

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23966-Civ-LENARD
(Crim. Case No. 98-721-Cr-LENARD)

ANTONIO GUERRERO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

**MEMORANDUM IN SUPPORT OF MOTION TO
VACATE, SET ASIDE, OR CORRECT JUDGMENT
AND SENTENCE UNDER 28 U.S.C. § 2255**

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MEMORANDUM IN SUPPORT OF 28 U.S.C. § 2255 MOTION

Movant Antonio Guerrero, through counsel, respectfully submits this memorandum of law in support of his motion to vacate conviction and sentence under 28 U.S.C. § 2255:

I. The Movant Was Denied Due Process of Law Because the Government Surreptitiously Funded a Highly Inculpatory, Anti-cuba Propaganda Campaign in the Community in Which the Defendants Were Tried.

The movant has alleged a distinct, fundamental violation of the premises of a fair trial where: (A) the government secretly paid highly influential journalists in the trial venue—indeed, journalists selected based on their proven effectiveness in communicating the desired message—to deliver, in the guise of objective journalism, a message supporting components of the government’s trial arguments; (B) government-funded media inculcated the defendants by, among other things, purporting to link the defendants to myriad Cuban conspiracies—fictitious and otherwise—and highlighting and/or misrepresenting purported evidence against the defendants; (C) government-funded media published prejudicial evidence that the district court ruled was inadmissible and addressed jury selection issues, including strategic avoidance of cause challenges; (D) the government’s propaganda campaign was both prejudicial and inflammatory; (E) the government’s misconduct undermined the fundamental structure of petitioner’s trial and petitioner’s convictions must thus be vacated; and (F) the government’s misconduct created an unconstitutional probability that the petitioner was deprived of a fair trial.

A. Facts.

Before trial, the movant sought a change of venue, arguing that it would be impossible to receive a fair trial in a community so saturated with persistent anti-Cuba media coverage and bias, including as to the underlying prosecution. The government vigorously opposed the motion, and the Court denied it. Unsurprisingly, the defendants were subjected to speculative and damning commentary in the media prior to and throughout their trial; journalists proclaimed the defendants’ guilt in newspaper articles and over the airwaves and linked the defendants to purported Cuban plots as horrific as they were fictional. The most inculpatory evidence presented at trial saturated the media, cast in the most inculpatory light. Indeed, even evidence excluded at trial made its way to the community through the media. For example, in a piece run during the trial entitled “Cuban

Spies,” a news station broadcast a Brothers to the Rescue video the defendants successfully excluded in court earlier that day. Videotape: *Noticias 23* (WLTW-23 Local News Jan.31; Feb. 1, 2001).

More than five years after their convictions, the defendants learned that the government was not merely a beneficiary of the media assault, but also one of its underwriters and that the government had supported a climate in which recruitment and payment of journalists was premised on conveying the very message that the defendants had identified as prejudicial in the venue. The Miami Herald first self-reported that the U.S. government had been paying at least ten Miami journalists—regarded as “among the most popular in South Florida”—to advance an anti-Cuba propaganda campaign. Oscar Corral, *10 Miami Journalists Take U.S. Pay*, Miami Herald, Sept. 8, 2006, at A1. Since the Reagan Administration, the U.S. government has dedicated significant resources to the promotion of democracy in Cuba, most prominently through USAID, the National Endowment for Democracy, and the Office of Cuba Broadcasting. Kirsten Lundberg, *When the Story is Us*, The Journalism Knight Case Studies Initiative, Columbia Univ., 2000 at 6-7.

The Office of Cuba Broadcasting is an administrative and marketing arm of the Broadcasting Board of Governors (“the Board”), the government agency in charge of all non-military international broadcasting sponsored by the U.S. government, including Radio Free Europe and Voice of America. The Office of Cuba Broadcasting is responsible for directing the operations of Radio and TV Martí, both of which broadcast anti-Castro programming to Cuba and parts of the U.S., including South Florida. During the defendants’ trials, the U.S. government was funneling \$37 million to Radio/TV Martí each year, on top of numerous other anti-Castro efforts. *Id.* at 7.

Corral’s article revealed that prominent Miami journalists were paid through Radio and TV Martí and were frequently featured by those programs as purportedly independent journalists delivering anti-Castro messages. *Id.* at 9. Many Miami journalists have been vocal in their disapproval of these arrangements. Two of Corral’s ethics experts compared the Radio/TV Martí payments to those made to TV personality Armstrong Williams to promote No Child Left Behind, payments reviled by the public as government manipulation and bribery of the media. *Id.* As Tom Fielder, then-Executive Editor and Vice-President of The Miami Herald said, these journalists were “in effect giving a contribution in kind, [their] time and [their] expertise, to carry out the mission of the U.S. government, a propaganda mission.” *Id.* at 11. Fielder’s analysis was well warranted, as the journalists’ endorsement of the government’s anti-Castro message on Radio/TV Martí soon

bled over into their everyday reporting on the trial and the government's Cuba policy in general.

Prominent and widely-read Miami journalists were on the government payroll in the months leading up to and throughout the defendants' trial, and the stories they published asserted the defendants' guilt and/or linked the defendants to events and speculation beyond the evidence adduced at trial. In addition to their widespread reporting on inadmissible speculation and accusation, many journalists on the government payroll published fear-mongering anti-Castro and anti-Cuba pieces during the period of trial. As Corral lamented, they "'just kind of fell in line with everything the federal government did.'" *Id.* (internal citation omitted). Despite adamant efforts by the defendants, much remains unknown about the full extent of the government's media program. Yet the information thus far uncovered shows the defendants faced a government-stacked deck.

For example, Ariel Remos of *Diario las Americas* earned around \$25,000 from the U.S. government, approximately \$5,000 of which was paid during the defendants' trial. Letter from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Gloria La Riva, Nat'l Comm. to Free the Cuban Five (Mar. 11, 2009). In the months leading up to the trial, Remos published a story quoting a BTTR "legal representative" at length, characterizing that person as someone with "extensive experience as a criminalist and prosecutor." Ariel Remos, *Castro Could be Arrested and Prosecuted in the United States*, *Diario las Americas*, Nov. 28, 1999, at 14B. Remos's expert "opine[d] that" there "'exist[ed] elements of fact and law to prosecute dictator Fidel Castro in the U.S., and to find him guilty of murder of the 4 members of [BTTR] who died in the downing of two small aircraft by MIGs of the Castro regime.'" *Id.* He further stated: "'At this very moment there are conspirators accused but not being prosecuted for the downing of the small aircraft of [BTTR] including Fidel Castro.'"

During the defendants' trial, Remos published three additional stories. The first contended that "Cuba represents a continuous challenge to the security of the US," and it reported the "surpris[e]" of a commentator "at the little attention that had been given to . . . the most important fact, among those which came up in the trial of the Cuban spies of the 'Wasp Network,'" namely, "the order of the Cuban intelligence service to one of its agents to find a place in south Florida to unload explosives and weapons," which, the article stressed, "could be chemical or bacteriological weapons." Ariel Remos, *Castro Represents a Continuous Challenge to the Security of the U.S.*, *Diario las Americas*, Jan. 16, 2001 at 1A. Three days later, he claimed that "[t]hrough the trial in

question it has not only become known that the Cuban regime planned to disembark arms and explosives on United States territory, but also planned the murder of prominent Cuban exiles because of their opposition to the regime.” Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, *Diario las Americas*, Jan. 19, 2001, at 1A. The “file of the trial of those from the ‘Red Wasp,’” the story went on, “talks about a ‘Parallel Operation’ whose objective is to ‘develop a series of actions’ against the CIA. *Id.* “Other Cuban exiles,” he maintained, “discuss[ed] Cuban ‘orders to kill in the USA and in other countries.’” *Id.* (citation omitted). The article dramatically concluded: “It’s not anything new, like having available four or five specialized men to murder in Latin America those that are believed to have betrayed guerilla movements.” The article also attributes to Cuban agents, among other crimes committed in the south of Florida, the murder of a Mr. Torriente and of an astrologer and her husband who were killed when leaving a radio station that carried her program. *Id.*

A few weeks later Remos described a letter prosecution of Cuban political leaders, noting that it “in the upcoming trial of five Cuban officials in Florida, evidence has come forward that the murders were premeditated.” Ariel Remos, *Jeane Kirkpatrick Asks Ashcroft to Prosecute Cuban Officials for International Terrorism*, *Diario las Americas*, Feb. 27, 2001, at 1A. “As part of the upcoming trial of the five employees of the Castro government who spied in the United States for the Castro regime, referred to in the letter headed by Dr. Kirkpatrick, the recordings of the pilots who chased the two small aircraft have come to light again in an impressive way, where they are vociferously asking for permission to down them, and having obtained it, their vulgar exclamations of satisfaction with the consummated act, after having committed the murder.” *Id.*

Similarly, Wilfredo Cancio Isla, a Miami Herald reporter for *El Nuevo Herald*, earned approximately \$22,000 to promote the government’s message, including as to the specific allegations underlying the criminal case, approximately \$5,000 of which he received while the defendants were being tried. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). Isla attributed to an unnamed defector the claim that Cuba’s “Wasp network,” to which [some of the] defendants allegedly belonged, was “a part of the espionage work that was conceived to infiltrate the United States on a long-term basis,” along with the accusation that the Cuban government had Used hallucinogens to “modify the behavior” of agents. Wilfredo Cancio Isla, *Cuba Usó Alucigenos al Adiestrar á sus Espios*, *El Nuevo Herald*, June 4, 2001 at 1A. Isla also publicly advertised

information about the trial to which the jury was not privy. In one of his articles, he revealed that on April 18, 2001, the prosecution had sought to block another trip by the defense to Cuba to interview witnesses on the grounds that the Cuban government was somehow controlling the defendants' trial. Wilfred Cancio Isla, *La fiscalia teme que Cuba controle el juicio a espías*, El Nuevo Herald, Apr. 19, 2001, at 15A. The prosecution did indeed express such a concern, and the jury was not present at the discussion. Trial trans. at 11743.

The government enlisted the help of opinion writers. Most notably, Helen Ferre, the opinion page editor for *Diario las Americas*, earned at least \$5,800 in total from the U.S. government, nearly \$1,000 of which was paid to her during the defendants' trial. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). During trial, she published "The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.," in which she opined that "[a]nyone who says that Cuba does not represent a danger for the cause of world democracy certainly does not understand what the concept of danger entails in the case of Cuba, or deliberately wants to favor the totalitarian tyranny of Fidel Castro which has been enslaving the Cuban people for over forty-two years and which has discredited, also causing considerable harm, the United States of America." Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, *Diario las Americas*, Feb. 16, 2001, at 4A.

"The Fidel Castro dictatorship has been responsible for many serious problems, many tragedies," she went on, "not only for the United States but also for many countries of this Hemisphere and also of Africa, such as the case of Angola." *Id.* "The American taxpayer has had to spend astronomical amounts of millions of dollars because of the presence of Castro," she protested, and "many worthy American citizens have lost their lives because of the criminal whims of the Havana regime." *Id.* As an "example" of these "criminal whims," she stated that "on February 24th, Castro killed four Cuban Americans whose unarmed light planes were shot down while flying in international air space." *Id.*

The list of influential journalists on the government payroll goes on. For example, Enrique Encinosa, a popular radio host on Radio Mambí, has received over \$10,000 from the government since the start of the defendants' trial. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). And Carlos Alberto Montaner, a famous exiled Cuban author and journalist with a weekly column in *The Miami Herald*, has received over \$40,000 since the beginning of the trial. *Id.* Given the government's failure to make candid disclosures—despite its obligation to do so—the defendants

have no way of knowing where this list ends. Lest these few examples leave any doubt as to the impact of such coverage, the government itself described what was affirmatively at stake when it sought enforcement of a gag order for witnesses involved in the trial. On December 23, 2000, a Miami Herald article alleged that the FBI intercepted Cuban radio calls indicating that the Brothers to the Rescue plane would be shot down. Gail Epstein Nieves, *Messages may have warned of shoot-down*, The Miami Herald, Dec. 23, 2000 at 1A. The article contained comment by trial witness Richard Nuccio, the advisor on Cuba to President Clinton at the time of the shutdown, in which Nuccio expressed shock and fury that the FBI had not shared these interceptions with him. *Id.*

In its motion, the government decried the “supposed facts” alleged and the “one-sidedness of the commentary.” Gov’t Mot. To Enforce Directive as to Witness Comments to the News Media at 1-2, Dec. 26, 2000. The government disputed the facts contained in the article and complained that it had been “severely prejudiced” by the reporting. *Id.* Most importantly, however, the government’s motion intimated that something additional to jury bias was at stake, admitting that

[t]he jury in this trial has been strictly instructed not to read press accounts of the case, and there is no reason to believe that they have disregarded their instruction. Nonetheless, unbridled comment by persons who are designated witnesses in this matter, contrary to the Court’s clear directives, *poses risks to the process* that none of the parties should have to endure.

Id. at 3 (emphasis added). The government’s brief thus looked beyond the danger of jury bias to condemn a corruption in the trial process itself. Such a corruption actually materialized when the government poisoned the trial venue by paying Miami’s reporters to encourage anti-Cuba sentiment.

Once it came to light that the government had been paying prominent Miami journalists to participate in anti-Cuba reporting, the National Committee to Free the Cuban Five (“the Committee”) launched an impressive yet ultimately thwarted FOIA effort on behalf of the defendants. The resulting FOIA request process has been an arduous, unproductive and unending one. To date, the Broadcasting Board of Governors has refused or ignored most of the components of the FOIA requests made on behalf of the Cuban Five on January 23, 2009. In January of 2009, the Committee made a FOIA request to BBG seeking “data, contracts, memoranda, letters, alerts, correspondence, applications, bulletins, e-mails, electronic postings, reports, notes, images, balance sheets or any other materials” pertaining to “all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by U.S. media communications entities in television, newspaper, radio and Internet.” The request also sought “all records, including

correspondence and contracts, regarding the purpose of those grants, payments and/or transfers from the BBG and OCB to those individuals, organizations and vendors.” Letter from Gloria La Riva, Coordinator, Nat’l Comm. to Free the Cuban Five, to FOIA Officer, Broadcasting Bd. of Governors (Jan. 23, 2009). The request encompassed records from January 1, 1996 to the present. *Id.* In addition to the record request itself, the request sought a public interest waiver of the production fees, as well as expedited processing due to the urgent need to inform the public about possible unlawful government activity. *Id.* Finally, the Committee asked that the Board justify any denial with reference to the relevant section of the FOIA. *Id.* Realizing that the request might cover a considerable amount of information, the Committee asked the Board to prioritize the production of the contracts of 34 specific journalists, for which the Committee provided the journalist and vendor names, contract date, and contract number. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). The Board has since stubbornly refused to comply with even this preliminary request, sometimes in the form of an explicit denial, and sometimes by ignoring the request outright.

When the Board finally responded to the FOIA request on March 11, 2009, it incorrectly characterized the list of names as a “revised request” and even then only provided cursory information for 16 of the reporters. *Id.* The requested contracts were not produced. Though these records were produced for free, no mention was made of the fee waiver or expedition requests, and the Board informed the Committee that any further name searches would incur charges. *Id.* The Committee responded on March 19, 2009, writing to protest the fee imposition, incomplete processing of the request and failure to address the fee waiver request. Despite its objections to the handling of the request, the Committee offered to pay under protest for 34 contracts it requested. *See* Letter from Mara Verheyden-Hilliard, P’ship for Civil Justice Fund, to Martha Diaz-Ortiz, Broadcasting Bd. of Governors (Mar. 11, 2009). This time the Board outright ignored the correspondence—and a follow-up letter of March 31, 2009—breaching its obligation to respond to each FOIA request or appeal within 20 business days.

On May 4, 2009, the Committee submitted an appeal to the Access Appeal Committee (“AAC”) of the Board, reiterating each of its previous points and renewing its requests. Letter from Mara Verheyden-Hilliard, P’ship for Civil Justice Fund, to Timi Kenealy, Chief FOIA Officer, Broadcasting Bd. of Governors (May 4, 2009). Completely ignoring the Committee’s offer to pay provisionally for the information relating to the 34 reporters, a June 3, 2009 letter from the Board

announced a non-itemized estimate of \$31,192.80 to process the entire January 23 request. Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Mara Verheyden-Hilliard, P'ship for Civil Justice Fund (June 3, 2009). That same day, the AAC issued a decision denying the fee waiver and expedited processing request, having determined that disclosure was not in the public interest. Letter from Marie Lennon, Chair, Access Appeal Comm., Broadcasting Bd. of Governors, to Mara Verheyden-Hilliard, P'ship for Civil Justice Fund (June 3, 2009). This was the first direct response to the January 2009 fee waiver and expedition requests. Again, the AAC made no mention of the 34 requested contracts and failed to estimate the production cost. This despite that, because the information on the 16 reporters' contracts was compiled from a database, contracts identified by the Committee could easily have been identified and located through a similar search with nominal cost.

In its June 26, 2009 response, the Committee reiterated its request for the specific contracts and its offer to pay for them under protest. Letter from Carl Messineo, P'ship for Civil Justice Fund, to Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors (June 26, 2009). It also asked for clarification of the cost estimation and threatened litigation if this "final demand" was ignored. *Id.* Finally, the Committee even offered to reformulate its request in order to get timely production of the documents. *Id.* In a separate letter on the same day, the Committee issued a second appeal to the AAC which reiterated all of its past requests and asked for reconsideration of a fee waiver, this time as a "representative of the news media." Letter from Carl Messineo, P'ship for Civil Justice Fund, to Marie Lennon, Chair, Access Appeal Committee, Broadcasting Bd. of Governors (June 26, 2009). To this end, the Committee included extensive supplementary information supporting its designation as a media representative and set forth its plan to publish and disseminate the requested subject matter. *Id.*

The Board's July 15, 2009 response arbitrarily focused on the Committee's willingness to reformulate its FOIA request. Six months after the request, the Board changed its approach and asserted that it kept records for only three to six years, and that therefore the earlier dates contained in the original request would not produce results. Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Carl Messineo, P'ship for Civil Justice Fund (July 15, 2009). Similarly, the Board for the first time asserted that the parties to the requested contracts would have to be notified and given the opportunity to object to production, citing

Executive Order 12600. *Id.* The Board offered to reassess the cost after the scope was narrowed and recommended a “focus on exactly what [the Committee is] looking for.” *Id.* The Board’s recommendation included a suggestion that the Committee request all contracts for the period of the defendants’ trial which, of course, it had done a mere four days after its initial request in January, actually requesting *specific* contracts. Most galling, the AAC again denied the fee waiver request on July 27, 2009, *citing the Committee’s purported unwillingness to pay*. Letter from Marie Lennon, Chair, Access Appeal Committee, Broadcasting Bd. of Governors, to Carl Messineo, P’ship for Civil Justice Fund (July 27, 2009). As to the inordinate delay, the letter asserted wrongly that “[b]ecause [the Committee had] not agreed to pay the estimated costs at th[e] time, the time limits ha[d] been waived.” *Id.* Whether oversight or willful disregard of the Committee’s numerous offers to pay for production of the requested documents was to blame, the contention was without merit.

The Committee has since filed suit in the U.S. District Court for the District of Columbia to effect the production of its request. Additionally, the Committee submitted a newly fashioned two-pronged FOIA request (FOIA Requests “A” and “B”) on January 25, 2010 in an attempt to highlight and prioritize the requested contracts. The request also reiterated its fee waiver and expedition requests. Despite having encouraged the Committee to make a more specific request, the Board thwarted this simplification attempt by aggregating the two requests to “insure proper processing fees are paid.” Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Radhika Miller, P’ship for Civil Justice Fund (Feb. 5, 2010). The Board has since again denied the fee waiver requests, but on May 17, 2010 agreed to begin processing the prioritized request and to suspend payment requirements pending the outcome of the District Court ruling. Fax from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Radhika Miller, P’ship for Civil Justice Fund (Mar. 12, 2010); Fax from Marie S. Lennon, Chair, Access Appeal Comm., Broadcasting Bd. of Governors, to Radhika Miller (May 17, 2010).

B. Argument.

1. “One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence *produced in court* and under circumstances *assuring an accused all the safeguards of a fair procedure.*” *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring) (emphases added). The United States’ claim to this “rightful boast” is reflected in the Constitution’s Fourteenth Amendment, which guarantees a criminal

defendant due process of law. At its core, due process assures every defendant “his day in court.” *In re Oliver*, 333 U.S. 257, 273 (1948). It is a promise of deceptive simplicity, for the contours of the proverbial day in court “embod[y] the fundamental conceptions of justice which lie at the base of our civil and political institutions.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

Though these fundamental conceptions are numerous and diverse, they derive from the “theory of our system” of justice, that a criminal conviction “will be induced only by evidence and argument in open court, and not by any outside influence.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.); see *Estes v. Texas*, 281 U.S. 532, 540 (1965) (“Court proceedings” conducted “for the solemn purpose of endeavoring to ascertain the truth” are “the *sine qua non* of a fair trial.”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals.”). Implementing this theory “provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” *In re Winship*, 397 U.S. 358, 363 (1970) (internal quotation omitted). The myriad rights guaranteed a criminal defendant—e.g., the “right to examine the witnesses against him, to offer testimony, and to be represented by counsel,” *In re Oliver*, 333 U.S. at 273—flow from, and presuppose, realization of this promise. The very notion of a fair trial assumes convictions will rest solely upon its proceedings; protections accorded a defendant at trial are without meaning if he is also to face the government beyond the courtroom without those protections.

More fundamentally, we “protect and facilitate” the “high function” of the criminal trial from outside government influence, *Estes*, 381 U.S. at 540, in order to “safeguar[d] the liberty of the citizen against deprivation through the action of the state,” *Mooney*, 294 U.S. at 112. The “balance of forces between the accused and his accusers” finds calibration only in the courtroom, *Wardius v. Oregon*, 412 U.S. 470, 474 (1973); government efforts to incriminate outside the courtroom “are apt to carry much weight against the accused when they should properly carry none,” *Berger v. United States*, 295 U.S. 78, 88 (1935). Due process thus ensures that the accused must meet his accuser only in that arena. See, e.g., *Donnelly v. DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J. dissenting) (“Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair

trial.”). In sum, if it requires anything at all, due process demands, as this court succinctly put it, that the government convict only with “[e]vidence [that] comes from the witness stand.” *United States v. Eyster*, 948 F.2d 1196, 1207 (11th Cir. 1991).

2. It cannot seriously be disputed that a government campaign surreptitiously to fund highly prejudicial media—in the very community in which a defendant must stand trial—runs afoul of the Due Process Clause. When the government advances its case outside the courtroom, “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citations omitted). Because the Constitution “guarantee[s] that the accused [is] fairly dealt with and not unjustly condemned,” *Estes*, 381 U.S. at 538-39, “[i]t is as much [the government’s] duty to refrain from improper methods,” the Supreme Court has stressed, “as it is to use every legitimate means to bring about a just [conviction],” *Berger*, 295 U.S. at 88; *see ibid.* (“The United States is “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); *Estes*, 381 U.S. at 540 (“[T]he primary concern of all must be the proper administration of justice.” (internal quotation omitted)). The government unquestionably breaches this duty when, as here, it delivers its message of guilt directly to the community that is to sit in impartial judgment of the defendant—before and during the trial proceedings constitutionally designed and required to produce a just verdict. *E.g.*, *Berger*, 295 U.S. at 88 (“[W]hile [the government] may strike hard blows, [it] is not at liberty to strike foul ones.”).

A government campaign to advance in the media an inculpatory message undermines not only the defendant’s, but also “the public’s interest in fair trials designed to end in just judgments.” *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). “It is critical that the moral force of the criminal law not be diluted” and “important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt.” *In re Winship*, 397 U.S. at 364. Strict adherence to due process is “indispensable” to these ends. *Id.* at 364; *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“our system of the administration of justice suffers when any accused is treated unfairly.”); *United States v. Harbin*, 250 F.3d 532, 543 (7th Cir. 2001) (“The procedures and constitutional protections afforded defendants operate to

provide a fair process for adjudicating the defendants' guilt or innocence, but also to ensure that society perceives the process to be fair, thus promoting respect for the rule of law."'). Thus, when the government circumvents due process safeguards, both the defendant and society at large bear constitutionally intolerable costs. *See, e.g., Offutt v. United States*, 348 U.S. 11, 14 (1954) (to perform its high function effectively "justice must satisfy the appearance of justice").

Whether the government officials responsible for perpetrating the media campaign intended to influence the trial or not "is irrelevant," *Eyster*, 948 F.2d at 1207; as the Supreme Court has repeatedly explained, "[t]he touchstone of due process analysis" is "the fairness of the trial, not the culpability of the [government]." *Smith v. Phillips*, 455 U.S. 209, 209 (1982). Because "[t]he principle of" due process "is not punishment of society for misdeeds of [the government] but avoidance of an unfair trial to the accused," *Brady*, 373 U.S. at 87, the "constitutional obligation" of due process cannot be "measured by the moral culpability, or the willfulness," of the government misconduct, *United States v. Agurs*, 427 U.S. 97, 110 (1976). In short, a government media campaign that deprives a defendant of due process cannot be justified on the ground that it was advanced with good intentions, and a defendant's right to a fair trial cannot be sacrificed to advance the government's contrary objectives, however noble.

3. The defendants' convictions are fundamentally irreconcilable with the Constitution's guarantee of due process. Government-sponsored stories—printed during the trial—directly referred to, and inculcated, the defendants. *E.g.*, Ariel Remos, *Jeane Kirkpatrick Asks Ashcroft to Prosecute Cuban Officials for International Terrorism*, *Diario las Americas*, Feb. 27, 2001, at 1A ("[E]vidence has come forward that the murders were premeditated."); *id.* (referring to "the upcoming trial of the five employees of the Castro government who spied in the United States for the Castro regime"). Some commented on the trial, highlighting the government's "best" evidence and intensifying its effect with speculation and innuendo. *E.g., id.* ("[R]ecordings of the pilots who chased the two small aircraft have come to light again in an impressive way, where they are vociferously asking for permission to down them, and having obtained it, their vulgar exclamations of satisfaction with the consummated act, after having committed the murder."); Ariel Remos, *Castro Represents a Continuous Challenge to the Security of the U.S.*, *Diario las Americas*, Jan. 16, 2001 at 1A. (claiming "the most important fact, among those which came up in the trial of the Cuban spies of the 'Wasp Network'" was "the order of the Cuban intelligence service to one of its agents to find

a place in south Florida to unload explosives and weapons,” which “could be chemical or bacteriological weapons”); *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A. (“Through the trial in question it has not only become known that the Cuban regime planned to disembark arms and explosives on United States territory, but also planned the murder of prominent Cuban exiles because of their opposition to the regime.”).

Worse, the defendants were linked, as was their trial, to propaganda that painted a picture of a radical, dangerous Cuba at our shores. *E.g.*, *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A. (“Cuba represents a continuous challenge to the security of the US.”). Defendants, the campaign asserted, were “part of the espionage work that was conceived to infiltrate the United States on a long-term basis.” Wilfredo Cancio Isla, *Cuba Usó Alucigenos al Adiestrar á sus Espios*, El Nuevo Herald, June 4, 2001 at 1A. And their actions, readers were told, were “not anything new, like having available four or five specialized men to murder in Latin America those that are believed to have betrayed guerilla movements,” like “the murder of Torriente, and that of the astrologer and her husband that were killed when leaving the radio station that had her program,” and Like “other crimes committed in the south of Florida” by “the Castro regime.” Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, Diario las Americas, Jan. 19, 2001, at 1A.

This inflammatory depiction of the defendants and the significance of their trial was built upon “reporting” of “facts” that were at best dubious rumor and at worst pure fiction. *E.g.*, Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, Diario las Americas, Jan. 19, 2001, at 1A (discussing a “Parallel Operation whose objective is to develop a series of actions” against the CIA And “Cuban orders to kill in the USA and in other countries” (internal quotations omitted)). And it was bolstered by vitriolic, government-purchased “opinions” voiced by leading, respected journalists in the community. “Anyone who says that Cuba does not represent a danger for the cause of world democracy,” the government-sponsored campaign maintained, “certainly does not understand what the concept of danger entails in the case of Cuba, or deliberately wants to favor the totalitarian tyranny of Fidel Castro which has been enslaving the Cuban people for over forty-two years and which has discredited, also causing considerable harm, the United States of America.” Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, Diario las Americas, Feb. 16, 2001, at 4A. “The American taxpayer,” the campaign

asserted, “has had to spend astronomical amounts of millions of dollars because of the presence of Castro,” and “many worthy American citizens have lost their lives because of the criminal whims of the Havana regime.” *Id.* That “Castro killed four Cuban Americans whose unarmed light planes were shot down while flying in international air space” was explicitly labeled an “example” of these “criminal whims.” Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, *Diario las Americas*, Feb. 16, 2001, at 4A.

Thus, the U.S. government sponsored a media campaign—during the defendants’ trial and aimed at the community in which they were tried—that both passionately asserted their guilt for the offenses at issue and linked those events to propaganda about the Cuban government that bordered on the outrageous and the hysterical. For **at least four** independent reasons, this gross deprivation of due process requires reversal of defendants’ convictions.

First, though “the formalities of trial were observed,” the government-sponsored media campaign that has come to light “negate[d] the fundamental conception of trial” enshrined in the Due Process Clause. *Estes*, 381 U.S. at 564 (gathering cases). That the government has not mounted an inculpatory media campaign can safely be labeled “a requisite to the very existence of a fair trial.” *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); cf. *Rose*, 478 U.S. at 578 (“Harmless-error analysis . . . presupposes a trial” that is fundamentally fair.). To sanction a conviction despite this campaign is to “cas[t] the [government] in the role of an architect of a proceeding that does not comport with standards of justice,” *Brady*, 373 U.S. at 88, in a drama that “tell[s] more about the power of the state than about its concern for the decent administration of justice,” *Chandler v. Florida*, 449 U.S. 560, 580 (1981). It is “essential to the very concept of justice” that such a production earn no endorsement from the courts. *Lisenba v. California*, 314 U.S. 219, 236 (1942).

Second, the government’s media campaign “created a constitutionally intolerable probability” of influencing the trial. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2262 (June 8, 2009); see *Estes*, 381 U.S. at 542-43 (“[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[O]ur system of law has always endeavored to prevent even the probability of unfairness.”); cf. *Eyster*, 948 F.2d at 1207 (“Implying the existence of additional evidence not formally before the jury severely impairs the *likelihood of a fair trial.*” (emphasis added)). *Caperton* is highly instructive. In *Caperton*, the Supreme Court asked

whether the Due Process Clause might “bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Caperton*, 129 S.Ct. at 2265 (internal quotation omitted). It answered yes; an “unconstitutional potential for bias,” the Court held, arises when “there is a serious risk of actual bias-based on objective and reasonable perceptions.” *Caperton*, 129 S.Ct. at 2263 (internal quotations omitted). Despite “[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one,” the Court reaffirmed the general rule that “most matters relating to judicial disqualification,” such as “kinship, personal bias, state policy, [and] remoteness of interest,” do not “rise to a constitutional level” in the absence of proof of actual bias. *Id.* at 2259 (internal quotation omitted). However, it also recognized that “objective standards” also “require recusal” when circumstances “pos[e] such a risk of actual bias or prejudice that the [government] practice must be forbidden if the guarantee of due process is to be adequately implemented”—“whether or not actual bias exists or can be proved.” *Id.* at 2255, 2265 (internal quotation omitted). Finding present in the case before the Court “circumstances in which experience teaches that the probability of actual bias” is “too high to be constitutionally tolerable,” the Court concluded “as an objective matter” that the petitioner had been deprived due process of law. *Id.* at 2259 (internal quotation omitted).

Similarly, when it insists upon mounting a prosecution in the very community in which it is simultaneously funding an inculpatory media campaign, The government creates “such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Caperton*, 129 S.Ct. at 2255 (internal quotation omitted). As with judges, the “ascertainment of [the jury’s] mental attitude of appropriate indifference” is at best a difficult task not susceptible to a “formula.” *Irvin*, 366 U.S. at 724-25 (quotation omitted). Indeed, even if a “juror was sincere when he said that he would be fair and impartial,” he may in fact harbor “deep and bitter prejudice,” as “the psychological impact requiring such a declaration [of impartiality] before one’s fellows is often its father.” *Id.* at 728 (quotation omitted). Nonetheless, as he must for judges, a defendant challenging a juror’s bias must generally “sho[w] the actual existence of [a predisposition] in the mind of the juror” in order to “raise the presumption of partiality.” *Id.* at 723. Critically, however, as is true of the general rule governing judicial recusal, The Supreme Court’s “adoption of [this] rule” of jury bias does not, and could not, “foreclose inquiry as to whether, in a given case, the application of [the] rule works a deprivation of the

prisoner’s life or liberty without due process of law.” *Id.* at 723 (internal quotations omitted). That is, “in the light of [other] circumstances,” *id.* at 728, due process may demand more than the lack of proof of actual bias; a government practice may be “so inconsistent with the conception of what a trial should be and so likely to produce prejudice” that it is “unconstitutional even though no specific prejudice [is] shown.” *Estes*, 381 U.S. at 562.

It is difficult to imagine government misconduct that would more directly raise “objective and reasonable perceptions” of unfairness, *Caperton*, 129 S.Ct. at 2263, than the government media campaign that has come to light. This is not simply a case of prejudicial news coverage; it concerns a media “plan [that] was carried out with the active cooperation and participation of the [government].” *Rideau v. Louisiana*, 373 U.S. 723, 725 (1963). The federal government spent hundreds of thousands of dollars to advance an anti-Cuba propaganda campaign in the very community in which the defendants were to be tried. A considerable portion of that money was spent during the trial itself. In exchange for government funding, “the most popular [journalists] in South Florida” wrote scathing pieces that not only inculpated the defendants in the crimes for which they were charged, but also tied them to decades of purported Cuban wrongdoing, implicated them in vast conspiracies, and heaped upon them the prejudice of rumors and speculation. In such circumstances, due process cannot tolerate the suggestion that “reversal is inappropriate . . . because the jury that actually sat was impartial, based on the fiction that the challenges for cause eliminated all biased jurors.” *Harbin*, 250 F.3d at 549.

Third, the deprivation of due process at issue “unquestionably qualifies as ‘structural error’” because it results from government misconduct “with consequences that are necessarily unquantifiable and indeterminate.” *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). As the Supreme Court has held on numerous occasions, A finding of structural error may “rest . . . upon the difficulty of assessing the effect of the error.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (citing *Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984) (violation of the public-trial guarantee is not subject to harmless review because “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance”); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (“[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained”). Each defendant “cannot put his finger on [the] specific mischief” caused by the

government “and prove with particularity wherein he was prejudiced,” and some aspects of the “actual unfairness” caused are “so subtle as to defy detection by the accused or control by the judge.” *Estes*, 381 U.S. at 544-45; cf. *Caperton*, 291 S.Ct. at 2261 (“what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision.” (internal quotation omitted)). But the “untoward circumstances” that have been uncovered “are inherently bad,” and “prejudice to the accused [must be] presumed,” *Estes*, 381 U.S. at 544, because “[h]armless-error analysis in [this] context would be a speculative inquiry into what might have occurred in an alternate universe,” *Gonzalez-Lopez*, 548 U.S. at 150.

Fourth, if the fundamental misconduct at issue is not deemed per se reversible, “the specific circumstances presented by the case” certainly warrant relief. *Caperton*, 129 S.Ct. at 2262. “[T]he ‘totality of circumstances’” may “le[ad] to a denial of due process.” *Chandler*, 449 U.S. at 574, n.8; see also, e.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (referring to “indications in the totality of circumstances that [a] trial was not fundamentally fair”); *Estes*, 381 U.S. at 544 (describing cases where “circumstances were held to be inherently suspect,” requiring automatic reversal). And the “nature, context, and significance of [a] violation” of due process “may determine whether automatic reversal ... is appropriate.” *Harbin*, 250 F.3d at 544 (internal quotation omitted) (citing *United States v. Pearson*, 203 F.3d 1243, 1261 (10th Cir. 2000); *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996)); see also *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir.1995).

The government’s media coverage of defendants’ trial was inflammatory, pervasive and persistent. “In the overwhelming majority of criminal trials,” the Supreme Court has explained, “publicity presents few unmanageable threats to” due process. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 551 (1976). When a “criminal case . . . generates a great deal of publicity” there is “a heightened risk that “the right of the defendant to a fair trial” will be “compromise[d],” and as a result, “courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law.” *Chandler*, 449 U.S. at 574.

This case was “a ‘sensational’ one,” *Nebraska Press*, 427 U.S. at 551; it concerned events “widely known throughout the community” and there was “Massive pretrial publicity,” which “emphasized the notorious character” of the crimes “and, therefore, set [it] apart in the public mind as an extraordinary case or, as Shaw would say, something ‘not conventionally unconventional.’” *Estes*, 381 U.S. at 535-36, 538; cf. *Caperton*, 129 S.Ct. at 2263 (“Not every campaign contribution

by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case.”). Moreover, by surreptitiously paying purportedly objective journalists to deliver its message, the government fraudulently imbued that message with unearned and unwarranted reliability. As the Supreme Court has recognized, the mainstream media's service as “[a] responsible press” is “documented by an impressive record of service over several centuries,” and has made it a “handmaiden of effective judicial administration, especially in the criminal field.” *Nebraska Press*, 427 U.S. at 559-60. In short, people rightly place trust in the reports of mainstream media—certainly, they assume that it delivers objective reporting consistent with basic ethical standards, not the unattributed press releases of the federal government.

However, as this case went to trial, and during that trial, the government bought the public trust in secret deals with unethical reporters, and it abused that trust, by design, to cloak its propaganda in the garb of the journalist. The government's conduct “resulted in a public presentation of only the State's side of the case” in media considered objective and reliable by the community. *Estes*, 381 U.S. at 551. Articles presented as “largely factual” were, in fact, both “invidious [and] inflammatory.” *Murphy*, 421 U.S. at 801, n.4. In sum, if due process means anything, it guarantees that the government cannot mount a propaganda campaign that assumes a defendant's guilt; ties him to decades of international tensions; smears him with rumors, speculation, innuendo and fiction; and inflames community passions—while it simultaneously prosecutes that defendant. For this reason, the movant's convictions must be vacated.

4. At the very least, the defendants are entitled to an evidentiary hearing and to insist that the government prove that its deprivation of their due process rights did not cause prejudice. Pursuant to 28 U.S.C. § 2255, a habeas petitioner is entitled to an evidentiary hearing “[u]nless the [Section 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” As the Eleventh Circuit has made clear, “[a]lthough . . . a district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record,” “if the petitioner ‘alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.’” *Aron v. United States*, 291 F.3d 708 (11th Cir. 2002).

The movant has alleged—and both newspaper reports and government records confirm—that the federal government spent tens (and perhaps hundreds) of thousands of dollars to mount an anti-

Cuban propaganda campaign that prejudged petitioners' guilt and sought to bolster the case against them with arguments and evidence not adduced at trial. These allegations are neither "affirmatively contradicted by the record" nor "patently frivolous," *Aron*, 291 F.3d at 715; to the contrary, they implicate the government in a pervasive and systematic effort to deprive the defendants of their rights under the Due Process Clause. An evidentiary hearing is warranted to allow movant to further develop these allegations and counter any arguments by the government concerning prejudice from the government's attempts to sway their trial.¹

II. Movant's Due Process and Fair Trial Rights Were Violated by the Government's Abuse of the CIPA Process and its Failure to Comply with *Brady* and the Government Undermined the Effective Assistance of Counsel by Failing to Disclose Material Exculpatory Evidence.

The government's withholding of material evidence in relation to claims of national security and the use of the CIPA process skewed the totality of the evidentiary presentation. Because the government was able to exclude the defense from determinative stages of the CIPA process, and the Court was placed in the position of relying on the government's good faith, the movant was deprived of the constitutional right to present a defense in that he was denied the opportunity to identify and seek to introduce classified materials that were favorable to the defense at trial and at sentencing. Among the material withheld was discovery regarding actual Cuban espionage efforts and that these channels and means of espionage were fundamentally different in nature from the activities at issue in this case. In summary, government investigational and analytical materials showed that the actual espionage efforts by Cuba were entirely distinct from social-networking or ground-level community monitoring efforts at issue in this case. Similarly, the government suppressed evidence that would more clearly have shown the compartmentalization of operations by Cuban intelligence.

On April 16, 1999, upon receiving the security clearances that allowed defense counsel to review the classified materials, the defense moved to reconsider the Order granting an *ex parte* hearing. *See* DE-210; DE-219. Defendants argued that the Court "*should have the benefit of defendants' views* on the admissibility of evidence before making evidentiary rulings that will affect trial." DE-210:3. This was "particularly" so in "that the *government may not understand the defendants' theory of defense* (especially at this early stage in discovery), or given the *government's traditionally narrow view of its Brady obligations.*" *Id.* (emphasis added). As the Supreme Court

¹ An evidentiary hearing is particularly appropriate given government resistance of efforts to obtain more information regarding payments to journalists via the Freedom of Information Act.

stated in *United States v. Dennis*, 384 U.S. 855, 875 (1966), “The determination of what may be useful to the defense can properly and effectively be made only by an advocate.” Thus, the defendants argued that “counsel should be heard as to what is relevant.” DE-219.

Important decisions concerning discoverability and admissibility of classified information were made at the *ex parte, in camera* Section 4 proceeding held on May 26, 1999. Subsequent media revelations suggest that helpful information was suppressed due to the government’s one-sided presentation and at trial, and only a few of numerous intercepted high frequency messages relevant to the case were turned over to the defense. Government actions to secure the conviction in this case, including discovery violations and the unfairly prejudicial use of bias promoted by the government violated the defendant’s right to due process of law and a fundamentally fair trial. Section 2255 provides for “an independent and collateral inquiry into the validity of the conviction.” *United States v. Hayman*, 342 U.S. 205, 222 (1952).

III. The Movant’s Right to an Evidentiary Hearing and Reasonable Discovery.

In granting the right to an evidentiary hearing, 28 U.S.C. § 2255 states that “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall [upon notice to the government] grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” 28 U.S.C. § 2255. *See* Advisory Committee Note, Rule 8, Rules Governing § 2255 Proceedings (incorporating *Townsend v. Sain*, 372 U.S. 293, 312 (1963), whereby evidentiary hearing must be held if alleged facts that, if true, would warrant relief. Proof of facts alleged is not required for entitlement to a hearing); *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (“need only allege—not prove” facially valid claim; “If the [movant’s] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof”); *Fontaine v. United States*, 411 U.S. 213, 215, 93 S.Ct. 1461, 1463 (1973) (relying upon § 2255’s language to reverse summary dismissal and remanding for hearing where record did not “‘conclusively show’ that under no circumstances could the petitioner establish facts warranting relief under § 2255”).

As a result, a hearing is generally required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (hearing is necessary”where material facts are in dispute involving inconsistencies beyond the

record”); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (need for evidentiary hearing focuses on whether motion is “based on alleged occurrences outside the record”).

It is settled law that resolution of factual disputes on which the merits of a claim hinge must be resolved by hearing. *United States v. Jolly*, 252 Fed.Appx. 669 (5th Cir. 2003). A hearing is required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (hearing is necessary”where material facts are in dispute involving inconsistencies beyond the record”); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (need for evidentiary hearing focuses on whether motion is “based on alleged occurrences outside the record”). *See Gallego v. United States*, 174 F.3d 1196, 1198 (11th Cir. 1999) (movant’s assertions, even where not bolstered by defense counsel, require a § 2255 evidentiary hearing so that credibility determinations can be made). Merely assuming the affidavit of trial counsel to be false is improper. *Harris v. Dugger*, 874 F. 2d 756, 761 n.4 (11th Cir. 1989) (absent evidence to the contrary, “we do not, and cannot, second guess the credibility” of trial counsel’s statements regarding the representation.); *cf. United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1991) (providing for right of discovery as to motion for new trial based on presentation of false evidence relating to informant and agent misconduct).

Denial of access to fundamental underlying historical records, such as the CIPA evidence in this case, that permit the movant to conclusively establish his claim is reversible error. *See Hansen v. United States*, 956 F.2d 245, 248 (11th Cir. 1992) (reversing denial of post-conviction movant’s request for access to “original sound tapes of the sentencing proceeding”). Where the movant has made a showing that the records are necessary to the resolution of an issue or issues he has presented in a non-frivolous pending collateral attack, there is plainly good cause for discovery. *Id.*)”We agree with the Seventh Circuit that prisoners have a right of access to the court files of their underlying criminal proceeding.” (citing *Rush v. United States*, 559 F.2d 455, 459-60 (7th Cir.1977)). Thus, the Third Circuit has held that mere doubt as to whether a tape will show alteration is not a basis to excuse counsel’s failure to undertake a forensic examination of an undercover recording. *United States v. Baynes*, 687 F.2d 659 (3d Cir.1982) (granting relief under § 2255 based on failure to obtain scientific examination of contested audiotape; “mere possibility that investigation of the exemplar might ... have produced nothing of consequence for the defense cannot serve as a justification for the failure to perform such an investigation in the first place”).

While the grant or denial of a request for discovery in collateral proceedings generally is discretionary, *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 1799 (1997), an abuse of discretion is shown where a petitioner demonstrates good cause for the discovery request. *Arthur v. Allen*, 459 F.3d 1310, 1310-11 (11th Cir. 2006) (“Good cause is demonstrated ‘where specific allegations ... show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he ... is entitled to relief.’”) (quoting *Bracy*, 520 U.S. at 908-09; *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). Similarly, the Fifth Circuit has held that although it is generally within a district court’s discretion to grant or deny discovery requests in habeas proceedings, a court’s denial of discovery is an abuse of discretion if discovery is “indispensable to a fair, rounded, development of the material facts.” *East v. Scott*, 55 F.3d 996, 1001 (5th Cir.1995) (quoting *Townsend v. Sain*, 372 U.S. 293, 322, 83 S.Ct. 745, 762 (1963)); accord *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (recognizing that district court must allow discovery where petitioner’s specific allegations, if developed, provide reason to believe that the petitioner may be entitled to relief). Application of these standards in this case establishes the need for discovery.

CONCLUSION

For the reasons expressed herein and stated in the motion under 28 U.S.C. § 2255, Antonio Guerrero prays that the Court will grant him relief from his convictions and sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on March 5, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ John E. Bergendahl
John E. Bergendahl, Esq.