Nos. 01-17176 & 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

ANTONIO GUERRERO,

Defendant/appellant.

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

EN BANC BRIEF OF THE APPELLANT ANTONIO GUERRERO

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Antonio Guerrero
Case Nos. 01-17176 & 03-11087

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

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLANTS

Appellant Antonio Guerrero, 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, Ruben Campa, Luis Medina, and Rene Gonzalez, including their issue statements and all other portions of their en banc briefs.

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 ISSUE

Whether the district court improperly denied defendants' motions for change of venue and motion for new trial based on newly discovered evidence.

STATEMENT OF THE CASE

Course of Proceedings, Disposition, and Statement of Facts

This appeal involves extraordinary venue circumstances. Considered in their totality, they constitute the "perfect storm" of prejudice against these defendants, as found by the panel after reviewing the entire record. Appellant adopts the statement of the case in the en banc briefs of Rene Gonzalez and Luis Medina. The undisputed facts before the district court at the time the Rule 21(a) motion was made and argued, included the following:

First, the charges: The main charges the defendants faced were conspiracies: conspiracy to commit murder, espionage and defraud the United States. Because of the nature of the conspiracy charges and the absence of substantive charges of murder or espionage, the jury would be asked to draw inferences of the intent of the Cuban government as well as to weigh the credibility of conflicting testimony offered by American and Cuban officials.

Second, the status of the defendants: They admitted from the outset that they were covert agents of the Cuban government who came to the United States, some using false identities, to accomplish a mission for their country.

Third, the nature of the venue: Miami is home to some 700,000 Cuban exiles and their descendants, many of whom seek to return to their homeland after the Castro regime is overthrown. They enjoy extraordinary political and economic power at the city and county level, including local governmental regulation of even indirect dealings with Cuba.

Fourth, the status of the victims: The victims of the most emotional charge, the Count III murder conspiracy allegations, were all Miami residents who belonged to a local organization with widespread support in the community, "Brothers to the Rescue," who died when their plane was shot down by the Cuban government, with the alleged complicity of one of the defendants, after taking off from the Miami area and heading towards Havana. Their status as martyrs to the humanitarian exile cause has been officially recognized by governmental authorities, religious masses, and permanent memorials.

Fifth, fear in the community about involvement in the case: The local concern for violence against those who opposing core positions of the Cuban exile community was reflected in the community opinion survey submitted to the district court in which 35.6% of those polled expressed concern about what might happen to them should they serve on a jury that rendered a not-guilty verdict and voir dire confirmation of such concerns by numerous jurors. R2-321, Ex. A at 11-12. The fear generated by official and widespread support for strident exile actions was expressed

by defense attorneys who, at certain times, feared for their own safety and that of their families.

Sixth, contemporaneous events: The period between arrest and trial, rather than dissipating the prejudice from an initial flurry of publicity, produced additional events that made imperative a transfer to a venue less subject to the passions displayed in Miami. See, e.g., "Terrorism must not win . . .," Miami Herald, Feb. 24, 2000, at 8B; R3-397, Ex. J-1 (citing victim's survivors' wish for defendants' convictions to serve as "moral sting" against Cuban regime).

Beginning in late November, 1999, while defendants were awaiting trial, Miami was convulsed by the controversy over Elián González. Community disturbances, including protests, deliberate traffic disruptions, bomb-threats and death threats illustrated the violent and pervasive hostility towards anyone–including the Attorney General of the United States–who did not agree with an anti-Castro position in Miami.[1] Just one week before oral argument on the venue motion and five months before trial, 100,000 local residents marched down the main street of Miami to repudiate the government that sent the defendants to Miami as its agents. In light of that fury, few residents of Miami could ignore what the Cuban community thought

[1] An article on a bomb threat to the home of then-Attorney General Janet Reno placed the threat in the context of a history of "[s]cores of bomb threats and actual bombings" attributed to Cuban exile groups between 1974 and 1990, resulting in serious injuries and property damage to those who criticized exile violence, advocated trade or normalized relations with Cuba. R4-498, Ex. A-4.

should be the verdict in this case, or how it would react to a different one.

Seventh, the media: The record demonstrates an extraordinary relation between both English and Spanish language local media and the exile community. In addition to publishing over sixty articles about the case , at least half a dozen under the headline "SPIES AMONG US," the Miami Herald editorialized about the need for convictions in this case as a first step towards toppling the despised regime in Cuba. During the months prior to the trial, the leading newspapers in the venue reported the confessions of five co-defendants who pled guilty to being part of the same conspiracy as the defendants.

Eighth, statistical evidence: A community survey was submitted to the District Court showing that 69% of all respondents admitted prejudice against defendants merely because they were charged with being agents of the Cuban government in connection with the acts alleged in the indictment. Approximately 40% percent said their pre-existing feelings about Castro's government would make it "difficult to be fair and impartial" as jurors in this case.

Standards of Review

1. A district court's application of Rule 21(a) to the facts of a particular venue is ordinarily reviewed for abuse of discretion United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975).

2. The district court's interpretation of the Federal Rules of Criminal

Procedure is reviewed de novo. United States v. Noel, 213 F. 3d 833, 835 (11th Cir. 2000).

3. Allegations that the defendant's Fifth and Sixth Amendment rights were violated by the district court's failure to change venue requires the "reviewing court to undertake an independent evaluation of the facts established in support of such an allegation." Williams, 523 F.2d at 1209.

SUMMARY OF THE ARGUMENT

Although it is rare that a federal criminal case presents conditions that render a change of venue necessary, nevertheless, when circumstances create such a strong likelihood that prejudice due to community passions and hostility that the assurance of a fair trial and an impartial jury is undermined, a change of venue or transfer of the case to another part of the venue where the defendant will not face substantial prejudice is required by rules, and enforced by the supervisory authority of the federal courts. The district court abused its discretion in failing to take the necessary action under the facts of this case during a period of time in which community passions, as even the government later conceded, ran extremely high on issues of great importance to the Miami Cuban exile community consisting of hundreds of thousands of persons. The instant case–including a charge of a conspiracy to murder four exiles viewed by the community as humanitarian exile rescuers and a broader charge of conspiracy to

undermine community relations and disrupt the lives and efforts of Miami Cuban exiles, such that the prosecutors claimed the conspirators needed to be punished in order protect the community from Fidel Castro–was a unique, highly emotional, and media-intensive proceeding, with strong risks of prejudice from events inside and outside the courtroom. Under both the supervisory standard for application of Fed. R. Crim. P. 21(a) and the constitutional standard for the denial of a fair trial and an impartial jury, the district court manifestly erred.

In denying a change of venue, the district court erred as a matter of law by: (1) imposing an impossibility burden as to defense proof of pervasive prejudice permeating the community; (2) failing to afford appropriate weight to pretrial publicity evidence showing community passions that confirmed defense contentions and survey evidence; and (3) failing to recognize the special circumstances appropriate to analysis of hostility in the community apart from impressions of guilt from pretrial publicity. Further, the district court manifestly erred in discounting survey evidence on grounds that do not withstand scrutiny. And the district court ultimately abused its discretion by reaching an unreasonable conclusion as to the existence of prejudice against the defendants. Under these unique factors, described aptly by the panel as a perfect storm of prejudicial conditions, the district court abused its discretion in denying a change of venue.

ARGUMENT

The District Court Improperly Denied the Defendants' Repeated Motions for Change of Venue.

The district court abused the discretion afforded under Fed. R. Crim. P. 21(a) to transfer venue when it adopted as its standard for granting a change of venue a requirement that defendants prove a fair trial would be "virtually impossible," and limited its consideration of the evidence, after discounting a community survey, to pretrial publicity that explicitly referred to the defendants, their trial, and the charges, excluding from analysis of prejudice approximately two-thirds of the press material submitted by the defendants. Contrary to the district court, the defense did not claim the prejudice derived merely from pretrial publicity creating an impression of the defendants' guilt, but, as well, from long-standing and recently inflamed hostility in the county toward agents of the Cuban government.

The district court erred in adopting the test and standards appropriate for federal habeas review of state court convictions, without considering its duty to use its discretion under its supervisory power to prevent a foreseeably unfair trial. Once the defendants showed a substantial likelihood that a fair trial would not be possible in Miami, Rule 21(a) required transfer. That rule would have no meaning if it required district judges to exercise their discretion under a standard that applies only when federal courts are asked to reverse state convictions in a habeas setting.

The defendants' claim of prejudice was not primarily one of excessive press coverage, but of "inherently suspect" "outside influences affecting the climate of opinion" in the community, resulting in a "probability of unfairness," as described in Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966). Pamplin establishes that in a very limited number of cases, prejudice can be presumed from circumstances inherent in and unique to the venue, such as pre-existing and pervasive community sentiment hostile to the defendant. In these cases, because the source of the prejudice is not constitutionally-protected freedom of the press and information, but rather local prejudice, prejudice may be presumed without a showing of actual bias because voir dire is unlikely to reveal or cure this type of deep-seated and widely shared sentiment.

The district court, while acknowledging the defendants' claim that theirs was one such case, refused to consider the evidence relevant to this claim. Instead of considering the evidence and circumstances showing a pre-existing and deep-seated climate of opinion hostile toward agents of the Cuban government in Miami, the district court focused exclusively on the number of articles discussing the case. In doing so, it failed to consider the pervasive prejudice engendered by a four-decades' long history of violent repudiation of the government of Cuba, and the venue's warm embrace of those trying to topple it, whom the government argued were victims of the defendants' offenses against the community. Moreover, the district court's rejection

of the community opinion survey on the strength of a counter-affidavit criticizing the methodology of its author in a separate case was arbitrary and unwarranted by the record.

This case falls squarely within the parameters of those in which district courts have transferred venue to avoid trials corrupted by pervasive community hostility directed at a class of persons, e.g., those associated with the Cuban government. Finally, the district court's failure to explain its rejection of an alternative venue, within the district, and its failure to even consider its broader discretion to do so under Rule 18[2] is also clearly an abuse of discretion.

1. The District Court Abused its Discretion in Denying the Pretrial, Rule 21(a) Motion for Change of Venue.

A district court clearly "abuses its discretion" in reaching a particular decision if the court (1) applies an incorrect legal standard, or (2) follows improper procedures in making the determination, or (3) makes or relies upon findings of fact that are clearly erroneous, or (4) reaches a conclusion that is "clearly unreasonable or incorrect." SEC v. Smyth, 420 F.3d 1225, 1230 (11th Cir. 2005); United States v. Jordan, 316 F.3d 1215, 1249 (11th Cir. 2003). In ruling on the defendants' pretrial

[2] Fed. R. Crim. P. 18 provides, in pertinent part: "The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice."

motion to change venue here, the district court abused its discretion in each of these four separate respects. Accordingly, the decision below should be reversed.

2. Application of an Erroneous Legal Standard.

When the decision to be reviewed for an abuse of discretion is based upon an interpretation of law, this Court's own review must be de novo. United Kingdom v. United States, 238 F.3d 1312, 1319 n.8 (11th Cir. 2001). Here, applying de novo review, the Court should find that the district court misunderstood and misapplied the law in disposing of the defendants' Rule 21(a) motion according to the legal standard of Ross v. Hopper, 716 F.2d 1528, 1540 (11th Cir. 1983), modified on other grounds, 756 F.2d 1483 (11th Cir. 1985) (en banc) – a case factually and procedurally distinct from the instant case in crucial respects.

Notably, Ross – unlike the instant case – was a habeas corpus case filed under 28 U.S.C. § 2254. Ross was initially tried by the Georgia state courts, and accordingly, his case never at any time involved interpretation or application of Fed. R. Crim. P. 21(a) (the rule-based issue before the district court here). While admittedly, Ross moved the state trial court for a change of venue, his motion (unlike the defendants' Rule 21(a) motion in this case) was premised **solely** upon adverse, case-specific pretrial publicity. When Ross thereafter filed a § 2254 petition in federal court, he "constitutionalized" his change of venue claim, alleging that his right to a

fair and impartial jury had been violated due to the pretrial publicity and the trial court's denial of a change of venue.

Reviewing only that specific **constitutional claim** in Ross v. Hopper, this Court noted the heavy burden faced by habeas petitioners who **collaterally attack** prior convictions due to **prejudicial publicity**:

> One who challenges the fairness of the trial based on prejudicial publicity carries the burden of showing that prejudice resulted from the publicity. Irvin v. Dowd, [366 U.S. 717, 729,] 81 S.Ct. [1639,] 1643 [(1961)], quoting Reynolds v. United States, 98 U.S. [145,] 157 (1878). **This is especially true in a federal habeas proceeding**. See Sumner v. Mata, 429 U.S. [539,] 550-51, 101 S.Ct. [764,] 771 [(1981)]; 28 U.S.C. § 2254(d).
>
> Petitioner must show an actual or identifiable prejudice on the part of the jury resulting from publicity, Mayola v. Alabama, 623 F.2d 992, 996 (5th Cir. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed. 2d 303 (1981) ... or pretrial publicity so inflammatory and prejudicial or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice, United States v. Capo, 595 F.2d 1086, 1090 (5th Cir. 1979), cert. denied, 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed. 2d 641 (1980). See also Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963); Mayola v. Alabama, 623 F.2d at 997.

Ross v. Hopper, 716 F.2d 1540 (emphasis added).

Ignoring the factual and procedural distinctions between the instant defendants' case and Ross (namely, that the instant case had not come to the court in a habeas posture, but rather as an original Rule 21(a) motion, which was not premised solely

upon prejudicial, case-specific pretrial publicity, but also and more fundamentally upon "pervasive community prejudice" against anyone associated with the Castro regime), the district court misfocused its Rule 21(a) inquiry exclusively upon the "third inquiry" in Ross. Citing Ross, the district court found that the only relevant issue vis-à-vis the Rule 21(a) motion was whether the defendants had shown "that the pretrial publicity has been 'so inflammatory and prejudicial and so pervasive or saturating the community as to render **virtually impossible** a fair trial by an impartial jury, thus raising a presumption of prejudice.'" United States v. Hernandez, 106 F. Supp.2d 1317, 1319, 1321-1322 & n.2 (S.D. Fla. July 27, 2000) (emphasis added). In requiring the defendants to meet this very onerous standard on a pretrial Rule 21(a) motion premised upon "pervasive community prejudice" largely independent of specific pretrial publicity, the district court misapplied the law, and abused its discretion. The court's multiple legal errors in connection with its denial of the pretrial Rule 21(a) motion mandate reversal here.

(a) The "Virtual Impossibility" Standard Set Forth in Ross, and Used by the District Court to Deny the Defendant's Rule 21(a) Motion, Exceeds the Applicable Standard For Addressing Change of Venue Claims.

While admittedly, this Court held in Ross that the denial of a change of venue does not violate due process unless the defendant proves a "virtual impossibility of a fair trial," the Supreme Court has never validated that heightened standard of proof

in constitutional cases. The Supreme Court has struck down an impossible-to-satisfy change of venue standard as patently unconstitutional[3] and has rejected the suggestion that a demonstration of "actual prejudice" is a constitutional prerequisite for a venue change.[4] Instead, the Court has stressed that it is the "appearance of justice" that is paramount in a a fair trial, and that the constitutional inquiry should focus upon the mere "probability" or "likelihood" of prejudice – not the certainty. In Estes v. Texas, 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1633 (1965), the Supreme Court found that a change of venue constitutionally is mandated whenever there is a "probability that prejudice will result" from the procedures employed. Id. The Court reminded the Texas courts that in fact this had always been the standard as expressed in prior caselaw, including:

> In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:

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[3] See, e.g., Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 490 (1971) (state law that "categorically prevent[ed] a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant," was unconstitutional).

[4] See, e.g., Rideau v. Louisiana, 373 U.S. 723, 726-727, 83 S.Ct. 1417, 1419-1420 (1963)(due process demanded a change of venue in a case where the community had been "pervasively exposed" to such inherently prejudicial pretrial publicity that any subsequent court proceedings in such a community could be "but a hollow formality;" under such circumstances, it was unnecessary for trial court to await voir dire, or for reviewing court to examine voir dire transcript, before finding due process violation from refusal to change venue).

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. **But our system of law has always endeavored to prevent even the probability of unfairness. * * * [T]o perform its high function in the best way 'justice must satisfy the appearance of justice**.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 ... [emphasis supplied].

And, as Chief Justice Taft said in Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

> "The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. **Every procedure which would offer a possible temptation to the average man *** to forget the burden of proof** required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused **denies the latter due process** of law." At 532, 47 S.Ct. At 444 ... .

Estes, 381 U.S. at 543, 85 S.Ct. 1633 (emphasis added); see also Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522 (1966) ("[W]here there is a **reasonable likelihood** that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity") (emphasis added).

Given such precedent, in Brecheen v. Oklahoma, 485 U.S. 909, 108 S.Ct. 1085 (1988) (Marshall, J., dissenting from denial of certiorari), Justices Marshall and Brennan questioned the constitutionality of an Oklahoma change of venue rule which

– just as in Ross – required the more onerous showing of a "virtual impossibility of a fair trial." Dissenting from the Court's refusal to review the Oklahoma rule upon certiorari, Justices Marshall and Brennan acknowledged that the Court had **not yet** clearly established "the minimal requirements of the Due Process Clause for state change of venue standards," id. at 912, 108 S.Ct. at 1087, but nevertheless questioned the constitutional validity of any rule setting the threshold for venue change as high as a "virtual impossibility of a fair trial." In this regard, Justices Marshall and Brennan noted with significance that Oklahoma "diverg[ed] sharply from its sister states" in setting this "much higher threshold." Id. at 911, 108 S.Ct. at 1086. Moreover, these two Justices found, "[m]ost states have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish 'a reasonable likelihood that in the absence of such a relief, a fair trial cannot be had.'" Id. (noting that at least one state court had defined "reasonable likelihood" as a lesser standard of proof than "more probable than not"). Finally, Justices Marshall and Brennan noted, other states granted change of venue motions when the circumstances merely established "a substantial likelihood of prejudice" – a standard that the American Bar Association explicitly endorsed in its Standards Relating to

Fair Trial and Free Press 8-3.3(c)(2d ed. 1980).[5] Brecheen, 485 U.S. at 911, 108 S.Ct. at 1086.

According to Justices Marshall and Brennan, "Oklahoma's strong presumption

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[5]According to the ABA, "The following standards govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of **threatened interference** with the right to a fair trial:

> (a) Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.
>
> (b) A motion for change of venue or continuance should be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a **substantial likelihood** that, in the absence of such relief, a fair trial by an impartial jury cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.
>
> (c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.
>
> (d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the subsequent waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

(emphasis added).

against venue change fail[ed] to accommodate properly the concerns expressed in our due process precedents," and was "out of step with this Court's repeated recognition that 'our system of law has always endeavored to prevent **even the probability** of unfairness.'" Brecheen, 485 U.S. at 911, 108 S.Ct. at 1086 (citing In re Murchison, 349 U.S. at 136 (emphasis added by Justice Marshall); Sheppard v. Maxwell, 384 U.S. at 352, 86 S.Ct. at 1517; Estes v. Texas, 381 U.S. at 543, 86 S.Ct. at 1633). In urging the Court to address the constitutionality of the Oklahoma standard, Justices Marshall and Brennan noted that both Estes and Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961), had invoked and reaffirmed Justice Taft's holding in Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927), that "[e]very procedure which would offer a **possible** temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Brecheen, 485 U.S. at 911-912, 108 S.Ct. at 1087 (emphasis added by Justice Marshall).

Notably, several years after this highly critical dissent from the denial of certiorari in Brecheen (which itself was five years after this Court's decision in Ross), the Oklahoma Court of Criminal Appeals reconsidered its "virtual impossibility" standard. Brown v. State, 871 P.2d 56, 61-62 (Okla. Crim. App. 1994). The Brown

court examined almost a century of Oklahoma caselaw to determine the genesis of the "virtual impossibility" standard. Ultimately, the court concluded that the phrase "virtually impossible" had entered its caselaw by chance, through somewhat of a misunderstanding, but notably, **without any legal support**. The court stated:

> The words "virtual impossibility" seem to first surface in Thomsen v. State, 582 P.2d 829 (Okl. Cr. 1978). A reading of that case reveals the word "impossible" comes first from the assertions of that appellant that it was "impossible to empanel a jury which did not have a fixed opinion concerning this case." Thomsen, 582 P.2d at 832. This Court responded in kind:
>
> > This Court has held previously that a change of venue on the ground that a fair trial cannot be had in the district where the action is pending is warranted only where it is shown that the inhabitants of the district are so prejudiced that a fair and impartial trial for the defendant in that district court be impossible.
>
> Id. The case cites Mooney v. State, 273 P.2d 768 (Okl. Cr. 1954) and Wininegar v. State, 97 Okl. Cr. 64, 257 P.2d 526 (1953) in support of its language. However, the word "impossible" is not found in either of those cases. We believe the more traditional and more accurate statement of the law is found in Wininegar, where this Court held:
>
> > On application for a change of venue, the affidavit of the defendant in support thereof must not only aver "that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein," but it must also set forth the facts rendering a fair and impartial trial there **improbable**.
>
> Id. at 68, 257 P.2d at 531 (quoting Starr v. State, 5 Okl. Cr. 440, 115 P. 356 (1911)). This is the correct test. Thomsen and other cases using the

> wording "virtual impossibility" are hereby overruled to the extent they conflict with the "improbable" wording found in Wininegar and Starr.

Brown, 871 P.2d at 61-62.

What occurred in this Circuit is similar to what occurred in Oklahoma. The phrase "virtually impossible" first appeared in the former Fifth Circuit's decision in Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980) – where the Court rejected a § 2254 petitioner's argument that prejudice should be presumed from pretrial publicity, stating as follows:

> In Rideau, the Supreme Court, "without pausing to examine a particularized transcript of the voir dire examination of members of the jury," id. at 727, 83 S.Ct. 1417, 1419-20, overturned the conviction of a habeas petitioner whose uncounseled confession had been filmed, recorded, and then telecast three times by the local television station to large audiences in the Louisiana parish from which the jury was drawn and in which he was tried less than two months later. The principle distilled from this holding by courts subsequently discussing the case is that **where** a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render **virtually impossible** a fair trial by an impartial jury drawn from that community, "(jury) prejudice is presumed and there is no further duty to establish bias." United States v. Capo, 595 F.2d [1086,] 1090 [(5th Cir. 1979)].

Mayola, 623 F.2d at 996-997 (emphasis added). The Mayola dicta, that a defendant seeking reversal of his conviction "due to adverse publicity ordinarily must demonstrate an actual identifiable prejudice attributable to that publicity" and that, "barring the introduction of affidavits or testimony of the jurors admitting a bias,

proof of such prejudice without recourse to a transcript or other detailed account of the voir dire, would be virtually impossible," id. at 996, also contributed to the notion that to find pervasive prejudice, the court must first find impossibility of impartiality.

Reading the Mayola panel to have announced a prerequisite rather than merely an observation about common facts in prior presumed-prejudice cases, subsequent panels of this Court have seen Mayola as establishing an actual constitutional requirement that a defendant show the "virtual impossibility of a fair trial" to secure a change of venue. See, e.g., United States v. De La Vega, 913 F.2d 861, 866 (11th Cir. 1990) (presumed prejudice "standard is reserved for extreme situations where pretrial publicity renders 'virtually impossible a fair trial by an impartial jury;" citing Mayola); United States v. Awan, 966 F.2d 1415, 1427-1428 (11th Cir. 1992) (same, citing De La Vega; Mayola); see also Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985) (Mayola standard for presumed prejudice: "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community, '[jury] prejudice is presumed").

If this Court reads Mayola to establish a "virtual impossibility" requirement or standard, then clearly, it was Mayola that miscited and misconstrued the Fifth Circuit decision in Capo. In Capo, this Court's predecessor correctly recognized that the

governing constitutional standard was the "probability of unfairness" standard of Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966). See Capo, 595 F.2d at 1090 (citing Pamplin's holding that "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial"); see generally Pamplin, 364 F.2d at 5-6 (applying "the Irvin holding with the gloss of Rideau, Estes, and Sheppard," "the [constitutional] test is no longer whether prejudice found its way into the jury box at the trial, . . . As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting **probability of unfairness** requires suitable procedural safeguards, such as a change of venue to assure a fair and impartial trial; also citing Sheppard's holding that "[w]here there is a **reasonable likelihood** that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county no so permeated with publicity.") (emphasis added).

Notably, it was only **after** recognizing and invoking the Pamplin standard, that the Court in Capo **observed**:

> The cases in which such presumptive prejudice **has been found** are those where prejudicial publicity so poisoned the proceedings that **it**

> **was impossible** for the accused to receive a fair trial by an impartial jury. The clearest paradigms of such pervasive publicity were the trials in Estes and Sheppard wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial into an event akin to a three-ring circus.

Capo, 595 F.2d at 1090-1091 (emphasis added; also citing Rideau). Again, "observing" that "presumptive prejudice **has been found**" in three prior Supreme Court cases in which (as a factual matter) it "**was** impossible" for the accused to receive a fair trial, is fundamentally different than establishing a "virtual impossibility of a fair trial" as the constitutional showing necessary for a venue change. Significantly, neither Estes, Sheppard, or Rideau used the words "impossible," or "virtually impossible," or any other phraseology suggestive of such a heightened burden of proof.

The en banc rehearing in this case presents this Court with the opportunity to clarify Circuit law in conformity with governing Supreme Court precedent. In the same way that the Oklahoma court in Brown stopped the snowballing effect of its legally-unsupported, constitutionally-questionable "virtual impossibility" standard, and definitively abandoned it, this Court can and should do the same here.

However, even if the Court were to continue to view the "virtual impossibility" standard as setting forth the "constitutional minimum" for establishing a due process violation upon collateral review of a venue claim premised upon adverse pretrial

publicity, the Court should still hold that the district court erred as a matter of law and abused its discretion in applying that heightened constitutional standard to the Rule 21(a) motion here. See Brecheen v. Reynolds, 41 F.3d 1994 (10th Cir. 1994) (later habeas proceeding in Brecheen, supra; assuming, without deciding, that use of the "virtual impossibility" standard on direct review of denial of a change of venue motion would have been unconstitutional).

(b) The Constitutional Standard Does Not Govern a Fed. R. Crim. P. 21(a) Motion – Either Before the District Court or Upon Direct Review.

While a state habeas petitioner collaterally attacking the fairness of his trial faces the heavy burden of proving the complete denial of a constitutional right before a federal court may vacate the state conviction, a federal defendant filing a pretrial motion for change of venue under Fed. R. Crim. P. 21(a) does **not** face this same heavy burden. While the federal rule provides that "[u]pon the defendant's motion, the court must transfer the proceeding against the defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there," the few cases specifically construing and applying this Rule have uniformly rejected an overly-literalist reading (**either** that it incorporates the heightened constitutional standard necessary to reverse a conviction due to violation of the right to a "fair and

impartial trial," **or** that protection of such a vital constitutional right is committed to the complete discretion of the district court). Noting that these overly-literal interpretations of the Rule would both thwart its purpose and undermine relevant Supreme Court precedent, Judge Heebe correctly grasped the essence of the Rule almost four decades ago in United States v. Marcello, 280 F. Supp. 510 (E.D. La. 1968), where he explained:

> The rule is preventative. It is anticipatory. It is not solely curative as in a post-conviction constitutional attack. Thus, the rule invokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue. Succinctly, then, it is a well-guarded **fear** that the defendant will not receive a fair and impartial trial which warrants the application of the rule.

Id. at 513-514 (citing Singer v. United States, 380 U.S. 24, 35, 85 S.Ct. 783, 790 (1965), where the Supreme Court noted that Rule 21(a) permits venue to be changed "when there is a well-grounded **fear** of jury prejudice;" also citing the "reasonable likelihood" standard of Sheppard v. Maxwell, 384 U.S. at 683, 86 S.Ct. at 1522). See also United States v. Holder, 399 F. Supp. 220, 227 (D. S.D. 1975) ("to obtain a change of venue under Rule 21(a), the burden is upon the defendants to establish a reasonable likelihood that prejudice in the District [] will prevent a fair and impartial trial") (citing Marcello, 280 F. Supp. at 513-514); (where "probability of prejudice is great because of deeply rooted passions or recent massive publicity, the efficacy

of voir dire in screening the prospective jurors is diminished")(citing Groppi v. Wisconsin, 400 U.S. 505, 510, 91 S.Ct. at 493, and Irvin v. Dowd, 366 U.S. at 727-728, 81 S.Ct. at 1645). Holder is particularly apposite to the instant case, because the court based its change of venue ruling on survey data indicating "not only massive publicity surrounding the [violent] incident, but more significantly a deeply-felt prejudice toward Indians which was tremendously reinforced by the" offense. 399 F. Supp. at 228. The ABA "substantial likelihood of prejudice" standard is comparable to the standard articulated by Judge Heebe and should be applied here.

As Judge Devitt correctly recognized in United States v. Moody, 762 F. Supp. 1485 (N.D. Ga. 1991), the Supreme Court – in the exercise of its supervisory powers over the lower federal courts in their administration of the federal criminal laws – has applied a "more exacting fairness standard" on venue issues than is constitutionally required. Id. at 1490. In Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959), the Supreme Court notably reversed the district court's refusal to grant a mistrial where jurors had been exposed to prejudicial newspaper articles during the trial – notwithstanding their assurances that they could decide the case only on the evidence, and the district court's finding of no actual prejudice to the petitioner. Invoking its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts," the Supreme Court in Marshall

ordered a new trial. Id. at 312-313, 79 S.Ct. at 1173. Cf. Murphy v. Florida, 421 U.S. 794, 797, 95 S.Ct. 2031, 2035 (1975) (noting that reversal in Marshall had been an exercise of the Court's supervisory powers, based upon a "high potential of prejudice," but was **not** "a matter of constitutional compulsion").

Although this Court has never squarely addressed Rule 21(a) on the merits, nor determined – on direct review of a Rule 21(a) case – what would constitute an abuse of the district court's discretion under that Rule,[6] it is nonetheless clear that

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[6]This Court's decisions in United States v. Capo, 595 F.2d 1086 (5th Cir. 1979); United States v. Fuentes-Coba, 738 F.2d 1191 (11th Cir. 1984); United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990); United States v. Awan, 966 F.2d 1415 (11th Cir. 1992); and United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992), were **not** premised upon Rule 21(a). While indeed, the defendants in all of these cases filed motions for change of venue under Rule 21(a) before the district court, on appeal they did **not** challenge the district court's Rule 21(a) ruling under the abuse of discretion standard. Instead, in their appeals to this Court, these appellants explicitly invoked (and therefore willingly subjected themselves to a decision under) the more onerous due process standard. See, e.g., Capo, 595 F.2d at 1088 ("On this appeal, appellants claim they were denied a fair trial by virtue of prejudicial pretrial publicity, prejudicial publicity during the trial and prosecutorial conduct"); Fuentes-Coba, 738 F.2d at 1195 (addressing only issue of whether defendant's due process right to an "impartial trial" was violated); De La Vega, 913 F.2d at 864 ("Carballo and Coello allege that the pretrial publicity surrounding this case was so pervasive and prejudicial that the trial court's refusal to grant their motion for a change of venue or continuance deprived them of their Sixth Amendment right to trial by a fair and impartial jury"); Awan, 966 F.2d at 1427 ("The appellants assert that extensive pretrial publicity about the American invasion of Panama and the arrest of Manuel Noriega created a presumption that an impartial jury could not be selected"); Lehder-Rivas, 955 F.2d at 1521 ("Appellants claim that in the wake of inflammatory and pervasive publicity, the district court deprived them of their right to a fair trial when it refused to . . . order a change of venue").

disposition of a Rule 21(a) motion under an inapposite, and much more onerous constitutional standard, would be a clear abuse. See, e.g., Murphy v. Florida, 421 U.S. at 804, 95 S.Ct. at 2038 (Burger, C.J., concurring) (agreeing that there was no Due Process violation, but stating: "I would not hesitate to reverse petitioner's conviction in the exercise of our federal supervisory powers, were this a federal case"); Rideau v. Louisiana, 373 U.S. at 728-733, 83 S.Ct. at 1420-1423 (Clark and Harlan, JJ., dissenting) ("[I]f this case arose in federal court, over which we exercise supervisory powers, I would vote to reverse the judgment.[] It goes without saying, however, that there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension."); see also Isaacs v. Kemp, 782 F.2d 896, 897 (11th Cir. 1986) (Hill and Fay, JJ., dissenting from denial of rehearing en banc) ("I have little doubt that the state court should have ordered a change of venue in these cases. The administration of justice must be even-handed and should be so perceived. Were we considering these cases on direct appeal from convictions in federal court, I have little or no doubt

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To the extent that the district court read any of these due process decisions as controlling or even persuasive with regard to the Rule 21(a) motion, see, e.g., Hernandez, 106 F. Supp.2d at 1319 (misciting Fuentes-Cobo as authority in a Rule 21(a) case, and for proposition that where "the defendant has not met the burden of demonstrating prejudice in the community as a whole [under the "virtual impossibility" standard of Ross], the court may then conduct a voir dire examination of the jury to explore any potential bias of the jurors individually"), the court reversibly erred.

that, in the exercise of our supervisory power, they should be reversed. In these habeas cases, however, we are required to determine whether state court proceedings were constitutional – nothing more."). See In the Matter of Balsimo, 68 F.3d 185, 186 (7th Cir. 1995) (granting petition for mandamus, court usurped its authority by denying motion for change of venue requested under Rule 21(b), by holding defendants to overly burdensome standard of showing "truly compelling circumstances").

(c) Even if a Rule 21(a) Movant is Held to the Heightened Constitutional Standard for "Presuming Prejudice," and Even if – in a Pretrial Publicity Case – that Heightened Constitutional Standard Requires a Showing of the "Virtual Impossibility of a Fair Trial," the Pretrial Publicity Standard Should Not Govern a "Hybrid" Case Like This One, Where There was Not Merely Adverse, Case-Specific Pretrial Publicity, But Also "Pervasive Community Prejudice" Apart from That Publicity. In Such a Case, the District Court Should Have Applied the "Probability of Prejudice" Standard of Pamplin v. Mason.

In Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984), this Court correctly warned that principles specific to "pretrial publicity" cases should not be "haphazardly applied" to assertions of prejudice unrelated to pretrial publicity. Id. at 1538. The district court's application of an inapposite pretrial publicity standard resulted in clear legal error by the court here. Plainly, the defendants' Rule 21(a) motion was **not** premised "solely" or even "primarily" upon case-specific, pretrial

publicity. Rather, it focused upon the deep-seated, pervasive, anti-Castro "community prejudice" among the residents of Miami-Dade County – a unique form of prejudice predating this particular case, in existence for decades, but inflamed by Fidel Castro's perceived manipulation of events in the handling of the Elián Gonzalez case. And in fact, even if it was proper for the district court here to hold the defendants – on a pretrial Rule 21(a) motion – to the heightened constitutional standard for "presuming prejudice," the district court nonetheless applied a factually-inapposite constitutional standard.

Admittedly, where a defendant seeks to invoke a presumption of prejudice based **solely** on pretrial publicity, newspaper articles are not – in and of themselves – "enough;" the defendant must additionally prove that the publicity "so saturate[d] and taint[ed]" the community, that "any subsequent proceeding in th[e] county would have been unavoidably poisoned by [the pretrial publicity]." Mayola, 623 F.2d at 998. This "saturation" requirement requires a showing of at least some "actual prejudice" (in the form of circulation figures, or other evidence of community exposure), id. at 999, but even if a defendant can make the requisite showing, the government still maintains the right to "rebut" such the "presumption of prejudice" via voir dire, by showing the impaneling of an impartial jury. Id. at 1000-1001.

This almost insurmountable legal standard – and, in particular, the

government's right to rebut any presumption of prejudice via voir dire – applies, however, **only** in cases where the change of venue is sought solely due to pretrial publicity. The standard does **not** apply in cases such as the defendants', where there is pervasive community prejudice pre-dating, and unrelated to, pretrial publicity. Such cases present the unique risk that a defendant will be judged simply for who he is and **not** for what he has done – and, as such, are governed by the "probability of unfairness" standard of Pamplin v. Mason, 364 F.2d at 5.

The defendant in Pamplin, Reverend Mason, was a "Negro minister, active in the civil rights movement" in rural Texas, who led a 1963 "sit-in" demonstration at a "white" restaurant – the first racial demonstration in the community. Rev. Mason was arrested for "contributing to the delinquency of a minor," and jailed – after which he allegedly took a "swing" at one of the white jail deputies, bloodying the deputy's nose. Mason was charged with assaulting the deputy, and quickly moved for a change of venue – which the Texas trial court summarily denied. Pamplin, 364 F.2d at 3. Writing for the Fifth Circuit in Reverend Mason's subsequent habeas corpus case, Judge Wisdom acknowledged that "[u]nder the Rideau rule the trial court is not precluded from utilizing the voir dire to help gauge the intensity of community prejudice **inspired by pre-trial publicity**." 364 F.2d at 6 n.9 (emphasis added). Nonetheless, Judge Wisdom discounted the effectiveness of voir dire for ferreting out

prejudice unrelated to pretrial publicity. Specifically, he noted, where (as in Rev. Mason's case) "racial feeling may be strong," neither individual voir dire nor a group examination can "be expected to reveal the shades of prejudice that may influence a verdict. Due process of law requires a trial before a jury drawn form a community of people free from inherently suspect circumstances of racial prejudice against a particular defendant." Id. at 7. In such circumstances, Judge Wisdom recognized, "we must suspect the responses of prospective jurors even on individual examination." Id.; see also id. at 8 (the "feeling in the community, rather than the transcript of voir dire," is dispositive).[7]

Two years after Moody, in a "very large, metropolitan, populous city (Atlanta)," the district court in United States v. Tokars, 839 F. Supp. 1578 (N. D. Ga. 1993), transferred venue in a Rule 21(a) decision after discussing at length the distinction between the federal supervisory power incorporated into Rule 21(a), citing to "the seminal Supreme Court decision involving the exercise of supervisory power ... Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959)," and the constitutional due process standard used in resolving constitutional challenges.[8]

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[7] The Pamplin standard is not limited to small venues. The same U.S. Attorney's office prosecuting this case cited it repeatedly as applicable to presumed prejudice in Miami in a case following the instant matter.

[8] The District Court noted that, "The court has been unable to locate any Eleventh Circuit decision which resolves or clarifies the differences or the

Tokars involved a series of crimes charged against a former Assistant District Attorney, including procuring the murder of his wife. Like here, as well as in Moody, supra, the venues, although large, were convulsed by events in which violence against high ranking and respected officials (Moody) and betrayal by a high ranking law enforcement official (Tokars), created a wave of passion as though the community itself was the crime victim. In each, as here, there was not just high public interest in the events on trial, there was a strong communal investment in the outcome.

The Oklahoma City bombing produced a community-wide consensus that "only a guilty verdict would be a just result," thereby provoking a change of venue. United States v. McVeigh, 918 F. Supp.1467 (D. Okla. 1996). It was precisely circumstances such as these that led the Supreme Court of the United States to observe: "There can be no justice in a trial by jurors menaced by the virulence of public opinion." Groppi v. Wisconsin, 400 U.S. at 511, 91 S.Ct. at 493.

The underlying rationale of Pamplin – calling for venue change in advance of voir dire in cases of pervasive community prejudice based upon "who a defendant is" or the "group or category" to which he belongs (and not simply pretrial publicity about the crime charged) – applies with equal force to this case involving the

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applicability of the two foregoing strands of authority to a federal trial." 839 F. Supp. at 1581.

admitted agents of the Castro government. Admittedly, if the source of prejudice is merely (and exclusively) pretrial publicity, voir dire is much more likely to reveal the information the juror obtained and enable the court to gauge how deeply embedded it is in the juror's mind. By contrast, where–as here (as in Pamplin)–the source of the prejudice is long-standing and pervasive community attitudes, values, and beliefs, the conventional protections afforded by voir dire will not suffice to unearth the latent bias. Such prejudices are a community norm and often not even consciously known to the jurors.

In Williams, the Court observed that the due process standard merely "places a bottomline on the discretion exercisable by the district court." 523 F.2d at 1209 n.11. The defendants here were entitled to more than that constitutional minimum. The district court misapprehended its duty to supervise the proceedings before it in order to protect the defendants from foreseeable threats to their fair trial rights by relying upon the unprecedented and most stringent test, the "virtually impossible" standard, and not engaging its supervisory power under Rule 21(a). Its use of the wrong test and its failure to undertake its supervisory duty constituted an abuse of discretion.[9]

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[9]After reviewing all the known cases on Rule 21(a), Professor Charles Wright, in his treatise on federal practice, recommended as the correct standard to be applied to the Rule: "reasonable likelihood of prejudice." See 2 Wright, Federal Practice & Procedure (Crim. 3d 2005) § 342, at 378-379.

3. The District Court's Failure to Evaluate the Rule 21(a) Motion and Supporting Evidence under Pamplin's Governing "Probability of Unfairness" Standard Was Improper; but Even Assuming Applicability of the Virtual Impossibility Standard, the Record Confirms It Was Met Here.

Notably, the district court's reliance upon the incorrect legal standard caused it to misperceive and ignore evidence relevant to the motion – evidence which should have required a change of venue in advance of voir dire, under Pamplin.[10] The district court abused its discretion in focusing attention almost exclusively on pretrial coverage of the case while ignoring the abundant factors demonstrating pervasive community prejudice.

In almost all the reported cases discussing presumed prejudice in the last several decades, pretrial publicity has been the claimed source of the prejudice. See United States v. Capo, 595 F.2d 1086 (5th Cir. 1979); United States v. Padilla-Martinez, 762 F.2d 942 (11th Cir. 1985); United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985); United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990); United

[10]Cf. Government's Motion for Change of Venue in Ramirez v. Ashcroft, Case No. 01-4835-Civ-Huck/Turnoff, R15:1636:Ex.2:15 (acknowledging that the "probability of unfairness" standard of Pamplin governed even in a civil case, and that the "climate of opinion" in Miami-Dade County in the aftermath of Elián Gonzalez' return to Cuba, required a change of venue to assure a fair trial **for the government**); see generally United States v. Rey, 811 F.2d 1453, 1457 n. 5 (11th Cir. 1987) (court of appeals may take judicial notice of its own records and those of inferior courts).

States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992); United States v. Awan, 966 F.2d 1415, 1427-1428 (11th Cir. 1992). Each of those holdings failed to find presumed prejudice, clearly demonstrating that publicity is not, in and of itself, incompatible with a defendant's right to a fair trial.[11] Volume and quantity of news reporting may not always be an absolute indicator that the presumed prejudice threshold has been crossed, particularly where the nature of the reporting has been factual and informative, as opposed to inflammatory.

The instant case, however, belongs to a distinct, and small, genre of cases in which preexisting prejudice in the venue about issues integrally related to those the jury will have to determine, in combination with exacerbating publicity, creates the core obstacle to a fair trial. In such cases, publicity does not ordinarily create the prejudice; rather, it reflects and amplifies preexisting bias that is already a norm in the community. While the district court recognized that the defendants specifically argued that the source of prejudice was "the inflamed atmosphere in this community

[11] These cases were typical of the publicity cases that normally fall short of demonstrating presumed prejudice. See Capo, 595 F.2d at 1091 (publicity concerned a murder the defendant was allegedly involved in 100 miles from the venue and which peaked one year before trial; only 10 jurors had to be excused for cause and jurors who were seated acquitted four of Capo's co-defendants); De La Vega, 913 F.2d at 864, 865 (involved charges against police officers where pretrial coverage "was largely factual" and venire members "recalled only sketchy details of facts that were publicized"); Lehder-Rivas, 955 F.2d at 1525 (large gaps existed in media reporting of the crime, while voir dire revealed that "most of the prospective jurors had not closely followed the media coverage of the case").

concerning the activities of the government of Cuba," R5:586:2, it proceeded to analyze the news articles in the same manner as if appearing in a community untouched by animosity toward the defendants.

While at least thirty-three articles referred in highly prejudicial terms to the defendants, the charges, and their impact on the venue, see United States v. Campa, 419 F.3d at 1229 n.18 (identifying press articles), in addition to those, at least twice that number reflected on the nature, degree, and pervasiveness of hostility towards Cuba. These, the district court rejected as "relate[d] to events other than the espionage activities in which the Defendants were allegedly involved." 419 F.3d at 11. But these articles documented the pervasive hostility to Cuban and sympathy to those they were accused of conspiring to spy on, disrupt, and even murder.

4. The Content of the Articles about the Case Focused Upon, and Exacerbated, the Existing Community Prejudice Against Agents of Cuba, Requiring a Verdict for "Us" (the Miami Community") or "Them" ("Cuban Spies").

Of the thirty-three articles directed related to the defendants' case, thirty contained some form of the word "spy" in their headlines. These were not merely factual recitations of procedural incidents in a trial, but a rallying cry to defend the community from despised intruders; as the panel opinion recognized, "spies among us" was a predominant theme. United States v. Campa, 419 F.3d at 1261 & n.18. Another dominant theme of the articles directly related to the case were the

confessions, contrition, guilty pleas and sentences of codefendants, reported in no fewer than seven articles submitted with the initial venue motion.

5. The District Court Gave No Weight, nor Did It Even Discuss, the Articles that Documented Community Prejudice.

Published in a different venue, such articles, while emotional and prejudicial, might not have created a pervasive atmosphere or hostility toward the defendants; in Miami, the articles had special resonance and reinforced prejudice. The district court eliminated all consideration of the environment into which the flames of prejudice reached because it found the articles documenting the nature of that environment "relate to events other than the espionage activities"charged in the indictment, and thus disregarded that evidence entirely.[12]

While the district court was correct in noting that the articles were not nearly so numerous as those in McVeigh, many of the same factors that poisoned all of Oklahoma as a venue were present in Miami for these defendants: the defendants were portrayed as the personification of the enemy, while the victims were intensely humanized as "brothers" in the community, characterized by the prosecution as "four people who were cared about very deeply by people here in this community." R65:6735 (statement of prosecutor in favor witness-press contacts for 5-year

[12] R15:1636:Ex.10 (prominent Cuban-American attorney explains that due to presence of 700,000 Cuban-Americans in Miami, "issues related to Fidel Castro are not a historical footnote; they are living, breathing wounds").

anniversary memorials for BTTR victims).

The district court did not, of course, have specific advance notice that there would be demonstrations during the trial by men in fatigues, or placards calling for "SPIES TO BE KILLED," R59:6145, but any fair reading of the evidence presented at the venue motion would have made these and other events that threatened to derail the trial predictable; moreover, the defendants' renewal of their motions on multiple occasions during trial afforded the court ample opportunity to reconsider its decision in light of ongoing prejudicial influences occurring in the community at trial.

6. The District Court's Rejection of the Community Survey Was an Abuse of Discretion.

The defendants also submitted with their initial venue motion a community attitude survey which reflected that 69% of those eligible for jury service in the venue held prejudice against anyone accused of the acts described in the indictment; 40% admitted that feelings about Castro's government would make difficult for them to be fair and impartial, and of those, 90% said that evidence would not change their minds. See Holder, 399 F. Supp. at 228 (reliance on survey data to measure non-pretrial publicity prejudice); Tokars, 839 F. Supp. 1578 ("While the survey may be faulted for failing to include a question as to whether the respondents would be able to be fair and impartial notwithstanding their exposure to pretrial publicity, it nonetheless stands as evidence which weights in favor of Defendant's motion for

change of venue.").

Indeed, under any standard, including "virtually impossible," the district court's refusal to transfer this case to a venue not tainted by pervasive and virulent prejudice against the Cuban government and its agents, and not wounded by the deaths of four honored members of the community, is error. The Rule 21(a) ruling suffers from legal error; rejection of the evidence of community prejudice was arbitrary, as was rejection of the community opinion survey. The evidence of the venue's long and violent hostility to the government which defendants admitted serving as agents, together with its embrace of those identified as its victims, made it clear that jurors from that venue could not fairly draw inferences about their intentions to conspire to obtain national defense information or murder members of Brothers to the Rescue.

Under standards for constitutional review, an independent evaluation of all the facts establishes that defendants' Fifth and Sixth Amendment rights were violated. The totality of the circumstances reveals that the level of hostility towards defendants, as demonstrated by the press, the public opinion survey, the rate for prejudice in voir dire, and the prejudicial effect of the prosecutors' arguments and a witness's attack on a defense lawyer, as well as press intrusion into the trial process, shows that this was a case in which prejudice was shown and a fair trial denied.

7. Rule 21(a) Is Mandatory and Does Not Merely Permit, But Requires, the District Court to Change of Venue Once Pervasive Prejudice Is Shown After Weighing All Relevant Factors, Including the Possibility of Transfer to Another Division Within the District.

In its decision and order of July 27, 2000 denying defendants' motion pursuant to Rule 21(a), the district court treated the mandatory language of the statute ("the court **must** transfer the proceeding") as permissive. R5:586:3 ("To protect these rights, a district court **may** transfer proceedings to another district '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 . . . .'"). Given the mandatory nature of the rule and the rule's focus on trying to determine whether there is some place in the venue where prejudice can be avoided, the district court's consideration of the motions was not fully adequate to assure the appearance of fairness. Rule 21(a) mandates transfer whenever the district court is satisfied "that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." The language of the statute leaves no discretion once prejudice is found. The role of discretion under Rule 21(a) is in the weighing of the relevant factors in order to determine whether prejudice in the district makes further efforts to obtain a "fair and impartial trial" there futile, unnecessary and unwise.

The text of Rule 21(a) neither instructs district courts on precisely what factors

it must weigh, nor what standard to use in judging whether a defendant can "obtain a fair and impartial trial" in the venue. The history of amendments to this Rule and its relation to Rule 18 do give clear indications of the scope of the discretion given to district courts presented with evidence of prejudice or hostility to defendants in a particular district or division. Prior to 1966, Rule 21 included transfer to another "division" within the district as a remedy upon showing that defendants could not obtain a fair and impartial trial in the division under challenge. The 1966 Amendments distinguished between discretion to transfer to a different district, upon such a showing of prejudice, pursuant to Rule 21, and the district court's broader discretion to "fix another place of trial within the district (if there be such) where prejudice does not exist," pursuant to Rule 18. Fed. R. Crim. P., R. 18 advisory committee's note (1966 Amendments). Under Rule 18, the only restrictions on the court's exercise of discretion are "due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice."

While the defendants' motion was filed pursuant to Rule 21(a), and the evidence presented clearly warranted transfer pursuant to that provision, at oral argument on the venue motion on June 26, 2000, the defendants agreed to accept a within-district transfer to Fort Lauderdale as an acceptable compromise. R5-586 at 2 n. 1.

The district court's Order of July 27, 2000 acknowledges that "[d]efendants

seek a change of venue of the trial of this case, **i.e., to have the trial held in Fort Lauderdale** rather than in Miami." R5:586:2 (emphasis supplied). However, the district court's opinion and reasoning do not thereafter return to the question of whether it should exercise its discretion to transfer to a division – apparently acceptable, given that the government conceded that relevant evidence and events in the underlying cases were tied to Broward – just half an hour's drive away and within the same district.

The proper interpretation of Rules 21(a) and 18 is illustrated by United States v. Hoffa, 205 F.Supp. 710 (S.D.Fla. 1962), in which a local bank was the victim of a fraud involving not only a well-known figure, but also local "prominent citizens." The district court moved the case to a different division within the district because the "local interest" would create a "possible difficulty" in selecting an impartial jury, writing:

> It is the opinion of the Court that these facts create a local interest in this matter which is greater than that which might be present in another locality and they naturally tend to create an atmosphere which might present some difficulty in selecting an impartial and unbiased petit jury.

It thus transferred the case from Orlando to Tampa, "in order to obviate this possible difficulty and to assure that the defendants are tried in a locality which is free from prejudice . . . ." Id. at 722-723.

The district court's refusal to consider and explain why even a within-district

transfer would be inappropriate demonstrates that its Order, rather than reflecting careful consideration of all relevant factors and weighing them with a view toward protecting defendants fair trial rights, arbitrarily denied any transfer.

The district court, rather than consider the factors relevant to the exercise of its discretion to protect defendants' rights prospectively, used the criteria appropriate to reversal of state court convictions in a habeas review and, in effect, concluded that if sitting as a judge of this Court faced with a habeas record grant of habeas relief would not be mandated; and, therefore, the district court did not appropriately exercise its discretion under the supervisory power, to transfer this case, even to another division, within the same district. The district court's contrary interpretation of the Federal Rules of Criminal Procedure, particularly Rules 21(a) and 18, was clearly erroneous.

8. Given the Facts and Circumstances Presented Here, the Denial of a Venue Change under Rule 21(a) Constituted an Abuse of Discretion, Even under the "Virtually Impossible" Test, as well as the Constitutional Standards Applied in Federal Habeas Cases.

Demographics, local politics, a forty-year history of molding anti-Castro attitudes into organized and active exile efforts, recent eruptions of major demonstrations aimed at Cuban interference with exile efforts to keep Elián in Miami, the issues and events surrounding trial, all produced the many prejudicial events set out in the panel decision – e.g., organizational efforts and media contacts by victims and witnesses, memorial masses, a steady stream of editorial coverage attacking even

the judge for allowing the defense to present their explanation for coming to the United States, a courtroom crowded with media and victims, unprecedented levels of bias and concern for community reaction, prosecutorial fear and community protection themes that played into the media prejudice, the media's "Spies Among Us" theme that repeatedly ran in the headlines prior to trial, extensive and graphic introduction of Fidel Castro into the case; introduction of exile figures and witnesses and argument on repression in Cuba as a ground for believing the defendants themselves were evil, mischaracterization of communications of the agents to give them a more menacing and heartless appearance, press scanning the courtroom with binoculars and causing even the prosecution to complain about the press "breathing down my neck," press access to evidence before cross-examination, an ineffectual gag order that witnesses found ready means to avoid, jurors raising concerns, even during deliberations, that the intrusive TV cameras were following them after leaving the courthouse and recording their license plate numbers, and an improper, and full blown attack, on the defendants for having come to America to "destroy the United States" and use of the most disparaging arguments to attack defense counsel, including making their court appointments look like part of a plan to destroy the United States, requiring the district court to sustain dozens of objections to the government summations as being contrary to, or not supported by the evidence, or otherwise improper. As predicted by the

defendants, the "environing atmosphere" of hostility to the Cuban government and its agents took over the proceedings, destroying any confidence in the ability of the jury to fairly make inferences solely from the evidence to determine the defendants' specific intent. See Groppi v. Wisconsin, 400 U.S. at 510, 91 S.Ct. at 493.

For the reasons stated by the panel, the standards set by this Court's precedents compel the relief of a new trial in this case.

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 11,803 words.

Leonard I. Weinglass

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was hand-delivered this 15th day of December 2005, upon Anne R. 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; Orlando do Campo, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1500, 200 South Biscayne Boulevard, Miami, Florida 33130-1555, Miami, Florida 33131; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; and William M. Norris, 8870 SW 62nd Terrace, Miami, FL 33173.

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