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)

REPLY BRIEF OF APPELLANT

PHILIP R. HOROWITZ, ESQUIRE
Court Appointed Attorney for the Appellant

STATEMENT REGARDING ORAL ARGUMENT

Given the first impression nature of several legal arguments addressed in these consolidated appeals, as well as the extensive record of the multi-defendant proceedings in the district court, resolution of these appeals would be facilitated by oral argument. The defendant therefore renews his request for oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

REPLY ARGUMENT

I.

THE DISTRICT COURT ERRED IN DENYING DEFENSE-REQUESTED JURY INSTRUCTIONS.

The government=s brief omits relevantCand largely undisputedCfacts supporting a defense-theory instruction on counts charging the defendants, under 18 U.S.C. ' 951, with failing to notify the Attorney General of their presence in the U.S. while acting as Cuban agents. The government also overstates the defendants= evidentiary burden to obtain a defense-theory instruction and reads too narrowly the statute=s mens rea element. The defense-requested jury instructionsCon mens rea and theory of defenseCwent to the core question of defendants= culpability, where evidence showed they acted undercover in the U.S. to obtain civilian intelligence

regarding terrorism directed at Cuba, in order to stem the tide of terrorist activity that had flooded, and created a national emergency in, Cuba.[1]

The district court=s denial of these requested instructionsCone going to the mens rea element and the other to a defense theory based on extraordinary terrorist-threat circumstances justifying, under the necessity doctrine, the defendants= acting without disclosure to U.S. officialsCprevented the defendants from receiving a fair evaluation of the relevant evidence by the jury and requires reversal of the convictions.

A. Theory of defense.

The government acknowledges that the Adistrict court=s determination whether a defendant has established a sufficient proffer to permit the defense of necessity is reviewed de novo,@ Gov=t-Br:29, but argues the defense failed to meet a Apreponderance of the evidence@ evidentiary threshold, Gov=t-Br:67, for submission of its justification theory. See Gov=t-Br:68-69 (arguing defense failed to

[1] Without doubt, the U.S. government today has agents performing similar unannounced roles in other countries. See Dana Priest, AA Curtain Lifts on the Life of Spies,@ Washington Post, Nov. 14, 2003, at A1. In Muslim countries, for example, where political pressures prohibit interference with radical fundamentalist elements responsible for inflicting devastating terrorist acts, this country=s responsibility to infiltrate such activities is deemed fundamental to our national security. See The National Security Strategy of the United States of America 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (discussing need to take adaptive measures to confront Aimminent threat ... of today=s adversaries@) (emphasis added).

demonstrate: Arequisite present and impending threat,@ Ano reasonable alternative,@ and Acausal relationship@ between Aappellants= activities and avoidance of the claimed threatened harm@). The government=s articulation of defendants= burden for obtaining the instruction as a Apreponderance@ standard and the government=s three factual contentions are refuted by this Court=s precedents and the record evidence.

Defense burden of production. The government wrongly claims that A[a] jury instruction on necessity is not warranted unless the defense proves by a preponderance of evidence each element of such affirmative defense.@ Gov=t-Br:67 (emphasis added) (citing United States v. Deleveaux, 205 F .3d 1292 (11th Cir. 2000)). Deleveaux contains no such assertion, and the law is well-established that to obtain a defense-theory instruction, the defendant=s Athreshold burden is extremely low,@ satisfied by Aany foundation in the evidence,@ not a preponderance. United States v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995) (emphasis added).

Further, while the government notes that sufficiency-of-evidence claims call for viewing evidence in a government-favorable light, Gov=t-Br:31, the opposite rule applies on review of denial of a defense-theory instruction: AIn deciding whether a defendant has met her burden [for a defense-theory instruction], the court is obliged to view the evidence in the light most favorable to the accused.@ Ruiz, 59 F.3d at 1154 (emphasis added).

Ignoring this Circuit=s defense-theory precedents,[2] the government directly misstates this Court=s holding in Deleveaux, where the Court decided that if a necessity instruction is granted, the defendant then has the burden of proof on that defense by a preponderance of the evidence. See 205 F.3d at 1298-99.

Deleveaux=s burden-of-proof holding is not at issue here, because the government successfully opposed granting a necessity instruction, by arguing that the defendant=s view of the terrorist threat, the absence of alternatives, and the effectiveness of defendants= efforts to stop terrorism were inconsistent with the government=s view of its own handling the Miami-based terrorism problem. See R117:13579 (A[T]hese defendants had a choice ... of options. ... They had the opportunity to ... call the FBI.@).

However, particularly because of the self-servingCand highly contestedCnature of the government=s claim that the FBI had investigated Aevery case@ of terrorism against Cuba involving Aviolent Cuban exile groups,@ R124:14471, and that Cuba therefore did not need its agents to investigate furtherCdenial of the defense-theory

---

[2] See, e.g., United States v. Opdahl, 930 F.2d 1530, 1535 (11th Cir.1991) (reversal of conviction required where district court refuses defense theory instruction supported by some evidence, even if such evidence is Aweak, insufficient, inconsistent, or of doubtful credibility@).

instruction was fundamental error, going to a core Sixth Amendment jury trial value: interposing independent citizens between the government=s view and a criminal conviction.

Imminent threat. The government gives short shrift to extensive evidence of contemporaneous terrorism, murder, sabotage, and destruction wrought on the people and government of Cuba by opponents of the Castro regime residing, training, planning, and funding such operations, in the Miami area. See Gov=t-Br:67 (referring to Adefense evidence relating to alleged acts of terrorism by Miami-based Cuban exiles@). The government refers to such terrorists merely as Cuban exiles, but evidence at trial showed terrorist groups that, by operating as fringe-element paramilitary and political organizations, were able to work under the protection and cover of the broader, innocent exile community, to commit terrorist acts against Cuba. See R117:13561-76 (Appendix A, attached hereto) (addressing record evidence of terrorist bombing campaigns peaking in 1997 with nearly daily bombings of Havana tourist hotels and restaurants); see also Campa-Brief (No. 03-11087) at 5-12 (detailing terrorist bombing; showing terrorism increasing from 1993 to 1997); id. at 13-16 (evidence linking defendants= operations ANeblina,@ AParaiso,@ AMorena,@ and AArcoiris,@ to obtaining intelligence on planned and actual terrorist actions by specific exile paramilitary organizations in Miami). The defense evidence was strong and was consistent with public knowledge of many attacks emanating from such

fringe groups in Miami.[3]

The government does not expressly concede the fact of this terrorism, but does not dispute the reasonableness of defendants= and the Cuban government=s perception of these terrorist groups in the Miami area.[4] See Gov=t-Br:10 (conceding Cuban intelligence=s Afocus on >counterrevolutionary= activity reflected concern about Cuban-exile organizations= ... perceived violence against Cuba@); Gov=t-Br68 (discussing Abombings of hotels and other tourist facilities in Cuba which, in their

---

[3] See, e.g., James LeMoyne, ACuban Linked to Terror Bombings Is Freed by Government in Miami,@ N.Y. Times, July 18, 1990, at A1; Ann Louise Bardach & Larry Rohter, AA Cuban Exile Details >Horrendous Matter= of a Bombing Campaign,@ N.Y. Times, July 12, 1998, at A10-11; Juan O. Tamayo, AAnti-Castro Plots Seldom Lead to Jail in U.S.,@ Miami Herald, July 23, 1998, at 11A.

[4] Neither does the government contest the sincerity of the defendants= belief that their actions were necessary to stop imminent life-threatening terrorist acts in Cuba. See, e.g., R97:11254-320 (Cuban message traffic seized by the government detailing more than 25 intelligence messages focused on terrorist investigations); cf., R131:19-20 (sentencing allocution of appellant Gonzalez, emotionally explaining defendants= subjective belief that their actions were compelled by humane necessity).

view, were instigated or directed by Miami exiles@).

The government argues that evidence of Ageneralized future perils to Cuban nationals is patently insufficient to demonstrate the requisite present and impending threat.@ Gov=t-Br:68 (citing United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989)). Contrary to the government, the threat to Cuba was not a generalized threat as in Aguilar. In Aguilar, individual Central American illegal immigrants to the U.S. claimed fear of violent conditions in their home countries, but offered no evidence that they or their families were personally targeted. 883 F.2d at 693. That generalized threat was therefore not imminent to those individuals. Here, however, Cuba was the target; it was not just one among many Caribbean nations facing terrorism on a daily basis. It was the only such nation. The threat to Cuba was specific, not generalized. And near-daily attacks were sufficiently imminent to warrant jury resolution of the case. The term Aimminent@ should be interpreted in light of the reality of modern terrorism, as the U.S. has recently explained. See The National Security Strategy of the United States of America 15 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (describing present terrorist threat to U.S. as Aimminent threat@). Defendants provedCwith photographs, videotapes, and testimony as to the death and destruction menacing Cuba in the period covered by the indictmentCthat the violence was not merely perceived, but real, not merely generalized, but specific, and not merely potential, but imminent. See R117:13561-

76.

No tenable alternative. The most politically-charged of the evidentiary disputes regarding the necessity defense in this case was whether Cuba had a viable alternative. The defense introduced evidence that when Cuba revealed to the United States information concerning prospective terrorist actions, the U.S. reacted by arresting or deporting the persons who had provided such information to Cuba.[5] Similarly, defendants introduced evidence of the impossibilityCdue to political and social constraints of the exile community, and fear of retaliation by violent groupsCof reliance on voluntary provision of information even by exiles opposed to Miami-based terrorist activities. See R117:13561-76; see also R99:11559 & Juan Gomez deposition at 66 (evidence of threats to kill persons who informed on Miami-based groups). In the present case, A>a history of futile attempts revealed the illusionary benefit of the alternative.=@ United States v. Hill, 893 F.Supp. 1044, 1047 (N.D. Fla. 1994) (quoting United States v. Gant, 691 F.2d 1159, 1164 (5th Cir.1982)). While the government argued that the U.S. government had both the political will and the investigative capacity to address the problem, R124:14471, the jury, viewing this record of waves of seemingly interminable terrorism from Miami to the nearby island

[5] For example, on June 17, 1998, Cuban officials provided FBI agents a comprehensive dossier of information about exile terrorist activity for use in prosecution and to prevent future acts of violence. See R93:10839-40. Shortly thereafter, appellants and other Cuban informants were arrested.

of Cuba, should have had the opportunity to determine whether the government=s suggested alternative was truly a reasonable means of avoiding the threat.

Causal relationship in defusing terrorism. The government, disputing that Cuba=s self-help measures could cause a reduction in Miami-based terrorism, Gov=t-Br:68, ignores record evidence of the success of exactly such undercover Cuban investigations in Miami. For example, another Cuban agent, Percy Godoy, acting in the same manner as the defendants in infiltrating radical elements in Miami, succeeded in 1994 in preventing the bombing of the famous Cabaret Tropicana, a popular Havana nightclub and tourist attraction. R95:11012; Percy Godoy deposition at 45-55. Similarly, actions by Cuban agent Juan GomezCwho was recruited by would-be Miami terroristsCsucceeded in uncovering plots to explode bombs in tourist hotels and at a political memorial in Santa Clara, Cuba. R99:11559; Gomez deposition at 16-20. This evidence was essentially undisputed by the government, undermining the government=s claim of Ano factual basis@ for a causal relationship between the undercover actions and stopping imminent terrorism. Gov=t-Br31.

Applicable law. The government=s brief also reflects some confusion in case law regarding the comparative elements of duress, necessity, and justification defenses, such that the government argues for a kitchen-sink approach of elemental requirements for a necessity instruction. See Gov=t-Br:67-68; cf. Deleveaux, 205 F.3d at 1295 n.2 (refusing Ato explore the distinctions between duress and

necessity@). At times, Ajustification@ is described as a Abroader defense@ than necessity. United States v. Bell, 214 F.3d 1299, 1300 (11th Cir. 2000). At other times, Ajustification@ is seen as Aclosely related@ but distinct from necessity and duress, with courts Atreat[ing] the three defenses separately.@ Gomez, 92 F.3d at 774 nn.5&6. At still other times, courts have used Ajustification@ as a code word for duress, necessity, and even self-defense. See United States v. Posada-Rios, 158 F.3d 832, 873 (5th Cir. 1998).

Evidencing the confusion, at trial the prosecution argued against a necessity instruction by relying on Posada-Rios, R117:13577-78, a case that was not about necessity, but instead duress. Posada-Rios, 158 F.3d at 873. Appellant requests that this Court take this opportunity to clarify the standards and prerequisites for the separate defenses of self-defense, defense of others, justification, and necessity.[6]

---

[6] The government argues the district court Adid instruct that it was appellants= theory of defense that they did not act with the necessary bad purpose to disobey the law because they were trying to prevent violence.@ Gov=t-Br:69 n.52. But that instruction related solely to the specific intent element of different offenses, of which appellant Gonzalez, for example, was not charged, not the failure-to-notify statute, 18 U.S.C. ' 951, as to which the district court refused defense requests to instruct on specific intent. Thus, defendants= only meaningful defense to the ' 951 chargesCthe justification theory of defenseCwas disallowed, virtually assuring a conviction on those counts. See Deleveaux, 205 F.3d at 1298 (rejecting contention that affirmative defense Anegates the mens rea;@ instead, it Arequires proof of additional facts and circumstances distinct from the evidence relating to the underlying offense@).

Viewing the substantial record evidence in the light most favorable to the defendants, the district court erred in denying the necessity instruction in this case.

B. Specific intent element of 18 U.S.C. ' 951.

The government ignores the context of Gonzalez=s argument on the mens rea requirement for application of 18 U.S.C. ' 951=s felony criminal penalties for failure to notify the Attorney General that he was acting as an agent for Cuba: Gonzalez is an American citizen, who clearly had the right to take positions advocating Cuba and to undertake activities that served Cuba=s interests, including infiltrating and discrediting political campaigns or organizations that falsely claimed humanitarian objectives; providing information to the FBI concerning drug trafficking by Cuban exiles; and generally injecting himself into political issues of concern to Cuba. See Gov=t-Br:6-7. Despite the government=s choice of characterization of such effortsCsee Gov=t-Br:7 (Gonzalez Asmear[ed]@ a political opponent, Apenetrate[d] U.S. Congressional election activity,@ and Amanipulat[ed] U.S. government institutions@); Gov=t-Br:22 (Gonzalez sent Aanonymous letters and [made] telephone calls undermining@ certain exile organizations and Aforward[ed] derogatory information or vulnerabilities to discredit ... or neutralize Cuban-American Congresspersons@)Cthe allegations concern conduct that, at least nominally, is the right of any American citizen, including Gonzalez, to undertake under the First

Amendment. Thus, criminalizing these actions without requiring a specific intent element creates issues of constitutional doubt. See Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (Acardinal principle of statutory interpretation ... that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided@) (internal citations omitted); Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will).

The government=s reliance on cases involving the possession of hazardous materials, see Gov=t-Br:69 (citing United States v. International Minerals & Chern. Corp., 402 U.S. 558, 563 (1971)), is inapposite to the issue presented by the abundant protected political activity and speech in this case. See Staples v. United States, 511 U.S. 600, 606 n.3 (1994) (distinguishing International Minerals & Chern. Corp.=s lesser intent standard as premised on obviousness of harmfulness of hazardous conduct).

Instead, because the dividing line between First Amendment-protected rights of association, speech, and political activity, on one hand, and acting so uniformly in Cuba=s interests as to constitute acting as an agent, on the other, is not well-defined, and plainly subject to dispute and conjecture, penalizing Gonzalez=s crossing of that

line without first requiring a showing of criminal intent, violates United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (holding that, in context of possible First Amendment restrictions effected by criminal statute, A[i]t is ... incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress@).

The government, see Gov=t-Br:70, cites Justice Ginsburg=s concurring opinion in Staples, regarding Aconventional mens rea ... the general intent standard,@ but ignores the holding of Staples, in which the offense touched on the Second Amendment right to bear arms, that the element of Aknowing@ commission of an offense can, when an offense touches so closely upon protected activity that it could ensnare conduct protected under a general understanding of the law, reach beyond mere knowledge of the surface of the offense to more detailed knowledge of the facts that make one understand that the conduct is unlawful. See id. at 605 (A>The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.=@) (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)). In Gonzalez=s caseCwhere the conduct of an American citizen is involvedCthe Staples precept would require proof that the defendant knew

he was engaging in conduct for which he had lost his otherwise-applicable First Amendment rights.

The government seeks to avoid discussion of the instruction on the substantive ' 951 offense by focusing on the conspiracy instruction, which related to knowledge of action of codefendants. See Gov=t-Br:70-71 (on conspiracy count, proof was required that at least one codefendant had not notified Attorney General of presence in the U.S.). But whether or not Gonzalez knew of inaction by others, that did not make him aware that his own actions as an American citizen participating in the public and political forums of Miami placed him at risk of a felony conviction. As to his substantive conviction for which he received a consecutive 10-year sentence, he was, contrary to the government, exposed to Astrict liability.@ Gov=t-Br:70.

The government recognizes, Gov=t-Br:71, that in United States v. Frade, 709 F.2d 1387 (11th Cir. 1983), this Court explained:

> ASince the purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law, no useful end is served by prosecuting the >violators= when they have no knowledge of the law=s provisions.@ The requirement of notice is grounded in the Constitution.

Id. at 1392 (quoting United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978), and citing Lambert v. California, 355 U.S. 225, 228-230 (1957) (AEngrained in our concept of due process is the requirement of notice. ... Where a person did not know of the duty to register ... he may not be convicted consistently with due process.@)).

The government argues, Gov=t-Br:71, that this constitutional limitation on the application of criminal statutes was overruled in Bryan v. United States, 524 U.S. 184, 196 (1998) (wilfulness requirement of statute criminalizing unlicensed firearms-dealing merely requires proof of defendant=s knowledge that conduct is unlawful). But here, it is exactly the requirement of defendant=s knowledge of the unlawfulness of the conductCwhich otherwise would be constitutionally protectedCthat requires application of the rule in Staples, Frade, and X-Citement Video.

Under Staples= interpretation of the term Aknowingly,@ absent a jury finding that Gonzalez knew that his otherwise clearly-protected speech and related political activity had ceased to be constitutionally protected, because of his contact with Cuba, the imposition of criminal penalties for his activity would violate the First and Fifth Amendments.

II.

THE DISTRICT COURT ERRED IN DENYING, WITHOUT AN EVIDENTIARY HEARING, DEFENDANTS= MOTION FOR NEW TRIAL.

1. Government=s response to bases for the new trial claim.

The government=s response to appellants= argument that the district court erred in denying defendants= motion for new trial, Gov=t-Br:60-61, fails to address several

components of the claim and offers no explanation for diametrically-opposite government representations regarding pervasive community prejudice in Miami against persons associated with the Castro government, despite that in taking these contradictory positions, the government succeeded both in obtaining relief for itself from that prejudice in Ramirez v. Ashcroft, et al., Case No. 01-4835-Civ-HUCK (S.D.Fla. 2002), and in opposing the defendants= attempt to obtain the same relief.

The government=s brief fails to address the denial of an evidentiary hearing on the new trial motionCwhere the district court=s ruling was based on accepting mere government proffers regarding litigation strategies. And the government fails to address affidavits and other documentary evidence supporting the motion for new trial. See R14:1636.

The government focuses singularly on the misconduct premise of the new trial motionCthe government=s failure to acknowledge in this case, while forthrightly admitting in Ramirez, the existence of pervasive community prejudice relevant to the decision whether or not to grant a change of venue. But by addressing only the misconduct component of the claim, the government fails to speak to the undisputed facts underlying the government=s venue-change position in Ramirez: the government=s knowledge of overwhelming evidence that present-day MiamiCwhich has seen four decades of massive waves of Cuban exiles who established social, economic, political, and media influence proportionate with their status as the city=s

overwhelming-majority ethnic group, and the predominant group in the surrounding countyCis pervasively influenced by the prevailing Cuban-exile view of the Cuban government and its agents as dire enemies, such that virulent opposition is expected, if not demanded, on issues relating directly to Cuban governmental actions.[7]

The motion for new trial was based, in part, on the fact of the community prejudice, and not merelyCas the government arguesCon the government=s misconduct in disputing the existence of the prejudice while contemporaneously taking a contrary factual position in other litigation.[8]

Further, the misconduct demonstrated in the new trial claim is based not merely on A[t]he government's actions in Ramirez,@ Gov=t-Br:60, which revealed the government knew of prejudicial attitudes deeply pervading the Miami venue, yet chose to make contrary representations hereCin the one case where the community=s hostility to the Cuban regime could be focused on criminal defendantsCbut also on

---

[7] Community anger over the Elian Gonzalez matter was largely attributable to the non-exile community=s failure to fully support the predominant exile viewpoint, due to competing values concerning father-son relationships. See Affidavit of Dr. Lisandro Perez, R14:1636:App. Ex.5 &28.

[8] Similarly, the government=s argument regarding defendants= claims under the judicial estoppel doctrine, Gov=t-Br:61, fails to recognize applicability of that doctrine not just to review of new trial issues, but also to this Court=s direct review of denial of a change of venue. Defendants contend the government should not be permitted to defend the venue order on the concededly-false premise of no pervasive anti-Cuba prejudice in Miami, when the government admitted such prejudice in Ramirez. See Campa Brief (No. 01-17176) at 15.

record evidence that the government sought, by way of argument and evidence at trial, to take unfair advantage of the prejudice. It is these combined grounds of newly-discovered evidence and misconduct that warranted, in the interest of justice, a new trial and, at a minimum, an evidentiary hearing.

2. Asserted distinctions in the Ramirez case.

The government=s sole response to the new trial argument is that this Court should ignore the government=s duplicity in contradictory litigation postures and representations as to the effect of prevailing community prejudice, for one reason:

> The two cases have different parties and subject matter. The Ramirez case was about INS= role in the Elian Gonzalez matter, whereas this case was about agents of the GoC operating unlawfully in the U.S. and conspiring to commit espionage and murder. Appellants seek to tie them, and the government=s actions in them, as being about ACuba@ and Miami Cuban exile attitudes generally, but such a broad generalizing approach has no legal or factual basis, and does not constitute newly discovered evidence.

Gov=t Br 60-61 (footnote omitted).

Notwithstanding the claim of distinctions in parties and subject-matter, the only meaningful difference between the prejudice concerns in both cases is the government=s standing on both sides of the issue in order to unfairly influence the result to the defendants= prejudice. Any difference in parties or subject matter so plainly weighs more heavily toward a conclusion of greater prejudice to the actual, admitted Cuban agents, charged, inter alia, with attacking and disrupting the Cuban-

exile community and murdering Cuban exiles who were seen by the community as trying rescue refugees from the Cuban regime, that the government=s ipse dixit Adifferent parties and subject matter@ comment warrants little discussion.

ADifferent parties.@ Clearly, the United States was a party in both cases, as plaintiff in the instant case and as defendantCin the person of the U.S. Attorney GeneralCin Ramirez. Thus, the only difference in parties was that the plaintiff in Ramirez was a Mexican-American employee of the U.S. Immigration and Naturalization Service, while the defendants in the instant case were covert agents of the Cuban intelligence service. Without even considering that the defendants admitted responsibility was to monitor certain Miami Cuban exilesCand that they were alleged to have taken secret actions to undermine that community, spy on its members, and, in the central allegation of the indictment, murder members of a Miami organization dedicated to rescuing would-be Cuban exiles seeking freedom from CubaCto any rational observer, this distinction in the parties= risk of having to overcome prejudice against the Cuban regime would tend to favor a finding of prejudice against the criminal defendants. There were no Cubans or Cuban exiles in the Ramirez case. And the government does not offer a rational explanation of how the Miami community would be more prejudiced against the U.S. Attorney General than Cuban secret agents allegedly sent to investigate, report on, and murder elements of the Miami community.

ADifferent subject matter.@ The government argues that A[t]he Ramirez case was about INS=s role in the Elian Gonzalez matter.@ Gov=t-Br:61. That, however, is not accurate. Ramirez was an employment discrimination case that arose in a community rent by the emotions of the Elian case; it was not about INS=s Elian role. The only tangential relation of the Elian matter was that Ramirez believed some disparate treatment he allegedly received from non-Hispanic fellow INS employees related to hostility to Hispanics as manifested during the Elian controversy.

The government contrasts that situation by describing the instant case as being Aabout agents of the GoC [Cuba] operating unlawfully in the U.S. and conspiring to commit espionage and murder.@ Gov=t-Br:61. The government implicitly argues the instant case was not about Elian-related issues and that such a distinction meant actual agents of the Castro regime charged with subverting and murdering Miami Cuban exiles would face less prejudice than the employer of INS agents who expressed mild annoyance with resistance to lawful government authority during the Elian case.

The government seeks to distinguish the Elian case from Miami=s attitude toward the Castro regime, to make Elian a bigger issue than Castro himself, rather than simply one manifestation of community hatred of the Castro regime. The unsoundness of the government=s position is seen by peeling off even a single layer of the Elian case, to see that to the Cuban-exile community, Elian was a would-be Cuban exile, rescued and brought to Florida, yet repatriated to Cuba due to perceived

manipulation of local events by the Castro regime. Those concepts had everything to do with the charges in the instant case, and was particularly and violently linked to Count 3, which the government tried to characterize as Cuba=s murdering of humanitarians, Brothers to the Rescue, who had sought nothing more than to help Cuban rafters such as ElianCand his mother who tragically drowned before the rescueCescape the tyranny and repression of Cuba. The government alleged here not the passive failure to resist CastroCas was the concern with the INSCbut the active murdering and other acts of subversion of the very Cuban-exile community that viewed itself as trying to save children such as Elian from the Castro regime. See, e.g., R2:224:4 (count 1 of indictment, charging defendants= object as Ainfiltrating, informing on and manipulating anti-Castro political groups in Miami-Dade County@).

The Elian controversy itself was about the cause of refugee-rescuers, such as Brothers to the Rescue, as well as the right of civil disobedience in order to promote that goal. The Ramirez litigation barely touched on community anger regarding the U.S. government=s failure to join with exiles in denying Cuba the return of the boy. But another rescued boy was at issue in this case. Pablo Morales, rescued by Brothers to the Rescue in 1992, see R56:5659, was one of the BTTR pilots shot down by Cuba, one of the alleged murder victims in Count 3.

As displeasing as the return of Elian to his father was to some elements in the Miami community, that unhappiness did not compare to the unified community horror

toward the BTTR shootdown. See Affidavit of Dr. Lisandro Perez, R14:1636:Ex.5 &28. The community view, expressed in a prior district court order was that A[t]he victims [of the shootdown] were Brothers to the Rescue pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys.@ Alejandre v. Cuba, 996 F.Supp. 1239, 1242 (S.D. Fla. 1997).

Other differences concerning the subject matter of the two casesCRamirez and the instant caseCfail to justify the government=s diametrically-opposite factual representations concerning pervasive attitudes in Miami. While the community was basically split 50-50 on the Elian issue, the community was united 100% against Cuba on the Brothers to the Rescue issue. See R14:1636:Ex.5 &28. The penalties faced by the defendants in this case, life sentences, made the significance of the need for change of venue all the more important, as compared with mere employment discrimination damages at stake in Ramirez. The district court did not substantively distinguish the core Aprejudice@ issues in Ramirez and here, but to suggest, whatever the differences, that the prejudice was less significant in a claim of murder of exiles is unfounded.

The government characterizes the defense argument on appeal of the denial of the motion for new trial as a Abroad generalizing approach,@ Gov=t-Br:61, but it was not; rather the argument defendants raised is a narrow and focused contention, that the

very same condition of prejudice existed in both trials, but the government took stridently-opposed positions in the two cases; whatever context distinctions exist between the two cases are legally irrelevant to the government=s misconduct and the significance of the pervasive prejudice evidence.

3. Government=s trial strategy.

The government brazenly accuses appellants of a Afabrication@ in arguing that the thrust of the government=s trial strategy was to present the defendants as Castro agents working against the Cuban-exile community in South Florida. Gov=t-Br:76. Appellants argued that the government effectively presented its case at trial as Aour community@ versus Aagents of the tyrant Castro.@ Joint Appellants= Brief (No. 03-11087) at 20.[9]

The government=s excessive protestations notwithstanding, appellants= argument is correct. Although it was witness Jose Basulto who used the term Atyrant@ to describe Castro, R84:9391 (after he attacked defense counsel as a tool of the Castro government, a separate issue due to the district court=s denial of defendants= motion for mistrial), the government itself went down the same road, referring to Castro=s government as a Arepressive regime@ that Adoesn=t believe in any [human] rights,@ R124:14519, employs the Adeath penalty@ for minor offenses,

[9] The passage the government challenges comes not from appellants= statement-of-facts on the direct appealCas the government wrongly impliesCbut from

R73:7807, and uses a Agoon squad@ to torture its critics, R124:14495, such that the jury could A[t]hank God we don=t have Cuba=s rules,@ R124:14475. The government did Aeffectively@ present its case as Aour community@ versus agents of the so-called-tyrant, Castro.

The government employed an us-against-them, nationalistic, anti-Cuba theme at trial. When the prosecutor told the jury that Cuba had a Ahuge@ stake in the outcome of this case, R124:14532, he made it clear the jurors would be abandoning their community if they let the Cuban Aspies@ who came to this country Ato destroy the United States,@ R124:14481, go unpunished. That appeal, in MiamiCwhere the Cuban exile ethos has been etched deeply into the flesh and fabric of the societyCwas a call to arms that could not go unheeded.

Subsequent to the filing of defendants= initial briefs, the government further confirmed its us-versus-them approach to prosecuting the events of this case. To pursue an extraterritorial murder prosecution under 18 U.S.C. ' 2332, the U.S. Attorney General must certify the purpose of the killing was to Acoerce, intimidate, or retaliate against a government or a civilian population.@ Id. (emphasis added). In compliance with this provision, the government included in its new BTTR murder indictment, against Cuban military officers, United States v. Martinez Puente, et al.,

---

the argument section of the new trial brief.

No. 03-20685-Cr-SEITZ (S.D. Fla.), the following allegation:

> It was the object of the conspiracy, known as AOperation Escorpion,@ to support and implement a plan to kill a U.S. national, utilizing information which included Cuban spy sources from within the Southern District of Florida, the goal of which was to terrorize, intimidate and retaliate against the Cuban exile community as well as to intimidate the Cuban populace, through a violent confrontation with aircraft operated by BTTR, with decisive and fatal results.

Docket Entry 1 at 5 (emphasis added). The new indictment specifies not only that the object of the murder conspiracy was **Ato terrorize, intimidate, and retaliate against the Cuban exile community,@** but also that the placement of Aspies in BTTR@ was part of the overall conspiracy incorporated into the murder counts. Id.

In characterizing the BTTR shootdown as an attempt to terrorize the Miami Cuban-exile community, the government reveals expressly what its trial strategy revealed implicitly, but persistently. Focusing on the mini-war mentality of the majority Cuban-exile population in the venue, the government took advantage at trial of pervasive prejudice in the community on an issue of core concern to the Adistinct civilian population,@ in the language of ' 2332.

4. Denial of an evidentiary or other hearing.

The government fails to address the significant effect of the polling and sociological and academic evidence in the motion for new trial and the importance of defendants= right to a hearing to elucidate its significance and its connection to the government=s concession in Ramirez. The government ignores substantial evidence

appended to the motion for new trial showing unfair mishandling of the defense sociological expert=s work in statistically establishing community prejudice, evidence the government used outdated affidavits to attack and as to which the district court failed to disclose a prior history in dealing with the expert. The government also fails to address its pattern of contradictory representations in this case, including representations made in its petition for writ of prohibition concerning jury instructions that it now seeks to evade. See Gov=t-Br:46-47.

Given the thinness of the government=s Adifferent parties and subject matter@ argument, the clear trial strategy of playing to the very community prejudices it later acknowledged, and its subsequent admission of a litigation theory that the defendants were sent to Miami to terrorize the civilian population, the district court erred in failing to conduct an evidentiary hearing to determine whether innocent explanations satisfactorily explain the government=s making of diametrically-opposite factual representations regarding venue.

III.

BATSON ERROR.

Citing United States v. Allen-Brown, 243 F.3d 1293 (11th Cir. 2001), the government argues Aappellants made no prima facie showing before the district court that the government had exercised peremptory challenges on the basis of race.@ Gov=t-Br:61. Establishing a prima facie case is a precondition to further inquiry into the motivation behind the challenged strike. Id. By ordering the government to give racially-neutral reasons for exercising each of five strikes, the trial court believed that a prima facie case was established.

The reasons proffered by the government, however, leave too much to be desired to re-shift the burden to the defendant. From being unhappy with jurors for having their hands folded, R28:1506, to being a normally prosecution-desired corrections officer, R28:1500, to a simple laugh, R28:1511, but for their skin color, all should have remained on the jury. The trial court, despite five separate individual challenges during jury selection, erroneously found the proffered excuses by the racially-neutral. R28:1499-1500,1501,1503,1508,1512.[10]

Citing United States v. Steele, 178 F.3d 1230, 1235 (11th Cir. 1999), the government argues that the presence of some members of the protected class on the jury supports a finding of a non-discriminatory purpose. As this court observed in United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986), Athe striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and when valid reasons for the striking of some black jurors are shown.@ Therefore, the mere presence of blacks on the jury does not preclude a

[10] The government=s notes: AAppellants incorrectly claim that an additional black venire person, Barahona, was struck.@ Gov=t-Br:62 n.45. Although the government objected at trial to the defense contention that Barahona was black, see R28:1502, the district court did not resolve the objection.

finding of racial discrimination. Eagle v. Linahan, 279 F.3d 926, 942 (11th Cir. 2001); Cochran v. Herring, 43 F.3d 1404, 1412 (11th Cir. 1995).

Both criminal defendants and the excluded jurors alike are denied equal protection when the trial jury is constructed in a racially-discriminatory manner. Eagle v. Linahan, 279 F.3d at 943. An unconstitutionally-selected panel, no matter its ultimate composition, cannot be considered fair. The government brief=s self-serving Appendix 5-B is not only an improper extra-record list of prosecutorial opinions, it is irrelevant to this court=s determination whether the jury selection process denied the defendant equal protection. The government=s appendixCa chart of supposed political correctnessCdoes not alter the record, nor should the government=s perception of the ultimate composition of the jury direct the Court from the improper process utilized to select the jury here.

IV.

ERRONEOUS CONSECUTIVE SENTENCING

Defendant Gonzalez was convicted of two violations of federal criminal law. While the probation officer stated, in the presentence investigation report (PSI) that there are no applicable guidelines for defendant=s counts of conviction (PSI &&65-

67), the sentencing guidelines and the Sentencing Reform Act of 1984 should not have gone by the wayside. Although the PSI correctly sets forth, at &105, the statutory maximum sentences, it remains defendant=s position that under ' 5G1.2, the sentencing court should have run the sentences concurrently.

The government concedes there was an applicable guideline for at least one of the two objects of the ' 371 conspiracy (Count 1). Gov=t-Br:76-77. The government=s reliance on U.S.S.G. ' 2X5.1 therefore is misplaced because it suggests that ' 2X5.1=s application should be glossed over. Seemingly ignored by the government is the background commentary to that section, stating that though there may not be an expressly-promulgated guideline for all of the offense of conviction in Count 1, the Court should use the most analogous guideline. U.S.S.G. ' 2X5.1, comment. (backg=d). The government cites unsupported assertions of the probation officer, to the effect that reliance on the sentencing guidelines for one of the objects of the conspiracy count would be Aunduly cumbersome@ and urges this Court to find the same. Gov=t-Br:77 n.56. This Court should reject the invitation. Since November 1, 1987, courts throughout the U.S. have followed their sworn duty to apply these guidelines, whether they believe them to be correct or Aunduly cumbersome.@

The stated objective of the Sentencing Commission is to Aprovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing

disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted ... .@ 28 U.S.C. ' 991(b)(1)(B). Inherent in the Commission=s mission is a certain amount of tension between the goal of ameliorating sentencing disparities, which necessarily requires restricting a sentencing court=s discretion, and the necessity of preserving a sentencing court=s discretion to fashion an appropriate sentence in unusual cases. See United States v. Cherry, 10 F.3d 1003,1012 (3d Cir. 1993).

Absent a directly applicable guideline, the sentence is determined by analogy to criminal behavior. The sentence that is ultimately imposed should relate to sentences prescribed by the guidelines applicable to similar offenses and offenders. United States v. Hyde, 977 F.2d 1436 (11th Cir. 1992).

The government suggests it is Aunduly cumbersome@ to avoid application of the most analogous guideline that '2X5.1 directs be utilized. At sentencing, the district court avoided finding any analogous crime. As outlined at sentencing and in objections to the PSI, the sentencing court ignored that one of the two objects within Count 1 (the 18 U.S.C. ' 371 count) did, in fact, have an applicable guideline assigned to it. The sentencing guidelines provide in U.S.S.G. ' 2C1.7 an applicable guideline for a conviction for conspiracy to defraud by interference with governmental

functions as charged here. Under ' 2C1.7, the base offense level would be 10 with a maximum potential 8-level enhancement.

With a base offense level of 10 and a criminal history category I, the guideline range should have been 6-12 months. Even assuming applicability of the eight-level increase, the guidelines would have been 27-33, a far cry from the 60-month consecutive sentence imposed for Count 1. Therefore, the sentence imposed amounted to an upward departure.

Further, ' 2X5.1 instructs that if there is not a sufficiently analogous guideline, then and only then should 18 U.S.C. ' 3553(b) control. The district court avoided the Aquest to find the most analogous crime,@ although one was readily applicable. Hyde, 977 F.2d at 1439. The district court=s sentencing decisionCabsent any determination that an upward departure was warrantedCimproperly employed consecutive sentences. The sentence should be vacated and the matter remanded for a new sentencing hearing.[11]

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Court vacate his

[11] The defendant relies on his initial brief as to insufficiency of the evidence as to the Count 1 conspiracy charge and the district court=s error in denying the motion for mistrial following witness Basulto=s mid-trial attack on the patriotism of defense counsel, accusing counsel, in front of the jury, of acting as a front for the Castro government.

convictions or alternatively, remand for a new trial and/or sentencing hearing.

Respectfully submitted,

PHILIP R. HOROWITZ, ESQUIRE
Attorney for the Appellant GONZALEZ

By: PHILIP R. HOROWITZ, ESQUIRE

CERTIFICATE OF COMPLIANCE

The Appellant certifies that 14 point New Roman font is used in this reply brief and pursuant to Fed. R. App. P. 32 (a)(7)(C) this brief contains 6,996 words.

PHILIP R. HOROWITZ, ESQUIRE