No. 08-987

In the Supreme Court of the United States

RUBEN CAMPA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly rejected petitioners' claim that the government's peremptory challenges were based on race in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

2. Whether the district court erred in denying petitioners' motions for change of venue.

3. Whether sufficient evidence supported petitioner Hernandez's conviction for conspiracy to commit murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111 and 18 U.S.C. 1117.

4. Whether the court of appeals properly declined to remand petitioner Hernandez's case for resentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-89a) is reported at 529 F.3d 980. The opinion of the en banc court of appeals (Pet. App. 90a-219a) is reported at 459 F.3d 1121. The initial, now-vacated opinion of a panel of the court of appeals (Pet. App. 220a-318a) is reported at 419 F.3d 1219. The opinion of the district court denying a pre-trial motion for change of venue (Pet. App. 319a-338a) is reported at 106 F. Supp. 2d 1317.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2008. Petitions for rehearing were denied on September 2, 2008 (Pet. App. 401a-403a, 404a-406a). On November 18, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to

and including December 19, 2008. On December 19, 2008, Justice Thomas further extended the time to and including January 30, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of acting and conspiring to act as agents of a foreign government without notifying the Attorney General, in violation of 18 U.S.C. 951 and 18 U.S.C. 371, as well as other offenses related to covert service on behalf of a foreign government. The court of appeals affirmed all petitioners' convictions and the sentences of petitioners Hernandez and Gonzalez, but remanded for resentencing of petitioners Campa, Medina, and Guerrero. Pet. App. 1a-89a.

1. Petitioners were operatives of the Directorate of Intelligence (DI) of Cuba and members of a DI organization in South Florida known as La Red Avispa, or the Wasp Network. Pet. App. 3a. Petitioners Hernandez, Campa, and Medina were intelligence officers in the Network, and they supervised a number of agents, including petitioners Gonzalez and Guerrero. *Id*. at 3a-4a. As members of the Network, petitioners penetrated U.S. military facilities and transmitted information about the facilities' operations and layout to Cuba. *Id.* at 4a-6a, 36a-37a, 42a-43a, 265a-266a, 285a.

The Network's activities also included penetrating Cuban-American organizations opposed to the Cuban regime. Pet. App. 5a, 119a-120a. Among other organizations, the Network targeted Brothers to the Rescue (BTTR), a Miami-based organization that flew small

civilian aircraft over the Florida Straits to assist rafters escaping from Cuba. *Id.* at 4a, 285a-286a.

In January 1996, BTTR planes twice dropped leaflets that drifted over Havana. Pet. App. 4a. DI headquarters in Cuba responded by initiating Operation Scorpion, which aimed to "perfect" a "confrontation" with BTTR. *Id*. at 4a, 48a. The DI directed petitioner Hernandez to task petitioner Gonzalez and another agent, both of whom had infiltrated BTTR, with procuring detailed information about future BTTR flights. The DI also directed Hernandez to keep the DI agents off of BTTR flights on prescribed dates. *Id*. at 4a, 48a-49a.

On February 24, 1996, three BTTR planes made a scheduled flight over the Florida Straits to search for rafters. Pet. App. 276a. The flight plans were transmitted to Cuba. *Ibid.* When the planes passed the boundary between Miami and Havana air traffic control, which lies in international airspace, they identified themselves to Havana. *Ibid*. Within minutes, Cuban fighter jets pursued two of the BTTR planes. *Id*. at 276a-277a. The Cuban fighters shot down both planes, killing all four men aboard, three of whom were U.S. citizens. Both planes were in international airspace, heading away from Cuba, when they were shot down. Neither plane had entered Cuban airspace. *Id*. at 5a, 276a-277a.

Following the shootdown, petitioner Hernandez wrote to his superiors that he and others took pride in having contributed to an operation that "ended successfully," and the chief of the DI recognized petitioner Hernandez for the "outstanding results achieved on the job, during the provocations carried out by the United States this past 24th of February." Pet. App. 49a.

None of the petitioners notified the United States Attorney General that they were acting as agents of the

Cuban government. Pet. App. 120a. Petitioners employed elaborate measures to conceal their clandestine operations, including code names and countersurveillance. *Id.* at 5a, 38a, 267a. Some petitioners used multiple false identities, backed up by fraudulent documents, including fake United States passports. *Ibid.*

2. Petitioners were indicted by a federal grand jury in the Southern District of Florida in 1998. Pet. App. 92a-94a. A second superseding indictment was filed in 1999. *Id.* at 92. n.2.[1] Petitioner Campa was charged with two counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; one count of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); and one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3).

Petitioner Gonzalez was charged with one count of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371.

Petitioner Guerrero was charged with one count of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; and one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 794(c).

[1] Although Congress amended certain statutory provisions cited in the indictment after the dates on which petitioners committed their offenses, those amendments are not relevant here.

Petitioner Hernandez was charged with one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 794(c); seven counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; two counts of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3); and one count of conspiracy to murder, in violation of 18 U.S.C. 1117.

Petitioner Medina was charged with four counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 794(c); two counts of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); one count of making a false statement in a passport application, in violation of 18 U.S.C. 1542; and one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3).

3. Before trial, petitioners moved for a change of venue, contending that pretrial publicity and pervasive community prejudice against anyone associated with the Cuban government would prevent a fair trial in Miami. The district court denied the motion, and an oral request to move the trial within the district, without prejudice. Pet. App. 319a-338a.

The district court held that petitioners had not presented evidence of pretrial publicity or pervasive com-

munity prejudice sufficient to warrant a presumption that the jury would not be fair and impartial. Pet. App. 329a-337a. The court noted that much of the pretrial publicity cited in petitioners' motion did not relate to petitioners' alleged activities, that the most recent articles on the downing of the BTTR planes had been published more than a year beforehand, and that the coverage was "largely factual in nature." *Id.* at 330a-331a. The court also found that a survey conducted by petitioners' expert purporting to demonstrate pervasive community prejudice was faulty in several respects. *Id.* at 331a-336a.

The district court concluded that "thorough voir dire * * * and careful instructions to the jury throughout trial will enable the Court to safeguard [petitioners'] right to a fair and impartial jury in Miami-Dade County," but invited petitioners to renew their motions for change of venue if the voir dire process showed that an impartial jury could not be empaneled. Pet. App. 337a. The court repeated that invitation in denying a motion for reconsideration. *Id.* at 341a.

The district court conducted a two-stage voir dire that lasted seven days. Pet. App. 106a-119a. During the first stage, the court questioned panels of prospective jurors about their qualifications to serve in the case, then permitted the parties to exercise challenges for cause or hardship. *Id.* at 108a-109a. Of 168 prospective jurors questioned, ten were struck for cause at the first stage because of concerns about their opinions about Cuba or acquaintance with persons involved in the case. *Id.* at 113a-114a. During the second stage, the court questioned prospective jurors individually, separated from the rest of the venire, about their exposure to the media, their knowledge and opinions, and their connections to and attitudes about Cuba. *Id.* at 109a-113a. The

parties were then permitted to exercise peremptory challenges, as well as any additional challenges for cause. *Id.* at 114a-115a. By the end of the second stage, 22 additional prospective jurors were struck for cause because of their opinions about Cuba. *Ibid.*

The defense exercised 15 of its 18 peremptory challenges and both of their allotted challenges for alternate jurors. Pet. App. 115a. The government exercised 9 of its 11 peremptory challenges and both of its allotted challenges for alternate jurors. *Id.* at 7a, 426a-433a. Petitioners objected to seven of the government's challenges, claiming that the government struck the prospective jurors because they were African-American, in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Pet. App. 7a, 417a-418a, 422a.[2] Accepting the government's race-neutral reasons for its challenges, the district court concluded that the challenges were lawful. *Id.* at 7a, 417a-433a. The seated panel included three African-American jurors and one African-American alternate. *Id.* at 434a.

Despite the district court's earlier invitations, petitioners did not renew their change of venue motions at the conclusion of voir dire. Pet. App. 118a. Counsel instead expressed satisfaction with the conduct of voir dire and, later, with the jury ultimately empaneled. *Id.* at 118a-119a.[3]

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[2] The government also argued that petitioners inaccurately characterized one of the challenged jurors as African-American. Pet. App. 423a. Petitioners did not respond to that argument, and the district court did not resolve the question. *Ibid*.

[3] During the trial, petitioners renewed their requests for change of venue by moving for a mistrial "based on community events and trial publicity." Pet. App. 121a. The district court denied those motions, after determining through a defense-requested inquiry of the jury that

After a seven-month trial, the jury found petitioners guilty on all counts. Pet. App. 7a, 155a, 344a.

4. A panel of the court of appeals reversed petitioners' convictions and remanded the case for a new trial. Pet. App. 220a-318a. The panel held that the district court abused its discretion by denying petitioners' motions for change of venue, concluding that empaneling an impartial jury in Miami was "an unreasonable probability" because "[t]he entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami." *Id.* at 311a-312a.

5. The court of appeals granted rehearing en banc. By a 10-2 vote, the en banc court affirmed the district court's denial of the motions for change of venue. Pet. App. 90a-219a.

The en banc court of appeals concluded that the district court did not abuse its discretion in concluding that pretrial publicity did not warrant a presumption of jury prejudice. Pet. App. 133a-137a. The court explained that most of the news materials petitioners had submitted did not relate directly to their crimes, but instead to "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." *Id.* at 136a. The court concluded that the "very few" articles that "related directly to the defendants" were "too factual and too old to be inflammatory or prejudicial," and it noted that "most of the venire revealed that they were either entirely unaware of this case, or had only a vague recollection of it." *Id.* at 136a-137a.

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nothing indicated that jurors were not complying with the court's direction to avoid contact with the media reporting on the matter. *Id.* at 122a-123a.

The en banc court also upheld the district court's finding that petitioners' survey evidence was insufficient to establish pervasive community prejudice against persons alleged to have assisted the Castro regime. Pet. App. 138a; see also *id.* at 139a n.219 (upholding the district court's "specific finding" that "the defendants' evidence did not demonstrate that community prejudice warranted a change of venue"). The en banc court agreed with the district court that petitioners' community-attitudes survey was "riddled with non-neutral questions" and was "too ambiguous to be reliable." *Id.* at 138a.

Finally, the en banc court concluded that the district court's voir dire process provided added assurance that the asserted community prejudice would not prevent a fair trial. Pet. App. 140a-145a; see *id.* at 133a. The en banc court noted that the "meticulous," seven-day, two-phase process "was a model voir dire for a high profile case"; that the second-phase questioning revealed that most of the potential jurors and all the actual jurors had been exposed to little or no media coverage of the case; and that only 32 of 168 prospective jurors had been struck for Cuba-related reasons. *Id*. at 141a-142a. The court found further support for its conclusion in petitioners' conduct. The court noted that petitioners did not use all of their peremptory challenges; that petitioners declined to renew their motions for change of venue at the end of voir dire, despite the district court's earlier invitations to do so; and that counsel expressed satisfaction with the conduct of voir dire and, later, with the jury ultimately empaneled. *Id.* at 143a. The voir dire, the court concluded, "rebutted any presumption of jury prejudice." *Ibid.*

Judge Birch dissented in an opinion joined by Judge Kravitch. Pet. App. 160a-219a. He explained that, "[d]espite the district court's numerous efforts to ensure an impartial jury in this case," he was "not convinced that empaneling such a jury in this community was possible because of pervasive community prejudice." *Id.* at 212a.

6. On remand, a panel of the court of appeals affirmed petitioners' convictions and the sentences of petitioners Hernandez and Gonzalez, but remanded for resentencing of petitioners Campa, Medina, and Guerrero. Pet. App. 1a-89a.

The court of appeals rejected petitioners' contention that the government exercised its peremptory challenges in violation of *Batson*. Pet. App. 25a-27a. While noting that the district court had found the government's proffered reasons for each challenged strike to be race-neutral, the court affirmed on the alternative ground that petitioners failed to establish a prima facie case of discrimination. *Id.* at 26a. The court concluded that any inference of discrimination that might arise from the government's use of some of its challenges to strike African-American prospective jurors was undercut by the facts that the government did not use two of its peremptory challenges and that the jury included three African-American jurors and one African-American alternate. *Id*. at 26a-27a.

The court of appeals also rejected petitioner Hernandez's claim that there was insufficient evidence to support his conviction for conspiracy to murder under 18 U.S.C. 1111 and 18 U.S.C. 1117. Pet. App. 43a-55a. The court held that, even if, as Hernandez argued, the conspiracy would not have been unlawful had the conspirators intended for the shootdown to occur in Cuban air-

space, rather than international airspace, there was "ample evidence" that Hernandez and his co-conspirators intended for the killing to occur in international airspace, where it did in fact occur. *Id.* at 54a-55a.

Finally, although the court of appeals rejected most of petitioners' challenges to their sentences, the court held that the district court had incorrectly sentenced petitioners Medina, Guerrero, and Hernandez with respect to their convictions for conspiring to gather and transmit national defense information. Pet. App. 62a-63a, 70a. The court held that, under Sentencing Guidelines § 2M3.1(a), the district court should have set those petitioners' offense level at 37 rather than 42 because the district court did not find that petitioners had actually succeeded in gathering or transmitting top secret information. Pet. App. 62a-63a, 70a. The court did not, however, remand for resentencing of petitioner Hernandez because he was subject to a concurrent life sentence on his conviction for conspiracy to murder, making the error harmless. *Id.* at 63a, 70a-71a.

Judge Kravitch concurred in part and dissented in part. Pet. App. 72a-89a. Although she joined most of the court's opinion, she concluded that the evidence was insufficient to prove that the conspirators had planned an unlawful murder in international airspace, rather than a confrontation within Cuban jurisdiction. *Id.* at 87a-88a.

ARGUMENT

1. Petitioners contend (Pet. 10-14) that the court of appeals erred in concluding that they failed to make a prima facie showing under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that the government's peremptory strikes

were racially discriminatory. Petitioners' contention does not warrant this Court's review.

a. *Batson* established a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising a peremptory challenge. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory strike on a prohibited basis. *Id*. at 96-97. To make such a showing, the defendant must establish that the "relevant circumstances raise an inference" of racial discrimination. *Id.* at 96. Second, if that showing has been made, the government must come forward with a race-neutral explanation for the strike. *Id*. at 97-98. Third, if the government provides a race-neutral explanation, "the trial court must * * * decide * * * whether the opponent of the strike has proved purposeful racial discrimination." *Purkett* v. *Elem*, 514 U.S. 765, 767 (1995) (per curiam); *Batson*, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. A trial court's ruling on the issue of discriminatory intent is reviewed for clear error. *Snyder* v. *Louisiana*, 128 S. Ct. 1203, 1207-1208 (2008).

b. The district court rejected petitioners' *Batson* claim on the ground that the government had proffered race-neutral reasons for each challenged strike. See Pet. App. 417a-432a. Without considering the merits of that conclusion, the court of appeals affirmed on the alternative ground that the defendants did not establish a prime facie case of discrimination. *Id.* at 26a. Petitioners contend (Pet. 10-14) that review is warranted because, in their view, the court of appeals erroneously established a "*per se* rule" that "no *Batson* inquiry is

required whenever even one minority juror is seated by a party that does not use all of its strikes." Pet. 11. Petitioners are incorrect.

Contrary to petitioners' contention, the court of appeals' opinion in this case does not establish that "allowing at least one minority juror to serve" will necessarily defeat a *Batson* claim, or that other relevant circumstances, such as a pattern of strikes against persons of a particular race or gender or counsel's statements and questions during voir dire, are irrelevant to the inquiry. See Pet. 11-12; *Batson*, 476 U.S. at 96-97. Rather, in holding that petitioners did not show a prima facie case, the court relied on its earlier decision in *United States* v. *Dennis*, 804 F.2d 1208 (11th Cir. 1986) (per curiam), cert. denied, 481 U.S. 1037 (1987), which emphasized similar considerations in determining that "all of the relevant facts and circumstances" did not give rise to an inference of discrimination. *Id.* at 1211; see Pet. App. 26a-27a.

In applying *Dennis*, the court of appeals has explicitly "recognize[d] that the seating of some blacks on the jury does not necessarily bar a finding of racial discrimination." *United States* v. *Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990), cert. denied, 500 U.S. 904 (1991). But the court has held that, where, as here, a defendant's claim of racial discrimination rests solely on the number of peremptory challenges the government has exercised against members of a particular race, the government's decision not to exercise available peremptory challenges against members of the same race is a "significant fact" that "undercuts any inference of impermissible discrimination." *Ibid.* That approach is consistent with the approaches of other courts. See, *e.g.*, *United States* v. *Willie*, 941 F.2d 1384, 1399 (10th Cir. 1991) (the "fact

that the prosecution exercised only four of its six peremptory challenges undercut[] an inference of discrimination since the government, if it had chosen, could have excluded [another minority] from the jury"), cert. denied, 502 U.S. 1106 (1992); *United States* v. *Young-Bey*, 893 F.2d 178, 180 (8th Cir. 1990) (court of appeals "consider[ed] the presence of two blacks on the petit jury to undermine" defendant's attempt to make a prima facie showing).

Despite petitioners' arguments to the contrary (Pet. 12-13), the court of appeals' approach creates no conflict with those courts that have held that a prosecutor's decision not to remove all members of a certain race or gender is not necessarily dispositive and that have considered other relevant circumstances in evaluating whether the defendant has established a prima facie case of discrimination. See *Hardcastle* v. *Horn*, 368 F.3d 246, 251, 256 (3d Cir. 2004), cert. denied, 543 U.S. 1081 (2005); *Coulter* v. *Gilmore*, 155 F.3d 912, 914, 918-921 (7th Cir. 1998); *Jones* v. *Ryan*, 987 F.2d 960, 962-963, 972-975 (3d Cir. 1993); *United States* v. *Alvarado*, 923 F.2d 253, 255-256 (2d Cir. 1991); see also *State* v. *Duncan*, 802 So. 2d 533, 550, 552 (La. 2001) (concluding that the prosecutor's decision not to use all available peremptory challenges against members of a particular race, though not dispositive, is a "valid factor" to consider in determining whether the defendant made out a prima facie case of discrimination), cert. denied, 536 U.S. 907 (2002).

Petitioners also err in contending (Pet. 13-14) that "other courts would find that petitioners made out a *prima facie* claim under *Batson*," based 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. For that proposition, petitioners rely primarily on *Alvarado*, in which the Second Circuit employed a similar analysis, using the demographics of the community as a "surrogate" for the demographics of the venire. 923 F.2d at 255-256. The Second Circuit has since made clear, however, that such analysis, though permissible, is "a thin basis for assigning discriminatory motive to an officer of the court." *Sorto* v. *Herbert*, 497 F.3d 163, 172 (2d Cir. 2007).

c. In any event, even if there were a conflict on this issue that otherwise merited this Court's review, this case would not be a suitable vehicle. As explained below, the district court correctly held that no *Batson* violation occurred because the government's strikes were non-discriminatory. Petitioners could not prevail on their *Batson* challenge absent a demonstration that the district court committed clear error, which they cannot do. And the prevailing view is that, once the district court has credited the government's explanation, the question of whether that finding was clearly erroneous is the only question for appellate resolution. A grant of certiorari to address any purported conflict on the standards for establishing a prima facie case thus would not alter the result in this case.

i. The district court did not clearly err in finding that race-neutral reasons sufficiently supported the government's exercise of the challenged peremptory strikes. Pet. App. 420a, 421a, 424a, 428a, 432a. The record reflects that the prosecutor struck one prospective juror on account of her attitudes about U.S. policy on Cuban immigrants, her history of travel to Cuba, and her unusual demeanor. *Id.* at 419a. The district court found those reasons to be sufficient, specifically citing

the juror's unusual demeanor. *Id.* at 420a; see *Snyder*, 128 S. Ct. at 1208, 1209 ("[D]eterminations of credibility and demeanor lie peculiarly within a trial judge's province, and * * * in the absence of exceptional circumstances, we would defer to the trial court.") (brackets, internal quotation marks, and citations omitted). Another prospective juror was struck because he was a prison guard, and the prosecution would be relying on witnesses who were prisoners. Pet. App. 420a-421a.[4]

Other prospective jurors were struck for equally valid reasons: one prospective juror was struck after she said that her son's trial for armed robbery had been unfair, and she had no faith in the jury system, Pet. App. 422a-423a; another was struck because of her demeanor, because she gave "basically one word answers to every question," and because she was from the same country (Panama) as the family of one of the petitioners, *id.* at 427a; and a prospective alternate was struck because of her apparent difficulty understanding English and inability to read documents in English, as well as her laughter and annoyed demeanor in response to the court's question about her opinion on Elian Gonzalez, *id.* at 431a-432a.

The district court's decision to credit the government's race-neutral explanations for its strikes is not clearly erroneous. The clear-error standard is a high hurdle because "credibility and demeanor" determinations, which pertain to prosecutors and jurors alike, "lie

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[4] The district court accepted the government's explanation despite the defense's argument that the explanation was pretextual because the government "didn't have a problem" with a white prospective juror who worked at the Federal Detention Center. Pet. App. 421a; Gov't C.A. Supp. Br. 43. As the government explained, the other prospective juror was a clerk who did not guard prisoners. Pet. App. 421a.

peculiarly within a trial judge's province." *Snyder*, 128 S. Ct. at 1208 (internal quotation marks and citation omitted). The district court's rejection of petitioners' *Batson* claim thus is entitled to respect on appeal. See Pet. App. 420a, 421a, 424a, 428a, 432a.

ii. The district court's factual finding that no intentional discrimination occurred fully supports the judgment in this case, regardless of whether a prima facie case was made out. Indeed, the prevailing view is that, once a party has provided an explanation for a challenged peremptory strike and the district court has credited it, an appellate court should review that finding for clear error, rather than reviewing the antecedent question whether a prima facie case existed.

In *Hernandez* v. *New York*, 500 U.S. 352 (1991), a plurality of this Court explained that, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 359. As the plurality noted, that rule is consistent with the rule this Court has applied in employment discrimination cases. *Ibid.* (citing *USPS Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983)). In *Aikens*, the Court explained that, once a defendant in an employment discrimination case "has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." 460 U.S. at 715. A court thus should proceed "directly" to the ultimate question of intentional discrimination; to ask at that stage whether the plaintiff has made out a prima facie case "unnecessarily evade[s] the ultimate question of discrimination *vel non*." *Id.* at 714-715.

In contrast to the court of appeals in this case, most courts of appeals have concluded that, when a trial court has already ruled on the ultimate question of discrimination in a *Batson* case, the only question on appeal is whether the trial court's ruling on that ultimate question is clearly erroneous.[5] That principle provides an added reason for this Court to decline review of the prima-facie-case issue petitioners present. If this Court should agree that the only issue to be resolved on appeal is whether the district court's finding of no intentional discrimination was clearly erroneous, the Court would have no occasion to reach the prima-facie-case issue. Accordingly, no further review of that issue is warranted.

2. Petitioners next contend (Pet. 14-29) that the court of appeals erred in upholding the district court's denial of their motions for a change of venue. They contend that the jury pool in Miami should have been presumed to be prejudiced against them, regardless of the results of the district court's extensive voir dire process, and that they were therefore deprived of their right to

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[5] See, *e.g.*, *United States* v. *Perez*, 35 F.3d 632, 635-636 (1st Cir. 1994); *United States* v. *Brown*, 352 F.3d 654, 660-661 (2d Cir. 2003); *United States* v. *Uwaezhoke*, 995 F.2d 388, 392-395 (3d Cir. 1993), cert. denied, 510 U.S. 109 (1994); *United States* v. *Lane*, 866 F.2d 103, 105-107 (4th Cir. 1989); *United States* v. *Williams*, 264 F.3d 561, 571-572 (5th Cir. 2001); *Lancaster* v. *Adams*, 324 F.3d 423, 432-435 (6th Cir.), cert. denied, 540 U.S. 1004 (2003); *United States* v. *McMath*, 559 F.3d 657, 664-665 (7th Cir. 2009); *United States* v. *Gillam*, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900 (1999); *United States* v. *Johnson*, 941 F.2d 1102, 1108-1109 (10th Cir. 1991). But see Pet. App. 26a; *United States* v. *Stewart*, 65 F.3d 918, 924-926 (11th Cir. 1995) (holding that an appellate court may not uphold a trial court's decision to disallow strikes without reviewing the trial court's prima facie case determination), cert. denied, 516 U.S. 1134 (1996).

a trial by a fair and impartial jury. Petitioners' contentions are without merit.

a. The court of appeals correctly upheld the district court's conclusion that petitioners had failed to show that "pervasive community prejudice against the Cuban government and its agents and the pretrial publicity that existed in Miami" warranted a presumption that any jury empaneled would not be fair and impartial. Pet. App. 132a. As the court explained, "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 and impartial jurors could not be assembled by the trial judge to try the defendants impartially and fairly." *Id.* at 158a-159a.

As the court of appeals explained, a defendant can "establish that prejudice against him prevented him from receiving a fair trial and necessitated a change of venue" either by showing that the jury was actually prejudiced against him, or by showing that "widespread, pervasive prejudice against him" in the community warranted a presumption that any jury empaneled would not be fair and impartial. Pet. App. 131a-132a (citing *Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961), and *Rideau* v. *Louisiana*, 373 U.S. 723, 726-727 (1963)).

The court of appeals correctly concluded that the media materials submitted by petitioners "f[e]ll far short of the volume, saturation, and invidiousness of news coverage" necessary to establish a presumption of jury prejudice. Pet. App. 136a-137a; see, *e.g.*, *Murphy* v. *Florida*, 421 U.S. 794, 802 (1975). The court of appeals also correctly upheld the district court's finding that "defendants' evidence did not demonstrate that community prejudice warranted a change of venue." Pet. App. 139a n.219.

Finally, as the court of appeals noted, the district court's "careful and thorough voir dire rebutted any presumption of jury prejudice." Pet. App. 143a; see *Mu'Min* v. *Virginia*, 500 U.S. 415, 430 (1991); see also *Murphy*, 421 U.S. at 800. Notably, even though the district court invited petitioners to renew their motions for change of venue if the seven-day voir dire process showed that an impartial jury could not be empaneled, petitioners did not object to empaneling the jury. They instead expressed satisfaction with both the voir dire process and, later, with the jury ultimately empaneled. Pet. App. 143a.

b. Petitioners contend that the court of appeals erred by holding that claims of "uniquely pervasive and severe" community prejudice are "irrelevant as a matter of law." Pet. 15. The court of appeals, however, considered petitioners' claims of community prejudice, and it held that the district court, which "is necessarily the first and best judge of community sentiment," acted reasonably in rejecting those claims, while offering petitioners the opportunity to renew their motions following voir dire. Pet. App. 139a (internal quotation marks and citation omitted); see *id.* at 139a n.219 (noting that the district court made a "specific finding as to prejudice in the community: that the defendants' evidence did not demonstrate that community prejudice warranted a change of venue").

In addressing petitioners' pretrial publicity claims, the court of appeals also correctly discounted news articles about events not directly connected with the matter on trial, such as "community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and * * * the Elian Gonzales matter." Pet. App. 136a. This Court has made clear that "unfairness of con-

stitutional magnitude" will not be presumed "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'" *Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977) (quoting *Murphy*, 421 U.S. at 798). The court of appeals' conclusion that pretrial publicity "regarding peripheral matters" does not give rise to a presumption of prejudice against a defendant, Pet. App. 134a, is consistent with this Court's cases, none of which found that "prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant," *ibid.*; *id.* at 146a-149a; see, *e.g.*, *Rideau*, 373 U.S. at 726 (defendant's confession was broadcast on local television); *Sheppard* v. *Maxwell*, 384 U.S. 333, 355-357 (1966) (media reported numerous prejudicial rumors and accusations regarding defendant charged with murdering his wife).

Petitioners (Pet. 17-18) rely on the language of a handful of appellate decisions to support their claim that other courts have rejected a limitation of the venue inquiry to evidence "directly relate[d] to the defendant's guilt," Pet. 17 (internal quotation marks and citation omitted), but those decisions do not support their argument. See *Whitehead* v. *Cowan*, 263 F.3d 708, 719-723 (7th Cir. 2001) (rejecting claims of jury prejudice based on newspaper articles directly related to defendant and his criminal record, as well as a newspaper's publication of the names and addresses of the jurors in the case), cert. denied, 534 U.S. 1116 (2002); *United States* v. *De Peri*, 778 F.2d 963, 971-973 (3d Cir. 1985) (rejecting a claim of jury prejudice based on pretrial publicity because, among other things, the "articles only indirectly concerned [the defendants]," and instead "detail[ed] a structurally similar but apparently separate extortion scheme"), cert. denied, 475 U.S. 1110, and 476 U.S. 1159

(1986); *United States* v. *Bangert*, 645 F.2d 1297, 1306 (8th Cir.) (concluding that the district court did not abuse its discretion in refusing to grant a mistrial or initiate a continuance based on "prejudicial publicity of world events," citing the district court's determinations "that sufficient precautions had been taken to ensure a fair trial to defendants" and that "the publicity in question did not constitute prejudicial publicity in this case"), cert. denied, 454 U.S. 860 (1981).

Petitioners also err in asserting (Pet. 18) that the decision below conflicts with *Daniels* v. *Woodford*, 428 F.3d 1181 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007). In *Daniels*, the court held that "'the venue [wa]s saturated with prejudicial and inflammatory media publicity about the crime' sufficient for a presumption of prejudice," citing, among other things, news reports identifying the defendant as having killed two police officers and letters to the editor calling for his execution. *Id.* at 1211 (citation omitted); *id.* at 1187, 1211-1212. The *Daniels* court did not rely on press coverage analogous to the articles about Elian Gonzalez and other Cuba-related issues that the court of appeals in this case appropriately discounted. See Pet. App. 136a.[6] Nor did the court of appeals in this case hold, as petitioners suggest, that "pre-trial publicity about the shootdown and

[6] Despite petitioners' suggestion to the contrary (Pet. 28-29), the government's motion to change venue in *Ramirez* v. *Ashcroft*, No. 01-cv-4835 (S.D. Fla. June 25, 2002), did not take a contrary position on the significance of the coverage of the Elian Gonzalez matter. In that case, the plaintiff, an INS agent, alleged that the INS discriminated against him as a result of the Elian Gonzalez controversy, and he stirred up "extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit," including causing a videotaped deposition to be broadcast on television. Pet. App. 130a, 152a-153a (citation omitted).

the jurors' regular exposure to a monument to BTTR were categorically irrelevant." Pet. 18. The court of appeals, like the district court, considered publicity about the shootdown, but concluded that it was "too factual and too old to be inflammatory or prejudicial." Pet. App. 136a; see *id.* at 330a-331a.

c. Petitioners next contend (Pet. 18-21) that the court of appeals erred by employing a too-onerous standard in determining whether they had carried their burden and that the circuits are in conflict on that issue. Their claim does not warrant further review.

The court of appeals in this case stated that a district court must grant a motion for change of venue based on presumed prejudice if the defendant shows that there is a "reasonable certainty" that "widespread, pervasive prejudice against him" in the community "will prevent him from obtaining a fair trial by an impartial jury." Pet. App. 132a; accord *id.* at 149a. Petitioners are correct (Pet. 19-20) that different courts have employed different formulations. Compare, *e.g.*, *United States* v. *Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir.) ("Prejudice may properly be presumed when," *inter alia*, "inflammatory publicity about a case has so saturated a community that it is almost impossible to draw an impartial jury from that community."), cert. denied, 502 U.S. 809 (1991), with *United States* v. *Livoti*, 196 F.3d 322, 326 (2d Cir. 1999) (defendant failed to show a "reasonable likelihood that pretrial publicity would prevent a fair trial") (internal quotation marks and citation omitted), cert. denied, 529 U.S. 1108 (2000). There is no

reason to believe, however, that those different formulations have resulted in different outcomes.[7]

In any event, this case would not be a suitable vehicle for resolving any differences among the various formulations of the applicable standard. Regardless of the standard it applied to petitioners' initial efforts to establish presumed jury prejudice, the court of appeals correctly held that any presumption of prejudice was rebutted by the district court's careful voir dire and trial manage-

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[7] Notably, petitioners cite few cases in which courts have in fact found a "reasonable likelihood" that the defendant would not receive a fair trial. In each of those cases, communities were saturated with media stories about the particular crime. See *State* v. *James*, 767 P.2d 549, 551, 553-556 (Utah 1989) (change of venue was warranted in a case involving the disappearance and death of a three-month-old infant in "a relatively small and homogeneous geographical area," citing a "widespread community effort to locate the missing child" that "brought people much closer to this alleged crime than ordinarily occurs," as well as news reports indicating that "the events had 'touched the community at its very core'"); *Pollard* v. *District Court*, 200 N.W.2d 519, 521 (Iowa 1972) (change of venue was warranted in a case involving an audit that revealed embezzlement from Sioux City accounts, because "[t]he area was flooded with publicity about the audit, the whole matter received much public attention, and the audit pointed to [the defendant] as an alleged offender"); cf. *Fisher* v. *State*, 481 So. 2d 203, 217-220, 221-222 (Miss. 1985) (change of venue was warranted where pretrial publicity created "substantial doubt" that the defendant could get a fair trial in the venue for the rape and murder of an area student; extensive local news coverage linking the defendant to the crime and revealing other "damning facts" not admissible at trial had "bombarded" the area, and "*every one of the prospective jurors*" was already familiar with the case). There is no reason to think that those courts would have reached a different conclusion had they applied a "reasonable certainty" standard. Although *Pollard* noted that its standard did not require the defendant to "demonstrate conclusively" that she could not receive a fair trial, 200 N.W.2d at 521, neither did the court of appeals in this case require a conclusive showing.

ment, which ensured that petitioners received a fair trial by an impartial jury. See Pet. App. 141a-150a.

d. Petitioners further contend (Pet. 21-23) that the court of appeals erroneously reviewed their presumed prejudice claim for abuse of discretion, instead of applying de novo review. Petitioner notes (Pet. 21-22) that, while the majority of circuits review decisions whether to transfer venue based on claims of presumed prejudice for abuse of discretion, other courts have reviewed such decisions de novo. See, *e.g.*, *United States* v. *Skilling*, 554 F.3d 529, 557-558 (5th Cir. 2009), petition 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).

The court of appeals correctly reviewed the district court's ruling on petitioners' change of venue motions for abuse of discretion. This Court has explained that "primary reliance on the judgment of the trial court makes good sense" in reviewing a district court's conduct of voir dire in the area of pretrial publicity, since the trial judge "sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror." *Mu'Min*, 500 U.S. at 427. The same is true of a trial judge's disposition of more generalized claims of community prejudice. As the court below recognized, "[t]he trial court is necessarily the first and best judge of community sentiment and the indifference of the prospective juror." Pet. App. 139a (internal quotation marks and citation omitted). Its 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," and it merits deference. *Id.* at 140a.

In any event, even the courts that apply de novo review to presumed prejudice claims have acknowledged that (1) the government may rebut any such presumption by showing, based on voir dire, that an impartial jury was in fact empaneled; and (2) a district court's determinations of jury impartiality are reviewed deferentially. *Skilling*, 554 F.3d at 557-558, 561; see also *McVeigh*, 153 F.3d at 1179, 1183. Those decisions are consistent with the decision below, which held that voir dire rebutted any presumption of jury prejudice. See Pet. App. 143a. Further review of the issue is not warranted.

e. Finally, petitioners err in contending (Pet. 23-25) that the court of appeals erred in considering evidence from the voir dire process in rejecting petitioners' presumed prejudice claim. Although it is certainly true that voir dire might reveal evidence of actual juror bias, it is well-established that voir dire may also reveal evidence relevant to claims of presumed community prejudice. See, *e.g.*, *United States* v. *Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) ("[T]he key to determining the appropriateness of a change of venue is a searching voir dire of the members of the jury pool."); *McVeigh*, 153 F.3d at 1183 (rejecting a claim of presumed prejudice in part because of "the fact that a large number of the venirepersons summoned were not even aware" of some allegedly prejudicial news reports). See generally 2 Charles Alan Wright, *Federal Practice and Procedure* § 342, at 390-392 (3d ed. 2000) ("The courts consider that the existence of prejudice can better be determined by voir dire examination of potential jurors than by affidavits and speculation about the effect of publicity. If the voir dire

produces a satisfactory panel, this is regarded as demonstrating that a transfer is unnecessary.") (footnote omitted). Indeed, in this case, petitioners themselves "admitted that the district court's voir dire more thoroughly evaluated the sentiment of the Miami-Dade community." Pet. App. 140a.[8]

The conduct and outcome of the district court's seven-day, two-phase voir dire process in this case refutes any claim that pervasive community prejudice deprived petitioners of their right to a fair and impartial jury. Pet. App. 141a, 149a-150a.[9]

3. Petitioner Hernandez challenges (Pet. 29-35) the sufficiency of the evidence supporting his murder con-

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[8] Although petitioners (Pet. 24-25) cite cases in which courts have stated that a district court that has found sufficient support for a presumption of prejudice need not undertake voir dire, they cite no case in which a court has held that voir dire evidence is categorically irrelevant to the inquiry.

Nor does this Court's decision in *Rideau* support petitioners' contention. Although the Court in that case presumed prejudice "without pausing to examine a particularized transcript of the voir dire," 373 U.S. at 727, the petitioner's confession had been aired three times on television, on one occasion drawing as many as 53,000 viewers, in a community of 150,000 people. *Id.* at 724-727. In contrast, petitioners in this case had argued that the residents of a major metropolitan area should be presumed to be prejudiced based on pretrial publicity concerning matters other than petitioners' crimes, and based on a survey and an expert affidavit the district court found to be flawed and unpersuasive. The court below did not err in considering the results of the voir dire in evaluating petitioners' presumed prejudice claims.

[9] Petitioners assert (Pet. 28) that they were prejudiced by "serious misconduct by the prosecution," namely, statements in its closing argument. The court of appeals rejected that contention, concluding that the alleged misconduct was "minor" and followed by curative jury instructions. Pet. App. 155a (internal quotation marks and citation omitted). Petitioners do not seek review of the court's conclusion.

spiracy conviction. The court of appeals' factbound conclusion that sufficient evidence supported Hernandez's conviction does not warrant further review.

Even assuming that the government was required to prove that Hernandez and his co-conspirators specifically intended for the shootdown to occur in international airspace, there was sufficient evidence from which a rational jury could conclude that they did so intend. Pet. App. 54a-55a; see also *id.* at 350a (noting that the jury was instructed to determine "whether the shootdown was planned to occur in international airspace"). That evidence included the fact that the shootdown *did* occur in international airspace and that Hernandez and his superiors later congratulated one another on the successful operation. *Id.* at 55a; see also *id.* at 350a-351a.

Petitioners argue (Pet. 31-32) that the fact that Hernandez and his co-conspirators characterized their operations as a response to BTTR's "provocation" shows that they intended to only shoot down the planes if they provoked Cuba by invading its sovereign airspace. The evidence showed, however, that the operation was a direct response to the leaflet drops BTTR executed a month before the shootdown. Pet. App. 4a, 48a. Viewed in the light most favorable to the government, the evidence showed that none of the BTTR planes entered Cuban airspace during those drops. *Id.* at 75a-76a. The jury could therefore infer that, because BTTR's most recent "provocations" were committed in international airspace, the planned confrontation was also to occur in international airspace. See *Jackson* v. *Virginia*, 443 U.S. 307, 326 (1979) (evidence is sufficient to support a conviction if any rational trier of fact, viewing the evidence in light most favorable to the government, could find guilt beyond a reasonable doubt).

4. Finally, petitioner Hernandez errs (Pet. 35-36) in contending that the court of appeals was required to remand his case for resentencing on his conviction for conspiracy to gather and transmit national-defense information. As the court of appeals explained (Pet. App. 70a-71a), no remand was required because any sentencing error was harmless, given that Hernandez had already been properly sentenced to life imprisonment on the murder count. See Fed. R. Crim. P. 52(a); see also Pet. App. 70a-71a (citing cases).

It is true, as petitioners note (Pet. 35 & n.13) that the Ninth Circuit declined to apply the so-called concurrent sentence doctrine in a similar context in *United States* v. *Kincaid*, 898 F.2d 110 (1990), explaining that it was "unwilling to place upon [the defendant] the risk that * * * prejudice" from the erroneous concurrent sentence "may manifest itself in the future." *Id.* at 112. Whatever tension there may be between *Kincaid*'s rejection of the concurrent sentence doctrine and the court of appeals' harmlessness analysis in this case, however, there is no developed conflict that would warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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