NO. 01-17176-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

ANTONIO GUERRERO,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF ANTONIO GUERRERO

LEONARD I. WEINGLASS, ESQ.
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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Antonio Guerrero
Case No. 01-17176-B

Appellee Antonio Guerrero files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Armando Alejandre

Jack Blumenfeld

David Buckner

Ruben Campa

Carlos Costa

Orlando do Campo

Mario de la PeZa

Hon. Robert L. Dubé

Rene Gonzalez

Antonio Guerrero

Caroline Heck Miller

Gerardo Hernandez

Phillip R. Horowitz

Marcos Daniel Jiménez

John Kastrenakes

Richard C. Klugh, Jr.

Hon. Joan A. Lenard

Guy A. Lewis

Erik Luna

Paul A. McKenna

Luis Medina

Joaquin Mendez

Pedro Morales

William Norris

Barry Sabin

Anne R. Schultz

Kathleen M. Williams

STATEMENT REGARDING ORAL ARGUMENT

The defendant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

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STATEMENT ADOPTING BRIEFS OF OTHER PARTIES

Appellant Antonio Guerrero, pursuant to Fed.R.App.P. 28(I), hereby adopts the following portions of the appellate briefs filed by co-appellants Gerardo Hernandez, Luis Medina, Ruben Campa, and Rene Gonzalez:

BRIEF OF GERARDO HERNANDEZ: All portions of the brief concerning his Issue III (prosecutorial misconduct in closing argument) and Issue V (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count 2), including the statement of the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

BRIEF OF LUIS MEDINA: All portions of the brief relating to his Issue I (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count 2), Issue II (misapplication of U.S.S.G. § 2M3.1 in calculating the base offense level for count two, where no top secret information was gathered or transmitted), Issue III (sentencing guideline misapplication by the district court in sentencing on count two by failing to inquire into the nature of the harm involved and failing to permit the defense to employ appropriate guideline means to ensure reliable fact-finding in calculating the relevant guideline offense level and enhancements), Issue IV

(erroneous failure to apply U.S.S.G. § 2X1.1 to the count two conspiracy conviction, where no national security harm occurred), Issue V (improper sentencing guideline adjustment for obstruction of justice under U.S.S.G. § 3C1.1), and Issue VI (erroneous application of the role in the offense guideline under U.S.S.G. § 3B1.1), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

BRIEF OF RUBEN CAMPA: All portions of the brief concerning Issue I (improper denial of motion for change of venue), Issue II (prosecutorial misconduct denying the defendants a fair trial), Issue III (improper use of the Classified Information Procedures Act to exclude defense counsel from relevant proceedings and to suppress material subject to discovery under Fed.R.Crim.P. 16, resulting in a violation of the defendants' due process rights and impairment of their ability to present a defense), and Issue IV (improper denial of motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any reply argument as to those issues.

BRIEF OF RENE GONZALEZ: All portions of the brief concerning Issue I (Batson violation), Issue II (insufficiency of the evidence as to the count one conspiracy to violate 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq., and the counts alleging substantive violations of those provisions, specifically, as to Hernandez, counts 13, 15, 16, 19, and 22-24), Issue III (failure of the district court to instruct the jury regarding the specific intent element of both conspiracy to violate and substantive violation of 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq.), and Issue IV (prosecutorial misconduct and denial of motion for mistrial based on misconduct by a hostile witness), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any reply argument as to those issues.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal was timely filed on January 2, 2002, from the final judgment and commitment order entered on January 2, 2002.

ISSUES

I. Whether the district court erred in denying motions for change of venue.

II. Whether the evidence was sufficient to prove a conspiracy to transmit national defense information.

III. Whether the district court erred in denying a defense theory instruction on justification and necessity.

IV. Whether the district court erred in imposing a special skills enhancement under U.S.S.G. § 3B1.3.

STATEMENT OF THE CASE

Proceedings

Appellant, ANTONIO GUERRERO, was charged with conspiracy to transmit national defense information to Cuba, in violation of 18 U.S.C. § 794 (Count 2); failure of a foreign agent to register, in violation of 18 U.S.C. § 951 (Count 16); and conspiracy to violate the agent-registration provision and to defraud the United States, in violation of 18 U.S.C. § 371 (Count 1). (DE224). He proceeded to trial, was convicted of these charges, and on December 27, 2001, was sentenced to life imprisonment. (DE1445).

Facts

The procedural facts relevant to denial of the motions for change of venue are discussed as part of the argument on that issue, infra at p.5.

The evidence at trial–discussed as part of Guerrero's argument on sufficiency of the evidence, infra beginning at p.38–consisted principally of undisputed testimony that Guerrero, a Cuban intelligence agent in the U.S., reported open-source information to Cuba during the period 1993-1998. Guerrero sought to show that his monitoring activity was directed not to espionage, but rather reporting public information obtained in south Florida.

Standard of Review

Denial of a motion for change of venue is subject to multi-level review. The district court's interpretation of Federal Rules of Criminal Procedure is reviewed de novo. U.S. v. Noel, 231 F.3d 833, 835 (11th Cir. 2000). The district court's application of Fed.R.Crim.P. 21(a) is ordinarily reviewed for abuse of discretion. U.S. v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975). However, this Court "undertake[s] an independent evaluation of the facts" when considering violation of due process or the right to an impartial jury resulting from denial of a venue-change motion. Id.

Sufficiency of the evidence is reviewed de novo. U.S. v. Hernandez, 141 F.3d 1042, 1049 (11th Cir. 1998). Denial of a theory of defense instruction is reviewed to determine whether the requested instruction was legally-correct and supported by the evidence, viewing the evidence in the light most favorable to the defendant. U.S. v. Lewis, 592 F.2d 1282, 1285 (5th Cir. 1979).

This Court reviews the district court's interpretation of the special skills guideline, U.S.S.G. § 3B1.3, de novo, and its determination that a defendant used a special skill to significantly facilitate an offense for clear error. U.S. v. Foster, 155 F.3d 1329, 1331 (11th Cir. 1998).

Summary of the Argument

I. The record in this case, events and publicity surrounding and during trial, scientific opinion surveys, subsequent government concessions, and both the nature of the defense and the government's theory and manner of prosecution rendered impossible the Miami jury's consideration of the case free from pervasive community prejudices toward the defendants, their cause, their witnesses, and their admitted actions.

Here, there was substantial evidence–and indeed worldwide recognition–that strong factors of passion, prejudice, prior acts of violence, virulent public opinion, and powerful underlying interests and influences were present in Miami in the

post-Elián Gonzalez period when the case was tried. See Groppi v. Wisconsin, 400 U.S. 505, 511 (1970).

The district court both abused its discretion under Fed.R.Crim.P. 21(a) and erred as a matter of law in misinterpreting the requirements of the rule, applying an improper legal standard to well-established venue facts. The district court further abused its discretion in dismissing findings of the court-approved community survey and abundant newspaper and other media articles and reports corroborating prejudice found in the survey.

Where an available alternative venue thirty miles away, and within the district, was agreed to by the defense, eliminating any concerns of inconvenience or expense, denial of repeated defense requests for change of venue, both prior to and during trial, was error under Fed.R.Crim.P. 21(a) and violated the defendants' core due process and jury trial rights under the Fifth and Sixth Amendments.

II. Guerrero, while acting as a Cuban agent, provided information to and followed instructions given him by Cuba. But the government failed to show Guerrero's actions were part of an unlawful agreement to obtaining closely-held national defense information under 18 U.S.C. § 794. See Gorin v. U.S., 312 U.S. 19, 28 (1941). Because Guerrero's actions did not reach such national defense information, his conviction of Count II should be reversed.

III. The district court erred in failing to instruct the jury on the defense theory of necessity and justification. Viewed in a defense-favorable light, there was substantial evidence that actions taken by Cuba to defend itself from terrorist attacks were justifiable. Although raising politically-charged issues regarding the problem of terrorism confronted by Cuba, a jury, rather than a judge, should decide whether Cuba acted justifiably.

IV. The district court erred in imposing a two-level U.S.S.G. § 3B1.3 enhancement for use of a special skill to significantly facilitate a conspiracy to transmit national defense information where Guerrero neither abused a legitimate special skill nor utilized such a skill to facilitate the offense.

ARGUMENT

I.

TRIAL OF THESE CUBAN-AGENT DEFENDANTS IN MIAMI, OVER THEIR REPEATED VENUE OBJECTIONS, VIOLATED FED.R.CRIM.P. 21(A), DENIED THE DEFENDANTS A FAIR TRIAL, AND UNDERMINED THE RELIABILITY OF THE VERDICTS.

A. Introduction: The Defendants Could Not Receive a Fair Trial in Miami.

The principal question before the district court, in ruling on pretrial motions for change of venue and mid-trial motions for mistrial due to denial of the motions for change of venue, was whether a substantial risk of influences undermining jury

impartiality and independence would result from conducting trial in Miami of five admitted Cuban agents charged with: conspiring to spy for their government; infiltrating Miami Cuban-exile organizations; and committing related criminal actions, including, as to one agent, conspiring to murder four members of a Miami anti-Castro Cuban-exile organization.

Against overwhelming record evidence of pervasive Miami community hostility to the defendants and their government, the district court denied relief and proceeded with trial in Miami. Doing so, it ignored a unique confluence of history and demographics that created, in the months prior to trial, what the government later acknowledged is a local climate of opinion making a fair trial "virtually impossible" for anyone remotely associated with Cuba.[1]

The Fifth Amendment due process clause requires "fundamental fairness in the prosecution of federal crimes." U.S. v. McVeigh, 918 F.Supp. 1467, 1469 (W.D.Okla. 1996). The Sixth Amendment guarantees "trial, by an impartial jury."

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[1] See Ramirez v. Ashcroft et al., Case No. 01-4835-Civ-HUCK (S.D.Fla. 2002), Motion for Change of Venue. In its Motion, the government claimed it would be "virtually impossible" to get a fair trial in Miami for the Attorney General of the United States, charged with employment discrimination against Hispanics. It cited the furor of the exile community over the decision to return Elián González to his father, which peaked in the pretrial period of the instant prosecution, June 2000. Guerrero's trial began in November, 2000. Nearly eighteen additional months elapsed before the government sought a change of venue in Ramirez in June 2002.

Together, these guarantees insure a "system of law [that] has always endeavored to prevent even the probability of unfairness." In re Muchison, 349 U.S. 133, 136 (1955). That system carries a "message [which] echos more than 200 years of human experience in the endless quest for the fair administration of justice." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971).

To avoid even a substantial likelihood that a defendant will be tried in an atmosphere disturbed by a "wave of public passion," Irvin v. Dowd, 366 U.S. 717, 728 (1961), the Federal Rules of Criminal Procedure require transfer to another district whenever the district court is satisfied a fair and impartial trial cannot be held in the district. Fed.R.Crim.P. 21(a). This supervisory power of district courts is broader than venue strictures imposed by the Due Process Clause and the Sixth Amendment right to an impartial jury.

The Fifth Amendment right to due process, the Sixth Amendment right to an impartial jury, and the prophylactic provision of Rule 21(a) were all violated by the district court's refusal to transfer trial in this matter to a location not imbued with intense local passions, less than 30 miles north of Miami, in Fort Lauderdale.

The essential facts before the district court were uncontested. They showed:

- As a result of what the district court would later call the "impassioned Cuban exile community residing within this venue,"[2] Miami-Dade was unique in its virulent antipathy toward persons associated with Cuba.

[2] See DE1392:14.

- All five defendants were admitted agents of the Cuban government[3] and several admitted, inter alia, infiltrating and monitoring Miami-based Cuban-exile groups. Key defense witnesses would include officials of the Cuban military and government.

- The charges were among the most serious, including conspiracies to commit espionage and murder, as well as 24 additional felony charges.

- Jurors would be called upon to make delicate credibility determinations based upon conflicting testimony of representatives of the governments of Cuba and the U.S., and to draw inferences about defendant's specific intent.

- The relief sought by the defendants was minimal: moving the trial to Fort Lauderdale, within the district in adjoining Broward County, just 30 miles from the Miami courthouse.[4]

In this context, the district court was asked to exercise its historic supervisory power to ensure both the reality and appearance of a fair proceeding and to protect the defendants' constitutional right to a fair trial. Failing to address the local climate of pervasive hostility and deep prejudice directed at anyone professing loyalty to the Cuban government, the district court:

- misread Rule 21(a), treating it as nothing more than a codification of due process and fair trial rights, and applied the wrong legal standard in reviewing the evidence;

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[3] At oral argument on venue, the Court was advised that the defendants would concede their status as Cuban agents at trial. DE514:45-51

[4] According to the 2000 U.S. Census, almost 30% of the population of Miami-Dade County is of Cuban ancestry, compared to just 3.1% in Broward.

- misconstrued the record as well as the arguments advanced by the defense; and
- failed to take necessary steps to protect defendants' fair trial and due process rights when voir dire and incidents occurring during trial confirmed the unsuitability of the venue.

To understand how grievously that decision affected defendants' rights, reducing the months-long trial to what the Supreme Court once described as a "hollow formality," Rideau v. Lousiana 373 U.S. 723, 726 (1963), the nature of the venue must be considered in some detail.

B. Miami Was a Singularly-Inappropriate Venue.

1. Inflamed by passion.

The Miami metropolitan area was a singularly-inappropriate venue, incapable of providing a fair trial of these defendants. It is demographically, politically, and culturally unique. Well over half-a-million of its 2,253,362 inhabitants either fled from Cuba themselves, or are immediate family of those who did, making it the only large, U.S. metropolitan area in which Cubans form the largest single ethnic/national origin group. It is also the only federal venue where a large proportion of the community has personal or family experiences capable of affecting the decision-making process in a case charging a conspiracy to

commit espionage on behalf of Cuba, as well as conspiracy to murder four local heroes of the Miami-based struggle to overthrow Cuba's government. Those experiences were described as "living, breathing wounds" by a prominent Cuban-American attorney for thousands of Miami residents. DE1636:Ex.9.

Defendants sought a change of venue not merely to escape the effects of prejudicial publicity, but so that their trial could take place in a community in which "virulent anti-Castro sentiment" has not been "a dominant value...for four decades." DE321:3,5. News articles and a community survey were submitted to substantiate "an atmosphere of great hostility toward any person associated with the Castro regime," and "the extent and fervor of the local sentiment against the Castro government and its suspected allies." DE329:1,3.

This evidence showed that, like several localities during the turmoil of the civil rights movement, in Miami, "certain cultural factors" had created a "community atmosphere so pervasively inflamed" against a specific "target group" that the local "climate of opinion" made a fair trial impossible. See Pamplin v. Mason, 364 F.2d 1, 7 (5th Cir. 1966). In fact, defense evidence showed, as one expert characterized it, a "state of war" mentality against Cuba.[5]

[5] DE1636:Ex. 4 at 3 (Legal psychologist, Dr. Kendra Brennan, upon viewing a decade of polling data on Miami's attitudes toward Cuba, characterized the results as indicating a "state of war" mentality.)

Such views, while perhaps not embraced by all sectors of the local population with equal ferocity, nevertheless exert a dominant influence not only on the social and cultural atmosphere in Miami-Dade, but also the political, economic, and public-safety decisions of its Cuban-exile led local governments. For example, when Miami resident Orlando Bosch fired a bazooka on a civilian ship docked in the Miami harbor, ostensibly to punish it for trade with Cuba, the city held a parade and named a day in his honor. In the months leading up to trial below, a man who nearly provoked a military crisis between the U.S. and Cuba (by overflying Cuba in violation of U.S. laws) was made the guest of honor at an Epiphany Day parade in Miami. DE329:Ex.M.

Trial of this case offered hundreds of thousands of local exiles and refugees an opportunity to express their moral outrage at Cuba by judging and condemning agents of the government that precipitated their exile. Indeed, Miami opinion-makers made no secret of their desire to make defendants' prosecutions the first step in a process leading to trial, conviction, and overthrow of Cuba's President, Fidel Castro.

As the case was being readied for trial, on February 24, 2000, the largest newspaper in the venue (the Miami Herald) gave voice to this community sentiment in a lead editorial headlined, "Terrorism Must Not Win," urging

conviction as a way of vindicating local morality and initiating a process for the overthrow of the Cuban government:

> [N]othing could honor [the victims'] memory more than to call to account their murderers. ... More than compensation, **the families want the moral sting of a U.S. criminal prosecution in federal court.** So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged with conspiracy to murder in connection with the shootdown.

DE397:Ex. K-1. The editorial went on to urge conviction in this case as a stepping stone to prosecution of Cuba's President, a demand repeatedly made by segments of the exile community following the shootdown. This was but the latest call to arms, part of four decades of public discourse pervaded by extraordinarily-intense sentiment deeply hostile to the defendants and all they represented as dedicated agents of the Cuban government.[6]

2. Awareness of violence.

Miami-Dade is the only venue in which hatred toward Cuba's government is such a community norm that expression of a different opinion places the speaker in physical danger, lending Miami the distinction of being the focus of two special

[6] "Uncompromising hostility" to Cuba and its government was the way Professor Lisandro Pérez, Ph.D., the Director of the Cuban Research Institute at Florida International University, described the discourse in the Cuban-exile community. DE1636:Ex.5 at 7.

reports on human rights violations. Dangerous Dialogue[7] and Dangerous Dialogue Revisited[8] document the climate of "violence and intimidation" against those not in step with the "maintenance of a belligerent United States policy toward Cuba." DE1636:Ex.11 at 2.

The two reports recount four decades of assassinations, bombings, death and bomb threats, verbal assault, vandalism, economic reprisals and blacklisting, as among actions taken by the anti-Castro community in Miami to punish and control expression of even neutrality toward the Cuban government. The role of local government in tolerating or, at a minimum, failing to stop such activities is noted. Evidence at trial established the same facts.

No one who had resided for any length of time in Miami could be ignorant of the climate reflected in an article published in Miami shortly before oral argument on the venue motion:

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

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[7] "Dangerous Dialogue," Americas Watch/The Fund for Free Expression DE1636:Ex.12.

[8] DE1636:Ex.8.

> Since then, numerous small businesses–those promoting commerce, travel, or humanitarian aid to Cuba–have been targeted by bombers.

DE498:Ex.A-4.

Fear of physical retaliation affected even defense counsel. Guerrero's counsel advised the court "counsel for all the Defendants shared a personal fear for their own well-being were we required to defend alleged agents of the Cuban Government..." DE324:3 At oral argument on the venue motion, a Cuban-born defense attorney, a Miami resident for forty years, told the Court, "I have children in the community and I am sensitive to how my involvement in this case will ... affect others who are dear and close to me." DE514:30. Another defense attorney, a former assistant U.S. Attorney, also spoke of "his daughter in school in Miami" and his concern that "many of her classmates are from Cuban families." DE514:72

Less than five months before trial, Miami was rocked by civil disturbances and a threatened confrontation between local and federal law enforcement officials over the decision of a court to return a Cuban boy (Elián González) to his father. The incident presented an unprecedented challenge to federal government by the vehemence of local passions.

A month before oral argument on defendant's venue motion, "close to 100,000 people poured into the streets to demonstrate their anger at the [Elián]

decision," according to a front-page article in the Miami Herald. DE498:Ex.C-4. Death threats were made against government agents, and a bomb threat against then-Attorney General Janet Reno required special protection at her home in the district, including barricades and visible law-enforcement presence. Two of defendant's jurors were from the same Miami community of Kendall, where Reno lived. DE498:Ex.A-4.

Like the bombing of the Oklahoma City courthouse, the shootdown incident at the heart of this case served to unite a community that identified closely with the victims against the "outsiders" responsible for the tragedy. Indeed, even while arguing against venue change, the government acknowledged that in response to the shootdown, "[t]here were masses . . . all over town and numerous people attended," (DE1471:535), conferring the status of martyrs to the victims.

Evidence of an "inflamed community atmosphere," Coleman v. Kemp, 778 F.2d 1487, 1489 (11th Cir. 1985), respecting the shootdown, deeply hostile to defendants, is literally a part of the landscape of the venue where they were tried. The Miami-Dade County government building and mass-transit hub features a prominent statue and memorial honoring those named as victims of the shootdown and condemning the Cuban government. A main thoroughfare in Miami and a

plaza at the OpaLocka[9] airport (home base to the "Brothers to the Rescue" flights) were renamed in honor of the fallen fliers.[10]

No fewer than sixteen prospective jurors had personal contact with the victims and the victims' organization, "Brothers to the Rescue," as well as their family members. Family members attended the trial as a group, dressed in mourning, and were afforded special seating and FBI escort in the courtroom. On opening day they held a press conference on the steps of the courthouse in the presence of prospective jurors. DE1245:111;DE1472:715.

3. Distorting effects of prejudice.

Selecting an impartial jury in the trial of pro-Castro Cuban government agents might represent a challenge in any venue. Miami is unique, however, both in the intensity of the animosity and the degree to which it pervades, influences, and, at times, dominates public policy for Miami residents.

The Cuban exile community in Miami sees itself not as willing immigrants hopeful of assimilation into the "American dream," but rather exiled, forced from their country by a tyrant, awaiting (and fighting for) the overthrow of the current

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[9] The small community of OpaLocka was home to two seated jurors.

[10] The shootdown also "raised a lot of money" for the Brothers to the Rescue as the result of public appeals on Miami radio where the organization's leader, Jose Basulto (a witness), had been a popular guest for years, according to prospective juror Placencia, a media manager. DE1472:684

government to return to reclaim what they believe is rightfully theirs. Largely unlike other Hispanic immigrant groups, their economic and social standing has effected significant changes on local and national politics, even to the point of making the public policy of Miami-Dade a weapon in their campaign against Castro and all who support him.[11]

Thus, Miami is the only municipality or county in the United States to adopt as official policy measures supporting those who advocate the violent overthrow of a foreign government, and penalizing those who do not. In its eagerness to demonstrate its rejection of all things Cuban, the Miami-Dade County Commissioners had, in one instance, usurped the federal foreign-affairs function by enacting an unconstitutional ordinance compelling provision of an affidavit forswearing contact with Cuba as a condition of doing business with, or obtaining funds from the county.[12]

As evidence of the local climate of prejudice, the defense submitted press reports of reprisals threatened against a university for attempting to show a film

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[11] DE1636:Ex.4 at 3 (Dr. Brennan concludes that the large number of people with Cuban ancestry have had a "substantial impact" on the rest of Miami-Dade with respect to their attitudes toward the Cuban government). See also DE1636:Ex.5 at p.7 (affidavit of Dr. Pérez; explaining how the priorities and agenda of the Cuban community "take center stage in Miami").

[12] See Miami Light Project v. Miami-Dade County, Case No. 00-1281-Civ-MORENO) (S.D.Fla. 2000) (permanent injunction granted July 2000).

made in Cuba, DE324, Miami-Dade's choice to sacrifice close to a quarter of a million dollars invested to secure the coveted Pan American games, rather than permit Cuban athletes to participate, DE397:Ex.M-1; the "no contact with Cuba" affidavits; and threats from county officials that a ballet company would have trouble with its credit line and certificate of occupancy for opposing the "no contact with Cuba" rule. DE497:Ex.E-4.

It was undisputed that only in Miami would a dance recital provoke a near-riot because of the national origin (Cuban) of the dancers. DE329:Ex.L. And only in Miami would the Mayor not seek to apologize to the visiting artists, but rather, promise to write to the White House to ensure any future visa requests on their part would be denied. Id.

In such a hostile atmosphere, not even a total news blackout would suffice to permit a fair trial in Miami. And there was no such news blackout here. The press, conscripted into the war against Cuba, left little room for doubt as to the guilt of these particular defendants. From the outset, banner front-page headlines proclaimed defendants' arrest as one of "**SPIES AMONG US**," playing upon the "us" against "them" atmosphere by placing the community from which jurors were

drawn in the role of victim of foreign invaders, a theme played to great advantage by the prosecution at trial, beginning in opening statements.[13]

The U.S. Attorney exacerbated the prejudice by telling the prospective venire, through the public media, the conspiracy "**strikes at the very heart of our national security**." DE329:Ex.G. The impression caused by such statements is unlikely to be erased by judicial admonitions. Despite the government's concession that there was no evidence the crime of espionage had actually occurred–the charge was conspiracy–and that, in any event, no classified documents were involved, the prosecution dwelt on that exaggerated theme in closing argument.[14]

The usual forms of prejudicial pretrial publicity, not the chief source of prejudice in this case, were not absent. The Miami Herald, announced, in headlines during the same year defendant's trial was held "**Confessed Cuban**

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[13] In its opening, the prosecution repeated the theme no less than four times, referring to spies "among **us** here**,**" " spies here in **our community**," "their operations [in] **this community**," and "Cuban intelligence officer in **this community**."(DE1476:1573,1576,1592). See U.S. v. Williams, 613 F.2d 573 (11th Cir. 1980) (local prejudice exacerbated by prosecution's argument; reversing for failure to change venue).

[14] The prejudicial effect of these inflammatory remarks was incalculable, referring to the defendants as "spies bent on the destruction of the United States of America," "a Cuban spy sent to the United States to destroy the United States," "people bent on destroying the United States, paid for by the American taxpayer." (DE1583:14535-36,14535-36,14482)**.**

Spies Sentenced to Seven Years." The article revealed a confession concerning involvement in a "ten-member ring that snooped on U.S. military installations," the same "ring" identified as the conspiracy in the indictment. DE397:Ex. I-1. An earlier headline proclaimed "Couple Admit Role in Cuban Spy Ring," with the accompanying article referring to guilty pleas and confessions of two former co-defendants. DE329:Ex.H.

Here the passions were not created by a sensationalistic press, but resident in the community. If anything, it was passionate community sentiment that demanded articles related to the case be given a prominence and tone in Miami they would not merit elsewhere.[15] It was not a prejudice that could be measured by counting the number of articles submitted.

4. Virulence of public opinion.

Given the climate of fear and intimidation, not a single prospective juror, of the more than 160 questioned, publicly acknowledged a favorable impression of Cuba. The three jurors who reported a neutral judgment–one saw "things from both sides"; one heard "good and bad"; and one saw "pros and cons"–were promptly removed by government peremptory challenges. (DE1472:767,810; DE1473:939).

[15] As this Court has stated, the publicity may be "**reflective** of an atmosphere of hostility." See Coleman v. Kemp, 778 F.2d 1487, 1538 (11th Cir. 1985).

Unsurprisingly, every juror ultimately chosen who expressed an opinion on Cuba, expressed strongly negative opinions.

Attitudes expressed during voir dire confirmed pervasive hostility toward all those associated with the Cuba government, permeating the venue. They also confirmed the defense survey's finding that the "climate of opinion" in Miami included a clear message that conviction was the only verdict acceptable to the community.[16] Various venirepersons expressed concern about their physical well-being and safety, or economic survival, should they serve on a jury that returned a different verdict.

One non-Cuban prospective juror readily expressed his disdain for the Castro government, but then went on to add:

> I would feel **a little bit intimidated and maybe a little fearful for my own safety** if I didn't come back with a verdict **in agreement with what the Cuban community feels, how they feel the verdict should be**.

(DE1473:1068).

Still later, when pressed to explain himself, he added:

> I would be a nervous wreck if you wanted to know the truth. ... I guess I would ... **have some fear, actual fear for my own safety if I didn't**

[16] According to the survey conducted by Dr. Moran, 36% of all Miami-Dade respondents admitted they would be worried about community criticism if they failed to convict. DE321:Ex.A at 10.

> **come back with a verdict that was in agreement with the Cuban community at large**.

(DE1473:1070).

Prospective juror Glanery, a non-Cuban, was also concerned:

> I do expect that if the case were to get a lot of publicity, **it could become quite volatile** and yes, people in the community would have things to say about it.

(DE1473:1010). In response to the question whether he would be willing to follow the Court's instructions, he stated: "It would be very difficult **given the community in which we live**." (DE1473:1018).

Prospective juror Michelle Petersen, a non-Cuban, also expressed concern, in light of the volatile community atmosphere, about possible reaction to a verdict: "I think I would be concerned about the reaction that might take place." (DE1473:938). "**I don't want rioting and stuff like that** to happen like what happened in the Elián case." (DE1473:945).

Hispanic, but non-Cuban, prospective juror Pareira spoke plainly: "I would be concerned about how others viewed me... I don't like the mob mentality that interferes with what I feel is a working system." (DE1474:1121).

Prospective juror Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, expressed concern about how his participation in the jury

might affect his social and commercial reputation in the community and, thus "ability to do business in the community":

> I guess I have a concern just how public opinion might affect my ability to do my job afterward. ... [I]t might impact my ability to do business in the community. ... [T]here may be strong opinions...that may or may not affect my ability to generate loans for my employer.

DE1473:1057,1059,1073. Further, incidents during voir dire and trial demonstrated that the non-sequestered jury was neither selected, nor able to deliberate, free of the extraneous influence of community passions.

A press conference by members of the families of victims held on the opening day of trial was attended by prospective jurors (DE1245:111). A demonstration outside the courthouse caused the court to suggest an alternate exit for the jurors. (DE1518:6096-6107) Reference was made during trial to the former mayor of Miami having flown with Brothers to the Rescue. (DE1504:5756-5759) A key witness from Brothers to the Rescue accused one of the defense counsel, in front of the jury, of "doing the work of intelligence for the government of Cuba." (DE1540:8945) See argument IV D3 below for a recitation of the unrestrained media intrusions into the court process.

C. The Venue Litigation in the District Court.

From the outset, the defense argued that "the dominant value in this community, i.e., "[v]irulent anti-Castro sentiment," would make a fair trial

impossible in Miami. DE321:3,5. Guerrero first moved for change of venue on January 5, 2000, DE317, arguing that in "the inflamed atmosphere concerning the activities of the government of the Republic of Cuba" in Miami, voir dire was not could not detect all extraneous elements that could influence the verdict, nor insulate deliberations from them.

In opposition, the prosecution assumed the role of defender of the community's honor, arguing, according to local headlines, that "South Floridians can be fair," and defending local taxpayers against a "costly" change of venue. See DE279:15 (during hearing concerning appointment of jury expert, court notes "lead story in the local section on Saturday in the Miami Herald," August 21, 1999). Defending Miami's honor, the prosecution argued the presumption of prejudice may operate in "smaller or provincial communities," but not in the "extremely heterogeneous, diverse and politically non-monolithic" Miami. DE286:5.[17] Any prejudice from pretrial publicity could be detected and cured during voir dire, it argued.

[17] The same U.S. Attorney argued in Ramírez that Miami could not provide a fair trial for the Attorney General or INS because of the intense community prejudice concerning Elián González.

The prosecution insisted pre-voir-dire venue change for pre-existing hostile community sentiment was not appropriate because Miami "is not the type of small, insular provincial community" involved in Pamplin. DE324:63.[18]

Replying to the government's opposition, (DE322), Guerrero reiterated that the chief problem was not the press, but the pervasive political and cultural factors unique to Miami "operating either openly or insidiously to such an extent as to poison the judgment" and prevent a fair trial. See Groppi, 400 U.S. at 511.

Co-defendant Medina's motion for change of venue, attached results of a random-sample of 300 venue residents showing 69% of all respondents (and 74% of all Latino respondents) had demonstrated prejudice against persons charged with espionage for the government of Cuba, and concluding virulent sentiment against that government had been a "dominant value in this community" for four decades. DE321:Ex.A:3-5 Ninety percent of all respondents who held an opinion acknowledged that evidence would not change their opinions. DE321:Ex.A:13. Co-defendants Campa and Medina reiterated the need to move their trial away

[18] A year later, when the government faced a civil complaint, it acknowledged the impact of the passionate climate and violent attitudes on matters even remotely related to Cuba, and sought a change of venue on the basis of "deep seated feelings" and "deep-seated prejudices" related to Cuba that exist here, but diminish as one moves away This about-face, this admission by the U.S. Attorney, bars it from asserting otherwise before this Court. See DE1636:Ex.3 at 25(transcript of oral argument in Ramírez v. Ashcroft, hearing of August 15, 2002).

from the "atmosphere of great hostility," submitting additional press reports documenting that atmosphere. Defendant Campa submitted numerous press clippings in five separate submissions: DE329;DE397;DE455;DE483;DE498.[19]

In response to the survey evidence, the prosecution attacked the defense expert and his methodology, based upon an affidavit provided by an expert fifteen years earlier, in an entirely different case–a fact it did not mention when invited by the district court to comment upon the defense request for funds for this expert's survey.

On March 20, 2000, the defendants filed a Joint Reply Memorandum of Law in further support of the venue motion, noting the impact of the turmoil in Miami over the Elián case, more than half a dozen news reports of sentencing hearings of co-operating co-defendants, an unrelated "Cuban spy" arrest, and contemporaneous turmoil and protests related to cultural activities involving Cuban or Cuba-friendly artists. DE455. The district court would ultimately dismiss such evidence as being either irrelevant, because they "relate to events other than the

[19] While the district court's opinion referred to more than 30 articles, the actual number submitted was more than twice that number. DE586:10 At one point the court complained "there seems to be a parade of articles appearing in the media about this case." DE279:14. The prosecution conceded "it is only logical to assume that well-read, intelligent people from all walks of life will have been exposed to information regarding this case." DE608:3

espionage activities" of which three defendants were charged, published more than a year earlier, or "largely factual in nature." DE586:11.

At oral argument, on June 26, 2000, defendants informed the court they would accept an intra-district transfer to the district's northern division, specifically Fort Lauderdale, a procedure previously used by the district court with minimal disruption. (DE514:52).

In an Opinion and Order dated July 27, 2000 DE586, the district court denied the transfer, without prejudice. A Motion for Reconsideration filed on September 15, 2000, (DE656), was denied. (DE723). The request was twice renewed during trial, DE1527:7130;DE1540:8949, and again denied. (DE1579:13894-95).[20] The venue claim was reasserted in post-trial defense motions, including Guerrero's, DE1338,1342,1343,1347, and denied by the district court. (DE1392).

[20] The issues relating to the district court's treatment of the defense expert and others relating to the venue issue, occurring or discovered only after the verdict, were raised in Guerrero's Motion for New Trial and once again denied. (DE1678).

D. In the Face of an Unprecedented Record of Inherently Suspect Circumstances of Prejudice Against the Defendants, the District Court Erred in Denying an Intra-District Transfer to a Neutral Venue Just 30 Miles Away.

1. The Court Mischaracterized Rule 21(a), Applied the Wrong Standard to the Facts, and Failed to Exercise Its Supervisory Power.

Given the factual circumstances, the appropriate inquiry for changing venue under Rule 21(a) should have been: did outside influences affect the community's climate of opinion to such an extent as to create an inherently suspect condition for a fair trial. As pointed out by Judge Devitt of the Northern District of Georgia, drawing on the controlling authority of Pamplin v. Mason 364 F.2d 1 (5th, 1966):

> [T]he test is no longer "whether prejudice found its way into the jury box at the trial," thus requiring a showing of prejudice at voir dire. ... Judge Wisdom wrote:
>
> > "As we read the Supreme Court cases, the test is where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable safeguards, such as change of venue, to assure a fair and impartial trial."

U.S. v. Moody, 762 F.Supp. 1485, 1491 (N.D. Ga., 1991) (quoting Pamplin, 364 F.2d at 5).

Where such outside influences create an inherently suspect condition venue must be changed pre-voir dire since, under such circumstances, there exists a "substantial likelihood" that prejudice will prevent a fair trial. Id. at 1487. Citing

the "pertinent" ABA Standard for Criminal Justice 2nd Ed. 1980 Sec. 8-33(c), the court adopted and applied the following recommended standard:

> A motion for change of venue or continuance shall be granted whenever it is determined that ... there is a substantial likelihood that, in the absence of such relief, a fair trial cannot be had.

Id.

The "substantial likelihood" standard is to be applied by the district court pursuant to the supervisory power vested in all federal courts to assure both the substance and appearance of a fair proceeding. Marshall v. U.S., 360 U.S. 310 (1959). This Circuit has explicitly adopted Marshall's analysis of the supervisory power of the federal courts. U.S. v. Herring, 568 F.2d 1099 (5th Cir. 1978).

In U.S. v. Tokars, 839 F. Supp 1578, 1581 (No. Dist., Ga. 1993) the district court specifically applied the supervisory power enunciated in Marshall in ordering a change of venue, referring to it as "a more exacting fairness standard on this issue." Id. at 1490. The failure of the court below to even acknowledge, no less exercise, its supervisory power to effect an intra district transfer[21] is, at a minimum, an abuse of discretion

[21] The change here was within the district, a "relatively convenient, suitable alternative venue," a significant factor to be considered in determining whether or not to change venue. See Tokars, 839 F.Supp at 1584. District courts have authority to set the place of trial anywhere within the district. See Fed.R.Crim.P. 18.

In a departure from both Pamplin and Marshall, as enunciated in Moody, Tokars, and Herring, the district court utilized a test not applied in any reported Rule 21(a) decision in this Circuit, requiring the defense to prove it was "virtually impossible" to have a fair trial. See DE 586:10, n.3. Thus, although the analytical path for Rule 21(a) ordinarily examines surrounding facts and circumstances to determine if they meet the substantial-likelihood test of preventing a fair trial, (Pamplin, Moody), and then employs the supervisory power of the federal courts to correct it, (Marshall, Tokars), nothing of the sort occurred below. The "virtual impossibility" test adopted by the district court, ordinarily utilized when federal courts are asked to apply the stringent Fourteenth Amendment due process standard to state cases on habeas corpus, as announced in Ross v. Harper 716 F.2d 1528, 1540 (11th Cir. 1983), has no relation to Rule 21(a). In the context of deciding habeas cases, federal courts, must accord deference to state court judgments requiring a higher standard in reviewing the venue evidence. Not so with Rule 21(a) motions.

Far from having to defer to state court determinations, federal district courts, are required to ("shall"[22]) transfer venue under Rule 21(a) under the less-demanding substantial likelihood test. See Moody, supra. As a matter of logic,

[22] In its quotation of Rule 21(a), the district court's opinion, DE586:3, inexplicably substituted the permissive "may" for the mandatory "shall."

there would be no need for a rule that merely codifies the constitutional standard for habeas cases. Logic also dictates that if there is to be a separate rule requiring transfer for cases initiated in federal courts it would contemplate a broader scope for the exercise of the court's supervisory powers than that afforded in reviewing state court adjudications.

Certainly in this Circuit, insistence that the venue evidence prove that a fair trial was virtually impossible runs counter to not just the substance, but the spirit of the Rule. In writing about Rule 21, District Judge Heebe wrote:

> The rule is preventive. It is anticipatory. It is not solely curative as in a post-conviction constitutional attack. ... Succinctly, then, it is a well-guarded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule.

U.S. v. Marcelo, 280 F.Supp. 510, 513 (E.D.La. 1968).

The difference between the constitutional standard in Ross, as opposed to the supervisory standard in Marshall, as applied in Tokars, is substantial. As the Tokars court acknowledged it would not change venue under the Fourteenth Amendment's due process standard, but granted a venue change under the more deferential supervisory standard of Marshall/Tokars.[23] As noted by this Court in

[23] Because the district court applied the wrong standard in the wrong context, it engaged in an irrelevant discussion as to whether "actual prejudice" need be demonstrated, as in U.S. v. Fuentes-Coba 738 F.2d 1191 (11th Cir. 1984), when no jury had as yet been selected in this case. The district court similarly failed to recognize glaring factual differences between the venue

Williams, 523 F.2d at 1209, n.11, the Fourteenth Amendment due process standard merely "places a bottom line on the discretion exercisable by the district Court," but does not define or narrow the ambit of that discretion.

Although the Court below cited to Pamplin, it inexplicably failed to apply it, despite its uncanny factual resemblance to this case. There, Justice Wisdom concluded that a civil rights activist could not receive a fair trial in a Texas community, irrespective of voir dire. Pamplin, 364 F.2d at. 8 (It's the "feeling in the community rather than the transcript of voir dire."). Because of such inherently suspect outside influences, Rev. Pamplin ran a substantial risk of being judged–not because of what he allegedly did–but because of who he was. Here, a Cuban agent facing trial in Miami faced no less of a risk. See also, Frazier v. Superior Court of Santa Cruz County, 486 P. 2d 694, 699 (1971) where the Supreme Court of California, in transferring venue of a "hippie" charged with a crime in a rural county, feared that he "runs the very real risk of being judged not for what he has done, but for what he is, or what he appears to be."

The underlying rationale of Pamplin, calling for venue change in advance of voir dire, applies here with equal force. When the source of prejudice is publicity,

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issue here and that in U.S. v. Capo, 595 F2d 1086 (5th Cir, 1979). Unlike Pamplin and the instant case, Capo did not present "inherently suspect" circumstances hostile to a certain type of individual.

voir dire is likely to reveal the information the juror obtained and enable the court to gauge how deeply embedded it is in the juror's mind. When the source of prejudice is long-standing and pervasive community attitudes, values and beliefs, protections afforded by voir dire will not suffice since the prejudice is a community norm and frequently not even consciously known to the juror. Moreover, in the instant case the jurors were asked to gauge the credibility of witnesses who held positions within the Cuban government and draw inferences concerning the alleged intent of these Cuban agents.[24] That, plus the fear of one's neighbors and the prevailing sentiment within the community, recently stirred up by the Elián controversy, cried out for the application of Pamplin, the substantial likelihood test of Moody, and the supervisory power of Tokars. In failing to utilize any of these Eleventh Circuit standards–and substituting an inappropriate test–the court below abused its discretion.

2. The Court Failed to Understand and Correctly Evaluate the Venue Facts Presented and Wrongfully Dismissed the Findings of the Community Survey.

In mischaracterizing the relevance of the submitted newspaper articles, the court ignored the "totality of the surrounding facts," Pamplin, 364 F.2d at 4, and

[24] Although the court was advised the defendants would concede at trial they were agents of the Cuban government, it failed to acknowledge or even discuss its impact on a Miami jury.

ultimately ruled that the defendants' "more than thirty articles" (in reality more than sixty), "failed to carry their burden of demonstrating **that it is impossible** to select a fair and impartial jury." DE586:10. Rather than use the articles to gauge community sentiment, the district court found most of them irrelevant because they relate to events "other than the espionage activities in which the Defendants were allegedly involved." DE586:11. It considered relevant only those which directly reported on the defendants and their trial. These it dismissed as "published more than one year ago ... and discuss matters that are largely factual in nature" except for "articles relating to the sentencing of two co-defendants and one editorial connoting the anniversary of the shootdown." The content or impact of even the "relevant" articles was not spelled out. While these articles amplified and reflected the results of the community survey of Professor Moran, they were never considered in conjunction with his findings.

While acknowledging **"the inflamed atmosphere in the community** concerning the activities of the government of the Republic of Cuba," DE586:2, and that the defense motions are "directed primarily toward the issue of 'pervasive community prejudice,'" DE586:10, n.2, the district court 's Opinion failed to consider the press reports submitted to illustrate the nature and severity of community prejudice and reviewed them only as evidence of pretrial publicity.

The district court's focus on a juror's ability to "put aside" impressions gained from "pretrial publicity" ignored the difficulty of twelve persons living in a community with a four-decades-long, well-documented hostility to Cuba ignoring the prevailing atmosphere where they lived and rendering a verdict free from concern about possible hostile, and even violent, reaction in the event of acquittal.

A review of those articles to determine if they contributed to the outside influences which created an inherently suspect condition would have revealed a substantial likelihood that a fair trial could not be held.

Furthermore, the district court abused its discretion by dismissing Professor Moran's survey on a number of grounds, all of them inaccurate and unsupported:

1. It criticized and found "the size of the statistical sample in this case (300 respondents) too small to be representative." DE586:15. However, it was the district court which had specifically authorized a survey based upon 300 residents, DE:303, and never complained during argument (when the defense could have corrected the size), weeks before its decision, that the sample size was too small. Furthermore, the author of the survey reminded the court in a letter sent to the court, but not copied to counsel, of its fundamental error in

criticizing the sample size, but the court failed to communicate that fact to the defense.[25]

2. The district court came to its conclusion on the survey without an evidentiary hearing, on the basis of an affidavit submitted by a prosecution expert, executed some fifteen years earlier, concerning Dr. Moran's methodology in a different case.

3. The Post-impanelment Incidents Provided Additional Proof That Defendants Could Not Receive a Fair Trial in Miami-Dade.

While the Pamplin Court, 364 F.2d at 8, advises that it's the "feeling in the community rather than the transcript of the voir dire" that matters in reviewing venue appeals (there the court was not convinced by the transcript of voir dire indicating the jury could be fair[26]), portions of the voir dire and post-voir-dire transcript are helpful in accurately reflecting the atmosphere in the venue.

Efforts to insulate the jury from the "outside influences" in the venue proved futile. On the first day of voir dire the bizarre behavior of a juror called the

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[25] The accuracy of the Moran survey finds support in the polling data independently taken by a local university over a period of a decade. DE1636:Ex.4

[26] As the Supreme Court recognized in Irvin v. Dowd, 366 U.S. at 727-28, protestations of ability to follow judicial instructions and make an impartial decision are meaningless when sentiment against defendants is both deeply-held and wide-spread. See also Rideau v. Louisiana, supra (jurors assertions of lack of bias not determinative).

attention of the court and the parties to him. He turned out to be an officer of the Cuban-American National Foundation, one of the sources of funding for "BTTR" and of much of the hostility to defendants. While he was quickly excused, no inquiry was made about his relation to other members of the venire, or what he may have expressed to them, notwithstanding the court's concern that the panel may have been "improperly exposed to opinions that will strike the whole panel."[27] DE1470:308.

The district court repeatedly expressed concern about the intrusiveness of the media and the futility of attempting to insulate the jury, but took no remedial action. For example, the district court noticed the "tremendous number of requests" for disclosure of the voir dire questions in advance of voir dire, for the apparent purpose of alerting the members of the venire prior to the questions being posed by the Court DE1471:625, and the requests for the names of deliberating jurors just as the deliberations began. (DE1585:14643).

Even more disturbing, on the first day of the jury's brief deliberations, jurors complained of feeling intimidated by the fact TV cameras were following them. Well into the second week of jury selection a prospective juror complained of media harassment as he left the courthouse. (DE1473:1026). As late as March 13,

[27] The Court was informed that a newspaper carrying a prejudicial article concerning this case was suspiciously found in the jury assembly room. No further inquiry was made. DE1245:171

nearly four months into the trial, the Court noted on the record the jurors were still being harassed by the camera. (DE1540:9005). Given the historic role of the Spanish-language media in identifying and warning those who earned the wrath of the anti-Castro community by expressing opinions that differed from those favored by that community, see Dangerous Dialogue at DE1636:Ex.12 on p.9, the intimidation could not have been clearer.

As the jury retired to deliberate the TV cameras moved in, this time frightening jurors as they left court to go to their cars, to such an extent that three jurors were overheard by the court's staff who reported to the court that "they have been followed by the cameras ... they were filmed yesterday and several of them felt they were filmed all the way to their cars and their license plates had been filmed." (DE1585:14644). In emphasizing the fear they felt the court noted, "they were concerned ... felt their license plates were being filmed, so they were concerned ... this is a concern they have." (DE1585:14645-14646).

None of this would have occurred had the court granted a change of venue and taken remedial steps to insure a fair proceeding.

4. The Prosecution Took Advantage of the Hostile Climate and Publicity to Encourage Conviction on the Basis of the "Us" Against "Them" Atmosphere and Further Prejudiced the Defense in its Final Argument to the Jury, Creating a "Tandem Effect" of Unacceptable Bias.

At trial, the prosecution reiterated the "Spies Among Us" theme in its opening statement: **"[T]hey** go about their daily tasks **among us here**"; "**they** worked as spies here in **our community"**; **"their** operations from the community in which they lived, this **community**"; "as a Cuban intelligence officer **in this community**." (DE1476:1573,1576,1580,1592). And from the prosecution's closing**:**

> "Look at all of these defendants for what they truly are, they are spies **bent on the destruction of the United States of America**."

(DE1583:14535-36).

> "That was not a Cuban spy **sent to the United States to destroy the United States**."

(DE1583:14481).

> "These are four people **bent on destroying the United States**, paid for by the American taxpayer."

(DE1583:14482)

The prejudicial effect of these inflammatory remarks was incalculable. See Williams 613 F.2d 573 (reversing denial of venue change when prosecution's arguments draw upon preexisting bias, triggering further prejudice, and creating an unacceptable "tandem effect").

5. The Jury's Rapid Verdict Suggests a Response to Pervasive Community Prejudice Surrounding the Trial.

At the close of the evidence, the government, in its extraordinary Emergency Petition for Writ of Prohibition, sought this Court's assistance in avoiding the instructions proposed by the district court on the most serious offense charged, Count III's conspiracy to commit murder, as well as on Count I.

In its Emergency Petition, the government asserted that the district court's instruction, "in light of the evidence presented in this trial," constituted "an **insurmountable hurdle** for the United States" and "**will result in the failure of the prosecution**" on the most serious count. Emergency Petition at 21. The jury nonetheless returned its verdict of guilty on all 26 charges in the indictment without asking a single question of the court, or a review of a single witness out of the 76 who testified.

As in Pamplin, where the Court found the jury's selection of punishment reflective of its bias, so too did the manner in which the verdicts were arrived at here, following the prosecution's confession of insufficient proof, manifest the prejudice extant in the community and the jury.

II.

THE GOVERNMENT FAILED TO PROVE A CONSPIRACY TO TRANSMIT NATIONAL DEFENSE INFORMATION TO CUBA.

Count II charged that defendants Guerrero, Hernandez, and Medina conspired to "obtain and report to ... Cuba information...relating to the national defense of the United States" in violation of 18 U.S.C. § 794(c).

Section 794(c) proscribes only conspiracies to transmit a specific class of information, "national defense information." Stressing the limited, precise nature of the statute's scope, Judge Learned Hand, discussing the predecessor statute, emphasized in U.S. v. Heine, 151 F.2d 813, 815 (2d Cir. 1945): "The section is aimed at the substance of the proscribed information."

In Heine, a German agent for the Third Reich was convicted of conspiring to transmit national defense information, consisting of information about aircraft production "so that the Reich should be advised of our defense in the event of war." 151 F.2d at 815. The Second Circuit reversed. Although the war-related information transmitted to Germany might appear to be national defense information, Judge Hand explained the information "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and

collate it" and thus could not meet the statutory test for closely-held defense information. Id. at 815.

Most recently, the Fourth Circuit, reviewing the cases decided since Heine, concluded:

> These decisions stand for the simple proposition that an inference of bad faith on the part of the accused may not be justified where the "national defense information" alleged in the charge is generally accessible to the public.

U.S. v. Squillacote, 221 F.3d 542 (4th Cir. 2000). See also U.S. v. Truong, 629F 2d 908, 918 n.9 (4th Cir. 1980) ("transmission of publicly available information did not fall within the statutory prohibition").[28]

At trial, the government's proof established Guerrero and his co-defendants engaged in concerted activity as Cuban agents and transmitted information to Cuba. However, no substantial evidence was produced that the information they agreed to transmit was "national defense information."

Guerrero was part of a group of Cuban agents who were assigned the task of infiltrating, monitoring and disrupting the work of certain Cuban exiles who had

[28] Similarly, here the jury was instructed: "where sources of information are lawfully available to the public and the United States made no effort to guard such information the information itself does not relate to the national defense." (DE1584:14595).

formed clandestine groups in southern Florida. For over four decades these groups had launched numerous armed attacks in the U.S. and Cuba, including dozens of well-documented bombings, arsons, and murders, and other acts of provocation directed against civilian targets designed to increase tensions between the U.S. and Cuba, all for the purpose of undermining and overthrowing the Cuban government. (DE1493:3958;DE1499:4935-4938).[29] These activities were described by the government's counterintelligence expert as "anti-Castro terrorism." (DE1492:3896).

Fearing the "counterrevolutionaries" responsible for these campaigns would either launch an attack from the Boca Chica Naval Air Station in Key West (the military base closest to Cuba), or use the base's U.S. military assets to support their own attack, Cuba assigned Guerrero to monitor the operational situation on the base by observing the comings and goings of aircraft and other indicia of a military buildup, DE1494:4235,4239;DE1499:4863-64, including the presence of "counterrevolutionaries." He was also asked to clip local newspapers and forward information about the base to Cuba.[30]

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[29] In a pleading, the government admitted "the American Government is worried about seeing itself dragged into a confrontation caused by a little game being played by the inciters in Miami." (DE1499:4984).

[30] One of the key sources of his information was the Southernmost Flyer, a publication by the Naval Air Station's Public Affairs Section.

Unlike other cases prosecuted under § 794, the jury did not have to speculate on the nature of the information the defendants sought to obtain and transmit. Copies of Guerrero's reports to Cuba, and his evaluations and instructions, were seized when the defendants were arrested. (DE1494:4153). These materials totaled over 20,000 pages. (DE1486:3092). In no other known espionage case had the government come into possession of such a large trove of correspondence between an agent and his government. (DE1498:4804).

In opening statements, the prosecution advertised these documents as "the clearest, most powerful window into [the defendants'] intentions and goals in this entire case." (DE1476:1588). But far from demonstrating an agreement to transmit "national defense information," they showed their goal was "open source intelligence," information generally available to the public. While some documents may have included isolated comments about more closely-held information, the evidence as a whole clearly failed to establish an agreement to obtain "national defense information."

Three FBI witnesses, including a counter-intelligence expert, testified about the seized documents. Their testimony plus the introduced documents comprised the bulk of the government's case. Despite their qualifications, none of these witnesses explicitly offered an opinion that the information transmitted to Cuba

was national defense information. In fact, on rebuttal, the government produced General James R. Clapper, Jr., USAF (ret.), an expert on intelligence matters (formerly the director of the Defense Intelligence Agency, and one of the highest ranking members of the intelligence community), who specifically **ruled it out**.

After acknowledging he had reviewed the entire collection of reports and correspondence that constituted the government's case, General Clapper was asked, on cross examination, the following question:

Q. In your review of these documents, did you come across any secret **national defense information** that was transmitted. Did you come across any?

A. **Not that I recognized, no.**
(DE1574:13340) (emphasis added).

Earlier, in opening statements, the lead prosecutor conceded that:

> One thing you will not see, ladies and gentlemen, is any classified document that these defendants were able to gather and pass through to the Government of Cuba.

(DE1476:1588).[31]

Guerrero's reports to Cuba and his instructions and the evaluations of his work from Cuba were at the core of the government's case. They establish he was

[31] In fact, the former FBI counterintelligence expert testified that the words "classified information" nowhere appear in the documents. (DE1492:3852).

assigned the mission of visually observing public activities at the base and clipping the local news media.[32]

Guerrero began his employment at Boca Chica in 1993. For five years, he worked essentially as a manual laborer and then a sheet-metal worker until his arrest on September 12, 1998. (DE1495:4319).

The Naval Air Station is primarily a training facility, open to the public, and unfenced except for the airfield area which, despite its fencing, allows recreational use, such as jogging on and around the runways during lunch hours. (DE1494:4222). There is no guard posted at its entrance. (DE1531:7910,7918). Every member of the public has access to the base. The base commander confirmed "all you had to do to get on the base was to drive on." (DE1531:7967). As a public relations gesture, the base provided a viewing deck from which the public was invited to watch and photograph aircraft on the runways.

[32] Former Cuban agent Santos, who testified as a government witness, stated that his mission at Southcom, a command and control structure in Miami, similarly involved observing activities and "changes in the operational situation of Southcom and its surrounding area." (DE1493:3974). He specifically denied receiving any instructions to obtain or transmit secret or classified information. (DE1488:3348). The information he gathered was entirely of a public nature. Nonetheless, he was commended by his Cuban superiors for providing "very useful and valuable" information. (DE1488:3305). Guerrero was also commended for essentially reporting the same.

(DE1531:7915). The philosophy behind the open-base policy and low level of security was described by the base commander:

> We want somebody to come on board and take a look at the base and find out how the taxpayer dollars are being spent.

(DE1531:7955).

Guerrero's reports contained information any member of the public could have gathered or any reporter could have written about in the local press. He did not have security clearance for access to classified information and was never instructed to apply for one. (DE1573:13228;DE1499:4856,4856,4887). In fact, he was specifically told by his superiors to "take advantage of open public activities without violating any security measures." (DE1499:4890). Throughout his employment, his superiors understood he had "no access to restricted centers and installations," (DE1499:4871), and acknowledged "he does not have possibilities of obtaining information about military plans except for those that might be detected by signs." (DE1499:4862). They nonetheless neither criticized him for these limitations, nor directed him to overcome them.

The best evidence of the conspiracy–the seized documents–showed the precise information Guerrero was to obtain and report. He was repeatedly instructed to monitor deployment of aircraft and personnel through **visual**

observation and report any sudden buildup of forces that might indicate an imminent attack on Cuba. (DE1494:4234,4235,4239,4240).

His specific instructions were: " to detect indications present in the NAS, that indicate preparation and/or implementation of action against Cuba."[33] (DE1499:4860; Defense Exhibit 51).

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[33] He was specifically directed to observe the following signs that might appear on the base, based upon what was publicly-observable during the military buildup on Haiti:

- increase of physical training of military personnel;
- unusual visit by senior military officers and movement of executive aviation;
- increase in relocation to base of resources for aerial combat and exploration, from distant locations, and others; unusual with regard to training on this base;
- increased movement of resources for logistic support;
- installation of new centers for communications, command and control for direction and exploration;
- increase of coast guard and combat naval units;
- presence of aircraft carrier in the area;
- arrival of forces and resources of other kinds of armed forces, such as marine infantry, army, etc.;
- reinforcement of security measures in the environs and access routes, increase in post guards, increased controls;
- greater control over entrance and exit of personnel at N.A.S. and units;
- increased measures to prevent movement of military personnel around the city, to guarantee their prompt recall; cancellation of passes and vacations;
- unusual movement of security personnel and officers;
-information by public sources to create a favorable environment for the act of aggression (if not censored).

Defense Exhibit 40 (DA-101).

Those who evaluated his work were clear that he "[d]oes not have possibilities of detecting the plans and implementation of visits and activities of the main military leaders which may influence the decision-making of an act of aggression, except those that might be published, or that he would be able to see." (DE1499:4862).

Government witnesses also quoted from portions of the documents noting specific instructions consistent with his mission of obtaining publicly-observable information:

> "List any changes that arises in the situation and operational regiments in the installation that could indicate a heightening of the level of combat preparedness and readiness."

(DE1494:4244).

> "Discover and timely report indications that denote the preparation of military aggression against our country."

(DE1494:4239).

On October 25, 1996, in the midst of the alleged conspiracy period, Guerrero was evaluated for having fulfilled his assigned tasks, which involved, "visual observation and public source information." (DE1494:4240).

When asked to summarize the thrust of Guerrero's reports to Cuba, the key government witness to review the documents replied, "the reporting of the coming and goings of aircraft and military units." (DE1495:4289).

According to General Clapper, the expert witness called by the government during rebuttal, monitoring aircraft by direct observation is "open source intelligence," not espionage. (DE1573:13156,13207).[34]

Guerrero's other main task was to clip the local press reports on the operational situation on the base, such as the arrival and departure of military units. (DE1495:4289). This also constituted "open source" intelligence and not espionage. (DE1573:13207).

At trial, the government succeeded in placing before the jury several discrete and isolated references in Guerrero's reports to activities occurring in several buildings he described as being, or having the capacity to become, "top secret." It was also clear that everyone on the base, including civilian employees without clearances, knew, just from observing the fencing and lighting configuration, that these buildings were involved in restricted or classified activities. (DE1562:11866,11854;DE1555:11210). Whatever the designation and purpose of these buildings, they were not the focus of Guerrero's activities and reports, but

[34] A former FBI counterintelligence agent acknowledged that Cuban intelligence seeks, amongst others, public source information in what he described as "their vacuum cleaner effect." (DE1492:3800). In describing the role of Cuban agents who functioned on the same level as Guerrero, he asserted they work in a "support capacity ... providing information based on his position ... his access." (DE1491:3720). As previously pointed out, both his position and access limited his intelligence gathering to information available to the public.

were fortuitous isolated incidents duly passed on in a steady stream of routine reports concerning the visible operational situation on the base.

Thus, there was no evidence Guerrero was instructed to enter any of those buildings, nor that he was told to obtain information they housed. During the entire alleged conspiracy, he was never found in any unauthorized or restricted areas, apart from his work. None of his co-workers, extensively interviewed by the FBI, were called upon to testify about any inappropriate inquiries or behavior on his part. In fact, it was the defense who called two fellow employees to testify.

Guerrero worked on renovation of one of the buildings, "A1125" or the "hot pad", **before** it was put to use storing classified documents. (DE1531:7926). At no time during his nine hours of work related to installing air-conditioning ducts in the building, (DE156211870,11881), was classified information stored there. (DE1531:7956;7945-49,7979;DE1562:11861,11869). According to the base commander, no classified activity occurred in the building during the renovation. (DE1531:7977). Guerrero's reports did not indicate what kind of activity was scheduled to go on in the building. (DE1499:4854,4893). Once it was completed and began functioning as a classified information storage center, he was never inside, and never attempted to enter. Nor was he ever instructed to enter. (DE1492:3831).

At trial, reference was made to his having given his recollection of the building's floor-plan to a Co-defendant. (DE1495:4278). The floor-plan itself could hardly qualify as "national defense information," as it was maintained in a public area where non-cleared workers had ready access. (DE1562:11883,11867,11872). Indeed, Guerrero's trial attorney obtained a copy of it from the Navy by merely requesting one in the mail. (DE1562:11867; Def. Ex. 57). Moreover, the building's security features were visually observable by all non-cleared civilian workers, and obviously not sensitive or restricted, as the base commander and a co-worker testified at great length and detail about those measures in open court. (DE1531:7927-28;DE1562:11878).[35]

Other buildings Guerrero casually mentioned in one of his reports on the base's operational situation were located in the Truman annex and were enclosed by fencing. (DE1531:7958). These buildings housed tenants such as the Joint Interagency Task Force, which was assigned to drug interdiction. (DE1531:7983). Anyone on the base could see that the fencing and lighting arrangement around these buildings indicated restricted or protected activity. Once again, there is no evidence Guerrero was ever instructed to gain access to these buildings. Rather,

[35] General Wilhelm, former commanding general of Southcom, a high-level command facility, openly described Southcom's internal security measures during his direct testimony. (DE1558:11512-13). The internal security measures were neither protected nor closely-held.

consistent with his mission to observe air traffic, he was instructed to find a better job closer to the runways. (DE1495:4367). Nor did he ever report on any of the information inside the buildings except, on one occasion, to mention that building 290 had a central office in Room 200 with 12 computer workstations. (DE1531:7996-97;DE1562:11872).[36] No evidence was produced that he was ever in that building, much less near the computers or with access to secret materials. (DE1499:4858). Recognizing his limited access to these buildings, his superiors wrote

> He does not have many possibilities in the areas where the offices of the Joint Inter-Agency Task Force East are located, which [is] in charge of the fight against drug trafficking in the region, since it's a closed area with little access. He could obtain something from public sources or comments that might be made. (He has sent something about the O.S. of the buildings.)

(Def. Ex. 51 at 9).

While the government sought to protect information in the computers, it made no effort to protect the physical layout of areas housing the computers. In any event, comments about these building were merely offhand observations

[36] Government expert witness Stuart Hoyt, a 30-year veteran FBI counterintelligence agent, acknowledged that the locations of offices within buildings, and the buildings themselves, are customarily not protected through classification. (DE1492:3866).

concerning the operational status of the base, all of which was publicly-observable information.

The other incidental observations presented as evidence of an intention to obtain "national defense information" concerned an unlocked, unguarded mobile mini control tower–a small, modified trailer made up mostly of plexiglass and commonly referred to as the "greenhouse" because of its appearance. (DE1531:7950;DE1562:11850). It functioned as a land-based communication unit for aircraft practicing carrier-type landings on the base, and housed a tier of radios that could be seen by anyone standing next to it. (DE1562:11850). The radios were used to communicate to pilots whenever the unit was towed to the end of the runway to function as a control tower. If the greenhouse contained sensitive information, it would have required not just a lock but an escort for anyone working on it (DE1562:11852). Neither, however, was required. Guerrero, who was assigned to repair a door on the unit, described the unit in a report as well as the readily-observable frequencies, two of which the base commander claimed had some use in time of emergencies or combat. (DE1495:4387;DE1562:11851).[37]

[37] Actually, it was the U.S. attorney who suggested this use in a leading question, to which the witness merely agreed. (DE1531:7950). Later, the witness' testimony reflected a much different function for those frequencies: "we shift to those so the public doesn't know we are using those frequencies to talk on, communicate on." (DE1531:7951). Admiral Eugene Carroll, called as an expert witness by the defense, referred to these frequencies as

This commander, who had been transferred from the base a year earlier (DE1531:7964), contended the greenhouse was stored in a restricted area and was therefore protected. However, an employee working at the base at the time of Guerrero's observations, testified the mobile "greenhouse" was also kept in a public parking lot where anyone could have access to it and observe the radio frequencies. (DE1562:11853). The frequencies were thus not protected or closely-held information. At stated in Squillacote, 221 F.3d at 578, "the secrecy of the information is determined by the government's actions." Here, the government maintained the information in a public area to which anyone who came on the base who was "willing to take pains to find it,"see Heine 151 F.2d at 815, would have ready access. The government's expert witness, General Clapper, who viewed Guerrero's reports, including the report on the frequencies, confirmed they were **not** national defense information. (DE1574:13340).

In reversing a conspiracy conviction of three men accused of attempting to send sensitive and banned technology to the Soviet Union during the Cold War, the former Fifth Circuit, explained:

> It is not enough for it merely to establish a climate of activity that reeks of something foul. The law requires proof that the members of the conspiracy knowingly and intentionally sought to advance an

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"clear transmissions" and added "anybody with a Radio Shack scanner, if they didn't have the publication which says what frequencies are being used, can scan and find them." (DE1533:8244).

> illegal objective. Involvement by individuals in a clandestine agreement that appears suspicious may be ill advised or even morally reprehensible, but, without proof of an illegal aim, it is not criminal.

U.S. v. Wieschenberg 604 F.2d 326, 332 (5th Cir. 1979).[38]

In a further warning about the risky "tendency" associated with conspiracy prosecutions where "some questionable acts" took place, but did not reflect an alleged conspiratorial agreement, the Third Circuit wrote, reversing a conspiracy conviction in a different context:

> There is some tendency in conspiracy cases for finders-of-fact to believe that a defendant must have been involved in the conspiracy, once evidence has been presented of some questionable acts of the prosecution contends are but an extension of the large conspiracy.

U.S. v. Samuels,741 F.2d 570, 574 (3d Cir. 1984).

Guerrero, in reporting on the operational situation on the base, merely included in his comprehensive description the designation of buildings housing "top secret" activity, or sent publicly-available information. While the inclusion of isolated, peripheral observations may constitute "questionable acts," it clearly did not define the nature of the agreement between the three defendants named in Count II.

[38] See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as precedent decisions of former Fifth Circuit).

Here, as in Wieschenberg, 604 F.2d at 331 (5th Cir. 1979), "the jury did not have to rely solely on inferences or circumstantial proof as is frequently the case, in determining what went on within the alleged conspiracy," because it had the "clearest, most powerful window into their intentions and goals." (DE1476:1588). The bulk of the documents established it was the defendants' plan to engage in open-source intelligence-gathering, no matter how "suspicious and unsavory" that might have appeared to a jury. The Wieschenberg court concluded "juries 'must not be permitted to convict on suspicion and innuendo.'" 604 F.2d at 335 (quoting U.S. v. Palacios, 556 F.2d 1359, 1365 (5th Cir. 1977)); accord U.S. v. Fernandez, 892 F.2d 976, 986 (11th Cir. 1990) (activities merely "susceptible of either an illegal or legal interpretation ... cannot be used to establish a conspiracy).

Finally, a similar set of contextual facts and circumstances which drove the analysis for the Fifth Circuit in Wieschenberg was present here. The Wieschenberg court pointed to the prejudicial effect of pretrial publicity which mischaracterized that Miami trial as the "Missile Spy Case." The prejudice generated by such publicity affected a fair weighing of the evidence, reasonable use of inferences, and a correct application of the facts to the law. Here, as well, the overwhelming bias against these Cuban agents in Miami prevented a careful and delicate weighing of the evidence and drawing the necessary distinction

between the lawful and unlawful objectives of what was, in effect, a foreign-intelligence operation. Granted, the defendants were agents, but they were not spies in the sense of seeking information closely held or protected by the government. Those jurors who openly expressed enmity toward Cuba undoubtedly had difficulty in drawing that fine distinction. However, the law requires no less and the conviction should be vacated.

III.

THE DISTRICT COURT ERRED IN DENYING A DEFENSE THEORY INSTRUCTION ON NECESSITY AND JUSTIFICATION.

To obtain a defense-theory instruction, the defendant's "threshold burden is extremely low: The defendant is entitled to have presented instructions relating to a theory of defense for which there is **any** foundation in the evidence. ... In deciding whether a defendant has met her burden, the court is obliged to view the evidence in the **light most favorable to the accused**." U.S. v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995) (emphasis added).

The evidence, viewed in the light most favorable to the defendants, showed they engaged in acts for which they were surveilled and ultimately arrested by the government only as a last-resort means of impeding continuing actions and

threats–by virulently anti-Castro Cuban-exile groups in south Florida–that had terrorized Cuba.

As the defense explained in requesting the necessity or "choice of evils" instruction:

> We have introduced 35 documents that reflect a long history of acts of violence, acts of aggression against Cuba by persons and organizations in the United States. ... There is before this Court evidence of a very long and continuous history of violent acts against Cuba and Cuban citizens from people in this community.
>
> * * *
>
> [N]or do we have to show we have a great deal of evidence to support each of these elements. ... [W]hat Bailey requires and every other case that deals with this issue require[s], is that there be some evidence as to each of these elements of the defense ... so the requested instruction can be given.

DE1576:13562, 13567 (citing U.S. v. Bailey, 444 U.S. 394 (1980)); see DE1197:6 (defense theory instruction).

Viewing the evidence in a defense-favorable light, Cuba was terrorized by years of bombings, murders, and sabotage–both in Cuba and on Cuban officials, aircraft, vessels, and instrumentalities outside Cuba–committed by anti-Castro Cuban-exile groups.[39] After unsuccessfully seeking U.S. law enforcement action, Cuba proceeded on its own, sending these defendants to infiltrate–as only Cuban nationals could–the Cuban-exile groups associated with the violence.

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[39] See also Brief of Ruben Campa, 11th Cir. No. 03-11087-B (filed 4/8/03) at 5-19 (detailing trial evidence of terrorist attacks on Cuba by south Florida groups).

The defense of necessity, which has well-founded common-law roots, see Bailey, 444 U.S. at 408, 415; LaFave and Scott, Substantive Criminal Law § 5.4 (1986), has four elements: "(1) the defendant was faced with the choice of evils and he chose the lesser evil; (2) he acted to prevent imminent harm to himself and/or others; (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) ... there were no legal alternatives to violating the law." DE1197:6.

The government did not dispute that this was a correct statement of the law. See DE1576:13576. Instead, the government disputed whether the facts warranted the defense, arguing that: Cuba did not face an "emergency" of terror; exclusively relying on U.S. law enforcement would not have been "futile,"; not everything defendants did in the U.S. can be explained by reference to such a terrorism emergency; and the terror threat did not continue throughout the entire period of defendants' actions. DE1576:13577,13579,13582.

Notwithstanding the U.S. government's view on these factual disputes, the factual issue–whether Cuba was justified in meeting a terror emergency through limited self-help measures–should have gone to the jury along with the defense argument that Cuba's response met the four-element test. The U.S. government's view should not have precluded submission of the defense.

In Bailey, the defendants escaped from federal custody to avoid a brutal, life-threatening situation, and were at large for over three months. 444 U.S. at 396, 398. The Supreme Court held it was possible to satisfy the immediacy requirement even though the immediacy of the threats ceased once the prisoners escaped. Id. at 412.

Here, the defendants were entitled to argue their actions in south Florida were justified because the continuing terrorism threat had not abated. See U.S. v. Blanco, 754 F.2d 940, 943 (11th Cir. 1985) ("Duress can also exist when the threat of immediate, serious harm is directed at a third party."); Pollgreen v. Morris, 770 F.2d 1536, 1545 (11th Cir. 1985) (same).

U.S. v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985), is distinguishable. In Montgomery, this Court held nuclear disarmament protestors were not entitled to a necessity defense to charges that they destroyed public property to publicize their political message. Id. This Court held that the "Defendants could not hold a reasonable belief that a direct consequence of their actions would be nuclear disarmament." Id.

Under Montgomery, mere moral necessity, absent an imminent harm and "a reasonable belief [by defendants] that a direct consequence of their actions would" be avoiding the harm, is insufficient. But here, the evidence went beyond moral necessity to a proven human tragedy of murder and terror which defendants'

actions, taken only after years of requests to law enforcement proved unavailing, were designed to interrupt. The jury's historic role was usurped here and the case should be remanded for a new trial. See U.S. v. Newcomb, 6 F.3d 1129, 1137 (6th Cir. 1993) (jury should decide if defendant had reasonable alternatives and their plausibility under the facts).

IV.

THE DISTRICT COURT ERRONEOUSLY APPLIED A SPECIAL-SKILL ENHANCEMENT UNDER U.S.S.G. § 3B1.3.

At sentencing, the district court erred on two grounds: (1) Guerrero did not use the type of special skill to which U.S.S.G. § 3B1.3 refers; and (2) Guerrero skills did not significantly facilitate his commission of the offense.

The district court found Guerrero received Cuban government-training to operate as a secret, illegal intelligence officer. The district court and concluded because Guerrero was a trained Cuban agent, his participation in a conspiracy to conduct such work in the U.S. warranted a special-skill enhancement. DE1460:15. However, § 3B1.3 refers not to training designed for the specific purpose of committing the type of offenses at issue, such as Guerrero's receiving training as a Cuban agent, but rather to legitimate skills–such as those of a doctor, lawyer, chemist, or pilot–that are wrongly used for illegal and improper. See U.S. v. Young, 932 F.2d 1510, 1513 (D.C. Cir. 1991) (§ 3B1.3 refers to "legitimate pre-existing skills ... that may be abused to facilitate the commission of a crime"); U.S.

v. Connell, 960 F.2d 191, 198 (1st Cir. 1992) (same); U.S. v. Mainerd, 5 F.3d 404, 406 (9th Cir. 1993) (same); U.S. v. Burt, 134 F.3d 999-1000 (10th Cir. 1998).

Here, however, where Guerrero's training was merely as a Cuban agent; such training is essentially indistinguishable from the related conspiratorial conduct. Under the First, Fourth, Ninth, and D.C. Circuits' holdings, Guerrero's use of such training to commit the acts alleged does not warrant sentence enhancement.

Apart from inapplicability of the "spying" skill to the enhancement of an espionage conspiracy sentence, there also was no "significant facilitati[on]" of the offense due to Guerrero's having received a certificate for coursework in civil aviation engineering. DE1460:15. Guerrero worked in manual-labor jobs at Boca Chica, first as a ditch-digger and later as a sheet-metal worker. He took note of what he observed and reported to his superiors, but was not required to employ any special engineering skills for this low-level "eyes-and-ears-open" function.

The district court relied on the term "mental blueprint" in reference to Guerrero's observations of Building A1125 at Boca Chica as reflecting engineering skill. DE1460:15-16. The record does not support an engineering connection to Guerrero's observations of the building's basic interior features, such as a door, hallway, room, and the like. No engineering skills were used in making or remembering such observations. The special-skill enhancement is inappropriate because no significant offense-facilitation resulted. See U.S. v. Hickman, 991 F.2d

1110, 1112 (3d Cir. 1993) (in mail fraud case, where building contractor made no direct use of construction skill in perpetrating fraud through his construction company, no § 3B1.3 enhancement warranted). Because Guerrero neither possessed special skills under the guideline nor abused any skill to significantly facilitate the offense, the enhancement should be vacated.

CONCLUSION

Appellant requests that the Court vacate his convictions or, alternatively, reverse and remand for a new trial.

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