IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 01-17176 & 03-11087

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

GERARDO HERNANDEZ, *et al.*

Defendants/appellants.

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

EN BANC BRIEF OF APPELLANT GERARDO HERNANDEZ

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

United States v. Gerardo Hernandez, et al.
Case Nos. 01-17176 & 03-11087

Appellants file 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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David M. Buckner

Ruben Campa

Orlando do Campo

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STATEMENT ADOPTING BRIEF OF CO-APPELLANTS

Appellant Gerardo Hernandez, pursuant to Fed. R. App. P. 28(i), hereby adopts the *en banc* appellate briefs filed in the instant appeal by co-appellants Ruben Campa, Luis Medina, Antonio Guerrero, and Rene Gonzalez, including the statements of the issues and the case, standard of review, summary of the argument, argument and citations of authorities, and any reply argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231. The court of appeals has jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF *EN BANC* ISSUES

I. Whether the district court erred in denying defendants' motions for change of venue.

II. Whether the district court abused its discretion in denying the defendants' motion for new trial based on newly-discovered evidence.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the District Court

The defendants, Gerardo Hernandez, Luis Medina, Antonio Guerrero, Ruben Campa, and Rene Gonzalez, were charged in a multi-count indictment alleging: in Count 1, that all of the defendants conspired, in violation of 18 U.S.C. § 371, to defraud the United States and to act as foreign agents without proper notification as required under 18 U.S.C. § 951 and 28 C.F.R. § 73.01, *et seq.*; in Count 2, that Hernandez, Medina, and Guerrero conspired to transmit national defense information to Cuba, in violation of 18 U.S.C. § 794; in Count 3, that Hernandez conspired with the Cuban government to murder four members of the Miami-based Cuban exile organization, "Brothers to the Rescue," in the special maritime and territorial jurisdiction of the United

States, in violation of 18 U.S.C. § 1117; in Counts 4 and 6 (Hernandez), Count 7 (Campa), and Counts 9 and 11 (Medina), that Hernandez, Medina, and Campa possessed false passports, in violation of 18 U.S.C. § 1546; in Count 10, that Medina made a false statement in a passport application, in violation of 18 U.S.C. § 1542; in Count 5 (Hernandez), Count 8 (Campa), and Count 12 (Medina), that Hernandez, Medina, and Campa possessed false identification documents, in violation of 18 U.S.C. § 1028; in Counts 13, 19, and 22-24 (Hernandez), Counts 14, 25, and 26 (Medina), Count 15 (Hernandez and Gonzalez), Count 16 (Hernandez, Medina, Guerrero, and Campa), and Count 17 (Campa), that the defendants acted and aided and abetted others in acting as foreign agents without notification to the Attorney General as required under 18 U.S.C. § 951 and 28 C.F.R. § 73.01, *et seq.*

Following denial of their motions for change of venue and for reconsideration of their venue and intra-district transfer requests, R5:586, 723, the defendants proceeded to a jury trial which began November 27, 2000 and concluded on June 8, 2001 with verdicts of guilty on all counts. R11:1291, 1293, 1295, 1297, 1299.

Sentencing hearings were conducted in December 2001, with Hernandez, Medina and Guerrero receiving life sentences; Campa received a sentence of 19 years, and Gonzalez received a 15-year sentence. R14:1430, 1435; DE1437, 1439, 1445. The defendants are incarcerated.

On November 13, 2002, Guerrero filed a motion for new trial, pursuant to Fed. R. Crim. P. 33, based on newly-discovered evidence pertinent to the denial of the defendants' motions for change of venue and the defendants' motions for mistrial based on denial of a change of venue. R15:1635. Guerrero also filed an appendix of submissions in support of the motion. R15:1636. The district court thereafter granted motions by Hernandez, R15:1644, Medina, R15:1650, Campa, R15:1638, and Gonzalez, R15:1651, to join in the motion for new trial. On February 10, 2003, the district court entered an order denying the motion for new trial. R15:1678.

Statement of Facts

Appellant adopts the statement of facts in the *en banc* brief of Rene Gonzalez. With respect to the motion for new trial based on newly discovered evidence, the relevant facts concern: (a) prosecutorial misconduct

in unfairly representing facts, taking positions, and offering evidence diametrically opposite to representations the government made in civil proceedings, as to the amenability of Miami-Dade County in the period following the Elián Gonzalez events to impartiality on issues of core concern to the Cuban exile community; and (b) facts relevant to the district court's evaluation of expert survey evidence establishing overwhelming community prejudice against the defendants.

1. Pervasive community prejudice against the defendants arising from passionate hatred of Fidel Castro, the Cuban government, and its agents, and community hostility concerning the alleged crimes of murder, espionage, and infiltration of anti-Castro Cuban exile organizations.

The district court, in an order denying motions for judgment of acquittal and for new trial made immediately following trial, expressly acknowledged its awareness "of the impassioned Cuban exile community residing in this venue." R13:1392:10. Given the undisputed history of the populous Cuban exile community in one county of the venue in which the prosecution was brought, Miami-Dade, court-appointed counsel sought and obtained leave of court to commission a random survey of 300 persons to reveal community

attitudes regarding the defendants and the prosecution in order to determine how pervasive the prejudice was. R18:15-28. Although the motion was filed *ex parte*, the district court, due to media discovery and reporting of the defense motion, *see* R18:14 (court is "becoming increasingly concerned about ... a parade of articles appearing in the media about this case"), invited the participation of the government on the issue in August 1999, several months prior to the Elián Gonzalez events which commenced with his rescue on Thanksgiving Day 1999. R18:15. The district court first sought to name an independent court-appointed survey expert to avoid disputes with regard to the precise level of prejudice, because "I want it right down the middle of where it should be, as accurate information that is going to assist the Court in making a decision for the fairness of everyone who is involved in this matter." R18:17. The defense agreed to such a procedure, R18:18, but the government objected, stating it would not present survey evidence or any evidence of the "temperature of the community," but instead would likely just challenge the defense survey results. R18:25.

In January 2000, the defense submitted, as part of a motion for change

of venue, the random survey commissioned to determine the level of prejudice faced by these defendants, along with an affidavit of the survey expert confirming prior polling data reflecting the deference of the Miami community as a whole to the Cuban exile community on matters relating to hostility to the Cuban government. R2:321 App. A (Declaration of Prof. Gary Moran, Ph.D.; reporting scientific survey results showing substantial percentage of the Miami-Dade population acknowledges prejudice against agents of the Cuban government engaged in activities in the United States). Defendants also submitted a large volume of news articles to substantiate "an atmosphere of great hostility toward any person associated with the Castro regime," and "the extent and fervor of the local sentiment against the Castro government and its suspected allies." R2:329:1,3.

Rather than present its own evidence of what the level of prejudice in the community toward these defendants was in 2000, the government offered an affidavit prepared in 1997 by a psychologist who disputed the formulation of the survey questions used by Dr. Moran in relation to a prior survey dealing with a United States citizen accused of violating regulations dealing

with trade with Cuban businesses. R3:443. The government offered no affidavit or other evidence disputing the specific survey questions submitted in the instant case, which differed in substance and phraseology from the 1997 trade-embargo survey. Nor did the government offer any expert or lay opinion or other evidence with respect to the level of prejudice against the defendants or the Cuban government in this case.

The district court adopted the government's position, finding that this case is "substantially similar to that in" *Ross v. Hopper*, 716 F.2d 1528, 1540 (11th Cir. 1983), *modified on other grounds*, 756 F.2d 1483 (11th Cir. 1985) (*en banc*), and *United States v. Fuentes-Coba*, 738 F.3d 1191 (11th Cir. 1984), "in which the pretrial publicity did not rise to a sufficient level to raise a presumption of prejudice in the community," but the district court made no findings as to the actual level of prejudice in the community, apart from the volume of case-specific publicity, and announced that the court would proceed to select a jury using individual voir dire followed by preventive instructions. R5:586:16-17.[1]

[1] Contrary to the district court, a review of the cited cases shows that any prejudice in *Ross* or *Fuentes-Coba* was not at all comparable to the

The district court subsequently denied reconsideration of the motions for change of venue, noting that the court's original order adequately dealt with the fact that the defendants were admitted agents of the Castro government working in the Miami area adversely to the interests of certain exile organizations. R5:723:2. The district court reiterated that further consideration of the motion to change venue would occur only if the court first determined that it could not select a jury through individual voir dire. R5:723:2-3; RBox1:514:66 (hearing on motion to change venue; describing court's intention to select jurors through individual questioning).

2. Trial proceedings and events occurring during trial confirming the level of community prejudice and hostility toward Castro agents that would be anticipated in Miami and the heightened importance of such factors given the nature of the case as tried.

As tried to the jury, the evidence and argument presented by the defendants – that certain Miami Cuban exile activists, beyond engaging in lobbying and fund-raising to fight Cuba, were also involved in terrorism and

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prejudice faced by these defendants. In *Ross*, 716 F.2d at 1540, only three members of the venire harbored a fixed opinion of the defendant's guilt, while in *Fuentes-Coba*, 738 F.2d at 1194-95, not a single member of the venire was either potentially biased or concerned about community reaction.

other illegal activity that justified Cuba's active investigation to protect itself from attack – conflicted with the core beliefs of the Cuban exile community. The district court acknowledged that the defendants adequately represented, as part of their venue motions, "the argument that the defense of necessity will uniquely prejudice Defendants if tried before a Miami jury." R5:723:2.

In combination with hostility to the defense offered by admitted Cuban agents infiltrating Miami Cuban exile groups, the theory of prosecution employed by the government heightened the community prejudice confronted by the defendants. The government, in opening statements and closing arguments, presented the case as "our community" against Castro's spies. *See* R29:1573, 1576, 1592 (government opening statement, referring to spies "among us here," "spies here in our community," "their operations [in] this community," and "Cuban intelligence officer in this community"); R124:14474, 14480-82, 14520, 14535-36 (government closing argument; prosecutor compares Count III conspiracy charge to Nazi Germany's genocide based on racial and religious hatred; accusing Cuban government of "sponsor[ing] book bombs, ... threats, telephone threats of car bombs, [and]

sabotage" in the Miami community;[2] referring to defendant Campa as a "Cuban spy sent to the United States to destroy the United States"; arguing that failure to convict defendants would undermine internal opposition to the Cuban government; comparing the Cuban shootdown to Pearl Harbor; calling the defendants "spies, bent on the destruction of the United States of America" and "people bent on destroying the United States, [with counsel] paid for by the American taxpayer").

Further, throughout the examination of defense witnesses (both those actually employed by the Cuban government and those who had spoken with the Cuban government to obtain relevant information), the prosecution made pointed attacks on the credibility of such persons due to their connection to Cuba. *See*, *e.g.*, R87:9958-60; R94:10917; R95:11061. In examination of government witnesses, the prosecution sought to bring out justifications for the community-accepted view of strident hostility to the Cuban regime. *See*, *e.g.*, R58:6007-18 (testimony regarding political persecution in Cuba).

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[2] Review of the record shows no evidence that any of the defendants committed or attempted to commit physical harm to persons or property in the United States, nor were they charged with such conduct.

Apart from direct actions by the government, key witness Jose Basulto, who led the incursions into Cuban territory that precipitated the shootdown of Brothers to the Rescue planes and whose high-profile status in the Cuban exile community lent significance to his views, accused, as the district court acknowledged, one of the defense attorneys in this case of being a spy for the Cuban government. R13:1392:14. The defense contended that such an allegation by such a public figure, particularly in the middle of trial in front of the jury, was not the type of event that a juror or anyone else who heard it could be expected to erase from memory.[3]

Nor was Basulto constrained from engaging, during the course of trial, in public displays in connection with the case, including a major

[3] In renewing the venue issue following Basulto's in-court verbal attack, defense counsel noted, without dispute by the government, Basulto's "stature" in the community. *See* R81:8948 ("These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community, who have access to the media, are going to call them communists, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial."). As a prospective juror noted in voir dire, Jose Basulto had, among other public activities, been a popular guest on Miami radio for years. R25:684 (statement of prospective juror Placencia, a south Florida media manager).

demonstration to commemorate the fifth anniversary of the BTTR shootdown, February 24, 2001 and media interviews. *See*, *e.g.*, Kirk Neilson, "Bird of Paradox," MIAMI NEW TIMES, April 26, 2001 at 1, 5, 26, 29 (cover story on Jose Basulto regarding political import of issues at the trial of this case; Basulto's position on superseding defendants' indictment to add Fidel Castro as BTTR shoodown defendant, which "has the backing of the Cuban American National Foundation and the Democracy Movement").

3. The government's action in strongly disputing in this case what it flatly admitted in other litigation – that a jury trial in Miami addressing hot-button, core Cuban exile issues presented unacceptably high risks of bias and lack of impartiality – and newly-disclosed evidence concerning improprieties in the handling of expert community surveys confirming overwhelming prejudice against the defendants in Miami.

Newly-discovered evidence that arose less than six months after the final sentencing hearing in this case confirmed defense beliefs that the government had tried to mislead the district court by opposing the selection of a court survey expert, critiquing the post-Elián community survey with a stale affidavit relating to a prior survey in a wholly distinguishable prosecution, and by arguing, both in writing and in proffers to the district

court at the hearing on the motions, that Miami-Dade County is "extremely heterogeneous," "politically non-monolithic," with "great diversity," and therefore immune from "outside influences" that would preclude seating a fair jury in the trial of admitted Cuban agents charged with murder and other crimes targeting Cuban exiles. R3:443; RBox1:514:63.

The defense belief that the government well knew of the level of community prejudice in this case–the first and only prosecution of such allegations–was heightened by comments immediately following the return of the verdict on June 8, 2001, by the United States Attorney, who announced in a press conference that by prosecuting the defendants, "his office ***protected the community from 'Castro's tentacles***.'"[4] Thus, when the defense learned that on June 25, 2002, the same government that had opposed a change of venue – on the ground that Miami-Dade was immune from "outside influences" that would preclude seating a fair jury – moved, in *Ramirez v. Ashcroft, et. al.*, Case No. 01-4835 Civ-HUCK, for a change of venue out of Miami-Dade, relying on precisely the fact that such influences made a fair

[4] Gail Epstein Nieves, Alfonso Chardy, *Cuban Spies Convicted*, MIAMI HERALD, June 9, 2001, at 1A (quoting U.S. Attorney) (emphasis added).

trial "virtually impossible ... if the trial [of an employment-related discrimination action against the U.S. Attorney General] is held in Miami-Dade County," the defense sought relief based on the venue-prejudice recantation by the government. R15:1636:Ex.2:15 (Gov't motion to transfer venue out of Miami-Dade in *Ramirez*); *see also id.* at 14-15 (government acknowledges media bias in favor of the position of the Cuban exile community); *id.* at 13 ("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 ensure a fair trial. ... Evidence of pervasive community prejudice is sufficient even without a showing of a clear nexus between community feeling and jury feeling.") (citing *Pamplin v. Mason*, 364 F.2d 1, 4 (5th Cir. 1966); *United States v. Moody*, 762 F.Supp. 1485, 1487 (N.D. Ga. 1991)) (emphasis in government's pleading).

The principal case cited and relied upon by the government in *Ramirez* – *Pamplin v. Mason* – ***was the same case relied upon by the defense in this case, and which the government vigorously opposed as having no application to***

a venue the size of Miami-Dade. *See* R1:286:5; R3:443:6-8; RBox1:514:59-63.

The newly-discovered evidence presented by the defendants also included events regarding the handling of Professor Gary Moran's expert survey evidence on the prejudice held toward Cuban agents in Miami. Following the filing of the *ex parte* motion for authorization of funds to conduct a survey as a predicate for change of venue, the district court entered an order inviting the government's advice on whether or not to grant the defense request. R1:284. The government responded with an *ad hominem* attack on the proposed expert, accusing him of having "a career oriented toward defense practice." R1:286:5; R3:443:8 n.6. In addition, the United States Attorney denied the need for a survey expert, proffering that venue was not an issue worthy of exploration because Miami-Dade was an "extremely heterogeneous, diverse, and politically non-monolithic community." R1:286:5.

In applying for funding for the expert, the defense specified that the survey sample would include 300 respondents from Miami-Dade, answering questions designed to probe attitudes relevant to this case. On November 15,

1999, the district court granted the defense request, specifically to fund that survey. R2:303. Months later the district court discounted the survey, finding that "the size of the statistical sample in this case is too small to be representative of the population of potential jurors in Miami-Dade County." R5:586:15. However, at no time during the three months in which the district court was considering the defense application for a survey, or in the eight months that followed after it received the survey results and before announcing the decision, including during the hearing on the motion, did the district court indicate it entertained any doubt about the sample size.[5]

As Dr. Moran's affidavit explains, disputes over reimbursement by the court forced him to effectively withdraw from the case, leaving the defense without an expert in response to the prosecution's attack on him, an attack which now appears disingenuous in light of the government's pleadings and assertions in *Ramirez*. R15:1636:Ex.7. With Dr. Moran absent from the venue

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[5] Moreover, the court's criticism of the sample size was mistaken as a matter of mathematical and survey science. As confirmed by Dr. Kendra Brennan, a psychologist and head of a Miami statistical research and consulting firm, the sample size was fully adequate for its intended purposes and produced statistically valid results. R15:1636:Ex.4 at 6.

proceeding, the district court's criticism of his methodology – based on an affidavit prepared years earlier in an unrelated case by a government-retained psychologist with no experience in conducting venue surveys – went unrebutted. *Id.*

Dr. Moran's affidavit (and a letter that he provided to the district court) explained that if he had appeared and testified at the venue hearing, any questions regarding the drafting of the survey documents and his tallying of the survey results may have been resolved. After the district court denied a change of venue on July 27, 2000, Dr. Moran received a copy of the published order rejecting his survey findings. Because he no longer had a working relationship with the attorneys in this case (having, in the meantime, filed a Bar complaint against the lawyer who retained him for non-payment of both his fees and expenses), he wrote a letter directly to the district court while the defense motion for reconsideration of the venue decision was pending, advising the court of fundamental errors the government's critique of the survey and the survey's sample size. R15:1636:Ex.7. The district court's clerk failed to bring this letter to the attention of counsel, and the defense did not

become aware of its existence until long after sentencing.[6]

4. District court's ruling.

The district court, while denying the motion for new trial based on newly-discovered evidence, nevertheless acknowledged that under Fed. R. Crim. P. 33, a new trial may be granted based on newly-discovered evidence undermining reliance on the impartiality of the jury. *See* R15:1678:8 ("Challenges to the fairness or impartiality of a jury may be raised in the context of a motion for new trial.") (citing *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980); *Rubinstein v. United States*, 227 F.3d 638, 642 (10th Cir. 1995); *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960)).

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[6] During a status conference on August 25, 1999 the district court sought the active assistance of the government in obtaining a qualified survey expert to act as a court's expert in conducting the survey. *See* R15:1636:Ex.11. Rather than advise the district court of allegedly negative information about community surveys which the government had in its possession for several years, the government waited seven months and until after Dr. Moran's survey was filed to produce the affidavit of Dr. J. Daniel McKnight. The McKnight affidavit, R3:443:Ex.2, prepared for the government nearly three years before the Elián events and more than three years before the trial in this case, related solely to a smaller survey conducted by Dr. Moran in a case involving the trade embargo with Cuba, an issue about which attitudes, even in the Cuban exile community, vary. The government has never offered an explanation for its failure to obtain any expert testimony or report directed to Dr. Moran's survey in the present case.

The district court concluded, however, that because the *Ramirez* case was tangentially related to the Elián case and the instant prosecution was, in the district court's view, not as related to Elián issues, the government's directly contrary representations in the two cases failed to "demonstrate prosecutorial misconduct." R15:1678:9. For that reason, the district court ruled that such evidence could not be viewed as newly-discovered evidence within the meaning of Rule 33. R15:1678:6, 8-9. The district court further determined that because the main thrust of the new trial motion rested on evidence relating to the government's actions in the *Ramirez* case, which the court distinguished from the present case, none of the additional evidence submitted by the defense, which the court construed as relating solely to the "interests of justice," would be considered. R15:1678:6 n. 3 ("Here, since the Court finds that Defendants have not submitted any newly discovered evidence within the meaning of Rule 33, the Court need not consider the 'interests of justice' issue."). Thus, the district court denied the newly-discovered evidence motion. R15:1678:9 ("Absent any 'newly discovered evidence" within the meaning of Rule 33, Defendants are not entitled to a new

trial in this case.").

Standard of Review

This Court's "review of the district court's denial of a motion for a new trial based on newly discovered evidence is subject to the abuse of discretion standard." *United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998) (citing *United States v. Obregon*, 893 F.2d 1307, 1312 (11th Cir. 1990)). The abuse of discretion standard ordinarily applies to the district court's denial of an of a motion to change venue. The Court conducts an independent evaluation of the relevant record facts as to prejudice in the venue. *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975). But where a defendant claims that pervasive community prejudice violated the defendant's constitutional rights, the issue is reviewed *de novo* as a mixed question of law and fact. *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522 (1966).

SUMMARY OF THE ARGUMENT

1. The district court clearly erred in denying the motions for change of venue or, alternatively to transfer the case to a place within the venue where community prejudice against the defendants was not pervasive. Where, as here, there was a very substantial percentage of the population openly admitting bias against the defendants, without regard to the evidence and without regard to the defendants' guilt of specific offenses, but based simply on the fact that the defendants are–in the government's menacing words–Castro's tentacles, voir dire could not be expected to change the deep-seated beliefs and prejudices of community. Hence, there was no fair cross-section of the community that could be drawn to isolate the influence of community prejudice in the aftermath of the Elián events.

The standard for evaluating pervasive community prejudice, and the tests for measuring such prejudice, must be consistent with the interest of society in the appearance of justice. Thus, where a defendant shows a strong likelihood that unique community history and demographics have created animus toward certain individuals, a change of venue should be granted.

Here, the district court apparently proceeded on the assumption that the largest group of people in the community, Cuban Americans, were saturated with prejudice, but that still a jury could be selected that avoided prospective jurors admitting that they share the widespread prejudice. Requiring the defendant to overcome such a methodological approach in order to obtain the benefit of Fed. R. Crim. P. 21(a) and the Sixth Amendment right to an impartial jury is result oriented: it is theoretically inconceivable that everyone in the community would admit community prejudice or influence or even be conscious of it. Thus, the absolute impossibility test employed by the district court with respect to determining if pervasive prejudice existed was logically inverted. Despite defense assertions that voir dire itself confirmed the Moran survey, the district court relied on jurors' assurances that they could put their animus toward the defendants to one side, analogizing to cases in which jurors have stated that they would put publicity aside to hear the evidence.

By proceeding without determining and framing the nature of the prejudice facing the defendants, the district court erred in evaluating the pervasive prejudice grounds of the motions for change of venue and abused

its discretion in denying the motions.

2. The district court erred in denying the defendants' motion for new trial based on newly-discovered evidence. The motion for new trial was premised on the government's contradictory representations and manipulation of the forum for trial in order to take advantage of community prejudices well known to exist in Miami. The fortuitous disclosure of the government's contradictory position on Miami's status as a site where emotional Cuba-related issues cannot fairly be tried provided insight into the government's persistent trial tactic of poisoning the well against the defendants by trying not only them but their country, whose face the defendants represented in Miami, and by frequently using community-sensitive means to prejudice the defendants in the eyes of the Miami jury due to the defendants' connections to and associations with Cuba. Knowing – as the *Ramirez* documents show – the incendiary effect in Miami of a barrage of politically prejudicial suggestions, innuendoes, and evidence tarring the defendants with the worst possible views of the Cuban regime, the government clearly tried to maximize the benefit of the forum-shopping

victory it had won by playing to local hostility to and fear of Cuba and Castro in order to overshadow the technical legal issues and narrow defenses in the case. The trial tactics and evidence showed an overriding focus on issues likely subject to the influence of local community passions and prejudices. Similarly, additional newly-discovered evidence concerning the handling of community surveys supporting defense assertions of intense community prejudice warranted the granting of the motion for new trial.

The district court erred in failing to consider most of this evidence at all for several reasons: (1) most of the evidence consisted of matters of general public knowledge concerning the history of the Cuban exile community in Miami, i.e., undisputed history; (2) opinion evidence relating to community prejudice, if true, was relevant to determining whether the government had intentionally taken a misleading position using stale evidence in order to obtain an unfair trial advantage; and (3) evidence concerning the nature of community prejudice and its relationship and positioning in community attitudes was relevant to determining whether there was any validity to the government's claim that in a county where it is impossible to hold a fair trial

on matters tangentially related to Elián, after the Cuban government had obtained his return to Cuba, there is no such problem for a defendant targeted as a tentacle of Fidel Castro trying to disrupt humanitarian exile organizations, undermine the political efforts of exiles, and murder innocent exiles in order to repress or terrorize the exile community. All of the evidence offered in support of the motion for new trial belied the government's strained theory of community passion for post-Elián "footnotes" such as the *Ramirez* case, but no such passion for the BTTR shootdown prosecution that defendant Hernandez faced.

ARGUMENT AND CITATIONS OF AUTHORITY

The district court committed manifest error by denying the defendants' motions for change of venue and for new trial based on newly-discovered evidence.

The Court has directed the parties to three questions as part of the *en banc* proceedings:

> **1.** Did the district court abuse its discretion by denying the defendants' motions to change venue, after finding that an impartial jury could be selected from a cross-section of the community to ensure the defendants a fair trial.
>
> **2.** Did the district court abuse its discretion when it ruled that the defendants failed to demonstrate prejudice sufficient to warrant application of the presumed prejudice standard, i.e., that pretrial publicity was so pervasive as to render virtually impossible a fair trial by an impartial jury drawn from the community.
>
> **3.** Did the district court abuse its discretion by denying the defendants' motions for new trial, by failing to consider the interests of justice issue and the exhibits presented in support of that issue, including the affidavit by Professor Moran, the news articles, the Human Rights Watch reports, and the surveys conducted by Dr. Brennan and Dr. Perez.

Unsurprisingly, appellant's response to each of these questions is yes, largely for the exhaustively-detailed factual reasons given by the panel.

1. With regard to the first question, concerning abuse of discretion

in denying a change of venue, after finding that an impartial jury could be selected from a cross-section of the community to ensure the defendants a fair trial, the record establishes that the defendants did not receive a fair trial given numerous factors that enhanced the effects of community animus toward the defendants, nor was the district court's legal conclusion that juror assurances of putting aside bias would yield an impartial jury well founded. Instead, the manner in which the district court proceeded presumed, contrary to governing precedent, that voir dire is the defining test of the *effect* and *controlability* of community prejudice; that personal animus (as opposed to opinion) is subject to the same level of volitional self-control; and that its unconscious effects are of no moment. *See, e.g., Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1420 (1963) (particularized transcript of voir dire examination not dispositive in circumstances of due process violation effected by community's pervasive exposure to prejudicial publicity); *Irvin v. Dowd*, 366 U.S. 717, 727-28, 81 S.Ct. 1639, 1645 (1961)(juror assertions of impartiality do not overcome "pattern of deep and bitter prejudice" throughout community); *Pamplin v. Mason*, 364 F.2d 1, 7 (5th Cir. 1966)(trial by jurors in

community saturated by bias against defendant's group violates due process, regardless of particularized voir dire showing concerning juror assertions of impartiality: "The court must make an independent determination of whether a fair trial can be obtained in the community based upon all the evidence available at the time.").

The district court's errors were multiple. First, the district court failed to make an actual determination of the approximate extent and various types of prejudice the defendants faced. *See Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036 (1975)(totality of circumstances, including nature and type of publicity and inflammatory atmosphere in the community or courtroom, is touchstone of prejudice analysis). When the defense first sought to hire a survey expert, the court expressed clear interest in obtaining useful agreed data as to the level of community prejudice, but the court stepped back from such a determination when the government said it did not want to "tak[e] the temperature of the community." R18:25-26. Thus, when the district court considered the Moran survey, the court discounted the survey, but failed to state what level of community prejudice the court found to be present.

Essentially, by agreeing to the government's approach of relying on voir dire as the *sine qua non* of bias, the district court failed to make the appropriate findings to set the framework for evaluating information obtained in voir dire, adopting the plainly erroneous theory that successfully picking jurors who promise to be fair demonstrates that community prejudice was not so pervasive as to prevent picking a fair jury. This circular reasoning was initiated by the government's opposition to consideration of any means other than voir dire to gauge community bias and was compounded by the district court's failure to distinguish a prejudgment of fact based on hearing one-sided presentation of evidence, i.e., prejudice due to pretrial publicity regarding the supposed facts, and deep-seated hate of a class of individuals based on personal considerations. *See Pamplin*, 364 F.2d at 4-7 (analyzing Supreme Court caselaw establishing principle that juror protestations of impartiality are not susceptible of credence where community is pervaded by prejudicial influences and exposure); *Williams v. Griswald*, 743 F.2d 1533, 1539 & n. 12 (11th Cir. 1984) (recognizing that individual juror assurances of impartiality are not controlling)(citing *United States v. Williams*, 523 F.2d 1023,

1209 n. 10 (5th Cir. 1975)(noting that prospective jurors' assertions of impartiality "are best met by a healthy skepticism by the bench," and that the court, not jurors, must determine whether prejudicial influences have destroyed their impartiality).

In *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (*en banc*), the *en banc* former Fifth Circuit examined the results of public survey reports to determine whether in fact there was public animus toward the defendant, faulting the district court for failing to consider such evidence: "We mention the above [survey] material only to emphasize that the district judge overlooked important aspects of the record in reaching his conclusions, and to note that there appears to have been no single sentiment regarding the case held by a *vast segment* of the American public." *Id.* at 206 (emphasis added). In the instant case, the district court simply never made the determination of whether there was a "vast segment" of the community that held the defendants in such personal disdain that mere voir dire inquiry would not be sufficient to protect the defendants' rights.

The record that the panel addressed with such painstaking effort is

thoroughly consistent with only one conclusion, that Miami-Dade's population at least contained a *vast segment*–hundreds of thousands of persons–for whom the defendants were the personification of evil and who viewed themselves as victimized by the defendants. *United States v. Campa*, 419 F.3d 1219, 1228-1261 (11th Cir. 2005) (detailing "massive" evidence of community bias against the defendants stemming from virulent anti-Castro hostility and widespread media publicity). The panel further concluded that given the extensiveness, indeed pervasiveness, of this passionate antipathy to the defendants based just on who they are, without regard to whether they might have violated federal law, community influences could not reliably be cabined. 419 F.2d at 1261.

The values expressed in the panel decision are very significant. Although the panel opinion was of course attacked by elements of the community, it is clear that the values that are upheld in a decision such as the panel's are the values of both community and Constitution. **First,** the panel recognized that despite differences on occasion – e.g., Elián – for the most part, a community – even a large community such as Miami-Dade – is a

community (a sharing) of interests and sensitivities and interdependencies, such that a perceived *horrible injury* to one part of the community – e.g., the predominant segment of the community – is felt by the rest of the community that is sensitive and responsive to the community as a whole. **Second**, the panel recognized the fundamental nature of the role of the jury in our constitutional system as the only bulwark standing between the power of the government and the liberty of the people. The panel noted that protecting and preserving the independence and impartiality of the jury – the right to which is contained not just in the Bill of Rights, but in the body of the constitution as well – is essential to the American concept of liberty; in sum, preserving the integrity of the jury is always more important than the result in any particular litigation. *Campa*, 419 F.2d at 1261-1264.

With respect to the significance of the fact that no persons born in Cuba served on the jury, the panel also reached the right conclusion. Such a fact should have no legal significance at all, if the sense of community outlined above is to have meaning. Indeed, the absence of Cuban-born jurors places all the more heavily the burden on the remaining jurors to represent the

whole community and to defend their fellow community members. *See Campa*, 419 F.2d at 1261 (recognizing that "[t]he entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami.") The theory propounded by the government, that the non-Cuban jurors will go into the jury room and say "we don't have to concern ourselves with our Cuban neighbors, friends, employers, co-workers, and spouses, who the government says have been so aggrieved in this matter," is contrary to ordinary sensibilities of a community.

The government also challenges the panel for finding that even jurors unsympathetic to their Cuban American neighbors were subject to the influence of pervasive prejudice because of fear of community reaction. But again, the panel's analysis was premised on the intensity of passions manifested not merely by hypothesis, but the *actual testimony at trial*. The panel noted that both fear of community reaction and sensitivity to community interests were factors revealed in surveys and in the selection of the jury; when a juror "betrays" her community, she might experience fear of community or media reaction, when passions run so high. 419 F.2d at 1261

(noting "palpable" perception of harm which could befall any juror rendering verdict unfavorable to prevailing exile community preference). Thus, even jurors who are not sensitive to the interests of the Cuban American community might well experience a level of fear, particularly after hearing extensive testimony of the violent intensity of some elements of the anti-Castro groups in Miami and having recently experienced the intensity of passions in the Elián matter – and *particularly* given that this was the first ever trial of Castro's "spies" or "tentacles" from which the community needed to be "protected" – thereby affecting their ability to be fully impartial and independent; it is undisputed that the jurors who served expressed concerns about media intensity.

The panel also correctly pinpointed the prejudice flowing from the government's arguments to the jury, holding, correctly, that there were government appeals to passion and community interests that both exceeded the permissible limits of prosecutorial comment and added fuel to the inflamed community sentiment. 419 F.2d at 1263 (improper prosecutorial references merged with both pervasive community feelings of bias and

widespread publicity before and during trial to create "perfect storm" depriving defendants of fair trial). The government repeatedly made inflammatory claims, unsupported by the evidence, that the defendants were trying to somehow destroy the United States of America; compared the BTTR shootdown to both the Nazi plan for the Holocaust and to the Pearl Harbor attack; complained that defense counsel were funded by the American taxpayer; called for attributing guilt to the defendants based on their partners in Cuba who tortured and murdered innocent people; argued that an acquittal would give a victory to the "bosses in Havana" who had a "huge" stake in the outcome; and basically did what it deemed was necessary to obtain a conviction where no actual act of espionage had been effected and where the evidence did not justify attributing Cuba's shootdown of BTTR aircraft to any defendant.

Undersigned counsel found himself in the course of one trial, accused, in front of the jury, of being a Cuban spy (by a prominent exile leader), and of being a defense-attorney version of Adolph Eichmann (by a skilled and determined prosecutor). The defendants were not the only ones facing

editorials, epithets, and the exploitation of community passions.

In *United States v. Williams*, 568 F.2d 464, 469 (5th Cir. 1978), the Court reiterated that on direct appeal of a federal conviction, the Court must use its supervisory power to prevent the risk of unfair prejudice to the defendant based on extra-record information and bias. This case is a singularly appropriate case for the exercise of that supervisory power, given the many factors supporting the panel's decision.

2. The second question asked by the Court is whether the district court abused its discretion in ruling that the defendants failed to demonstrate prejudice sufficient to warrant application of the presumed prejudice standard, "i.e., that pretrial publicity was so pervasive as to render virtually impossible a fair trial by an impartial jury drawn from the community." Whatever the precise extent of prejudice that must be shown to establish pervasive prejudice, it seems clear that if the prejudice – and intensity of prejudice – shown in this case towards these defendants accused of these crimes at that period in Miami's history does not satisfy the test for presumed prejudice, for all of the reasons stated by the panel, it is difficult to imagine a

case that would; and thus enforcing that doctrine in this case is essential to avoiding having the Sixth Amendment right to impartial jury watered down into nonexistence. This Court has held that in determining whether the showing made by a habeas petitioner is sufficient – a standard likely higher, but certainly not lower, than on direct appeal – the question comes down to the fundamental fairness of the proceeding, whether the defendant can meet "the burden to show 'essential unfairness.'" *Coleman v. Zant*, 708 F.2d 541, 545 (11th Cir. 1983) (quoting *Beck v. Washington*, 369 U.S. 541, 558, 82 S.Ct. 955, 964 (1962)). The defendants met that burden here.

There were many assertions of bias by prospective jurors that revealed the intensity of the prejudice. For example, Rene Silva's statement that he absolutely could not be fair, but would love to be on the jury, reflects how personal and important the passions toward these defendants were in Miami in 2000. R23:304. That type of aggressive prejudice is unreported in any other case. The district court expressed shock over Silva's boldness in manifesting hostility toward defense counsel. *Id.* Silva's lack of inhibitions may have been the most vivid, but other jurors, more inhibited in *expressing* their biases

(an admission that might be much more difficult to make than merely admitting an opinion from having read the newspaper) were nevertheless as strong in the fervor of their biases. The Spanish language newspaper and radio coverage – which, although very difficult for non-Spanish speaking counsel to document and monitor, was constant in galvanizing opposition to any maneuver by Castro, even ostensibly positive moves; for those media, the opportunity to play to the theme of Castro's "spies among us" both had a prejudicial effect and manifested what the district court failed to encounter: the pervasiveness of community prejudice. The record fully supports the panel's conclusion as to pervasive prejudice.

3. Did the district court abuse its discretion by denying the defendants' motions for new trial and by failing to consider the interests of justice issue and the exhibits presented in support of that issue, including the affidavit by Professor Moran, the news articles, the Human Rights Watch reports, and the surveys conducted by Dr. Brennan and Dr. Perez? Yes.

The instant case was assigned to a Miami district judge for trial based on the district court's rules for divisional assignment of cases depending on

which division the government chooses as the site of bringing the indictment. S.D. Fla. L.R. 3.4; *see also* Fed. R. Crim. P. 18. The government chose Miami for the case, even though arrests, seizures, and surveillance evidence would also have warranted bringing the case in either Broward or Monroe Counties. *See*, *e.g.*, R31:1961 (arrest of defendants in Broward County and search of residence); R61:6337 (surveillance of defendants in Broward County). Thus, the government brought the indictment in Miami not because it was the only proper place in the venue, but because the government chose Miami.

When the defendants sought, as an alternative to change of venue, to have the case tried in Broward County, they were complying with Fed. R. Crim. P. 21(a), which provides that a change of venue should be granted only if the defendant cannot avoid substantial prejudice in the district. Here, because Broward County was a suitable and appropriate location for trial, where the government could have brought the indictment if it had so chosen, the defendants' request, which at an absolute minimum would have substantially reduced the level of prejudice, was reasonable. The government opposed the request, arguing that, unlike small towns, Miami is not subject

to the concerns of "monolithic opinion," that the Miami community does not have a sense of "family," and that "Miami-Dade juries are just as capable as juries elsewhere of making rational decisions" about issues of fundamental concern to the dominant Cuban exile community. RBox1:514:59-62.

In essence, the motion for new trial raised two categories of information that were not within the discoverability of counsel: (1) that the government was falsely representing both the facts and its institutional position as to the state of community prejudices and deep-seated convictions on issues closely tied to hostile actions by the Cuban government, and (2) that the defense's ability to counter the government's submission of opinion evidence, now known to be contrary to the government's own knowledge of the facts, was undermined by events outside the defendants' knowledge or control, relating to the CJA expert hired to mathematically determine community attitudes.

The motion also incorporated matters of public record, which the government did not factually contest, contained in the extensive affidavit by Professor Lisandro Perez, who is a leading world expert on the sociological

impact of the Cuban exile community in Miami.[7] Dr. Perez's affidavit was not so much opinion as an encyclopedic summary of facts that are well known. The government did not dispute the accuracy of Dr. Perez's affidavit summarizing the historic rise of political and economic influence of the Cuban exile community, nor did the government dispute that the Cuban-exile community has maintained a strong level of energy and activism for the exile cause, and that exiles were galvanized and activism renewed in the late 1990's by two events, the BTTR shootdown and the Elián saga.

Dr. Perez's analysis of the significance of the trial of individuals that the United States Attorney's office characterized as "Castro's tentacles" on charges of complicity in the BTTR shootdown is the logical one: that this trial was a singular event in Cuban exile history, certainly the first of its kind in

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[7] Professor Perez is the current Chairman of the Sociology and Anthropology Department at Florida International University (FIU) in Miami and member of FIU's Cuban and Cuban-American Study Faculty. Professor Perez is the founder, in 1991, and Director, from 1991-2003, of FIU's Cuban Research Institute, "the nation's leading institute for research and academic programs on Cuban and Cuban-American issues." The Cuban Research Institute draws on the "Cuba-related expertise of more than 40 FIU faculty, the largest nucleus of faculty experts on Cuba or the Cuban-American community of any university in the United States." *See* http://lacc.fiu.edu/centers_institutes/?body=centers_cri&rightbody=centers_cri.

Miami with intense exile emotions and, unlike the Elián event, one as to which the county and local governmental, community, and religious leaders' actions and statements in accord with exile views were not challenged.

A. The district court erred in concluding that the affidavits and public reports submitted were not relevant to the motion for new trial.

First, the majority of the unconsidered evidence constituted matters of public record, including the references collected in the Americas Watch reports and the public information set forth in the Perez affidavit. These are matters that are undisputed, such as a the identities of public officials, the exile status of Cuban immigrants, the basic outlines of the Cuban exile community in Miami-Dade, and the history of incidents reported in the press relating to exile concerns and activities, including ordinances and public actions. Second, the district court could not fairly evaluate the impropriety of the government's prejudice-denial misconduct without knowing what the relevant prejudice was in relation to the *Ramirez* case and how that related to the prevailing prejudice in the community. The additional survey evidence submitted with the motion and the opinion evidence concerning the nexus

between the BTTR shootdown, Elián, and the resulting community intensity in the year 2000 were relevant to determining, independently of any government proffer, exactly what the government's concession of pervasive community prejudice in *Ramirez* meant. If it meant only something about "Elián," the nature of such prejudice became, of necessity, the focal analysis – i.e., what is Elián prejudice about? Arguably no one in the world was more qualified to offer an opinion about such "what's it about" questions of the Cuban exile community than scholar, author, professor, and Cuban American Lisandro Perez, founder and Director of the eminent Cuban Research Institute at Miami's only public university. *See* n. 6, *supra*. It would be difficult to imagine a more credible, reliable, and current expert than Perez. Making judgments about the nature of the prejudice in the Elián matter without hearing opinion and survey evidence was plainly an abuse of discretion.

But the truth is that the government never factually disputed a single word of either the Perez affidavit or the America's Watch reports, which are respected and frequently cited by the United States government. The utter truth of the information conveyed in the motion for new trial warranted its

consideration in order to determine not merely whether the new evidence warranted a new trial, but in resolving the threshold questions of what did the government's recantation relate to and what were the likely reasons for the government's duplicity.

B. The district court erred in determining that the government's contradictory positions on venue did not affect the fairness of the resolution of the venue motions.

The district court dismissed the importance of the government's "recantation" as to venue, and premised its denial of the motion for new trial on the theory that the newly-discovered evidence of the government's forum-shopping approach to venue representations in the district court did not constitute misconduct, because "[t]he situation in *Ramirez* differed from the facts of this case in numerous ways." R15:1678:8.

Although there were of course distinctions between the two cases – the instant case and *Ramirez* – none made the government's contradictory litigational representations about prejudice concerns in Miami-Dade County excusable. They include:

(1) Relationship of defendants to hostile environment.

In the actual Elián Gonzalez case, the factor that motivated popular demonstrations, anger and the resulting hostile publicity against the Attorney General was nothing other than the pervasive hostility against the Cuban government. The controversy around Elián Gonzalez was merely a dramatic manifestation of that sentiment. In the instant criminal case, however, the ***defendants were part of the very government that was at the core of the community's animus***. In the Elián case, the Attorney General, in executing the laws of United States, simply stepped into the line of fire against anyone perceived as being helpful to these defendants' principal. Whatever derivative prejudice the successor Attorney General (sued only in his official capacity) faced in a lawsuit with the barest connection to Elián was substantially less than that directed at these defendants who were not just perceived as helping Cuba, but were actually a part of the enemy in the "state of war" atmosphere that existed in Miami.

(2) Intensity of prejudice directed at defendants.

In *Ramirez*, the ultimate issue for the jury was whether a U.S. governmental agency had been motivated by ethnic or national-origin animus

against Hispanics when it made an unfavorable employment decision as to a Mexican-American. The Elián case was merely partial backdrop against which certain INS employees may have created a hostile work environment. *See* R15:1660 (attaching copy of *Ramirez* complaint alleging that INS agents referred to Cuban exile-dominated Miami as a "banana republic").[8] By contrast, in the criminal case, the ultimate issue for the jury was whether the defendant Cuban agents secretly conspired to violate espionage and other laws and conspired to murder four local Miami heroes. Anti-Cuban animus may have been tangentially relevant to the jury's decision in *Ramirez*, but the passions aroused by mild allegations of INS agency bias paled in comparison to those stirred by Brothers to the Rescue murder allegations and charges of espionage.

(3) Perception of defendants by the jury.

In *Ramirez*, the alleged target of potential prejudice was the chief law-

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[8] The government's contention, in opposing the new trial motion, that *Ramirez* was "**about** the Elián Gonzalez matter" is incorrect. DE1660:15 Plaintiff's counsel in *Ramirez* stated at oral argument: "This is not an issue about Elián Gonzalez. I would be prepared to say that to the jury during voir dire. It is not Elián Gonzalez, whether he went to Cuba." R15:1636:Ex.8 at 21.

enforcement officer of the United States – a figure inspiring respect and deference – as well as an agency of the U.S. government. Here, the defendants were members of a linguistic and national minority who, the prosecution argued, had come to the United States to "destroy" America. DE1583:14482.

The government, in its opposition to the motion for new trial, observed that the defendants necessarily chose not to exercise peremptory challenges on the jurors who served in this case. *See* R15:1660:5 n. 2. The government's apparent argument – that the defendants thought the jurors it failed to strike would be more fair than those the defense struck – does not mitigate the level of community prejudice or its potential for influence on the jurors. *Pamplin v. Mason*, 364 F.2d 1, 8 (5th Cir. 1966) (transcript of voir dire will not reflect full extent of community prejudice nor serve to eliminate influence of such pervasive prejudice). In fact, several of the jurors who served, including the foreperson, made strong statements of solidarity with the Cuban exile cause. *See*, *e.g.*, R25:743 (jury foreman's voir dire). That the defense felt compelled to accept such jurors, particularly given the government's exercise of

peremptory challenges as to the total of three prospective jurors who failed to express negative views toward Cuba, in no way diminishes the level of community-wide prejudice. *See*, *e.g.*, R25:861; R27:1296-97 (anti-Cuba comments of jurors who served); R25:767,810; R26:939 (jurors who expressed neutrality to Cuba challenged by government).

(4) Weight of pervasive community prejudice vs. pretrial publicity.

In *Ramirez*, pretrial publicity included, according to the government, a damaging report of possible discrimination within the INS on the part of an Administrative Law Judge. In the instant case, there were, among other things, press reports of guilty pleas by co-defendants who publicly confessed to being part of the charged conspiracy. R3:397:Ex. H & I-1. An editorial in the local paper openly advocated punishment for those responsible for the shootdown and pointedly suggested that a conviction here could bring down the Castro government. R3:397:Ex. K-1. Moreover, a damaging comment about this case by the former head of the local FBI office, appearing in an article in the local newspaper on the opening day of trial, was found open in the jury assembly room. R22:171.

The government's defense in *Ramirez* did not claim it could meet the stringent tests for unfair pretrial publicity (created for the protection of criminal defendants). Rather, the government relied there upon the concept of pervasive community prejudice, citing *Pamplin v. Mason*. In the criminal case, where the prejudice was clearly a more direct threat to defendants' rights, the prosecution disavowed *Pamplin* as having no relevance to a large, metropolitan, diverse jurisdiction such as Miami-Dade.

The contention here by the government that the post-Elián litigation that struck south Florida was not relevant to the underlying pressures on members of the community who might dare to take a position contrary to the accepted Cuban exile position on a core anti-Castro issue is not credible. The *Ramirez* litigation was just one manifestation of the damage that can befall an individual – or, as in *Ramirez*, the entire U.S. government – by opposing the Cuban exile viewpoint regarding the evils of dealing with Fidel Castro.[9]

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[9] The government's rEliánce on adverse pretrial publicity cases, such as *Ross v. Hopper*, 716 F.2d 1528, to distinguish *Ramirez* from the instant case is therefore misplaced. The prejudice manifested in *Ramirez* points to an even more united community hostility to admitted pro-Castro agents than could possibly be true as to Attorney General John Ashcroft; and, as noted, the very fact of the publicity attendant to retaliatory lawsuits as a result of the

To say that the government's concession of pervasive community prejudice on issues dealing with Elián is somehow inapplicable to issues of murder by the Cuban government of four Miami Cuban exile members of Brothers to the Rescue or to an espionage conspiracy by Castro agents is linguistic distortion truly worthy of Lewis Carroll. The government cannot maintain the excuse that the Elián controversy was about something other than the deeply-held belief in the Miami Cuban exile community that Castro's regime is a murderous, Nazi-like tyranny to which no child should be forcefully returned.[10] *See* R16:1660:13-14 (government argument regarding prejudice to defendants from Ramirez's counsel's use of "Nazi reference" in relation to the sending of Elián back to Cuba).

(5) Proximity in time.

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government's neutral position toward Castro in the Elián matter would heighten any Miamian's expectation of consequences from any acquittal of Cuban government agents charged with espionage and murder conspiracies.

[10] As defense counsel noted, without dispute by the government, at the district court hearing on the motions for change of venue, "I think we all agree in this community [that Castro] is considered by members of this community to be the personification of evil. ... You are taught this by the priest, by the teachers in these [Cuban American] communities" in Miami. RBox1:514:29.

In *Ramirez*, the principal incident relied upon by the United States in its motion (the return of Elián Gonzalez to his father) occurred more than **two years** before the motion was filed. In contrast, judicial resolution of the Elián Gonzalez case preceded trial of the instant criminal case by just five months. Thus, the passions giving rise to community prejudice were much more intense at the time of this trial.

(6) The pervasiveness of the community prejudice.

There was "divided sentiment in the community regarding the handling of the Elián Gonzalez case," according to government counsel R15:1636:Ex.11 at 24-25. Whereas, in the criminal case, the shootdown created a "reaction to the incident (that) was uniform throughout Miami as both Cubans and non-Cubans stood united in their outrage and condemnation of the Cuban government." R16:1636:Ex.5 at 10 (affidavit of Dr. Lisandro Perez).

(7) Relation to legal norms and procedures.

In *Ramirez*, there was no civil equivalent to Fed. R. Crim. P. 21(a), which mandates transfer of the case whenever local prejudice threatens a fair trial. In the criminal case, Rule 21(a) incorporates federal supervisory and due

process protections afforded criminal defendants. Civil defendants, such as the Attorney General in *Ramirez*, not faced with the loss of liberty, are not similarly protected.

(8) Consequences of decision resulting from community prejudice.

In *Ramirez*, the United States risked having to pay modest damages. In the criminal case, five individuals risked loss of liberty – three of them for the rest of their lives.

(9) Role of the Office of the United States Attorney.

In *Ramirez*, the United States Attorney was representing an institutional client and the Attorney General as an advocate in a civil suit. In the criminal case, the United States Attorney was not free to act solely as an advocate, but under both professional canons and due process, owed a duty to the defendants and the court to safeguard their right to a fair trial. Thus, a prosecutor may not use "improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935).

C. The district court misconstrued Fed. R. Crim. P. 33 in failing to consider the interests of justice, evidentiary submissions in the motion for new trial, and surrounding evidence relevant to determination of the motion.

The district court erroneously premised its exclusion of consideration of relevant submissions in support of the motion for new trial on a stylistic change to Fed. R. Crim. P. 33 made after the motion was filed. See DE1678:4-6 (relying on version of Rule 33 adopted after filing of motion for new trial). The district court reasoned that the under the new rule, the district court could not consider "the interests of justice" in ruling on a motion for new trial based on newly-discovered evidence. *Id.* But the rule change did not alter the scope of the relevant factors for consideration by the district court in weighing the significance of newly discovered evidence.

The express language of both the new and former versions of Rule 33, read in their common sense meaning and according to precedent, do not preclude considerations of fairness and justice in ruling on a motion for new trial based on newly-discovered evidence. *See United States v. DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) (even where evidence was technically inappropriate for new trial motion, it was nevertheless given consideration by district court and court of appeals and found to support affirmance of district court's granting of motion for new trial).

The theory that the interests of justice have no place in considering a newly-discovered evidence motion is internally contradicted by the government's recognition that a multi-part analysis applies to resolution of such a motion. *See* DE1660:20 (Gov't Response to Motion for New Trial). The key element in the determination of the motion – weighing the significance of newly-discovered evidence in relation to the venue error at issue – requires context-specific evaluation of all relevant factors, including matters of which judicial notice can be taken as well as evidence supporting the ultimate claim for relief. *See*, *e.g.*, *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980) ("Admittedly, there are major distinctions in the substance of the evidence proffered by the appellant and that proffered in the usual case, since appellant's evidence goes to the fairness of the trial rather than to the question of guilt or innocence. ... However, for this case, a corollary to the third requirement stated above would be that the newly discovered evidence 'would afford reasonable grounds to question the integrity of the verdict.'") (quoting *United States v. Jones*, 597 F.2d 485, 488 (5th Cir. 1979)).

Given the instant newly-discovered evidence, the context provided by

the additional submissions adds not merely to the interests of justice favoring granting relief, but also to the likelihood that the newly-discovered evidence, considered in relation to the actual status of community attitudes and prejudices in this case, would rise to the level of a probability of an erroneous denial of the change of venue motions. *See id.* (recognizing that juror bias impugns integrity of verdict). As is true of other new trial motions based on newly-discovered evidence, the probabilities in this evaluation must be determined in light of other factors that may counter or support the newly-discovered evidence. *See, e.g., United States v. Devila*, 216 F.3d 1009, 1017 (11th Cir. 2000) (court of appeals considered post-conviction certifications submitted by government in weighing significance of newly-discovered evidence as to maritime drug enforcement jurisdictional element; post-conviction affidavit offered by government "was obtained long before any ***retrial***, and therefore would be sufficient evidence to establish United States jurisdiction") (emphasis added).

These surrounding circumstances explain both the prejudice to the

defense, resulting, for example, from the government's failure to candidly admit – as it did in the *Ramirez* case – the deep-seated nature of the anti-Cuban government sentiment in Miami and its integral relation to local economic and political institutions, and the likelihood of an effect on the outcome of the case due to the withheld information, such as, for example, alternative and bolstering evidence that could have been offered with respect to the defense CJA expert. The significance of these matters to the Fifth and Sixth Amendment issues raised by the motion for new trial goes to more than merely the interests of justice; it concerns acknowledging the realities of commonly-understood community experience and explain the government's attempt to selectively acknowledge such facts only in accordance with its choice of whether a given party should have the same fair trial rights that the government seeks for itself in civil litigation.

D. The district court failed to take into account the record as a whole, which established a series of improper prosecutorial actions designed to take advantage of community prejudice.

In *United States v. Williams*, 523 F.2d 1203 (5th Cir. 1975), the former Fifth Circuit explained that the prejudicial nature of trial in a venue susceptible to

community bias is most pronounced when the manner of prosecution of the case stirs the same passions already present in the community. *See id.* at 1208-09 (holding that where constitutional fair trial issues arise, community prejudice and prosecutorial misconduct capitalizing on such prejudice must be considered in "tandem").

The clear premise of the government misconduct here – unfair attempts to thwart a meritorious venue motion combined with the intent to use community prejudices, from opening through trial and closing, warranted granting the new trial motion. The most strident of the governmental arguments – the rebuttal references to the "final solution" of the Holocaust, the moral equivalency of Pearl Harbor, and taxpayer funding of defense counsel to help the defendants destroy America – were just the most visible part of the "iceberg" of underlying prejudice confronting these defendants. *See* R15:1636:Ex.5 at 12 (affidavit of Dr. Lisandro Perez).

The government's rebuttal closing hit the core Cuba button in Miami when comparing Cuba and the actions of the defendant agents to Nazi Germany and the actions of the Nazis who ran the death camps of the

Holocaust. The massive Holocaust memorial on Miami Beach symbolizes the extent to which the government sought to bring in every community prejudice that it knew existed against a regime that the government directly equated with the most vile, genocidal racists of the 20th century.

Apart from the government, outside forces sought to undermine the defense and poison the community atmosphere. Witness Jose Basulto, before testifying, engaged in public demonstrations to rally the community behind his claims as to the shootdown. *See generally In re Jose Basulto*, 11th Cir. No. 01-10949 (11th Cir. Feb. 22, 2001) (unpublished order finding that district court's gag order did not properly bar Basulto from engaging in memorial events and public statements concerning the Brothers to the Rescue shootdown). After testifying, and in disregard of the district court's gag order, Basulto (through his family) rebutted the results of his examination as a witness by way of a letter to the editor of the MIAMI HERALD. *See* Rita Basulto, Letter to the Editor, MIAMI HERALD, March 23, 2001, at 8B.

Similarly, while the government argued in attempting to distinguish the *Ramirez* case, that the plaintiff's attorney in *Ramirez* was a well-known media-

friendly personality, the government failed to acknowledge that both before and after he represented Mr. Ramirez, the same attorney, Larry Klayman, represented witness Jose Basulto in Basulto's efforts to create press coverage during trial of his claims regarding the shootdown (as to the location of the shootdown, Basulto's actions and intentions that day, Basulto's incursions earlier in January 1996 and the nature of his actions and intentions or those and earlier Cuba flights), *see In re Jose Basulto*, 11th Cir. No. 01-10949 (dismissed as moot following trial in defendants case), and Basulto's claims for civil damages from the Cuban government relating to the same events. *See Basulto v. Republic of Cuba*, Case No. 02-21500-Civ-MARRA (S.D. Fla.).

E. The record establishes media and community pressures on jurors spanning the entire trial which the government knew, at the very outset of the proceedings, were unique to Miami-Dade and which it improperly exploited, in violation of its due process obligation and the principles of judicial estoppel.

Miami media, including the MIAMI HERALD, successfully litigated at the outset of the trial to obtain a ruling by the district court providing for media inspection, on a daily basis, of all evidence entered into the record. *United States v. Hernandez*, 124 F.Supp.2d 698, 705 (S.D. Fla. 2000) (finding

"Defendants' foreshadowing of a 'hostile, prejudicial environment' resulting from the media's access to the evidence too speculative, at this point"; allowing media examination of documentary evidence prior to its presentation to the jury; recognizing risks to fair trial of "widely publicized case"). The intense media coverage continued throughout the months-long trial. *See*, *e.g.*, R7:978; R7:988.

Just prior to closing arguments, the MIAMI HERALD took the unprecedented step of publishing in its editorial opinion page a lengthy column attacking the district court for allowing the defense to present evidence in support of their claims as to the murder and espionage conspiracies. *See* Luis J. Botifol, "The Cuban Spies' Case vs. Credibility of the U.S. Judiciary," MIAMI HERALD, May 16, 2001 at 9B. The author of the article, Cuban exile Luis Botifol, was identified by the HERALD as "a Miami banking pioneer and a longtime community activist." *Id.* In the column, which jurors may have inadvertently seen even if they were trying to avoid news articles in the paper, Botifol ridiculed the district court for allowing the defendants to offer evidence "presenting Castro as the victim and the Cuban exile

community as the guilty party." *Id.* Botifol argued that even by allowing the defendants to present their defense, the district court had "diminish[ed] the trust and credibility of the judiciary on which our democracy rests." *See also id.* ("*Notwithstanding* the silence imposed on those who participate in this case, the media's reports generate unfavorable comments in the community, which attributes the judge's permissiveness as stemming from an association with prominent members of the past administration who don't sympathize with the exile community, especially after the Elián case."). This type of venom directed at a federal judge for merely allowing the defense to put on a case had no rebuttal in the HERALD.[11]

The media pressure had reached such a level by the time the jury was sent out to deliberate that the jurors – filmed and followed "all the way to their cars" by local news media and government-sponsored Radio Marti –

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[11] The pervasive understanding of the core community concern about this case was reflected in the United States Probation Office's presentence reports which explained that the events alleged in Count 3 of the indictment, the Brothers to the Rescue shootdown, created an "unspecified impact to the community in South Florida." *See* PSI for each of the five defendants. "Incalculable," rather than "unspecified," would be more precise.

expressed fear to the district court during deliberations of being identified by their license plate numbers. R126:14644-46.

The government knew at the time of this trial what it later acknowledged in an attempt to minimize civil damages after the trial: Issues of such importance to the Cuban exile community as their right to engage in anti-Castro activities without interference from Cuban spies were not susceptible to freedom from community pressure in the aftermath of Elián. The defendants, as the district court expressly observed in denying the motion for reconsideration as to venue, DE723:2, had made plain prior to trial that their defense – premised on evidence offered to support a necessity defense and a lack of intent to violate the law, but rather to protect Cuba from actions by Cuban exiles – would likely be viewed in terms of an attack on the prevailing beliefs underlying the community in Miami.[12]

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[12] *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 424 (2000) (Thomas, J., dissenting) ("The Framers, of course, thought ... that faction would infest the political process. As to controlling faction, James Madison explained, 'There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.' *The Federalist No. 10*, p. 78 (C. Rossiter ed.1961)."); *Gutierrez de*

"[T]he Due Process Clause requires conduct of a prosecutor that it does not require of any other participants in the criminal justice system, such as the duty to disclose evidence favorable to the accused." *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2000) (granting habeas corpus relief based on state's use of factually inconsistent theories to convict defendants in two criminal cases, in violation of due process); *see ABA Standards for Criminal Justice: The Prosecutorial Function*, 1993, Section 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court."). *See also Bradshaw v. Stumpf*, __U.S.__, 125 S.Ct. 2398, 2409 (2005) (Souter, J., concurring)("'serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings'")(internal citation omitted); *Smith v. Groose*, 205 F.3d 1045, 1051 (8th Cir. 2000)(due

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Martinez v. Lamagno, 515 U.S. 417, 428 (1995) ("'No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time ... .' *The Federalist No. 10*, p. 79 ... . *See In re Murchison*, 349 U.S. 133, 136 ... (1955) ('[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.').").

process violated by prosecutor's use of "inherently factually contradictory theories").

This Court has consistently admonished every attorney representing the United States to "remember that he is the representative of a government dedicated to fairness and equal justice for all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer." *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998). *See also United States v. Crutchfield*, 26 F.3d 1103 (11th Cir. 1994) (emphasizing that a United States Attorney has a duty to refrain from using improper methods to secure a conviction). *See also Wilson*, 149 F.3d at 1303 ("We recall the duties in a criminal prosecution of a lawyer for the United States: 'A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative

of a government dedicated to fairness and equal justice to all ... .'") (quoting *Dunn v. United States,* 307 F.2d 883, 885 (5th Cir.1962)).

"[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Related to that premise is the venerable doctrine of judicial estoppel, providing that "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . .' *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555 (1895)."). *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (applying judicial estoppel to the State of New Hampshire based on its representations in litigation over two decades earlier; "Courts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle ... . Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be 'clearly inconsistent' with its earlier position. ... Second, courts regularly inquire whether the party has succeeded in

persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled ... .") (internal quotations, citations, and alterations omitted). The government's use of the contradictory representations in this case meets the judicial estoppel standard and represents a serious shortfall in the appearance of justice, even absent a judicial finding of intentional misconduct. *See id.* at 743, 121 S.Ct. at 1810 (judicial estoppel is intended "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment").

From the filing of the indictment to opening statements to closing arguments, the prosecution took maximum advantage of the "impassioned," DE1392:10, location of the trial. The very fact that the government drafted the indictment's allegations of murder conspiracy to assert that conspiracy resulting in murders on February 24, 1996 began "in or about January, 1996, and **continu[ed] until on or about September 12, 1998**," more than two and

one-half years after the shootdown, showed the extent to which the government sought to portray Cuba and its agents as bloodthirsty and bent on destroying the United States. The government's closing arguments, *see* R124:14474-14520, continued this theme and went even further to discredit the defense lawyers, portraying them as being used by the Cuban agents to destroy the country (presumably by infiltrating Miami Cuban exile organizations such as Basulto's Brothers to the Rescue).

The trial reveals a laundry list of attempts by the government to make the case one of proving how bad Cuba is – tarnishing in that way the character of the defendants who personified Cuba in Miami as much as Martians would personify Mars anywhere on earth.[13] Here, the government

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[13] *See*, *e.g.*, R44:3699 ("Q. Tell the ladies and gentlemen of the jury who is at the top of the Cuban intelligence pyramid? A. The top of the Cuban intelligence pyramid is Fidel Castro."); R58:6007-18 (government witness – a Miami Cuban exile – testifies to political persecution in Cuba and repression of independent political organizations with ties to Miami; characterizing Basulto as leader of support for political dissent in Cuba); R80:8748, 8754 (government cross-examination of former White House official to show that Cuba is politically "repressive" and a "dictatorship"); R83:1542:9214-17 (government questioning of Basulto directed to showing Cuba's violation of human rights and efforts by Miami Cuban exiles in support of human rights);

went on and on about Cuba, when the defendants had admitted from the start that they were Cuban agents, doing the work of the Cuban government in the United States. The government thus used the "give a dog an ill name and hang him" approach in a community that already hated dogs. *See United States v. Boyd*, 446 F.2d 1267, 1273 (5th Cir. 1971) (reversing conviction due to government's "improper use of other crime evidence"); *United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (prosecutor "may not appeal to the jury's passion or prejudice"); *cf. United States v. Masters*, 118 F.3d 1524, 1525 & n. 4 (11th Cir. 1997) (government's conduct in taking legal position "knowing full well" it was wrong was "reprehensible" and violated "oath of office").

Particularly where the matters at issue touch the rawest of community nerves – such as here in Miami where admitted pro-Castro agents were accused by the prosecutor of being sent by Castro to destroy the Miami Cuban

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R124:14475 (government rebuttal closing: "We are not operating under the rules of Cuba. Thank God."); *id.* at 14530 (disparaging credibility of Cuban government witnesses in defense case by invoking name of Adlai Stevenson, who revealed Soviet misstatements in the Cuban missile crisis of 1962).

exile community – the prosecution's denial of facts it later admits, in a civil case in which fundamental liberty interests and due process rights were not in jeopardy, and its use of the prejudice as a component of its trial strategy, compel reversal in the interest of justice. *See Williams*, 523 F.2d at 1207 ("[W]e widen the breadth of our consideration to the tandem effect created by the intense pretrial publicity and the closing argument offered by the United States. ... [T]hese two factors operating together deprived appellant of a fair trial.").

The government and the district court in the *Ramirez* case correctly determined that pretrial publicity ancillary to the Elián events – in which the government was portrayed in the Cuban exile community as the handmaiden of the Castro regime's demand for Elián's return to Cuba – fostered such prejudice and hostility against the government that a change of venue was necessary. But if so, it can hardly be denied that forty years of widespread, virulent anti-Castro publicity and events in Miami even more clearly contributed to pervasive local prejudice against actual agents of Fidel Castro,

such as the defendants. They were acknowledged Cuban agents who proudly admitted working on behalf of the Cuban government against local exile groups and individuals (whom they characterized as extremist), yet they disputed the highly-sensitive allegations of murder and espionage conspiracy among other charges in the indictment, including charges that the government conceded would be "insurmountable" for the government to meet if the jury followed the district court's jury instructions.[14]

The conceded logical difficulty of the government's case surely encouraged the government to exceed reasonable limits in closing – calling on the very community prejudices, the existence of which it later conceded – in order to obtain the convictions in this case. The district court erred in denying the motion for new trial.

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[14] *See* Emergency Petition for Writ of Prohibition (11th Cir. No. 01-12887) at 4, 6, 21 (government represented to this Court that the district court's jury instructions created "*insurmountable barriers* for a prosecution involving foreign agents;" instruction rendered "prosecution of such offenses a *virtual impossibility*;" instruction on count three "presents an *insurmountable hurdle* for the United States in this case") (emphasis added).

CONCLUSION

Appellant requests that the Court reinstate the panel decision.

Respectfully submitted,

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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 13,840 words.

PAUL A. McKENNA, ESQ.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 13th day of May, 2003, upon Anne Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111; and Joaquin Mendez, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1700, Miami, Florida 33130-1555.

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