UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-721-CR-LENARD

UNITED STATES OF AMERICA,

vs.

ANTONIO GUERRERO
Defendant.
_____

DEFENDANT ANTONIO GUERRERO'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE BASED UPON NEWLY DISCOVERED EVIDENCE AND IN THE INTEREST OF JUSTICE

The Defendant ANTONIO GUERRERO, through counsel, respectfully moves for a new trial based upon newly discovered evidence and in the interest of justice, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The newly discovered evidence consists principally of deliberate misrepresentations of fact and law made by the United States Attorney in opposing the defendants' motion for change of venue due to pervasive community prejudice. In summary form, the motion is based upon the following facts:

One year following the conclusion of Mr. Guerrero's trial, on June 25, 2002, the same United States Attorney who persuaded this Court to deny a change of venue in this case on the ground that Miami-Dade is an "urban center" that is "extremely heterogeneous," "politically non-monolithic," and with "great diversity," and therefore is immune from "outside influences" that would preclude the seating of a fair jury, moved in Ramirez v. Ashcroft, et. al. Case No. 01-4835 Civ-HUCK) for a change of venue out of Miami-Dade, relying on precisely such influences, which he argued made a fair trial "virtually impossible" in an employment-related discrimination action against the

Attorney General of the United States. The principal case cited and relied upon by the government in Ramirez, Pamplin v. Mason, 364 F2d 1 (5th Cir. 1968), was the same case relied upon by the defense in this case, and which the government vigorously opposed as having no application to a venue the size of Miami-Dade.

In so doing, the chief legal representative of the United States presented two mutually exclusive factual scenarios and assumed antithetical positions with respect to the controlling law on a single issue: Can a fair trial in Miami-Dade County be afforded to a defendant when the issue being litigated becomes entwined with pervasive community prejudices regarding Cuba? When the defendants were agents of the Cuban government charged in connection with murder and espionage, amongst other charges, the U.S. Attorney argued it was possible. When the defendant in a civil suit was the Attorney General of the United States charged with discrimination in an employment case only tangentially related to Cuba, the government argued it was "virtually impossible." This clearly contradictory position taken in Ramirez reveals the disingenuous, if not outright deceptive nature of the government's misrepresentations in the instant case.

In both cases, the source of the prejudice was the same: the uniquely passionate climate of political discourse related to Cuba, engendered by the presence of over half a million Cuban American exiles who comprise at least twenty percent of the population in the district. Their ongoing 40-year "war" with the Cuban government and the preeminence of the "vision of the exile ideology," in Miami which includes "uncompromising hostility toward the Cuban government and intolerance to contrary views," permeated the entire community.[1]

Defendant Guerrero now moves for a new trial, in the interests of justice, because this about-

[1] See the Declaration of Dr. Lisandro Perez, a leading authority on the exile community and Miami-Dade, Exhibit 5.

face on the part of the United States Attorney reveals that in this case the government repeatedly made misrepresentations of fact and law in order to secure a tactical advantage over the Defendants, violating their Fifth Amendment right to due process of law and their Sixth Amendment rights to a fair trial before an impartial jury.

This motion shall rely upon the following facts, exhibits appearing in the accompanying Appendix, and arguments of law.

I. **BACKGROUND ON VENUE:**

A. The Defendant's Argument in Support of Venue Change:

The first motion for change of venue was filed by Guerrero on January 5, 2000, D.E. 317. No news articles were attached and no reference was made to prejudicial pretrial publicity. Instead, the request for venue change was predicated upon pre-existing community bias manifested in "the inflamed atmosphere concerning the activities of the government of the Republic of Cuba" in the Southern District of Florida.[2] Id.

Citing the public upheaval surrounding the recent events involving Elian Gonzalez,[3] Mr. Guerrero's moving papers pointed to the fact that it is not just the exile community, but the non-Cuban community as well that is "equally a problem" since once the jurors hear that these Cuban agents "are accused of spying on the country ... and one or more of these defendants in the death of four pilots whose unarmed civilian plane was shot down by jet fighters piloted by the Cuban Air

[2] Subsequent filings were made by defendant Medina who attached the survey results and affidavit of Professor Moran, D.E. 321 and by defendant Campa who attached news articles, .E. 329. Defendat Medina then filed additional news articles. Defendants Hernandez and Gonzalez joined in the motions.

[3] Ironically, in Ramirez it was the prejudicial pretrial publicity surrounding the Elian Gonzalez case on which the government relied to show an inflamed community. While this case went to trial within months of Elian's return, when emotions about Elian were still running high, another 18 months elapsed before the Ramirez defendants sought a change of venue.

Force," the prejudices and bias of the community concerning Cuba will preclude a fair evaluation of the evidence. Pointing to a "community atmosphere so pervasively inflamed" that prejudice must be presumed, Guerrero relied upon Pamplin v. Mason, 364 F2d 1 (5th Cir. 1966), to argue that venue must be changed when "certain cultural factors are so strong as to constitutionally mandate a change of venue," particularly where, the defendants are members of the "target group" at whom the prejudice is directed.

On January 20, 2000, Guerrero pointed out the government's misinterpretation of Pamplin and his reliance on it:

> The government misreads this case to hold that it is the publicity that created the "outside influence." In fact, Pamplin illustrates the outside influence caused by pervasive and ingrained racial prejudice. This "outside influence" was not a child of or created by publicity but rather of sociological implications of the struggle for the civil rights of African-Americans in the early '60's. The analogy to the situation in the case at bar is manifest.

D.E. 322 at 2-3 (Guerrero's Response to Government's Opposition to Change of Venue).

Guerrero argued that Pamplin recognizes that when a community's beliefs and attitudes are so pervasive and ingrained against a target group, that community is presumptively prejudiced and no longer able to fairly and impartially weigh the evidence against a member of that group. It was not pretrial publicity that was the problem, but community wide animus against a type of defendant – an agent of the Cuban government. In Pamplin, the unacceptable "outside influence" was the community's hostility toward blacks who engaged in civil rights activity. Here, it was the exile community's passionate hostility toward anyone engaging in activity in support of Cuba, which was, in the words of Pamplin, "affecting the community's climate of opinion as to a defendant."[4]

[4] Following trial, the Court acknowledged the "impassioned Cuban exile community residing within this venue." See Order Denying Motion for Judgment of Acquittal and New Trial.

Finally, and most importantly, once such existing bias influencing the climate of opinion is demonstrated, the test for changing venue under Pamplin is a showing that there exists in the district a "probability of unfairness." (The test applied by the Court in this case required a showing that a fair trial was "virtually impossible"). Prejudicial pretrial publicity was not a factor in Pamplin; indeed, there was no reference to it in the decision. Moreover, all the seated jurors in Pamplin swore they could be fair and impartial, a fact not dispositive when "outside influences" are present.[5]

On January 13, 2000, defendant Medina also filed a separate venue motion, attaching a survey and accompanying an affidavit of Professor Moran. See D.E. 321 (reflecting that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons acting as agents of the government of Cuba and charged with engaging in the types of activities outlined in the indictment). Medina's papers once again emphasized "the binding precedent" of the Pamplin case, which "...involves pervasive prejudice arising from widely held community values and attitudes, not from extensive case specific media coverage." Further citing data, the defense reminded the Court that "virulent anti-Castro sentiment is a dominant value in this community and has been for four decades." D.E. 321 at 3, 5.

Defendant Campa filed a separate motion for change of venue, also citing to "an atmosphere of great hostility toward any person associated with the Castro regime. "[6] He attached a number of news articles for the purpose of illustrating "the extent and fervor of the local sentiment against the Castro government and its suspected allies." D.E. 329 at 1, 3.

---

[5] The Pamplin Court also found evidence of jury bias in the harsh punishment meted out by the Texas jury. Likewise, here, jury bias is clearly evident in the jury's finding respecting Count III after the government conceded in its Writ of Prohibition to the Eleventh Circuit that the Court's instruction on that count created "an insurmountable obstacle" to conviction.

[6] At oral argument on venue the defense informed the Court at sidebar that the defendants would be tried as agents of the government of Cuba. See Exhibit 1, p. 45-49.

On March 20, 2000, the defendants, see D.E.451 at 5, updated the mounting evidence of pervasive community sentiment against anyone associated with Cuba and complained of the government's inexplicable denial of what was happening in the community:

> The government also ignores the growing, considerable interest the public has recently shown in this case, especially as the trial date approaches, and given such recent events as the Elian Gonzalez affair, the arrest of another alleged Cuban spy, see Exhibit B-2, the sentencing hearings of the cooperating co-defendants, see Exhibits C-2 and D-s, and the protests surrounding the Miami Film Festival and the Latin American Studies Association convention last week.

Finally, on the eve of oral argument, Defendant Medina reminded the Court of the obvious: "the question of venue is the single most significant issue determining whether there will be due process of law in this case." D.E. 461 at 1.

During oral argument, the defendants modified their request to move the case out of the district, agreeing to move it to another division within the same district – Fort Lauderdale (Broward County) – a mere 25 miles north of Miami. See Exhibit 1, page 43. Although a close neighbor, Broward County is significantly different from Miami-Dade in its demographics and attitudes toward Cuba. [7] Defendants also argued that their status as Cuban agents, made them pariahs in the eyes of most Miamians. Exhibit 1, pages 44 - 49.

B. The Governments Argument Against Change of Venue:

In its first opposition the government sounded the theme of its principal argument: because of the metropolitan size, heterogeneous nature and demographic diversity of Miami, Pamplin simply

---

[7] An Assistant United States Attorney provided the following demographic statistics during the venue argument: Miami-Dade has an Hispanic population of registered voters of 43.95 % (approximately ½ Cuban ancestry); Broward County has 6.04%, of which just 3.1% are of Cuban ancestry. See Exhibit 1, page 57 and Exhibit 4, page 5. When asked, 74.5% of all residents in Miami-Dade felt the U.S. should intensify its opposition to Cuba, but only 26.5% in Broward shared that view. See Exhibit 7, p. 57.

does not apply. Drawing on his stature as a preeminent figure in the community, the United States Attorney represented to the Court that the district is an **"extremely heterogeneous, diverse and politically non-monolithic"** community, and, as such, it is impervious to such "outside influence" as those cited by the defendants.[8] The government's brief scoffed at any suggestion that Miami (an "urban center") should be compared to the "smaller or provincial communities" at issue in Pamplin (a small town in Texas). The difference in their respective capacities to withstand and modulate community bias, argued the U.S. Attorney, completely distinguished the two jurisdictions, freeing Miami from the controlling authority of Pamplin -

> Community-wide implicit bias usually occurs, he argued in smaller or provincial communities than in urban centers like Miami-Dade County. (Citations omitted) Even where community prejudice has been found to warrant change of venue over a larger area, *see, e.g., McVeigh*, that was in part because of the homogenous and continuous nature of the prejudice throughout "the Oklahoma family," id. at 1471 - a description no one could apply to Miami-Dade County. The extremely heterogeneous, diverse and politically non-monolithic nature of this community is another reason not to presuppose community prejudice precluding the seating of a fair jury.

D.E. 286 at 5 (Government's Response to Defendant John Doe No.2 Ex Parte Motion For Authorization of Funds to Conduct a Survey) (emphasis added).

Six months later, lead counsel for the prosecution argued:

> Now I appreciate that counsel are proceeding not simply on a pretrial publicity argument but on an argument of pervasive community prejudice and citing Pamplin for that proposition. However, Your Honor, we believe Pamplin is not applicable in this situation. This is not the type of small, insular provincial community as was the case in Pamplin.

Transcript of June 26, 2000 at 63 (emphasis added), Exhibit 1.

And further, in pleading that voir dire, not venue change, is the appropriate remedy for

---

[8] The the government had to have known that if there is any community in the United States that is undeniably "politically monolithic," on the issue of Cuba, it is Miami-Dade County. See Declaration of Dr. Lissandro Perez, Exhibit 5.

community bias, the government argued that "in a case like this with a community of great diversity, great heterogeneity as opposed to the communities of Pamplin and the other voir dire cases. Transcript of June 26, 2000; Exhibit 1 at 64-65.

II. The Newly Discovered Evidence:

One year following the verdict in this case, on June 25, 2002, the same United States Attorney for the Southern District of Florida took the extraordinary step of filing a motion for a change of venue in a civil case, Ramirez v. Ashcroft et.al, Case No: 01- 4835-Civ-HUCK. That motion was based upon the alleged prejudicial effects of the pervasive community sentiment following the custody battle over Elian Gonzalez, an event that occurred more than 2 years earlier. This same U.S. Attorney, who had vehemently and repeatedly argued before this Court that Miami-Dade was unlikely to be impacted by such "outside influences affecting the community's climate of opinion" due to its size, now sought refuge under the Pamplin doctrine when called upon to defend high ranking officials of the United States government in a civil suit.

In an abrupt about face, far from rejecting Pamplin's relevance to Miami-Dade, the government's brief in Ramirez presented it as controlling authority for the division, citing it no less than three times. It also vigorously argued against the notion that a fair trial could be had in Miami-Dade (it is "virtually impossible") describing the pre-existing bias in words which mirrored the position of the defense in this case:

> [I]t will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami - Dade County, ... the inhabitants of Miami - Dade County are so infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions that jurors could not possibly put these matters out of their mind and try the instant case solely on the evidence presented in the courtroom.

Exhibit 2, page 15 (Defendants Motion to Change Location/Venue of Trial).

During oral argument in Ramirez, the U.S. Attorney acknowledged the "deep seated feelings"

and "deep seated prejudices" that exist in Miami-Dade and offered that "as you move the case out of Miami-Dade you have less likelihood" of encountering such outside influences. See Exhibit 3 (transcript of Ramirez v. Ashcroft hearing, August 15, 2002, at page 25). And, in contrast to our case, "the incident" referred to in Ramirez (1) did not involve the defendant and (2) was not a matter on which the jury would be asked to draw inferences in a criminal case setting.

These oral and written representations in the year 2002 reveal that the United States Attorney knew back in March/June of 2000 what every reasonable observer of Miami-Dade cannot ignore:

> a. The Cuban American community comprises the largest single ethnic community in the division;
> b. It harbors an uncompromising hostility toward the Cuban government, its agents and supporters;
> c. Its view of Cuba has permeated the political and social climate of the division;
> d. That view has been reinforced by a long history of terror threats, bomb scares, actual bombings, assaults and murder against all those who in any way express a different view, or even question that of the exile community.

In other words, at the time he argued Pamplin's irrelevance in pleadings before this Court, the prosecutor was undeniably aware that its factual predicate was fully present here. That is: (1) There existed in the division a pre-existing "outside influence," i.e., the passionate hostility of the Cuban exile community toward Cuba. (2) It "affected the community's climate of opinion as to a defendant" as amply demonstrated by polls, news articles and expert opinion (see below). (3) It was "inherently suspect...resulting in a probability of unfairness.".[9]

---

[9] As Victor Diaz, a prominent Cuban American attorney, succinctly stated:

> We can't escape the fact that in this town there are 700,000 Cuban Americans. There are 10,000 people in this town who had a relative murdered by Fidel Castro. There are 50,000 people in this town who've had a relative tortured by Fidel Castro. There are thousands of former political prisoners in this town. For these people and for the 500,000 Cuban Americans who are old enough to remember having to leave their homeland, the issues related to Fidel Castro are not a historical footnote, they are living, breathing wounds.

Miami New Times, May 25, 2000, page 12. See Exhibit 9.

Nonetheless, in order to gain a tactical advantage over the defense in this case, the United States Attorney deliberately, repeatedly and forcefully argued to this Court what he knew to be contrary to fact and law. That this should be done in a case where jurors would be called upon to draw inferences about the defendants' state of mind - and in a case with life sentences at stake – and, in fact, imposed – makes this conduct even more egregious. Given the newly discovered evidence from Ramirez, the tainted resolution of the venue claim risks the appearance of a mockery of justice.

The Eleventh Circuit Court of Appeals has consistently admonished those representing the United States in the circuit to "remember that he is the representative of a government dedicated to fairness and equal justice for all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer." United States v. Wilson 149 F.3d 1298, 1303 (11th Cir. 1998). See also United States v. Crutchfield 26 F.3d 1103 (11th Cir. 1994) (emphasizing that a United States Attorney has a duty to refrain from using improper methods to secure a conviction); Berger v. United States 295 U.S.78, 88 (1935). More directly related to the facts at hand, although in a civil context, the Eleventh Circuit expressed its unequivocal condemnation of those who take inconsistent positions in litigation, making "a mockery of the justice system." See Salomen Smith Barney, Inc. v. Harvey 260 F.3d 1302, 1308 (11th Cir. 2001). And in discussing the concept of equitable estoppel, the Circuit emphasized its rationale in words equally applicable to the case at hand: the purpose is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." Burnes v. Pemco Aeroplex, Inc., 291 F.3d 12282, 1285 (11th Cir. 2002).

Nothing merits greater concern than prosecutors changing positions in their exercise of the prosecutorial function. In Smith v. Groose 205 F 3d 1045 (8th Cir. 2000) habeas corpus relief was granted for a condemned man who became the victim of the prosecutor's shift in positions in the handling of two murder cases. It is particularly egregious when, as here, the changed position reflects an intentional misrepresentation of known facts and law. See ABA Standards for Criminal Justice: The Prosecutorial Function, 1993, Section 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court.").

Newly discovered evidence of the prosecution's intentional misrepresentations of both fact and law, resulting in clear violations of the defendants' right to a fair and impartial trial as well as due process of law, under the Fifth and Sixth Amendments to the Constitution of the United States, falls within the purview of Rule 33 of the Federal Rules of Civil Procedure and requires a new trial "in the interests of justice." See United States v. DiBernardo 880 F.2d 1216 (11th Cir. (1989); United States v. Wallach 935 F2d 445 (2d Cir. 1991); and United States v. Locascio 6 F.3d 924, 930-1 (2d Cir. 1993) (newly discovered evidence of a constitutional violation was reviewed under Rule 33.)[10]

Moreover, Rule 33 is the appropriate vehicle for bringing such matters before this Court even when an appeal is pending in the court of appeals. See United States v. Cronic, 466 U.S. 648, 667 n. 42 (1984) (cited with approval by the Eleventh Circuit in United States v. Ellsworth 814 F 2d 613 (11th Cir. 1987)).

---

[10] The actions of the United States Attorney also appear to violate Rule 60(b)(3) of the Federal Rules of Civil Procedure which condemns "fraud... misrepresentation, or other misconduct of an adversary party." This Rule has been cited as authority for setting aside criminal convictions. See United States v. McDonald 1998 WL 637184 (4th Cir. 1998); Reynosa v. Artuz, 1999 WL 335365 (S.D. N.Y. 1998).

III. **A NEW TRIAL SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE**:

A. The Demographics, Surveys and Expert Opinion Preclude Any Notion That a Fair And Impartial Trial Was, and Could Be, Had in Miami-Dade County.

Nothing is more fundamental to the interests of justice than the perception that trials be fair and impartial. As stated by the United States Supreme Court: What is at stake is the public perception of the integrity of our criminal justice system which must also "satisfy the appearance of justice." Orfutt v. United States 348 U.S. 11, 14 (1954). At the time the prosecutor was urging the Court to turn a blind eye to the facts before it, over a decade of scholarship and surveys of attitudes in the Cuban American community confirmed the impossibility of a fair trial in this venue. A survey of Miami-Dade's entire population taken just one month before jury selection, when compared to the results of an identical survey taken nationwide, leads inexorably to that same conclusion. The difference between Miami and the rest of the country with respect to attitudes toward Cuba in October of 2000, as reflected by the survey, is extraordinary.

The percentages of each sample *strongly in favor of* supporting direct U.S. military action to overthrow the Cuban government broke down as follows:

1. Local Cuban sample (Miami) 49.7%
2. Local Non-Cuban sample 26.0%
3. National sample 08.1%

The percentages of each sample strongly in favor of supporting military action by the exile community to overthrow the Cuban government broke down as follows:

1. Local Cuban sample 55.8%
2. Local non-Cuban sample 27.6%
3. National sample 05.8%

As concluded by noted legal psychologist Dr. Kendra Brennan: "There is an attitude of a state of war between the local (Miami) Cuban community against Cuba" and "their attitudes have spilled

over to the rest of the community." Exhibit 4, page 3.

Remarkably, in a separate Division within the same District, Broward County, with a much smaller concentration of Cuban Americans, the data indicated a substantial drop in hostile attitudes toward Cuba. When asked if "U.S. policy toward Cuba should promote better relations, intensify U.S. opposition to Cuba, or keep things the same," 74.5 percent of Miami-Dade residents wanted opposition intensified as opposed to just 26.5 percent in Broward. [11] It was to Broward County, a mere 25 miles away, that the defendants sought a change of venue.

Dr. Brennan's survey data, drawing on 2 separate polls, one of which spanned 6 years and the other 12 years, was not commissioned by the defense and preceded the events on trial by half a decade. It surveyed attitudes toward Cuba periodically right up to the time of trial. The persistence and consistency of the demonstrated hostility toward Cuba, as reflected in the survey's findings, mirror and support the survey findings of Professor Moran's survey which showed that 69 percent held a bias against these defendants. See D.E. 321.

These realities, so palpably clear, could not have escaped the attention of the United States Attorney. Rather, because they increased the possibility he would secure convictions here, he either ignored them or, worse, affirmatively represented that they did not exist. However, when it came to securing a fair trial for his client in a civil matter, he readily acknowledged the special character of this venue, and its manifest unsuitability for a case that would stir exile community passions.

Dr. Lisandro Perez, a foremost authority on the Cuban exile phenomenon, himself an exile and 27-year resident of Miami, Professor of Sociology and Anthropology and a Director of the Cuban Research Institute at Florida International University, amply substantiates and explains the

[11] Id. at 4

results of the Moran and Brennan affidavits. He reaches the same conclusion they do, as well as the defense in this case and in Ramirez:

> The possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero. I would reach that conclusion even if the jury were composed entirely of non-Cubans, as it was in this case.[12]

On the basis of an academic career specializing in the study of the development of Cuban communities in the U.S., and especially in Miami, Dr. Perez explains why this is so. The community bias affecting this case, "an opinion ... so entrenched as to often not be consciously held" is not susceptible to the ususal courtroom remedies for pretrial publicity, because it is rooted not in publicity, but in passionately held attitudes shared by an exceptionally powerful group within the community. Exhibit 5, p. 2.

Dr. Perez carefully explains these conclusions on the basis of a combination of factors: (a) demographics, (b) the "ethnic enclave" phenomenon, (c) the extraordinary political power of th exile community in Miami-Dade, (d) the "exile ideology," and (e) the impact of the downing of the February 24, 1996 incident which formed Count III of this indictment and the Elian Gonzalez saga which began in November, 1999 and ended just six months prior to the trial in this matter.

These concepts enable Dr. Perez to explain why the survey results cited by Dr. Brennan reveal that throughout the Miami-Dade venue attitudes about Cuba are heavily influenced by the attitudes and opinions of the exile community, and differ strongly from those in the rest of Florida. They also explain and document the existence of a unique and pervasive community bias against Cuban agents operating in Miami.

First, based upon Census and other demographic statistics, Dr. Perez explains that persons

---

[12] See Dr. Lisandro Perez' Declaration, Exhibit 5 on p 2-3

of Cuban descent comprise the largest single racial/ethnic/national origin group in the venue (2 of every 7 persons). Thus, it is literally not a "minority," but "the largest group, period, among immigrants or non immigrants alike. Exhibit 5, p 3-4. Second, because of its size and cohesiveness, the Cuban exile community has created a genuine "ethnic enclave" from which it exercises political and economic power, disproportionately impacting the rest of the community.

Third, the establishment of major institutions such as the Cuban American National Foundation, the Latin Builders' Association, the Latin Chamber of Commerce manifest and focus the exile community's power in Miami-Dade, securing the election of Cuban Americans to most of the major political offices: the Mayor of the city, the city manager, the county manager and a significant portion of the county's delegation to the state legislature as well as the Congress of the United States. Exhibit 5, p. 6

Fourth, this community has a singular and well-defined "overriding concern: the ongoing struggle for the recovery of their homeland," see Exhibit 5, p. 7-8, which it injects into the rest of the community. Hence, the surveys referred to by Dr. Brennan show far more support among non-Cubans in Miami for forcible ouster of the Cuban President than among non-Cubans elsewhere.

According to Dr. Perez, the issue is a highly emotional one of "uncompromising hostility to the Cuban government." The vehemence and centrality of that view make any expression of opposing views "especially difficult," Exhibit 5, p. 8, resulting in criticism, scorn and threats, as reflected in the concerns expressed by trial counsel and those prospective jurors brave enough to honestly voice their fear. As explained by Dr. Perez: "There is a long history of threats, bomb scares, actual bombings, and even murders directed at persons who have dissented from the predominant anti-Castro position or have demonstrated a perceived "softness" toward the regime." Id. at 8-9.

B. The Atmosphere Surrounding Jury Selection, And Subsequent Events, Confirmed That "Outside Influences" Hostile to the Defense Precluded Seating a Fair and Impartial Jury.

At the prosecution's insistence that the venue remain in Miami-Dade, the trial court was faced with the daunting task of seeking a qualified jury and labored for seven days in that futile effort. On the first day a press conference was held on the steps of the courthouse by families of the victims who were seated in the courtroom during voir dire. It was reported that several prospective members of the jury were present. When informed, the Court noted on the record "Members of the family held some kind of a press conference...with cameras present." (Vol.1:111). When told that several members of the venire were "observed talking to cameras and the media;" the Court reacted with resignation, "I thought I had given them a strong instruction." (Vol.3, Tr.111). Before the day was out, a prospective juror revealed that a newspaper article on the case was lying about in the jury assembly room. (Vol.1:171) Even more startling was the unchallenged observation by defense counsel that juror #34 was seen reading that article in the courtroom just as the court was introducing the case to the panel. (Vol.2:196). [13] Former regional director of the Cuban American National Foundation, a virulently anti-Castro organization, was a member of that panel; and, while his conduct with his fellow prospective jurors remains unknown, his bizarre behavior in the courtroom became a matter of record. On the second day of voir dire, one of the defense attorneys brought to the Court's attention his "rocking back and forth in his chair. He seems upset about something," (Vol.2:303), to which the prosecutor added her own observation of his strange, "strutting about." (Vol.2:565). When called to sidebar, his hostile responses to the Court's questioning caused an astonished judge to remark that she was, "taken aback by his quite

[13] A defense attorney read the article into the record which quoted the former chief of the Miami FBI office, "Cuban agents will be in the courtroom monitoring the trial and even if there are convictions they will probably be swapped." (Vol.2:195)

inappropriate manner." (Vol.3:308). He was removed during the next break. While the Court spoke of its concern that the current panel might have been "improperly exposed to opinions that will strike the whole panel," no inquiry was made.

In the first phase of questioning over twenty percent of the jurors revealed that they were either themselves exiles or of Cuban ancestry. In no other venue would agents of the government of Cuba face the wrath of such a large gathering of exiles. Indeed, as the attached statements of experts Brennan and Perez make clear, although no Cuban Americans served on the final jury, the non-Cuban jurors had been exposed to the pervasive effects of the 30 plus years campaign demonizing Cuba, resulting in attitudes and beliefs more akin to those of their Cuban neighbors than to other fellow Americans on issues central to this trial. See Brennan affidavit, Exhibit 4, page 3.

No fewer than 16 persons in the venire were personally acquainted with the victims of the shoot-down, their families or witnesses. With respect to issues concerning Cuba, Miami is a small town.[14] Only in Miami/Dade was trial witness Jose Basulto, one of the strongest critics of the Cuban

[14] Prospective Juror Montes knew one of the victim's family (Vol.1:29); Prospective Juror Alvarez' son and daughter worked with a victim's family (Vol.1:140); Prospective Juror Silva knew "the boys who were shot down." (Vol.2:297); Prospective Juror DeArcos knows the wife of a victim (Vol.1:139); Prospective Juror Rams knew the sister of a victim (Vol.2:297); Prospective Juror Rodriguez knew the daughter of a victim (Vol.2:297); Prospective Juror Silverman, non-Cuban, knew the wife of a victim (Vol.2:298, 370); Prospective Juror Palmer, another non-Cuban, knew a victim's family (Vol.1:141); Prospective Juror Kuk, a non-Cuban, was a teacher of a victim's daugher (Vol.3:458, 520); Prospective Juror George, non-Cuban, played tennis with a victim's wife (Vol.3:570); Prospective Juror Healty knew witness Basulto (Vol.1:139); Prospective Juror Rojos knew Basulto personally (Vol.2:375); Prospective Juror Placencia worked with Basulto on the radio (Vol.4:684); Prospective Juror Fernandez met Basulto when he came to his church to speak (Vol.3:458); Prospective Juror Vargas had work done for her by Basulto's son (Vol.1:140); Prospective Juror Rojos knew Basulto personally when he'd escort him through customs as a VIP (Vol.2:375).

All these members of the venire freely comingled with the other panel members. They were also confronted by several members of the victims family who were seated in the front row between members of the FBI when they were brought into court.

regime and an activist who has admitted to criminal acts against that government, accorded VIP status at a public airport, according to a prospective juror. (Vol.3:375). His shrill condemnation of the Cuban regime has been heard on radio for decades, as reported by another juror (Vol.3:458). And, as stated by the U.S. Attorney trying the case, only in Miami/Dade "were masses [held] after the shoot down all over town and numerous people attended." (Vol.3:535). See Declaration of Lisandro Perez, Exhibit 5 p. 10 (observation re: the shoot down united the city).

Only in Miami/Dade were public memorials erected to the memory of the victims of the shoot down. Not only was a major thoroughfare renamed to honor of one of the victims and a plaza named in honor of another, but the very Miami-Dade County Government building houses a large monument and shrine to one of the victims.[15]

Not to be overlooked was the role played by the media. The strong media presence at the courthouse did not dissipate after the first day's press conference and their attempted interviews of prospective jurors. Well into the second week of jury selection a prospective juror complained of media harassment as he left the courthouse. (Vol.5:1026) Months later, on March 13, 2001 the Court was still complaining about the presence of "cameras focused on the jurors as they came out of the building." (Vol.58:9005).

---

[15] The county shoot-down monument actually proclaims the truth of the version of the events offered by the government at trial in this case. Further evidence that Miami stands alone in its pervasive hostility to Cuba is found in the following undisputed facts: Only in Miami was an ordinance enacted requiring those who sought to do business with the county to file an affidavit that they do not, directly or indirectly, do business with Cuba or Cuban nationals; only in Miami does an institution of higher learning face reprisals for wanting to show a film made in Cuba (D.E. 324); only in Miami does a ballet company encounter problems with their line of credit and their certificate of occupancy" for opposing an anti-Castro resolution of the County Commission (D.E. 497, Ex. E-4); only Miami foregoes the coveted Pan Am games after spending nearly a quarter million dollars in winning the hosting rights upon being apprized that Cuban athletes would participate (D.E. 397;Ex. M-1).

Nor was this the usual inquisitive media reporting on a newsworthy event. Rather, some elements of the media, particularly from the Spanish-speaking radio and TV, spearheaded the decades-long campaign to demonize Cuba.[16] Their role in "covering" the trial was not to report the news, but to create a climate guaranteeing conviction. It was this same Spanish radio and TV that were cited by the United States attorney in the Ramirez case for their blatant stoking of hatred and divisiveness. In this case, they even called for public demonstrations outside the office of defense counsel. Nor was their intrusiveness limited to harassing prospective jurors. They also made unusual and unjustified requests for information not ordinarily of interest to the media. (For example, the Court expressed concern about the "tremendous amount of requests" for the voir dire questions in advance of their being asked, apparently destined to inform their listeners, including members of the venire, of the questions "prior to the time they are posed to them by the Court.") (Vol.3:625). Also notable was their request for the names of the jurors as the trial neared deliberations. (Vol.103:14643).

Nothing demonstrated the intrusive role of the TV cameras more than their behavior during the most sensitive part of the trial: jury deliberation. It was then that the Court indicated that three jurors were overheard by a member of its staff discussing the fact that "they have been followed by the cameras ... . They were filmed yesterday and several of them felt they were filmed all the way to their cars and their license plates had been filmed." (Vol.104:14644). Why would the media be

---

[16] Spanish language radio stations were identified in a report of America's Watch as "...fostering a climate in which many people are reluctant to express differing viewpoints. Virtually every incident discussed in this report - from the cancellation of a play to the bombing of a professor's home-has been preceded by virulent criticism of the person or persons involved over the Spanish-language radio airwaves...Denunciation over the airwaves as a "traitor," a "Communist," or a "Castro agent," is often followed by a telephoned threat, an act of vandalism, or a physical assault." See "Dangerous Dialogue: Attacks on Freedom of Expression in Miami's Cuban Exile Community" by America's Watch (1992). Exhibit 12, p. 8.

so interested in a license plate? Emphasizing the fear felt by these deliberating jurors the Court cited their "concerns" no less than 3 times: "This is something brought up by them, they were concerned." (Vol.104:14645). "[S]everal of them felt their license plates were being filmed, so they were concerned." Id. "This is a concern they have." Id. at 14646.

One of the defense attorneys noted for the record that "[t]wo cameras were out there yesterday, [Channel]23 and Radio Marti," id., both stations active in the campaign against the Cuban government.[17] Jurors who were caught on camera even appeared on TV the night before. (Id. at 14643). What made the jurors so fearful? The same facts that made trial counsel fear for their safety and that of their family. Nothing could so endanger the safety of an individual or family in Miami/Dade more than to be associated in any way with the government of Cuba and its supporters. As Attorney Blumenfeld, a decades long resident of the city, informed the Court: "Frankly, counsel for all the defendants share the personal fear for their own well being were we required to defend alleged agents of the Cuban government charged with complicity in the Brothers to the Rescue shoot down." See D.E. 322, page 2. In open Court, two other counsel, both with children in the public schools, voiced their concerns for the welfare of their families due to their involvement in this case. See Exhibit 1, transcript of pretrial hearing of June 26, 2000 on pages 30 and 72.

Those concerns were not misplaced. In an in-depth follow up report about Miami's civil liberties climate by America's Watch in 1994, the authors warned that any views "that go beyond these boundaries (anti-Castro views) may be dangerous to the speaker."[18] Columnist Jim Mullin catalogued more than 18 acts of violence and threats by anti-Castro zealots which occurred in the

[17] Seated juror Plantatin, for example, was a regular viewer of Channel 23. (Vol.4:864).

[18] Human Rights Watch, "Dangerous Dialogue Revisited" (1994). See Exhibit 8, page 9.

greater Miami area in the decade preceding the trial.[19] To live in Miami one had to be wary of any public deed or expression that could be viewed as not sufficiently anti-Castro.[20] Decades of vehement insistence by the exile community that Miami-Dade conform to their political culture, backed up by threats and violence, left an indelible fear in the rest of the community.[21]

C. The Responses Given By Prospective Jurors During Voir Dire Demonstrated That a Fair and Impartial Jury Could Not Be, and Was Not, Selected In This Case.

Understandably, prospective jurors were reluctant to express such fears and anxieties in a public forum before the watchful ears and eyes of the media, some of whose members were known for identifying and excoriating perceived enemies of the exile community. Some, however, managed the courage to do so, voicing what all knew. One non-Cuban prospective juror readily expressed his disdain for the Castro government, but then went on to add, somewhat hesitantly, his concern for his own safety should he vote an acquittal of these defendants: "I would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict in agreement with what the Cuban community feels, how they feel the verdict should be" (Vol.5:1068). Later, he elaborated: "I would be a nervous wreck if you wanted to know the truth ... . I guess I would...have some fear, actual fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large." (Vol.5:1070).

---

[19] See "The Burden of a Violent History," The Miami New Times, April 20, 2000 by Jim Mullin. (Exhibit 10).

[20] Mullin wrote in the Miami New Times on April 20, 2000 that: "Lawless violence and intimidation have been hallmarks of ex exilio for more than 30 years. Given that fact, it's not only understandable many people would be deeply worried, it's prudent to be worried."Id. at 1.

[21] Thus, Reverend Fred Morris, a United Methodist minister was quoted in the Miami Herald as reporting that his congregants were fearful of publicly taking a position on the Elian controversy because, "some of them are nervous about offending the Miami (Cuban) constituency ... they would not like to make waves on something like this." See D.E. 324, Ex. O.

Prospective Juror Glanery, a non-Cuban, was also concerned: "I do expect that if the case were to get a lot of publicity, it could become quite volatile and yes people in the community would have things to say about it." (Vol.5:1010). Would he be willing to follow the Court's instructions? "It would be very difficult given the community in which we live." (Vol.5:1018).

Prospective Juror Michelle Petersen was also concerned about the reaction to a verdict: "I think I would be concerned about the reaction that might take place." (Vol.5:938). "I don't want rioting and stuff like that to happen like what happened in the Elian case. I thought that got out of hand." (Vol.5:945). Prospective Juror Pareria (non-Cuban) stated: "I would be concerned about how others viewed me." (Vol.6:1120). "I don't like the mob mentality that interferes with what I feel is a working system." (Vol.6:1121). Prospective Juror Howe, Jr., stated: "My concern is that no matter what the decision in this case, it's going to have a profound effect on us, both here and in Cuba. (Vol.6:1272).

Physical violence was not the only fear. There was fear of economic reprisal and loss as well. Prospective Juror Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, was concerned about how a verdict would affect his ability to do his job: "I guess I have a concern just how public opinion might affect my ability to do my job afterward...might impact my ability to do business in the community." (Vol.5:1057, 1059). When questioned a second time, he responded: "I do deal a lot with members of the Hispanic community ... . There may be strong opinions ... that may or may not affect my ability to generate loans for my employer." (Vol.5:1073).

Given the climate of fear and intimidation, not a single prospective juror, of more than 160 questioned, would publicly acknowledge a favorable impression of Cuba. The three jurors who reported a balanced judgment - one saw "things from both sides"; one heard, "good and bad"; and one saw "pros and cons"- were promptly removed by the prosecution's exercise of peremptory

challenges.[22] That left a qualified jury pool, prior to the exercise of peremptory challenges, united in its hostility to the defense. Not surprisingly, every prospective juror who was finally chosen, and who had an opinion on Cuba, expressed strongly negative opinions. Typical was the expressed opinion of the foreman of the jury during voir dire: "I believe Castro is a Communist dictator and I am opposed to communism. I would like to see him gone and democracy established in Cuba." (Vol.4:741).

Another juror, a retired banker whose daughter served in the FBI, was no less opinionated: " I cannot reconcile with this form of government." (Vol.6:1296-1297). A third sitting juror, a woman who works for the criminal division of the State's Attorney's office, expressed nearly identical views: "I am strongly opposed to communism ... the U.S. has been fair to Cuba" (Vol.4:861). The other sitting jurors, too reluctant to express their political views publicly, had to have held similar views given the near unanimity of the negative responses. Standing alone, the heavy political bias of the venire denied the defense a fair trial.

D. Denial of a Change of Venue Was Premised Upon Reliance on Critical Legal and Factual Arguments Mandating a New Trial In The Interest of Justice.

In connection with the presentation of survey evidence proving - in this case - the same prejudice that the government later verified in the Ramirez case, several factors are noteworthy. First, the ex parte nature of the defense request for funds was rendered a nullity due to adverse press publicity alerting the government and resulting in subsequent government participation in the fund request process. Additionally, adoption of the government's flawed mathematics and science to reject the survey work also adversely impacted the defense. In its Order denying change of venue,

[22] The three jurors were Barahona, who "saw pros and cons"; Gair, who could "see things from both sides"; and Peterson who heard "good and bad" (Vol.4:767, 810; Vol.5:939).

the Court may accordingly have misapprehended the import of the evidence on publicity and the purpose for which it was submitted and its relation to the critical difference between these defendants–agents of the Cuban government charged with murdering anti-Castro Miami residents–and those in other Cuba-related cases, such as those involving American businessmen accused of trading with Cuba. Further, in reviewing the facts submitted, the Court required that the defendants meet the stringent test for granting habeas corpus relief from state court judgments, rather than the lesser burden applicable to the exercise of the Court's supervisory power to ensure justice, a standard clearly met given the government post-trial admissions in Ramirez v. Ashcroft.

1. Irregular Procedures and Legal Errors Concerning The Defense Community Survey, Further Supports The Need for A New Trial In The Interest of Justice.

On August 18, 1999 the defendant Medina filed an Ex parte Motion for Authorization of Funds to Conduct a Survey as a Predicate for Change of Venue. (D.E. 275). On October 18, 1999 the Court took the unusual step of seeking the government's advice on whether to grant an ex parte defense request. (D.E. 284). Predictably, the government responded by launching an ad hominem attack on the proposed expert, accusing him of having, "a career oriented toward defense practice." In addition, the government denied the need for a survey expert, representing that venue was not an issue worthy of exploration because Miami-Dade is "an extremely heterogeneous, diverse and politically non-monolithic" community. (D.E. 286).[23] This breach of the defense camp, however, proved to be the first of a series of missteps which undermined the crucial defense survey evidence.

In applying for funding for the expert the defense specified that the survey sample would

[23] This, despite the government's earlier reluctance to get involved in the CJA application process: "Ordinarily, it is my experience that matters of application for CJA funds is something the government does not get involved in ... . Frankly, I have had judges admonish me in other circumstances where I sought to interpose on CJA issues." See Transcript of August 25, 1999, Exhibit 11 on p 15,17.

include 300 respondents from Miami-Dade, answering questions designed to probe attitudes relevant to this case. On November 15, 1999 the Court entered a sealed Order granting the defense request, specifically to fund that survey. (D.E. 303) Months later the Court rejected the survey, finding "the size of the statistical sample in this case is too small to be representative of the population of potential jurors in Miami-Dade County." (See Exhibit 6, the Court's Opinion on page 15). But at no time during the pendency of the defense application for the survey, or in the months that followed after receipt of the survey results, including the oral argument, did the defense become of aware of any doubt about the sample size. Moreover, as confirmed by Dr. Brennan the sample size was fully adequate for its intended purposes and produced a statistically valid survey. See Exhibit 4, affidavit of Kendra Brennan, on p. 6.

In addition, delays with respect to reimbursing the expert caused him to, in effect, withdraw from the case, leaving the defense without an expert in response to the prosecution's attack on him. an attack which was plainly disingenuous in light of the government's pleadings in Ramirez. (See Exhibit 7, the affidavit of Dr. Moran, page 5). Dr. Moran's absence from the venue hearing led to the Court's criticism of his methodology based on an affidavit submitted in an unrelated case dealing with an earlier survey by a psychologist retained by the government with no prior experience in conducting venue surveys. Had Dr. Moran appeared and testified, the confusion surrounding the drafting of the survey documents and his tallying of the survey results would have been clarified. The loss of this crucial expert testimony on an issue of great significance, combined with the government's contrary-to-fact representations on the venue issue, impeded the full exercise of the defendants' due process and fair trial rights. See Chambers v. Mississippi, 410 U.S. 284 (1973).

After denial of a change of venue on July 27, 2000, Dr. Moran received a copy of the Court's Opinion rejecting his survey findings. Since he no longer had a working relationship with the

attorneys in this case (having, in the meantime, filed a Bar complaint against the lawyer who brought him into the case, for failing to secure his payment) he wrote a letter directly to the Court while the defense motion for a reconsideration of the venue decision was pending, advising of a fundamental and profound error in the rejection of his sample size. A copy of that letter is attached as Exhibit 1 to Dr. Moran's affidavit. See Exhibit 7. The clerk of court never brought his letter to the attention of counsel and the defense did not become aware of its existence until these papers were being assembled.[24]

The totality of these irregular events and procedures concerning the survey, some of them newly discovered, involving the key piece of evidence on the venue issue, adds further reason why a new trial should be had in the interest of justice.[25]

2. The Factual Record on Venue and the Court's Analysis of the Information Before It Also Supports The Need For a New Trial In the Interest of Justice.

In denying the venue change motion, the Court cited to the "more than thirty articles" submitted by the defense in support of the motion to change venue, thereby suggesting that the defendants had complained primarily of mere pretrial publicity. The actual count of submitted

[24] Likewise, until it interviewed him for this motion, the defense was not aware of the claim of an unfortunate episode which purportedly transpired between the Court and Dr. Moran. According to Moran, as recounted in his affidavit, see Exhibit 7, p. 7, the Court, while sitting as a state court judge, had called him and his partner into her chamber, and sharply criticized them for interviewing jurors following a civil trial and at the request of trial counsel. Dr. Moran's name was provided to the Court when the application was filed in August of 1999, and he remained a key figure in the venue litigation for 13 months. While no action was taken, it is clear from his recitation of that event that there very well might have existed a level of distrust by the Court regarding this defense expert.

[25] During a status conference on August 25, 1999 the Court sought the active assistance of the government in obtaining a qualified survey expert, perhaps to act as a court's expert, to conduct the survey. See Transcript of August 25, 1999, Exhibit 11. Instead of advising the Court of the allegedly negative information about Dr. Moran which the government had in its possession for several years, it waited seven months and until after Dr. Moran's survey was filed to produce the affidavit of Dr. McKnight.

articles was more than twice that number, but the problem is the possible misunderstanding of the purposes for which the articles were submitted. After review of the media evidence, the Court dismissed their evidentiary value, concluding that "the pretrial publicity has not been so 'inflammatory and pervasive as to raise a presumption of prejudice' among the potential jury venire in this case. See Exhibit 6, p. 11. However, Defendant's written and oral submissions to the Court, these materials were not offered for purposes of demonstrating prejudicial pretrial publicity (although they showed that as well), but to evidence the deep and pervasive prejudice against anyone associated with Cuba in that division.[26]

Thus, while alluding to an "editorial connoting the anniversary of the shoot-down," the Order refrained from any discussion of that lead editorial, published in the county's most widely read newspaper, under the caption, "Terrorism Must Not Win." More than merely "connoting an anniversary" the editorial advocated punishing these defendants as the only relief for the pain of the victim families:

> Nothing could honor their memory more than to call to account their murderers ... more than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down.

D.E. 397; Exhibit J-1.

Such an inflammatory comment in the Miami Herald, four years after the incident that was the focus of Count III of the indictment, reflected the acute impact on the community as a trauma

---

[26] The volume of publicity about the case was such that the prosecution conceded before trial that "[i]t is only logical to assume that well-read, intelligent people from all walks of life will have been exposed to information regarding this case." See Trial Memorandum Regarding Voir Dire at 3 (D.E. 608). Earlier the Court has complained "there seems to be a parade of articles appearing in the media about this case." (Exhibit 11, Trans. of August 25, 1999, p.14).

which still provoked unspent anger at these defendants.[27] The Court also articles headlining the guilty pleas and sentencing of co-defendants, including an article which referred to the "10 member spy ring that snooped on U.S. military installations." (D.E. 397; Exhibit I-1) Such articles clearly prejudiced the defendants as they were tantamount to publicizing the confessions of co-defendants allegedly involved in the same enterprise.

However, no reference was made in the Order to the singular fact that was bound to provoke hostility in Miami-Dade: that the evidence would show (and the defendants would concede) that these defendants were acting as agents of the government of Cuba. Notwithstanding the fact that this information was revealed at sidebar during oral argument, the Court relied heavily upon the case of Fuentes-Coba, discussed below, in which a survey showing prejudice toward the Cuban government did not warrant a change of venue for a businessman charged with commercial dealings with Cuba. (See Exhibit 6 on page 4). However, the Fuentes-Coba decision was based on the premise that there was no clear nexus between attitudes toward Cuba and attitudes toward that particular defendant since his defense was to **distance** himself from the Castro government. See United States v. Fuentes-Coba, 738 F.2d 1191 (11th Cir. 1984), as discussed by counsel for Campa during oral argument. Exhibit 1, page 45; D.E. 65, pages 2-3. In order to properly assess the evidence of prejudice in this case in light of Fuentes-Coba, the Court would have had to acknowledge that here the evidence would show the defendants were Cuban agents, not American businessmen hostile to the Castro government.

Nor did the Order discuss another crucial fact in the venue record: the level of fear of

---

[27] The editorial also presented this case as a mere stepping stone to the real goal of indicting Fidel Castro. Prospective jurors reading this lead editorial in the venue's most prominent paper came away with the impression that they could assist in the process of ridding Cuba of Fidel Castro by simply convicting on Count III.

retribution should any juror be perceived as lenient toward the government of Cuba. It required neither press clippings nor expert opinion to appreciate what one defense attorney after another confessed were their own fears merely because they accepted appointment to defend these men. Those sincere expressions of fear were neither answered nor rebutted by government counsel.[28]

3. The Order Denying Venue Does Not Apply the Mandatory Requirements of Rule 21(a), Further Supporting the Need For A New Trial in the Interest of Justice.

Fed.R.Crim.P. 21 (a) states, in relevant part, that the court:

> "shall transfer the proceeding ... if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial ... ."

(Emphasis added).

The Order denying Defendant's motion fails to reflect the mandatory language of Rule 21(a). It cited the language of the operative portion of the Rule verbatim with one significant exception: omission of the word "shall" and substitution of the discretionary "may." This recharacterization of the compulsory nature of the Rule significantly undermined the commanding thrust of the language and eroded its intended purpose.

The original ruling was thus premised not only on the misleading position of the government and incomplete survey evidence, but also on the application of an elevated standard of review of the facts, utilizing the rigorous due process standard applied by the federal courts in cases coming into the federal system by way of habeas corpus petitions from state jurisdictions, and relying extensively references to those cases: Irwin v. Dowd, 366 U.S. 717 (1961); Shephard v. Maxwell, 384 U.S. 333 (1966); and Murphy v. Florida, 421 U.S. 794 (1975) – all state court prosecutions, decided by federal

[28] Jurors' fear of coercion and intimidation from neighbors is a factor to be weighed in considering a Rule 21(a) motion. U.S. v. McVeigh 918 F.Supp. 1467, 1470, 1473 (W.D. Ok. 1996).

courts on the basis of the due process standard. In those cases, respect for the various states and the first hand experience of the trial courts imposed a restraint on the federal court.

Not so with cases originating in the Federal Courts. Rule 21 (a) invokes the supervisory power of the federal trial judges to oversee the administration of justice in the federal system. [29] Since 1959, the Supreme Court and lower courts have recognized that pretrial applications for venue change in the federal system address, and are to be decided through, the exercise of the court's supervisory power. See Marshall v. United States, 360 U.S. 310 (1959); United States v. Tokars, 839 F.Supp.1578 (N.D. Ga. 1993); United States v. Moody, 762 F. Supp. 1485 (N.D. Ga., 1991); cf. United States v. Faul 748 F.2d 1204, 1224-25 (8th Cir. 1984) (Lay, C.J., dissenting). Indeed, the venue denial order makes no reference to the court's supervisory power.[30]

And, while the Order cited to and quoted from Pamplin v. Mason it adopted instead the highest threshold standard for granting venue change: one that requires a showing that it would be "virtually impossible" to achieve a fair trial. That standard, enunciated by a federal case applying the due process standard to a case arising out of the state system, dealt with prejudicial pretrial publicity as the alleged cause for venue change. See Ross v. Harper 716 F2d 1528, 1540 (11th Cir. 1983).

Any analysis of the degree of prejudice required to change venue demonstrates that the decisional process is dictated by fact specific concerns. What is at once clear is that this case is not a matter of a single incident blown out of any reasonable proportion by a sensational press, but rather

---

[29] In supervising the administration of justice federal district courts are charged with the responsibility of "ensuring that criminal trials appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988). See also "The Supervisory Power of the Federal Courts" 76 Harvard Law Review 1658 (1963).

[30] The government only reminded the Court of its supervisory power when advocating for its use in the context of urging the Court to preclude discovery under the Classified Information Procedures Act. (See D.E. 104, Motion for Protective Order)

one that was endangered by a long-standing, deeply held set of beliefs and attitudes against a defendant from a particular country – in this case, agents from Cuba. As remarked by Mr. Guerrero's prior counsel: clandestine agents from China could receive a fair trial in Miami-Dade, but not ones from Cuba. That is why – as the government later acknowledged when its own interests in a fair trial were at stake – Pamplin, as opposed to the prejudicial pretrial publicity cases, was the appropriate starting point in analyzing the prejudice. It also enunciated the correct test to be applied when outside influences are present: "probability of unfairness," as opposed to much more stringent "virtually impossible to seat a fair jury" test applied in this case.

Moreover, the two federal criminal cases cited in the venue denial order, United States v. Capo, 595 F2d 1086 (5th Cir. 1979), and United States v. Fuentes-Coba, 738 F2d 1191 (11th Cir 1984), are so factually different from the facts of this case as to have no application here. In the former, a prejudicial publicity case, the trial took place in a large city 100 miles distant from the scene of the crime where the community had no investment in the outcome since none of the actors or victims resided there. Fuentes-Coba is also of no relevance since in that case the community's attitudes toward Cuba did not necessarily prejudice the defendant since he professed to share the community's hostility toward the Castro government. See discussion of Fuentes-Coba by Campa's counsel, D.E. 656, pages 2-3 as well as oral argument in Exhibit 1, pages 32-34. Here, the defendants not only embraced that perceived enemy government, they were part of it, and working against Miami-based organizations seeking Castro's removal. Under these circumstances prospective juror's attitudes toward the defendants were coextensive with, and completely inseparable from, their attitudes toward Cuba.

In light of the governing legal standard for pretrial venue analysis, the newly discovered government acknowledgment – indeed wholehearted endorsement – of the defendant's factual claim

of deep-seated prejudice warranting a change of venue mandates the grant of a new trial outside Miami-Dade County.

CONCLUSION

For the reasons cited above the conviction of Defendant Antonio Guerrero should be set aside and a new trial in an appropriate venue ordered.

Respectfully submitted,

_____

Leonard I. Weinglass
6 West 20th Street
New York City, N.Y.10011
Attorney for Antonio Guerrero