UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176-BB
03-11087-BB

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

RENE GONZALEZ,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
(CASE NO.: 98-721-CR-LENARD)

EN BANC BRIEF OF APPELLANT RENE GONZALEZ

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Rene Gonzalez
Case Nos. 01-17176 & 03-11087

Appellant Rene Gonzalez 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.

R. Alexander Acosta

Jack Blumenfeld

David M. Buckner

Ruben Campa

Orlando do Campo

Hon. Robert L. Dubé

Rene Gonzalez

Antonio Guerrero

Gerardo Hernandez

Philip R. Horowitz

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Hon. Joan A. Lenard

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Anne R. Schultz

Leonard I. Weinglass

Kathleen M. Williams

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTORY AND OTHER AUTHORITY:

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLANTS

Appellant Rene Gonzalez, 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, Antonio Guerrero, and Luis Medina, 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 ISSUE

Whether the district court violated Fed. R. Crim. P. 21(a), and the defendants' rights to due process and an impartial jury by denying a change of venue.

STATEMENT OF CASE

Course of Proceedings and Statement of Facts

I. FACTS AND PROCEEDINGS REFERENCED IN PANEL OPINION.

Appellant adopts the factual recitation by the panel regarding the entire course of proceedings, including the motions for change of venue; renewals of those motions; motions for new trial; pretrial publicity; prejudicial testimony, argument, and events at trial; jury selection responses by the venire; and statements by jurors during trial. *See United States v. Campa*, 419 F.3d 1219, 1222-57 (11th Cir. 2005) (holding that "perfect storm" of prejudice against admitted Cuban intelligence agents tried in Miami in immediate aftermath of Elian case violated right to impartial jury where prejudicial events and media activity surrounding trial, and issues and evidence presented at trial, confirmed pervasive community prejudice and heightened juror concerns, thereby undermining fairness of trial; noting that accusations that defendant participated in murder of humanitarian community exiles–whose martyrdom in opposing Castro government was celebrated by local religious and governmental recognition–and other aspects of case touching on important community interests made case more sensitive, particularly following series of traumatic disturbances in

Elian case; government's concession of venue prejudice in later case combined with other showings of prejudice to require new trial), *rehearing en banc granted, opinion vacated by*, __ F.3d __, 2005 WL 2840320 (11th Cir. Oct. 31, 2005) (*en banc*). In general, the relevant facts at trial concerned the mission that brought the five defendants, who were agents of the Cuban government, to the United States. While the defendants saw their purpose as being to (1) uncover illegal activity directed at Cuba from private individuals and groups composed largely of Cuban exiles and (2) pursue objectives to help avoid armed conflict between the United States and Cuba, the prosecution presented their intentions as being more sinister, including meddling in and destabilizing United States politics, committing espionage, and participating in murder.

II. OPENING STATEMENTS.

In its opening statement, the government characterized the entire Cuban exile community and the broader Miami community as the victims of the defendants' actions. R29:1570 (government opening: "agents of the Cuban *espionage* service" intended to "*sow discord and conflict* among members of" community groups "and *to bring about the murders* of four men ... north of Cuba").[1] The government's

[1] Whenever, in this brief, italic or bold emphasis appears in quoted portions of the trial transcript, such emphasis has been added. The transcript itself does not contain any emphasis indicators.

opening statement appealed to the jury's concept of a "community" under threat from Cuba. R29:1573 ("their daily tasks *among us here* ... which they in turn receive from the Cuban Intelligence Service in Havana"); R29:1574 ("they come and go *to the community*"); R29:1576 ("they worked as *spies here in our community*"); R29:1577 ("espionage cell operating in the midst of *our community*"); R29:1579 ("tasks *here in the community*"); R29:1580 ("secrecy was designed to obscure their operations from *the community in which they lived*, *this community*."); R29:1601 ("Cuban spy cell *here in South Florida*").

The government characterized Cuba's goal as community discord and disruption in Miami rather than the monitoring of exile organizations engaged in violating Cuban neutrality. R29:1591-92 (asserting that defendants sought to "spread rumors or threats and fear throughout the *Cuban exile community* and beyond," "to embarrass people [and] to undermine the legitimacy of the heads of various organizations, to bring *scorn and distrust between and among people in the South Florida community*;" and "to discredit the *Cuban community in Miami*, to make them appear as extremist, to *delegitimize* ... its members.").

The government focused on evidence of the defendants' pro-Castro zeal R29:1582-83, and asserted that Cuban interest in U.S. military matters belied any interest in preventing anti-Cuba terrorism, R29:1583, and that the work of the defendants was crucial to the "survival of the Cuban government." R29:1586. The

government sought to explain the absence of substantive espionage charges as due solely to FBI intervention, even though the defendants were here for years. R29:1589 (stating that defendants never gathered or transmitted "any classified document ... because, thankfully, the FBI was able to arrest these defendants").

The government portrayed the actions of groups targeted by the defendants as benign rather than provocative of international response. R29:1589-90 (characterizing Brothers to the Rescue as helping to solve the "Cuban raft crisis" and saving lives where "many ... rafters that left Cuba never made it to United States but died on the open water;" characterizing Movimiento Democracia's goal as being "to bring about *[d]emocratic reforms* through peaceful protest" and arguing that the defendants were undermining these humanitarian and peaceful efforts by acting as "the eyes and ears of the Cuban regime inside these two organizations").[2]

The government highlighted that although the murder conspiracy named ***only one*** of the defendants, it was a goal of the ***conspiracy*** as a whole to commit murder

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[2] Contrary to the government, the evidence was undisputed that the United States government viewed BTTR as a provocative and lawbreaking organization that was trying to precipitate an international crisis. *Campa*, 419 F.3d at 1245-46; *see* R116:13484 (government concedes that FAA charged BTTR leader with "operating an aircraft in a careless or reckless manner so as to endanger the life or property of another" regarding 1995 Cuban airspace violation). Similarly, the actions of Democracia were viewed askance by the United States government when Cuba was undertaking its surveillance, with Democracia having, like BTTR, violated Cuban sovereignty in provocations of Cuban law enforcement. R72:7548; R77:8376.

of humanitarian Cuban exiles. R29:1592-93 ("The final *task of the Wasp Network*, specifically as I said, defendant Hernandez, *was to bring about the murders* of four members of Brothers to the Rescue over international waters north of Cuba [in] the deadly confrontation that the Cuban Government had planned for Brothers to the Rescue ... on February 24, 1996."); R29:1597 ("Next to [pilot victim Carlos Costa] in the spotter's seat, the seat for *the person spotting the rafters* was Pablo Morales who had been *rescued* by Brothers to the Rescue when he was a rafter and had returned as a volunteer to the organization to repay the debt he felt he owed. ... Alejandre, a Vietnam veteran who was on his second mission for Brothers to the Rescue[,] had flown the week before with the group delivering food and supplies to Cuban rafters detained in the Bahamas ... ."). The government contended that the defendants' willing alliance with the Cuban government and its policies and actions proved their specific criminal intent. R29:1598.

Following the government's opening, defense counsel deemed it necessary to advise the members of the jury that counsel were not hired by Cuba and were participating in the case solely as court-appointed lawyers. R29:1604 (opening statement of counsel for Hernandez: "I do not represent the Government of Cuba. I don't represent Fidel Castro, and I am definitely not a communist. I am an American lawyer, a member of the bar of this Court and I was appointed by the Court to represent Mr. Hernandez and I am paid by the Court."); R29:1626-27 (opening

statement of counsel for Medina: "Like [counsel for Hernandez], I am a private lawyer here in Miami and I have been appointed by the Court to represent my client and I am paid by the Court and I am not an apologist for any philosophy or any politics for any foreign country.").

In opening statements, the defendants outlined their defense, which remained consistent throughout trial: as to Hernandez, counsel explained that the primary focus of his Cuban government job was "to find out about the terrorist activities [affecting Cuba]. Not to injure us, not to hurt the United States, but to protect them. To prevent injury to people in Cuba ... ." R29:1606.[3] With regard to the murder conspiracy allegation, defense counsel disputed the government's claims about the nature of BTTR actions to provoke Cuba and the government's characterization of Cuba's reactions, but counsel also argued that Hernandez "didn't do anything" to bring about

[3] R29:1640-41 (counsel for Campa: "In his opening remarks, the prosecutor, and I believe the words he used were, that you would be hearing about groups that advocated positions on the Government of Cuba. ... That is put very nicely but I suggest it sanitizes what these groups are involved with. The groups we are talking about, and the positions they advocate on Cuba are groups that are committed to violently overthrowing the Cuban Government and the position that they advocate as to the Government of Cuba is that the Government of Cuba should be physically annihilated, destroyed. The groups you will be hearing about, the groups that form the basis and the focus of everything that Mr. Campa did, that have been committed to carrying out acts of aggression against officials in Cuba, against business plants in Cuba, electrical plants in Cuba and recently have been focused on attacks against tourist establishments.").

the shootdown and was being made the "scapegoat." R29:1624. Similarly, other counsel denied specific intent to commit espionage and stated that their purpose was to monitor groups deemed likely to cause physical harm in Cuba and to watch for military buildups indicating the possibility of a strike against Cuba. R29:1631, 1641.[4] They contended that none of the defendants had ever sought a security clearance or attempted to obtain any classified information and that the espionage conspiracy charge rested on speculation. R29:1662.

III. THE GOVERNMENT'S CASE IN CHIEF.

The core issue at trial was whether the defendants specifically intended to violate the various statutes involved in counts 1-3, the conspiracy counts, including a specific intent to violate the law by conspiring to interfere with governmental functions and to withhold notification to the Attorney General that they were Cuban agents; to commit espionage by obtaining "[p]rotected information relating to the national defense of the United States" (Hernandez, Medina, and Guerrero); and to

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[4] R29:1668 (counsel for Guerrero: "Because there was a great deal of concern about the influence on what they ... perceived to be terrorist organizations posing as legitimate organizations ... there was a fear in Havana about the influence they had on United States policy and United States military policy specially and you will see reports about that why they were interested in Southcom in Miami as opposed to Panama from where it moved; because what is in Miami, the Cuban exile organizations and it is there, and you will see the evidence how concerned they were about the influence on Southcom, on the U.S. military and on the fear that there would be another Bay of Pigs, only this time with military support.").

commit first degree murder (Hernandez). R1:224; R121:14014. The government also sought to prove other elements of the murder conspiracy charge, including whether Cubans falsified evidence that the shootdown occurred in Cuban territory. The government neither charged nor sought to prove that espionage or attempted espionage had actually occurred within the meaning of the statute, but rather that the intent and agreement to do so could be inferred. The government sought to satisfy its burden as to the specific intent elements largely through interpretation of various coded messages sent to the defendants and other agents by the Cuban intelligence service and replies to these messages. The government sought to show that the shootdown of Brothers to the Rescue (BTTR) aircraft and killing of four persons was murder within the jurisdiction of the United States by presenting opinion testimony on the propriety of Cuba's actions and evidence of the location and carrying out of the shootdown.

The government called 49 witnesses (including 25 FBI agents and employees) in the 42 trial days in which it presented its case in chief. The majority of the witnesses were brief, establishing essentially undisputed points such as the defendants' use of false identities and secrecy procedures, R30:1705-21; R60:6218, 6245, 6253; R61:6372; R62:6486, 6515, meetings between the defendants and Cuban diplomats or agents, R33:3617; R46:3987; R46:4001; R56:5571; R61:6320; R74:7871, searches of the defendants' residences revealing documentary evidence

linking them to other defendants and the Cuban government, including radio transmission equipment, computer decryption programs, other computer records, false identity documents, and devices used for concealment, R30:1727; R31:1911, 1953; 1958; R33:2167, 2222; R34:2281, R43:3609, R61:6383, R66:6824, 6831; R69:6976, and the results of decryption of coded messages sent via shortwave radio or found in encrypted form on seized computers and computer disks. R35:2444, R36:2570.

Apart from these basically undisputed evidentiary offerings, the government presented more extensive testimony by agents and exiles to establish the disputed intent and murder conspiracy elements of the case. These witnesses occupied the bulk of 34 of the 42 days of the government's case, including: Joseph Santos (4 days of testimony by a would-be co-defendant who pled guilty to conspiring to act as an unregistered foreign agent), R40:3177; Guillermo Lares (2 days of testimony, by a former BTTR chief pilot, as to BTTR's pre-shootdown flights and organizational activities), R54:5295; Arnaldo Iglesias (3 days of testimony, by a non-pilot observer and BTTR board member, regarding prior flights and activities by BTTR and the flight on the day of the shootdown), R56:5575; Leonel Morejon (3 days of testimony by a founder of, and originator of the name, Concilio Cubano, a Cuban dissident organization that convened a meeting in Cuba of Cuban dissidents and exiled opponents of the Cuban government, from inside and outside Cuba, that was

cancelled before its scheduled date of February 24, 1996), R58:5989; U.S. Army Colonel Christopher Winne (who testified regarding the open-storage nature of the Southern Command headquarters building in Miami pursuant to which only persons with security clearances have freedom of movement), R46:4007; and U.S. Navy Captain Linda Hutton (testimony as to storage of classified information in a building at the Boca Chica Naval Air Station and the discouraging of repeated public visitors on the base, despite the absence of any restriction on public entry), R74:7904.

The remaining witnesses for the government sought to explain and interpret the documentary and other evidence in either summary or opinion fashion, placing the evidence in the interpretive light sought by the government as to specific intent. FBI language and counterintelligence specialist Susan Salomon, who is not a certified interpreter, testified over the course of seven days as to her interpretation of coded Spanish language messages to or from the defendants. R36:2643; R66:6820; R74:7889. FBI contract employee Stuart Hoyt testified, for three days, as to his interpretation of the activities and intentions of the defendants as indicated by the message traffic. R44:3684. FBI agent, and Cuban foreign intelligence supervisor, Richard Giannotti testified for 6 days as to his interpretation and summary of the message traffic and conspiratorial intent. R48:4272. Lanny Clelland, associate director of a radar squadron operated by the U.S. Air Force in Utah, offered 4 days of summary and opinion testimony as to radar estimates that the location of the

shootdown was outside Cuba's territorial limit. R62:6527. Finally, the government's aviation expert, Charles Leonard, testified for 4 days regarding his opinions on governmental interception of civilian aircraft and the Cuban government's actions in relation to BTTR as compared with the International Civil Aviation Organization's standards for civilian aircraft interception. R70:7140. Defense cross-examination was principally focused on these witnesses to show that any suggestion of the defendants' intent to commit espionage or murder was speculative and to dispute the government's jurisdictional allegations as to the shootdown.

IV. INFLAMMATORY TESTIMONY, MOTIONS FOR MISTRIAL, AND RELATED TRIAL EVENTS.

1. Continual press demands and media attention throughout trial.

As noted in the panel decision, media coverage during trial was of great concern to the defendants and the district court, including heavily-publicized "activities during the weekend of 24 February 2001, including the commemorative flights marking the fifth anniversary of the shoot down of the Brothers to the Rescue aircraft and the number of television interviews and the number of newspaper articles concerning that event[,] including an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act and articles including quotations from CANF members discussing at length the facts of the trial." 419 F.3d at 1232 (internal quotations and notes omitted).

The panel also observed that "[o]n the first day of voir dire, the district court addressed isolating the jurors following their exposure to a press conference" that enveloped the victims' families "on the courthouse steps and [the attempt] by members of the press" including news media with cameras, to approach prospective jurors. *Id*. at 1233 (internal quotations and notes omitted).

The panel noted that in the jury room during jury selection, "a copy of the Miami Herald which contained an article about the case was found" and that "after Hernandez's attorney commented that the ... article was 'disturbing,' Guerrero's counsel mentioned that he had viewed one of the potential jurors reading the article while in the courtroom." *Id*. (internal quotations and notes omitted); R223:196 (article in question quoted FBI agent as stating: "Cuban agents were in the courtroom monitoring the trial."). "Throughout the trial, the district court worked at controlling media access," and prior to trial,

> [T]he district judge stated that she was increasingly concerned that various persons connected with the case were not following her order based on the parade of articles appearing in the media about this case. In particular, ... an article about Medina's pending motion to incur expenses to poll the community was the lead story in the local section on Saturday in the Miami Herald. ... As the case proceeded to trial, media attention expanded. ... [The district court] acknowledged that there is a tremendous amount of media attention for this case.

Id. at 1240 (internal quotations and notes omitted).

In addition, there were many other prejudicial press matters that the panel did

not mention. From the very beginning of the trial, the courtroom was filled with media aggressively covering the case, with the total number of newspapers and radio and television stations beyond the capacity of counsel to monitor them all. The district court repeatedly noted and sought to accommodate media requests for access to evidence so as to publish government evidence before it was published to the jury, setting up a media access room to allow for the involvement of English and Spanish language newspapers, radio, and television, as well as press-like attention by local organizations seeking to publicize and monitor events. R30:1817 (THE COURT: "As you are all aware, the press and the media are actively observing this trial and have requested after the notebooks came up today and the introduction of the three notebooks that have been introduced as government exhibits, they have requested how they are going to have access to those notebooks."); R30:1820 ("THE COURT: We have a number of media. I am not keeping tabs on who comes in, who is here and who is not except there is a back row reserved for the media and from my viewpoint, for the most part it is filled and has been filled every day. I believe there are a number of representatives from the media from both TV and press and I don't know about radio, but several of them are Spanish speaking. There may be an interest even in the Spanish speaking evidence that is in."); R30:1824 ("MR. MENDEZ [counsel for Campa]: For the Court's information because maybe the Court doesn't read the Herald in its Spanish version, one of the reporters here every day is for the

Spanish version. They have been following the case much more closely and giving it a lot of press. As a matter of fact on the day of the opening statements, they published a photograph which the author of the article said was received from some anonymous source, a photograph of Mr. McKenna's client toasting with another co-defendant, an indicted co-defendant not before us who is in Cuba."; noting "aggressive coverage" of case in Spanish language media); R30:1826 ("THE COURT: While we are on that subject, what is happening with [NBC local TV reporter] Mr. Tester? He was in the courtroom this morning."); R31:1985-86 ("THE COURT: There is a gentleman back there with binoculars. I thought he was looking at me then I realized he was looking at the evidence.").

The district court and the prosecutor noted the intensity of the press interest as the taking of evidence proceeded. R36:2691-95 ("THE COURT: There is an issue no one has brought up–do you want to bring it up? MS. MILLER [prosecutor]: If we are thinking of the same thing. The press will be *breathing down my neck*. They want those English volumes [of transcript of decoded messages]. ... THE COURT: You have 45 minutes before the press is going to be expecting these documents to be in whatever room has now been designated as well as the other documents pursuant to my order. ... There will be a tremendous amount of evidence they will be looking at today and what will be happening they will be ordering copies from the clerk provided for in the Court's order. ... [T]he physical evidence will be in there under

guard of the marshal and the clerk, for observation by the press and news media. ... MR. KASTRENAKES [prosecutor]: During the recess can I bring the press up to look at some of the charts? THE COURT: They will have to wait until Mr. McKenna and his client and the other defendants and defense counsel and their clients have an opportunity to discuss whatever they need to discuss that needs to be discussed with Ms. Miller. Once that is completed, sure."); R37:2800 (counsel for Medina notes "a front page article in the Miami Herald that related to the documents that the government moved in yesterday"; "I am tremendously concerned about the fact that this Court will admonish as it admonished and will continue to admonish the jury not to read anything, but what happens when there is unstructured analysis of these documents without the opportunity to cross examine before they get published and before not just the jury but the jury's environment because people in their environment are not subject to this Court's rules yet they will read it and talk to these jurors ... ."); R37:2838 ("THE COURT: First of all, I wanted to indicate to counsel there has been some inquiry of my office by at least one newspaper of access to the materials during the break and in accordance with what Mr. Kastrenakes indicated he is the point man and my order said reasonable accommodations, I have directed them to you."); R37:2842 (defense counsel notes additional prejudice in that evidence government seeks to introduce relates to local news media personnel; "This one, is a little too hot and my fear is, it will be picked up on in the press and used in a very

negative fashion against these people, specially because it involves this reporter who apparently is very well known on channel 51."); R48:4401 ("MR. KASTRENAKES: I have another topic. Yesterday it came to our attention there was an article in El Nuevo Herald."); R48:4405 ("MR. MENDEZ: There was something in the paper the other day about an unnamed law enforcement source.").

Defense counsel noted that even during a long break in the trial for holidays, when jurors were not receiving daily admonitions about case coverage, prejudicial publicity continued apace. R38:2904-05 (counsel for Medina "requested inquiry of the jury regarding articles that appeared over the [lengthy Christmas] break ... to let them know we are checking up on them. If they read it, they read it and that is water over the dam or under the bridge, but just to make an inquiry because it was something, there were two front page articles. The chances they didn't see it are remote but if we ask them about it with the admonition, I think it will have some kind of protective purpose.").

Defense counsel pointed out the one-sided nature of the press coverage–even in English language media. R39:3020-21 (noting that news coverage of government's direct examination is published before the defense has a chance to cross-examine, counsel for Medina argues that "what the government is trying to do here [is] manipulating the news"; government responds that "claims ... regarding the press coverage ... are not claims that have anything to do with the issues in this trial").

The prosecutors noted organizational efforts at covering the trial beyond traditional press. R39:3140-41 ("MR. KASTRENAKES: Thanks to my brethren, they have referred a couple of private individuals to me and I don't know who the source was. I got a call from an attorney in town and they want access, private people want access to the documents that have been released to the media. I was going to ask the Court for some guidance. THE COURT: Who is this? MR. KASTRENAKES: An attorney, Manny Vasquez, called me. MR. McKENNA: He called me up. MR. HOROWITZ: He called me up as well. MR. McKENNA: He asked me if I would give him my materials and I didn't feel comfortable doing it so I asked him to contact Mr. Kastrenakes. MS. MILLER: Some of the family members have inquired of me whether they can get copies of documents that have been entered in evidence in this case."); R39:3142 (CANF lawyer and victims' lawyer Angones seeks access to evidence; MS. MILLER [prosecutor]: This is material in evidence. ... MR. MENDEZ: Let me tell you what I know about this individual. It is my understanding he represented at least one of the Cuban exiles who was prosecuted in Puerto Rico for attempting to kill Fidel Castro. I think he represented Otero whose name has come up in the case and who may be a witness on our side, Wilfredo Otero."); R39:3147 ("MR. KASTRENAKES: ... [R]ight now there was a New Times guy that asked to have them all copied for him and what I was proposing with respect to him because the Court has not ruled on any private individuals yet, but to give

them his name."); R39:3148 ("They would show press or media credentials to the copy service and they would be able to obtain copies and anybody else can file a motion until the issues are ruled on by the Court.").

The district court noted continual press interest in all aspects of the case, including sidebars. R69:6936 ("THE COURT: ... Let me inform you while you are all here, during the break the media made, I think it was the Herald and another press or media person, inquired of Lisa how they can get access to side bars."); R45:3839 ("THE COURT: Let me bring something up. It was brought to my attention yesterday from my court reporter that Radio Marti has requested a copy of a transcript or the transcripts. There are a number of side bars that have transpired that sealing of those side bars was not necessarily discussed."); R45:3840 (THE COURT: "I don't know what they are going to request. I have instructed [the court reporter] that before any transcript is turned over to anybody other than the parties here, that he must present it to me including the side bars and I will review the side bars with you."); R46:4086 ("THE COURT: ... This regards another request by media, I believe New Times, for two days of transcript on January 11 and January 12, but there are some of the same side bar issues in these particular days."); R53:5208-09 (court notes media seeking unsealing of all documents in the case, including those embarrassing to counsel; "MR. BLUMENFELD: I received motions, Your Honor, and we haven't had a hearing date set from the Herald and NBC 6. I don't know if the Court was

waiting for a response or expected a response from us as to unsealing the sealed documents.").

The boundary between the press and the trial itself was occasionally blurred. R55:5427 (court corrects prosecutor's representation of prior testimony because court "heard it on the news last night as I was driving home, the statement"); R74:7944-45 ("THE COURT: I just want to caution counsel for the defendants in how you are looking at documents at counsel table. One of the reporters has binoculars. I don't know if it is beamed towards you but you were looking at documents. MR. BLUMENFELD: He is from Nuevo Herald. He is using it for looking at the screen."); R81:9005 ("THE COURT: ... I was informed yesterday [March 12, 2001, three months before the end of the case] sometimes they have cameras downstairs. Yesterday the cameras were focused on the jurors as they came out of the building and I was informed afterwards by security that was happening. What I would propose today and I didn't–I came up with a plan B but I didn't want to put it into effect without speaking to you all. Larry has been walking them downstairs afterwards and rather than having them go out the front doors, they could go out what is supposed to be the open part of the tower which has the security gate down, open that and let them go out that way."); R84:9443 (court notes jurors' concerns as to giving out information in answering scheduling inquiries in front of the media in the courtroom; "THE COURT: There is a lot of press here, a lot of people and I don't want to make

them [the jurors] feel uncomfortable."); R88:10127 (court addresses television report and newspaper publication of classified material discussed in prior day's trial proceeding); R104:12158 (noting media's obtaining copies of videotape evidence without restriction on use).

The involvement of parties and witnesses in influencing the media coverage continued throughout the trial and led to renewal of the motion for change of venue as well as motions for mistrial. *See* R58:5885 ("MR. McKENNA: Your Honor, there was an article in the Miami Herald today that indicated Sofia Powell Cosio, the attorney for Mr. Basulto, telephoned the Herald and tried to distinguish some of the testimony yesterday. I don't know whether the Court has read the article. THE COURT: I saw it this morning. MR. McKENNA: I am very concerned about that for a couple of reasons. Number one, she has filed pleadings in this case so in a way, that makes her a lawyer that has some relation to the case. She has filed an appearance, she is not somebody outside of this proceeding."); R55:5442 (TV news reporter covering case is also witness to events relating to murder conspiracy charge); R55:5515 (lawyer for BTTR observed by the court to be nodding and signaling to shootdown witness Lares and is advised to stop); R56:5602-5 (same attorney again seen nodding and "cueing" to Lares; court bars witness from courtroom); R59:6096 (courthouse demonstration involving media and loudspeakers, "a bunch of police cars and horses outside"); R59:6097-98 (MS MILLER [prosecutor]: "[T]here are

alternative ways the jurors can be directed to leave the courthouse, they won't have to encounter the demonstration. ... I don't want to create a situation where demonstrators feel they could somehow force the hand of this Court to break court. There is no reason to do that right now and that would not be a good message to send, Your Honor."); R59:6145 ("THE COURT: ... Now we will discuss the situation outside. ... [S]ome of the examples of the signs were, take Castro down. I want you to have this information so you can make your positions. Fair trial wanted, spies to be killed. MR. McKENNA: Your Honor, if you have a chance, because I know you are in touch with the marshals, will you inquire whether they are aware of any risks to the attorneys, if you would?").

Press events arranged by witnesses added to the intensity of the coverage. R60:6237-38 ("MR. McKENNA: This has to do with Jose Basulto who is a witness I have subpoenaed. I think he is also under a government subpoena. Last night he gave a press conference and I have a tape of it. His press conference was to announce some type of demonstration he plans to hold down in the Straits of Florida or near Cuba on February 24, [2001] to commemorate the shoot down ... . He had one of the victim families up with him in front of the cameras. ... Also with him at the press conference was Guillermo Lares, another witness in this case who already testified."); R62:6575 ("MS. MILLER: Your Honor, some of the family members have mentioned to me they have held a memorial mass every year and have issued a press

release in connection with that memorial mass and they have come to me for guidance."); R65:6735 (government, arguing to allow press coverage of shootdown anniversary events, represented: "what we are talking about under any view of the evidence is the circumstance that resulted in the death of *four people who were cared for very deeply by people in this community*"); R65:6740 (5-year anniversary commemorative events include television coverage of "a mass that will be celebrated on Ermita de la Caridad, February 23 at 8 p.m. On the following day, their planes will fly over the Martyrs Point and drop leaflets which depending on how the weather is could reach Cuba. They are also asking exiles to sign the document which requests the Bush administration to order the indictment of Fidel Castro for the assassination of the pilots."); R65:6741 (government notes "call for the *indictment of Fidel Castro* is not something new or dreamed up for the purpose of agitating in the context of this trial. That also is something that has been *the position not only of Mr. Basulto but of many people in this community* for some time."); R65:6744 (government notes additional press coverage ongoing to wife of codefendant Roque who is suing him and Cuban government for fraud, deeming marriage as part of spy scheme); Rita Basulto, Letter to the Editor, Miami Herald, Mar. 23, 2001, at 8B (supporting testimony and actions of husband Jose Basulto at trial).

The district court recognized the substantial likelihood of prejudice from these witness-initiated press events and unsuccessfully sought to limit witness involvement

in public demonstration that garnered intense press coverage. R65:6759 ("THE COURT: ... I do find that there is a substantial likelihood that extra judicial commentary by trial participants including witnesses will undermine a fair trial."); R69:7110-11 (district court unsuccessfully seeks intervention of counsel to defend on appeal her gag order as against BTTR press events for February 24, 2001); *see* 11th Cir. No. 01-10949 (11th Cir. Feb. 22, 2001) (reversing application of district court's gag order).

In unsuccessfully opposing disclosure of evidence to print, radio, and television media before the defense had an opportunity to even cross-examine on the evidence, the defense expressed to the district court its fear of a "new wave" of prejudice, adding to the community hostility already present. *United States v. Hernandez*, 124 F.Supp.2d 698, 705-06 (S.D. Fla. Dec. 18, 2000) (overruling defense objections to press request for access to evidence before its introduction at trial; allowing press to publish government evidence before being offered to jury); *id*. at 705 ("Defendant Campa argues that unless defense counsel are allowed to talk to the press and respond publicly to the evidence that is released to the public, the public's view of what the evidence at trial will show will be unfairly one-sided and likely to create a hostile, prejudicial environment detrimental to the defendants' right to a fair trial."); *id*. at 701 (overruling defense objection that "Defendants ... object to any access other than that available during a public trial or, in the alternative, urge the Court to provide the

press and news media with access only to evidence, which counsel has published to the jury"); *id*. ("Defendants contend that the dissemination of evidence, admitted into the record prior to its publication to the jury, 'will likely generate a new wave of prejudicial publicity against the defendants, and create a climate of public hostility that will undermine the defendants' right to a fair trial.' (Def. Campa's Resp. at 2.) According to Defendants, [prov]ing this concern is the admission and reporting by the press and news media of the evidence in the Government's case-in-chief, prior to the presentation, if any, of Defendants' evidence. Lastly, Defendants argue that due to the Court's Order That All Parties and Counsel Shall Abide by Local Rule 77.2 of October 2, 1998 counsel is unable to balance the view of the evidence from the press, which Defendants project will be, and has been, 'unfairly one-sided.' (*Id*. at 3.)").

When the gag order failed to restrain the widespread publicity of the shootdown demonstration and memorials, counsel renewed the motion to change venue. R70:7130-31 ("MR. MENDEZ: ... I am required at this time and I do move for a mistrial and for a reconsideration of the motion for change of venue which this Court denied without prejudice to review the matters that came before us that required a renewal of that motion. I don't know that we have to take it up fully at this time. ... There are a number of newspaper articles that appeared over the weekend including an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act. Newspaper article quotes people from the Cuban American National

Foundation that discuss at length the facts of this case although the gentleman was only here one day when we heard argument on the motion concerning the press. There is another article today by Liz Balmaseda and there was another article yesterday quoting Mr. Basulto extensively. We are aware of Your Honor's rules, the rules of the Court of Appeals but given Your Honor's concern when this Court issued its order there are some news events that are so great and are so explosive, for lack of a better word, that any amount of instructing to the jury cannot cure the taint."); R70:7134 ("Somebody may have seen the Channel 23 report which supplies up images of MIGs shootdowns. It is basically a montage video which purports to represent what happened on the 24th but not what we have seen in trial when those videos were made.").

Even when courthouse demonstrations were not heavily attended, they reflected organizational involvement–including organizations affiliated with witnesses–and received press coverage. R91:10603-04 ("THE COURT: ... I was informed at the last break there were some persons downstairs in military fatigues with placards. I instructed my staff to check and see if they were still there as we were getting to about 1:15 and if they were still there to *escort the jurors out as we have done previously when there were a lot of cameras out there.* ... MR. KASTRENAKES: We didn't see placards. They had T shirts on *Comandos F 4*.").

Defense counsel anticipated that jurors would experience community pressures

in deliberations and raised the issue during closing. R121:14164 (counsel for Campa pleads with jury to put aside pressures in deliberations; "[N]obody can mess with that decision. It is your decision. I am sure because of the nature of this case, the nature of this community that you will feel all kinds of pressures that don't have anything to do with the facts of this case; but I ask you to put them aside and I think Judge Lenard will tell you, you shouldn't let sympathy or prejudice come into play. You should make your decision based on the evidence that has been presented at trial and it takes a lot of courage."); R124:14469-70 (counsel for Hernandez: "The issue right here now is what you are going to do, what is your verdict going to be, do you have the courage to vote not guilty; do you have the courage to be fair and know when they play that tape with cajones [sic], that it is not evidence against my client. To put aside the taxi driver stuff; do you have the nerve to do all those things?").

The jurors again acknowledged their concerns about the media when the full focus of the case fell on them during deliberations. R126:14643 (during deliberations, jury reports press following and photographing them; court provides special measures to conceal jury from press; court notes that a newspaper had contacted court "jury pool yesterday wanting the names of the twelve jurors"; counsel notes jury was filmed and shown "on TV last night, the jury"); R126:14644-47 (defense counsel objects to making the jury venire public; "THE COURT: The second issue regards the jury. ... As [the court's secretary] got in the elevator with ...

the jurors and they said hello to her, they recognized her. There was a discussion amongst the jurors who were there that they have been followed by the cameras. I did arrange yesterday for them to go out another way when they left with [court staff]. MR. BLUMENFELD: That is what was on TV. THE COURT: They were filmed yesterday and several of them felt they were filmed all the way to their cars and their license plates had been filmed. I am going to make arrangements with the marshal for them to come into the courthouse by other means other than on their own and have them come through the garage. They don't need this pressure–nothing should be dissuading them or preoccupying the jurors from their duty at this time to deliberate, and they certainly should not be pressed by the media during deliberations. I am going to make other arrangements today as to their transportation back to their cars or Metrorail, wherever they have to go and make arrangements from here on in so they will be parking away from the courthouse or some kind of arrangements will be made to be picked up and brought into the garage;" court notes it will tell jury the special measures are due to the media, "not because of security reasons;" "THE COURT: Yes. This is something brought up by them, they were concerned. The observation was made by my secretary. Then it was brought up by the jurors what had happened, that they had been filmed and several of them felt their license plates were being filmed, so they are concerned. They are concerned they are being pressed and filmed and I want to accommodate and alleviate that concern that they have, but

I wanted to let you all know before I made final arrangements. The only message is going to be that we have made arrangements so when they leave and come into the courthouse they are not exposed to the media. ... MR. BLUMENFELD: Two cameras were out there yesterday, [channel] 23 and [federal government-owned] Radio Marti. ... THE COURT: ... It will mainly be parking elsewhere which we will make arrangements and going into a van as soon as they park, meeting the people at Metrorail and meeting a van and bringing them in through the garage and taking them up to the fourth floor.")

2. Witness misconduct and prejudicial evidence.

The government, in its answer brief, contended that the "trial was a model of probity," Gov't Br. 58, but during the government's case in chief, numerous witness statements and events were the subject of defense objections and motions for mistrial. The panel opinion noted several of these events, in particular: (1) the dramatic effect of community leader Jose Basulto's labeling of defense counsel as aiding the Castro government, and (2) testimony and exhibits regarding violent anti-Castro activities and virulent community opposition to aiding the Castro government. *Campa*, 419 F.3d at 1240, 1243-45. Prior to these matters, however, the government began the presentation of its case with three witnesses who offered emotional testimony by family members of deceased children regarding identification facts to which the defendants had stipulated, that the false identities used by the three non-U.S. citizen

defendants–Hernandez, Medina, and Campa–were obtained from decades-old death certificate information pertaining to individuals who lived outside Florida and died before reaching adulthood. R30:1711 ("Q [by prosecutor]. Is your [dead] son present in the courtroom here as you look around the courtroom? A [by Luis Medina, Jr.]. He is not."). The government referred to this testimony at trial and in closing as "dead baby" evidence.[5] *See* R30:1712 (counsel notes defense filing of motion in limine to exclude "this testimony under [Fed. R. Crim. P.] 403 [and] *Old Chief versus United States*, 117 Supreme Court 644, 1997. Your Honor, any testimony comparable to the one we just heard a moment ago regarding the child's birth, his illness, his death, the pain and anguish a parent suffers as a result of that is unduly prejudicial in this case, a needless presentation of cumulative evidence and should be precluded. ... It is being offered solely for the purpose as you saw a moment ago today to introduce a ... human passion ... that plays no role in this case."); R30:1716 (defense counsel objects to continued asking of "macabre" question, "look around the courtroom and tell us if you see your son"). In closing argument, the government used the emotional component of this evidence to claim murderous intent on the part

[5] R33:2164 ("Q [by prosecutor]. Does Florida law allow you to obtain driver's licenses and false identifications under the name of a dead baby?"); R68:6955 (noting outside jury's presence that Campa was living "under the assumed identity of a dead baby"); R121:13929-30 (government closing: "infants who died," "dead babies"); R124:14480-82 (government closing: "dead babies," "dead children," "dead kids").

of Cuba and the defendants. R124:14480 (government closing: "They killed four innocent people and they use in these identities dead babies, dead children to establish who they are.").

The government's theory of espionage conspiracy–rather than a conspiracy to obtain insufficiently-protected or non-classified information–rested on interpretation of message traffic, including references to structural information about a building, at the Boca Chica Naval Air Station, that was later used to house classified information, *see* R37:2737 (quoting coded message as stating: "The renovations we mentioned are taking place in building A 1125, the hot pad building. It continues to be priority work for public work. I haven't been able to determine the reason for the renovations. I do have information that the structure will be used for some 'top secret' activity."), and a plan to have one agent seek a job at Southcom. But in its case in chief, the government repeatedly highlighted the few aspects of other coded messages that indicated that the Cuban intelligence service had considered various active measures of a political content. R36:2666-67 ("MS. MILLER: ... The active measures include whispering campaigns and anonymous telephone call campaigns ... to spread dissension among rival political leaders, to send communications in the guise of Cuban Miami exiles to try to foment the appearance that Miami Cuban exiles are fanatics; which is *squarely relevant to this case*."); R37:2748 (regarding Cuban American National Foundation).

The government began to highlight Fidel Castro on the first full day of testimony, during the testimony of FBI agent Julio Ball–the first of the government's physical search witnesses–who seized a photograph of Castro from Rene Gonzalez's daughter's bedroom. R31:1947. The government did not merely introduce the Castro photograph in evidence, but introduced an enlargement and projected it onto the main courtroom screen for an extended period of time, leaving it on the screen after concluding direct questioning of Ball. R31:1937 (publishing to the jury "SC 8 composite and the two blowup composite exhibits themselves, 8A [picture of Fidel Castro] and 8B [picture of Che Guevara building]"; prosecutor requests delay for consultation while leaving photo enlargement projected on screen, before announcing no further questions for witness). Thereafter, the government repeatedly (approximately 200 times) emphasized its agent's characterization of a term used by Cuban intelligence, "companero" or companion, as "comrade," to suggest Communist fervor on the part of the defendants. R36:2676-77; R37:2720-21; R39:3048-50 (FBI specialist admits changing other translations by FBI interpreters in order to increase appearance of term "comrade"; witness confirms "comrade" is more precisely translated by the Spanish word "camarada").

To give the defendants the image of violence, the government introduced and made repeated reference to a February 1994 memorandum by an unindicted coconspirator regarding "Operation Parallel" discussing the idea–*that was never put*

into effect–of sending a *phony* "book bomb" to a CIA agent while attributing it to an exile organization, for disinformation purposes. R37:2773 (mistranslating reference as "alleged book bomb"); R38:2981 (admitting term "alleged" was not in the memorandum). The government sought to convince the jury that the term "plastilina" or modeling clay–a substance that was to be part of the fake bomb–could actually have meant the real-bomb explosive substance, "plastique," such that the phony book bomb would be a real bomb. *Id*. The government continued to insist, including in closing statement, that the defendants–who neither authored nor acted on the fake-bomb memo and most of whom were not even in United States at the time–were involved in sending actual bombs. R124:14480 (prosecutor's closing: "They sponsor book bombs ... ."). The government successfully objected to defense introduction of a dictionary translation of "plastilina," R40:3173.[6]

The government's focus on interpretive inferences was magnified when its key witness as to Cuba's investigation of Southcom conceded that although he had been in discussions with Cuban agents about obtaining a job at Southcom, he never

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[6] No recognized dictionary or logic supports the idea of including "plastique" in something meant to be phony. The term "plastique" is French for "plastic," which in Spanish is "plastico." "Plastilina" is malleable clay. *See* Simon & Schuster's International Spanish Dictionary (English/Spanish; Spanish/English) (2d ed. 1997). The government refused to acknowledge that this is the only definition of "plastilina," arguing instead that the root word is "plasti" and that for that reason, it was acceptable to give the impression that highly-explosive plastique was to be used. R40:3171.

actually applied for such a job nor did he intend to apply for a security clearance to work at Southcom. R41:3365, 3371-72, 3506. Indeed, he admitted that his handler, Hernandez, "never had any discussion about getting secret information or anything like that" and "never told [Santos] to get national security defense information." R41:3339. Further, Santos testified that he was never criticized by the Cubans for failing to obtain secret information, R41:3362, and that he was "never told by any of [his] handlers what kind of specific information to obtain ... because [they] never reached the point." R41: 3346. Santos stated that throughout his work for the Cubans he never once obtained or provided any "secret information." R41:3350-51. Finally, government redirect examination of Santos emphasized Cuba's view that the crime Santos would be committing, if any, in the United States was acting as an unregistered agent, an offense carrying a 10-year penalty. R42:3408; *see also* R42:3507("Q [by defense counsel]. And finally, sir, your role was to get in there and see if there was any activity or increase in personnel that would indicate military aggression against Cuba; isn't that correct, sir? A. Yes."). Santos' testimony made it clear that the government's case for espionage conspiracy depended on inferences of intent that were highly disputed.

Following the Santos testimony, the government introduced further graphic evidence of the involvement of Fidel Castro in this case through the testimony of FBI contractor Stuart Hoyt:

Q. Mr. Hoyt, what I want to talk about first. If you can take that magic marker. I want to talk about first the structure of the Cuban intelligence system. 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* the Commander-in-Chief and he holds a number of titles. He is the president and Council Minister, he is head of the Cuban Communist Party and also the Commander-in-Chief.

Q. Put *him* in the first position if you would *write that on the board*, please.

A. I wrote his name as Commander-in-Chief. In all the documents he is referred to either as *Fidel Castro* or *Castro* by name, but he is also referred to as the Commander-in-Chief or our commander. ... Instead of his name *Castro* they might refer to him as our Commander or Commander-in-Chief.

Q. When you talk about the documents, are you talking about the documents entered in evidence in this case?

A. Yes.

Q. Under *Fidel Castro*, what is the next level of structure in the Cuban Government specifically relating to intelligence matters?

A. The next level down, just like any government, they have to have some type of mechanism to carry out the day-to-day responsibilities of government.

R44:3699-3700.

When Hoyt explained that Cuba has "two agencies within the Ministry of the Interior that are intelligence related," he added that "[t]he first one, and ... you only see it briefly in the documents, is the DCI, the Directorate of Counterintelligence.

It is referred to in the documents merely as CI. This is an organization that works almost exclusively on the Island of Cuba and their primary responsibility is *internal control, to insure that people don't speak out* against the government ... ." R44:3704. Hoyt returned to the theme of repression in Cuba when the prosecutor twice read to him–once during direct examination and once again on redirect–lengthy descriptions of Hernandez's noting that a taxi driver was criticizing the Cuban government, such that the government aligned Hernandez with repression in Cuba through a single incident–of complaining about a taxi driver–in four years of communications. R44:3705-06; R46:3970-71.

Hoyt further opined that the Cuban intelligence service's interest in exile groups was not limited to those seeking to harm Cuba but applied to the entire exile community. R44:3715 ("Q. There is a term that appears in the document as CR. Are you familiar what that means? A. Yes. It means counter revolutionary. Q. What does that refer to? A. That means the exile community. They are often referred to as the counterrevolutionary groups. Q. They are referred to that way because they are opposed to the Castro regime? A. Yes."). In redirect examination, the government returned to the theme of suppression of rights in Cuba as part of the purpose of the Cuban intelligence service. R46:3969 ("Q. Would you remind us again, what are the various roles and responsibilities of the Cuban Directorate of Counterintelligence, their jobs? A. It is internal control, but they have internal security; things of that

nature. Q. When you say internal controls, what do you mean? A. To make sure there is no counter-revolutionary activity within Cuba. That there is *no dissent* within the Island of Cuba. [That] may include *speaking out* against the government.").

With the testimony of summary witness Richard Giannotti, the government sought to explain statements made by Guerrero to his superiors–to the effect that he did not seek information about matters that are "not related" to his non-clearance job and that he would not seek to breach military "security measures" in his work, R48:4275–as reflecting something other than limitations on the scope of Guerrero's agency: in other words, the government sought the interpretation that talking to his superiors about not breaching security measures implied an intent to breach security measures. R47:4195. Hoyt later acknowledged that Guerrero was plainly advised as to his information gathering work, "that he never risk his job at any time in order to obtain" information. R50:4627.

In testimony prejudicial to Rene Gonzalez, the government offered Giannotti's reading of a coded message discounting the value of faith and the power of prayer, R49:4554-55, and a report indicating that Gonzalez, like Roque, had deceived Roque's wife, Ana, who later garnered substantial publicity for her successful lawsuit against the Cuban government based on fraud in her marriage to Roque. R50:4582.

In calling to the stand witnesses associated with Brothers to the Rescue, the organization that had repeatedly violated United States law and Cuban sovereignty

from 1995-96 and had, since its founding, encouraged illegal immigration from Cuba, the government asked what was the "*mission* of Brothers to the Rescue," obtaining witness Lares' response that "[i]t was a mission of love, a mission of saying, hey, we are there to help you out. It was a humanitarian effort and it was very rewarding to be able to help others and save lives." R54:5299. The government asked Lares if shootdown victim Pablo "Morales after he was *saved* by Brothers to the Rescue, came back to Brothers to the Rescue in some capacity?" R54:5313. The government introduced evidence of BTTR's humanitarian efforts on behalf of detained illegal Cuban migrants in the Bahamas. R54:5333, 5344. The government obtained Lares' testimony about one of the more emotional events in exile history, the sinking of a tugboat in which 40 Cubans trying to immigrate to the United States drowned. R54:5353 (Lares: "A. The tugboat was downed by the Cuban Government."). The government also sought Lares' claim that on another occasion, "two Cuban gun boats ramm[ed] the Democracia boat" during a commemoration of the tugboat sinking. R54:5357. During Lares' testimony, a BTTR attorney who was nodding and signaling to him during his testimony was first warned, R55:5515-16, and then, when another BTTR witness was called, and the attorney continued with the visible gesturing, was expelled from the courtroom. R56:5602-05.[7]

[7] Throughout trial, family and associates of victims were assigned prominent seating, immediately adjacent to the government. R25:714-717.

BTTR board member Arnaldo Iglesias was called as a government witness and he testified that BTTR was a "wonderful" organization, R56:5597, that tried to bring food to Cuba, but was barred by the Cuban government. R56:5615. Iglesias was a non-pilot observer on certain flights piloted by Jose Basulto, and the government used him to extent possible as a substitute for information possessed by Basulto as to overflights of Cuba on the date of, and prior to, the shootdown. R56:5623. Iglesias claimed knowledge of the location of the aircraft from reading Basulto's instrumentation and then writing it on his hand; Iglesias was then admonished by the court for repeatedly engaging in impromptu courtroom demonstrations of his writing-on-the-hand habit, which he did when the attorneys were distracted by attending side bar conferences during his testimony. R56:5629 ("MR. McKENNA: Can't we just tell this witness don't write anything on your hand while you are on the stand, it is ridiculous. I am not saying the prosecutors told him to do that. I find it bizarre coupled with what was going on yesterday and the attorney for Basulto, it is bizarre and he should be told don't do that."); R58:5902 (witness repeats demonstrative conduct while sidebar conducted); R58:5949 (court notes witness was not truthful in responding to court inquiries about hand-writing incident).

The government followed up on its BTTR witnesses by offering the testimony of a Cuban dissident, Leonel Morejon, who had named and founded the organization Concilio Cubano to challenge the government of Cuba. R58:5991-92. When defense

counsel objected to the necessarily emotional and passionate anti-Castro testimony to be expected of Morejon, the prosecutor responded that "*Concilio Cubano is at the center of this case.*" R58:5993. The government then introduced and read to the jury the Concilio Cubano petition to Fidel Castro appealing for freedom and invoking the aid of the United Nations. R58:6007-10. Despite instructions given to the witness, he responded to questioning with comments directed to passion against Cuba, R59:6076 ("Sir, the biggest crimes committed in Cuba have been committed by the Cuban Government."), and discussing his arrest by the Cuban government. R59:6140 ("MR. MENDEZ: Your Honor, he said in Spanish, again referred to the fact he was in prison. That is not responsive to my answer. He blurted it out that he had been in prison. He is about to do it a second time. The Spanish speaking jurors can understand it. ... [I]t is unfair for him to be allowed to say it twice."); R60:6195 (witness improperly comments a third time on his imprisonment in Cuba during government redirect examination).

By the time the government rested its case in chief, the defense had moved for a mistrial seven (7) times based on the introduction of prejudicial evidence and the impact of prejudicial publicity. R42:3423-25; R46:3985; R47:4128; R47:4171; R54:5277-79; R68:6952-56; R70:7130. Motions for mistrial and change of venue were renewed throughout the rest of the case when prejudicial events occurred, as discussed in the panel opinion. *Campa*, 419 F.3d at 1232 (noting renewals of venue

motion based on community events, trial publicity, and prejudicial improprieties at trial); *see* R76:8338 (Campa motion for mistrial); R81:8949 (Campa's counsel: "I ask the Court to consider this event as well as all the other events I have asked the Court to consider with respect to my motion for a mistrial and a change of venue."); R88:10027 ("MR. McKENNA: Before we leave the side bar, I reserved a motion. I move for a mistrial based on the publishing of the United Nations findings and condemnation of the shootdown."); R89:10196 (district court admonishes government for "improper vouching" in cross-examination and "resort[ing] to improper statements before the jury;" "You are slipping into these comments and you are doing it over and over again ... ."); R:113:13127 (mistrial motion based on prejudicial comments presuming espionage conspiracy); R124:14540 (motion for mistrial following repeated prejudicial comments in prosecutor's closing argument).

3. Closing arguments.

Although the government's most intense appeals to passion were in rebuttal closing, the government's initial closing argument pursued emotional anti-Castro themes as well. The government argued that the defendants' U.S. identities were appropriated from "infants who died," R121:13929, in a manner analogous to a community being taken over by invading aliens, as in the movie "Invasion of the Body Snatchers." R121:13939-40. Going beyond the bare evidence introduced at trial that the false identities derived from individuals who were deceased, the

government injected emotionality and fear by, first, stating that the fake identities derived from dead babies and, later, suggesting that the defendants were thereby effectively trying to gain control of our society. After repeatedly linking the shootdown to Cuban "propaganda," R121:14071-72, 14078, 14082-83, 14095-96, 14100, 14113, 14119, the government used the same language to suggest that the defense was premised on propaganda and that because "all the charges in this case have been proved beyond a reasonable doubt ... it is time now for the propaganda to end." R121:14119. Added to these references were further comments suggesting that the shootdown was prompted by Cuba's lack of belief in "due process where there are courts and defenses allowed." R121:14072. Again, no evidence was submitted that Cuba lacks courts or precludes defenses in court. The prosecution used emotional references to a Cuban Air Force cockpit recording, arguing that Cuba's MIG pilots expressed "jubilation and profane triumph" at the deaths of the pilots upon their being shot down and that, through its "planned mission," "the Government of Cuba [was able] to eliminate a nuisance to them, Brothers to the Rescue," without having to resort to international or FAA procedures; the government referred to this recording as "the sound of murder." R121:14094. The foregoing references reflect a prosecutorial strategy to place the government of Cuba on trial, taking advantage of fixed community positions on these issues.

The government's final closing argument was highly emotional and was

premised on attacks against counsel and the defendants that went well beyond permissible bounds to reach passion rather than reason:

> [R124:14471] ... MR. KASTRENAKES: This is an **extremely important case**. ...The FBI [pursues] cases involving violent Cuban exile groups. Every case ... brought before you [regarding exile group terrorism] resulted [14472] in somebody getting arrested and prosecuted. ...
>
> MR. MENDEZ: Objection, misstates the evidence.
>
> THE COURT: **Sustained.**
>
> MR. KASTRENAKES: [The **FBI] did a fabulous job**. ... [A]n extraordinary job, worthy of the highest praise. ... But of course in the **world of criminal defense attorneys**, law enforcement never does exactly the right thing. ... [T]his case [14473] is about [the] **intent of the Cuban intelligence bureau** ... . Let's talk about **Jose Basulto**. ... [14474] ... **Pablo Morales was a kid who had been rescued** by these people. ... All that matters to George Buchner and Mr. McKenna is Jose Basulto. What kind of justification is that to shoot people out, **or in Mr. McKenna's word, the final solution**. **I heard that word before in the history of mankind**. ... [14475] ... They took the action and decision to join a **hostile intelligence bureau** ... that sees the United States of America as its **prime and main enemy**. ... These are not the **rules of Cuba**. ... **We are not operating under the rules of Cuba, thank God.** ... [Jose] Basulto ... was bent on the overthrow of the **communist country of Cuba** as he is today, he wants to see Democracy restored ... . [14476] ... In this trial you have heard invented the **Disney World defense** ...

. * * * [14480] ... They sponsor **book bombs,** they sponsor **threats,** telephone threats of **car bombs,** they sponsor **sabotage.** They **killed four innocent people** and they use in these identities **dead babies,** [14481] **dead children** to establish who they are. ... They plead not guilty, but there is more than just that. ... [Ruben Campa is] a **Cuban spy sent to the United States to destroy the United States.** ... [14482] ... It is not just the **dead kids**. ... **Look, they are Cuban spies.** [T]hey **got the fairest trial** that they could have gotten. ... **They forced us to prove their guilt beyond a reasonable doubt.** They received the able[st] of **counsel who argued every point** and called many witnesses and **cross-examined our witnesses.** These are **for people bent on destroying the United States, paid for by the American taxpayer-**

MR. McKENNA: Objection.

MR. MENDEZ: I have a motion.

COURT: **Sustained**.

* * *

[14487] MR. KASTRENAKES: ... [L]et's talk about motives. Rodolfo Frometa ... had a motive. **Fidel Castro wiped out his entire family**. ... Do not nullify a guilty verdict because you don't trust Judge Lenard to do her job. She will do her job if you **do your job**. Mr. McKenna made reference on several occasions to the Cuban Government's point of view. The **Cuban Government's point of view** with respect to why they do this and **send spies into our country** is something that is **not proper for your decision** [14488] **making**. * * * [14492] If there is evidence, credible evidence [of terrorism

in] this community . . . **I will find out and prosecute the case**. * * * [14493] The FBI isn't invited back to pursue that stuff –

MR. MENDEZ: There is no evidence of that.

THE COURT: **Sustained**.

MR. KASTRENAKES: When **the bosses in Havana** decide that they want to share evidence with the United States of America –

MR. MENDEZ: Objection.

THE COURT: **Sustained**.

MR. KASTRENAKES: [When] they want to allow witnesses to be interviewed in Cuba, then that process will take place –

MR. MENDEZ: Objection, there is no evidence of that.

THE COURT: **Sustained**.

MR. KASTRENAKES: ... [14495] ... What is Hernandez all about? ... [A] Cuban working in Havana ... makes some statement about ... **Fidel Castro**. Does he say **let's send the goon squad and give this guy a tune up**? ... **What do you think go see this guy means in Cuba, somebody who talks about Fidel Castro?** * * * [14501] ... **When you are a defense attorney, you have to dance around plain English** ... . * * * [14510] ... Antonio Guerrero ... is a spy. **My God, these guys are spies. What do you think they are doing here in this country.** ... If I don't think of an argument because I don't have enough time and I am not as smart as you guys, please, **if you have an argument in your head that blows his [Mr. McKenna's] arguments [on Count III] away, don't be afraid to use it** ... . Mr. McKenna told you in his

opening the shooting was justified. The shoot downs of those planes were justified. He [14511] argues to you now his client didn't know anything about it. It is not a multiple choice test. Somebody dies and it is justified, you are involved in it. **If you don't know anything about it, tell us from the beginning, Mr. McKenna. Why do we spend months determining where the location of the shootdown was? If your guy doesn't know anything about it, let's go home.** That is because he changes horses in the middle of the stream. **He throws up what might be good day one and then uses what may be good day two.** ... You don't dance around it, you don't throw up ideas that are false and come up with some other ideas. You tell the jury the truth and you go and that is what they make their decision on. You make a decision based on truth. ... [14512] ... **The government of Libya–Cuba is not alone by the way. Cuba has been proven in this case to have friends such as the Chinese and the Russians**. They have radar interception. They are **cooperating with the Chinese**. They are not alone. **They are friends with our enemies.** ... [14514] ... The United States must prove there was a conspiracy to kill and have we proven the conspiracy to kill– [14515]

MR. McKENNA: Objection, they have to prove more than that.

THE COURT: **Sustained**.

MR. KASTRENAKES: ... [14517] We have **jurisdiction** in this Court, in this United States District Court because it occurred in international air space–

MR. McKENNA: Objection.

THE COURT: **Sustained**. ...

MR. KASTRENAKES: There is an element that requires the proof of the crime occurring in international air space.

MR. McKENNA: Objection, it is a misstatement. It is an agreement.

THE COURT: **Sustained**.

MR. KASTRENAKES: Ladies and gentlemen, you read the instructions–

MR. McKENNA: He is now arguing with the Court ... .

[14518] THE COURT: **Sustained**.

MR. KASTRENAKES: You will be given a copy of the instructions. I ask you to go back and read them closely concerning the crime and the elements that are charged. The United States of **America has proven that the shootdown occurred in international air space**–

MR. McKENNA: I object ... . That is not what must be proven.

THE COURT: **Sustained**.

[14519] MR. KASTRENAKES: ... The [BTTR] leaflets ... told people in Cuba that they had rights and ... the message is something that everybody can identify with;...and what did that mean to the country of Cuba, that **repressive regime who doesn't believe in any of those rights**, that meant trouble and they had to stop that, they had to stop that at all costs ... . [14520] ... **If their own people see** that planes dropping leaflets–**people inside those planes are going to be murdered brutally, mercilessly and nothing happens, what people in Cuba are going to stand up for their rights?**

Zero.

... [14521] [Was Hernandez] a **partner** in the conspiracy to shoot those planes down in international air space? **Absolutely. In for a penny, in for a pound. Everybody has a role in a conspiracy, everybody.** ... **Is he capable of conspiring to kill people? Absolutely.** ... A Roman philosopher said **he who profits by crime commits it. Did the defendant profit by the murder of those four people? Absolutely. He was promoted.** ... [14522] ... The **Commander-in-chief Fidel Castro** ... **Fidel Castro**, he is meeting with them on this operation. ... He **was very pleased** with the job done. ... [14523] **He who profits by crime commits it. He who performs a role in a conspiracy is a co-conspirator**. ... * * * [14530] ... Garbage in, garbage out but that is the Cuban radar they decided to put that shows this position here. ... This information isn't worth the paper it was written on. It is bogus. It is a lie. Adlai Stevenson said it best about lies. ... [14531] ... **What did the Cuban Government do in our case?** ... Hand plotted positions. This evidence is not worthy of belief ... . Folks, the **Cuban Government would like you to believe** that this pristine battery charger stayed gently inside of its velcro straps as a plane was exploded. ... [14532] This never happened. ... Think about it. ... **Does the Cuban Government have a stake in this case? A huge one.** ... [14533] ... [The defense radar expert] had 75,000 reasons to make that stuff up, folks. 75,000 reasons --

MR. McKENNA: Objection. There is no evidence he got $75,000.

THE COURT: **Sustained**.

MR. KASTRENAKES: You decide the motives he had to come up with the incredible testimony that he did. We talked about **in for a penny, in for a pound** and the [14534] concept that **anybody who joins into a conspiracy is liable for the results of that conspiracy** ... . [14535] Without Gerardo Hernandez, those MIGs don't go up in the air and **Pearl Harbor is also a good analogy** because this was a sneak attack on two defenseless planes who had no idea they were going to get shot down on February 24, 1996. ... **February 24, 1996 like December 7, 1941 is a day that will live in the hearts and minds of these families, these four families forever destroyed.** I want you to remember that when you think about how long this trial has lasted, from Thanksgiving to Memorial Day, **a day we commemorate people who have fought for our country** and Thanksgiving, a day we cherish to be with our families and this will never happen again for these families **because he with his blood promotion to Captain**, Captain Hernandez, **according to the Cuban Government, has earned recognition for his actions in destroying these lives.** He has **earned his conviction for that recognition.** When all is said and done and **when the smoke clears,** you can **look at all of these defendants for what they truly are, they are spies, bent on the destruction of the United States of** [14536] **America**. They are conspirators, three of them in espionage and **Gerardo Hernandez has the blood of four people on his hands**. ... I know you will **do the right thing**.

R124:14471-14536.

Standard of Review

In a direct appeal raising a violation of Fed. R. Crim. P. 21(a) and constitutional issues of due process and jury impartiality, this Court conducts an "independent" review of the venue record. *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979); *United States v. Partin*, 552 F.2d 621, 640 (5th Cir. 1977). The government has conceded this independent evaluation standard. Gov't Br. 29. With respect to venue claims of actual jury bias, review of the district court's decision is for abuse of discretion. *United States v. Nix*, 465 F.2d 90, 96 (5th Cir. 1972). Where the defendant claims presumed prejudice, pervasive in the community, "this Circuit has treated the standard as a mixed question of fact and law," warranting *de novo* review. *Cummings v. Dugger*, 862 F.2d 1504, 1510 (11th Cir. 1989); *accord United States v. McVeigh*, 153 F.3d 166, 1179 (10th Cir. 1998) ("The court of appeals undertakes this review of the overall circumstances of the publicity *de novo*."; distinguishing *de novo* review of presumed prejudice claim from abuse of discretion review applicable to actual prejudice claims) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522 (1966)).

With respect to review for abuse of discretion, the district court reversibly errs when it fails to exercise discretion; when it evaluates evidence under, or otherwise applies, an erroneous legal standard; or when the error is manifest in the record, such as to call into question the trial's fairness. *See City of Tuscaloosa v. Harcros Chems.,*

Inc., 158 F.3d 548 (11th Cir. 1998) (district court by definition abuses its discretion when it makes an error of law); *cf. Bishop v. Wainwright*, 511 F.2d 664, 666 (5th Cir. 1975) (habeas standard: "manifest probability of prejudice").

SUMMARY OF ARGUMENT

Pervasive community prejudice–particularly in combination with improper prosecutorial appeals to passion and other improper comments and prejudicial events at trial–compelled a change of venue. There was a manifest probability that community passions affected the jury's verdict. It was virtually impossible, in light of the jury's own recognition of heightened community concerns and interests, that such factors had no effect on the jurors. In order to preserve both the appearance and reality of a fair trial by an impartial jury, appellant requests a new trial.

ARGUMENT

The district court manifestly erred in denying motions for change of venue based on pervasive prejudice against the defendants and prejudicial events, evidence, and arguments at trial.

The district court denied the motion for change of venue based on the conclusion that a two-phase voir dire of a large group of individuals would produce a sufficient number of individuals asserting the ability to judge the case fairly. The defendants did not dispute that voir dire could produce such a pool of jurors, but argued that given the issues to be tried, pervasive community prejudice against these defendants rendered such juror assurances of impartiality unreliable. The district

court abused its discretion by failing to determine the extensiveness of community prejudice in Miami, and instead collapsing the issue to merely obtaining the results of voir dire. Contrary to the district court, while voir dire can in itself reveal pervasive prejudice, *see Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1644 (1961)–and ultimately voir dire in this case did so–the presence or absence of such a voir-dire showing is not dispositive. *See Rideau v. Louisiana*, 373 U.S. at 724, 726-727, 83 S.Ct. at 1418, 1419-1420 (1963); *Pamplin v. Mason*, 364 F.2d 1, 4, 7 (5th Cir. 1966); *United States v. Williams*, 523 F.2d 1203, 1209 (5th Cir. 1975). Instead, where all of the other relevant evidence establishes such prejudice, voir dire protestations of fairness are not sufficiently reliable to overcome community prejudice. *Id.*

The government's argument for deference to district court findings of juror credibility in voir dire therefore misses the point of both case law and appellants' claims of pervasive community prejudice in the context of the trial as conducted, including prosecutorial appeals to that prejudice. Instead, on appellate review, when the multifaceted constitutional issues arising from pervasive community prejudice are at issue, this Court must independently weigh all of the "special circumstances," notwithstanding individual jurors' statements that they could put aside prejudicial concerns. *See United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979) ("In determining whether a fair and unbiased jury was empaneled, an appellate court is

obligated to make an independent evaluation of the special circumstances involved in the case.").

Once a determination of pervasive prejudice is warranted by the record, the law presumes that juror declarations of the capacity to be fair cannot overcome passions saturating the community. *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1644; *Coleman v. Kemp*, 778 F.2d 1487, 1543 (11th Cir. 1986); *Sheppard v. Maxwell*, 384 U.S. 333, 354-55, 86 S.Ct. 1507, 1518 (1966). Even if voir dire could serve to rebut pervasive prejudice, it would require more than jurors' assurances that they will not be influenced by community prejudice and pressures, pretrial publicity, and acknowledged hostility to defendants and their witnesses. *See Mayola v. Alabama*, 623 F.2d 992, 1000-01 (5th Cir. 1980).

The record in this case, even putting aside the government's post-trial admissions of community susceptibility to pervasive passions on issues of great concern to the unique exile status of so many citizens in Miami-Dade County–exiled from a country so close that television and radio broadcasts from the exile community are directed in part to Cuba–incorporates all of the traditional evidentiary manifestations of prejudice: community surveys; pretrial publicity; demographics; obvious historical facts; particularly intense community passions in the period leading up to trial; intensity of media interest surrounding every aspect of trial; street-level demonstrations; in-court emotional testimony; a prominent witness's verbal attack on

counsel showing the potential harm of community reaction and retaliation; evidence of violent community elements intensely affected by the trial issues; and appeals to, and presentation of evidence heightening, passionate concerns of the community.

Precedent compels this objective analysis of the special circumstances of the case. The decision by the panel–including judges of this Court who had never previously found a violation of the right to change of venue–to scour the record objectively and compare the facts of this case with every other significant federal decision on point rendered inevitable its conclusion.

The word "impartial" is the only element added by the Sixth Amendment jury trial guarantee, because the Constitution itself already provides the right to jury trial in the State where the offense was committed. U.S. Const. art. III, sec. 2. The defendants sought a jury trial in Florida, in the immediately adjacent county, Broward, where some of the charged offenses allegedly occurred. The defendants presented overwhelming evidence that the only way to insure jury impartiality was to hold trial outside Miami, such that the supervisory authority of the federal courts warranted the logical choice of trying the case in a division of the court appropriate for the underlying events. The government chose not to indict this case in Broward, despite seizing substantial evidence from defendants' residences there. But Broward County was an appropriate venue. Denial of this minimal request for preservation of constitutional and rule-based protections was error where at every turn in the Miami

trial, events, prejudice, fear, pressure, and appeals to passion, in the immediate aftermath of the Elian case–the impact of which the government later conceded–presented obstacles to impartial judgment. Unlike cases where this Court rejected venue prejudice claims, all of the key risk factors were present in this case, and the unique pressure-cooker effect of these factors on these jurors was not fair to them, to the defendants, or ultimately to the community where the case was tried.

Despite the fact that the defendants were arrested more than two years before their trial, approximately 80% of the venire who were asked whether they remembered pretrial publicity about the case said they did. *See* En Banc Brief of Appellant Campa, App. A & B. Concern for community reaction to the verdict was admitted by approximately 30% of prospective jurors asked about it. *Id*. Approximately 50% of the venire questioned about fairness was either excused for cause or deemed a "very close" call. *Id.*; R27:1254, 1382. These responses obtained even though voir dire questions did not present the issues in the intense manner in which they were presented at trial–where the jury was called on to make judgments about Castro, the Cuban government, the Cuban exile community, and the causes of community discord–but instead were directed to generic concepts of fairness in light of the types of offenses involved. *See* Gov't. Br. App. 4B.

The trial that jurors experienced in downtown Miami dealt much more directly

with core concerns of the Miami community–in relation to Castro and the Cuban government–than jurors could have expected from voir dire. Whether or not voir dire alone, or along with survey evidence, pretrial publicity and editorials, and other manifestations of community passions, compelled venue relief–or transfer within the venue–prejudicial events at trial, many unprecedented, in and out of court, relating to witnesses, attorneys, and media, carried too strong a likelihood that non-record influences played a role in the convictions. In the instant case, passionate prosecutorial excesses in closing magnified other prejudicial events at trial and compounded the venue prejudice.[8]

For the reasons that the panel seemingly reluctantly stated–even expressing solidarity with the Cuban exile cause–"justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). As in *Coleman v. Kemp*, 778 F.2d at 1543, and *Sheppard v. Maxwell*, 384 U.S. at 354-55, 86 S.Ct. at 1518, in which the record showing of pervasive prejudicial conditions undermined the assurance of a fair trial, a new trial is warranted. Whether a new trial can now be

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[8] With respect to the compounding prejudicial effect of improprieties in closing argument, the law is well established that cumulative error provides grounds for reversal even where prosecutorial misconduct alone would not warrant it. *See United States v. McLain,* 823 F.2d 1457, 1462 (11th Cir. 1987); *United States v. Williams*, 523 F.2d at 1209 (single prosecutorial impropriety in closing deemed to so aggravate risk of community prejudice as to require reversal under cumulative error principles).

conducted in Miami is a question time would answer, *see Patton v. Yount*, 467 U.S. 1025, 1034, 104 S.Ct. 2885, 2890 (1984) (four years' passage of "time soothes and erases"), but the law does not afford the district court discretion to proceed to trial under such inherently prejudicial conditions, where deep and manifold prejudice is exacerbated by the nature and conduct of the trial proceedings.

CONCLUSION

Appellant requests that the Court remand for a new trial.

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 13,939 words.

PHILIP R. HOROWITZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 15th day of December 2005 to OFFICE OF THE UNITED STATES ATTORNEY, Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132; Paul A. McKenna, Esquire, 200 South Biscayne Boulevard, Suite #2940, Miami, Florida 33131; Joaquin Mendez, Esquire, Assistant Federal Public Defender, 150 West Flagler Street, Suite #1500, Miami, Florida 33130, William Norris, Esquire, 8870 S.W. 62nd Terrace, Miami, Florida 33173, and Leonard Weinglass, Esquire, 6 West 20th Street, Suite #10-A, New York, New York 10011 and further certify that on the 15th day of December 2005 an electronic brief was provided by uploading the foregoing brief to the court's internet web site.

PHILIP R. HOROWITZ, ESQUIRE