NO. 01-17176-B
NO. 03-11087-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

REPLY BRIEF OF THE APPELLANT ANTONIO GUERRERO

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

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THE "SPECIAL FACTS" OF THE MIAMI VENUE, DEMONSTRATING PERVASIVE PRE-EXISTING COMMUNITY BIAS REGARDING CUBA–AS WAS THEREAFTER INVOKED BY THE GOVERNMENT ITSELF TO OBTAIN A CHANGE OF VENUE–GIVE RISE TO A PRESUMPTION OF PREJUDICE THAT, UNDER CIRCUIT PRECEDENT, COMPELS REVERSAL.

Failing to acknowledge the established principle that appellate review of denial of a requested transfer of venue "must turn on the special facts of each case," Marshall v. United States, 360 U.S. 310, 312 (1959), the Government avoids any discussion of the "special facts" of the Miami venue, as amply set forth in Guerrero's brief. See Br. at 9-22.[1] The year after trial in this case, however, the Government did address those "special facts," in Ramirez v. Ashcroft, No. 01-4835-Civ-HUCK (S.D. Fla.), when it sought a venue change on the express basis of "deep-seated prejudices" rendering Miami so hostile to anyone insufficiently

[1] Despite challenging the defense expert's community survey–with a 15 year-old affidavit addressing his methodology in an unrelated case–the Government has not factually disputed the survey's results, which demonstrate pervasive bias throughout Miami. GovBrf:57. Accepting untested allegations of that inapposite affidavit, despite scores of recent news articles showing ingrained hostility toward these defendants, R4:586, the trial court denied the venue-transfer motion.

opposed to the Cuban regime–there, the U.S. Attorney General–that a fair trial was "virtually impossible." R15:1635:1-2.

Miami's "uncompromising hostility" toward Cuba and anyone associated with it, R15:1636:Ex.5:7, stamps that venue as a unique island of bias against these Appellants, particularly given the charges against them–which the government presented as representing an attack on the very community from which the jury was drawn. Moreover, the decades-long "state of war mentality," R15:1636:Ex.4:3, against the Cuban government is not confined to merely one segment of the Miami community; rather, it permeates the venue, and its mass media, as the Government pointed out in Ramirez.[2]

On appeal, as below, the prosecution–invoking an incorrect legal standard–attempts to focus on the feasibility of identifying jurors who displayed no personal bias during voir dire.[3] The Government urges this Court to abandon the established law of this Circuit with respect to cases where pervasive community

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[2] The Government has not disputed the facts, drawn from a multitude of sources, concerning the nature of the Miami venue, confirmed by experts Moran, Perez, and Brennan. R15:1636.

[3] The prosecution acknowledges that almost half (47%) of the 180 prospective jurors questioned were excused for cause, and that 40% of those jurors were excused not simply because of something they read in the newspaper, but because of fears for their safety, fears of rioting, awareness of a local consensus of hostility towards Cuba, and a fixed opinion prejudicial to the defendants.

bias creates a poisoned "climate of opinion" against a particular type of defendant, and attempts, instead, to direct this Court's attention to the voir dire transcript, a practice specifically rejected in Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966), as inadequate for cases of pervasive, pre-existing community bias.

Review of the voir dire does not dissipate the inappropriateness of venue in Miami and ignores the time-honored requirement that federal courts preserve, at a minimum, an appearance of fairness. Indeed, the Government's assertion that the trial was a "model of probity," GovBrf:58, is belied by the record, which reflects a press conference on the opening day of trial attended by a number of prospective jurors, who were seen being interviewed on camera; the unexplained appearance of a news clipping in the jury assembly room; demonstrations at defense counsel's office; intimidation of the jurors by the constant presence of television cameras, months into the trial and even during deliberations; and a verbal assault on defense counsel by a prominent witness, who questioned his patriotism. See R15:1636.

Contrary to the Government's suggestion, the jury's deliberations for less than five days–after a six-month trial–to resolve the numerous charges in this case did not dispel community bias. Further, the "analytic aids" the jury requested during deliberations, GovBrf:59, consisted of the indictment, a chart listing the defendants' names, and the exhibit list. R126:14640. The jury did not request to

see a single one of the hundreds of exhibits nor to rehear any testimony of the nearly 80 witnesses.

The Government argues that the evidence, viewed favorably to the prosecution, would allow a reasonable jury to convict–a proposition we contest, but the very question of how the evidence is viewed is at issue where the jury has a predisposition to view facts in the light of a community permeated by virulent prejudice. For that reason, this Circuit has held the requirement of a fair trial in a fair tribunal must be upheld regardless of the weight of the evidence, which, in any event, the government does not suggest was overwhelming here. See Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985) ("Fair trial in a fair tribunal is a basic requirement of due process... [T]his is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.") (emphasis added) (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961).

The Government confuses the standard for evaluating a motion to change venue under Fed.R.Crim.P. 21(a) with that applicable to habeas review of state-court decisions. District judges within this Circuit have explained this difference, see, e.g., United States v. Moody, 762 F. Supp. 1485 (N.D. Ga. 1991); United States v. Tokars, 839 F. Supp. 1578 (N.D. Ga. 1993), aff'd, 95 F.3d 1520 (11th Cir. 1996), applying the "more exacting fairness standard" inherent in the district

court's supervisory power to change venue. In contrast, the district court here failed even to address its supervisory power, relying instead on the strict constitutional standard applicable in habeas review. See Ross v. Harper, 716 F.2d 1528 (11th Cir.1983). The habeas standard imposed by the district court required that defendants prove it was "virtually impossible" to secure a fair trial–a standard even the Government does not now defend. R4:586:4.

The Government also bases its argument on cases declining to reverse convictions for failure to change venue because of the absence of "actual prejudice"–cases which involved not pre-existing community bias, as here, but pretrial publicity. Those cases, as explained in Pamplin v. Mason, 364 F.2d at 5, are inappropriate guides to venue issues involving pre-existing community bias, because they focus on defects in the voir dire process, rather than the "special fact" of pervasive community bias arising prior to jury empanelment.[4] The central concern here is not whether voir dire reveals "actual" bias in the selected jury, but whether prejudice must be "presumed" from the nature and extent of longstanding and pervasive community bias.[5]

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[4] The court below refused to engage in an "actual bias" analysis, erroneously deeming it "not yet ripe" until bias was manifested at trial. See GovBrf:App.2 n.2.

[5] The Government's reliance on United States v. Alvarez, 755 F.2d 830, 859 (11th Cir. 1985), United States v. Yousef, 327 F.3d 4 (2d Cir. 2003), and

The Government's attempt to distinguish Ramirez rests on the premise that the context of Ramirez–tangentially involving the Elian Gonzalez controversy–was irrelevant to this case. However, the Government ignores its own participation in constructing the voir dire questionnaire in the instant case that included specific questions about the Elian controversy. That the "Elian" episode served as a rallying point for anti-Cuban sentiment in Miami, convulsing the venue just five months prior to commencement of trial, and eighteen months before trial in Ramirez, is undisputed. See GovBrf:App.4B ("Community Impact Questions":Question 17)[6].

United States v. Rewald, 889 F.2d 836 (9th Cir. 1989), see GovBrf:52, 54, is misplaced. Each of these cases involved challenges based on actual, not presumed bias, based solely on pretrial publicity. Invoking Alvarez to argue that the defense's use of 17, rather than all 18, peremptory challenges indicates no actual prejudice, the Government omits that the Alvarez court, after stressing the defendants' "completely failed" to show either actual or presumed prejudice from mere exposure to publicity, noted, in passing, an inference of no prejudice in the failure to use peremptory challenges. Id. Yousef likewise finds only that failure to renew the venue motion suggested no actual prejudice from pretrial publicity; and Rewald merely reinforces the "actual bias" standard in pretrial publicity cases. This is not a pretrial publicity case, despite the government's determined intent to make it appear so.

[6] Oral argument on the venue motion took place within one week of Elian Gonzalez's return to Cuba and ended with a plea from defense counsel:

> That incident, that case shows the true colors of this community better than anything else and if we didn't have that episode over the last year or eight months ... we might not be able to see this issue as clearly as we are able to see it right now but what has happened over the last eight months shows what this community is all about, that is why we can't do it here.

Further, the Government fails to explain its reasons for opposing the defense request for the logistically-feasible, within-district transfer to a location less than 30 miles away. The ready availability of an alternative suitable venue is a critical factor in determining the propriety of the trial court's discretion in denying venue. See, e.g., Tokars, 839 F.Supp. at 1584 (identifying "availability of a relatively convenient suitable alternative venue that was...not unduly inconvenient for the large number of trial witnesses...and will not unduly burden the parties with additional expense" as factor favoring transfer). In fact, during oral argument, the Government did not suggest holding trial in Ft. Lauderdale–a move frequently made within the district for lesser reasons–would create any burden. The within-district transfer to Broward County would not have incurred extra costs or delay, given that it was a convenient location for all parties. Nor was the courtroom to which the case was assigned in Miami appropriate to a trial of this dimension since it was in the midst of a renovation, reducing seating capacity to just 32 seats in four shortened rows, more than half of which were assigned to victims' families, law

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R4:75. The district court failed to even mention the Elian controversy in its 17-page opinion. See GovBrf:App.2. Eighteen months later, in the diluted wake of that episode, the Government won a change of venue in Ramirez–a civil case–when a federal judge in the same venue concluded community sentiment concerning Elian Gonzalez precluded a fair trial.

enforcement, and the press. It was in such a condensed space that the intense contest below unfolded for over half a year.

A.

This case does not present an issue of the constitutional minimum, but of the proper interpretation of Rule 21(a).

The Government ignores clear language in Pamplin, 364 F.2d at 4-5, and the teachings of Marshall, 360 U.S. at 312, as interpreted in United States v. Herring, 568 F.2d 1099, 1105 (5th Cir. 1978), regarding the distinct constitutional and supervisory standards that require district courts to adopt a "more exacting standard" in deciding venue change motions than in reviewing state court proceedings for constitutional error. See United States v. Williams, 523 F.2d 1203, 1209, n.11 (5th Cir. 1975); United States v. Tokars, 839 F.Supp. at 1581; United States v. Marcelo, 280 F.Supp. 510, 513 (E.D.La. 1968); United States v. Moody, 762 F.Supp. at 1490.

Rather than defend the district court's interpretation of Rule 21(a) to require that defendants prove a fair trial "virtually impossible," the Government notes the "heavy burden" placed on petitioners claiming presumed prejudice on habeas review, citing Coleman v. Kemp, 778 F.2d 1487,1489,1537 (11th Cir. 1985). Like the other cases relied on by the Government in its brief discussion of the proper

standard for deciding change-of-venue motions, Coleman involved not an interpretation of Rule 21(a) or an exercise of the district court's supervisory powers, but federal habeas review. Of equal significance is that Coleman did not involve a claim, such as here, of pre-existing bias in the community, but rather one about prejudicial pretrial publicity.

The Government argues that this Circuit has declined to adopt a standard for reviewing pretrial publicity under Rule 21(a) that is any more stringent than that imposed on federal habeas review, relying, as did the district court, on United States v. Capo, 595 F.2d 1086, 1092 n. 6 (5th Cir. 1979). It then argues that the same constitutional minimum applied in habeas review of pretrial publicity should be used to assess pre-existing community bias under Rule 21(a). This argument suffers from two flaws: first, Capo does not establish the federal habeas standard as the correct yardstick for Rule 21(a); and second, Capo does not establish any standard for decisions involving pre-existing community bias. Capo did not establish a "virtually impossible" standard for Rule 21(a) at all. Rather, it used that language to characterize the standard used by the Supreme Court in cases assessing claims that prejudicial publicity had violated a defendant's constitutional rights, all of which were state cases reviewed on habeas review.

When the Court in Capo turned to the case before it, it closely examined the special facts of that venue to evaluate the impact of publicity on the local community. After noting that (1) the publicity was about an event that occurred 100 miles from the venue, and therefore did not implicate local passion, and (2) had subsided in the year between its occurrence and the trial, it failed to find that "degree of pervasive community prejudice which would warrant a presumption of jury prejudice." 595 F.2d at 1091. Under such circumstances, the Court declined to adopt the ABA "Fair Trial, Free Press" standards, which reject the need for a showing of actual prejudice when a "prospective juror . . . has been exposed" to publicity. Id. at 1092 n.6.[7]

The Government's out-of-context excerpts from federal habeas cases–Coleman, 778 F.2d 1487; Ross v. Harper, 716 F.2d 1528; Knight v. Dugger, 863 F.2d 705 (11th Cir. 1989); Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985)–or federal cases which, like Capo, characterize their holdings in a habeas context, serve only to blur the critical distinction between the standard applicable to the exercise of supervisory power under Rule 21(a) and that representing a

[7] Standard 8-3.3 abolishes the requirement of actual prejudice whenever a substantial likelihood of prejudice from "dissemination of potentially prejudicial material" is shown, rejects treating the issue as cured by an otherwise acceptable panel, and specifies that failure to exercise all peremptory challenges is not a waiver. ABA Standards, Fair Trial, Free Press (1990).

constitutional minimum applicable on habeas review. Indeed, in Jordan, 763 F.2d at 1280 n.17, this Court specifically acknowledged the significance of this difference.

This Court should reject the Government's position that Rule 21(a) means nothing more than conformance to a standard that could survive habeas review. As the Court in Marcelo observed, "[T]he rule is preventive. It is anticipatory. It is not solely curative as in a post-conviction constitutional attack." 280 F. Supp. at 513 (emphasis added). It is beyond cavil that all courts are bound by the constitutional minimum. The district court's interpretation, echoed here by the prosecution, would entirely nullify Rule 21(a).

B.

Controlling caselaw recognizes that pervasive pre-existing community prejudice is more insidious, and must be treated differently, than mere exposure to prejudicial publicity.

Acknowledging that "appellants' presumptive prejudice claim focuses on pervasive community bias," the Government nevertheless argues "the pretrial publicity in this case falls far short" of the standard cited by Capo. GovBrf:55 (emphasis added). Crucially, the Government remains silent with regard to the "pervasive community bias" standard applied unequivocally in Pamplin. See also Jordan, 763 F.2d at 1280.

Having invoked Pamplin in support of its position in Ramirez, the Government cannot properly, rationally, or ethically argue here that Miami is merely an "extremely heterogeneous, diverse, and politically non-monolithic" community, exempt from pervasive community bias, which–as Pamplin recognizes–creates a presumption of prejudice. And, while the Government repeats its attacks on the value of expert opinion in general and specifically here,[8] it does not argue that the bias identified by defendants does not exist or was unlikely to affect their trial.

None of the cases cited by the Government calls into question the test articulated in Pamplin and invoked by the Government in Ramirez for judging pre-existing community bias. Indeed, in Jordan, the Court affirmed a decision to transfer venue because pretrial publicity did not stand alone, but was "coupled with inherent community prejudice" involving race and economic dependence upon employment at the prison where the events occurred. 763 F.2d at 1266. The Jordan Court specifically considered the significance of the "long history of racial turbulence" in the community and the impact of the issue of race in the trial itself

[8] Nor does the Government defend the district court's violation of the ex parte mandate of the Criminal Justice Act, or its failure to reveal past and ongoing conflicts with defense expert Moran.

to determine that such a venue was inappropriate, notwithstanding selection of twelve persons who promised an attempt at fairness.

The Appellants here, as in Jordan, have consistently maintained that while pretrial publicity was highly prejudicial,[9] "we do not assert that pretrial publicity ... is the basis for [the change of venue motion]. Rather, the source of prejudice is the sentiment in the community . . . toward the Castro government. Virulent anti-Castro sentiment is a dominant value in this community and has been for four decades." R2: 321:3,5 (emphasis added).

The media reports were not, as the district court opined, significant merely because they exposed potential jurors to information about the case, but rather because they illustrated the inflamed community sentiment, to which the prosecution repeatedly appealed, not only at trial, R124:14482 (prosecution characterizes defendants as Cuban spies "in our community," bent on "destroying the United States" and "paid for by the American taxpayer"), but in pre-trial press statements which were made the subject of sanctions by the district court. As the district court properly concluded, a variety of alternative measures may be taken to

[9] In addition to headlines about "Spies Among Us" and reports about codefendants' guilty pleas, headlined "confessed spies," there were reports of unrelated arrests of Cuban spies, numerous reports about violent local reaction to the Elian controversy, and front-page headlines alleging Cuban agents were responsible for drug smuggling, and torturing POWs in Vietnam.

insulate jurors from the effects of pretrial publicity. However, no instruction has been devised to keep the kind of pre-existing community prejudice that permeated Miami out of the jurors' minds. It simply was not fair to ask the jurors in this case to do that.

As Pamplin and Jordan make clear, this Circuit has articulated specific standards to deal with the particular danger to fair trial rights posed by a local "climate of opinion" hostile to a defendant because of his race or religious, cultural or political beliefs. Unlike pretrial publicity, these factors are more difficult to detect on voir dire, less amenable to prophylactic and remedial measures, and have a far more insidious impact on the deliberative process–and on the reality and appearance of fairness. This is especially true where, as here, the jury was called upon to draw inferences from circumstantial evidence concerning the alleged unlawful object of the conspiracy.

In addition, when the threat derives from publicity, district courts must balance rights in conflict: not only do the press and the public have First Amendment rights of access to information about the trial, but publicity also serves defendants' Sixth Amendment rights to a public trial. Prejudice is not presumed from the fact that the venire may be well-informed; only actual bias threatens fair trial rights. When, by contrast, the threat stems from a culture in which national

origin or ideology is the source of hostility to minority views or persons, there is no countervailing legitimate interest to protect, and both trial and appellate courts must take appropriate "strong measures" to ensure that the balance is never "weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

It is well-settled that, notwithstanding that a suitable number of jurors can be found who may sincerely believe they can remain unaffected by the dominant community view, where pre-existing community hostility is at issue, it is "the feeling in the community rather than the transcript of the voir dire" that determines the propriety of transferring the trial to a venue that does not harbor community sentiment hostile to the defendants. Pamplin, 364 F.2d at 8 (emphasis added). Once such a hostile atmosphere is established, the law presumes prejudice from such an "outside influence," much as when a community becomes so saturated with sensationalistic or negative publicity that it is obvious that a fair trial cannot be held. 364 F.2d at 4-5.

In community bias cases, the issue for the reviewing court is not whether the jury was "actually biased," as shown by the voir dire transcript, but whether the record shows the existence of the kind of community hostility that requires the district court to presume bias. The voir dire record may supplement,[10] but cannot

[10] See R26:945,1070,1018,1057,1059,1073,1074,1121 (prospective jurors expressed fear for personal safety and economic viability if they

supplant, evidence of "the feeling in the community" as evidence of community bias.

An "actual bias" analysis is typically the second step in a pretrial publicity claim. See United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975) ("evidence of pervasive community prejudice dispenses with the requirement that actual jury prejudice be shown."). If a venue change is denied because the court initially determines that publicity does not rise to a level so as to create a presumption of prejudice, the court proceeds to voir dire. See, e.g., Capo, 595 F.2d at 1090 (declaring that once "prejudice is presumed... there is no further duty to establish actual bias"). The results may then be analyzed to determine the degree to which the venue is saturated by the publicity, and the impact it has made on the minds of jurors. Thus, the long-established law is that once a hostile climate is established, prejudice is presumed.

Here, while the Government disputes the extent of transcript expressions of actual bias by the jurors, that is beside the point. Because there is no dispute as to the existence of "a community with sentiment so poisoned against [the defendants]

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did not return guilty verdicts demanded by popular sentiment, as well as post-Elian fears of riots and "mob mentality").

as to impeach the indifference of jurors who displayed no animus of their own," Murphy v. Florida, 421 U.S. 794, 803 (1975),[11] the convictions must be reversed.

II.

THE RECORD, VIEWED AS A WHOLE, ESTABLISHES NO MORE THAN GUERRERO'S INVOLVEMENT IN OBTAINING PUBLICLY-AVAILABLE, OPEN-SOURCE INFORMATION, AND THUS IS INSUFFICIENT TO SUSTAIN HIS CONVICTION FOR CONSPIRACY TO COMMIT ESPIONAGE.

Although the Government argued at trial that the more than 20,000 pages seized from the defendants are "the clearest, most powerful window into the defendants' intentions and goals in this entire case," R29:1588, it fails on appeal to fairly describe the material in those documents to show Guerrero's actual "intentions and goals." Much of the Government's brief is devoted to establishing the relationship between the Cuban government and the defendants–a relationship conceded below and in Guerrero's brief. The Government fails to address convincingly the central issue before this Court: whether the defendant's objective was to gather and transmit U.S. government national defense information, or,

[11] Murphy, relied on by the district court and the prosecution, involved review of a state conviction for [actual] bias caused by pretrial publicity; the publicity subsided seven months before trial.

instead, "public," unsecured information, through visual observation and open sources.[12]

In this case–unlike any other reported espionage conspiracy prosecution–undisputed evidence was presented of the precise written directives to the defendant concerning his mission:

> HE IS CLEAR ON WHAT HIS PRINCIPAL MISSION IS: TO DETECT INDICATIONS PRESENT IN THE NAS, THAT INDICATE PREPARATION AND/OR IMPLEMENTATION OF AN ACTION AGAINST CUBA, WHICH HE SHOULD REPORT ON URGENTLY, AMONG THEM, CHANGES IN THE O.S., INCREASES IN COMPLEMENT AND RESOURCES, REINFORCEMENTS IN SECURITY MEASURES, ETC.
>
> DOES 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 WITHOUT KNOWING WHAT THEY ARE IN RESPONSE TO.

DEX51:DG141e:10 (attached as Appendix 1) (emphasis added).

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[12] Not all intelligence-gathering is espionage. The Government's brief notes that Cuba used its agents in non-classified roles to gather public information. GovBrf:5. The gathering of public information does not violate 18 U.S.C. § 794, which protects only national defense information, narrowly defined as guarded or closely-held information of the United States. See United States v. Squillacote, 221 F.3d 542, 576 (4th Cir. 2000).

The same document recognized that Guerrero was to complete his tasks "according to the possibilities for visual observation and public sources." DEX51:DG141e:20 (emphasis added). He was instructed to "take advantage of open public activities, anytime that it is justified, and without violating any security measures." DEX51:DG141e:24.

Guerrero was told to report "on the comings and goings of aircraft and military units," R48:4289, on a base where the commander invited the public to observe air traffic from a deck constructed for that purpose near the runway. R74:7915. Like the public, Guerrero watched aircraft take off and land, but he also reported what he saw to Cuba. He was never directed to seek employment in buildings on the base related to top secret activity; rather, he was instructed to get "any job that is connected with the runways," from which he would view the aircraft take-offs and landings. GX:DL102:5. These runways were also open to view by joggers. R47:4244. It was through such observations, as well as clippings from local newspapers, that Guerrero was to accomplish his mission, by "list(ing) any change that arises in the situation and operational requirements in those installations that could indicate a heightening of the level of combat preparedness and readiness." Id. His superiors were well aware that "he does not have possibilities of obtaining information about military plans except for those that might be detected by signs." R52:4862. Instead, he was to "take advantage of the open public activities any

time that it is justified and without violating any security measures." GX:DG106:24-25; R47:4245.

Although the Government possessed virtually the entire correspondence between the defendants and Cuba–covering a period of nearly five years–no instructions were ever given to acquire secret military information. In fact, Guerrero was specifically told not to violate "security measures." R47:4245. The seizure of 20,000 pages of documents failed to produce even a single page of classified material. See R29:1588 (prosecutor concedes "you will not see, ladies and gentlemen ... any classified document that these defendants were able to gather and pass through to the government of Cuba").

In United States v. Soblen, 301 F.2d 236, 239 (2d Cir. 1962), a Soviet espionage case, at issue was whether or not defendant sought open-source intelligence or, instead, closely-held information. The conviction was upheld where information recovered from the defendant was "classified as secret." Id. By contrast, here, in a startling admission by the Government's chief expert, General James Clapper, not only was there no classified information, but also no sign of national defense information in the thousands of documents seized. R115:13340.

Absent any testimony or other evidence that the group of which Guerrero was a part (the "Wasp Network") sought to collect or transmit U.S. military secrets, the

Government relies almost exclusively on attenuated inferences from the seized documents.[13]

Mere selective references to the record, as the Government attempts here, cannot sustain a conspiracy conviction. Rather, the reviewing court "views the record as a whole" in determining sufficiency of the evidence. United States v. Adames, 878 F.2d 1374 (11th Cir. 1989); United States v. Bethea, 672 F.2d 407 (5th Cir. 1982). Adherence to this standard is of particular importance where, as here, "the defense raised serious questions" about what inferences may be drawn from the circumstantial evidence presented. United States v. Burns, 597 F.2d 939, 946 (5th Cir. 1979).

The record, viewed as a whole, demonstrates Guerrero's actions consisted of no more than transmitting military information derived from visual observation and public sources at a public-access military base, acts which, at worst, constitute transmission of "open-source intelligence"–not espionage. This conclusion is supported by the opinion expressed at trial by the Government's chief expert

[13] Joseph Santos testified as a prosecution witness that he, like Guerrero, was never instructed to collect or transmit secret military information to Cuba. R46:3974. In United States v. Abel, 258 F. 2d 485 (2nd Cir. 1958), the conviction was sustained although no classified information was found, but crucial supporting evidence–consisting of a coconspirator's testimony concerning the group's goal of obtaining secret information–was presented. Santos' testimony here was to the contrary.

witness, General Clapper, formerly Director of the Defense Intelligence Agency of the U.S. Department of Defense. R115:13340.

Reversing an espionage conviction based on military information drawn from a public source, Judge Learned Hand, speaking for the court in United States v. Heine, 151 F. 2d 813, 816 (2d Cir. 1940), observed:

There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information ... procured by a magazine through interviews with officers.

Id. at 816 (emphasis added).

The Naval Air Station at Key West allowed "access to all comers." Indeed, the public was affirmatively courted by the NAS base commander to enter the unguarded, unfenced facility. R74:7955. Undoubtedly there were guarded secrets on the base. However, the Government offered no evidence that Guerrero, in five years on the base, ever attempted to collect or transmit such information or was ever asked to. [14]

[14] In press releases following Guerrero's arrest, the government acknowledged "there are no indications that they had access to classified documents or access to sensitive areas." Washington Post (Sept. 15, 1998). The FBI reported that the operations of the base were "never compromised." Miami Herald (Sept. 16, 1998).

Without even acknowledging these unambiguous statements–which, as in Burns, 597 F.2d at 946–"raised serious questions" about the inferences drawn from its circumstantial evidence–the Government instead focuses on isolated fragments in the record, taking them wholly out of context. Thus, random notes of Guerrero which were, in any event, unprotected information available to anyone "willing to take the pains to find it, sift it, and collate it," Heine, 151 F.2d at 815, are insufficient to sustain his conviction. Given the presence of abundant and unambiguous evidence–including the "Principal Mission" statement–which demonstrates the limited nature of Guerrero's objective and activities, the Government's attempt at a weakly-inferential, selective reading of the record is both improper and insufficient.

While these selective references reflect Guerrero's transmission of information concerning U.S. military operations, none of the transmitted material constitutes national defense information. Military, or non-public, information that is not shielded from the public and protected by government action is not "national defense information." See Squillacote, 221 F.3d at 576 (as to unguarded information, "the information itself does not relate to the national defense") (emphasis added). Following Squillacote, the trial court instructed the jury using that identical language. Nevertheless, throughout its brief, the Government refers inaptly not to "national defense information" but rather "non-public information,"

misstating its burden of proof on this essential element. GB:32 ("government was required to prove only that appellants agreed to transmit to Cuba non-public information related to the national defense"); see also GB:14,30,33,36.

The Government's mischaracterization of its burden of proof ignores the critical requirement that the information must be "guarded"–a requirement wholly unmet here. Moreover, such an unprecedented enlargement of the narrowly-defined statutory concept of "national defense information" as proposed by the Government would raise serious First Amendment and overbreadth concerns. See United States v. Morison, 844 F 2d 1057, 1076 (4th Cir. 1988); Heine, 151 F.2d 815.

The Government rests its argument on five additional circumstances: the mission of alleged co-conspirator Santos to observe SouthCom facilities in Miami; Guerrero's reports about a proposed future use of Building A1125 to store top-secret information; Guerrero's relationships with fellow workers; the see-through "Greenhouse" parked in a public area; and the arrival of an intelligence unit. GovBrf:17-20,33-35,36,37. None of these suffices to establish Guerrero's involvement in an espionage conspiracy.

First, while Cuban intelligence was apparently concerned about contacts between the Cuban American community in Miami and Southcom and wished Santos to monitor those contacts, R96:11197-98, the Government concedes Santos

was never in the SouthCom building and never sought a security clearance. According to Major General Edward Atkeson, a defense intelligence expert, Santos, a non-English speaking Cuban, would have had "virtually zero" chances of getting employment inside the facility, nor was he tasked to obtain sensitive information. R103:11860; R96:11110. Further, Santos himself testified that his mission had nothing to do with obtaining military secrets. R41:3348. All his reports reflect open-source intelligence reporting. R46:3974; GX:DAV101:7. That he was working for Cuban intelligence, like Guerrero, does not, prove espionage occurred or was planned. Rather, the substance of the information sought and the steps taken to protect it are the crux of espionage prosecutions. Heine, 151 F.2d at 815.

Second, Guerrero's mere alerting Cuba to structures on the base to be used in the future for "top secret" functions does not reflect a conspiracy to commit espionage. As the prosecution's FBI expert attested at trial, uses to which a building is put are so obvious to the viewing public that the government does not customarily classify them. R45:3866; R46:4035 (Lieutenant Colonel Christopher Winne, Southcom intelligence expert, acknowledges that when the government operates a secured facility, like Southcom, it is willing to "announce to the world that it is a secured facility."). Nor are photographs of the building classified. R46:4061. What is protected, rather, is the content of the information to be placed

in the building. With respect to the latter protected material, the Government failed to prove Guerrero ever sought to obtain such information or was ever instructed to do so.

To the contrary, the future use of Building A1125 was publicly known; base personnel spoke openly of its top secret function. See R103:11866 (Guerrero's co-worker, Tim Carey, testifies that the "talk around the base" was that Building A1125 was going to be "high security"); R103:11866 (Director of Public Works testifies that "[W]e kind of all knew what it was for.").

Indeed, any news reporter could have written a story asserting that Building A1125 was to be used for top secret purposes without fear of prosecution. See Heine, 151 F.2d at 815. And the public had open access to roadways on the base, as attested to by Captain Hutton, the base commander. R74:7955. The restricted nature of secure buildings was obvious to anyone viewing the fencing and lighting surrounding those structures. As Captain Hutton testified, noting the lights and warning signs, "[W]e wanted to make sure that everybody understood it is a restricted area." R74:7928-29.

Crucially, there was no suggestion Guerrero was ever in such buildings when classified documents were stored, R74:7926, nor that he was ever directed to enter the buildings, ever sought to obtain clearances to do so, or otherwise attempted to gain such entry.

Guerrero's transmission of a rough-sketch blueprint for Building A-1125's layout adds no weight to the Government's case; that information was publicly-available and not restricted. Guerrero's attorney received a copy through the mail, and non-cleared workers in the building had ready access to it. R103:11883. Even those employed by food distributors outside the base had ready access to the floor plan. R103:11873. Additionally, security features in the building were easily observable by non-cleared construction workers employed there. In fact, during her testimony in open court, Base Commander Hutton revealed additional security measures not previously reported; clearly, such features were not guarded information. R747928.

Third, Guerrero's relationships with fellow workers at the Naval Air Station, where he labored for five years before his arrest, reflect no untoward behavior. During his tenure at NAS, Guerrero performed several jobs and encountered dozens of fellow employees. A well-educated, personable U.S. citizen, he befriended many co-workers, some of whom testified at trial. None testified that he asked them to secure information, or do anything that would violate the law, their duties, or security procedures at the naval base; nor did the prosecution offer any witnesses to the contrary.

Fourth, radio frequencies noted by the Government were maintained in a transparent mobile unit–referred to as the "Greenhouse" because of its openness–

that was unguarded and unattended in a public parking lot, according to testimony by base employees. R103:11850, 11860. Those frequencies were not classified, as the Government has conceded. Id. Guerrero's co-worker, Tim Carey, was not escorted when he worked on the Greenhouse, indicating it contained no protected information. R103:11860. Although the prior base commander suggested precautions taken to secure the unit, she left the base prior to Guerrero's observations and did not dispute the unit's subsequent openness. Further, absent circumstances reflecting civil radio frequencies were protected, they cannot be considered national defense information.

Fifth, the Government refers to a single line–taken out of context and appearing on just one of 1600 pages of documents–which purports to indicate Guerrero gave Cuba early information concerning arrival of an intelligence aircraft unit. GX:DL103. There is no evidence that the source of Guerrero's information was anything other than visual observation or other "open source" information. Evidence established Guerrero's reporting on arrival and departure of military units came from visual observation or public sources, such as the base newspaper, The Southernmost Flier. Further, arrival of aircraft involved in intelligence missions was preceded by arrival of ground units, such as "elements of communications command control," which were plainly-marked and visible to anyone on the base. GX:DL103. Finally, the record confirms Guerrero's visual

observation of "land resources" on the open base enabled him to forecast arrival of intelligence units. GX:DG123:17.

The foregoing circumstances fail to establish proof meeting the substantial evidence test. See United States v. Macko, 994 F.2d 1526, 1532 (11th Cir. 1993) (conviction "must be supported by substantial evidence"). In Bethea, 672 F.2d at 418, the Court examined whether circumstantial evidence established the unlawful object of the alleged conspiracy. The Court explained that not only must circumstantial evidence be reasonable; it must be substantial.[15]

The conviction below cannot survive the three-tiered review that must be undertaken in conspiracy cases submitted on circumstantial evidence: the evidence must be substantial, Macko, 994 F.2d at 1532, must satisfy the proof-beyond-a-reasonable-doubt standard, taking into account defense evidence, Adames, 878 F.2d at 1377; and must establish inferences sufficient to convince a reasonably-minded jury, Burns, 597 F.2d at 941. Because the government's case founders at each level of this test, the conviction below must be set aside.

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[15] This Court's deference to jury determinations is not limitless; in examining the reasonableness of inferences from circumstantial evidence, consideration of the context of the trial and whether the jury can be deemed "reasonably-minded" is appropriate. United States v. Burns, 597 F.2d at 941. As in United States v. Wieschenberg, 604 F.2d 326 (5th Cir. 1979), the inferences the jury drew here were organically related to the prevailing attitudes toward Cuba in the venue.

III.

THE DISTRICT COURT ERRED IN IMPOSING A SPECIAL-SKILLS ENHANCEMENT.

In addressing Guerrero's skill-enhancement argument, Gov't Br. at 77-78, the government: (1) offers no explanation how a "skill" possessed by Guerrero significantly facilitated the specific offense of conviction–a conspiracy to transmit national defense information; (2) fails to explain how any skill possessed by Guerrero allowed him to do more than an ordinary laborer could do, in that attentiveness to detail is a character trait, rather than a "special skill" under U.S.S.G. § 3B1.3; and (3) fails to address Guerrero's citation of authority holding that education specifically directed to the criminal undertaking and primarily useful for such illegal conduct–here, spy training by Cuba–is not viewed as an abuse of a pre-existing legitimate skill. United States 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"); United States v. Connell, 960 F.2d 191, 198 (1st Cir. 1992) (same); United States v. Mainerd, 5 F.3d 404, 406 (9th Cir. 1993) (same); United States v. Burt, 134 F.3d 999-1000 (10th Cir. 1998). Thus, the government offers no explanation how training to be an intelligence officer qualifies for a skills enhancement for working as an intelligence officer.

The government fails to specifically link any skill to the offense other than to say his being a capable educated man gave him greater value to Cuba in information-gathering. The government claims, without record support, that being a civil engineer got him the job as a "spy." The holding in United States v. Malgoza, 2 F.3d 1107, 1110 (11th Cir. 1993), affirming a finding of extensive radio-operation experience as a special skill facilitating essential radio communications for a drug-smuggling operation has facial relevance, but reveals the inapplicability of the enhancement here. Radio skills were also possessed by Guerrero, but the government would not suggest a radio-skills enhancement here, where Cuba provided him such training especially for conducting concealed communications. Likewise, Cuba's provision of civil engineering training to Guererro was training that employed in no more than an ordinary fashion that neither significantly enhanced any espionage nor constituted abuse of a skill.

CONCLUSION

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

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