newly discovered evidence can also include a review of evidence obtained post-trial. *See United States v. Devila,* 216 F.3d 1009, 1013, 1017 (11th Cir.2000) (per curiam), *vacated in part on other grounds,* 242 F.3d 995, 996 (2001).

The grant of a new trial may be based on pretrial publicity, a prosecutor's improper closing argument, and the combined effect of publicity and prosecutorial zeal. Thus, we "widen the breadth of

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[311] Rule 33 was "stylistically" amended in 2002 "to make [it] more easily understood and to make style and terminology consistent throughout the rules." *See* Fed.R.Crim.P. 33 advisory committee's note (2002). The earlier revision was not subdivided, but the relevant wording remained the same.

our consideration" to determine whether "these two factors operating together deprived the [defendant] of a fair trial." *Williams,* 523 F.2d at 1204-05, 1209; *see also Jordan v. Lippman,* 763 F.2d 1265, 1266, 1267, 1269, 1279 (11th Cir.1985) (finding that, in a state habeas corpus proceeding, a new trial based on a change of venue was required when "extensive publicity" was coupled with the community's "long history of racial turbulence" and the involved institution's "economic and social impact" on community).

Attorneys representing the United States are burdened both with an obligation to zealously represent the government and, as a "representative of a government dedicated to fairness and equal justice to all," an "overriding obligation of fairness" to defendants. *United States v. Wilson,* 149 F.3d 1298, 1303 (11th Cir.1998). A prosecutor may not make improper assertions, insinuations, or suggestions that could inflame the jury's prejudices or passions. *United States v. Rodriguez,* 765 F.2d 1546, 1560 (11th Cir.1985). Such an obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction." *United States v. Crutchfield,* 26 F.3d 1098, 1103 (11th Cir.1994) (internal citation omitted). A trial may be rendered fundamentally unfair by the prosecution's use of factually contradictory theories. *See Smith v. Groose,* 205 F.3d 1045, 1051-52 (8th Cir.2000) (holding that the prosecution's use of contradictory theories for different defendants in a murder trial violated due

process).[312] A prosecutor's reliance on a legal position

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[312] We note that judicial equitable estoppel generally bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, *related* proceeding. *See New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001). As discussed earlier, one of the arguments Guerrero made in his motion for a new trial (which was adopted by Campa, Gonzalez, Hernandez and Medina) was that the government contradicted its position on change of venue in this case with the position that it took regarding the motion for change of venue that it filed in the *Ramirez* case. *See supra* at 1253-54. But, judicial equitable estoppel is not applicable here because *Ramirez,* a civil case, was unrelated to this criminal prosecution. However, because the doctrine seeks to prevent a "party from 'playing fast and loose' " with the courts, the guidance that it provides may be helpful to parties considering a change in their subsequent position in unrelated litigation based upon the same set of facts. *See*18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (2d ed.2002).

We also note that the rule against the use of evidence of other crimes or bad acts by a defendant is intended to prevent a conviction based on the theory of "Give a dog an ill name and hang him." *United States v. Boyd,* 446 F.2d 1267, 1273 (5th Cir.1971)(citation and internal punctuation omitted). The interest of the United States Attorney, as representative

> of a sovereignty whose obligation is to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done .... He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

despite "knowing full well" that it is wrong is "reprehensible" in light of his duty "by virtue of his oath of office." *United States v. Masters,* 118 F.3d 1524, 1525 & n. 4 (11th Cir.1997) (per curiam). Further, when the government has sought to foreclose the submission of evidence, an evidentiary hearing is warranted on a motion for new trial when the newly-discovered evidence "might likely lead" to a new trial. *United States v. Espinosa-Hernandez,* 918 F.2d 911, 914 (11th Cir.1990) (per curiam).

Here, a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the improper prosecutorial references. The district court's instructions to the jury only generally reminded the jury that statements by the attorneys were not evidence to be considered. The community's displeasure with the Elian Gonzalez controversy paled in comparison with its revulsion toward the BTTR shootdown. In a civil case which arose out of the same facts as this criminal prosecution, the

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Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Because "the average jury ... has confidence that these obligations will be faithfully observed, ... improper suggestions [and] insinuations ... are apt to carry much weight against the accused when they should properly carry none." *Id.* at 88, 55 S.Ct. at 633. "Where such conduct was pronounced and persistent, with a probable cumulative effect upon the jury which can not be disregarded as inconsequential[,] [a] new trial must be awarded." *Id.* at 89, 55 S.Ct. at 633.

BTTR shootdown was described as an "outrageous contempt for international law and basic human rights" perpetrated by the Cuban government in murdering "four human beings" who were "Brothers to the Rescue pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys."*Alejandre,* 996 F.Supp. at 1242. In *Ramirez,* the government not only recognized the effect of the Elian Gonzalez matter on the community, but also that the publicity continued through 2002. *See supra* at 1254-55. If the effect of those inflamed passions is clear in an employment discrimination action against the agency which contributed to Elian Gonzalez's removal and which failed to support the Cuban exiles' position, it is manifest in a criminal case against admitted Cuban spies who were alleged to have contributed to the murder of "humanitarians" working to rescue rafters such as Elian Gonzalez.

III. CONCLUSION

In light of the foregoing discussion, the defendants' convictions are REVERSED and we REMAND for a new trial.

The court is aware that, for many of the same reasons discussed above, the reversal of these convictions will be unpopular and even offensive to many citizens. However, the court is equally mindful that those same citizens cherish and support the freedoms they enjoy in this country that are unavailable to residents of Cuba. One of our most sacred freedoms is the right to be tried fairly in a noncoercive atmosphere. The court is cognizant that its judgment today will be received by those citizens

with grave disappointment, but is equally confident of our shared commitment to scrupulously protect our freedoms. The Cuban-American community is a bastion of the traditional values that make America great. Included in those values are the rights of the accused criminal that insure a fair trial. Thus, in the final analysis, we trust that any disappointment with our judgment in this case will be tempered and balanced by the recognition that we are a nation of laws in which every defendant, no matter how unpopular, must be treated fairly. Our Constitution requires no less.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
GERARDO HERNANDEZ A/K/A MANUEL VIRAMONTEZ, ET AL., DEFENDANTS.

United States District Court, S.D. Florida.
No. 98-0721-CR.

July 27, 2000.

Cuban defendants were charged with conspiracy to become unregistered foreign agents, becoming unregistered foreign agents, and conspiracy to commit espionage. Defendants moved for change of venue. The District Court, Lenard, J., held that defendants did not show that pretrial publicity was sufficiently pervasive to warrant change of venue.

Denied.

ORDER DENYING WITHOUT PREJUDICE MOTIONS FOR CHANGE OF VENUE

LENARD, District Judge.

THIS CAUSE is before the Court on Defendants' Motions for Change of Venue. (D.E.# 317, 321, 329.) Having reviewed the Motions and the record, having heard the oral arguments of the parties, and having been otherwise advised in the premises, the Court finds, for the reasons set forth below, that Defendants have failed to demonstrate that a change

of venue is required to protect Defendants' right to receive a fair trial by an impartial jury.

I. INTRODUCTION

The Second Superseding Indictment charges Defendants in this case with, inter alia, conspiracy to become unregistered foreign agents, becoming unregistered foreign agents, and conspiracy to commit espionage. (D.E.# 224.) Defendants are alleged to have been part of a Cuban espionage ring that infiltrated and reported on United States military activities, in particular those occurring at the Naval Air Station at Boca Chica Key, Florida. By a separate count in the Second Superseding Indictment, the conduct of Defendant Gerardo Hernandez is alleged to have culminated in the shoot-down of two private aircraft from the United States and the deaths of four members of Brothers to the Rescue, a Miami-based Cuban exile group.

This case is now set to proceed to jury trial on September 5, 2000, at the United States District Courthouse in Miami, Florida. On January 5, 2000, Defendant Antonio Guerrerro filed the initial Motion for Change of Venue. (D.E.# 317.) Subsequently, Defendants Luis Medina (D.E.# 321), and Ruben Campa (D.E.# 329), filed separate Motions seeking the same relief. Defendants Gerardo Hernandez and Rene Gonzalez have joined in the Motions, but have not filed separate pleadings. The Government filed a Response to the Motions (D.E. # 441), and on June 26, 2000, the parties appeared before the Court for oral argument on the Motions.

II. ANALYSIS

Defendants seek a change of venue of the trial of this case, i.e., to have the trial held in Fort Lauderdale rather than in Miami.[1] Defendants argue that if the trial is held in Miami they will be denied their rights to due process of law and a fair trial with an impartial jury because of the inflamed atmosphere in this community concerning the activities of the government of the Republic of Cuba. (D.E. # 317 at 2.) In opposition to the Motions, the Government maintains that Defendants have not met their burden of showing that a different jury venire is necessary in these circumstances, and, in particular, disputes the methodology and conclusions of the survey conducted by Defendants' expert in support of their argument that pervasive community prejudice exists.

A. Legal Standard

The Fifth Amendment to the United States Constitution assures a criminal defendant the right to due process of law, and the Sixth Amendment guarantees the right to an "impartial jury." U.S. Const. amend. V, VI. To protect these rights, a district court may transfer proceedings to another district "if the court is satisfied that there exists in

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[1] Defendants' written Motions sought a change of venue from the Southern District of Florida to another judicial district. At oral argument, however, Defendants asked that their Motions be considered requests that the trial be held in Fort Lauderdale, within the Southern District of Florida, rather than Miami. (Tr. of 6/26/00 Hg. at 52:2-7.)

the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district." Fed.R.Cr.P. 21(a); *see also Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir.1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.")

These protections do not mean, however, that a criminal defendant is constitutionally entitled to a trial by jurors ignorant of issues and events relating to the trial. *See Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Rather, "due process requires only that a jury be seated which can put aside any impressions gained from pretrial publicity and render a fair verdict based exclusively on the evidence presented in court." *United States v. Fuentes-Coba*, 738 F.2d 1191, 1194 (11th Cir.1984) (citing, *inter alia, Irvin,* 366 U.S. at 723, 81 S.Ct. 1639), *cert. denied*, 469 U.S. 1213, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985). As the Supreme Court has explained:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any

> preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 722-23, 81 S.Ct. 1639.

In seeking a change of venue under Rule 21 prior to trial, the defendant bears the burden of demonstrating: (1) "an actual or identifiable prejudice on the part of the jury resulting from publicity;" (2) "community prejudice actually infecting the jury box;" or (3) sufficient evidence that the pretrial publicity has been "so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice." *Ross v. Hopper*, 716 F.2d 1528, 1540 (11th Cir.1983) (internal citations omitted). Whether a change of venue is necessary must be determined from the "totality of the surrounding facts" of the case. *Irvin*, 366 U.S. at 721, 81 S.Ct. 1639. If the court concludes that the defendant has not met the burden of demonstrating prejudice in the community as a whole, the court may then conduct a voir dire examination of the jury to explore any potential bias of the jurors individually. *See Fuentes-Coba*, 738 F.2d at 1195. In assessing the jurors' opinions, the test is " 'whether the nature and strength of the opinion formed are such as in law necessarily ... raise the presumption of partiality.... Unless [the defendant] shows the actual existence of such an

opinion in the mind of the jurors as will raise the presumption of partiality, the juror need not necessarily be set aside.' " *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639 (internal citation omitted).

B. Supreme Court Precedent

The case law governing the issue of the effect of pre-trial publicity stems from two Supreme Court cases in the 1960's, in which publicity and media coverage both before and during the trials rendered them "hollow formalities" at best and "three-ring carnivals" at worst. The first, *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), involved six widely-publicized and brutal murders committed in the vicinity of Evansville, Indiana. Following Irvin's arrest for the murders, the prosecutor disseminated throughout Evansville and its adjoining counties several press-releases stating that Irvin had confessed to the murders. *See Id.* at 719-20, 81 S.Ct. 1639. Irvin's appointed counsel sought and was granted a change of venue, but the trial was moved only to Gibson, the county adjoining Evansville. *See Id.* at 720, 81 S.Ct. 1639. The trial court subsequently denied Irvin's second change of venue motion. See *Id.* Reviewing the evidence Irvin presented in support of his motion, the Court found the evidence of the "build-up of prejudice [to be] clear and convincing:" (1) Irvin's trial had become the "cause celebre of this small community" such that a "roving reporter" solicited and recorded "curbstone opinions" that were later broadcast over local stations; (2) there had been a "barrage" of newspaper headlines, articles, cartoons and pictures during the six months preceding the trial; (3) local news and television stations "blanketed" the community with "extensive

newscasts" about his background; and (4) the media reported Irvin's confession, indictment, and offer to plead guilty in exchange for a life sentence rather than the death penalty. *Id.* at 725, 81 S.Ct. 1639.

In view of these facts, the Court found that "[i]t could not be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." *Id.* at 726, 81 S.Ct. 1639. Examining the voir dire process, the Court determined that a "pattern of deep and bitter prejudice" was present throughout the community as well as among the members of Irvin's jury, two-thirds of whom confessed prior to the trial to having an opinion that he was guilty and a familiarity with the facts and circumstances of the case. *Id.* at 727, 81 S.Ct. 1639. In such circumstances, the Court held that the trial court's finding of the jury's impartiality "did not meet constitutional standards" and therefore, Irvin's detention and death sentence were unconstitutional. *Id.* at 727-28, 81 S.Ct. 1639.

The second case addressed whether Sam Sheppard was deprived of a fair trial in his state conviction for the murder of his wife because of the trial judge's failure to protect him sufficiently from the "massive, pervasive and prejudicial publicity that attended his prosecution." *Sheppard v. Maxwell*, 384 U.S. 333, 334, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). From the moment of the reporting of the death of Sheppard's wife, the media captured every moment of the investigation, prosecution, trial and sentencing including, *inter alia*, Sheppard's re-enactment of his version of the events of the night of the murder, the preliminary hearing broadcast live

from the high school gymnasium, and the jurors' visit to the Sheppard home during the trial. *See Id.* at 339-42, 86 S.Ct. 1507. In addition to the escalating intensity of the negative and disparaging pre-trial publicity, the trial judge allowed approximately twenty representatives of the news and wire services to sit inside the bar, behind the counsel table, for the length of the trial. *Id.* at 355, 86 S.Ct. 1507. Prejudice among the jurors was manifest: every juror testified to having read or seen reports of the Sheppard case, and, during the trial, the daily record of the proceedings, including pictures of Sheppard, the judge, the exhibits, and the jurors themselves were printed or broadcast. See *Id.* at 345, 86 S.Ct. 1507 (noting that "[d]uring the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone"). One report referred to the atmosphere surrounding the Sheppard case as a "Roman holiday for the news media." *Id.* at 356, 86 S.Ct. 1507.

Despite this "carnival" surrounding the trial, Sheppard was not granted a change of venue nor was his jury sequestered. *Id.* at 352-53, 86 S.Ct. 1507. Reviewing his habeas corpus petition, the Court held that Sheppard's failure to receive a trial by an impartial jury free from outside influences violated his right to due process. *Id.* at 362, 86 S.Ct. 1507. The Court went on to describe remedial measures the trial judge could have taken "prevent prejudice at its inception," including: (1) asking jurors whether they had read or heard specific prejudicial comment about the case; (2) adopting stricter rules governing the use of the courtroom by the media; (3) insulating the witnesses; (4) sequestering the jurors; (5) controlling the release of leads, information and gossip to the

press by members of the prosecution; and (6) proscribing extrajudicial statements by any lawyer, party, witness, or court official containing potentially prejudicial matters. See *Id.* at 361, 86 S.Ct. 1507.

The Supreme Court later characterized the proceedings in *Irvin* and *Sheppard* as "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The *Murphy* court then distinguished "largely factual publicity from that which is invidious or inflammatory." *Id.* at 801-02, 95 S.Ct. 2031. Noting that the majority of reports, primarily factual in nature, concerning Murphy had appeared more than seven months prior to jury selection and that only twenty of eighty potential jurors were excused based on their opinion of Murphy's guilt (as compared to 268 excused out of 430 veniremen in *Sheppard*), the Court found that the circumstances did not "suggest a community with sentiment so poisoned against [Murphy] as to impeach the indifference of jurors who displayed no animus of their own." *Id.* at 803, 95 S.Ct. 2031. Thus, the Court held that Murphy had failed to show that the circumstances of his trial were inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. *Id.*

C. Eleventh Circuit Precedent

Subsequent to the Supreme Court's holding in *Murphy*, the courts in this Circuit have been cautious to provide procedural safeguards to prevent the prejudicial impact of pre-trial publicity. In *United States v. Capo*, 595 F.2d 1086, 1091 (5th Cir.1979),

after first finding that the record did not demonstrate the "degree of pervasive community prejudice which would warrant a presumption of jury prejudice," the Court of Appeals held that the "elaborate measures" taken by the district court to ensure that an impartial jury was impaneled also precluded a finding of "prejudice in fact." *Id.* The district court first conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict and instructing them to decide the case strictly on the evidence and not to discuss the case or read or listen to any news reports on the proceedings. *Id.* at 1091. Over the course of ten days, the court then conducted, in camera in the presence of defense counsel, an individual voir dire of each of the jurors based on questions requested by the defense to elicit each juror's knowledge of the case and the details of the crime and any preconceived opinions or partiality. *Id.* At the end of each day and prior to each recess, the court warned the jurors not to discuss the case or read or listen to any news reports. *Id.* at 1092. Under these circumstances, the Court of Appeals was "satisfied that the procedural safeguards taken by the court produced a fair and disinterested panel of jurors." *Id.* at 1092.

In a case involving a Cuban defendant convicted of violating the Trading With the Enemy Act and the Cuban Assets Control Regulations, the Eleventh Circuit held that the voir dire procedures guaranteed that the jury selected was able to "put aside any impressions gained from pre-trial publicity and render a fair verdict based exclusively on the evidence presented in court" and affirmed the district

court's denial of the pre-trial motion for change of venue. *United States v. Fuentes-Coba*, 738 F.2d 1191, 1194 (11th Cir.1984). In ruling on the change of venue motion, the district court first reviewed the survey evidence the defendant had presented and determined that the pre-trial publicity was not so inflammatory as to raise a presumption of prejudice. *Id.* at 1194. The court then conducted a voir dire of the jurors, during which defense counsel "extensively inquired" of the potential jurors with respect to their feelings about Cuba and Cuban-sympathetic organizations. *Id.* The Eleventh Circuit held that this "thorough inquiry" of the jury panel on the issue of their potential bias was sufficient to guarantee the defendant's right to a fair trial. *Id.* at 1195.

D. Defendants Have Not Presented Evidence of Pervasive Community Prejudice as Would Preclude the Selection of a Fair and Impartial Jury in This Case.[2]

In support of their Motions, Defendants have provided the Court with more than thirty articles on their case and other Cuba-related issues over the last two years. Defendants argue that these articles demonstrate that the community atmosphere is "so

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[2] As the Court has yet to empanel the jury venire, any claim that there exists actual or identifiable prejudice of jury members or that community prejudice actually infected the jury box is not yet ripe. Further, the Court construes Defendants' Motions as directed primarily toward the issue of "pervasive community prejudice," and, accordingly, the Court's analysis focuses on the third inquiry set forth in *Ross*. See *Ross*, 716 F.2d at 1540.

pervasively inflamed" that "resort to questioning in the cool reflection of a courtroom is not sufficient to cleanse the record." (D.E. # 317 at 3.) Defendants argue that community influences will affect any juror's ability to reach a fair verdict. (*Id.* at 6.)

In response, the Government asserts that the Defendants have failed to carry their burden of demonstrating that it is impossible to select a fair and impartial jury in this community. (D.E. # 441 at 3.) The Government maintains that an extensive voir dire of prospective jurors is preferable to a change of venue "because it provides actual, rather than speculative, observation" of the venire and "presents the opportunity to eliminate preconceptions and to determine whether jurors can be 'cured' of prejudice." (*Id.* at 3-4.)

The Court has reviewed the articles submitted by Defendants and finds that the majority of these articles relate to events other than the espionage activities in which Defendants were allegedly involved. (See, *e.g.*, D.E. # 329 Ex. I ("Former U.S. POWS Detail Torture by Cubans in Vietnam"); Ex. L (discussing protests of performance by Cuban band); Ex. N, O, P (discussing Elian Gonzalez).) With the exception of articles relating to the sentencing of two co-defendants and one editorial connoting the anniversary of the shoot-down, the articles that do pertain to the downing of the Brothers-to-the-Rescue plane were published more than one year ago, *see Capo*, 595 F.2d at 1091 (noting that local news coverage of crimes had subsided substantially by the time of trial), and discuss matters that are largely factual in nature. See *Murphy*, 421 U.S. at 801-02, 95 S.Ct. 2031 (distinguishing factual publicity from

that which is invidious or inflammatory). (See, *e.g.*, D.E. # 329 Ex. A, B, C, D, E, H.) Based on its review of the materials presented by Defendants, the Court finds that the pretrial publicity has not been "so inflammatory and pervasive as to raise a presumption of prejudice" among the potential jury venire in this case. *Ross*, 716 F.2d at 1541.

In further support of their Motion, Defendants introduced the results of a random survey conducted by Professor Gary Moran.[3] (D.E. # 321 Ex. A.) Between December 9 and December 14, 1999, Professor Moran conducted a random survey of 300 registered voters in Miami-Dade County. The survey elicited responses to a questionnaire consisting of eight opinion and twenty demographic inquiries, designed to examine prejudice against anyone alleged to have assisted the Cuban government in espionage activities. (*Id.* at 16.) According to Professor Moran, the results of the survey indicated: (1) that 69% (with a sampling error of 5.3%) of eligible jurors are prejudiced; (2) that 40% of survey respondents (60% of Hispanic respondents) would find it difficult to be impartial, of which 90% would not change their minds under any circumstances; and (3) approximately 1/3 of the respondents are "at least

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[3] Professor Moran holds a Bachelor of Arts degree from the University of Florida, a Master's Degree in Psychology from the University of Detroit, and a Ph.D. in Psychology from the Catholic University at Nijmegen, the Netherlands. (D.E. # 321 Ex. A at 1.) He is currently a Professor of Psychology at Florida International University. (*Id.*)

somewhat worried about community criticism in the event of a 'not guilty' verdict." (*Id.*)

The Government argues that Professor Moran's survey is unworthy of this Court's reliance due to numerous flaws in Professor Moran's procedures and conclusions which call into question the validity of his survey. (D.E. # 441 at 6.) The Government takes issue with Professor Moran's reliance on two prior surveys concerning South Floridians' attitudes toward Cuba,[4] and argues that the present survey "is not well designed and does not support the conclusions and resulting opinion" of Professor Moran. (*Id.* at 8-9.)

In support of its position, the Government has submitted the affidavit and curriculum vitae of Professor J. Daniel McKnight.[5] Professor McKnight

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[4] The first survey was conducted by Jay Schulman in *United States v. Fuentes-Coba*, 738 F.2d 1191 (11th Cir.1984), in which the Eleventh Circuit affirmed the district court's denial of the motion for change of venue. Professor Moran conducted the second survey in the case of *United States v. Broder*, Case No. 97-267-CR-GRAHAM, in which the district court also denied the defendants' motion for change of venue.

[5] Professor McKnight is a social psychologist specializing in social perception, research methodology, and psychometrics. (D.E. # 441 Ex. B at 1.) He holds a Bachelor's degree in Psychology from the University of Illinois at Chicago, and a Master's degree and Ph.D. in Psychology from the State University of New York at Stony Brook. (*Id.*) He has completed a post-doctoral fellowship in Cardiovascular Behavioral Medicine-Psychophysiology at the Western Psychiatric Institute & Clinic, University of Pittsburgh Medical Center. (*Id.*) As of

opined that Professor Moran's prior survey,[6] which concluded that a "substantial prejudice [existed] in the Southern District of Florida against a defendant alleged to have helped the Castro government," (D.E. # 441 Ex. A at 13), lacked "empirical rigor, scientific validity and provides no estimation of its scientific reliability." (D.E. # 441 Ex. B at 2.)

The Court has reviewed the questionnaire and Professor Moran's interpretation of the responses, and, based on the following findings, declines to afford the survey and Professor Moran's conclusions the weight attributed by Defendants. First, the Court finds that 54% of all respondents and 48.5% of Hispanic respondents stated that they were not

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August 1997, he was a consultant with Zagnoli McEvoy Foley Ltd., in Chicago, Illinois. (*Id*.)

[6] Professor McKnight's affidavit was previously offered in rebuttal to the defendant's reliance on Professor Moran's survey in support of the motion for change of venue in *Broder*. See note 4, supra. The Court has reviewed Professor Moran's prior survey, analysis and conclusions, and finds that there are substantial similarities with Professor Moran's analysis and conclusions in the survey in the case sub judice. For example, question 6 in the present survey ("Castro's Cuba is an enemy of the United States.") (D.E. # 321 Ex. E at 2) also appears in the Broder survey (question 5). (D.E. # 441 Ex. A at 11.) In addition, many areas of Professor Moran's analysis and conclusions in his affidavit in this case appear verbatim in the *Broder* affidavit. (Compare D.E. # 321 Ex. A 7-9, 12-16 with D.E. # 441 Ex. A 8-10, 14-16.) Therefore, based on these similarities, the Court deems Professor McKnight's critique of the *Broder* survey equally applicable to Professor Moran's survey in this case.

aware of this case altogether. (D.E. # 321 Ex. E at 1.) Yet, Professor Moran appears to have included these respondents in quantifying the alleged prejudice in this community against Defendants.

Second, although prejudice is an attitude directed toward members of a group solely based on their membership in that group, the questions Professor Moran used to calculate prejudice do not reference a "social target" of the prejudicial attitude. (*See* McKnight Aff. at 2 (D.E. # 441 Ex. B).) Therefore, Professor Moran's calculation of prejudice is without substantial support, thus rendering it unreliable.

Third, in those questions in which a social target is mentioned, Professor Moran has done so in non-neutral terms characterizing actors subjectively, a method contrary to standard scientific procedure. (*Id.*) For example:

> 2. These defendants are charged with setting up the ambush of the Brothers to the Rescue planes in which four people were killed. This type of activity is characteristic of the Castro regime.
>
> 3. The aim of Castro is to undermine legitimate Cuban exile organizations.
>
> 5. Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades.

(D.E. # 321 Ex. E at 2 (emphasis added).)

Therefore, because Professor Moran failed to use neutral terminology, the questions in the survey cannot validly assess social prejudice.

Fourth, several of Professor Moran's questions are ambiguous, casting further doubt on the accuracy of the response provided. For instance, question 10 asks if there are "any circumstances" that would change the respondent's "opinion," but does not clarify to which opinion the question refers. (D.E. # 321 Ex. E at 2.)

Fifth, Professor McKnight pointed out in the *Broder* survey, the sample size of 250 respondent constituted less than 0.003% of eligible jurors in Miami-Dade County in 1992, and could not be considered representative of the population at that time. (McKnight Aff. at 4-5 (D.E. # 441 at 4-5).) Similarly, the size of the statistical sample in this case (300 respondents) is too small to be representative of the population of potential jurors in Miami-Dade County.

Finally, and most significantly, Professor Moran attempts to bolster his conclusion that community prejudice exists by referencing the earlier study of anti-Cuban sentiment in South Florida that was introduced in *Fuentes-Coba*, in which the district court concluded-and the Eleventh Circuit affirmed-that the survey did not give rise to a presumption of prejudice. *See Fuentes-Coba*, 738 F.2d 1191. Due to its ambiguity and lack of clarity and reliability, therefore, the Court is unwilling to give Professor

Moran's survey substantial weight in determining whether Defendants are entitled to a change of venue. *See Id.*

Based on the articles and Professor Moran's survey, Defendants portray their case as identical to the circumstances in *United States v. McVeigh*, 918 F.Supp. 1467 (W.D.Okla.1996), in which Judge Matsch granted a change of venue to Colorado for the trial of the Oklahoma City bombers. In granting the defendants' motion-which the Government did not oppose-Judge Matsch emphasized the strong judicial preference for careful voir dire and noted that extensive pre-trial publicity does not per se preclude a finding of fairness in the conduct of the trial. *Id.* at 1470, 1473. Because of: (1) the demonization of the defendants in contrast to the intense humanization of the victims; (2) the character of the crimes charged; and (3) the "profound and pervasive" effects of the explosion such "that no detailed discussion of the evidence [was] necessary," Judge Matsch concluded that there was "so great a prejudice against [the] two defendants in the State of Oklahoma that they [could] not obtain a fair and impartial trial" anywhere in the state. *Id.* at 1474.

The volume and character of the evidence justifying a change of venue in *McVeigh* far outweighs the evidence Defendants have submitted in support of their argument that pervasive community prejudice exists in this case. *See McVeigh*, 918 F.Supp. at 1470 (evidence submitted included, *inter alia*, videotapes of local and national telecasts from the date of the bombing to the date of the motions hearing). Thus, while the pretrial atmosphere in Oklahoma City was more akin to that

of the *Irvin* trial, this case is substantially similar to that in *Ross* or *Fuentes-Coba*, in which the pretrial publicity did not rise to a sufficient level to raise a presumption of prejudice in the community. *See Fuentes-Coba*, 738 F.2d at 1194; *Ross*, 716 F.2d at 1541. Thus, the Court finds that Defendants have not adduced evidence sufficient to raise a presumption of prejudice against Defendants as would impair their right to a fair trial by an impartial jury in Miami-Dade County. *See Fuentes-Coba*, 738 F.2d at 1194-95; *Ross*, 716 F.2d at 1541.

III. CONCLUSION

The Court finds that Defendants have not demonstrated the degree of pervasive community prejudice which would warrant a presumption of jury prejudice, and that thorough voir dire, conducted in a manner similar to *Ross,* 716 F.2d at 1540, and *Fuentes-Coba*, 738 F.2d at 1194-95, and careful instructions to the jury throughout trial will enable the Court to safeguard Defendants' right to a fair and impartial jury in Miami-Dade County. In addition, the Court notes that if the Court determines during voir dire that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motions for Change of Venue (D.E.# 317, 321, 329) are DENIED WITHOUT PREJUDICE. It is further

ORDERED AND ADJUDGED that counsel for the Government and counsel for Defendants shall have

up to and including August 21, 2000 to file with the Court any proposed voir dire questions.

S.D.Fla.,2000.

U.S. v. Hernandez

106 F.Supp.2d 1317, 14 Fla. L. Weekly Fed. D 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 98-0721-CR-LENARD/DUBÉ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN DOE NO. 3 a/k/a RUBEN CAMPA, et al.,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court on the Motion for Reconsideration of This Court's Denial of Defendant's Motion for a Change of Venue, filed September 15, 2000 by Defendant Ruben Campa. The Government filed a Response on October 2, 2000. Having reviewed the Motion, the Response, and the record, the Court finds as follows.

Defendant Campa moves the Court to reconsider its Order Denying without Prejudice Motions for Change of Venue (D.E. 586), issued July 27, 2000. Defendant Campa renews the arguments alleged in the previous Motions for Change of Venue, which the Court denied, and contends that the Court did not address how Defendants' theory of defense affects their ability to receive a fair trial in Miami, which community "is undeniably and strongly opposed to the Castro regime and its perceived

sympathizers and supporters." (Def. Campa's Mot. Reconsideration at 2.) Defendant Campa distinguishes the instant case from that of Mariano Faget, who was recently charged with passing United States classified information to the Cuban government. Defendant Campa stated that Faget's defense "relied . . . on his vehement denial of any support or sympathy for the Cuban government." (Id. at 3.) By contrast, Defendant Campa emphasizes that the affirmative defense of necessity, which Defendants have asserted here, "would . . . quickly cast Mr. Campa and his co-defendants as villanous Castro sympathizers." (Id.) In support of this argument, Defendant Campa submits a six news articles published after the Court denied the Motions for Change of Venue on July 27, 2000.

As to Defendants' renewed arguments, the Court finds that its Order of July 27, 2000 sufficiently addressed them and need not discuss them further. The Court finds that Defendants have previously raised the argument that the defense of necessity will uniquely prejudice Defendants if tried before a Miami jury, and that the Court's reasoning in its Order Denying Motions for Change of Venue adequately addresses this argument.

Moreover, the Court reiterates that "the court may conduct a voir dire examination of the jury to explore any potential bias of the jurors individually." (Order Denying Mots. Change Venue at 4 (citing United States v. Fuentes-Coba, 738 F.2d 1191, 1195 (11th Cir. 1984))), and that "careful instructions to the jury throughout trial will enable the Court to safeguard Defendants' right to a fair and impartial jury in Miami-Dade County." (Order Denying Mots.

Change Venue at 17.) Again, "if the Court determines during voir dire that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time." (Id.) Accordingly, it is

ORDERED AND ADJUDGED that the Motion for Reconsideration of This Court's Denial of Defendant's Motion for a Change of Venue (D.E. 656), filed September 15, 2000 by Defendant Ruben Campa, is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 24 day of October, 2000.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Robert L. Dubé

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Case No. 98-0721-CR-LENARD/DUBE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 98-0721-CR-LENARD/DUBÉ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GERARDO HERNANDEZ, et al.,

Defendants.

ORDER DENYING DEFENDANT GERARDO HERNANDEZ'S MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL

THIS CAUSE is before the Court on the Motion for Judgment of Acquittal and Motion for New Trial, filed June 15, 2001 by Defendant Gerardo Hernandez. The Government filed a Response on June 29, 2001. On July 11, 2001, Defendant Hernandez filed a Reply. Having reviewed the Motion, the Response, the Reply, and the record, the Court finds as follows.

INTRODUCTION

Five defendants stood trial for over six months on counts of entering, and conspiracy to enter, the United States as foreign agents without prior notification to the Attorney General or, alternatively, with the purpose to defraud the U.S. Government;

conspiracy to deliver information, relating to the national security of the United States, to Cuba for the purpose of injuring the United States or benefitting Cuba; and using falsified passports to enter the United States. Defendant Hernandez was charged in Count 3 of the Superseding Indictment with conspiracy to murder the pilots and passengers of the Brothers to the Rescue planes, shot down by Cuban MiG's on February 24, 1996. On July 8, 2001, the jury returned a verdict of guilty on all Counts, including Count 3.

Defendant Hernandez moves for a judgment of acquittal as to Count 3, pursuant to Federal Rule of Criminal Procedure 29(c),[7] and, in the alternative, a new trial on Count 3, pursuant to Federal Rule of Criminal Procedure 33. [8] Defendant Hernandez

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[7] Federal Rule of Criminal Procedure 29(c) provides in pertinent part that:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

[8] Federal Rule of Criminal Procedure 33 provides in pertinent part that "[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice require . . . . A motion for a new trial may be made only within 7 days after the verdict or finding of guilty or within such further time a the court may fix during the 7-day period."

argues that the Government did not meet its burden of proof with respect to Defendant Hernandez's mens rea for Count 3 — specifically, the Government failed to show beyond a reasonable doubt that Defendant Hernandez knew that the shootdown was planned to occur in international airspace. In support of this contention, Defendant Hernandez cites to HF 115, DG-104, HF 119, DG-108, statements by the prosecution at closing, and a quote from the jury foreman in The Miami Herald. Should the Court elect not to grant Defendant Hernandez's Motion for Judgment of Acquittal, he urges the Court, in the alternative, to grant him a new trial on Count 3, "based on the government's blatantly improper closing argument, continuous misstatement of the law and invitation of the jury to disregard or nullify the Court's instructions, which in fact the jury did based on post verdict interviews with the media." (Mot. J. Acquittal & Mot. New Trial at 13.)

The Government maintains that Defendant Hernandez has waived his argument regarding Defendant Hernandez's mens rea because he failed to raise that argument in his Rule 29 Motion for Judgment of Acquittal, filed March 2, 2001. Responding to the merits of Defendant Hernandez's arguments, the Government contends that the propagandizing leaflets were provocative incursions that prompted the shootdown. Citing to HF-108, HF-111, HF-115, HF-116, HF-126, HF-127, HF-128, DG-104, and DG-108 as well as the trial-testimony of White House advisor on Cuban policy, Richard Nuccio, the Government argues that Defendant Hernandez and the Cuban government sought to terminate contact between Cuba's internal dissidents

and the Cuban exile groups in Miami, such as Concilio Cubano and Brothers to the Rescue, and that the shootdown was the remedy. The Government also states that "the sustaining of objections does not itself reflect prosecutorial misconduct." (Gov't's Resp. at 13.)

MOTION FOR JUDGMENT OF ACQUITTAL

Standard of Review

The Eleventh Circuit mandates that when considering a Rule 29(c) motion for judgment of acquittal, "a district court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction." United States v. Ward, 197 F.3d 1076, 1079 (11th Cir. 2000) (citation omitted). The Ward court elaborated upon this standard of review as follows:

> The district court must view the evidence in the light most favorable to the government. . . . The court must resolve any conflicts in the evidence in favor of the government, . . . and must accept all reasonable inferences that tend to support the government's case. . . . The court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. . . . "'It is not necessary for the evidence to exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence establishes guilt beyond a

> reasonable doubt.'". . . A jury is free to choose among reasonable constructions of the evidence. . . . The court must accept all of the jury's "reasonable inferences and credibility determinations."

Ward. 197 F.3d at 1079 (citations omitted).

Analysis

Even assuming arguendo that Defendant Hernandez has not waived his right to argue that the Government did not meet its burden of proof as to his mens rea for the charges alleged in Count 3, the Court finds that it cannot grant a judgment of acquittal on Count 3.

Construing the evidence in the Government's favor, the Court finds a reasonable inference can be made from the evidence that Defendant Hernandez knew that the Brothers to the Rescue ("BTTR") shootdown of February 24, 1996 was to occur in international airspace. In support of this finding is HF-115, which provides in pertinent part:

> Superior Headquarters approved Operation Escorpion in order to perfect a confrontation of [counter revolutionary] actions of BTTR. Info from German and Castor should come with clear and precise specifications that allow to know without a doubt that Basulto is flying, whether or not activity of dropping of leaflets or violation of air space; if Castor and German are or are not flying, anticipated plan any type BTTR flights,

> in order to know about these activities ahead of time. If there is not access this should also be a priority. Always specify if agents are flying.

(Mot. J. Acquittal Mot. New Trial Ex. A at 1.) While Defendant Hernandez argues that the language, "dropping of leaflets or violation of air space," indicates that the plan was to fire on the BTTR planes, only upon violations of Cuban airspace, the Court disagrees. (Id.) Instead, the Court finds a reasonable inference can be made from the disjunctive phrase, "dropping of leaflets or violation of air space," that the plan was to shoot down the planes, upon either a violation of Cuban air space or the dropping of leaflets. (Id.) Under this line of reasoning, violating Cuban airspace was not the only preordained reason given by the conspirators to shoot down the BTTR planes.

Also, the Court finds a reasonable inference can be made from (a) Nuccio's testimony, describing Cuba's intent to cease the contact between Cuban insurgents on the island and Cuban exile groups in Miami, and (b) HF-108, in which Cuba's head of intelligence refers to the BTTR leaflets as "propaganda," such that Defendant Hernandez and the Cuban government perceived the dropping of leaflets as an incursion itself. Even if the leaflets were dropped from international airspace, at least twelve miles from Cuban shores, the Court finds that a reasonable juror could conclude that the Cuban government perceived such an act as grounds for shooting down the BTTR planes. Likewise, the Court finds a reasonable inference can be made from the foregoing evidence that the "provocations" mentioned

in DG-108 referred to the dropping of leaflets from international airspace. Indeed, in the Eleventh Circuit, the prosecution need not show that defendants, being tried for conspiracy, "knew all of the details of the alleged conspiracy as knowledge of the essential objective is sufficient to impose liability." United States v. Johnson, 889 F.2d 1032, 1035 (11th Cir. 1989) (citing United States v. Elledge, 723 F.2d 864, 865 (11th Cir. 1984)).

Furthermore, DG-104 is a Cuban government-message reminding Defendant Hernandez that "we need to pinpoint in more detail everything related to new incursions by Brothers to the Rescue to be carried out in our country," and that such details included, but were not limited to, "whether the activity is to drop leaflets or violate the air space." (Mot. J. Acquittal Mot. New Trial Ex. B at 1.) The Court finds a reasonable inference can be made from this message that Defendant Hernandez and the Cuban government viewed both dropping leaflets and violating airspace as "new incursions." (Id.)

In addition, the Court finds that "the sustaining of objections does not itself reflect prosecutorial misconduct." (Resp. at 13.) The Court sustained counsel for Defendant Hernandez's objections to the Government's characterizations of the jury instructions for Count 3 made during closing arguments. At the conclusion of closing arguments, the Court provided each juror with a written copy of the Court's instructions on the law for all Counts, including Count 3, to follow as the Court instructed. These packets of jury instructions were then available for each juror's use and reference during deliberations. As such, the Court finds that

Defendant Hernandez was not prejudiced by the prosecution's typification of the Court's jury instructions at closing argument. The Court thus finds that neither the prosecution's closing arguments nor the statements of the jury foreman reported in The Miami Herald merit a judgment of acquittal.

These instructions did not charge the jury with determining whether the shootdown actually occurred in international airspace, but whether the shootdown was planned to occur in international airspace. Evidence of what actually occurred however can be used ex post as proof of what was deigned in the conspiracy. Johnson, 889 F.2d at 1035 (citing United States v. Bascero, 742 F.2d 1335, 1359 (11th Cir.), cert. denied, 472 U.S. 1021 (1984). The Court finds that based upon the evidence, demonstrating that the shootdown actually occurred in international airspace, a reasonable juror could conclude that the shootdown was to occur in international airspace. The Court also finds a reasonable inference can be made from HF-127 and HF-128, congratulating Defendant Hernandez on his effort related to the BTTR shootdown, that Defendant Hernandez knew the plan was to shoot down the BTTR planes in international airspace. In addition, a reasonable inference can be made that the leaflets were dropped from international airspace, based on Basulto's trial-testimony. While Defendant Hernandez highlights a number of exhibits, showcasing the Cuban government's concern regarding the encroachment of its airspace and indicating that both governments knew of the BTTR's January 1996 leaflet-dropping over Cuban waters, the Court nevertheless finds that

such a concern neither overrides other concerns, namely the dropping of leaflets from international airspace, nor eliminates the aforementioned evidence probative of Defendant Hernandez's knowledge that the shootdown was to occur in international airspace.

Thus, accepting all reasonable inferences from the evidence in favor of the Government, the Court finds that Defendant Hernandez's Rule 29(c) Motion for Judgment of Acquittal is denied.

MOTION FOR NEW TRIAL

Courts may grant a new trial, when the interest of justice so requires or when a criminal defendant was unable to receive a fair trial and suffered "actual, compelling prejudice." United States v. Pedrick, 181 F.3d 1264, 1267 (11th Cir. 1999) (citing United States v. Cassano, 132 F.3d 646, 651 (11th Cir.), cert. denied, 525 U.S. 840 (1998)). Nevertheless, the Court's "standard of review in granting a new trial 'is addressed to the discretion of the trial judge . . . . Such motions are not favored and are granted with great caution." United States v. Harris, Civ. A. No. 93-52, 1993 WL 483484, *2 (E.D.La. Nov. 12, 1993) (citing United States v. Hamilton, 559 F.2d 1370, 1373 (5th Cir. 1977)[9]). As discussed, infra at II.B, the Court finds that the conduct of the prosecution and the jury foreman's statement in the newspaper did not prejudice

[9] In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Defendant Hernandez, such that a new trial on Count 3 is merited.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion for Judgment of Acquittal and Motion for New Trial, filed June 15, 2001 by Defendant Gerardo Hernandez, is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 28 day of November, 2001.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Robert L. Dubé

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Case No. 98-0721-CR-LENARD/DUBE

USDC FLSD 245b (Rev 3/01). Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

GERARDO HERNANDEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 1:98cr0721-001

Counsel For Defendant: Paul McKenna, Esq.

Counsel For The United States: Caroline Heck Miller, AUSA

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 2, 3, 4, 5, 6, 13, 15, 16, 19, 22, 23 and 24 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794 (c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18USC§1117	Conspiracy to commit murder	09/12/1998	3
18 USC § 1546(a)	Fraud and misuse of documents	08/25/1998	4
18 USC § 1546(a)	Fraud and misuse of documents	07/22/1996	6
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	5

18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	13, 15, 16, 22, 23, 24
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	2/23/1996	19

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

If ordered to pay restitution. the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. xxx-xx-xxxx
Date of Imposition of Sentence:
December 12, 2001
Defendant's Date of Birth: 06/04/1965
Deft's U.S. Marshal No .: 58739-004
Defendant's Mailing Address:
FDC -33 NE Fourth Street
Miami. FL 33132
Defendant's Residence Address :
FDC -33 NE Fourth Street
Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 12, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life Imprisonment** as to Counts 2 & 3 to run concurrently; 60 months as to Count 1; 36 months as to Count 5 and 120 months as to Counts 4, 6, 13, 15, 16, 19, 22, 23 and 24. These counts shall run concurrently with one another and concurrently with the sentences imposed as to Counts 2 and 3.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on_____to_____at_____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

If released from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years,** as to Counts 1, 4, 6, 13, 15, 16, 19, 22, 23 and 24. He shall be placed on concurrent terms of 5 years supervised release as to Counts 2 and 3, as well as a concurrent term of 1 years supervised release as to Count 5.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission

of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	**Total Fine**	**Total Restitution**
$1,250.00	**$**	**$**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL SECTION 301 N. MIAMI AVENUE, ROOM 150 MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

USDC FLSD 245B (Rev 3/01). Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

LUIS MEDINA III,

A/K/A RAMON LABANINO

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 1:98cr0721-002

Counsel For Defendant: William Norris, Esq.

Counsel For The United States: Caroline Heck Miller, John Kastranakes, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 2, 9, 11, 12, 14, 13, 25, and 26 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794 (c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18 USC § 1546(a)	Fraud and misuse of documents	09/12/1998	9, 11
18 USC § 1542	False statement in a passport application	02/06/1996	10
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	12

18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	14,16, 25, and 26

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution. the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. xxx-xx-xxxx
Date of Imposition of Sentence:
December 13, 2001
Defendant's Date of Birth: 06/09/1963
Deft's U.S. Marshal No .: 58734-004

Defendant's Mailing Address:
FDC -33 NE Fourth Street
Miami. FL 33132
Defendant's Residence Address :
FDC -33 NE Fourth Street
Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 19, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life as to Count 2; It is further ordered** that the defendant shall be imprisoned for 60 months as to Count 1, 36 months as to Count 12, and 120 months as to Counts 9, 10, 11, 14, 16, 25, and 26. These counts shall run concurrently with one another and concurrently with the sentences imposed as to Count 2.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on_____to_____at_____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

If released from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years,** as to Counts 1, 9, 10, 11, 14, 16, 25 and 26. He shall be placed on concurrent terms of **5 years** supervised release as to Count 2, as well as a concurrent term of **1 year** supervised releases as to Count 12.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of

a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of

probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment Total Fine Total Restitution

$950.00 $ $

*Findings for the total amount o flosses are required under Chapters 109A , 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL SECTION 301 N. MIAMI AVENUE, ROOM 150 MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

USDC FLSD 245b (Rev 3/01). Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

RENE GONZALEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 1:98cr0721-003

Counsel For Defendant: Philip Horowitz, Esq.

Counsel For The United States: Caroline Heck Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1 and 15 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	15

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution. the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 592-04-7723
Date of Imposition of Sentence:
December 14, 2001
Defendant's Date of Birth: 08/13/1956
Deft's U,S. Marshal No .: 58738-004
Defendant's Mailing Address:
FDC -33 NE Fourth Street
Miami. FL 33132
Defendant's Residence Address :
FDC -33 NE Fourth Street
Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 19, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **10 years** as to Count 15 and **5 years** as to Count 1 to run consecutively.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on_____to_____at_____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years,** as to Counts 1 and 15.

The defendant shall report to the probation office in the district to which the defendant is released within 48 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised

release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of

a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

It is further ordered that the defendant file accurate income tax returns for the prosecution years and to

pay all taxes, interest and penalties due and owing to him by the Internal Revenue Service.

The defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, organized crime figures are known to be or frequent.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	**Total Fine**	**Total Restitution**
$200.00	**$**	**$**

*Findings for the total amount o flosses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL SECTION 301 N. MIAMI AVENUE, ROOM 150 MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

USDC FLSD 245b (Rev 3/01). Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ANTONIO GUERRERO

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 1:98cr0721-004

Counsel For Defendant: Jack Blumenfeld, Esq.

Counsel For The United States: Caroline Heck Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Patricia Saunders

The defendant was found guilty on Count 1, 2, and 16 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794(c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	16

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution. the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 592-19-6042
Date of Imposition of Sentence:
December 27, 2001
Defendant's Date of Birth: 10/16/1958
Deft's U.S. Marshal No .: 58741-004
Defendant's Mailing Address:
Federal Detention Center 33 NE 4th Street
Miami. FL 33132
/s/JOAN A. LENARD

United States District Judge

December 31, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life as to count 2; 5 years as to each**

of Counts 1 and 16 to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on_____to_____at_____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years at to Count 2 and 3 years as to each of Counts 1 and 16 to run concurrently**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and

Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

The defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, organized crime figures are known to be or frequent.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	**Total Fine**	**Total Restitution**
$300.00	**$**	**$**

*Findings for the total amount o flosses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the

period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL SECTION 301 N. MIAMI AVENUE, ROOM 150 MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

USDC FLSD 245b (Rev 3/01). Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

RUBEN CAMPA

A/K/A FERNANDO GONZALEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 1:98cr0721-005

Counsel For Defendant: Joaquin Mendez, AFPD

Counsel For The United States: Caroline Heck Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 7, 8, 16, and 17 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 1546(a)	Fraud and misuse of documents	09/12/1998	7
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	8
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	16 &17

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution. the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 240-77-4930
Date of Imposition of Sentence:
December 18, 2001
Defendant's Date of Birth: 08/18/1963
Deft's U.S. Marshal No .: 58733-004
Defendant's Mailing Address:
FDC 33 NE Fourth Street
Miami. FL 33132
/s/JOAN A. LENARD

United States District Judge

December 19, 2001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months as to Count 1 and 48 months

as to Count 7 to run consecutively; 36 months as to Count 8 to run concurrently; 120 months as to each of Counts 16 & 17 to run concurrently with each other and to run consecutively with Counts 1 & 7.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on_____to_____at_____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years as to Counts 1, 17, 16, and 17; 1 year as to count 8 to run concurrently.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to

the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment Total Fine Total Restitution

$500.00 $ $

*Findings for the total amount o flosses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL SECTION 301 N. MIAMI AVENUE, ROOM 150 MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17176-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
RUBEN CAMPA,
a.k.a. John Doe 3,
a.k.a. Vicky,
a.k.a. Camilo,
a.k.a. Oscar,
RENE GONZALEZ,
a.k.a. Iselin,
a.k.a. Castor,
GERARDO HERNANDEZ,
a.k.a. Giro,
a.k.a. Manuel Viramontez,
a.k.a. John Doe 1,
a.k.a. Manuel Viramontes,
LUIS MEDINA,
a.k.a. Oso,
a.k.a. Johnny,
a.k.a. Allan,
a.k.a. John Doe 2,
ANTONIO GUERRERO,
a.k.a. Rolando Gonzalez-Diaz,
a.k.a. Lorient,
Defendants-Appellants.

No. 03-11087-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
GERARDO HERNANDEZ,
a.k.a. Giro, a.k.a. Manuel Viramontez,
a.k.a. John Doe 1, a.k.a. Manuel Viramontes,
LUIS MEDINA,
a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan,
a.k.a. John Doe 2,
RENE GONZALEZ,
a.k.a. Iselin, a.k.a. Castor,
ANTONIO GUERRERO,
a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,
RUBEN CAMPA,
a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a. Oscar,
Defendants-Appellants.

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

[September 2, 2008]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

For Appellant Gerardo Hernandez the Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17176-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
RUBEN CAMPA,
a.k.a. John Doe 3,
a.k.a. Vicky,
a.k.a. Camilo,
a.k.a. Oscar,
RENE GONZALEZ,
a.k.a. Iselin,
a.k.a. Castor,
GERARDO HERNANDEZ,
a.k.a. Giro,
a.k.a. Manuel Viramontez,
a.k.a. John Doe 1,
a.k.a. Manuel Viramontes,
LUIS MEDINA,
a.k.a. Oso,
a.k.a. Johnny,
a.k.a. Allan,
a.k.a. John Doe 2,
ANTONIO GUERRERO,
a.k.a. Rolando Gonzalez-Diaz,
a.k.a. Lorient,
Defendants-Appellants.

No. 03-11087-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
GERARDO HERNANDEZ,
a.k.a. Giro, a.k.a. Manuel Viramontez,
a.k.a. John Doe 1, a.k.a. Manuel Viramontes,
LUIS MEDINA,
a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan,
a.k.a. John Doe 2,
RENE GONZALEZ,
a.k.a. Iselin, a.k.a. Castor,
ANTONIO GUERRERO,
a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,
RUBEN CAMPA,
a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a. Oscar,
Defendants-Appellants.

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

[September 2, 2008]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, PRYOR and KRAVITCH, Circuit Judges.

PER CURIAM:

For Appellants Campa, Gonzalez, Medina and Guerrero the Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

UNITED STATES of America, Plaintiff-Appellee,
v.
Ruben CAMPA, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a. Oscar, Rene Gonzalez, a.k.a. Iselin, a.k.a. Castor, Gerardo Hernandez, a.k.a. Giro, a.k.a. Manuel Viramontez, a.k.a. John Doe 1, a.k.a. Manuel Viramontes, Luis Medina, a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan, a.k.a. John Doe 2, Antonio Guerrero, a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient, Defendants-Appellants.
United States of America, Plaintiff-Appellee,
v.
Gerardo Hernandez, a.k.a. Giro, a.k.a. Manuel Viramontez, a.k.a. John Doe 1, a.k.a. Manuel Viramontes, Luis Medina, a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan, a.k.a. John Doe 2, Rene Gonzalez, a.k.a. Iselin, a.k.a. Castor, Antonio Guerrero, a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient, Ruben Campa, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a. Oscar, Defendants-Appellants.
Nos. 01-17176, 03-11087.

Oct. 31, 2005.

Appeals from the United States District Court for the Southern District of Florida (No. 98-00721-CR-JAL);
Joan A. Lenard, Judge.
(Opinion Aug. 9, 2005, 419 F.3d 1219, 11th Cir.2005)

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges[10]

BY THE COURT:
A member of this Court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above causes shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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[10] Senior U.S. Circuit Judge Phyllis A. Kravitch may elect to participate in further proceedings in these matters pursuant to 28 U.S.C. § 46(c).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
GERARDO HERNANDEZ,
a/k/a MANUEL VIRAMONTEZ, ET AL.,
Defendants.

Docket No.
98-721-CR-LENARD
Miami, Florida

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOAN A. LENARD AND A JURY

* * * *

[535] personally did not conduct the counseling and on the issue of whether she attended services, this is exactly what I was concerned about. The mere fact of having attended a mass not become a benchmark here. There were masses after the shoot-down all over town and numerous people attended and I think we could all take notice of the

fact even in a non-public situation, people go to funeral services and perform those social acts without being tainted by irretrievable prejudice. As the Court said yesterday, it is a question of the totality of the circumstances other than the mere fact of having attended a service. To say that this individual should be stricken for cause in light of her statement she did not have strong feelings about this matter, would be to preempt the process that has been prescribed here where these matters were supposed to be employed on Thursday where we will go into them in greater detail.

If she is not stricken for cause and comes back on Thursday, I am sure this is a matter the Court will go into with her and that is the appropriate setting.

MR. McKENNA: It is a Catholic school. She is the principal of the school. She is almost like a priest herself. She teaches religion to these students, she goes to the home, prays and gives her condolences. She is too close to the victims.

THE COURT: I will deny the challenge for cause

* * * *

[625] it for tomorrow and we will continue on Friday and I am not sure we will complete the individual voir dire by Friday but certainly by Monday we should be at least close to completing it.

Thus far I think it is going well.

MS. MILLER: Judge, you have distributed to us the questions that you will be using tomorrow, but at the time you said they were not quite in final form. Would it be possible for us to get those questions in final form?

THE COURT: What I had done previously when we were working on the questions I gave you a rough draft. I have now completed the questions, made some changes as to the wording, but the thrust of the questions are the same as to what we went over in the pretrial conference.

I can tell you, I have been getting a tremendous amount of requests from the media for those particular questions and I am sure you know I have not released it to them and telling them it is not public record. I don't think we want to see those printed or indicated in the news segment so jurors would hear those questions prior to the time they are posed to them by the Court.

MS. MILLER: I certainly have no objection to receiving them under seal if that would give the Court some more comfort but I was hoping if we could have them tonight to take a look at the questions.

* * * *

[1026] people would be criticizing me being in this jury either way?

Q. Would you be able to put aside whatever concerns you have about that?

A. Yes.

Q. And sit and listen to the evidence in this case and be fair to both the prosecution and the defense?

A. I think it would be difficult.

Q. How so?

A. This is a high profile case. When I left the courtroom, the media were outside for this.

Q. Did anyone try to talk to you from the media?

A. I was videotaped, but no one tried to talk to me. I put my badge into my pocket. They were out there for this, I could tell.

Q. Would you be able to put aside whatever concerns you have about any verdict that may be rendered by the jury and render a verdict if that is what the jury wishes to do based on the evidence presented at trial and for no other reason?

A. You have to repeat that question again.

Q. Would you be able to put aside whatever concerns you have about how a verdict may be received in your community and make a decision on a verdict based upon the evidence presented at trial and for no other reason?

A. I definitely would be thinking about the fact what would happen when we render this verdict and what would people say.

* * * *

[1492] A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N.

(Open court.)

THE COURT: United States of America versus Gerardo Hernandez, et al. Case Number 98-721.

Would counsel state their appearances.

(All parties present.)

THE COURT: We are ready to begin the peremptory strike portion of the voir dire process. We will be utilizing the numbers as the jury panel members appear on the list 1 through 49. The government is odd, defendant is even. The government will exercise their peremptory first on odd numbered jurors and defendant on even numbered jurors. The government has 11 challenges, the defendants 18 and two additional each side for alternates.

MR. McKENNA: May we stay seated?

THE COURT: Yes.

THE COURT: No back striking.

MR. McKENNA: The government will exercise on odd and we will exercise on even and you will

THE COURT: What will happen, I will say juror number 1. The government will exercise a peremptory strike if they have one. If they say accept, which is the preferred terminology by Richard for the record, then it goes to the [1493] defense and you will either strike or accept. On juror number 2, you will exercise a peremptory strike if you wish. If you say strike, that person is gone. If you say accept, then it goes to the government to have the opportunity to exercise a peremptory.

MR. KASTRENAKES: Since we have five defense attorneys, I assume by virtue of their

agreement they are agreeing to pool their strikes and have one person announce?

MR. McKENNA: That is true.

THE COURT: That is what I assumed would be happening.

Now we are ready.

Juror number 1 to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Accept.

THE COURT: Juror number 2.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: Let's make sure we all have the same list.

Are we all working off the same list?

MR. McKENNA: We checked with Lisa before.

THE COURT: Did you check mine?

THE CLERK: No.

THE COURT: Check mine.

(Interruption.)

THE COURT: No one has any objection to Lisa's [1494] official list?

MR. McKENNA: No, Your Honor.

MR. KASTRENAKES: Correct.

THE COURT: We are up to juror number 3 to the government.

MR. McKENNA: When you get to the number, would you say the name so we don't have any mistakes at all?

THE COURT: Sure.

Juror number one is Gil Page, juror number two David Buker. Juror number three Steven Gair.

MR. KASTRENAKES: We exercise a peremptory challenge.

THE COURT: The government strikes.

Juror number 4 to the defense.

MR. McKENNA: Strike.

THE COURT: Juror number 5, Diana Barnes to the government.

MR. KASTRENAKES: Accept.

THE COURT: To the defense.

MR. McKENNA: Accept.

THE COURT: That is juror number 3.

Juror number 6, Marco Barahona to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: The government strikes.

Juror number 7, Paolercio to the government.

[1495] MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: Juror number 8, Laverne Greene to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 9, Ileana Briganti, to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 10, John Gomez, to the defense.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 11, Sonia Portalatin.

MR. KASTRENAKES: Accept.

MR. McKENNA: May we have one moment?

THE COURT: Sure.

(Interruption.)

MR. McKENNA: Defense accepts.

THE COURT: She is juror number four.

Juror number 12, Lazaro Barreiro to the defense.

MR. McKENNA: Strike.

THE COURT: Juror number 13, Belkis Briceno-Simmons to the government.

MR. KASTRENAKES: Accept.

[1496] MR. McKENNA: Defense strikes.

THE COURT: Juror number 14, Omaira Garcia to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We will accept Ms. Garcia.

THE COURT: She is juror number five.

Juror number 15, Michele Peterson to the government.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 16, Elthea Peeples to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We accept.

THE COURT: Juror number 6.

Juror number 17, Louise Cromarti.

MR. KASTRENAKES: Strike.

MR. McKENNA: May we have a moment, please?

THE COURT: Sure.

(Interruption.)

THE COURT: Number 18, Wilfred Loperena.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: That is juror number seven.

Juror number 19, Kenneth McCollum to the government.

MR. KASTRENAKES: Strike.

MR. McKENNA: Your Honor, at this time we would like [1497] to move under Batson for the government to give some racially neutral reason for that strike. They have exercised four out of their six challenges on Afro-Americans, and I would point out the last juror that was struck, we looked at our notes. Her name was Louise Cromartie and there was absolutely nothing objectionable about Ms. Cromartie. She was an elderly woman who had never served on a jury before, had absolutely no baggage in her background and we thought we would wait to see if there was any further pattern to the

government's use of their challenges and it appears there is a pattern.

Mr. McCollum actually is employed in the law enforcement field. He is a correctional officer at Everglades Correctional Institute and there was nothing objectionable about him, Your Honor.

At this time we would ask you request the government give some racially neutral reason for their use of the peremptory challenge.

MR. KASTRENAKES: Your Honor, in response --

MR. McKENNA: And Ms. Cromartie also because she was the last one and we looked at her notes and there was nothing in her that we could decipher was a reason for exercising a peremptory that made her objectionable in some way.

THE COURT: Can you give me one moment and let me locate my notes, please.

Yes, Mr. Kastrenakes.

[1498] MR. KASTRENAKES: The defense has failed to establish a pattern. The United States has agreed to the first three jurors, two African-Americans. It is true we have struck four African-Americans. We have sat two. There is no pattern here.

THE COURT: Is that the standard under Batson?

MR. KASTRENAKES: First they have to establish some type of pattern to your satisfaction that you would make a further inquiry into our reasons.

THE COURT: I would like you to state the reasons for both Cromartie and McCollum, race neutral reasons.

MR. KASTRENAKES: On Ms. Cromartie, there were three things we had identified about her why we did not want her sitting as a juror. Number one was her stated disagreement with the United States policy with respect to the immigration of Cubans versus other ethnic groups. She was upset about that.

The second thing was, her answer concerning her travel to Cuba. She indicated she traveled to Cuba in the early years of Fidel Castro's regime which unlike anybody else who has traveled to Cuba was of much more vintage and when the policy concerning travel between United States and Cuba was relaxed.

Third, was her demeanor how she sat in the box during the second phase. The Court began its dialogue with her and offered an apology for having had her sit out the day before and she didn't even respond. She sat with her arms folded [1499] staring away from the Court and we were concerned about that.

Do you want me to continue with Ms. McCollum?

THE COURT: Is there any response from the defense?

MR. McKENNA: I think the argument they struck her because she was upset about the immigration policy fails because they did not strike Mr. Paolercio and he was outspoken about his disgust with the immigration policy and the fact he can't

speak English in his own city and things of that nature. I don't buy that argument. There were many people they didn't strike that they already passed over that have strong views about that.

I also don't think Ms. Cromartie had strong views on immigration. She didn't really have strong views on anything. She was an extremely soft spoken elderly black woman that didn't seem to be upset or offended by any of the questions, answered the questions. I didn't notice any kind of a demeanor problem with that prospective juror at all. I thought she was a sweet elderly lady who answered your questions and we were through with her very quickly.

There were many people that traveled to Cuba and the government hasn't moved to challenge them. All the Cubans traveled to Cuba. I don't think they have made a good argument specially when contrast the situation with Mr. Paolercio who was so outspoken about his views.

THE COURT: I will deny the Batson challenge [1500] concerning Louise Cromartie. I do find the race neutral reasons given by the government to be sufficient and specifically as to the apology that the Court gave regarding having to bring Ms. Cromartie back, she was the one juror who did not acknowledge or respond to the apology whatsoever. She just looked at me. She gave no response, no acknowledgement of

it whatsoever, and I do find the other reasons given by the government to be race neutral.

Mr. McCollum.

MR. KASTRENAKES: He is a corrections officer and I guess the defense's argument 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.

MR. McKENNA: I find that argument interesting because when we dealt with the issue of the gentleman who was from the Federal Detention Center, they had no objection and they resisted our attempt I believe to remove him for cause.

MR. KASTRENAKES: He didn't guard anybody. He was a clerk downstairs.

MR. McKENNA: I am not finished.

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 [1501] 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? It is another way of making an argument not on all fours.

THE COURT: I will deny the Batson challenge on Mr. McCollum. The government has stated a race neutral reason for exercising their peremptory strike against him and I find it to be sufficient under the Batson decision.

Let's continue. Morton Lucoff to the defense?

MR. McKENNA: Defense accepts.

MR. KASTRENAKES: The United States strikes Mr. Lucoff.

THE COURT: Number 21, Florentina McCain to the government.

MR. KASTRENAKES: We accept Ms. McCain.

THE COURT: To the defense.

MR. McKENNA: Defense strikes.

THE COURT: Number 22, John McGlamery to the defense.

MR. McKENNA: Defense strikes.

THE COURT: Number 23, Richard Campbell to the government.

MR. KASTRENAKES: The United States accepts.

MR. McKENNA: Defense accepts.

THE COURT: That is juror number 8.

Number 24, Queen Lawyer to the defense.

[1502] MR. McKENNA: Defense accepts.

MR. KASTRENAKES: The United States strikes Ms. Lawyer.

MR. HOROWITZ: Same objection, Your Honor.

MR. McKENNA: That is now five out of eight and the last three in a row.

THE COURT: Would you give your reason for striking Queen Lawyer?

MR. KASTRENAKES: Her son was convicted of armed robbery in 1996. He was not treated fairly, is the main reason.

MR. NORRIS: Judge, two things. Just so the record is clear since the record is race neutral; the government's two prior strikes of black jurors were of juror number 6, Barahona and Lavern Greene, number 8. The record is clear, these people have

relatives including children who have prison records. This is a strike to assign that as a reason it is really a make weight argument and we think it is racially motivated.

MR. KASTRENAKES: Counsel inaccurately characterized Mr. Barahona of African decent, he is not.

MR. HOROWITZ: Your Honor, first of all the last two jurors, Ms. Lawyer and mr. McCollum are the typical type of jurors the defense would normally strike, a correction officer and a lady whose –

[1503] THE COURT: I already ruled on that.

MR. HOROWITZ: Her sister is an FBI officer and her cousin is a parole officer in Miami. These are jurors that we believe will be fair that the government has stricken for a racially motivated reason. That is the nature of our challenge.

MR. KASTRENAKES: Ms. Lawyer I could go further. She actually came out and said that her son went to trial and even despite the fact -- side bar she was talking about all the witness identifications. The jury made a mistake. She has no faith in the jury system based on her son's conviction.

The other black juror we sat, Mr. Page, did have a family member that was prosecuted and treated fairly. We draw a huge distinction between a person's ability to trust the jury system and a person who does not trust the jury system. Ms. Lawyer clearly indicated the jury in her son's case made a mistake and she was not happy about it and he was not treated fairly. We don't want that kind of person on a jury.

THE COURT: I will deny the Batson challenge concerning Queen Lawyer. The Court finds that the government has stated a race neutral reason, that Ms. Lawyer did indicate her unhappiness with the criminal justice system because of her son's experience and I do not find it is a racially motivated exercise of peremptory to strike. The Batson challenge is denied.

[1504] Let's go forward.

Juror number 25, Jess Lawhorn, Jr., to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: Juror number 26, Barbara Pareira to the defense.

MR. McKENNA: Defense strikes.

THE COURT: How many challenges has each side exercised?

THE CLERK: The government 9 and the defense 10.

MR. KASTRENAKES: We have seated how many jurors?

THE COURT: Eight.

Juror number 27 to the government, Angel De La O to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 28 Lilliam Lopez to the defense.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 29, Juanito Millado, to the government.

MR. KASTRENAKES: Can we have one moment?

THE COURT: Sure.

(Interruption.)

THE COURT: To the government, juror number 29.

[1505] MR. KASTRENAKES: Accept.

MR. McKENNA: Accept.

THE COURT: That is juror number nine.

Juror number 30, Migdalia Cento to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: Juror number 31, Miguel Hernandez to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 32, Hugo Arroyo to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 33, Leilani Triana to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 34, Sergio Herran to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We will accept Mr. Herran.

THE COURT: That is juror number 11.

Juror number 35, Rosa Hernandez to the government.

MR. KASTRENAKES: Accept.

[1506] MR. McKENNA: Strike.

THE COURT: Juror number 36 Debra Vernon to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: One moment, Your Honor

(Interruption.)

I guess we have a jury. We will accept Ms. Vernon.

THE COURT: Both sides tender the jury?

MR. KASTRENAKES: The government tenders the jury.

MR. McKENNA: The defense tenders the jury.

THE COURT: That is the jury.

Alternates. 37, Haydee Duarte to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: 38, Wanda Thomas to the government.

MR. KASTRENAKES: The government strikes.

MR. McKENNA: We renew our Batson challenge.

MR. KASTRENAKES: Your Honor, the first thing that we had discussed with respect to her as a potential witness was her body language and demeanor in the box. The entire time she had her arms crossed and did not appear to be happy with the

process and we formed a poor impression of a potential juror as a result of that. She also gave basically one word answers to every question asked by the Court and we were concerned about her, [1507] although this is not the primary reason, we were concerned about her ability to state any opinion on any matter whatsoever.

Finally, Judge, she indicated she was from Panama and only in the context of this case does that cause us a concern. One of the defendants in this case Antonio Guerrero has a wife and child and travels to Panama frequently. The documents will come out he traveled to Panama and he has a wife and child in that country and we were concerned about that.

THE COURT: She was born in Panama, is that what you said?

MR. KASTRENAKES: Yes. She answered that question she was born in Panama.

THE COURT: Anything further?

MR. McKENNA: I can't say that I noticed any demeanor problems with Ms. Thomas. The fact she had no opinion on certain issues, there were many jurors that the government passed over that had no opinions. The government passed over Omaira Garcia. Despite the fact she had Cuban

relatives -- she had no Cuban relatives. She had no opinion on Elian or anything to do with the government of Cuba. The same with Migdalia Cento the government passed over. She had no opinion about Elian, no opinion about the Government of Cuba. The government passed over many of these people and really to say she crossed her arms that means they don't have a reason. It [1508] is desperation when they make that kind of an argument.

The argument about Panama, the fact she was born there, I don't think there is any evidence she lived there recently or a long time. I don't think that will exclude her merely because some defendant took a trip or traveled there or had a wife from that country. I don't think that is a basis at all, Your Honor.

THE COURT: I find that the government has stated race neutral reasons. You may not agree with them but I do find they are sufficient and that there is not a motivation on the government's part to exclude this juror as an alternate because of her race. Therefore, the Batson challenge is denied.

Let's go forward.

Juror number 39, Eugene Yagle to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: May we have a moment?

THE COURT: Yes.

THE CLERK: They both have one challenge left.

MR. McKENNA: 39, we accept.

THE COURT: That is alternate number one.

Number 40, Louise Hernandez to the defense.

MR. McKENNA: Defense strikes, Your Honor.

THE COURT: Those are your two strikes.

MR. KASTRENAKES: The United States is concerned in this case the defense has systematically struck every [1509] individual born in Cuba. Of Cuban decent. Mr. Luis Hernandez of Cuban decent answered the questions with respect to any other inquiry without any hesitation, without any problem and I don't see any reason that would be race neutral to strike Mr. Luis Hernandez.

MR. McKENNA: I have some reasons.

MR. BLUMENFELD: I do too.

With respect to Mr. Hernandez born in Miami Beach, when you asked him about whether he would believe a member of the communist party of Cuba, he questioned whether he would believe them. He said he would listen but he didn't know if he would believe them. Considering who the defense witnesses are in this case, that is clearly a race neutral reason for Mr. Hernandez.

In addition to that, his manner of dress, the way he came to Court --

THE COURT: That is what he ultimately ended up saying? He said he would listen but he didn't know if he would believe them.

MR. BLUMENFELD: He would listen but didn't know if he would believe them.

Our race neutral reason is, he had doubts in his mind --

THE COURT: That wasn't necessarily the ultimate answer when questioned by the Court but he said it at one [1510] point?

MR. BLUMENFELD: Yes. He made the statement he wouldn't know whether he would believe a member of the communist party. He would listen when you rehabilitated him but it doesn't mean I would believe him. Based on the fact he would have a question whether he believed some of the communist party of Cuba, we may have some witnesses and we would strike him.

Plus when he came in here he was wearing a baseball satin jacket. He sat there slumped and indicated to us he didn't give enough importance to this case. Based on those reasons is why we struck him.

MR. McKENNA: In addition to that, he said his father's family was in Cuba and when asked whether he had an opinion about the Government of Cuba, he said no. I found it in contrast to the majority of people that have some family in Cuba that had an opinion about the Government of Cuba. I found that to be an indication of a possible lack of candor, that he didn't have any view at all of the Government of Cuba. That was an additional reason.

THE COURT: The government's challenge is based on what, what is your position, that is being challenged by them because of national origin?

MR. KASTRENAKES: There is a pattern that developed in their striking. In looking at all of their strikes, they [1511] struck anybody that had a connection with Cuba through family relations and while many of those people gave reasons during their

questioning, the United States felt looking at Mr. Hernandez' examination, the reasons they gave for striking them didn't exist.

THE COURT: Based upon the reasons stated by the defendants concerning number one, demeanor and number two his original answers versus his ultimate answers when further questioned by the Court, the Court finds it is not sufficient for a Batson challenge based upon national origin. That there are national origin neutral reasons for his exclusion and the peremptory strike is properly executed by the defense.

They are out of strikes for the alternates.

Odornia Homuska to the government?

MR. KASTRENAKES: We strike.

MR. McKENNA: We renew our Batson challenge.

THE COURT: Let me hear your reasons.

MR. KASTRENAKES: There are several with her. It does not rise to a level for cause. Her language difficulty was evident with respect to the examination from the Court and her responses. This case involves the submission of an incredible amount of documents in the English language and we were concerned about her ability to digest that information.

Secondly, Your Honor, her demeanor when asked questions from the Court caused the United States concern. The [1512] Court asked a question, number 16, concerning her opinion on the Elian Gonzalez matter. As the Court will recall, her response was a laugh. She laughed out loud. The

Court followed up and asked are you sure about that and she said no, I don't and she laughed. You asked her is she sure and she answered, yes.

It appeared to us she was annoyed with the further inquiry of the Court or the question that the Court may have asked her why she may have laughed in response to that question.

It is either indicative of two things, one, she doesn't understand what the Court is asking her and reason number two, she is unhappy about questions on her personal opinions and we have a concern in that regard. Overridingly, our main concern with respect to her was her inability from a peremptory point of view to digest the voluminous information we would be introducing.

THE COURT: I will deny the Batson challenge. The Court finds the government has stated rationally neutral reasons for their determination to exercise a peremptory strike concerning Homuska, that being both her demeanor and her response to the Elian Gonzalez question and her ability to digest a tremendous amount of documents in English.

Therefore, I find the exercise proper and not a violation of Batson.

[1513] Number 42, Miguel Torroba is alternate number two. Marjorie Hahn is alternate number three and Beverly Holland is alternate number four.

MR. KASTRENAKES: That is what I have.

THE COURT: Let me make sure the record is complete. For the twelve jurors the defendant exercised 15 challenges, the government exercised

nine. Neither side utilized the amount of challenges granted by the Court. The defendant's 18 and the government's 11.

I want to commend both sides for your cooperative efforts as we went through the voir dire process which was, though fairly efficient, was a long process by the number of hours spent. Both sides truly advocated for their clients and their positions and it was a spirit of cooperation and I appreciate that and I hope it will continue, I expect it will continue throughout the trial.

I specially want to commend my chambers staff who worked many, many long hours to make this process and the different stages of this process run as smoothly as it did, Lisa Shelnut and Larry Irons, Robin Godwin. Lisa spent a tremendous amount of hours making sure people were called in here and making sure everything was organized and Richard Kaufman, of course, his magic fingers have worked so well as they always do in making sure these very long hours we put in in an effort to accommodate jurors, that we were able to do so

* * * *

[1671] from you on opening statement?

MR. HOROWITZ: Tops, Judge.

THE COURT: On Monday you will be ready with your first witness?

MS. MILLER: Yes, Your Honor.

THE COURT: Any other issues or matters I need to take up at this time?

MS. MILLER: I just had two. They are really housekeeping matters. We spoke about Rule 615 and the defense has invoked the rule on witness sequestration. Just so it is clear on the record, the government also asks that rule be invoked with regard to defense witnesses.

THE COURT: The rule has been invoked. All witnesses are instructed they are not to discuss their testimony among themselves or anyone else save the attorneys involved.

MS. MILLER: The other matter we wanted to put on the record, since we did have some Batson challenges, we did want to make as a matter of record, this jury which has been tendered by the government does include three African-American members of the regular panel and one African-American member in the alternate panel, a percentage of 25 percent.

THE COURT: Any other issues or matters?

MR. MENDEZ: I have a matter, Your Honor. Depending who the government's witnesses are, we will have a large amount of documentary material we need to bring into the courtroom or

* * * *

[2691] the government has provided. It is voluminous. There is no question about it. It might be helpful to sit down with the government, perhaps this afternoon, if you can do so, and just have a discovery conference to review some of the material as they were originally produced to you so you are

more familiar and can see exactly how many communications were produced, in what form and I think it would make these side bar conversations certainly more efficient.

I am not faulting anybody. It is voluminous and it is very complicated and I know counsel, everyone here, is working very hard, both the government in their presentation to the jury are very complex matters and defense counsel with their representation in defending their clients to make sure there is a presentation and a defense and everybody is being properly represented and I appreciate that.

MR. McKENNA: The objection I made earlier, I will have those documents for you tomorrow.

THE COURT: There is an issue no one has brought up -- do you want to bring it up?

MS. MILLER: If we are thinking of the same thing. The press will be breathing down my neck. They want those English volumes.

MR. MENDEZ: I thought they were subject to a final ruling on 403, so there is a conditional ruling --

MR. BLUMENFELD: Let me be out of here when you tell

* * * *

[7688] MR. McKENNA: It had to do with the boundary of Cuba.

THE COURT: I don't want to get into this.

I will make these findings for the record.

This witness has testified that he relied on the ICAO report for his opinion. Part of his opinion was as questioned by the government, that the shootdown occurred in international waters. The ICAO report considered this radar data along with the American radar data and made certain findings based on that. Mr. McKenna is entitled to question this witness on his opinion and the differences between that opinion and the ICAO report upon which he says he relied and it is for the jury to evaluate his opinion on the same basis under Rule 703 that I allowed the other questioning.

MS. MILLER: It is understood.

THE COURT: The objection is overruled.

(Open court.)

THE COURT: Overruled, you may proceed.

I don't remember if there was a question. I think you will have to start again, Mr. McKenna.

BY MR. McKENNA:

Q. We were talking about the ICAO report and information in the ICAO report about the Cuban radar data for the shootdown on February 24, 1996. This is at 2.35.1.3.

According to the Cuban air defense radar records, one aircraft, N 5485S was first observed at 1439 hours just north [7689] of the 24 north parallel heading west. A second aircraft, N 2506 was observed at 1451 hours, also just north of the 24th parallel and heading west.

These two aircraft were observed on a westerly track before turning south along 08230 west and crossing the 24th north parallel at about 1500 hours.

The third aircraft, N 2456S was first observed at 1500 hours at position 23, 41 north, 082, 087 west, well within the MUD 9 danger area heading south. According to the Cuban radar records, this aircraft penetrated the twelve nautical mile Cuban territorial limit at 1507 hours and continued on a south westerly track until it was shot down in an area about five nautical miles north of Baracoa at 1521 hours.

Further, the report states, N 2506 and N 5485S penetrated the twelve nautical mile limit at about 1517 and 1519 hours respectively. The track of N 5485S continued south until this aircraft was shot down in the same area as the first aircraft. N 2506 turned northeast at about 1520 hours and left Cuban territorial air space at 1524 hours. At 1528 hours, N 2506 turned northwest and crossed the 24th north parallel northbound at 1543 hours at about 08230 west.

Sir, according to the ICAO report, all three aircraft per Cuban radar entered Cuban air space; correct?

MS. MILLER: I object to the form of the question in light of the purpose for which these data are admitted. I [7690] would also ask for the limiting instruction to be given to the jury again.

THE COURT: The question is overruled.

These out of court statements are not coming in for the truth of the matter asserted, but to assist you in evaluating the expert's opinion and testimony.

You may answer the question, sir.

BY THE WITNESS:

A. Yes. According to the Cuban radar.

BY MR. McKENNA:

Q. All three were in the Cuban territory and the two that were shot down were shot down in the Cuban territory?

MS. MILLER: Asked and answered.

MR. McKENNA: I just wanted him to reference it because of the answer.

MS. MILLER: I withdraw my objection.

THE COURT: Go ahead.

BY THE WITNESS:

A. That is correct.

BY MR. McKENNA:

Q. As far as the exact plottings of the shootdown, and this is at page 74, 2.35.31 -- I am sorry, I didn't give you the report. Would you like to have that?

A. I would.

Q. Did data showed that the three aircraft penetrated the [7691] twelve mile nautical limit and two of them were shot down? Cuban territorial air space five to six nautical miles north of Havana. N 2456S at position 2309.4 N 082, 32.6 west and the other aircraft N 5485S at position 2311 on 08234.1 west.

Are those the fixed coordinates that Cuban radar shows according to the ICAO report for the location of the shootdown of the two aircraft?

A. According to this report.

Q. According to this report that relies on the Cuban radar data; correct?

MS. MILLER: Objection. Mischaracterizes.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. Attached to the ICAO report and within the ICAO report are the plots of the Cuban radar data; is that correct?

A. The hand plotted plots; yes.

Q. On a map?

A. That is correct.

Q. It shows the progress of the aircraft and their ultimate location at the time of shootdown; is that correct?

A. According to their radar; correct.

Q. You mentioned a ship called the Tri Liner in the course of your testimony, do you remember that?

A. Yes.

* * * *

[9005] problem.

MS. MILLER: It should end on page 10.

MR. McKENNA: We will knock out the last couple of pages.

THE COURT: I will instruct the jury they should only turn the pages and we will take out the pages after that.

MR. KASTRENAKES: When he says goodbye.

THE COURT: Okay.

MR. McKENNA: How long did you want to go?

THE COURT: Do you want to stop here?

MR. McKENNA: I think it is a good idea.

THE COURT: Then you can remove the pages for tomorrow.

I was informed yesterday sometimes they have cameras downstairs. Yesterday the cameras were focused on the jurors as they came out of the building and I was informed afterwards by security that was happening. What I would propose today and I didn't -- I came up with a plan B but I didn't want to put it into effect without speaking to you all. Larry has been walking them downstairs afterwards and rather than having them go out the front doors, they could go out what is supposed to be the open part of the tower which has the security gate down, open that and let them go out that way.

MR. KASTRENAKES: Leave it open for me too, Judge.

MR. McKENNA: No objection at all.

* * * *

[9869] Q. With respect to radar, as a general principle, what radar is better, radar that is fixed closer to an event or further away?

A. Generally closer to the event the better.

Q. In your evaluation of the U.S. radar in this case, what radar was able to track events that were taking place just North of the Cuban coast?

A. The aerostat balloon.

Q. What is the aerostat balloon again?

A. Basically an airborne radar antenna.

Q. Where was it located?

A. Cudjoe Key, Florida.

Q. How far away from Cuba was it?

A. It was roughly 90 miles away from the events.

Q. What about the Cuban radar that recorded the data in this case?

A. It was anywhere from five to twelve miles away.

Q. You have studied the Cuban radar data as well?

A. Yes.

Q. Tell the jury what the radar data you studied was in Cuba?

A. I studied an onionskin that was recorded at the time of the events and I also studied a copy of the onionskin.

Q. How is the onionskin generated?

A. Basically at the time of the events, the events were occurring on a radar scope –

[9870] MR. KASTRENAKES: Objection.

MR. McKENNA: He is giving his opinion. They can ask for the instruction if they want.

MR. KASTRENAKES: This is not his opinion.

MR. McKENNA: It is his opinion.

MR. KASTRENAKES: He is not giving his opinion. He is recounting hearsay events.

THE COURT: Sustained.

Rephrase your question. Then if you wish the instruction you can request the instruction.

BY MR. McKENNA:

Q. First of all, have you incorporated Cuban radar into your opinion where the shoot down took place?

A. Yes.

Q. By the way, do you have an opinion as to where the two aircraft were shot down?

A. Yes.

Q. What is your opinion?

A. Roughly six or eight miles -- in the area of six to eight miles offshore.

Q. Would that be in the Cuban territory?

A. Yes.

Q. In arriving at that opinion, have you relied upon the Cuban radar data?

A. Yes, in part.

[9871] Q. You have relied on many other things too; haven't you?

A. Yes.

Q. We will get to those. We are talking now about the Cuban radar.

Could you go back and tell us --

MR. KASTRENAKES: I would ask for an instruction with respect to that opinion and the conclusion, with respect to the data.

THE COURT: As to the opinion?

MR. KASTRENAKES: As to the data.

MR. McKENNA: I haven't gotten to the data yet.

THE COURT: With respect to the opinion, it is denied.

He is getting to the data.

BY MR. McKENNA:

Q. Can you tell the ladies and gentlemen of the jury how the onionskin was generated?

MR. KASTRENAKES: I have an objection to that.

Hearsay.

THE COURT: The objection is overruled.

These out of court statements are not coming in for the truth of the matter asserted, but to assist you in evaluating the expert's opinion and his testimony.

You may proceed.

BY MR. McKENNA:

Q. When you were in Cuba, were you shown the onionskin?

[9872] A. Yes.

Q. Were you permitted to photograph it?

A. Yes.

MR. KASTRENAKES: Your Honor --

BY MR. McKENNA:

Q. At that time did someone explain to you how the onionskin was generated?

A. Yes.

Q. Who explained it to you?

A. Colonel Capote.

Q. What were you told?

A. The events occurred --

THE COURT: These out of court statements are not coming in for the truth of the matter asserted but to assist you the jury in evaluating the expert's opinion and his testimony.

You may proceed.

BY MR. McKENNA:

Q. What did he explain to you?

A. The events occurred on the radar scope. There was somebody adjacent to the radar scope doing a hand plot on a plexiglas which is consistent with the way hand plots and recording of data was done and before we had a recording capability in the United States.

I saw -- I can't say that it happened on February 24, [9873] but I saw a videotape that Cuba had made where somebody was plotting on a plexiglas --

MR. KASTRENAKES: I have an objection to this.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Confine yourself to what Mr. Capote told you?

A. The events occurred on the radar scope. It was recorded on plexiglas and reproduced on onion skin.

Q. When you say reproduced on onion skin, how did he explain they did that?

A. Put the onionskin on a plexiglas and reproduce it.

Q. What does the onion skin look like?

A. It is kind of brown and it has various lines and colors on it.

Q. Can you see through it?

A. Yes.

Q. You have examined the onion skin?

A. Yes.

Q. Where was it represented the onion skin came from that you examined?

A. It came from the archives.

MR. KASTRENAKES: Objection.

THE COURT: Overruled.

These out of court statements are not coming in for the truth of the matter asserted but to assist the jury in [9874] evaluating the expert's opinion and testimony.

BY MR. McKENNA:

Q. Where did it come from?

A. From a radar Battalion that made it then it came from the archives where it was stored.

Q. Did you examine the onion skin?

A. Yes.

Q. Did it have plots on it?

A. Yes.

Q. Did it have plots on it as to where the shoot down occurred?

A. Yes.

MR. KASTRENAKES: Objection to leading.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. What did the onion skin show as to the location of the shootdown?

A. It had plots of radar, aircraft tracks taken from the radar and it had an indication where the tracks stopped.

Q. Based on your discussion with Colonel Capote, was there an indication what the stop meant?

A. Yes. That was the general area where the aircraft were shot down.

Q. Have you reviewed a transcript of the MIG dialogue with [9875] their control center?

A. Yes, I have reviewed several transcripts.

Q. Have you reviewed -- let me show you what is in evidence right now as Government Exhibit 483 comp.

Is this the MIG transcript you have reviewed?

A. This is one of them.

Q. That is the final one that was introduced into evidence in this case --

MR. KASTRENAKES: Objection, leading.

MR. McKENNA: Just to clear up any confusion, Your Honor.

MR. KASTRENAKES: Objection, leading.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Do you have a copy of the MIG transcript I gave you?

A. Yes.

Q. Would you pull it out.

A. I have it.

Q. Do they appear to be the same transcript?

A. Yes.

Q. Is that the one you relied upon?

A. Yes.

Q. My question is this, Mr. Buchner.

In reviewing the MIG transcript, did you come -- let me direct you to it.

[9876] In reviewing the MIG transcript, did you come across any portion that indicated dialogue between the MIG pilot and the control center regarding marking the spot of the shootdown?

A. Yes.

Q. What does the transcript say? Read that brief portion?

A. It says "mark the spot."

Q. What page?

A. Page 11.

Q. Go ahead?

A. "Mark the spot. We downed him. We are above it now."

Q. Who was the MIG pilot talking to?

A. He was talking to the battle commander in the air defense facility.

Q. Why would the MIG pilot be saying "mark it"?

MR. KASTRENAKES: Objection, calling for speculation.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. You have been qualified as an expert in MIG combat tactics and control. Based upon your knowledge, how are MIGs directed when they are engaged in military activity?

A. They have a ground radar control controlling them.

Q. Do they operate differently than U.S. fighter pilots?

A. They are under much closer control.

Q. When a MIG pilot says to the control center "mark it," [9877] what is he telling the control center to do?

MR. KASTRENAKES: Objection. He is calling for the witness to speculate.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. Do you have an opinion based on your expertise what the MIG pilot is telling the control center to do by saying "mark it"?

MR. KASTRENAKES: Objection. Beyond the scope of his expertise.

THE COURT: Overruled.

BY THE WITNESS:

A. He shot down an airplane. He is telling the ground control to mark it on his radar where it went down.

BY MR. McKENNA:

Q. Why wouldn't the pilot give coordinates?

MR. KASTRENAKES: Objection.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Do you have an opinion why the MIG pilot wouldn't give coordinates?

A. He is traveling nine miles a minute and he doesn't have access to his coordinates at that time.

Q. In your expert opinion, when the pilot says "mark it" as to the first aircraft being shot down, is that reflected on the [9878] onion skin that you saw in Cuba?

A. I saw when the track terminated and that is Colonel Capote who said that is the general area where the shoot down occurred.

Q. Does the same sequence occur for the second shoot down as well?

A. Yes.

Q. With respect to the U.S. radar, I want to shift gears and go back to that for a minute. You stated that the radar that would have been relied upon for activities close to Cuba was the aerostat balloon?

A. U.S. radar, yes.

Q. Have you studied some papers on that aerostat balloon put out by RADES?

A. Yes, I have.

Q. Are you aware of flaws in the aerostat balloon?

A. The paper discussed the accuracy of the system, yes.

Q. What are the flaws with the aerostat balloon?

A. Basically it has a plus or minus one and a half mile accuracy in azimuth and a half mile error in range.

Q. Is the aerostat balloon fixed or is it at the time erred?

A. It is in the air at the time erred.

Q. Does that create any problems with respect to accuracy?

A. Yes. Weather conditions can affect the accuracy.

Q. The RADES program you said you reviewed, was that raw radar

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[9915] A. No.

MR. KASTRENAKES: Same objection.

MR. McKENNA: It is part of his expert opinion.

THE COURT: Rephrase your question. Sustained.

BY MR. McKENNA:

Q. Based on your expert opinion how MIG pilots operate and how fighter pilots operate in general, do they know their exact longitude and latitude when they are fixed on a target?

A. No.

Q. Why not?

A. You don't have an exact read out. Things are happening fast. You are looking outside the cockpit and that is not your frame of reference. The frame of reference is the airplane and the target, not a geographical reference.

Q. We are now going over to page 11.

On page 11, after the pilot says we downed him; the pilot then says "mark it, mark it," then again a line later he says "mark the spot," and again later, three more lines down, "mark the spot, mark the spot," then UP says "marked."

Who is UP?

A. The air defense chief.

Q. In your expert opinion, what is going on right here?

A. He is noting the location on the radar scope. The fighter pilot wants the air defense chief to note the location and the air defense chief located it.

[9916] Q. When he says "mark it," mark it on what?

A. On the radar scope and on the plexiglas.

Q. The onion skin you examined with the plots, was that taken from the plexiglas?

A. Yes.

Q. Where did that show the proximate location of the first shoot down?

A. The proximate location -- may I refer to my notes, please?

Q. Yes, you may.

A. Do you want latitude and longitude or distance?

Q. Can you give us the latitude and longitude and distance from the Cuban coast?

THE COURT: Ladies and gentlemen of the jury, these out of court statements are not coming in for the truth of the matter asserted but to assist you in evaluating the expert's opinion and testimony.

BY THE WITNESS:

A. The first shoot down 2456, according to the map that I got that was a copy of the onion skin, the shoot down was at roughly 1521 or 321 local. The coordinates were as I took them off the map were 2306 North, 8239 West. That is approximately six miles off the Cuban coast.

Q. Let me show you what is in evidence as 492E.

MR. KASTRENAKES: It is not in evidence. It is a blank navigational chart, a duplicate of what is in evidence

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[13874] the -- that is what makes it a morally culpable act. That is not a jurisdictional thing, and that is embodied in the instructions that we have proposed and that the Court proposes, adding as a finding of fact for the jury, that at least one of the shootdowns in fact occurred in the special maritime and territorial jurisdiction.

THE COURT: We will be in recess for fifteen minutes.

(Therefore a brief recess was taken, after which the following proceedings were had.)

(Open court. Jury not present.)

THE COURT: We are back on United States of America versus Gerardo Hernandez et al.

Counsel, state their appearances again for the record.

(All parties present.)

THE COURT: The interpreters are also present.

MS. MILLER: I did get a chance to look more at Walker over the break.

THE COURT: I will give a ruling at this time.

The criminal intent required by 18 United States Code Section 1111 for murder in the first degree is both malice aforethought and premeditated intent. Malice aforethought means to kill another person deliberately and intentionally and premeditated intent, killing with premeditated

intent, premeditation is defined as typically associated with killing in cold blood and requires a period of time in which the [13875] accused deliberates or thinks the matter over before acting.

In addition, Title 18 United States Code, Section 1111 defines murder as the unlawful killing of a human being, then goes on to state with malice aforethought, then provides the language for premeditated intent.

Feola at 420 U.S. holds that general knowledge of the status of a federal law enforcement is not required, also states, and I quote from page 686, "we are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under Section 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea.

"For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent."

This is the exact provision that is later quoted in the case of United States versus Conroy, 9 F.2nd, 1998 when the Fifth Circuit found, consistent with Feola that Feola teaches in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution

[13876] for assaults upon them cognizable in the federal courts, Title 18 United States Code Section 111 cannot be construed as embodying an unexpressed requirement that the assailant be aware that his victim is a federal officer. The statute requires an intent to assault, not an intent to assault a federal officer.

The Conroy/Walker court then cites the very provision that I have just cited from Feola, and goes on to hold that in the Walker case, that case dealt with a negation of criminal intent, in that circumstance, knowledge was a relevant consideration.

Consistent with Feola, therefore, and of a general rule regarding status regarding 111, and its additional teaching, that knowledge may be a relevant consideration under certain circumstances, and the circumstances that the Feola court cites are justification, unlawful actions in that case by a perception, a reasonable interpretation of unlawful use of force by the victim and mistake of fact.

Here the government has presented their case and indicated from the very start of this case in opening statement, that the final task of the Wasp Network was to bring about murders over international waters; and the presentation of their evidence proceeded from there as that was the plan, the object of the conspiracy.

Therefore, based upon the teachings of Feola and [13877] Walker and finding that the facts and circumstances of this case as presented by the government and the defendants may negate the existence of mens rea, and this should be a

determination that this jury makes as to whether or not this defendant possessed the mens rea required by the statute and the government has proven conspiracy to commit murder in the first degree.

Therefore, I am granting Mr. McKenna's request, and I will give the pattern jury instruction 11.1 as modified to reflect Title 18 United States Code Section 1117 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which is actually carried out, would amount to a violation of Title 18 United States Code Section 1111. I will give that instruction in its totality and follow it as what is normally done in conspiracy cases with the instruction on the substantive offense.

I find that my ruling follows the teachings of Feola and its progeny.

In regard to the proposed instruction number 19 which is false identification documents, I have had an opportunity to read the Gros case, which I indicated previously the government had cited and I informed Mr. McKenna I would look at it in conjunction with the pattern jury instruction; and I will modify the instruction given in the Gros case, it will substantially track the Gros instruction. Gros is

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[14475] decisions, there are consequences and with consequences come responsibilities. This case is about consequences and responsibilities.

They took the action and decision to join a hostile intelligence bureau. Nobody forced them to do that. They did that on their own. A bureau that sees the United States of America as its prime and main enemy. This was their decision.

These are not the rules of Cuba. This is the United States District Court in the Southern District of Florida. This is an Honorable United States Federal District Judge and you will receive the law of this great country. We are not operating under the rules of Cuba, thank God.

Their loyalty to their country has not been disputed by them in this trial. That loyalty is something that has driven their very action in this case and they chose to dedicate themselves to that. They took those actions and there are now consequences.

Whether you disagree or agree with Jose Basulto – he said one thing I remember when I was asking him questions that kind of rings true and it is in the documents; do you remember when he went back to Cuba in 1961 with the false identities. Yes, he was bent on the overthrow of the communist country of Cuba as he is today, he wants to see Democracy restored and he had those false documents and he told you he knew he was taking a risk, that he knew if he infiltrated that country, at left he

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[14481] dead children to establish who they are.

We had to prove that they weren't who they claimed they were. They plead not guilty, but there is more than just that. You talk about stealing the memories of families. Reverend Medina lost a child 30 years ago. Luis Medina III who died in infancy, and died in a different state than he was born, but that is enough for them, that is what they need. You die in a different state than what you were born in and it is about 30 years ago, well, that is who they become. That is what these guys are about. They don't care.

Ruben Campa was the beloved brother of a homicide detective from Texas. Does that matter to anybody? He died in infancy.

When they see Detective Campa on the streets out in Texas, I think it was in Houston, you probably know because you have the notes; but Ruben Campa, wasn't that a Cuban spy prosecuted in Miami Florida? No. That was my brother. That was not a Cuban spy sent to the United States to destroy the United States. He was born in the United States and if he had been allowed to live, he would love this country.

The hollow words of Mr. Norris he is sorry that his client stole the identity of some child isn't enough. His client wasn't sorry one month before he was arrested when he is out in California hatching another 30, 40 names to be used for the next waive of spies.

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[14643] MS. MILLER: When Mr. Mendez is through, if we could look at it because there have been several iterations.

(Interruption.)

THE COURT: Any objection from the government as to Mr. Mendez' list?

MS. MILLER: No, Your Honor.

THE COURT: I will make all of them uniform without any identifying features. The government's list will be identified as the government's trial exhibits and the defendants will be identified as defendants and no other identifying features and they will all go in stapled.

There are one or two other matters I need to discuss with counsel side bar.

(Side bar.)

THE COURT: The Sun Sentinel called the jury pool yesterday wanting the names of the twelve jurors.

MR. BLUMENFELD: They were on TV last night, the jury.

THE COURT: Were they filmed?

MR. BLUMENFELD: Yes.

THE COURT: That is the second issue I want to discuss with you.

As I understand it from jury pool, of public record is the entire venire, the 250 people who were summoned initially and that is what they would provide. They have not provided anything as of yet because I wanted to first of all bring this

ANOTHER ORDER OF BUSINESS, ACCORDING TO THE OPERATIONAL SITUATION OF THE PLACE, HOW YOU DEVELOP YOUR LEGAL COVER AND IF YOU HAVE COME ACROSS ANY DIFFICULTIES IN THAT SENSE. IN THE SAME WAY, EVERYTHING RELATING TO YOUR ACCENT.

2.-) YOUR INSTRUCTIONS THAT THE COMRADES LISTEN TO RAUL'S SPEECH TRANSMITTED BY ARUCA WERE CORRECT. REMEMBER THE IMPORTANCE OF EXCHANGE WITH THEM IN THIS SENSE, LOOKING AT THE FORMATION OF THEIR POLITICAL IDEOLOGY.

3.-) IT IS VERY IMPORTANT THAT YOU SEND US THE STUDY YOU DID AT EACH OF THE DIFFERENT COMPANIES FOR THE ACQUISITION OF THE BEEPER, THAT IS, THE PAPERWORK THEY REQUIRE AT EACH COMPANY AND ON THE OTHER HAND ALL THE STEPS TAKEN IN THE ACQUISITION OF SAME.

4.-) IT IS NECESSARY THAT YOU INFORM US ABOUT ALL THE STEPS TAKEN TO ENROLL IN ENGLISH CLASS, AS WELL AS THE CONDITIONS AND CHARACTERISTICS OF SAID COURSE.

ON THE OTHER HAND, JUST AS YOU EXPRESSED, YOU SHOULD COMMENT REGARDING THE AID IT HAS GIVEN YOU FOR YOUR LEGEND AND THE ESTABLISHMENT OF NEW RELATIONS.

5.-) JUST AS WE INFORMED YOU VIA RADIO, YOU WERE RECOGNIZED BY THE HEAD OF THE DI FOR OPERACION VENECIA. THE ORDER SAYS THE FOLLOWING:

ORDER FROM THE CHIEF OF THE DIRECTORATE OF INTELLIGENCE APRIL 1, 1996 NO: 84 CITY OF HAVANA

TO GRANT RECOGNITION TO PERSONNEL

KEEPING IN MIND THE OUTSTANDING RESULTS ACHIEVED ON THE JOB:

I ORDER:

FIRST: GRANT RECOGNITION FOR THE OUTSTANDING RESULTS ACHIEVED ON THE JOB, DURING THE PROVOCATIONS CARRIED OUT BY THE GOVERNMENT OF THE UNITED STATES THIS PAST 24TH OF FEBRUARY OF 1996. TO THE COMRADES:

Reviewed by: LS Salomon
Declassified by: KMDJr/RJG

MM-10517

9/24/00

DG-108 (E) RSB(~ARIO).wpd

GERALDO
SECOND: GIVE KNOWLEDGE OF THE PRESENT ORDER TO THE ESTEEMED COMRADE AND TO THE CHIEFS AND OFFICIALS THAT PARTICIPATE IN IT'S FULFILLMENT THIRD: ANNOTATE IT IN THE COMRADES SERVICE CARD.

CHIEF, DIRECTORATE OF INTELLIGENCE, BRIGADIER GENERAL EDUARDO DELGADO RODRIGUEZ.

[….material omitted….]

8.- REGARDING COMMUNICATIONS:

A.-) REGARDING THE OSO P.O. BOX, WE WANT TO INFORM YOU THAT IT WAS DECIDED TO GIVE THIS FORM OF COMMUNICATION GREATER USE, SINCE ON OCCASION WE HAVE RECEIVED THE INFORMATION, ESPECIALLY LORIENT'S, WITH SOME DEGREE OF TARDINESS AND THEY HAVE LOST PART OF THEIR VALUE, DUE TO THE MAILINGS NOT BEING STABLE AND THESE WERE LATE, THEREFORE WE WANT TO AVOID THIS WITH THE USE OF THE POST OFFICE BOX THAT YOU HAVE, SINCE THAT WAY THE INFORMATION WOULD GET TO US MORE PERIODICALLY.

THIS WAS THE REASON FOR THE INSTRUCTIONS THAT WERE SENT TO YOU SO YOU WOULD SEND MAILINGS TO THE BOX EVERY 15 DAYS, SINCE IN THIS MANNER WE WOULD

RECEIVE MORE UP TO DATE INFORMATION, SINCE YOU CAN SEND A FLOPPY WITH ENCRYPTED INFO, LIKE COPRONTOS. ON THE OTHER HAND, WE CAN ALSO RECEIVE ALL TYPES OF NON-SECRET MATERIALS, THAT OTHER COMRADES CAN USE, AS WOULD BE THE CASE WITH DOCUMENTATION, TO GIVE AN EXAMPLE, AND IT WOULD ALSO ALLOW US TO MAINTAIN THE BOX FED, THAT IS, THAT IT RECEIVE MAIL PERIODICALLY AND NOT CALL ATTENTION. ON THE OTHER HAND, DON'T ALWAYS SEND THE SAME TYPE OF MAILINGS, THAT IS, EXPRESS MAIL ENVELOPES, THEREFORE, THERE IS THE NEED THAT ON OCCASION YOU HAVE OTHER TYPES OF MAILINGS USING OTHER ENVELOPES SUCH AS PRIORITY, POSTCARDS, LETTERS, ETC.

Reviewed by: LS Salomon
Declassified by: KMDJr/RJG

MM-10517

9/24/00

DG-127 (E) RSC (RSC-32-'PTRS.WPD').wpd

[. . . . material omitted . . . .]

.#10. ABOUT 46. IT'S A GREAT SATISFACTION AND SOURCE OF PRIDE TO US THAT THE OPERATION TO WHICH WE CONTRIBUTED A GRAIN OF SALT ENDED SUCCESSFULLY. IT IS OUR GREATEST HOPE IN THIS JOB, FOR WHICH WE WILL CONTINUE TO WORK SO THAT IT WILL ALWAYS BE LIKE THAT. STOP. WHEN LORIENT LEFT VIA CP HE HANDED IN A PROPOSAL FOR A NEW METHOD OF INFORMING ABOUT THE MEANS. WHEN HE CAME, WE DIDN'T SEE HIM THAT'S WHY WE HAVEN'T DISCUSSED THE MATTER AND THERE ARE LOOSE ENDS. ON SATURDAY LORIENT USED A CODE MEANING REBASING OF FORCES AND MEANS NOT COMMON THAT MIGHT BE ARMY, SPECIAL OPERATIONS, MARINES, ETC., OR REBASING OF TACTICAL EXPLORATION UNITS SUCH AS THE 224 INTELLIGENCE BON. SO FAR I HAVEN'T BEEN ABLE TO FIND OUT EXACTLY FROM HIM BUT WILL TRY TO DO SO. STOP. I THINK THIS MESSAGE WILL GO VIA ESFERA BECAUSE I GAVE 48 TO HORACIO, BUT I DIDN'T RECEIVE 47 AND I THINK IT MIGHT BE RELATED TO 48. IF THAT'S THE CASE I NEED IT REPEATED, URGENTLY. MAYBE THE TIME IS TOMORROW MORNING. STOP. CASTOR TOLD ME ON THE PHONE

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Cred. #10517
11/7/00

THAT HE HAS NO INFORMATION ABOUT THE FLOTILLA THAT'S NOT PUBLIC KNOWLEDGE; NEVERTHELESS, WE AGREED TO MEET TOMORROW FIRST THING. I WILL CALL HIM AGAIN TONIGHT AND IF HE DOESN'T HAVE ANYTHING IMPORTANT SEE HIM LATER AND PRIORITIZE LISTENING FIRST THING. RPT. HORACIO ALREADY HAS 48, BUT I DID NOT RECEIVE 47, NEEDS TO BE REPEATED URGENTLY IF IT PERTAINS TO THE FLOTILLA. GIRO. APRIL 29.

[. . . . material omitted . . . .]

.#19. OK 56. WE WILL MONITOR FREQUENCIES. STOP. AS YOU KNOW, CASTOR HAS BEEN INSTRUCTED NOT TO CREATE A SCANDAL WITH MATTER OF HIS WIFE. FROM THE VERY BEGINNING HE WAS WORRIED THAT HIS PASSIVITY WOULD ATTRACT ATTENTION. WE TOLD HIM BECAUSE OF THE GERMAN CASE AND BECAUSE OF HIS BEING A PILOT THAT IT WAS ALSO A BAD IDEA TO COME OUT OF HIDING BECAUSE HE WOULD CERTAINLY BE AN OBJECT OF DISTRUST BECAUSE OF CURRENT SPY PHOBIA, SO HE SHOULD REMAIN QUIET. NEVERTHELESS, WE HAVE ASKED HIM TO PERIODICALLY TELL US HOW THIS SITUATION IS PROGRESSING; AND HIS LATEST REPORTS STATE THAT BECAUSE

OF THE DELAY WITH HIS WIFE'S SITUATION IT ALREADY CALLS TOO MUCH

Reviewed by: LS Salomon

Declassified by KMDJr./RJG

Cred. #10517

11/7/00

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

3. Section 1111 of Title 18 of the United States Code provides in relevant part:

(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, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; 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.

* * * *

4. Section 1117 of Title 18 of the United States Code provides:

If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

PROTEST AGAINST TRIAL AS UNFAIR – PARTIAL LIST OF PARLIAMENTS AND PARLIAMENTARY BODIES, HUMAN RIGHTS AND LAWYER ORGANIZATIONS, AND INDIVIDUALS

Nobel Laureates

Adolfo Perez Esquival (Peace Prize – 1980: Argentina); Archbishop Desmond Tutu (Peace Prize – 1984: South Africa); Rigoberta Menchú Turn (Peace Prize – 1992: Guatemala); José Ramos-Horta (Peace Prize – 1996: East Timor); Wole Soyinka (Literature Prize – 1986: Nigeria); Nadine Gordimer (Literature Prize – 1991: South Africa); José Saramago (Literature Prize – 1998: Portugal); Günter Grass (Literature Prize – 1999: Germany); Harold Pinter (Literature Prize – 2005: England); Zhores Alferov (Physics Prize – 2000: Russia)

Public letter to U.S. Attorney General; letter to the Editor of *New York Times*, April 11, 2003

REGIONAL PARLIAMENTS

Latin American Parliament (Parlamento Latinoamericano) (www.parlatino.org)

Established by treaty. Consists of representatives elected by the parliaments of 22 Latin American and Caribbean countries: Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador,

Guatemala, Honduras, Mexico, Netherlands-Antilles, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

Resolution, December 2006

MERCOSUR Parliament (Parlamento de MERCOSUR)
(www.parlamentodelmercosur.org)

Regional institution established by the Republics of Argentina, Brazil, Paraguay, Uruguay and Venezuela. Responsibilities include the preservation of democratic systems and respect for human rights by the member countries.

Declaration, April 29, 2008

Latin American and Caribbean Parliamentarians

Meeting of parliamentarians from fifteen countries in Latin America and the Caribbean as well as parliamentarians from five regional parliaments: Latin American Parliament (Parlamento Latinoamericano), Andean Parliament (Parlamento Andino), Central American Parliament (Parlamento Centroamericano), MERCOSUR Parliament (Parlamento de MERCOSUR) and the Indigenous Parliament.

Declaration, July 7, 2008

European Parliament
(www.europarl.europa.eu)

Vice-President of the European Parliament and the Parliament's Bureau and 19 other Members from the United Kingdom, Germany, France, Italy, Spain, Belgium, Portugal, Greece and Cyprus, including the Vice-Chairman of the Delegation for relations with the United States, the Vice-Chairwoman of the Subcommittee on Human Rights; current and former members of the Committees on Foreign Affairs, Human Rights, Civil Liberties, Justice and Home Affairs; and delegation members for relations with the countries of Central America and Mexico and to the Euro-Latin American Parliamentary Assembly.

Letter to U.S. Ambassador to European Parliament, January 8, 2007; letter to President of Delegation for Central American and Mexican Relations (European Parliament), October 8, 2003; letter to European Council, the European Commission, the President of the European Parliament, the General Affairs and External Relations Council and the presidents of seven different political groups, November 19, 2007

GUE/NGL Group – 41 Members of the European Parliament from thirteen European countries.

Declaration, October 25, 2006

European Parliament session. Parliamentary questions raised by numerous European Parliament Members, October 5, 2006 and October 22, 2003

Declaration, October 31, 2006

African, Caribbean and Pacific-European Union Parliamentary Assembly – Vice-President

Created by 101 countries in the Cotonou Agreement. Consists of 79 elected representatives of the European Parliament and elected representatives of 79 African, Caribbean and Pacific states. Responsibilities include the protection and promotion of human rights, democratic principles and the rule of law.

Letter to President of Delegation for Central American and Mexican Relations (European Parliament), October 8, 2003

INTERNATIONAL BODIES

Ibero-American Federation of Ombudsmen (Federación Iberoamericana de Ombudsman) (www.portalfio.org)

Federation of officials in Spain and sixteen countries in the Americas and the Caribbean who are national, provincial and local government officers serving as Ombudsmen, Public Defenders, Commissioners, and Presidents of Public Human Rights Commissions. In addition to Spain, the officials are from: Andorra, Argentina, Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal and Venezuela. Their official duty, imposed by law, is the protection of the human rights of citizens against governmental abuse.

Pronouncement, March 27, 2008

Permanent Conference of the Political Parties of Latin America and the Caribbean (Conferencia Permanente de Partidas Políticos de América Latina y el Caribe) (www.copppal.org.mx)

Created in 1979, the Permanent Conference consists of 60 political parties from 26 countries in South and Central America as well as the Caribbean, including Brazil, Mexico, Columbia, Argentina and Chile. Its responsibilities include the protection and promotion of human rights, democracy and legal and political institutions.

Declaration, April 19, 2008

Inter-Parliamentary Union – More than 50 members of the 113th General Assembly (www.ipu.org)

International body comprised of representatives chosen by the 154 member national parliaments. Established in 1889.

Declaration, October 2005

Latin American Council of Churches (Consejo Latinoamericano de Iglesias) (www.clailatino.org)

Compromised of 139 member churches and religious organizations in 19 countries. Its mission has focused on the building of a just and participatory society.

Declaration, October 20, 2008

Party of the European Left (www.european-left.org)

Composed of national political parties in 17 different countries.

Resolution, November 25, 2007

American Association of Jurists

Non-governmental Organization with consultative status to the United Nations Economic and Social Council and with membership in all countries of the American continent. Its main principles and objectives include the defense and promotion of human rights and the realization of better and more effective guarantees to their protection.

Declaration, October 8, 2007; resolutions, January 28, 2005 and November 14, 2003

International Association of Democratic Lawyers (www.iadllaw.org)

Non-governmental organization founded in 1946 with more than 16 member organizations in 4 continents and with consultative status to the United Nations Economic and Social Council and the United Nations Educational, Scientific and Cultural Organization.

Public statement, June 6, 2008

LATIN AMERICA

MEXICO

Senate (Senado de la República) (www.senado.gob.mx)

Adopted Points of Agreement (Unanimously Approved), October 7, 2006, and September 28, 2006.

Senate – North American Foreign Relations Committee (Senado de la República – Comisión de Relaciones Exteriores, América del Norte)

Adopted Point of Agreement, October 7, 2006

House of Representatives (Cámara de Diputados de la República) (www.diputados.gob.mx)

Public statement, July 9, 2003 (300 Deputies)

State of Aguascaliente – Congress (Congreso del Estado) (www.congresoags.gob.mx)

Decree, October 10, 2007

BRAZIL

House of Deputies – Human Rights and Minorities Commission (Camara dos Deputados – Comissão de Direitos Humanos e Minorias)

Adopted Repudiation Motion, June 26, 2006; adopted Motion in the Defense of Human Rights, April 10, 2007

National Congress (Congresso Nacional de Brasil) – Chairs of 24 Parliamentary Commissions, including the Senate Human Rights and Legislation Participatory Commission and House of Deputies Foreign Relations and National Defense Commission and 118 Deputies and 14 Senators from fourteen different political parties (www.senado.gov.br) (www.camara.gov.br)

Order of Attorneys of Brazil (Ordem dos Advogados do Brasil) (www.oab.org.br)

The Brazilian bar association, founded in 1930. Responsible by law for regulation of the legal profession.

> Letter to Director of the Human Rights and Social Issues, Department of the Ministry of Foreign Relations of Brazil, September 12, 2006

Municipality of Ribeirao Preto – Municipal Chamber (Camara Municipal do Ribeirao Preto) (www.camararibeiraopreto.sp.gov.br)

> Declaration, April 5, 2005

Municipality of Porto Alegre – Municipal Chamber (Camara Municipal do Porto Alegre) (www.camarapoa.rs.gov.br)

> Adopted Motion, February 22, 2006

ARGENTINA

House of Deputies (Cámara de Diputados) (www.diputados.gov.ar)

Letter to U.S. Attorney General, August 24, 2005 (20 Deputies)

Legislature of Buenos Aires (Legislatura de la Ciudad Autónoma de Buenos Aires) (www.legislatura.gov.ar)

Declaration, October 23, 2008

Municipal Council of Rosario (Concejo Municipal Rosario) (www.concejorosario.gov.ar)

Declaration, November 13, 2008

Workers Association of the State (Asociación Trabajadores del Estado) (www.ateargentina.org.ar)

Declarations, April 29, 2008 and September 12, 2005

Bar Association of Santiago de Estero, Argentina (Colegio de Abogados de Santiago del Estero) (www.abogadossantiago.com.ar)

Resolution, November 4, 2004

44 leaders of human rights organizations, political leaders, lawyers, journalists, academics and trade unionists

CHILE

Senate (Senado de la República) – Human Rights, Nationality and Citizenship Commission (www.senado.cl)

Resolution, May 2008

Judge Juan Guzmán Tapia

Member of Chile's Court of Appeals for 22 years, Judge Juan Guzmán Tapia tried former Chilean dictator Augusto Pinochet on human rights charges and has investigated 99 cases of human rights violations in total. Currently, Dean of the law school at the Central University of Chile (Universidad Central de Chile) and director of its Center for the Study of Human Rights.

Press Release, September 27, 2007

BOLIVIA

National Senate (Senado Nacional) (www.senado.bo)

Declaration, September 17, 2008

House of Deputies (Cámara de Diputados) (www.congreso.gov.bo)

Declarations, November 5, 2008 and October 11, 2007

Province of Chaco – House of Deputies (Cámara de Diputados de Chaco)

Resolution, September 10, 2008

PERU

Congress (Congreso de la República de Peru) (www.congreso.gob.pe)

Approved Motion, September 29, 2008

VENEZUELA

National Assembly (Asamblea Nacional) (www.asambleanacional.gob.ve)

Resolution, September 23, 2008

PANAMA

National Assembly – President and Vice-President of the National Assembly and the President of the Commission of Foreign Relations

Special Declaration, October 10, 2007

National Assembly – Foreign Relations Commission (Asamblea Nacional – Comisión de Relaciones Exteriores) (www.asamblea.gob.pa)

Resolutions, October 22, 2008 and October 3, 2006

National Bar Association of Panama (Colegio Nacional de Abogados de Panamá) (www.cnapanama.com)

Panama's official bar association; compulsory membership for lawyers. Its purposes include

protection of the rule of law and improvements to the administration of justice.

Resolution, October 27, 2008; pronouncement, October 8, 2007

Ecumenical Committee of Panama (Comité Ecuménico de Panamá)

Includes the Catholic Church, the Greek Orthodox Church, the Russian Orthodox Church, the Anglican Church, the Evangelical Methodist Church of Panama, the Methodist Church of the Caribbean and the Americas, the Baptist Calvary Church, the Union Church, the Lutheran Church and the Salvation Army of Panama.

Declarations, October 20, 2008 and October 8, 2007; pronouncement, September 28, 2006

Democratic Revolutionary Party (Partido Revolucionario Democrático)

Largest political party in Panama, with more than 650,000 members. It is currently the governing party.

Public statement

National Federation of Associations and Organizations of Public Employees (Federación Nacional de Asociaciones y Organizaciones de Empleados)

Resolution, September 8, 2007

Association of Trial Attorneys of Panama (Asociación de Abogados Litigantes de Panamá)

Public statement, October 5, 2007

Istmeña Academy of International Law (Academia Istmeña de Derecho Internacional)

Public statement, September 6, 2006

Independent Lawyers Association of Panama (Frente de Abogados Independientes de Panamá)

Declaration, October 4, 2007

PARAGUAY

House of Deputies (Cámara de Diputados del Paraguay) – 27 Deputies (www.diputados.gov.py)

Declaration, November 2007

ECUADOR

Chamber of Anglican Bishops of Ecuador (Cámara de Obispos Anglicanos del Ecuador)

Letter to U.S. Attorney General, August 9, 2006

Permanent Assembly of Human Rights – APDH of Ecuador (Asamblea Permanente de Derechos Humanos - APDH del Ecuador) (www.apdh.ec)

Non-governmental organization founded in 1984 to support human rights.

Declaration

COLUMBIA

Collective Corporation of Lawyers José Alvear Restrepo (Corporación Colectivo de Abogados José Alvear Restrepo)
(www.colectivodeabogados.org)

Organization dedicated to defending human rights, with consultant status to the Organization of American States. Member of the International Federation of Human Rights.

Columbian-Panamanian Institute of Procedural Law (Instituto Colombo – Panameño de Derecho Procesal)
(www.institutocolombopana.com)

Resolution, July 20, 2004

EUROPE

UNITED KINGDOM OF ENGLAND AND WALES

House of Commons – 112 Members of House of Commons
(www.parliament.uk/commons/index.cfm)

The MP's include a former Secretary of State for Foreign Affairs, a current Minister and a former Minister.

Public letter to U.S. Attorney General, February 8, 2006; statement in the House of Commons, Nov. 21, 2002.

Trade Unions

The Trade Union Congress and twenty-four additional national trade unions, representing almost all of organized labor. Represents over six million members.

Motion passed unanimously, September 10, 2008; declaration published in *Guardian* and *Independent*, October 2008; public letter to U.S. Attorney General, February 8, 2006.

Tens of thousand individuals, including former Ministers of State, numerous political leaders, academics, writers, and film and theater artists

Signatories include two former Secretaries of State and a former Minister.

Declaration published in *Guardian* and *Independent*, October 2008.

GERMANY

German Parliament (Bundestag) – Chair of Parliamentary Commission on Human Rights and Humanitarian Aid and 64 other Members (www.bundestag.de)

Letters to the U.S. Congress, September 7, 2006, July 2006 and June 16, 2006

IRELAND

Irish Parliament (Oireachtais) – 53 Members from all political parties (www.oireachtas.ie)

Letter to U.S. Attorney General, September 30, 2005; public statements, November 20, 2003 (Labor Party Whip on behalf of all Labor Party Deputies and Senators) and December 8, 2004; letter to the Editor of *Irish Independent*, September 24, 2008

ITALY

Senate (Senato della Repubblica) – 39 Senators, including the former Vice-President of the Senate and former Chairperson of the Judiciary Committee (www.senato.it)

Letter to the U.S. Senate, October 25, 2006

SPAIN

Nineteen Municipal Councils

Adopted motion, February - June 2006, September 2005, February 2004 and November 2003

Over 1,100 individuals, including political leaders, trade unionists, artists and businessmen.

Letter to U.S. Attorney General, January 2006

SWITZERLAND

Federal Assembly – 48 Members from all parties and including Members on the Council of State's Juridical Affairs Commission and the joint Assembly's Judiciary Commission (www.parlament.ch)

Letter to U.S. Ambassador to Switzerland, October 3, 2007

BELGIUM

Flemish Parliament (Vlaams Parlement) – 35 Members (www.vlaamsparlement.be)

Declaration, February 2006; letter to U.S. Ambassador in Belgium, November 8, 2007; public letter, October 27, 2006

NORWAY

National Federation of Teachers – Vesterålen Region

Request to the First Minister of Norway, May 2008

CANADA

Parliament– 56 Members, including the former Minister of Justice for Quebec, several members of the Foreign Affairs and International Development Committee and the Vice-Chair of the Immigration Committee, and the acting leader of the Bloc Québécois (www.parl.gc.ca)

Letters to Canadian Minister of Foreign Affairs and U.S. Attorney General, June 19, 2008 and December 12, 2007

Canadian Federation of Students (www.cfs-fcee.ca)

Comprised of more than 500,000 students from over 80 university and college students unions.

Resolution and letter to President of the United States, June 9, 2008

Ninety-One Academics, Trade Unionists, Writers and Film and Theater Artists

Letter to U.S. Attorney General, U.S. Ambassador to Canada and Foreign Affairs Minister of Canada, February 21, 2008

RUSSIA

Parliament (State Duma) (www.duma.gov.ru)

Call to U.S. Congress (Unanimously Approved), February 21, 2007

JAPAN

Former Speaker of the Japanese House of Representatives and 53 other current and former member of the National Diet, lawyers and law professors, 5 legal and human rights organizations

The former Speaker of House of Representatives; the former Vice-President of the Japan Federation of Bar Associations; several current and former members of the House of Councillors and House of Representatives; numerous practicing lawyers and law professors; Japan Civil Liberties Union, the Foundation for Human Rights in Asia, the Japan Democratic Lawyers' Association, the Japan Lawyers International Solidarity Association and the Lawyers Center for Social Democracy.

INDIA

30 political leaders including the Minister of Education (State of Kerala), unionists, writers and artists

Letter to U.N. Secretary General, October 27, 2008

TURKEY

Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi - TBMM) – Friendship with Cuba Parliamentary Group (www.tbmm.gov.tr/english/english.htm)

Declaration, September 2008

NAMIBIA

National Assembly (www.parliament.gov.na)

Resolution (Unanimously Approved), July 9, 2008

MALI

National Assembly (Assemblee Nationale, Republique du Mali) (www.assemblee-nationale.insti.ml)

Declaration, June 2, 2006

UNITED STATES OF AMERICA

National Association of Criminal Defense Lawyers (www.criminaljustice.org)

Amicus Curiae in the United States Court of Appeals for the Eleventh Circuit

National Association of Federal Defenders (www.federaldefenders.org)

Amicus Curiae in the United States Court of Appeals for the Eleventh Circuit

Florida Association of Criminal Defense Lawyers (www.facdl.org)

Amicus Curiae in the United States Court of Appeals for the Eleventh Circuit

National Conference of Black Lawyers (www.ncbl.org)

Letter to U.N. High Commissioner for Human Rights, September 2007

National Jury Project (www.njp.com)

Amicus Curiae in the United States District Court for the Southern District of Florida

National Lawyers Guild (www.nlg.org)

Amicus Curiae in the United States Court of Appeals for the Eleventh Circuit, December 2005; Letter to U.N. High Commissioner for Human Rights, September 2007; resolution, November 2007; public statement, June 5, 2008;

National Organization of Legal Service Workers NOLSW/UAW Local 2320

Letter to U.N. High Commissioner for Human Rights, September 2007

Latino National Congress (www.latinocongreso.org)

Annual conference of over 500 organizations from 20 states to discuss issues that concern Latinos nationwide.

Resolution, October 6, 2007

Council on Hemispheric Affairs (www.coha.org)

Report, May 24, 2006

Center for International Policy (www.ciponline.org)

Letter to U.N. High Commissioner for Human Rights, September 2007

Global Exchange (www.globalexchange.org)

Letter to U.N. High Commissioner for Human Rights, September 2007

Detroit City Council (www.ci.detroit.mi.us/legislative/)

Resolution, March 29, 2006

Ramsey Clark

Former U.S. Attorney General (1967-69)

Speech, October 1, 2002

OTHER

Over 8,000 individuals and organizations from around the world, including political leaders, trade unionists, academics, writers and film, music and theater artists

Open Letter to U.S. Attorney General (www.liberenlos5.cult.cu)