No. 08-987

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. This is a signal case in the international community regarding our nation's commitment to the principle of due process. The petition seeks review of an en banc ruling upholding the only U.S. trial ever condemned by the U.N. Human Rights Commission. The government ignores completely the thirteen *amicus* briefs – filed by, *inter alios*, domestic legal organizations, scholars of the Cuban community, ten Nobel Laureates, foreign parliaments and hundreds of individual legislators (such as multiple former Presidents and Vice-Presidents of the European Parliament), and experts in the American jury process – urging this Court to grant certiorari, apparently more than have ever before been submitted in a criminal case. As the *amici* explain, "No criminal trial in modern American history has received such international approbation" (Laureates Br. 6), such that the decision below undercuts the U.S. Constitution "as a model for the rest of the world with respect to the protection of individual rights and the guarantee of due process of law in criminal trials" (Mexican Senate *et al.* Br. 16). Beyond the important conflicts presented here, given the worldwide attention placed uniquely upon this case, the petition presents "important question[s] of law that . . . should be[] settled by this Court." SUP. CT. R. 10.

2. The United States does not persuasively answer the petition's showing, supported by the dissent below (Pet. App. 160a-61a), that this Court should review the exceptionally high barriers to securing a change of venue erected by the en banc court. That the Eleventh Circuit took this case en

banc in response to the government's own claim that the panel's "de novo review of the facts" and consideration of "the community's political and social views about issues other than the defendants' commission of the charged crimes" were error (Resp. Pet. for Reh'g En Banc 6) belies the government's newfound contention that this case is not an appropriate vehicle to resolve the four conflicts directly implicated by the ruling below.

a. The relevance of community prejudice. The petition and *amicus* briefs demonstrate that "petitioners, because they were agents of the Castro Cuban government, could not have had a fair trial in Miami-Dade County from jurors who would fear the stigma of a not guilty verdict." Cuban-American Scholars Br. 3. Miami civic life is "dominated by the anti-Castro, Cuban American exile community" (*id.* at 4) and pervaded by an "anti-Castro, clandestine, coercive and violent political culture" (*id.* at 13) in which city officials have advocated that "anyone who 'support[s] Fidel Castro' should be legally barred from expressing such views" (*id.* at 14). Militantly anti-Castro factions have perpetrated multiple acts of violence responding to perceived expressions of sympathy for the Castro regime, including a car bombing and an attack on a radio station. Howard Univ. Br. 11-12.

As the government acknowledges, an Eleventh Circuit panel remanded for a new trial on the basis of the violently anti-Castro sentiment in Miami. BIO 8. The en banc majority, however, subsequently reinstated the judgments because "most of the news materials petitioners had submitted did not relate directly to their crimes" (BIO 8): community prejudice,

it held, cannot be shown by "matters that do not directly relate to the defendant's guilt for the crime charged" (Pet. App. 134a), rendering "general anti-Castro sentiment" in Miami irrelevant as a matter of law (Pet. App. 136a).

The Eleventh Circuit's cramped conception of community prejudice not only defies common sense – as illustrated by the uncontested example of a trial of a minority defendant in a pervasively racist community (*see* Pet. 16) – but also conflicts with decisions of other circuits (*see* Pet. 17-18). There is no basis in law or logic to deem legally irrelevant a community's hostility towards an entire class, particularly as sharply defined a class as this one. Petitioners maintain not that a fair trial would be denied to "anyone associated with the Cuban government" (*contra* BIO 5), but that they could not receive a fair trial as *admitted agents* of a hated government sent to infiltrate the very organizations lionized by the community in a case in which they were alleged to have contributed to the deaths of two pro-democracy activists. Even those jurors who were not personally infected with hostility would legitimately fear for their safety and economic well-being if they had voted to acquit. Pet. 27.

b. The standard for securing a change of venue. In response to the conflict among the circuits and state supreme courts on the foundational question of the test for granting a change of venue, the United States invokes its defense of last resort: that, although the petition is "correct" that "different courts have employed different formulations," "there is no reason to believe . . . that those different formulations have resulted in different outcomes." BIO 23-24.

The petition anticipated that assertion by identifying *six* courts that consciously chose a lenient standard, rejecting the Eleventh Circuit's "virtual impossibility" test as too strict. Pet. 20. Though the conflict has existed for decades and is implicated by virtually *every* change-of-venue request, this appears to be the first opportunity in years for this Court to resolve it. *Compare Breecheen v. Oklahoma*, 485 U.S. 909, 911 (1988) (opinion dissenting from the denial of certiorari).

c. The standard of appellate review. The United States candidly acknowledges a square conflict between circuits that review the denial of a new-trial motion for "abuse of discretion" and other courts that "review[] such decisions de novo." BIO 25 (citing *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *pet. for cert. pending*, No. 08-1394 (filed May 11, 2009); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999)). *See also* Pet. 22 (citing additional courts). The conflict is outcome-determinative here: the panel reversed applying de novo review (Pet. App. 303a-04a), whereas the en banc court in reinstating the judgment emphasized its deference to the district court (Pet. App. 139a). The government only reinforces the importance of this Court's intervention by noting that "the courts that apply de novo review" make it "*the government's* burden to show that the district court empaneled an impartial jury" (*Skilling*, 554 F.3d at 562 n.53 (emphasis added); BIO 26), which is a showing that the Eleventh Circuit did not require of the government.

d. The relevance of voir dire. The government's principal argument in opposing review is that the

district court conducted a thorough voir dire. BIO 26. But as the petition explained (at 23), that argument collapses the critical distinction between "presumed" and "actual" prejudice: the defining feature of the former is that the community's fear and hostility are sufficiently pervasive that voir dire of individual venire members does not provide a sufficient assurance of a fair trial. In such cases, "a court could not believe the answers of the jurors." *Beck v. Washington*, 369 U.S. 541, 557 (1962). *See also* Pet. 24 (collecting cases).

Nor is there otherwise merit to the suggestion (BIO 25) that the voir dire renders irrelevant all of the other conflicts that the court of appeals' venue ruling implicates. The court of appeals first held that the community's anti-Castro militancy was categorically irrelevant, that presumed prejudice claims must meet an "extremely heavy" burden, and that it would defer to the district court's judgment (*see supra*), and *only then* held that the voir dire sufficiently protected petitioners under this multi-layered series of reinforcing hurdles to a change of venue. There is no reason to infer that the court of appeals would have affirmed if it had instead considered the community's hostility, reviewed the record de novo, and inquired whether there was a reasonable probability that petitioners would not receive a fair trial.

The United States also significantly overstates petitioners' "expressed satisfaction with the conduct of voir dire" and "the jury ultimately empaneled." BIO 7. It is uncontested that petitioners have always *vigorously* maintained that they could not receive a fair trial in Miami. The government itself acknowledges that petitioners renewed their motion for a

change of venue at trial. BIO 7 n.3. Although petitioners acknowledged the court's efforts to screen out *individual* prejudiced jurors (Tr. 1373-74), even then they immediately challenged whether three of the remaining candidates could "admit their underlying prejudices" (*id.* at 1376).

3. Certiorari is also warranted to review the Eleventh Circuit's holding that petitioners failed to make out a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986). The government conspicuously does not dispute that the rule applied by the Eleventh Circuit conflicts with decisions of this Court and other circuits in two respects.

First, the United States itself identifies an important additional circuit conflict that this case would resolve. BIO 17-18. When (as here) a district court requires the government to justify a peremptory strike, the Eleventh Circuit will nonetheless review the opposing party's prima facie case. BIO 18 n.5 (citing *United States v. Stewart*, 65 F.3d 918, 924-26 (11th Cir. 1995); Pet. App. 26a)). That holding conflicts with rulings of nine other circuits, which "[i]n contrast to the court of appeals in this case" (BIO 18) read *Hernandez v. New York*, 500 U.S. 352 (1991), to hold that resolution of the ultimate *Batson* question "moots" the prima facie inquiry (BIO 17-18 & n.5). The United States' assertion that this conflict "provides an added reason for this Court to *decline* review" (BIO 18 (emphasis added)) makes no sense: the government denies neither that this important conflict is encompassed by the question presented nor that, by granting certiorari and reversing, the Court would resolve that conflict and also vacate the Elev-

enth Circuit's legally erroneous holding that petitioners failed to make out a *prima facie* case.

Second, as the petition demonstrated (at 10-14), this Court should review the ruling below that petitioners failed to make out a prima facie case under *Batson* because the prosecution did not use all of its peremptory strikes and allowed some African-American jurors to be seated. The United States pointedly denies neither that such a rule conflicts with decisions of this Court and other circuits (Pet. 11), nor that it provides an easily manipulable tool to evade *Batson*'s protections (Pet. 11-12). Instead, the government erroneously suggests that the Eleventh Circuit is just as willing as other courts to consider "other relevant circumstances in evaluating" a defendant's prima facie case. BIO 14. But it cites nothing to support that assertion, and the Eleventh Circuit could not have been clearer that it was not considering the totality of circumstances: "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." Pet. App. 27a.

The government notes that the Eleventh Circuit here cited *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987). The decision below correctly reads *Dennis* to announce a *per se* rule: both here and in *Dennis*, the Eleventh Circuit did not consider *any* other facts in finding no prima facie case. Thus, although "the *seating* of some blacks on the jury does not *necessarily* bar a finding of racial discrimination" (BIO 13 (quot-

ing *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991) (emphases added)), the Eleventh Circuit erroneously holds that the combination of the seating of an African-American juror *and* the failure to use all available strikes defeats a prima facie case.

Though the petition does not present the question whether petitioners ultimately made out a *prima face* case under *Batson*, it is noteworthy that other circuits would find a *prima face* case on these facts. Pet. i, 13-14 & n.4. Ignoring the decisions of several courts cited by the petition, the government merely notes that one court once stated in dictum that "supplement[ing] the record" by accepting the "minority percentage of the population" on the venue "as a 'surrogate' for the minority population of the venire" is acceptable, but "a thin basis for assigning discriminatory motive to an officer of the court." BIO 15 (quoting *Soto v. Herbert*, 497 F.3d 163, 172 (2d Cir. 2007)). The United States does not explain why that quotation is particularly relevant: even that decision reiterates that such an inference is acceptable, and the government does not dispute that in this case the number of strikes was grossly disparate to the number of available minority jurors, just as it has never disputed on appeal that petitioners made out a prima facie case under *Batson*.

Petitioners' prima facie case furthermore does not rest "solely on a comparison between the percentage of the government's available peremptory challenges used to strike African-American venirepersons and the percentage of African-Americans in the population of Miami-Dade County." *Contra* BIO 14-15. The government, for example, struck one African-

American venireperson who "was an elderly woman who had never served on a jury before" and "had absolutely no baggage in her background" and a second who was "actually employed in the law enforcement field." Pet. App. 417a-18a. That the government was striking jurors like these suggested racial motivation in the context of the widely acknowledged "tension between the black population and the Cuban American community . . . over the government's approach to Cuba." Nat'l Lawyers Guild Br. 16.

The United States finally contends "[i]n any event" that "the government's strikes were nondiscriminatory" (BIO 15) "regardless of whether a prima facie case was made out" (BIO 17). But the petition does not present the ultimate question whether "the government's peremptory challenges were based on race" (*contra* BIO i), which the Eleventh Circuit would instead resolve on remand.

4. There is no better illustration of the prejudice petitioners suffered – and of the reason for the "widespread international condemnation of petitioners' trial" (Ibero-American Federation of Ombudsman *et al.* Br. 17) – than the conviction of petitioner Hernandez (and resulting *life sentence* he received) for conspiracy to commit murder. It is now common ground that "the government was required to prove that Hernandez and his co-conspirators specifically intended to for the shootdown to occur in international airspace." BIO 28 (citing Pet. App. 350a). Contrary to the government's submission (BIO 28), the question is not fact-bound, as the United States does not dispute that the Eleventh Circuit erred as a matter of law in failing to "scrutinize the record . . . with special care in [this] conspiracy case" (*Anderson*

v. United States, 417 U.S. 211, 224 (1974), given the significant risk of conviction on the basis of "equivocal" conduct (*Ingram v. United States*, 360 U.S. 672, 680 (1959)). *See* Pet. 34.

As to the record evidence, the United States ignores the utter implausibility of its own theory of the case: that Cuba complained bitterly to the United States about incursions into its territory, then took the lunatic step of effectively declaring war by purposefully shooting down civilian aircraft in international airspace. The petition also fully anticipated the vanishingly thin evidence invoked by the United States. In fact, there is no evidence of Hernandez's intent *at all*: the government candidly admitted that such a requirement presented an "insurmountable" hurdle to the prosecution. Emergency Pet. for Writ of Prohibition at 21, No. 01-12887 (11th Cir. May 25, 2001). As the petition explained (at 33), the fact that "Hernandez and his superiors later congratulated one another on the successful operation" (BIO 28) strongly supports Hernandez's *innocence*, given that Cuba maintained (and its radar showed) that the shootdown occurred over its own airspace. The government's further reliance on "the fact that the shootdown did occur in international airspace" (BIO 28) says nothing about Hernandez's intent and is nothing more than a plea to eliminate *any* requirement that it prove intent at all. That fact also proves almost nothing inferentially – it is undisputed that the speed of the BTTR planes and Cuban planes and missiles makes it entirely possible that a shootdown over international waters was not planned. Pet. 33. Nor could the jury fairly "infer" that "because BTTR's most recent 'provocations' were committed in interna-

tional airspace, the planned confrontation was also to occur in international airspace." *Contra* BIO 28. As noted, Cuba's complaint was that the United States was permitting illegal incursions into its airspace, and it is ridiculous to believe that Cuba planned to commit an act of war by murdering civilian pilots lawfully flying over international waters. At the very least – as is apparent from the dissent below and dubitante concurrence – any such "inference" does not come close to establishing proof "beyond a reasonable doubt."

5. Certiorari is finally warranted to review the Eleventh Circuit's refusal to remand for resentencing of petitioner Hernandez. Pet. 35-36. Like the ruling below, the government acknowledges a square conflict between several circuits and the Ninth Circuit, which "declined to apply the so-called concurrent sentence doctrine in a similar context in *United States v. Kinkaid*, 898 F.3d 110 (1990)." BIO 29 (quoting 898 F.3d at 112). Contrary to the government's unelaborated statement that "there is no developed conflict that would warrant this Court's review" (BIO 29), not only is the conflict acknowledged, but the Ninth Circuit's position is correct, at least in a case such as this one, in which the district court deserved an "opportunity to consider what sentence is appropriate upon a legally correct application of the Sentencing Guidelines" in the wake of *United States v. Booker*, 543 U.S. 220 (2005). Fl. Assoc. of Criminal Defense Lawyers Br. at 8; *see also* Pet. 36. Indeed, the United States does not argue to the contrary.

Given the important conflicts in the lower courts directly implicated by the rulings below, as well as the singular importance of this case in the eyes of the

international community to the commitment of the United States to the principle of due process, certiorari should be granted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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