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

PETITION FOR A WRIT OF CERTIORARI

Leonard I. Weinglass
6 West 20th Street
New York, NY 10011

Michael Krinsky
Eric M. Lieberman
111 Broadway
Suite 1102
New York, NY 10006

Counsel to Petitioner Guerrero

Thomas C. Goldstein
Counsel of Record
Christopher M. Egleson
Won S. Shin
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Additional counsel listed on inside cover

Paul A. McKenna
2910 First Union
Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Counsel to Petitioner Hernandez

Richard C. Klugh, Jr.
Ingraham Building
25 S.E. 2nd Avenue
Suite 1105
Miami, FL 33131
Counsel to Petitioner Campa

William N. Norris
8870 S.W. 62nd Terrace
Miami, FL 33173
Counsel to Petitioner Medina

Philip R. Horowitz
Two Datran Center
Suite 1910
9130 South Dadeland
Blvd.
Miami, FL 33156
Counsel to Petitioner Gonzalez

QUESTIONS PRESENTED

Petitioners were convicted in district court in Miami on charges centering on their role as unregistered Cuban agents in monitoring anti-Castro organizations. The trial was the only judicial proceeding in U.S. history to be condemned by the U.N. Human Rights Commission, which found a "climate of bias and prejudice against the accused" so extreme that it failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a fair trial." A panel of the Eleventh Circuit agreed and ordered a retrial in a new venue, but the en banc court reversed, holding that the community's pervasive hostility to the Castro government was categorically irrelevant to the venue inquiry. The dissent called on this Court to grant certiorari. The court of appeals further held that petitioners could not state a *prima facie* claim under *Batson v. Kentucky* because the prosecution had not used all of its peremptory strikes to eliminate every potential black juror.

The questions presented are:

1. Did the Eleventh Circuit apply an erroneous legal standard in holding that petitioners did not establish a right to a change of venue?

2. Does a party's failure to use all of its peremptory strikes to strike all minority members of the juror *per se* preclude a *prima facie* challenge under *Batson v. Kentucky*?

3. Incident to its review of Questions 1 and 2, should this Court review the judgment as it pertains specifically to petitioner Hernandez?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ruben Campa, Rene Gonzalez, Antonio Guerrero, Gerardo Hernandez, and Luis Medina respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' original panel opinion (Pet. App. 220a) is published at 419 F.3d 1219. The en banc opinion (Pet. App. 90a) is published at 459 F.3d 1121. The panel opinion on remand (Pet. App. 1a) is published at 529 F.3d 980. The opinion of the district court denying a change of venue (Pet. App. 319a) is published at 106 F. Supp. 2d 1317. The district court's opinions denying a change of venue (Pet. App. 339a) and denying a post-verdict judgment of acquittal (Pet. App. 343a) are unpublished. Petitioners' judgments of conviction (Pet. App. 354a) are unpublished.

JURISDICTION

The final judgment of the court of appeals was entered on June 4, 2008. Pet. App. 1a. Timely petitions for rehearing were denied on September 2, 2008. Pet. App. 401a, 404a. Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 30, 2009. App. No. 08A435. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The appendix to this brief reproduces the relevant portions of the Fifth and Fourteenth Amendments to the U.S. Constitution and 18 U.S.C. §§ 1111 and 1117. Pet. App. 467a.

STATEMENT OF THE CASE

1. Miami, Florida is home to a massive Cuban-American exile community that provides the base of support for an array of organizations—ranging from the political to the paramilitary—dedicated to overthrowing the Castro government. Prominent among these is Brothers to the Rescue (BTTR), which beginning in 1994 sought to spur a new government through overflights of Cuban territory. Both Cuban and American officials repeatedly warned BTTR to cease its illegal incursions into Cuban airspace, which created a significant risk of a confrontation with the Cuban military. On February 24, 1996, after three BTTR planes nonetheless ignored clear warnings to divert their approaching violations of Cuban airspace, two were destroyed by Cuban fighter planes. Although Cuba has always vigorously maintained that it shot the planes down in the course of yet another incursion into its territory, U.S. air radar indicated that the shootdown occurred a few miles into international airspace.

In 1998, the United States indicted petitioners in Miami. The indictment focused on the charge that petitioners were unregistered Cuban agents and had infiltrated various anti-Castro organizations, including BTTR—which Cuba regards as a terrorist organization. Petitioner Hernandez was specifically

charged with conspiracy to commit murder for providing information on BTTR flights as part of a supposed plan to shoot down the BTTR planes in U.S. jurisdiction, which extends to the international airspace between the United States and Cuba.

Petitioners sought a change of venue from Miami to Fort Lauderdale, thirty miles away. Petitioners invoked the "presumed prejudice" doctrine, which holds that a change of venue is required when strong community sentiment and pretrial publicity (as opposed to bias on the part of individual jurors) create too great a risk that the defendant will not receive a fair trial. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Petitioners introduced evidence that the pervasive and violent anti-Castro struggle of the Miami community would not only infect the jury with hostility, but would also cause jurors to fear for their (and their families') safety, livelihoods, and community standing if they acquitted admitted Cuban agents who were charged with, *inter alia*, conspiring to murder opponents of the Castro government. The district court, however, discounted the relevance of anti-Castro hostility on the ground that it "relate[d] to events other than the espionage activities in which Defendants were allegedly involved." Pet. App. 330a. The court held that petitioners had failed to show that it was "virtually impossible" for them to receive a fair trial in Miami, and denied the requested change of venue. *Id.* 323a. In the district court's view, voir dire would provide petitioners with a sufficiently fair trial. *Id.* 337a.

The prosecution exercised nine of its eleven peremptory challenges, as well as both of its additional challenges to alternates, to strike seven

black members of the venire: five during selection of the jury and two alternates. Pet. App. 413a-33a. The final jury included three black members and one black alternate. *Id.* 434a. The district court, however, accepted the government's proffered race-neutral justifications for its strikes, which it held did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 419a-32a.

The district court did agree with petitioners that the charge that petitioner Hernandez had conspired to commit murder, which applies only to an "unlawful killing" (18 U.S.C. § 1111), required the government to prove beyond a reasonable doubt that the conspirators planned to shoot down the BTTR planes in U.S. jurisdiction, rather than during an illegal incursion into Cuban airspace. Pet. App. 453a-56a, 350a. The government itself acknowledged that, "[i]n light of the evidence presented in this trial, [such a requirement] presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution on this count." Emergency Pet. for Writ of Prohibition ("Emergency Pet.") at 21, 27, No. 01-12887 (11th Cir. May 25, 2001). The prosecution thus introduced no direct evidence of such an agreement. Instead, it showed that after the shootdown Hernandez congratulated the Cuban government on an operation and that the government had awarded Hernandez a commendation. *Id.* 460a-66a. The prosecution did not explain how this evidence demonstrated a plan to destroy the planes in *international* airspace, given Cuba's insistence that the shootdown had occurred over its *own* territory. *Id.* 435a-39a, 441a-52a. The jury nonetheless convicted on all counts.

2. On petitioners' appeal, a panel of the Eleventh Circuit reversed petitioners' convictions on the ground that they were entitled to a change of venue. Pet. App. 220a-318a. Holding that it was required to "independent[ly] evaluat[e] . . . the facts established in support of [the] allegation[s]" (*id*. 304a), and consider the "totality of the circumstances" (*id.* 309a), the panel found that there was an "unreasonable probability" that petitioners would not receive a fair trial in Miami (*id.* 311a). The court weighed the prejudicial effect of not only anti-Castro sentiment, but also the widespread news coverage of the shootdown and indictments, anniversary ceremonies and "commemorative flights" staged in the Miami area during the trial, and news reports that could have made jurors fear for their safety if they acquitted petitioners. *Id.* 311a-12a. The court further noted an array of improper statements by the prosecutor in closing arguments, such as 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." *Id.* 288a. Finally, the panel found relevant the publicity surrounding the contemporaneous Elian Gonzalez debacle and that, in a case related to the Gonzalez incident, the government had tellingly taken the position that a fair trial was not possible in the Cuban-American community. *Id.* 311a-12a.[1]

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[1] In 1999, six-year-old Elian Gonzalez floated ashore in Florida after the ship on which he left Cuba foundered, killing his mother. When a federal court invalidated an asylum petition filed on his behalf, Border Patrol agents faced off

These facts, the panel found, created a "perfect storm" of publicity and inflamed community passions that denied petitioners a fair trial. *Id.* 316a.

3. The en banc court reinstated petitioners' convictions by a divided vote. Pet. App. 90a-159a. In contrast to the panel's *de novo* review, the en banc court more deferentially held that the district court had not abused its discretion in holding that it was not virtually impossible for petitioners to receive a fair trial in Miami. *Id*. 134a. Further, whereas the panel considered all the relevant circumstances, including the violently anti-Castro sentiment that pervaded Miami, the en banc majority deemed irrelevant as a matter of law all the evidence that "does not relate directly to the defendant's guilt for the crime charged." *Id.* The majority further held that a trial judge's efforts to empanel a neutral jury through voir dire examination and sequestration sufficiently addresses all claims of presumed prejudice. *Id.* 143a.

Judges Birch and Kravitch dissented. Pet. App. 160a-219a. In their view, "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." *Id.* 160a. Inviting this Court's intervention, they further recognized that, "in this media-driven environment in which we live, characterized by the ubiquitous electronic communication devices

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against anti-Castro protesters in Miami before Gonzalez was eventually returned to his father's custody in Cuba. The incident sparked massive protests in Miami.

possessed by even children . . . , 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." *Id.* 160a-61a.

4. On remand, a panel rejected petitioners' remaining challenges to their convictions. Pet. App. 1a-71a. Applying circuit precedent, the court held as a matter of law that petitioners had failed even to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986), because "[t]he government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror." Pet. App. 27a (applying *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986)). The validity of the government's stated reasons for striking the black jurors was therefore irrelevant.

By a divided vote, the court also sustained petitioner Hernandez's conviction for conspiracy to commit murder. Like the district court, the court of appeals accepted that the charge required proof that petitioner participated in a plan to shoot down the planes in international airspace. Pet. App. 54a. According to the majority, such proof beyond a reasonable doubt could be found in the fact that Hernandez and the Cuban government had exchanged congratulatory messages (*id.* 55a), notwithstanding that Cuba consistently maintained that the shootdown had occurred in Cuban territory. *Cf. id.* 71a (Birch, J., concurring) (acknowledging that "this issue presents a very close case").

Judge Kravitch dissented. Pet. App. 72a-89a. In her view, the verdict on the murder-conspiracy count was unsustainable in light of the full body of evidence

adduced at trial. Among other things, Cuba's repeated and clear objections to BTTR's violations of its airspace demonstrated that Cuba intended merely to protect its own territorial integrity. *Id.* 87a. For example, in the course of approximately 2000 flights, Cuba had never challenged BTTR planes in international airspace. *Id.* By contrast, the two isolated statements cited by the majority "failed to provide either direct or circumstantial evidence that Hernandez agreed to a shoot down in international airspace." *Id.* Thus, all "the evidence point[ed] toward a confrontation in Cuban airspace." *Id.*

The panel further held that that the district court had erred in enhancing the sentences of three petitioners for conspiring to gather national security information under U.S.S.G. § 2M3.1(a)(1), given that petitioners had never succeeded in doing so. Pet. App. 62a-63a. Recognizing a square conflict with the Ninth Circuit, the court of appeals nonetheless refused to remand for resentencing as to petitioner Hernandez, reasoning that he was already subject to a life sentence on the murder-conspiracy count. *Id.* 70a-71a (citing *United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir. 1990)).

Judge Birch concurred, reiterating that petitioners' "motion for a change of venue should have been granted" in light of "demonstrated pervasive community prejudice," and he once again urged this Court to use the case as a vehicle "to address the issue of change of venue in this internet and media permeated century." Pet. App. 72a (noting that the Court had not considered questions of venue in a quarter-century).

5. This petition followed.

REASONS FOR GRANTING THE WRIT

The legal conflicts created by the Eleventh Circuit's rulings, amplified by the outcry among domestic and international organizations over the judgment below, demonstrate the urgent need for this Court's intervention. The court of appeals' holding that the prosecution evaded even a *prima facie* inquiry under *Batson v. Kentucky* by not using all of its strikes to eliminate every minority juror represents a serious threat to the *Batson* regime. The Eleventh Circuit's holding that petitioners were not entitled to a change of venue despite the pervasive hostility in Miami to the Castro government—a factor the court of appeals deemed irrelevant as a matter of law—equally merits this Court's review, as Judge Birch recognized in urging that certiorari be granted. And the judgment as to petitioner Hernandez not only illustrates the manifest unfairness of petitioners' trial, but gives rise to an acknowledged circuit conflict. Particularly because this case "implicates serious issues of foreign relations" (*JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964)), certiorari should be granted.

I. Certiorari Should Be Granted To Review The Eleventh Circuit's Holding That A Party's Failure To Use All Of Its Peremptory Strikes To Eliminate All Minority Jurors Precludes A Finding Of A *Prima Facie* Case Under *Batson v. Kentucky*.

This Court's foundational ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986), forbids any party from striking a venireperson on the basis of her race. If an objecting party makes out a *prima facie* claim of a *Batson* violation, the striking party must articulate a race-neutral explanation. *See id.* at 96-97. In this case, petitioners objected to the prosecution's use of seven of its peremptory challenges to remove black members of the venire. The district court required the government to proffer race-neutral explanations, which the court accepted. Pet. App. 419a-32a.

Petitioners appealed, challenging the prosecution's stated rationale for striking the black jurors. The Eleventh Circuit, however, rejected petitioners' *Batson* claim at the threshold, holding as a matter of law that petitioners could not establish a *prima facie* claim under *Batson*, and thus that the prosecution had no obligation to explain its strikes. Under the court's categorical rule, no *prima facie* claim arose, and consequently "[n]o *Batson* violation occurred," because "[t]he government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror." Pet. App. 27a (applying *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986)).

Certiorari is warranted because the Eleventh Circuit's decision conflicts with this Court's precedents and seriously threatens the integrity and efficacy of the *prima facie* regime established by *Batson*. The Eleventh Circuit's holding that no *Batson* inquiry is required whenever even one minority juror is seated by a party that does not use all of its strikes cannot be reconciled with the principle that the right to jury selection untainted by racial discrimination is violated by the biased exclusion of even a single juror. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208 (2008). The ruling below—which affords talismanic significance to two factors—equally conflicts with this Court's repeated holding that the *prima facie* inquiry under *Batson* must account for "all the relevant circumstances." *Batson*, 476 U.S. at 96.[2] *Batson* itself directed courts to account for two factors that the Eleventh Circuit's *per se* rule deems irrelevant: "a 'pattern' of strikes against black jurors included in the particular venire" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97.

Even more important, the ruling below provides a ready tool to nullify *Batson*'s central role as an essential guarantee of equality in juror selection by permitting a party to freely engage in race-based

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[2] *E.g.*, *Snyder*, 128 S. Ct. at 1208; *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *Johnson v. California*, 545 U.S. 162, 168-69 (2005); *United States v. Armstrong*, 517 U.S. 456, 467 (1996); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991); *Teague v. Lane*, 489 U.S. 288, 295 (1989).

strikes merely through the nicety of allowing at least one minority juror to serve. "At *Batson*'s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level." *Miller-El*, 545 U.S. at 267 (Breyer, J., concurring) (emphasis in original). The very prospect of such facile avoidance of a bedrock principle of equal protection "undermine[s] public confidence in the fairness of our system of justice." *Johnson*, 545 U.S. at 172 (quotation marks omitted). And the pernicious effects of the court of appeals' ruling necessarily extend beyond the conduct of prosecutors to the expansive sweep of claims covered by *Batson*: strikes on the basis of not only race but also gender in all manner of both civil and criminal litigation.[3]

It is therefore not surprising that the Eleventh Circuit's significant narrowing of the circumstances that give rise to a *prima facie* claim under *Batson*—and its parallel license to engage in discriminatory juror selection—draws almost no support from decisions in other jurisdictions and squarely conflicts with the precedent of three circuits and one state supreme court. *See Hardcastle v. Horn*, 368 F.3d 246, 256-58 (3d Cir. 2004) (*prima facie* case when government struck twelve of fourteen black venirepersons, and seated one black juror); *Coulter v. Gilmore*, 155 F.3d 912, 914, 918-19 (7th Cir. 1998) (*prima facie* case when government used ten of

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[3] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Georgia v. McCollum*, 505 U.S. 42 (1992) (defendants); *Edmonson*, *supra* (civil litigation).

fourteen peremptory challenges, including nine on black venirepersons, and jury included three black members and two black alternates); *Jones v. Ryan*, 987 F.2d 960, 972-73 (3d Cir. 1993) (rejecting argument that government could not have used "peremptory challenges in a discriminatory manner" merely because government did not use available challenges to "eliminate all black venirepersons"); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) ("prosecutor may not avoid . . . obligation to provide race-neutral explanations . . . simply by forgoing the opportunity to use all of his challenges against minorities"); *State v. Duncan*, 802 So. 2d 533, 549-50 (La. 2001) ("mere presence of one or two perhaps token members of the group on the jury" not "dispositive of whether the *prima facie* requirement is satisfied").

Because the question whether petitioners would ultimately prevail in their claim that the government's stated race-neutral reasons fail to justify its strikes of black venirepersons was not decided by the court of appeals and is not encompassed by the question presented, that issue would be left to be decided by the Eleventh Circuit on remand. But it is worth noting that other courts would find that petitioners made out a *prima facie* claim under *Batson*, as the district court necessarily did in requiring the prosecution to provide race-neutral explanations for its peremptory strikes of multiple black members of the venire. It is settled outside the Eleventh Circuit that "a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination" and therefore "strongly

supports a *prima facie* case under *Batson*." *Alvarado*, 923 F.2d at 255. *Accord Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc). Here, the prosecution used seven of its eleven peremptory challenges (63.6%) to strike black members of the venire, whereas blacks comprised only 21% of Miami-Dade County's population. That great contrast is comparable to disparities that have been regularly found to support or outright establish a *prima facie* case under *Batson*.[4]

II. Certiorari Is Warranted To Review The Exceptionally High Barriers To A Change Of Venue Erected By The Eleventh Circuit.

The en banc Eleventh Circuit's holding that petitioners were not entitled to a change of venue rests on a series of legal standards that, together and apart, erect essentially insuperable barriers to a defendant's ability to secure a change in venue under the well-settled doctrine of "presumed prejudice." The court of appeals' exceptionally narrow conception of the right to a change of venue cries out for this Court's review because in four distinct respects it cannot be reconciled with the due process right to a neutral jury reflected in this Court's precedents and the rulings of other circuits. As Judge Birch's dissenting opinion recognized, "this case presents a

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[4] *Turner*, 63 F.3d at 813 (56% to 30%); *Alvarado*, 923 F.2d at 256 (57% to 29%); *Coulter*, 155 F.3d at 919 (90% to 29%); *Jones*, 987 F.2d at 971 (75% to 20%); *see also Johnson*, 545 U.S. at 170 (*Batson*'s first step is not intended to be too "onerous").

timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age . . . [and] to clarify circuit law to conform with Supreme Court precedent." Pet. App. 160-61a.

1. The common elements to every charge against petitioners were that each was an agent of the Castro government and that each had attempted to infiltrate organizations dedicated to overthrowing that government, actions that were tied to the deaths of four civilians. Petitioners argued that they could not receive a fair trial in Miami because of the uniquely pervasive and severe anti-Castro hostility in that community, which was significantly amplified by tremendous anger over the shootdowns and the contemporaneous Elian Gonzalez debacle. Even jurors who were not themselves prejudiced, petitioners argued, would sensibly fear for their and their families' safety and livelihood if they voted to acquit Cuban agents in such an environment. The essence of petitioners' submission was thus not that jurors in Miami were prejudiced towards them personally, but that a jury would inevitably include at least some members who could not truly serve neutrally due to the Castro government's overhanging central role in the case.

The en banc Eleventh Circuit deemed petitioners' argument to be irrelevant as a matter of law, categorically holding that "prejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not directly relate to the defendant's guilt for the crime charged." Pet. App. 134a. The majority relied on long-settled circuit precedent holding that "only media reports

linked directly to the defendant ha[ve] 'evidentiary value' in assessing his presumed prejudice claim." *Id.* n.196 (quoting *Meeks v. Moore*, 216 F.3d 951, 963 n.19, 967 (11th Cir. 2000)). *See also, e.g.*, *United States v. Awan*, 966 F.2d 1415, 1428 (11th Cir. 1992). The court accordingly concluded that evidence of "general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter"—in contrast to the much narrower group of targeted "articles that did relate to the defendants and their alleged activities in particular"—was *per se* irrelevant to the determination whether petitioners could receive a fair trial in Miami. Pet. App. 136a. Petitioners thus had no right to a change of venue notwithstanding that, as the dissent explained, the district court "made no findings regarding the prejudice within the community." *Id.* 211a (emphasis removed).

Certiorari is warranted because the Eleventh Circuit's decision conflicts with this Court's precedents and defies common sense. The court of appeals' error is easily illustrated by the hypothetical trial of a minority defendant for a serious crime with racial overtones in a community with a long history of pervasive racism. In such a case, it blinks reality to hold that the community's prejudices—though directed at a class to which the defendant belongs rather than at the defendant personally—have no effect on his ability to secure a fair trial. So too in this case it makes no sense to hold as a matter of law that the community's overwhelming hostility towards the Castro government and its supporters would have no effect in petitioners' trial for serving as spies for

that government, particularly when civilian deaths resulted.

This Court's decisions thus sensibly preclude the Eleventh Circuit's refusal to consider an array of evidence that logically informs whether attitudes of the community necessitate a change of venue. This Court has repeatedly held that courts must assess the prospect that the defendant will not receive a fair trial with jurors untainted by fear or bias in light of the "totality of [the] circumstances." *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *see also Dobbert v. Florida*, 432 U.S. 282, 303 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966). As the en banc dissent recognized, "[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." Pet. App. 209a.

Consistent with this Court's precedents, other courts would have held that the pervasive hostility in Miami was a proper basis for holding that petitioners would not receive the fair trial guaranteed by the Constitution without a change of venue. Those courts reject any effort to limit the evidence relevant to the venue inquiry to evidence "directly relate[d] to the defendant's guilt." Pet. App. 211a (Birch, J., dissenting). *See United States v. Bangert*, 645 F.2d 1297 (8th Cir. 1981) ("impartial jury" must be "free from outside influences, including potentially prejudicial news media reports of events *connected with* the matter on trial" (emphasis added)); *United States v. De Peri*, 778 F.2d 963, 972 (3d Cir. 1985) (presumed prejudice inquiry looks at totality of the

circumstances); *Whitehead v. Cowan*, 263 F.3d 708, 721 (7th Cir. 2001) (same).

Illustrative is *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), in which the Ninth Circuit reversed the district court's denial of a change of venue because it failed to account for significant publicity about the crime, most of which had no bearing on the defendant's guilt. The court found that the venue was "saturated with prejudicial and inflammatory media publicity about the crime." 428 F.3d at 1211. In stark contrast to the Eleventh Circuit's holding that pre-trial publicity about the shootdown and the jurors' regular exposure to a monument to BTTR were categorically irrelevant, the Ninth Circuit placed significant weight on analogous press coverage and the fact that a "statue commemorating fallen police officers was unveiled [and the] statute . . . was located across the street from the Riverside County courthouse where Daniels was tried." *Id*.

2. This Court's intervention is further required because the Eleventh Circuit erroneously assessed the limited remaining evidence it was willing to consider under that court's exceptionally high bar to a change of venue. The en banc majority explained that, to secure a change of venue, the defendant must show that a "fair trial was impossible." Pet. App. 131a. In the Eleventh Circuit, "[t]he presumed prejudice principle is rarely applicable and is reserved for an extreme situation," which makes the defendant's burden "an extremely heavy one." *Id.* 132a-33a (citations and quotation marks omitted). That stringent standard tracks a uniform body of Eleventh Circuit decisions holding, both before and

after the en banc ruling in this case, that a defendant asserting a claim of presumed prejudice cannot secure a change of venue unless it otherwise will be "virtually impossible" to secure a fair trial.[5] Five circuits similarly hold that presumed prejudice justifies a change in venue only if a fair trial is "virtually impossible" or "impossible."[6]

That standard cannot be reconciled with the holdings of four other circuits, which apply a substantially more lenient test that inquires whether it is "reasonably likely" that the defendant can receive a fair trial in the community.[7] The highest courts of nine states agree.[8] Two decades ago, two

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[5] *E.g.*, *Gaskin v. Sec'y, Dep't of Corr.*, 494 F.3d 997, 1005 (11th Cir. 2007); *Henyard v. McDonough*, 459 F.3d 1217, 1226 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1818 (2007); *Meeks*, 216 F.3d at 961; *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985). *See also* Pet. App. 323a (district court applying "virtually impossible" standard); *id.* 132a (en banc majority referring to the standard as "reasonable certainty").

[6] *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006); *United States v. Edmond*, 52 F.3d 1080, 1099 (D.C. Cir. 1995); *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir. 1991); *Simmons v. Lockhart*, 814 F.2d 504, 507 (8th Cir. 1987); *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982) (overruled in non-relevant part by *Garrett v. United States*, 471 U.S. 773 (1985)).

[7] *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999); *Washington v. Murray*, 952 F.2d 1472, 1484 (4th Cir. 1991); *United States v. Garza*, 664 F.2d 135, 139-40 (7th Cir. 1981); *United States v. Farrie*s, 459 F.2d 1057, 1061 (3d Cir. 1972).

[8] In addition to the cases cited in the next paragraph of the text, see *State v. Baker*, 320 S.E.2d 670, 676 (N.C. 1984); *State v. Rupe*, 743 P.2d 210, 220 (Wash. 1987); *People v. Gendron,* 243

Justices urged this Court to grant certiorari to resolve the conflict among state supreme courts on this question. *Brecheen v. Oklahoma*, 485 U.S. 909, 911 (1988) (Marshall, J., dissenting from the denial of certiorari) ("In this vacuum of constitutional precedent, states have taken divergent paths.").

Of note, courts have repeatedly stressed that the difference between the two competing standards is significant, not one of mere terminology. *People v. Lewis*, 43 Cal. 4th 415, 447 (Cal. 2008) ("'Reasonably likely' in this context means something less than 'more probable than not,' but something more than 'merely possible.'" (citation omitted)); *McBride v. Delaware*, 477 A.2d 174, 185-86 (Del. 1984) (rejecting prior stringent standard in favor of "reasonable probability" inquiry, a "lesser standard of proof"); *Pollard v. Dist. Court of Woodbury County*, 200 N.W.2d 519, 521 (Iowa 1972) (That the defendant "did not demonstrate conclusively she cannot receive a fair trial . . . . is not the test . . . . [T]he test is whether a 'reasonable likelihood' exists that the voir dire jury examination or a continuance will not be sufficient to allow a fair trial."); *Brown v. Oklahoma*, 871 P.2d 56, 61-62 (Okla. Crim. App. 1994) (rejecting "virtually impossible" standard on the ground that it "makes a change of venue very difficult to achieve"); *State v. James*, 767 P.2d 549, 552 (Utah 1989) (applying reasonable likelihood standard, which is less than "more likely than not"); *cf. Fisher v. State*, 481 So.2d 203 (Miss. 1985).

N.E.2d 208 (Ill. 1968); *State v. Beier,* 263 N.W.2d 622 (Minn. 1978).

The "extremely heavy" burden avowedly imposed by the Eleventh Circuit (Pet. App. 133a) is all but impossible to satisfy and conflicts with this Court's precedent. The en banc majority specifically erred in its belief that "the Supreme Court has ruled in [*Dobbert*, 432 U.S. at 303] that we cannot presume prejudice in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'" Pet. App. 134a. *Dobbert* was a very different case. There, the defendant sought a change of venue *not* based on community prejudice, but instead based merely on the fact that there had been extensive but neutral pretrial publicity about his case. By contrast, a distinct claim like petitioners' that pervasive fear and hostility in the community risk empanelling a jury that will not assess the facts neutrally is controlled by the holding of *Sheppard*, 384 U.S. at 363, that courts must ask only whether there is a "reasonable likelihood" that the defendant will not receive a fair trial. *Accord* 2 Charles Alan Wright, Federal Practice & Procedure § 342, at 378-79 (3d ed. 2005) (describing "reasonable likelihood" as correct standard in light of exhaustive review of existing caselaw).

3. This Court's review is also warranted because the Eleventh Circuit has imposed a still further significant obstacle to securing a change of venue by holding that a district court's denial of such a request is reviewed "for an abuse of discretion." Pet. App.

131a. That holding is consistent with the precedent of eight other circuits.[9]

By contrast, two circuits and the highest courts of three states engage in a substantially more searching *de novo* review of a district court's refusal to order a change of venue under the presumed prejudice doctrine. *See, e.g.*, *United States v. Skilling*, --- F.3d. ---, 2009 WL 22879, at *22 (5th Cir. Jan. 6, 2009) ("[w]e review *de novo* whether presumed prejudice tainted a trial, and this review includes conducting an independent evaluation of the facts") (quotation marks omitted); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998); *People v. Hamilton*, 774 P.2d 730, 737 (Cal. 1989); *State v. Reynolds*, 836 A.2d 224, 367 (Conn. 2003); *Lloyd v. District Court*, 201 N.W. 2d 720, 722 (Iowa 1972).

The Eleventh Circuit's substantially less rigorous standard of review renders it all but impossible for parties to secure a reversal of a district court's refusal to order a change of venue and cannot be reconciled with this Court's precedents. In *Sheppard*, this Court held that "appellate tribunals have the duty to make an independent evaluation of the

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[9] *United States v. Nettles*, 476 F.3d 508, 513 (7th Cir. 2007); *United States v. Angelus*, 258 F. App'x 840, 844 (6th Cir. 2007); *United States v. Higgs*, 353 F.3d 281, 308 (4th Cir. 2003); *United States v. Allee*, 299 F.3d 996, 999-1000 (8th Cir. 2002); *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001); *Rodriguez-Cardona*, 924 F.2d at 1158 (1st Cir.); *United States v. Edmond*, 52 F.3d 1080, 1099 (D.C. Cir. 1995); *United States v. Moran*, 236 F.2d 361, 362 (2d Cir. 1956).

circumstances" that give rise to the prospect that the defendant will be unable to receive a fair trial in the jurisdiction. 384 U.S. at 362. That more searching inquiry, the Court explained, is necessary to protect the defendant's due process right to "a trial by an impartial jury free from outside influences," "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors." *Id.* By contrast, it is hard to imagine a case so extreme that the Eleventh Circuit would find an "abuse of discretion" in the district court's finding that it was not "virtually impossible" to hold a fair trial. The ruling below thus renders the "presumed prejudice" doctrine a dead letter in practice.

4. This Court's intervention is equally warranted to review the Eleventh Circuit's suggestion that, when a trial court presides over a trial implicating community hostility, a defendant's right to a fair trial is sufficiently preserved merely by assessing the neutrality of individual jurors through voir dire. Pet. App. 133a. The Eleventh Circuit's holding erroneously collapses the distinction drawn by "clearly established Supreme Court precedent distinguishing between cases involving presumed prejudice—when 'the setting of the trial [is] inherently prejudicial'—and actual prejudice—when review of both the jury voir dire testimony and the extent and nature of the media coverage indicates 'a fair trial [was] impossible.'" *Nevers v. Killinger*, 169 F.3d 352, 364 (6th Cir. 1999) (quoting *Murphy*, 421 U.S. at 798). The latter addresses claims that particular members of the venire exhibited bias,

which accordingly calls for the examination of individual jurors through voir dire.

By contrast, the very point of the "presumed prejudice" doctrine is to identify cases in which community prejudice is sufficiently pervasive that "a court could not believe the answers of the jurors." *Beck v. Washington*, 369 U.S. 541, 557 (1962). *E.g.*, *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971) (while the exercise of challenges to the venire can be useful, it "is not always adequate to effectuate the constitutional guarantee" and "[o]n at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment."); *Rideau v. Louisiana*, 373 U.S. 723, 7227 (1963) (finding presumed prejudice "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury"); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

Other courts thus correctly hold—consistent with this Court's precedent but in irreconcilable conflict with the Eleventh Circuit—that findings of presumed prejudice do not call for the district court to undertake juror voir dire at all. *E.g.*, *House v. Hatch*, 527 F.3d 1010, 1023 (10th Cir. 2008) ("In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors."); *State v. Nelson*, 803 A.2d 1, 36 (N.J. 2002) ("The existence of such presumed prejudice obviates the need for conducting voir dire."). *See generally, e.g.*, *United States v. Grace*, 408 F. Supp. 2d 998, 1015 (D. Mont. 2006) (noting "the great many Ninth Circuit cases

applying the presumed prejudice test without considering the results of voir dire").

5. The many courts that reject the Eleventh Circuit's singularly demanding standards for establishing presumed prejudice would conclude that petitioners were entitled to a trial outside of the uniquely hostile environment created by the anti-Castro sentiment of Miami. No further evidence of that fact is needed than that the original panel in this case—which like other courts applied *de novo* review and examined the totality of the relevant evidence (*see supra* at 4-6)—held that petitioners *were* entitled to a change of venue. *See generally* Pet. App. 220a-318a. The government itself successfully sought en banc review precisely on the ground that the panel's distinct legal standards were outcome determinative, arguing that the panel's decision turned on "its own *de novo* review of facts" and "the community's political and social views about issues other than the defendants' commission of the charged crimes." Resp. Pet. for Rehearing En Banc 6.

It is hard to imagine a stronger case for a change of venue than this case. As the Working Group on Arbitrary Detention of the U.N. Human Rights Commission concluded, the "climate of bias and prejudice against the accused" was so extreme that the proceedings failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a fair trial" and "confer[red] an arbitrary character on the deprivation of liberty." Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add.1, at 65 (Oct. 19, 2005). Dozens of organizations and individuals around the world—

including, for example, numerous Nobel Laureates, national parliaments, and parliamentary committees on human rights—harshly criticized the proceedings. Pet. App. 469a-90a. No criminal trial in modern American history has been condemned in such a fashion.

At the time of petitioners' trial, there were more than 700,000 Cuban-Americans living in Miami. Of those, 500,000 remembered leaving their homeland, 10,000 claimed to have had a relative who was murdered in Cuba, 50,000 reporting having a relative who was tortured in Cuba, and thousands were former political prisoners. Memorials were subsequently erected in honor of the BTTR victims, and streets within the Miami-Dade County community were renamed for them. The trial judge herself referred to the "impassioned Cuban exile community residing within this venue" during the trial. *Id.* 292a.

Just before the district court held oral argument on the question of venue, the Miami area was convulsed by the largest public demonstration in the city's history with over 100,000 persons in the streets shouting anti-Castro slogans. Prospective jurors had recently witnessed anti-Castro groups turn parts of Miami into an armed camp in an effort to prevent federal agents from executing a court order to return Elian Gonzalez to his father.

The record demonstrates moreover that anti-Castro sentiment in Miami has manifested itself in a pattern of violence directed at those deemed not sufficiently hostile to the Castro regime. *See* Pet. App. 297a-98a; Human Rights Watch, Report, *Dangerous Dialogue: Attacks on Freedom of*

Expression in Miami's Cuban Exile Community (1992). Businesses pursuing commerce with, or aid to, Cuba have been targeted by bombers. Pet. App. 239a.

Voir dire revealed that many jurors feared for their safety or community standing if they acquitted petitioners. When asked about the impact any verdict in the case might have, one venireperson 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." Pet. App. 247a. Another, a banker, was "concern[ed] how . . . public opinion might affect [his] ability to do his job" because he dealt with 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." *Id.* 248a.

Other venire members indicated negative views towards Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury. Three of these ended up serving on the jury, including one as the foreperson. The district court denied petitioners' 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. Pet. App. 251a & n.82.

From the first day of deliberations, jurors complained of feeling intimidated by the TV cameras following them. Well into the second week of jury selection, a prospective juror complained of media harassment as he left the courthouse. Pet. App.

412a. As late as March 13, nearly four months into the trial, the court noted on the record that the jurors were still being harassed by cameras. Pet. App. 440a. *See* Human Rights Watch, Report, *Dangerous Dialogue* 9 (1994) (Spanish-language media has long publicly identified Cuban sympathizers).

The prejudice to petitioners was significantly amplified by serious misconduct by the prosecution. At closing, the government commented that the defendants had joined a "hostile intelligence bureau . . . that sees the Unites States of America as its prime and main enemy" and that the jury was "not operating under the rule of Cuba, thank God." Pet. App. 457a. The prosecutor also accused the defendants of "coming to the United States to destroy the United States." *Id.* 458a. The district court sustained the defendants' objections to these and other statements, but obviously not until after they were heard by the jury.

Despite opposing petitioners' requests for a change of venue from Miami to nearby Fort Lauderdale, the government itself argued in another case for a change of venue just a few months after petitioners were sentenced. The government argued in an employment case related to the Elian Gonzalez matter that

> 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.

Gov't Venue Mot., *Ramirez v. Ashcroft*, No. 01-cv-4835 (S.D. Fla. June 25, 2002).

In this case, petitioners requested minimal relief—moving the trial to Fort Lauderdale, a neighboring division within the same judicial district that is a mere thirty miles away. The Miami community's hostility towards the Cuban government assured that petitioners could not otherwise receive a fair trial. Because other courts would have held that a change of venue should have been granted, certiorari should be granted.

III. This Court's Review Of The Judgment As It Pertains To Petitioner Hernandez Is Warranted.

1. The fact that pervasive anti-Castro hostility in Miami and publicity regarding the shootdowns created a substantial risk that the jury would not neutrally decide the charges against petitioners is illustrated perfectly by the conviction of petitioner Hernandez for conspiracy to commit murder despite the absence of any actual evidence to support such a grave charge, for which the district court sentenced him to life in prison.

The district court and Eleventh Circuit both recognized that Hernandez's guilt depended on proof beyond a reasonable doubt not merely that he participated in a plan to shoot down the BTTR planes, but also that the agreement planned for the shootdown to *occur* outside Cuban airspace. Pet.

App. 54a, 453a-56a, 350a. Federal law did not prohibit Hernandez from participating in a Cuban-government plan to shoot down the planes during an incursion into Cuba's sovereign territory. A conspiracy is "an agreement to commit an unlawful act." *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)). In this case, the alleged unlawful act is "the unlawful killing of a human being with malice aforethought . . . [w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111; *id.* § 1117 (criminalizing conspiracy to violate § 1111).

Neither U.S. nor Cuban law deemed it "unlawful" for Cuba to defend its territorial integrity by destroying the planes if they violated its airspace. The federal murder statute applies only in U.S. jurisdiction, and Cuba's assertion that its domestic law permits it to defend its airspace is not only uncontested but immune from challenge in U.S. courts. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964). "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." Pet. App. 84a (Kravitch, J., dissenting); *see also id.* 54a-55a (majority opinion deciding the case on that premise).[10]

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[10] *See generally United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (a nation, "as sovereign, has the inherent

The overwhelming proof at trial was that, on the ambitious assumption that Hernandez was aware of a plan to shoot down the planes at all, there manifestly was no conspiracy to do so in U.S. jurisdiction. To the contrary, all "the evidence point[ed] toward a confrontation in Cuban airspace." Pet App. 87a (Kravitch, J., dissenting). In the period beginning in 1994 in which BTTR planes repeatedly violated Cuban airspace,[11] "*every* communication between Cuba and the FAA discussed the consequences for invading Cuba's sovereign territory" (*Id.*; ICAO Report §§ 2, 3 (detailing Cuban communications with U.S. State Department and FAA)). BTTR's leader "testified that in his nearly 2000 BTTR flights, [Cuban] MiGs never confronted him in international airspace." Pet App. 87a (Kravitch, J., dissenting). Finally, "communications between Cuba and Hernandez speak of a confrontation only if BTTR 'provokes' Cuba." *Id.* Given the Cuban government's consistent focus on the BTTR flight's incursion into Cuban airspace, these communications are only reasonably

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authority to protect . . . its territorial integrity"); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 259 (D.C. Cir. 1980) ("every nation has exclusive sovereignty over the airspace above its territory"); 26 C.F.R. § 1.911-2(h) ("territory under the sovereignty" of foreign government includes "the air space over the foreign country").

[11] *See* Report of the ICAO Fact-Finding Investigation, The Shooting Down of Two U.S. Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996, App. B to Council Document C-WP/10441, ¶¶ 2.1.1.1, 2.1.2.3, 2.1.3.1 (June 19, 1996) ("ICAO Report").

understood to mean provocation *by invasion of Cuba's sovereign territory*.

The Eleventh Circuit majority ignored all this proof, and cited no direct evidence of a plan to shoot down the planes in U.S. jurisdiction. Instead, the majority relied on two isolated pieces of evidence that, to the extent they are relevant at all, support Hernandez's innocence claim. According to the majority,

> 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.

Pet. App. 54a. The majority also thought that the same inference could fairly be drawn from Cuba's "recognition for [petitioner's] outstanding results achieved on the job." *Id.*[12]

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[12] Because the majority looked to whether a "reasonable" jury "could convict" Hernandez (Pet. App. 14a), there is a direct parallel between this case and No. 08-559, *McDaniel v. Brown* (cert. granted Jan. 26, 2009).

If anything, this evidence supports precisely the opposite inference. Cuba has always maintained that the shootdown was *in Cuban territory*. *Id.* 435a-39a, 441a-52a. There is no evidence at all that Hernandez rejected that account, and that Hernandez was an Cuban agent makes it exceptionally unlikely that he did so. It was moreover entirely plausible that Cuba would have intended the shootdown to occur over its own territory but inadvertently struck the planes over international waters: the Cuban jets were flying within the Cuban airspace's very confined bounds at 540 miles per hour and launched missiles that traveled even more quickly; the BTTR planes, in turn, were at the very least quite close to Cuba, having been shot down no more than 10 miles into international airspace. Thus, to the extent that any relevant inference can be drawn from the evidence that Hernandez and Cuba believed that Hernandez's acts had been a success, it is that the planes were intended to be shot down in Cuban territory, not U.S. jurisdiction.

At the very least, the isolated statements cited by the majority do not establish proof beyond a reasonable doubt when considered in the context of all the proof that Cuba intended to confront the planes within its own airspace. *See supra*. Indeed, the government itself frankly acknowledged that the prosecution would be essentially doomed by the requirement that it prove beyond a reasonable doubt that there was a plan to shoot down the planes in international airspace. Emergency Pet. at 21, 27. Though a sufficiency-of-the-evidence review requires drawing inferences in the prosecution's favor, it nonetheless requires consideration of "*all* of the

evidence" and the inferences drawn must be "*reasonable*." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added and deleted).

The Eleventh Circuit moreover failed to heed this Court's admonition that courts must "scrutinize the record . . . with special care in a conspiracy case." *Anderson v. United States*, 417 U.S. 211, 224 (1974). That more searching review is required because "[w]ithout the knowledge, the intent cannot exist," and because, "to establish the intent, the evidence of knowledge must be clear, not equivocal." *Ingram v. United States*, 360 U.S. 672, 680 (1959) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)). Without these protections, "charges of conspiracy" may "be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Id.* Grounding a conviction that carries a life sentence for a grave charge such as conspiracy to murder on isolated *post hoc* snippets plucked from a massive trial record and considered in isolation invites conspiracy convictions that rest on "a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J. concurring).

In this case, no reasonable juror could conclude that after consistently pursuing diplomatic channels to address incursions into its sovereign airspace, Cuba suddenly developed a conspiracy to shoot down planes that were traveling in international airspace. Such an inference would require concluding that Cuban intended to initiate an unprovoked war with

the United States. The verdict can thus only fairly be understood as further indicating the fear and hostility that inevitably influenced the jury's deliberations.

2. This Court's review is finally warranted because the Eleventh Circuit itself recognized that its refusal to order a resentencing of petitioner Hernandez conflicts with the precedent of the Ninth Circuit. Pet. App. 70a-71a. The court of appeals held that the district court erred in sentencing three of the petitioners for conspiring to gather national security information under U.S.S.G. § 2M3.1(a)(1) because petitioners never succeeded in doing so. Pet. App. 62a-63a, 70a. The Eleventh Circuit nonetheless refused to remand the case for resentencing as to petitioner Hernandez because he already faced a concurrent life sentence on the conspiracy to murder charge. Pet. App. 70a-71a.

The Eleventh Circuit's refusal to remand Hernandez's case for a further sentencing proceeding is consistent with the law of five other circuits but—as the Eleventh Circuit expressly recognized—conflicts with Ninth Circuit precedent.[13] The ruling below also conflicts with this Court's jurisprudence,

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[13] *Compare United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir. 1990) (court may not "place upon [the defendant] the risk" that prejudice from erroneous concurrent sentence "will manifest itself in the future") *with, e.g.*, *United States v. Pierre*, 484 F.3d 75, 90-91 (1st Cir. 2007); *United States v. Rivera*, 282 F.3d 74, 77-78 (2d Cir. 2000); *United States v. Pardo*, 25 F.3d 1187, 1194 (3d Cir. 1994); *United States v. Olunloyo*, 10 F.3d 578, 582-83 (8th Cir. 1993); *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir. 1997).

which—subsequent to the sentencing in this case—for the first time deemed the Sentencing Guidelines not to be binding. *See United States v. Booker*, 543 U.S. 220 (2005). The appropriate course in this case was accordingly to remand the case for the district court to exercise its sentencing discretion in the wake of the court of appeals' holding that § 2M3.1(a)(1) was inapplicable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard I. Weinglass
6 West 20th Street
New York, NY 10011

Michael Krinsky
Eric M. Lieberman
111 Broadway
Suite 1102
New York, NY 10006

Counsel to Petitioner Guerrero

Paul A. McKenna
2910 First Union Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Counsel to Petitioner Hernandez

Thomas C. Goldstein
Counsel of Record
Christopher M. Egleson
Won S. Shin
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Richard C. Klugh, Jr.
Ingraham Building
25 S.E. 2nd Avenue
Suite 1105
Miami, FL 33131
Counsel to Petitioner Campa

William N. Norris
8870 S.W. 62nd Terrace
Miami, FL 33173
Counsel to Petitioner Medina

Philip R. Horowitz
Two Datran Center
Suite 1910
9130 South Dadeland Blvd.
Miami, FL 33156
Counsel to Petitioner Gonzalez

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