NOS. 01-17176 & 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

RUBEN CAMPA,
Defendant/appellant.

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

EN BANC BRIEF OF THE APPELLANT RUBEN CAMPA

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Ruben Campa
Case Nos. 01-17176 & 03-11087

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

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLANTS

Appellant Ruben Campa, pursuant to Fed.R.App.P. 28(i), hereby adopts the *en banc* appellate briefs filed in the instant appeal by co-appellants Gerardo Hernandez, Luis Medina, Antonio Guerrero, and Rene Gonzalez.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with offenses against the laws of the United States. The court of appeals has jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over final decisions and sentences of United States district courts.

STATEMENT OF THE EN BANC ISSUES

I. Whether the district court improperly denied defendants' repeated motions for change of venue where pervasive community prejudice, in combination with prejudicial events at trial, rendered virtually impossible the jury's consideration of the case unaffected by prejudicial community influences.

II. Whether the district court improperly denied defendants' motion for new trial based on newly discovered evidence where the government conceded, after trial, pervasive community prejudice in Miami-Dade County with respect to issues of core concern to the Cuban exile community.

STATEMENT OF THE CASE

Course of Proceedings, Disposition, and Statement of Facts

Appellant Ruben Campa, who is presently serving a 19-year sentence for his conviction in this case on charges of conspiracy to fail to register as a foreign agent, failure to register as a foreign agent, and possession of false immigration and citizenship documents, *see* R14:1439, adopts and incorporates by reference the statement of the case in the *en banc* briefs of Rene Gonzalez and Gerardo Hernandez.

Standard of Review

The three questions propounded by the *en banc* Court focus on whether the district court abused its discretion in its venue and new trial rulings. This brief proceeds to analyze the issues in accordance with the abuse of discretion standard,

recognizing that the record of venue prejudice must nevertheless be examined independently by this Court. Appellant submits, however, that as to pervasive community prejudice, the governing standard is *de novo* review, inasmuch as pervasive prejudice–unlike claims of individual bias–presents a mixed question of law and fact. *Cummings v. Dugger*, 862 F.2d 1504, 1510 (11th Cir. 1989) (as to claims of pervasive community prejudice, "this Circuit has treated the standard as a mixed question of fact and law").

SUMMARY OF ARGUMENT

Venue claims must be resolved on a case by case basis. Not every case involving Cuban issues requires a change of venue from Miami, nor does a case that may require a change of venue at one time automatically require such measures at a later time. The case-by-case, one-at-a-time nature of the requisite venue analysis on appellate review is fundamental to the appropriate disposition of this case, where the timing, community and media interest, subjects of prosecution, identities of the defendants, and manner in which the issues for resolution were presented to the jury rendered manifestly erroneous district court's decision to deny a change of venue and to deny the defendants' alternative request to try the case in Broward County.

The relevant question in determining whether pervasive prejudice compelled a change of venue is whether the passions in the community in combination with the issues in dispute at, and conduct of, trial were such that voir dire could not assure an

impartial jury and a fair trial. *See Rideau v. Louisiana*, 373 U.S. 723, 732, 83 S.Ct. 1417, 1422 (1963). In the instant case, voir dire could not prepare jurors for a trial where they would resolve issues of such intense and passionate concern to their fellow members of the community and where the government characterized community relations as a victim of the offense. Nor could voir dire prepare jurors for evidence of the violent incidents by community elements regarding particularly important Cuban exile concerns. As defense counsel maintained both prior to and during jury selection, *see*, *e.g.*, R25:851, R27:1373-76, rather than curing prejudice, voir dire–despite the district court's vigorous attempts to rehabilitate jurors who expressed bias and related concerns of community influence–confirmed the deep-rooted community prejudice touching the lives of the jurors, their families, friends, business associates, and co-workers.

Following their selection to the jury, even if the jurors scrupulously observed the court's instructions, they would not have been immune to community passions regarding the factual issues in the case. Although the district court sought to limit the taint of traditional media, by directing jurors to avoid publicity "touching on this matter in any way," R33:2261, this instruction could not be expected to protect jurors from media and other influences going to broader and more fundamental evidentiary disputes at trial about the community and Cuba. Voir dire did not explain that the

trial would last nearly seven months such that it would require the special indulgence of jurors' employers–including Cuban-Americans–and family members.[1] The trial tested the jurors' endurance, as jurors suffered three deaths in their families during trial.[2]

Crucially, this case involved the most highly publicized killings in the history of the Cuban exile community in Miami-Dade County, an event deemed so significant that each year since its occurrence it has been recognized by religious masses, demonstrations, and flight ceremonies, complementing permanent, prominently-displayed memorials and renamed major thoroughfares for its victims. The issues at trial–as presented by the government, which took untoward advantage of the community's passions and fears–were far more emotionally-laden and touched closer to community nerves than jurors would have known from voir dire. These issues, viewed in combination with the continuing nature of prejudicial case-related publicity and events, and the jurors' own awareness of, and exposure to, widespread community bias, precluded any reliability that the jury could serve impartially in this case.

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[1] *See* R69:7008 (jurors' employers kept apprised of trial progress); R58:5953 ("THE COURT: We have gotten to a point [February 6, 2001] where the jurors are asking ... how much longer will the trial be to let their employers know.").

[2] *See* R105:12127 (alternate attends funeral in Venezuela; third panel member to experience death in the family during trial).

ARGUMENT

The district court manifestly erred in denying a change of venue where it was virtually impossible to select, from a cross-section of the Miami-Dade community, an impartial jury uninfluenced by community passions.

1. *Precedent compels that the prejudice seen in this case warranted a change of venue.*

The government, in seeking rehearing, ignored that the issue raised on appeal and in the district court was whether pervasive community prejudice against these defendants–as admitted agents of the Cuban government charged with murder and other crimes against humanitarian elements of the Cuban exile community, sowing community discord, and committing espionage–in combination with prejudicial trial events, intensive media coverage, and prosecutorial excesses, required a transfer of the case outside Miami.

The government has instead sought to analogize the unique factors in this case to mere run-of-the-mine criminal litigation. But in each of the cases on which the government relies, there was no significant level of even temporary bias, fixed opinions, or animosity toward the defendant, and no claims of inability to be fair due to personal, family, and community experience. In the pretrial publicity cases cited by the government, where jurors in the venue were exposed to some level of media coverage of an offense, the prospect of putting such news reports to the side and hearing the case on its merits was much less daunting than what was asked of the

jurors in the instant case.

In *United States v. Awan*, 966 F.2d 1415, 1428 (11th Cir. 1992), on which the government has placed heavy reliance, *see* Gov't Pet. i, 7, 9, 11, the prejudice hypothecated by the defendants in a money laundering "sting" case simply was not there; there was *no* evidence to support the theory that just because the defendants had engaged in business dealings with Panamanian General Manuel Noriega, bias was somehow transferred to the defendants. The *Awan* defendants notably *did not claim* that there could be a more favorable venue than Tampa. There was *nothing* linking Tampa to a history of prejudice against Noriega; there were *no* editorializations arguing for conviction of the defendants; there were very few articles of any kind about the case. And, even if there had been prejudice against Noriega in Tampa, there was *no* indication that Noriega's guilt implied anything about Awan's guilt in a sting operation.

The Court recognized in *Awan* a factor that has particular significance for the instant case: prejudice against an individual who is neither a coconspirator nor an uncharged participant in an offense will not, absent record support, be presumed to create prejudice against the defendant. *Id*. Such "peripheral" prejudice on "matters not directly related to the defendant's guilt" cannot automatically be deemed transferred to the defendant. *Id*. Thus, unlike *United States v. McIver*, 688 F.3d 726, 729-30 (11th Cir. 1982), in which prejudice was presumed from the jury's pre-

deliberation belief in the guilt of a coconspirator, a different presumption applies where jurors believe in the guilt of someone not directly related to the allegations against the defendant. *Awan*, 966 F.2d at 1429. In light of this distinction, the defendants' prejudice claim in *Awan* had two insurmountable problems: (1) there was no evidence of any community prejudice as to them personally; and (2) there was no direct connection between their culpability and that of Noriega, even if there were prejudice against Noriega himself.

The instant case contrasts with *Awan* on both grounds: (1) the government argued that there was a *very close* link between Fidel Castro, the Cuban government, and the defendants, as to each and every element of the charges; and (2) the government posited a direct connection between the defendants' culpability and that of Castro, as an asserted coconspirator. Thus, because of the defendants' involvement with the Cuban regime, every indication from the record was that there was substantial prejudice directed at the instant defendants–whether one considers the massive pretrial publicity and editorials, the survey results, or the voir dire responses and cause excusals–and the evidence established that the extraordinary level of such prejudice was attributable to the hundreds of thousands of Cuban Americans in exile in Miami-Dade and hundreds of thousands of their family members, who together compose, by far, the most populous group in the community. These passions were *directly* intertwined with every aspect of the case; and the Miami venue was the

special repository of the relevant prejudice.

Awan is consistent with prior precedent of this Court that where jurors are predisposed toward believing in the guilt of a coconspirator, there is a presumption of prejudice. *See McIver*, 688 F.2d at 730. But the Court found in *Awan* that Noriega was by no means a coconspirator or anything like it. His associations with the defendant were tangential to any element of the case, and thus the only conceivable prejudice to the defense was generic guilt by association; yet nothing in the record supported a finding of such associational prejudice. *Awan*, 965 F.2d at 1427-28. Moreover, the subsequent trial of Noriega himself in Miami shows that Florida jurors were not strongly biased against him; in his appeal, no venue issue was even raised. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

In the instant case, one need look no further than the trial evidence, and the extensive testimony of FBI Agents Ball, Hoyt, Giannotti, and Salomon, and exiles Lares, Morejon, and Iglesias, to see that Fidel Castro was presented as a coconspirator of the defendants as to both espionage and murder conspiracy and every other aspect of the case; the government used charts and enlarged photographs to make sure the image and name of Fidel Castro were burned into the jury's understanding of who the lead coconspirator was. The government's rebuttal closing argument alone invoked Castro's name five times while referring to the Commander in Chief or the Cuban Government another dozen times. Unlike *Awan*, the record here showed that the

prejudice the community felt toward the unindicted coconspirator (Castro) was alive both inside and outside the courtroom.

Other decisions on which the government relies are even more inapposite, including habeas cases where no claim (or only the barest unsupported claim) of pervasive community prejudice was raised and where voir dire showed no prejudice in the community. *See*, *e.g.*, *Spivey v. Head*, 207 F.3d 1263, 1271 (11th Cir. 2000) ("In fact, only six out of the seventy prospective jurors were struck because of their exposure to pretrial publicity."); *Bishop v. Wainwright*, 511 F.2d 664, 666 (5th Cir. 1975) (actual prejudice claim based on pretrial publicity; court found "nothing in the record to indicate [either] specific prejudice [or] a substantial likelihood of such prejudice").

The instant case is premised on an unequivocal showing of *pervasive community prejudice*, to which pretrial publicity both contributed and was a revealing window confirming the basis of juror concerns and admissions of bias. Here, the existence and unavoidable influence of pervasive community prejudice is evident from the very context and conduct of voir dire.

2. *The district court's belief that, by excising an entire bloc of the community from the jury, voir dire could serve the purpose of eliminating the influence of pervasive prejudice was erroneous as a matter of law and in light of the jury selection procedure applied*.

The voir dire procedure used by the district court was insufficient to eradicate

widespread bias within the community, as stressed repeatedly by the defense in arguments and renewed motions. The district court established the jury selection procedure before ruling on the venue motion. During the June 26, 2000 hearing on the defendants' venue motions, the district court indicated that it would likely deny the motions and proceed instead with a two-stage voir dire: in phase one, the court would question jurors as a group, seeking personal and biographical information, including relationships to witnesses and victims; in phase two, the court would ask jurors about prejudice concerns and whether beliefs regarding the defendants could be set aside at trial. *See* RBox1:514:66-67 (court asks defense counsel "[w]here would the prejudice lie" if, in phase two of voir dire, the court were "[b]ringing in a lot of people and whittling them down and going through very extensive individual questioning"). The district court reiterated its plans for this procedure in two additional lengthy pretrial hearings, including on October 24, 2000, when the district court denied the defendants' renewal of the venue motions. *See* Gov't Br. 51 & n. 39; R5:723.

The defendants strenuously argued that their motions *anticipated* such a voir dire procedure–i.e., the very procedure the district court used–and that the premise of their motions was that such a procedure–although capable of producing 12 persons promising fairness–would be insufficient in this "case of presumed prejudice [because] the quality of the voir dire is not the issue. It is the fear that the voir dire

cannot go to the subconscious influences that cause the type of prejudices that we are talking about." *Id*. at 68; *see id*. at 68-69 ("This isn't a situation where we are trying to get a jury in a particularly highly publicized case ... . [A]ll we could do is get [a] juror who comes in here and promises [to] be fair and impartial and listen. ... The problem is ... it is not that easy to cull out the type of problems we perceive with respect to ... the trial with a venire drawn from this community. It is not only Cuban Americans we are talking about, it is anybody ... . In making this motion and making these arguments, we have done it ***anticipating*** that type of proceeding ... wherever that venire was chosen.") (emphasis added); *id*. at 72-73 ("The problem is we can't separate those people from their environment. ... We can get perhaps 12 people or 18 people who are absolutely sanitized, but we can't keep them from the community and we can't keep them from those pressures and that is part of what we are afraid of and part of what the cases are talking about."); *id*. at 73 (responding to government arguments that violent threats following the Elian incident were not excessive, defense counsel states: "I am uncomfortable [if] even a handful of people threaten to kill Janet Reno. It is no comfort to me that only a handful or a number of people called in wanting to kill the INS agent that took Elian out of the house. ... [T]here are extreme elements and the presence of that number of extreme elements I think is enough to argue in favor of moving this trial elsewhere.").

The district court, after hearing the defense's objection to proceeding with the whittled-down jury approach, denied the motion for change of venue and later the defendants' renewal of the motion, *United States v. Hernandez,* 106 F.Supp.2d 1317 (S.D. Fla. 2000); R5:586, 723, ordering that the defendants could renew the motion only ***if*** the court's planned voir dire did not produce the necessary pool of qualified jurors. R5:723 at 2-3 (Oct. 24, 2000 "Order Denying Motion for Reconsideration," reiterating prior order's limitation that defendants would be permitted to renew venue motion "'***if*** the Court determines during voir dire that a fair and impartial jury cannot be impaneled'") (quoting R5:586:17) (emphasis added). *See also* 1SR3:11 (at November 2, 2000 hearing on jury questions, district court explains voir dire goal is to obtain 44 prospective impartial jurors out of 204 venire members, indicating that even if most prospective jurors are too biased to serve, that would still leave sufficient number of qualified jurors for impanelment).

3. *The government's belated mischaracterization of defendants' good-faith compliance with the district court's voir dire rulings and strategic use of peremptory challenges ignores the pervasive-prejudice nature of the defendants' claims*.

The district court having already considered and denied the defendants' objections to the voir dire plan and repeated motions for change of venue, defense counsel attempted during jury selection to cooperate with the letter and spirit of the district court's written and oral pronouncements with respect to jury selection. And

immediately following the selection of the jury, the district court put on the record its satisfaction with counsel's cooperation in complying with the court's orders:

> I want to commend both sides for your cooperation as we went through the voir dire process which was, though fairly efficient, was a long process by the number of [days] spent. Both sides truly advocated for their clients and their positions and it was a spirit of cooperation and I appreciate that and I hope it will continue, I expect it will continue throughout the trial.

R28:1513.[3] At the conclusion of jury selection, there was no suggestion by the court, the government, or any party that counsel had failed to avail themselves of an opportunity to again renew the venue change motion; instead, the district court expressly recognized that counsel's actions reflected cooperative compliance with what the district court had already decided. When trial events provoked defense renewals of the venue change motion at several points in the trial, the government ***never*** suggested that the defense had somehow withdrawn its venue objections by playing by the rules and attempting to select jurors who exhibited as few manifestations of prejudice as was feasible in light of the venire.[4]

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[3] The district court invested significant effort in preparing to conduct the voir dire as planned. *See* R24:626 ("THE COURT: ... I did spend some time in a mock situation trying to determine how long the questions would take and that is how I came up with the eight to ten per hour.").

[4] Nor did the government claim at trial, what it now argues, Gov't Pet. 4, 14 n. 5, that one defense attorney's statements made in opposition to the government's attempt, after 5 months of trial, to remove from the jury an African-American mother of a graduating college senior, somehow vitiated pervasive-prejudice arguments

The government also erroneously contends that the defense's failure to exercise three additional peremptory challenges–granted by the district court late in the jury selection process, in response to several "close-call" denials of defense challenges for cause as to jurors–has relevance to the pervasive community prejudice analysis. Gov't Pet. 3, 7-8 (noting defense used 15 peremptory challenges to the government's 9) (citing *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir. 1985)). The government errs in several fundamental respects. First, even if the defendants had proceeded on an actual bias theory, the government fails to note that the prospective jurors as to whom the three extra challenges were awarded to the defense *were* challenged by the defense, and hence the extra challenges were ultimately not needed. The defense, unlike the defendants in *Alvarez* and the case on which *Alvarez* Court relied, *United States v. Gorel*, 622 F.2d 100, 103-104 (5th Cir. 1979) (peremptory exercise relevant only to "actual" juror prejudice issue), used all of its rule-allotted challenges and more. Further, there is a crucial difference between blind jury

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made before and after the government's replacement request was denied. The government's post-hoc approach to avoiding the pervasive prejudice issue–an issue that does not rest on record showing of actual prejudice of individual jurors, *see Pamplin v. Mason*, 364 F.2d 1, 4 (5th Cir. 1966) (community prejudice against African-American civil rights activist seen as stirring up community trouble compelled grant of habeas relief without regard to showing of actual juror)–is not merely untimely and factually mistaken, but legally inapt and ignores that the defendants consistently opposed the government's striking all African-American jurors. *See infra* at 28 n. 9; *Eberhart v. United States*, 126 S.Ct. 403, 407 (2005) (government waived argument by raising it for first time on appeal).

selection–in which a party cannot compare prospective jurors in the box with jurors yet to be questioned–and the strike-pool system employed here, which encourages strategic, rather than exhaustive, use of peremptory challenges. [5]

Apart from these important factual distinctions, the more fundamental problem with the government's analysis is that *Alvarez*'s reference to an evidentiary implication from the failure to exercise peremptories relates to a showing of *actual* "*juror* prejudice," distinct from pervasive *community* prejudice. *Alvarez*, 755 F.2d at 859 (emphasis added); *see Gorel*, 622 F.2d at 103-04 ("Furthermore defendant has failed to show that actual prejudice infected the opinions of these jurors as a result of pretrial publicity. ... Indicative of the absence of juror prejudice is the fact that of defendant's ten peremptory challenges, only six were used to strike potential jurors from the case.").

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[5] The district court's numbered pool of 52 jurors was guaranteed to produce a jury even if all peremptory challenges were exercised. Because the parties knew the order of the jurors to come after a strike, and because all jury questioning was completed, the object of jury "selection" was to pick the best available jurors from the strike pool. In theory, this selection might require defense striking of the first or last 10 in the pool, but there is no reason defense counsel should arbitrarily keep striking jurors just to get to the worst possible jurors in the pool. Hence, while the *Alvarez* suggestion that in some circumstances, non-use of peremptory challenges may reveal the presence of actual bias, that is not logically the case here, where the strike pool method was employed to obtain the "best of the worst." The district court recognized the parties' strategic use of peremptories. R27:1383; R28:1526, 1528. And as events developed, defendants actually struck 17 prospective jurors ahead of the final juror selected to serve, Eugene Yagle.

Indeed, the Supreme Court has never approved the theory that voir dire rebuttal of pervasive community prejudice is sufficiently reliable to justify denial of a change of venue and has never suggested defense counsel must use all peremptory challenges to show pervasive prejudice. *See Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 1644 (1961); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417 (1963). The defendants here have always relied on a pervasive community prejudice theory, conceding that the record does not show whether individual jurors actually succumbed to the community pressures they experienced. And the defense has argued that, in this case, pervasive prejudice derived not merely from pretrial publicity, as in *Irvin* and *Rideau*, but also from: (1) media coverage which continued for the duration of the proceedings; (2) longstanding community animus against the Cuban government and its leader, Castro, with whom the defendants were alleged to be directly connected, compounded by specific events and outbursts during trial; and (3) closing prosecutorial argument suffused with improper, inflammatory remarks exploitative of community bias and fears. Thus, the government's actual-juror-bias argument is legally unfounded and not on point in this case.

Near the conclusion of voir dire, defense counsel observed that even discounting the denial of numerous for-cause challenges raised by the defense, the rate of prejudice found in voir dire validated that found in the only community survey in this case, prepared by FIU Professor Gary Moran; counsel re-raised the survey with

the district court in requesting additional peremptory challenges:

> One of the things that has hit me and I haven't had a chance really to sit down with the percentages, but ***how closely we came to the statistical breakdown that Professor Moran anticipated*** ... . He did his job as he saw it and I felt he did it well. There was quite a bit of criticism from the government but ***he was really borne out in terms of the percentage of his pool*** aren't answers he was getting that he based his opinion upon and ***whether you accept his opinion or not***, ***his statistical analysis I think has been borne out*** by what we have done ... .

R27:1373-74 (emphasis added). Defense counsel's reiteration of the survey's accuracy was plainly not a retreat from the venue motion. *See United States v. Campa*, 419 F.3d 1219, 1239 (11th Cir. 2005) (noting counsel argued that portions of the voir dire "exemplified Professor Moran's opinion"), *rehearing en banc granted, opinion vacated by*, __ F.3d __, 2005 WL 2840320 (11th Cir. Oct. 31, 2005) (*en banc*). And the government's immediate argument to the district court in response belies its new argument, Gov't Pet. 3 (claiming defense comments showed satisfaction with voir dire), that the defense believed voir dire cured prejudice. At trial, the government contested defense counsel's position and argued, incorrectly, that voir dire had not sustained substantial prejudice. R27:1378 (government disputes "Mr. Norris' point [that] somehow this proves Professor Moran to be right"). The denial of numerous challenges for cause and counsel's frustration with the underlying prejudice with which the defense was left as to the bulk of jurors approved by the district court reveal that counsel's only "satisfaction" with voir dire was that it proved

the very prejudice that was the basis for the venue change motions.[6]

4. *The limitations of voir dire in this case.*

Despite placing on the defendants the burden of showing as to each challenged juror that the juror "demonstrated [an] inability to follow the Court's instructions" or that the juror's biased opinion was unalterable, R25:852, the district court barred the attorneys from personally conducting any voir dire, even as to agreed questions, *see* Trans. (Oct. 24, 2000 hearing) at 34, thereby preventing counsel from evaluating physical or emotional reactions to questioning by attorneys for the Cuban-agent defendants. R22:6. Nor could the district court sequester the jury, given the length of the trial. Nor did the district court make the jury anonymous to the press and public; instead, biographical information was given in open court. Further, even during jury selection, it was not feasible for the district court to tell the jury to avoid reading continual news and editorial reports (particularly in Spanish-language media in Miami) concerning Castro, Cuba, the exile community, or relevant U.S.-Cuba policies and debates; nor could jurors be expected to cease having conversations with friends, family, and co-workers about such matters in Miami.

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[6] *See*, *e.g.*, R23:303 (noting prejudicial statements by prospective juror during group questioning); R25:851 (objecting "we have to go beyond the answers to the final question and consider the experiences and thoughts that underlie the person's evaluation of the whole matter"); R25:898-99 (objecting to failure to afford "follow-up" questioning once prospective juror is partially rehabilitated).

Additional record facts counter placing undue weight on the responses–and failures to respond–by some jurors regarding the subject matter of the case and potential community reactions. Despite implications from the transcript that the jurors were questioned in private, the questioning actually occurred at sidebar in open court, not in chambers. The courtroom was filled with the press and victims' family members and associates who watched, but were unable to simultaneously hear, the jurors' responses to the prejudice questions. In addition to the rows of print, television, and radio media, and numerous family members and associates of the victims of the Brothers to the Rescue aircraft shootdown, also present in court were the defendants, seated at counsel table. R19:112; R25:714; SR3:6, 8-9 (at pre-voir dire hearing, after denying defense request that the trial be conducted utilizing a larger courtroom than that ordinarily used by the district judge, court explains how tightly packed together the jurors and the victims and victims' families will be on one side of the courtroom throughout voir dire). Also excluded from the sidebar were the other jurors in the courtroom; they were therefore unaware that many jurors had forthrightly admitted biases. Ultimately, as the jurors could surmise from the court reporter and in-court nature of the proceedings, neither the jurors' identities nor their responses to the prejudice questions were shielded from the public or the media.

For several jurors, the confidence to admit their concerns did not come until the third interview. *See*, *e.g.*, R26:1068 (Cuevas, on third round of questioning, admits

he would feel "intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels").[7]

In this second stage of the voir dire, the district court, utilizing a questionnaire, *see* Gov't Br. App. 4B, sought individual jurors' statements that they could be fair despite prevailing community prejudice against the defendants. *See*, *e.g.*, R25:857 (district court denies for-cause challenge as to Cuban exile who stated that she was "biased," did not know if she "could be fair," and had frequently discussed the case with other Cuban exiles in her home, R25:829-831; after rehabilitative question, district court states: "I do find she could be a fair and impartial juror."). This prejudice questioning did not occur in the initial interview of the jurors, but rather in the days thereafter, after jurors accompanying the case. *See* R22:111-12; R23:196.

Lawyers for the defendants were (along with government counsel) precluded by the district court from directly posing any questions to prospective jurors, despite the defense's specific request for at least some attorney-conducted, face-to-face voir dire. R5:609:1 (Campa's voir dire request). The district court had overruled defense objections to the failure to allow any attorney-conducted voir dire, as was afforded

[7] Despite reluctant admissions such as Cuevas's, the government accused the panel of contriving a "miasma of fear." Gov't Pet. 13. Fear, however, arose naturally from the intense community issues litigated at trial; if anything, the government's spies-bent-on-destroying-America arguments rested on a miasma of fear-mongering.

to defense counsel in *United States v. Fuentes-Coba*, 738 F.3d 1191 (11th Cir. 1984) (prosecution charging defendant with trading with the enemy, Cuba). *See also United States v. Lehder*, 955 F.2d 1510, 1523 (11th Cir. 1992) ("The parties were then permitted to conduct their own individual voir dire."); *Patton v. Yount*, 467 U.S. 1025, 1035 n. 10, 104 S.Ct. 2885, 2890 n. 10 (1984) ("It should also be noted that the voir dire in *Irvin*, like that here, was conducted largely by counsel for each side, rather than the judge.").

When jurors acknowledged bias or hesitated as to whether they could be fair, the district court attempted rehabilitation. *See*, *e.g.*, R25:856; R27:1382 (district court concedes that efforts directed at rehabilitation left many questions). Even as to jurors whose answers to fairness questions were ambiguous, the district court overruled challenges for cause where the juror ultimately stated an intent to be fair. *See*, *e.g.*, R25:855; R27:1442. Most jurors expressed antipathy toward Cuba, but many remained silent as to other opinions, including many exiles claiming to have no opinions about Cuba, Elian Gonzalez, or U.S. policy toward Cuba. *See* Appendix A (chart of jurors' answers to opinion questions); Appendix B (summary of juror response chart). The district court did not undo the imbalance of prejudice by increasing the rate of defense peremptories, but instead gave the government proportionally greater power to strike jurors peremptorily. R27:1380-82.

Although the voir dire questioning was limited in explaining jurors'

connections to Cuban Americans in the community–e.g., jurors were not specifically asked whether they have Cuban American close friends or co-workers or employers or "significant others" or whether their family members came to the U.S. in exile from another country–answers given by many jurors filled in some of this information. The jurors were not specifically required to identify present or former Cuban American spouses, children, stepchildren, and stepparents, but several, including trial juror Cento, did so. Contrary to the government, although jurors were asked to give their place of birth, they were not specifically asked to state whether they or family members were of Cuban descent; it was unclear whether questions about relatives who lived in Cuba applied to deceased relatives. The absence of precise data on the ethnic background of the jurors is particularly relevant because extrapolation of the 2000 figures census indicates that as many as 800,000 Cuban Americans live in Miami-Dade County.[8]

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[8] While only 650,000 of the 1.3 million Hispanics in Miami-Dade in 2000 advised the Census Bureau that they were of Cuban descent, the actual number of Cuban Americans in the county is likely greater. Cubans constitute approximately 60% of the self-identifying Hispanic population in the county. *See* http://co.miami-dade.fl.us/planzone/census.htm. Applying that percentage to the 203,000 Hispanics from whom the Census Bureau did not collect information regarding country of origin yields an additional 122,000 Cuban Americans, such that the total number of Cuban Americans would be approximately 772,000, as of the year 2000.

5. *The government's claims of rebuttal of pervasive prejudice in Miami confuse actual versus presumptive prejudice arguments, ignore precedent of this Court setting a high bar for any potential rebuttal, and ignore the record of juror responses*.

The government now claims that the voir dire process "rebutted" the presumption arising from pervasive community prejudice that jurors were influenced by such prejudice and passions. Gov't Pet. 7, 11, 14 (contending, erroneously, that district court's acceptance of juror's assertion of ability to be fair constitutes rebuttal of pervasive community prejudice). This Court has never affirmed the denial of a motion to change venue on the theory of rebuttal of pervasive community prejudice, but has discussed the possibility of such rebuttal in several habeas cases. *See Coleman v. Kemp*, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985) (assuming such rebuttal is possible even though "[i]t might be argued that the threshold showing required to presume prejudice is so high that any rebuttal is inconceivable") (citing *Mayola v. Alabama*, 623 F.2d 992, 1000 (5th Cir. 1980)). The premise of presumed prejudice is that a juror's declarations of impartiality despite exposure to community-saturated prejudice are inherently unreliable. *See Rideau v. Louisiana*, 373 U.S. at 724, 726-727, 83 S.Ct. at 1418, 1419-1420 (1963) (holding that given existence of pervasive community prejudice–where at least 53,000 of 150,000 residents of county were exposed to unfairly prejudicial pretrial publicity–it was not necessary that defendant show that jury actually was prejudiced or that prejudicial material actually reached

jury, and thus infected trial; if information was prejudicial and dissemination sufficiently widespread in the community from which the jury was drawn, defendant is entitled to relief without regard to actual prejudice); *cf*. *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1644 (adverse pretrial publicity created presumption of prejudice such that jurors' claims of having no fixed opinions could not be believed).

In *Mayola v. Alabama*, the Court reasoned that *Rideau* pervasive prejudice arising from pretrial publicity could be rebutted by a prosecution showing that the jurors selected had never had any first- or second-hand exposure to any prejudicial events, evidence, or publicity. 623 F.2d at 1001 ("Although the state's burden would be very difficult to carry, it would not be insurmountable. ***Of course, it could not be satisfied merely by the jurors' assurances on voir dire of their own impartiality***. *See Murphy v. Florida*, 421 U.S. [794,] 800, 95 S.Ct. [2031,] 2036 (1975)[[9]]; *Irvin*

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[9] In *Murphy*, the Supreme Court affirmed the denial of habeas relief where: voir dire showed "no hostility" to defendant, "largely factual" pretrial publicity about the attempted robbery offense effectively ended 7 months before trial, and the defendant, although his "flamboyant lifestyle made him a continuing subject of press *interest*," was not a reviled figure in the community. 421 U.S. at 795, 800, 95 S.Ct. at 2034, 2037 (emphasis added) (noting that even his attorney referred to defendant by press-given nickname, "Murph the Surf"). Such "*indicia of impartiality*," while relevant to actual juror bias from pretrial publicity, do not rebut prejudice in "*a case where the general atmosphere in the community or courtroom is sufficiently inflammatory*." *Id*., 421 U.S. at 802; 95 S.Ct. at 2037 (emphasis added); *see also id*., 421 U.S. at 804, 95 S.Ct. 2038 (Burger, C.J., concurring) ("Although I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case. I agree with the Court that the circumstances of petitioner's trial did not rise to the level of a violation of the Due Process Clause ... .").

v. Dowd, 366 U.S. at 727-28, 81 S.Ct. at 1645-1646. On the other hand, a showing that none of the twelve jurors impanelled had ever been exposed, first or second hand, to the inflammatory publicity, would probably suffice to negate the presumption of prejudice flowing from that publicity.") (emphasis added). The *Mayola* standard of rebuttal, even if it were made applicable to direct appeals, presents a hurdle that the government neither can nor ever sought to satisfy in the instant case. *See*, *e.g.*, *infra* at 43-44 (noting jurors' exposure to pretrial publicity, community passions, and other prejudice factors). Moreover, even jurors who were not aware of intense community passions prior to trial became educated as to the intensity of community concerns during the presentation of the evidence and arguments and the intense media and community coverage during trial.

In voir dire, the district court did not make rebuttal-type findings; the findings were much more limited, addressing whether the defense had proven, based on the juror's responses, that the individual juror was actually biased, even though defense counsel could not address the jurors personally and the district court denied numerous requests for additional voir dire. R25:851-52 (rejecting defense argument that "with some of these people we have to go beyond the answers to the final question and consider the experiences and the thoughts that underlie the person's evaluation of the whole matter;" overruling defense cause challenge and applying test of whether juror "has a fixed opinion as to the merits of the case or the defendants' guilt [or]

demonstrated an inability to follow the Court's instructions").[10]

Thus, contrary to the government, Gov't Pet. 7, there were no findings of fact by the district court guaranteeing either the fairness of the jurors or the absence of prejudice. Instead, the district court concluded, erroneously, that despite pervasive community prejudice, *Irvin v. Dowd* requires at jury selection only a determination whether the defense has made a specific showing that the juror has "demonstrated an inability to follow the Court's instructions," such that the juror's opinion of the defendant's guilt is unalterable. R25:852.

The district court erred in this reading of *Irvin v. Dowd*, as the defendants explained in urging a change of venue. RBox1:514:68-69, 72-73. The district court's and the government's conception of dispelling pervasive community prejudice with standard voir dire inquiries as to capacity for fairness conflicts with the fundamental principle of *Irvin v. Dowd* that where a "'pattern of deep and bitter prejudice' [is] shown to be present throughout the community," mere juror assertions of an ability to be fair and impartial, however sincere, are insufficiently credible, and a finding of impartiality based thereon "does not meet constitutional standards." 366 U.S. at 727-28, 81 S.Ct. at 1645 (internal citation omitted). *Cf. Campa*, 419 F.3d at 1259

[10] After jury selection concluded, the district court did not, in the course of the entire trial, ever again individually question jurors at any time about potential prejudice.

(explaining that under *Irvin v. Dowd*, 366 U.S. at 728, 81 S.Ct. at 1645, pervasive prejudice supersedes claim by "each individual juror [of] capacity to be fair and impartial"). In the present case, where pervasive community prejudice stemmed not only from pretrial publicity, as in *Irvin v. Dowd*, but, as well, from a longstanding, intense animus towards the defendants and their alleged coconspirators, the Supreme Court's ruling in *Irvin v. Dowd* applies with even greater force.

6. *The record provides numerical confirmation of pervasive community prejudice despite culling of prospective jurors asserting capacity for fairness.*

The "strike pool," the resulting pool of 52 prospective jurors (out of 168 members of the venire, only 93 of whom were interviewed as to prejudice, 12 in phase one and 81 in phase two), was not purged of prejudice in the voir dire process. The defense was forced to peremptorily strike six jurors whom the district court, denying defense for-cause challenges, described as "very close" calls. R27:1382 (district court acknowledges that there were "a number of very close decisions made by the Court" adversely to the defense).[11]

As Appendix A (chart of all jurors questioned as to prejudice) reflects, the

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[11] At the same time, over defense objection, the government exercised the vast majority of its peremptory challenges on African-Americans, the racial minority in the Miami community. R27:1497-1500, 1506-08; R28:1528 (7 of 11 government strikes against African-Americans, ***including two state corrections officers***). The defendants repeatedly objected, under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). R27:1506-08.

district court excused for cause 42 jurors based either on admitted inability to be impartial (37 jurors) or such close connection to victims that questioning regarding prejudice was deemed unnecessary (5 jurors).[12] However, seven additional defense cause challenges were denied, despite jurors' own statements of hesitancy as to fairness issues in light of their personal experiences; the defense used six peremptory challenges on such "close-call" jurors. Including in the biased column these acknowledged close-call jurors brings the total of voir-dire proven prejudiced jurors to forty-nine (49)–constituting 50% of the 98 jurors either interviewed as to prejudice (93) or excused due to close victim relationships implying bias (5).

Apart from these 49 jurors, there were an additional 10 jurors as to whom the defense, in light of the district court's cause rulings, did not seek to challenge for cause despite the jurors' concerns about community reactions or hesitancy prior to being rehabilitated as to fairness. The defense utilized nine (9) additional peremptory challenges on these jurors, among whom were a juror who twice expressed concern about adverse business repercussions if he acquitted (Lawhorn, R26:1056, 1073), a juror concerned about volatile community reaction, inability to avoid media and

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[12] The district court did not excuse all jurors who had relationships with the victims. For example, juror Kuk, *see Campa*, 419 F.3d at 1235, was not excused because she was not interviewed as to prejudice. Instead, only those five jurors whose initial answers regarding their close connections to Jose Basulto or shootdown victims revealed a strong likelihood of prejudice were excused prior to phase two questioning. *See* R22:139; R23:254, 385-87; R24:538.

informal discussions, and the fact that all his neighbors are Cuban (McGlammery, R26:1012, 1019), a juror who initially stated that she "may be prejudiced" because her parents "fled the regime they have there" in Cuba (Maria Gonzalez, R25:790-91), the daughter of an exile who stated she would not "necessarily" automatically disbelieve any testimony by a Cuban government employee (Rosa Hernandez, R27:1227), and another child of an exile who initially doubted he could ever believe what any Cuban government agent said, but was rehabilitated by the district court (Luis Hernandez, R27:1301, 1306). *See* Appendix C (list of defense peremptory challenges).

The pervasiveness of prejudice concerns among the venire–both exile and non-exile–when all indications of prejudice are included (as reflected in Appendix A) shows a total of 59 of 98 jurors expressing concern about community and media reaction, inability to believe defense witnesses, or acknowledged or other indicia of bias. This total rate of record-evidence prejudice–50-60%–exceeds any rate of prejudice ever found in a voir dire record in any case previously decided by this Court. Indeed, in some notable venue claims decided by this Court, there were *no biased prospective jurors at all* in the venire. *See Meeks v. Moore*, 216 F.3d 951, 966 (11th Cir. 2000) (denying habeas relief on venue claim; "*No [prospective] jurors* in either [trial] were dismissed on account of bias against Meeks."); *Raulerson v. Wainwright*, 753 F.2d 869, 876 n.1 (11th Cir. 1985) (denying habeas relief on claim

of jury bias; "In the instant case, however, *not one prospective juror* on the panel indicated he or she had an opinion concerning Petitioner's guilt, so there is no reason to discredit the representation of impartiality given by those 12 jurors who actually served.").

Even in cases involving defendants perceived as notorious narco-terrorists and murderers, venire bias rates are far lower than appears in the instant record. *Lehder*, 955 F.2d at 1523-25 (11th Cir. 1992) (rejecting challenge to denial of change of venue where only 15% of venire indicated any prejudice; only "eighteen of 117 venire-persons in the instant case had formed an opinion about the defendants' guilt prior to trial" and district court afforded defense "adequate opportunity to alleviate this concern by allowing the defense a virtually unlimited range of questioning" including "conduct[ing] their own individual voir dire"); *Ross v. Hopper*, 716 F.2d 1528, 1540 (11th Cir. 1983), *modified on other grounds*, 756 F.2d 1483 (11th Cir. 1985) (*en banc*) (denying habeas relief on venue claim; "Only six of the venirepersons, however, indicated that they had a preconceived opinion about Ross' guilt or innocence based on the pretrial publicity. Only three of these persons voiced the view that they could not set their opinions aside and judge the case on the evidence alone. These three venirepersons were excused for cause. Certainly no significant number of prospective jurors were prejudiced by the pretrial publicity."); *United States v. Capo*, 595 F.2d 1086, 1091-92 (5th Cir. 1979) (affirming denial of

change of venue in case involving drug-related murders of innocent teenagers, where, following *in camera* voir dire at which all defense requested questions were propounded, only 10 of 73 prospective jurors "appeared to have an opinion [and] were challenged and dismissed for cause;" jury's acquittal of several defendants confirmed absence of prejudice).

Significantly, in the Court's most recent *en banc* precedent on jury impartiality, the bias rate was in favor of the ***defendant***, by a 2 to 1 margin. *Calley v. Callaway*, 519 F.2d 184, 208-09 (5th Cir. 1975) (*en banc*) (denying habeas relief from military court judgment; after "both defense counsel and the prosecution were allowed almost unlimited freedom to inquire into the court members' attitudes, perceptions, backgrounds and the nature and extent of their exposure to pretrial publicity," only two (2) prospective jurors had some negative opinion as to defendant's guilt, while twice that number, four (4), had a belief that defendant should not have been prosecuted); *Bishop v. Wainwright*, 511 F.2d at 666 (denying habeas relief on venue claim where only 6 of 48 jurors were excused for fixed opinions).

Supreme Court decisions on which the government has placed reliance similarly do not compare to the rate of prejudice shown during voir dire in the instant case. *See Mu'Min v. Virginia*, 500 U.S. 415, 420-21, 111 S.Ct. 1899, 1902-03 (1991) (denying habeas relief on voir dire insufficiency claim where only "[o]ne of the 16 panel members who admitted to having prior knowledge of the case answered in

response to these questions that he could not be impartial, and was dismissed for cause"; "One juror who *equivocated* as to whether she could enter the jury box with an open mind was removed *sua sponte* by the trial judge.") (emphasis added); *Beck v. Washington*, 369 U.S. 541, 556-57, 82 S.Ct. 955, 963-64 (1962) (rejecting venue challenge where, after venire "members were examined by the court and counsel at length[,] [o]f the *52 so examined, only eight [8] admitted bias* or a preformed opinion as to petitioner's guilt and six others suggested they might be biased or might have formed an opinion-all of whom were excused [and] [e]very juror challenged for cause by petitioner's counsel was excused") (emphasis added).

A stunning contrast to the 59 jurors' statements suggesting bias or concern for outside influences in the instant case is the fact that not a single veniremember in *Fuentes-Coba* expressed either bias or concern for outside influences. *Fuentes-Coba*, 738 F.2d at 1194-95 (following individual voir dire conducted by counsel, not one member of the venire "expressed concern about the influence of outside factors [or] possible bias" against defendant charged with trading with the enemy, Cuba). By comparison, in *United States v. Williams*, 523 F.2d 1203 (5th Cir. 1975), where the court granted relief from denial of a venue change, only 30% of the jury venire was tainted by pretrial publicity. Notably, the actual rate of prejudice shown here exceeds the percentage assumed by the panel in reaching its judgment, *see Campa*, 419 F.3d at 1233 n. 51 (reading government figures to equate to a combined rate of prejudiced

jurors equaling 46%), and exceeds the highest rates of prejudice in this Court's reported decisions. *See Coleman v. Kemp*, 778 F.2d 1487, 1543 (11th Cir. 1985) (granting habeas relief based on denial of motion to change venue where "almost one-half of the jurors who were questioned as to whether they had formed an opinion, were stricken for cause for having a fixed opinion"); *cf. Rideau v. Louisiana*, 373 U.S. 723, 732, 83 S.Ct. 1417, 1422 (1963) (presumed prejudice warranting habeas relief based on denial of motion to change venue even though only 3 of the 12 jurors saw pretrial publicity and they each said they would be fair and apparently had no opinions); *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1644 (granting habeas relief where 62% of prospective jurors, 268 of 430, were excused for preformed opinions of guilt).

In a striking parallel with *Irvin v. Dowd*, where prejudicial exposure of 62% of the jurors in a small county in the 1950's to publicity concerning murders attributed to the defendant was found to warrant a new trial, the level of prejudice in the instant case was nearly as high: 50-60%. Most significant, however, is that this elevated rate of prejudice was found in what is considered to be a major, urban, metropolitan area with over 30 municipalities and a population of 2.2 million people,[13] an area far more extensive than that in *Dowd*. Thus, these results of the voir dire would be clearly

[13] *See* http://www.miamidade.gov/planzone/planning_metro_CDMP.asp.

counterintuitive to normal expectations, in that, remarkably, voir dire in the instant trial in Miami showed no dissipation of prejudicial influence with regard to the defendants some two years after their arrest and despite the geographic and ethnic dispersal of the community. *See Patton v. Yount*, 467 U.S. at 1035, 104 S.Ct. at 2891 (noting that where prejudice stems merely from pretrial publicity, ordinarily "one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed"). To the contrary here, the media exposure, which included multiple television and radio stations, both local and cable, in a variety of languages, including English and Creole, in addition to Spanish–all greatly in excess of the limited press and airwaves publicity available in the 1950's setting of *Dowd*–was compounded by the well-known, long-standing, and intense anti-Cuban government passions in the Miami-Dade community.

The ensuing constriction of jurors' ability to serve impartially thus *surpassed* that in *Dowd*, in which the trial court arguably could have avoided undue prejudice by admonishing the jury to refrain from reading, viewing, or listening to whatever limited media was available 50 years ago in that small county. No such admonition here could have vitiated the inherent pressures formed by the unique combination of widespread, continuing media coverage and widespread, abiding community fervor, as manifested by public and private monuments to the victims of the charged shootdown offense and as vocally expressed by the leading group in the

community–Cuban Americans–representing a majority of the citizens in Miami-Dade County's main city, Miami; a plurality of the citizens in the remainder of the county; as well as a majority of those occupying political positions at every level–federal (three members of Congress from the county), state (majority of state senators and representatives), county (county mayor and police chief; majority of county commissioners; school and zoning boards), and major cities (Miami mayor and commission majority; same for Hialeah and other cities). The nature of the prejudice to which the venire was exposed in the instant case far exceeds that present in *Irvin v. Dowd*. The fact that so large a portion of the venire in this major, metropolitan area admitted not just exposure to publicity concerning the facts of the case, but actual prejudice and community fears, reflects an unparalleled level of community saturation.

The government, in response to the panel opinion, distorted the prejudice percentage by maintaining its effort to add into the pool of non-prejudiced jurors the 70 jurors who were *not interviewed* as to prejudice. *See* Gov't Pet. 3; Gov't Br. 53. Despite the government's repeated attempt to conclude that jurors who were never asked to reveal such bias can be counted as unbiased, those prospective jurors simply cannot be used to dilute the prejudice percentage where there is no indication as to whether those 70 jurors either were or were not biased as to the Cuban-intent and community-harm issues tried.

The government has also repeatedly argued that five of the jurors stricken for cause based on defense challenges due to bias should be counted as jurors who were not biased against the Cuban defendants. *See* Gov't Br. App. 5A (claiming that there was no showing of "Cuba-related partiality" as to cause-stricken jurors Beltran, Brantley, George, Niskin, and Mazza); Gov't Pet. 3 (claiming panel overstated bias-cause excusals). The record does not support the government.

Of these five prospective jurors, only Mazza was asked questions regarding pretrial publicity, concern for community reaction, and membership in, or association with members of, exile organizations relevant to the case. Mazza noted that his stepmother is a Cuban exile and that he, as a Venezuelan, harbored bias against Cuba due to its relationship with Venezuela. R27:1165-66. His recollection of the pretrial publicity was that "[t]hey were spying on an airport." R27:1169. He repeatedly stated doubts whether he could possibly believe the testimony of a Cuban government witness, R27:1161-62, 1169, and indicated it would be "very difficult" to say that his opinions about these issues would not control his verdict. R27:1175. While the government was arguing against his excusal, he engaged in an improper communication with the government, "mutter[ing] 'don't pick me.'" R27:1180. The government errs in arguing that Mazza should be counted as someone whose biases were not relevant.

None of the other four disputed jurors whom the government claims had no

bias was asked about concerns regarding community reactions, associations with exile activist organizations, or, significantly, the impact of prejudicial publicity; yet they expressed bias. George and Niskin were not asked whether the charges in themselves prevented them from being fair. Niskin, while noting that she harbored resentment toward the Clinton administration's friendly dealings with Yasser Arafat, also volunteered her concern that Castro was a war "ally of Saddam Hussein" (a charge also notably made during the Elian struggles in Miami). R24:454. George stated her bias as pro-U.S., admitting further that she had a prior friendship with one of the BTTR shootdown victims. R24:570. Beltran, after first saying she would not automatically "say no to Cuba," was asked four times whether she could ever believe a Cuban agent witness and each time replied that she "wouldn't believe them;" she was excused without further questioning. R25:781-82. Brantley first answered hesitantly to the question whether he could afford a fair trial to persons charged with being "agents acting on behalf of the Republic of Cuba," twice stating he did not "think he would have a problem," but later he stated that given his military associations, he would be prejudiced and would be "probably for the United States," finally acknowledging that he was "not sure" he could be fair to both the prosecution and the defense. R25:813-815.

If these five jurors were completely removed from the calculus simply because they were not asked all of the relevant questions, that would still leave a rate of

prejudice of between 47% and 58%. If the five jurors excused without prejudice questioning due to their special relationship with BTTR victims are also removed from the equation, the prejudice rate drops to between 44% and 56%. Even if only the 32 jurors the government counts are included in the bias category–and all the "close call" jurors, "close relationship" jurors, and jurors who made statements reflecting strong concerns are treated as unaffected by community influences–the resulting understated prejudice rate of 36.4% would still be *higher* than in any case in which this Court has ever affirmed denial of a motion to change venue.

The comments of jury foreman David Buker, a federal government computer specialist for whom Congressional funding of his employment was obtained shortly before trial commenced, show that even the most intelligent and articulate of jurors recognized that elements in the community might react with extreme hostility to an acquittal:

> A. [I] think some folks tend to basically just–let's say the reverse side of a dictatorship, in that they espouse views that basically–what they believe is correct and if you disagree with them then you must be terrible and a communist and such, and I view those people who espouse such views as essentially analogous to a Castro, only on the other side, but again I think that is a minority of people and on the whole the Cuban population has been and is a very positive part of this community and this country.
>
> Q. How strong is your opinion?
>
> A. I think both parts of that are strong.

R25:745-46. Buker's comments, expressing (1) concern regarding dictatorial community intolerance, (2) solidarity with Cuban exiles in the community, and (3) antipathy toward the Cuban government, reflect awareness of community pressures and ties and offer no assurance of immunity from their influence.

7. *Widespread anti-Castro animus and publicity–reflected even in permanent and prominently displayed County memorials reinforcing the government's theory of the case–persisted throughout trial.*

The unique persistence of the passion about these Castro agent defendants and the shootdown is manifested in the physical reality that confronted the jurors as they went about their lives over the seven months of trial. The Metrorail Center in downtown Miami (one block from the federal courthouse), to which the district court repeatedly directed the jurors during trial, has for nearly 10 years maintained a large public monument and indoor garden dedicated to Armando Alejandre, one of the shootdown victims. *See* Appendix D (photographs of plaque and garden, with four palm trees signifying the four fallen exiles, on ground floor of atrium in county government building, 111 N.W. 1st Street, Miami, Florida, which also serves as county public transportation hub). The large bronze county-government plaque in honor of Alejandre describes the events of the shootdown, in accordance with the prosecution theory, as involving a routine humanitarian flight during which Cuba shot down Alejandre's plane over the Straits of Florida, and is a truly stirring and

emotional memorial:

Dedicated to the memory of

Armando Alejandre, Jr.
1950-1996

An employee of Miami-Dade County,
Alejandre was a respected public servant who dedicated his life
to the cause of freedom. As a volunteer member
of Brothers to the Rescue, his plane was downed
by the Cuban Air Force during a routine humanitarian flight
over the Straits of Florida. His enthusiasm, commitment
and resolve will be missed, but not forgotten.

Likewise, the dispersal of Cuban-exile focused media in Miami is quite notable. Contrary to the government's claim that Miami is the "same media market" as Fort Lauderdale, even a cursory glance at the United States Attorney's press release for its petition for rehearing shows how many media outlets are unique to Miami. *See* Appendix E (copy of Sept. 28, 2005 email from the United States Attorney to approximately 200 media outlets and personalities, the vast majority of whom focus on Miami, including English and Spanish language Miami newspapers, radio stations and television channels).[14]

[14] Ironically, the press release inadvertently violated the local rules by directly communicating with a member of the jury venire, Morton Lucoff. *See* R22:48 (Lucoff states his son was member of Elian's legal team); R26:988 ("A. [by Lucoff]

Added to the vast scope of this publicity was the penetrating influence on fundamental aspects of community life–including employment, schooling, housing, and politics–exercised by Cuban Americans, the group forming the county's plurality. Highly vocal in their passionate hatred of the current Cuban government and its leader, Fidel Castro, the Miami Cuban American community has long shown extreme disdain for anyone perceived as insufficiently hard-line with respect to the Castro regime, engaging in organized strategies to ensure conformity with its views; elements of that community have, in fact, at times resorted to threats and violence. *See, e.g.,* Miami Herald, *Tense scene played out on Miami streets*, A1 (Apr. 23, 2000); *cf. supra* at 35 (comments of jury foreman David Buker). The inherent pressures on jurors stemming from this well-known, abiding, and intense level of virulently anti-Castro fervor within their community were *compounded* by the widespread adverse and editorialized publicity surrounding the case and the issues and manner of presentation of evidence and arguments at trial.

Significantly, even above the venire's acknowledged levels of bias, defense counsel advised the district court of the predicament the defendants were placed in

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I would like to see [Castro] go away. I don't advocate any military intervention in Cuba because I don't think that is the U.S. agenda here. Q. Would your opinion affect your ability to weigh the evidence in this case fairly and with an open mind and follow the Court's instructions on the law? A. I would have to say I would do my best.").

due to the court's failure to elicit more information from jurors who claimed no opinions at all or initially indicated bias, but were partially rehabilitated:

> We are representing men that are accused of being Cuban spies and the people that we can't get for cause that we feel we are wasting a peremptory challenge on, are people like Lilliam Lopez who comes right out and says we are never against the United States. That is what we are talking about, that kind of prejudice. The same thing with some of these other jurors. Mr. Angel De La O. His answer[s] seemed strange to us. He has no opinions about Cuba and [yet] he is concerned about his family in Cuba, reprisals and things of that nature. Migdalia Cento,[15] another Cuban American has no opinions about anything, no opinions about the Government of Cuba, even about Elian. We are concerned about some of these jurors and their candor and it is precisely because we represent people that are alleged to be Cuban spies. The other woman, I think her name is Haydee Duarte. She has a significant family past with respect to Cuba and all these issues. Family members that were involved in attacks on Cuba and all these are issues that are going to be generated in this case. Things related to these issues are going to be coming up, popping up constantly and these are people we have to exercise peremptories on and it makes it [difficult] when we have other people [we] would traditionally exercise a peremptory against, but we can't because we have to be on guard for the Cuban prejudice.

R27:1382.

8. *Voir dire of jurors who served disclosed exposure to underlying community bias and fears*.

Even as to jurors whom the defense did not strike, the voir dire record confirms defense counsel's assertion that peremptory challenges would ordinarily have been

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[15] Cento, the wife of a Cuban exile and mother of Cuban Americans, was selected and served as a juror. *Campa*, 419 F.3d at 1239 n.131.

used to strike seated jurors, but for the risk that even more prejudiced jurors would be selected. R27:1382. Thus, among the selected jurors and alternates, of whom more than 40% were Hispanic–contrary to the implication of the government's brief– the record reveals the following:

> **Cento** (initially unsure she could follow the instructions because her husband, a Cuban exile, was rescued from Cuba as a child as part of Operation Pedro Pan, R26:1128-29; after selection to jury, asserted difficulties "understand[ing] everything" in voir dire and stated she "didn't bring [her comprehension] difficulties forward before because I didn't think I was going to be picked"); **Portalatin** (characterized herself as an anti-communist who views the Cuban community as "fighting to get their country free," R25:862; exposed to pretrial publicity regarding the case from Spanish-language media, R25:862-63; initially ambiguous about whether community reaction would affect her verdict, R25:860); **Barnes** (recalled pretrial publicity and feared media attention on the case going directly to her, R25:805-06); **Buker** (concerned whether the vocal minority of Cubans really understands democracy, but agrees with the majority of Cubans on Cuba issues, R25:745; recalled pretrial publicity, R25:748); **O. Garcia** (victim of a skyjacking to Cuba, R25:886; smiled, but would not give opinion on Cuba-related issues, R25:888; had familiarity with BTTR and was exposed to pretrial publicity, R25:889); **Campbell** (works at county government-supported community business, close

work associates and friends are Cubans, R26:1034); **Herran** (notes social ties to Cuban exile friends, R27:1220, but expresses no opinions as to Cuba-related issues); **Yagle** (daughter works for FBI, investigating agency in this case, R22:166; "close friends" are Cuban exiles, R27:1295; son did photojournalism work showing the "living conditions" in Cuba, *id*.; exposed to pretrial publicity, R27:1299; "strong opinion" about Cuba but "believe[s]" could be fair, R27:1297); **Page** (failed to state any opinion about Cuba, the Cuban exile community, Elian or any subject, R24:739); **Loperena** (recalled pretrial publicity, R26:970; gave no opinions to evaluate his feelings toward Cuba, Cubans, or Cuban issues, R26:971-72); alternate **Hahn** (concerned that verdict might affect the community, R27:1344).

Other jurors gave no indication as to their feelings about Cuban exiles or the Cuban government, but asserted they could be fair. *See* R26:958-59.[16]

In sum, the voir dire in this case was not the searching, definitive rooting out of prejudice that the government now claims. But it was more than sufficient to reveal that community prejudice against the defendants was deep and pervasive. And the government's own voir dire efforts, both opposing additional questioning of jurors, R25:851, 898-99, and striking jurors from the non-white minority of the community, added to the risk of prejudice affecting the verdict.

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[16] As the district court indicated, R25:676, virtually all of the prospective jurors had heard of Jose Basulto. *See*, *e.g.*, R23:377 (prospective juror notes media coverage of Basulto as a community leader in Elian case).

9. *Voir dire confirmed that the prejudice went deeper than mere pretrial publicity concerning the defendants' participation in the offenses such that ordinary press avoidance admonitions lacked effect in the unique context of this case.*

The district court's instructions with respect to both pretrial publicity and specific prejudicial events at trial–such as comments by BTTR President Basulto–were necessarily limited in their impact. *See* R81:8945. The Basulto curative instruction sought to convince the jury to discount–in relation to trial evidence–Basulto's testimony that defense counsel was doing the work of the Cuban intelligence service, but the instruction did nothing to convince jurors that if they took the taboo position of finding reasonable doubt as to whether the defendants acted with innocent intent and then acquitted on any count, they would be hit with the same attacks as defense counsel was. And, unlike defense counsel's situation, there would be no federal judge around to protect the jurors when the accusations turned to them in their work, home, or social environments.

Similarly, the admonition to not read about or discuss "the case," *see*, *e.g.*, R29:1567 ("Do not listen to the radio or view any TV broadcasts about this trial."), was limited by the jurors' conception of where the issues of the case itself ended and where important community concerns about Cuba-related issues began. In the instant case, pretrial publicity was a triple threat: (1) news stories convincing jurors and the public of the defendants' guilt; (2) editorials emphasizing both the defendants' guilt

and the importance of convictions on the most serious charges; and (3) the mere fact of the intense coverage–of even mundane events at trial–serving to continually reinforce the passionate importance to community passions that the Castro government not be perceived as having another "victory" so soon after the Elian case.[17]

A similar example of difficult line-drawing between the evidentiary issues and community influences arises from voir dire, where the district court advised the jurors that "the facts in this case have nothing to do with the facts in" the Elian Gonzalez case. R26:1016 (responding to prospective juror McGlammery's statement that he does not know if Elian's issues would affect him because "I don't know what the evidence is or the circumstances" of the prosecution's case). However, as the panel noted, the main issue in the case dealt with the alleged murder of rafter rescuers, *see Campa*, 419 F.3d at 1264, including Pablo Morales who, like Elian, was himself a

[17] Jurors might not have believed that a WAQI (Radio Mambi) broadcast about Cuba as a repressive, murderous, or terrorist regime–as the government essentially argued at trial–constitutes prohibited programming. Yet such segments run virtually 24 hours a day on Spanish-language talk station Radio Mambi, Miami's leading AM station since July, 2000. *See* http://www.cpb.org/aboutcpb/leadership/board/puig.html; http://www.animaux.net/stern/ft_laud.html (noting soaring increase in Radio Mambi's average audience share began during Elian Gonzalez controversy in 2000, "when Elian's fate was practically the only topic of conversation on talk radio"). Nor would other local media agendas necessarily be discerned by jurors so as to tune out editorial comment going to issues on which the government's specific intent arguments were premised.

rafter rescued at sea as a young man; and the implications for community emotions were analogous to the rescue of rafter Elian.[18] For many in Miami, Elian was not just about a little boy; it was about the Castro government's manipulation of local events to besmirch and humiliate the exile community. Contemporaneous media reports showed that to many others, it was about the federal government's failing to trust the elected local Miami-Dade courts to be free from the influence of the dominant, anti-Castro electorate vociferously insisting that Elian not be returned to his father in Cuba, i.e., whether it is fair to impose on local factfinders the burden to try to avoid

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[18] Pablo Morales was portrayed by the government as a "saved" rafter "kid," R54:5312; R124:14474, cold-bloodedly murdered by Castro with the help of Hernandez and the spy network, focusing also on other defendants who had associations with BTTR. Just as Miami has a permanent memorial to Elian, there are in Miami permanent memorials to Morales and the other exiles shot down by Cuba. *See* Appendix F (photographs of memorials to the victims in this case, including six (6) Miami-Dade County streets, dispersed over 6 miles throughout the county and including some of the most famous and well-traveled streets in Florida, that were renamed in whole or in part: S.W. 8th Street (U.S. 41), also known as Tamiami Trail and Calle Ocho, from the Palmetto Expressway to 87th Avenue, renamed "24th of February Boulevard" by the 1996 Florida Legislature; Coral Way, also known as S.W. 24th Street, from 87th Avenue to 97th Avenue, renamed "Brothers to the Rescue Martyrs Boulevard"; N.W. 42nd Avenue, also known as LeJeune Road, at the entrance to Opa Locka Airport, renamed "Pablo Morales Avenue"; S.W. 92nd Avenue, from Coral Way to Bird Road, renamed "Mario de la Pena Avenue"; N.W. 82nd Avenue, from 170th Street to 186th Street, renamed "Carlos Costa Avenue"; and S.W. 72nd Avenue, from Sunset Drive to Miller Drive, renamed "Armando Alejandre Jr. Avenue"). *See* http://www.cuban-exile.com (document 0218). *See also supra* at 40 (reproducing prominent memorial to shootdown victim Armando Alejandre Jr., located in heart of downtown Miami).

community pressures as to fundamental and intensely-followed anti-Castro issues.

The pervasiveness of Cuba-themed Spanish-language media–that were beyond the capacity of the court to monitor and that addressed matters not clearly limited to the precise elements of the case–devalued the district court's press admonition. Even if the press-avoidance bar were followed to the letter, such a 7-month blackout on news of local interest could easily have left jurors with even greater concern for whether Miami's major newspapers–The Herald and El Nuevo Herald–were continuing to make the same insistent statements about what should happen in the case, such as new editorials for conviction or against measures to afford the defendants a fair trial. Likewise, the district court's repeated resort to special measures to effectuate the juror's avoidance of demonstrations and press could not have been lost on the jury as a further sign of the intense community importance and symbolism of the trial. Moreover, the district court clearly understood that jurors were discussing trial matters with family members and were aware of intense community interest. R95:11028-29 ("THE COURT: One of the jurors indicated [that] a relative–female–who is a Judge in Brazil is coming up and they wanted to know if they could sit in on the trial in the gallery... . She will give the caveat to the juror in addition to my normal instruction yes they can observe as long as they don't talk about the case.").

The sacrifice expected of the jurors was enormous. During voir dire, the government had said it was a 35-day trial that would end in mid-February, but the government's case in chief lasted until March 4, and the defense case did not even begin until March 6, a month after the jurors were told the case would be over. A voir dire of the jurors after seven months of trial seeking their opinion whether supporting the defendants' arguments would adversely affect their lives and relationships in the community might not have yielded the same answers. And the risk of prejudice increased as the jurors were stretched to their limits by the length of the trial.

In a short trial, a juror's perception of his or her ability to avoid community pressure may be more accurate than in a process that lasts from November to June, in which the pressures that some jurors felt in November may arise for others in the ensuing 7 months. The record offers no indication whether jurors moved to different neighborhoods or married into new families during the trial; the record offers no assurance that jurors could remain unaffected by community passions reflected both in media coverage and the evidence at trial.

The government has argued that several jurors who served did not acknowledge retaining much information about the case from news media reports. The pretrial publicity question in voir dire asked jurors to affirmatively relate what

they could "remember" about the content of news media reports that they had seen, *see* Gov't-Br. App. 4B, such that the district court's questioning took for granted the jurors' exposure to such media or other information regarding the case. The juror chart, Appendix A, reflects that nearly all of the prospective jurors asked to recall media reports did so, with only a few prospective jurors claiming they could not remember media content. The district court chose to limit the pretrial publicity inquiry after ruling that exposure to news was not dispositive and that the only relevant question was the conscious prejudicial impact of the exposure. R23:197.

The voir dire responses thus do not dispel the taint from media coverage. Indeed, strident, sometimes fear-mongering coverage by even mainstream media continues after the panel decision, even though English language readers might be unaware of some of it. The Spanish-language El Nuevo Herald newspaper ran an editorial column labeling the panel "underhanded racists" ("racistas solapados"). Daniel Morcate, *Jueces Ofuscados* [Blinded Judges], El Nuevo Herald, Aug. 19, 2005, at 20A (Appendix G). Univision, the leading Hispanic media organization in the United States, ran on its web site and its flagship Miami radio station, WAQI (Radio Mambi), its columnist/announcer's call for lynching the appellants following the appellate decision, which he described as "pure garbage" ("pura basura"). *See* Enrique Espinosa, *Los Cinco Esbirros del Castrismo* [The Five Hired Thugs of

Castroism], Univision Radio, Aug. 18, 2005 ("If we talk about justice, then the five should hang, like a bunch of bananas, from a ceiba tree."; "Si hablamos de justicia, entonces los cinco deberian colgar de una ceiba como un racimo de platanos.") (Appendix H). Not to be outdone, the U.S. Attorney at the time of the trial, and who now represents Jose Basulto in the campaign to indict Fidel Castro on shootdown charges, submitted a letter published by The Miami Herald, disputing that "the jury could be infected by regular and extensive coverage of Fidel Castro and his communist government," falsely claiming that "[a]nyone who had any opinion whatever about [the case] was excused," that "[e]veryday, [the judge] asked jurors if anyone had read, seen, or heard anything about the case," with jurors answering "No," and that "several jurors have stated publicly that there was no outside pressure;" and repeating false and prejudicial claims first made in government closing argument that "the accused spies ... had vowed to destroy the United States." Guy Lewis, Letter to the Editor, Miami Herald, Aug. 18, 2005, 22A (Appendix J).

A more recent editorial reaction to the appeal reveals how intensely the prejudice against the exercise of trial rights by "Castro's spies" is manifested in the leading, mainstream media directed to, and read by, the 60% majority Hispanic population of Miami-Dade County. *See* http://www.miami.com/mld/elnuevo/ news/photos/4604707.htm (editorial cartoon in El Nuevo Herald, Nov. 29, 2005, at

20A, "The New Trial [Given] To Castro's Spies"; presenting scar-faced defendants in prison garb, one with angel's halo–to mock Cuba's lauding defendants as martyrs; judge asks, "And what is the point of this new trial?"; prosecutor responds, "No idea"; defense counsel: "It's that I have to go to [Cuban resort town] Varadero – I haven't been to Varadero for five years, 'Your Honor.'"). El Nuevo Herald thus manages to simultaneously characterize the attorneys as corrupt buffoons and the defendants as unquestionably guilty not only of espionage and murder conspiracy, but of spouting phony claims of good intent:

Such attacks on the defendants and their attorneys following the panel decision

were apparently anticipated by the panel. *Campa*, 419 F.3d at 1264 (observing that "the reversal of these convictions will be unpopular and even offensive to many citizens"). Jurors would have expected no less.

Of course, the record shows that the prejudice toward the defendants and in favor of the government stemmed more fundamentally from non-media sources. Numerous jurors, at least 20, had personal relationships with victims and their families.[19] Of the jurors stricken for admitted inability to be fair, 22 of them were either not asked by the district court if they had been exposed to pretrial publicity or said they remembered nothing. *See* Appendix A. The admissions of bias stemmed principally from hate of the defendants as admitted agents of the Castro government and passions about the shootdown, not merely from media publicity regarding the offenses. This showing contrasts with cases in which claims of bias resting on matters other than factual guilt were belied by the record. *See Meeks v. Moore*, 216 F.3d at 967 (discounting bias claim where no press accounts recognized or appealed to such bias).

The government argues that "[t]he law does not recognize a presumption of juror bias for or against a class of people." Gov't Pet. 10 (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635 (1981)). But the Supreme

[19] These twenty jurors do not include those who were familiar with the victims from the media or other sources but did not know them personally. The district court explained that its inquiry extended only to personal relationships. R24:569.

Court explained in *Rosales-Lopez* that the "critical factor" in determining prejudice at trial against a group of people is whether issues drawing out such bias are "'inextricably bound up with the conduct of the trial.'" *Id*., 451 at 189, 101 S.Ct. at 1635 (internal quotation omitted). One telling example is juror Cento, who explained to the district court that her husband's rescue from Cuba as a child in Operation Pedro Pan ("Peter Pan") was her reason for questioning whether she was appropriate for the jury. *See* Miami-Dade College Forum, at 8, *Operation Pedro Pan Remembered* (Dec. 2005); www.pedropan.org; www.ingmiamimarathon.com/Travel/CourseTourNarrative.cfm (describing rescue of Cuban children in Operation Pedro Pan, headquartered at Gesu Church, located two blocks from Miami's federal courthouse). At trial, the government offered evidence and argued that one of the exile victims of the Count 3 murder conspiracy (the shootdown) was flying with BTTR because he himself was rescued by BTTR as a young "kid" escaping from Cuba, R54:5312; R124:14474, linking to the same intense theme acknowledged as a source of passion and bias.

Whether viewed numerically or qualitatively, the record confirms that the pervasive community prejudice against these defendants was so great, and the occurrence of prejudicial events at and surrounding trial so significant, as to render negligible the possibility that the jurors were not affected by community passions, a possibility that–pursuant to governing supervisory and constitutional standards– was

far too remote to vest the district court with discretion to run the risk. The district court abused its discretion by proceeding to try this case in Miami in November 2000.

CONCLUSION

Appellant requests that the Court remand for a new trial.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 13,656 words.

Orlando do Campo

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by hand delivery this 15th day of December, 2005, upon Anne Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111; Paul A. McKenna, Esq., 2940 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; William Norris, Esq., 8870 S.W. 62nd Terrace, Miami, Florida, 33173; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; and Leonard I. Weinglass, 6 West 20th Street, New York, NY 10011; and via U.S. mail to: Ruben Campa, Reg. No. 58733-004, FCI-Oxford, Post Office Box 500, Oxford, WI 53952.

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