IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 03-11087-B

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

GERARDO HERNANDEZ, et al.
Defendants/appellants.

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

BRIEF OF APPELLANTS GERARDO HERNANDEZ, ANTONIO GUERRERO, LUIS MEDINA, and RENE GONZALEZ

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Gerardo Hernandez, et al.
Case No. 03-11087-B

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

Jack Blumenfeld	Former counsel for Guerrero
David M. Buckner	Assistant United States Attorney
Ruben Campa	Defendant
Orlando do Campo	Assistant Federal Public Defender
Hon. Robert L. Dubé	United States Magistrate Judge
Rene Gonzalez	Defendant
Antonio Guerrero	Defendant
Gerardo Hernandez	Defendant
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Hon. Joan A. Lenard	United States District Judge
Guy A. Lewis	Former United States Attorney
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Joaquin Mendez	Assistant Federal Public Defender
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STATEMENT REGARDING ORAL ARGUMENT

The appellants respectfully submit that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

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STATEMENT ADOPTING BRIEF OF CO-APPELLANT

Appellants Gerardo Hernandez, Luis Medina, Antonio Guerrero, and Rene Gonzalez, pursuant to Fed. R. App. P. 28(i), hereby adopt the appellate brief filed in the instant appeal by co-appellant Ruben Campa, including the statement of the issue, statement of the case, standard of review, summary of the argument, argument and citations of authorities, and any reply argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231. The court of appeals has jurisdiction over this appeal under 28 U.S.C. § 1291. The appeal was timely filed on February 26, 2003, from the final order of the district court denying defendants' motion for new trial based on newly-discovered evidence, entered on February 11, 2003, that disposes of all claims between the parties to this cause.

STATEMENT OF THE ISSUE

Whether the district court erred in summarily denying the defendants' motion for new trial based on newly-discovered evidence, where the district court: (1) failed to conduct an evidentiary hearing before reaching factual conclusions regarding whether the new evidence showed prosecutorial misconduct or otherwise warranted a new trial; (2) misconstrued Fed. R. Crim. P. 33 in failing to consider the interests of justice, evidentiary submissions in the motion for new trial, and surrounding evidence relevant to determination of the motion; and (3) failed to take into account the record as a whole, which established a series of improper prosecutorial actions designed to take advantage of community prejudice.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the District Court

The defendants, Gerardo Hernandez, Luis Medina, Antonio Guerrero, Ruben Campa, and Rene Gonzalez, were charged in a multi-count indictment alleging: in Count 1, that all of the defendants conspired, in violation of 18 U.S.C. § 371, to defraud the United States and to act as foreign agents without proper notification as required under 18 U.S.C. §73.01, et seq.; in Count 2, that Hernandez, Medina, and Guerrero conspired to transmit national defense information to Cuba, in violation of 18 U.S.C. § 794; in Count 3, that Hernandez conspired with the Cuban government to murder four members of the Miami-based Cuban exile organization, "Brothers to the Rescue," in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 1117; in Counts 4 and 6 (Hernandez), Count 7 (Campa), and Counts 9 and 11 (Medina), that Hernandez, Medina, and Campa possessed false passports, in violation of 18 U.S.C. § 1546; in Count 10, that Medina made a false statement in a passport application, in violation of 18 U.S.C. § 1542; in Count 5 (Hernandez), Count 8 (Campa), and Count 12 (Medina), that Hernandez, Medina, and Campa possessed false identification documents, in violation of 18 U.S.C. § 1028; in Counts 13, 19, and 22-24 (Hernandez), Counts 14, 25, and 26 (Medina), Count 15 (Hernandez and Gonzalez), Count 16

(Hernandez, Medina, Guerrero, and Campa), and Count 17 (Campa), that the defendants acted and aided and abetted others in acting as foreign agents without notification to the Attorney General as required under 18 U.S.C. § 73.01, et seq.

Following denial of their motions for change of venue and for reconsideration of their venue and intra-district transfer requests, DE586; DE723, the defendants proceeded to a jury trial which began November 27, 2000 and concluded on June 8, 2001 with verdicts of guilty on all counts. DE1291; DE1293; DE1295; DE1297; DE1299. During the course of trial, the defendants renewed their venue change motions, by way of motions for mistrial, DE1527:7130; DE1540:8949; these motions were denied, as were the defendants' post-trial motions for new trial based on denial of a change of venue. DE1579:13894-95; DE1392.

Sentencing hearings were conducted in December 2001, with Hernandez, Medina and Guerrero receiving life sentences; Campa received a sentence of 19 years, and Gonzalez received a 15-year sentence. DE1430; DE1435; DE1437; DE1439; DE1445. The defendants are incarcerated.

On November 13, 2002, Guerrero filed a motion for new trial, pursuant to Fed. R. Crim. P. 33, based on newly-discovered evidence pertinent to the denial of the defendants' motions for change of venue and the defendants' motions for

mistrial based on denial of a change of venue. DE1635. Guerrero also filed an appendix of submissions in support of the motion. DE1636. The district court thereafter granted motions by Hernandez, DE1644, Medina, 1650, Campa, DE1638, and Gonzalez, DE1651, to join in the motion for new trial. Amicus curiae briefs in support of the motion for new trial were submitted by the National Jury Project and the National Lawyers Guild. DE1641; DE1654. On February 10, 2003, the district court entered an order denying the motion for new trial and denying the defendants' request for an evidentiary hearing as to the motion. DE1678.

Statement of Facts

> The instant appeal is from the denial of the defendants' motion for new trial based on newly-discovered evidence. The facts relevant to this issue are: (1) evidence showing that a trial in Miami of these five admitted Cuban agents on charges of espionage and murder conspiracy – and related overt acts and charges concerning the defendants' infiltration of Miami Cuban exile organizations in order to expose illegal anti-Castro activities and terrorism against Cuba – was directed to such a politically-charged core concern of the predominant Cuban exile community in Miami that the impediments

to jury impartiality were unresolvable absent a change of venue or intra-district transfer away from Miami;

(2) record evidence, during the trial, of: prosecutorial arguments, witness outbursts, intimidating and prejudicial occurrences outside the courtroom, the nature of the defenses and defense witnesses presented, and the types of evidence and submissions offered by the government, all of which heightened the unfairness of trying the defendants in Miami; and

(3) newly-discovered evidence of: (a) prosecutorial misconduct in unfairly making representations diametrically opposite to those the government made in civil proceedings as to the amenability of Miami to impartiality on issues of core concern to the Cuban exile community, i.e., issues such as the murder of anti-Castro activists by the Cuban government as well as espionage and infiltration of Cuban exile organizations by the Cuban government; and (b) facts relevant to the mishandling of expert survey evidence establishing overwhelming community prejudice against the defendants.

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

The evidence and record in this case show pervasive anti-Cuban-government prejudice in Miami, unmatched in any other community in the world. The district court, in an order denying motions for judgment of acquittal and for new trial, expressly acknowledged its awareness "of the impassioned Cuban exile community residing in this venue." DE1392:10. Perhaps the best description of the Cuban exile influence with respect to local attitudes on the issue of Fidel Castro and the Cuban government was provided as part of the motion for new trial based on newly-discovered evidence by one of the leading experts on the Cuban exile community in Miami, Dr. Lisandro Perez, whose affidavit stated:

DECLARATION BY LISANDRO PÉREZ

1. I am a Professor of Sociology and Anthropology and Director of the Cuban Research Institute at Florida International University, Miami's senior institution of public higher education.

2. I have lived in Miami for 27 years, first from 1960 to 1970, immediately after arriving from Cuba, and then from 1985 to the present. Most of my work during the past 15 years has involved applying my knowledge of Cuba and Cuban Americans to an understanding of the dynamics of this community. My entire academic career has been devoted almost exclusively to the study of Cuban society, Cuban migration, and the development of Cuban communities in the U.S., especially Miami. My first research project was my M.A. thesis, which focused on Cuban demographics, and was completed at the University of Florida in 1972. I received my Ph.D. in Sociology from that institution in 1974.

3. Since then, I have published numerous articles, chapters, edited books and other writings on Cuba and on Cuban Americans. I am co-author of a forthcoming (November 2002) book to be published by Allyn & Bacon entitled: The Legacy of Exile: Cubans in the United States. I am the Editor-in-Chief of a comprehensive encyclopedia on Cuba to be published by Macmillan Reference, and I have served since 1999 as the Editor of Cuban Studies, the oldest and most prestigious academic journal in the field. . . .

4. . . . I do not have a position on the guilt or innocence of the appellants.

5. Prior to . . . October of 2002, I had no involvement in this case. My knowledge of it was limited to newspaper and other media accounts. Since [then] I have also read transcript references provided to me of the selection process of the jury that originally convicted the appellants and of the questioning of prospective jurors. I used those references along with the leading sources on the dynamics of Miami

and the Cuban American community, most of which are listed at the end of the statement.

6. Let me state at the outset my conclusion, which I will develop and substantiate in the rest of this statement: **the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero**. I would reach that conclusion even if the jury were composed entirely of non-Cubans, as it was in this case.

7. To understand this conclusion, it is important to keep in mind that the usual approaches for determining and countering the influence of community bias on the process of jury selection are of limited applicability in this case. In determining bias, extensive pre-trial media coverage unfavorable to defendants is usually the most common indicator and represents the foremost argument for changing the venue.

8. In this case, pre-trial media coverage is an insufficient indicator of the depth of the community's pre-trial bias against the defendants. And selecting a non-Cuban jury does not counter that bias. . . .

9. First, it is important to keep in mind that persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in Miami-Dade County. According to the 2000 U.S. Census of Population and Housing, in the county there are more persons of Cuban birth or descent (650,600) than there are white non-Hispanics (465,770), more than African-Americans (427,140), and more than all the other Hispanic nationality groups combined (641,130). Two [of] every seven people in Greater Miami is a Cuban. It is not just one more immigrant group in the city's race/ethnic mosaic. It is the largest group, period, among immigrants or nonimmigrants alike.

10. It was therefore to be expected that more than twenty

percent of the jury pool be of Cuban birth or descent. Nor is it surprising that several non-Cubans in that pool had some personal ties with Cubans somehow involved in the case. In purely demographic terms, therefore, the Cuban presence in Miami-Dade is sizable and pervasive.

11. The importance of that presence, however, is based on much more than just demographics. **In social, political, and economic terms Cubans exert an influence in Miami-Dade County that extends well beyond the Cuban community itself.** Those who arrived from Cuba in the 1960s established the bases of that community. They were disproportionately drawn from the upper sectors of Cuban society. Many were professionals or entrepreneurs and had university degrees. A significant proportion had previous business experience, and more than a few had contacts with U.S. companies that had done business with Cuba before the revolution. Furthermore, their migration was facilitated by the U.S. government, which gave them entry as refugees and provided them with economic assistance.

12. Those earlier and privileged exiles eventually established in Miami what is regarded as the foremost example in the United States of a true ethnic enclave. An ethnic enclave is a strong ethnic community that is organized around a highly differentiated range of enterprises and institutions, which serve, and profit from, the community. At the core of the enclave is entrepreneurship. Already by the 1990s, 42 percent of all enterprises in Miami-Dade County were Hispanic-owned, and three-quarters of those were Cuban-owned, generating far more revenue than Hispanic-owned businesses elsewhere in the U.S. The range of that entrepreneurship is impressive. The variety of sales and services controlled by Cubans, as well as their penetration into the professions, is so extensive that it is argued that it is possible for Miami Cubans to live entirely within their

own community. One of the economic benefits of the enclave is the multiplication of social networks. The dense social networks of Cuban Miami provide a tremendous asset by which members of the community can advance their agenda of upward mobility for themselves and, especially, for their children. The enclave has provided the springboard, through experience and education, for the entry of many Cubans into the upper-management ranks of the largest institutions and organizations in Miami-Dade County, both private and public.

13. **The economic clout of Cubans in Miami has been matched by their political influence.** Few U.S. immigrant groups have attained electoral representation and political empowerment as rapidly as Cubans in Miami. During the 1980s Cubans in Miami established pivotal local power, exercised through the increasing number of elected officials and such organizations as the Cuban American National Foundation, the Latin Builders Association, the Hispanic Builders Association, and the Latin Chamber of Commerce. The size of the Cuban community in Greater Miami and its fairly high turnout rates during elections produced a boom in the number of Cubans in elected positions at all levels of government. By the late 1980s, the City of Miami had a Cuban-born mayor, and the city manager and the county manager were both Cubans. Cubans controlled the City Commission and constituted more than one-third of the Miami-Dade delegation to the State legislature. Ileana Ros-Lehtinen, a Cuban, won election to the U.S. House of Representatives in 1989. By the 1990s Cuban-Americans were mayors of the incorporated areas of Miami, Hialeah, Sweetwater, West Miami, and Hialeah Gardens, all within Miami-Dade. Cubans comprise a majority in the commissions or councils of those cities. When the 1990s began there were already ten Cubans in the Florida Legislature, seven in the House and three in the Senate. Ros-Lehtinen was joined

by another Cuban, Lincoln Diaz-Balart, in the U.S. Congress during the 1992 election cycle. By the beginning of the twenty-first century, six of the thirteen Miami-Dade County commissioners are Cuban, as is the mayor, Alex Penelas. Cubans head the two largest institutions of higher education in the county. Nowhere else in America, nor even in American history, have first generation immigrants so quickly, or so thoroughly, appropriated political power.

14. **The pervasiveness of the Cubans' political and economic influence means that their priorities and agenda also take center stage in Miami.** Cubans and their culture set the pace. David Rieff, a New Yorker who has written on Miami, has noted that Cubans have largely succeeded in taking "atmospheric control" of the city (Going to Miami, 1987, p. 143).

15. It was inevitable that Cubans would inject into the atmosphere of Miami their most overriding concern: the ongoing struggle for the recovery of their homeland. **An identity as exiles is a central theme of the ethos of Cuban Americans, contributing to a particularly "Cuban" way of looking at the social and political environment.** This vision is the **"exile ideology"** and it has three principal characteristics: 1) the primacy of the homeland; 2) **uncompromising hostility** towards the Cuban government; and 3) a **passionate attachment** to their ideology and intolerance to contrary views.

16. In the exile ideology, the desire to recover the homeland is the focus of political discourse and the source of mobilization in the Cuban American community. During the past forty years there has been a protracted continuation of the intense conflict that occurred in the early 1960s, when the Cuban government was entrenching itself against the serious attempts by the U.S. government and some sectors of Cuban

society to overthrow it. For many Cubans who "lost" that conflict and went into exile, the struggle has not ended, and they have tried, with amazing success, to keep the conflict alive.

17. The goal of the Cuban exile is the overthrow of Fidel Castro, and this is to be accomplished through hostility and isolation. Energizing that struggle is the highly emotional nature of the exile ideology.

18. The least favorable side of emotionalism and irrationality is **intolerance to views that do not conform to the predominant "exile" ideology of an uncompromising hostility towards the Cuban government**. Those inside or outside the community who voice views that are favorable or even "soft" or conciliatory with respect to Castro are usually subject to criticism and scorn, their position belittled and their motives questioned. Any dissent in Miami is especially difficult. The Cubans' pervasive influence in Miami means that **great pressures can be brought to bear on the dissenting individual or group**. Such pressures can be economic, political, or social, but they have also involved the threat of violence. There is a **long history of threats, bomb scares, actual bombings, and even murders directed at persons who have dissented from the predominant anti-Castro positions** or have demonstrated a perceived "softness" toward the regime.

. . .

19. Many Cubans and non-Cubans who have dissented from the hardline stance of hostility to the Cuban government have felt such pressures. Even institutions outside of the Cuban community are wary of ... making statements or holding activities (such as inviting artists from Cuba) that would evoke the displeasure of the leadership of Cuban American leaders.

Even the MIAMI HERALD, the only daily English-language newspaper, started moving, both editorially and in its coverage, in the direction of courting the support of the Cuban community. Despite its liberal tradition, the HERALD is now one of the very few of the major newspapers in the U.S. that favors a hardline policy towards Cuba, including the embargo on the island. This is highly significant, for it means that **the exile agenda and discourse has found resonance and support in the principal print media of non-Cubans in Miami, serving to spread the exile message outside the community**.

20. By the 1990s it appeared that perhaps the stridency, militancy, and intolerance among Cuban Americans might be waning with the passage of time. But **two events served to reenergize the traditional exile ideology and create a climate in Miami that is of special relevance to the venue issue in this case**.

21. One of those events, on February 24, 1996, was the **downing by Cuban military jets of two civilian aircraft** piloted by Cuban Americans. It was an event that caused outrage in both the community and the local press and rekindled the strident anti-Castro sentiment and discourse in Miami. The reaction to the incident was uniform throughout Miami as both Cubans and non-Cubans stood united in their outrage and condemnation of the Cuban government. The prosecutors tied this important event to this case.

22. The other event started on Thanksgiving Day, 1999, when a six-year-old boy, **Elián Gonzalez**, was found floating on an inner tube off the coast of Florida, and ended with the return of the boy to his father less than a year before this trial opened.

23. The Elián affair energized most of the Cuban American

community, even younger generations who had not been previously active in the exile agenda. From the beginning of the Elián saga, the predominant voices among Cuban Americans defined the situation as a battle with Fidel Castro over a trophy, a trophy they were determined not to lose. During forty years Fidel Castro may have triumphed over the exiles by retaining power in Cuba, but he was not, the exiles vowed, going to win this battle. The child was in their hands, in their city, a city where they had triumphed, a city they controlled. Even at the federal level, there was reason to be confident: the U.S. government had always proved willing to accommodate the exiles' agenda of combating Fidel Castro.

24. The 1996 shoot-down and the Elián saga served to reassure many Cubans, and remind many non-Cubans, that the exile ideology, complete with its emotionalism, irrationality, and intolerance, was still alive in Miami.

25. After having laid out the context and climate to the process of jury selection in this case, I will restate my two basic points, now evident: 1) in this case, pre-trial media coverage is an insufficient indicator of the depth of the community's pre-trial bias against the defendants; 2) selecting a non-Cuban jury does not counter that bias.

26. It is evident from the foregoing discussion that an **overwhelming community bias against defendants who acknowledged being agents of the Cuban government is something that runs much deeper in Miami than unfavorable pre-trial publicity**. Any evidence presented of such publicity would only be the tip of the iceberg. Miami has lived with anti-Castroism for forty years; it is part of the "atmosphere" that Cuban Americans have created in the city. . . .

27. . . . The exiles' anti-Castro agenda is at the forefront of the political discourse in Miami. Even the most important English-language daily newspaper resonates with it. The style of that agenda is

passionate and intolerant. If non-Cubans did not know that before the Elián case, they learned it then. Non-Cubans may publicly express such strong anti-Castro views because they sincerely hold them as a result of their local political climate, or because they may feel intimidated or pressured into voicing such views. They may also feel compelled to remain silent.

28. It is undoubtedly the case that all those in Miami who disagree with the predominant exile views, Cubans or non-Cubans, do not feel compelled to publicly remain silent or conform. Indeed, some did express dissenting views on the fate of Elián and many more have expressed dissenting views on current U.S. policy. But this case is not about the appropriate U.S. policy towards Cuba. It is not even about the custody of a child. This case is about people accused by the U.S. government of spying for Fidel Castro and of helping to perpetrate a violent act that resulted in deaths and was widely condemned in the community. The 1996 shootdown was uniformly repudiated in Miami. If Cubans and non-Cubans in Miami have felt uncomfortable dissenting even in the Elián case, we can be sure that **dissenting in this case approaches a taboo, a position that no one would want to take, or even appear to take**.

29. Given the sociological forces unique to Miami-Dade, described above, I repeat my conclusion here: the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero.

DE1636:Ex.5 (emphasis added).

A prominent, and ardently anti-Castro, Miami Cuban exile attorney, Victor Diaz, explained the ferocity of the antipathy to persons such as the defendants:

> The reason that the issues related to Cuba are the hot-button issues in this town is that we can't escape the fact that in this town there are 700,000 Cuban Americans. There are 10,000 people in this town who had a relative murdered by Fidel Castro. There are 50,000 people in this town who've had a relative tortured by Fidel Castro. There are thousands of political prisoners in this town. For these people and for the 500,000 Cuban Americans who are old enough to remember having to leave their homeland, the **issues related to Fidel Castro are not a historical footnote; they are living, breathing wounds**.

DE1636:Ex.9 at 2 (emphasis added).

The first-hand knowledge of lawyers and academics was reinforced not only by a random survey commissioned to determine the level of prejudice faced by these defendants, but also by years of polling data that continually reflect the deference of the Miami community to the clear will of the Cuban exile community on matters relating to hostility to the Cuban government, as well as by journalistic investigations and studies conducted by the independent human rights organization, Americas Watch. See DE321 (Declaration of Gary Moran, Ph.D.; reporting scientific survey results showing 70% of the Miami-Dade population acknowledges prejudice against agents of the Cuban government engaged in activities in the United States); DE1636:Ex.4 (affidavit of Kendra Brennan, Ph.D.; explaining that results of "The Cuba Poll" since 1991 "show a marked difference between the attitudes of citizens residing in Miami-Dade County and the rest of the country" with respect to intense community hostility to the Cuban government)

(see Appendix A, attached); DE1636:Ex.10 (Jim Mullin, "The Burden of a Violent History," MIAMI NEW TIMES, April 20, 2000) (see Appendix B, attached); DE1636:Ex.8 (Human Rights Watch, "Dangerous Dialogue Revisited" (1994)) (see Appendix C, attached).

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

As tried to the jury, the evidence and argument presented by the defendants – that Miami Cuban exile activists, beyond engaging in lobbying and fund-raising to fight Cuba, were also involved in terrorism and other illegal activity that justified Cuba's active investigation to protect itself from attack – was an affront to the core beliefs of the Cuban exile community. The district court acknowledged that the defendants adequately represented as part of their venue motions "the argument that the defense of necessity will uniquely prejudice Defendants if tried before a Miami jury." DE723:2.

In combination with hostility to the defense offered by admitted Cuban agents infiltrating Miami Cuban exile groups, the method and means of prosecution employed by the government removed any doubt that the defendants would feel the full brunt of community prejudice. The government, from opening statements through rebuttal closing argument, effectively presented the case as "our community" against the "agents of the tyrant Castro." See DE1476:1573,

1576, 1592 (government opening statement, referring to spies "among us here," "spies here in our community," "their operations [in] this community," and "Cuban intelligence officer in this community"); DE1583:14474, 14480-82, 14520, 14535-36 (government closing argument; prosecutor compares 1996 Cuban shootdown to Nazi Germany's "final solution," i.e., the Holocaust of European Jewry; accusing Cuban government of "sponsor[ing] book bombs, ... threats, telephone threats of car bombs, [and] sabotage" in the Miami community; referring to one defendant, who was not charged with espionage, as a "Cuban spy sent to the United States to destroy the United States"; arguing that failure to convict defendants would undermine internal opposition to the Cuban government; comparing the Cuban shootdown to Pearl Harbor; calling the defendants " spies, bent on the destruction of the United States of America" and "people bent on destroying the United States, [with counsel] paid for by the American taxpayer"; and arguing that defendants were "infiltrating exile groups").

Further, throughout the examination of defense witnesses (both those actually employed by the Cuban government and those who had spoken with the Cuban government to obtain relevant information), the prosecution made pointed attacks on the credibility of such persons due merely to their connection to Cuba. See, e.g., DE1546:9958-60; DE1553:10917; DE1554:11061. Even in examination of government witnesses, the prosecution sought to bring out justifications for the community-accepted view of strident hostility to the Cuban regime. See, e.g.,

DE1505:6007-18 (testimony regarding political persecution in Cuba).

Apart from direct actions by the government, key witness Jose Basulto, who led the incursions into Cuban territory that precipitated the shootdown of Brothers to the Rescue planes and whose high-profile status in the Cuban exile community lent significance to his views, accused, as the district court acknowledged, one of the defense attorneys in this case of being "a spy for the Cuban government." DE1392:14. The defense contended that such an allegation by such a public figure, particularly in the middle of trial in front of the jury, was not the type of event that a juror or anyone else who heard it can be expected to erase from memory.[1]

Nor was Basulto constrained from engaging, during the course of trial, in public displays in connection with the case, including a major demonstration to commemorate the fifth anniversary of the shootdown, February 24, 2001. See Kirk Neilson, "Bird of Paradox," MIAMI NEW TIMES, April 26, 2001 at 1, 5, 26, 29 (cover story on Jose Basulto's claims of victimization, including at the trial of this case; Basulto "warns that the president risks losing Cuban-American votes if he

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[1] In renewing the venue issue following Basulto's in-court verbal attack, defense counsel noted, without dispute by the government, Basulto's "stature" in the community. See DE1540:8948 ("These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community, who have access to the media, are going to call them communists, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial."). As a prospective juror noted in voir dire, Jose Basulto had, among other public activities, been a popular guest on Miami radio for years. DE1472:684 (statement of prospective juror Placencia, a south Florida media manager).

refuses to endorse an indictment [of Fidel Castro for the Brothers to the Rescue shootdown] which has the backing of the Cuban American National Foundation and the Democracy Movement.") (see Appendix D, attached).

Events during jury selection and trial – unavoidable press attention, hostile prospective jurors, including a member of the Cuban American National Foundation, blistering editorials and news articles throughout trial, including attacks on the judge for ruling against the government on the phraseology of jury instructions, the dogged following of jurors by Spanish language media (including government-sponsored Radio Marti) just as deliberations were to begin, such that the jurors felt intimidated – served to corroborate Dr. Moran, Dr. Brennan, Dr. Perez, attorney Diaz, and the experienced defense attorneys who confessed their own fears of community reaction: Miami simply was not the place to force jurors to rise to such a challenge of impartially evaluating witness credibility and the weight of the evidence in this case. See DE1636:Ex.12 (Americas Watch, Dangerous Dialogue) at 1 ("If one believes that the regime of Fidel Castro, however repressive, is the moral equivalent of the Nazi holocaust, then it is no great leap to view any position short of total intransigence as pernicious capitulation. In such a climate, moderation can be a dangerous position."); id at 20 (discussing assassination of exile who expressed willingness to work against Castro through electoral means, a position too moderate under prevailing exile views).

3. The government's action in strongly disputing in this case what it flatly admitted in other litigation – that a jury trial in Miami

addressing hot-button, core Cuban exile issues presents unacceptably high risks of bias and lack of impartiality – and newly-disclosed evidence concerning improprieties in the handling of expert community surveys confirming overwhelming prejudice against the defendants in Miami.

The government well knew of the level of community prejudice in this case. Immediately following the return of the verdict on June 8, 2001, the United States Attorney announced in a press conference that by prosecuting the defendants, "his office **protected the community from 'Castro's tentacles**.'"[2] Thus, it was not surprising that less than six months after the final sentencing hearing was conducted in this case, the government, in civil damages litigation, moved for a change of venue out of Miami due to the very community prejudice that it had, with impunity, denied throughout the defendants' case.

On June 25, 2002, the same government that had opposed a change of venue on the ground that Miami-Dade is an "urban center" that is "extremely heterogeneous," "politically non-monolithic," with "great diversity," and therefore immune from "outside influences" that would preclude seating a fair jury, see DE:443; DE514:63, moved in Ramirez v. Ashcroft, et. al., Case No. 01-4835 Civ-HUCK, for a change of venue out of Miami-Dade, relying on precisely on the fact that such influences made a fair trial "virtually impossible ... if the trial [of an employment-related discrimination action against the U.S. Attorney General] is held in Miami-Dade County." DE1636:Ex.2:15; see also id. at 14-15 (government

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[2] Gail Epstein Nieves, Alfonso Chardy, Cuban Spies Convicted, MIAMI HERALD, June 9, 2001, at 1A (emphasis added).

acknowledges media bias in favor of the position of the Cuban exile community); id. at 13 ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness **requires** suitable procedural safeguards such as a change of venue, to ensure a fair trial. ... Evidence of pervasive community prejudice is sufficient even without a showing of a clear nexus between community feeling and jury feeling.") (citing Pamplin v. Mason, 364 F.2d 1, 4 (5th Cir. 1966); United States v. Moody, 762 F.Supp. 1485, 1487 (N.D. Ga. 1991)) (emphasis in government's pleading). The principal case cited and relied upon by the government in Ramirez – Pamplin v. Mason – was the same case relied upon by the defense in this case, and which the government vigorously opposed as having no application to a venue the size of Miami-Dade. See DE286:5; DE443:6-8; DE514:59-63.

The newly-discovered evidence presented by the defendants also included events regarding the handling of Dr. Gary Moran's expert survey evidence on the prejudice held toward Cuban agents in Miami. On August 18, 1999, defendant Medina filed an ex parte motion for authorization of funds to conduct a survey as a predicate for change of venue. DE275. On October 18, 1999, the district court took the unusual step of seeking the government's advice on whether or not to grant the ex parte defense request. DE284. The government responded with an ad hominem attack on the proposed expert, accusing him of having "a career oriented toward defense practice." DE286:5; DE443:8 n.6. In addition, the United States

Attorney denied the need for a survey expert, proffering that venue was not an issue worthy of exploration because Miami-Dade was an "extremely heterogeneous, diverse, and politically non-monolithic community." DE286:5.

In applying for funding for the expert, the defense specified that the survey sample would include 300 respondents from Miami-Dade, answering questions designed to probe attitudes relevant to this case. On November 15, 1999, the district court granted the defense request, specifically to fund that survey. DE303. Months later the district court discounted the survey, finding that "the size of the statistical sample in this case is too small to be representative of the population of potential jurors in Miami-Dade County." DE586:15. However, at no time during the three months in which the district court was considering the defense application for a survey, or in the eight months that followed after it received the survey results and before announcing the decision, including during the hearing on the motion, did the district court indicate it entertained any doubt about the sample size.[3]

As Dr. Moran's affidavit explains, delays and the failure of payment forced him to effectively withdraw from the case, leaving the defense without an expert in response to the prosecution's attack on him, an attack which now appears disingenuous in light of the government's pleadings and assertions in Ramirez. DE1636:Ex.7. With Dr. Moran absent from the venue proceeding, the district

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[3] Moreover, the court's criticism of the sample size was mistaken as a matter of mathematical and survey science. As confirmed by Dr. Kendra Brennan, the sample size was fully adequate for its intended purposes and produced a statistically valid survey. DE1636:Ex.4 at 6.

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

Dr. Moran's affidavit (and a letter that he provided to the district court) explained that if he had appeared and testified at the venue hearing, any questions regarding the drafting of the survey documents and his tallying of the survey results may have been resolved. After the district court denied a change of venue on July 27, 2000, Dr. Moran received a copy of the published order rejecting his survey findings. Because he no longer had a working relationship with the attorneys in this case (having, in the meantime, filed a Bar complaint against the lawyer retained him for non-payment of both his fees and expenses), he wrote a letter directly to the district court while the defense motion for reconsideration of the venue decision was pending, advising the court that it had made fundamental errors in its reasoning in questioning the survey's sample size. DE1636:Ex.7. The district court's clerk failed to bring this letter to the attention of counsel, and the defense did not become aware of its existence until after sentencing.

Likewise, not until long after trial did the defense learn of prior interactions between the district judge and Dr. Moran. According to Dr. Moran's affidavit, DE1636:Ex.7 at 7, the district judge, while sitting as a state court judge in a civil matter, had summoned him to her chambers and sharply criticized him for interviewing jurors at the request and direction of trial counsel, following a civil trial. Dr. Moran's name was provided to the district court when the application

was filed in August of 1999, and he remained a key figure in the venue litigation for 13 months. While no action was taken in the state court matter, it is clear that due to those undisclosed events, there may have existed a level of distrust and antagonism by the district court regarding this defense expert.[4]

4. District court's ruling.

The district court, while denying the motion for new trial based on newly-discovered evidence, nevertheless acknowledged that under Fed. R. Crim. P. 33, a new trial may be granted based on newly-discovered evidence undermining reliance on the impartiality of the jury. See DE1678:8 ("Challenges to the fairness or impartiality of a jury may be raised in the context of a motion for new trial.") (citing United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980); Rubinstein v. United States, 227 F.3d 638, 642 (10th Cir. 1995); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960)).

The district court concluded, however, that due to factual differences

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[4] During a status conference on August 25, 1999 the district court sought the active assistance of the government in obtaining a qualified survey expert, to act as a court's expert, to conduct the survey. See DE1636:Ex.11. Rather than advise the district court of allegedly negative information about community surveys which the government had in its possession for several years, it waited seven months and until after Dr. Moran's survey was filed to produce the affidavit of Dr. J. Daniel McKnight. The McKnight affidavit, DE443:Ex.2, prepared for the government nearly three years before the Elián events and more than three years before the trial in this case, related solely to a smaller survey conducted by Dr. Moran in a case involving the trade embargo with Cuba, an issue about which attitudes, even in the Cuban exile community, vary. The government has never offered an explanation for its failure to obtain any expert testimony or

between the Ramirez case and the instant prosecution, the government's directly contrary representations in the two cases failed to "demonstrate prosecutorial misconduct." DE1678:9. For that reason, the district court ruled that such evidence could not be viewed as newly-discovered evidence within the meaning of Rule 33. DE1678:6, 8-9. The district court further determined that because the main thrust of the new trial motion rested on evidence relating to the government's actions in the Ramirez case, which the court distinguished from the present case, none of the additional evidence submitted by the defense, which the court construed as relating solely to the "interests of justice," would be considered. DE1678:6 n. 3 ("Here, since the Court finds that Defendants have not submitted any newly discovered evidence within the meaning of Rule 33, the Court need not consider the 'interests of justice' issue."). Thus, the district court denied the newly-discovered evidence motion, without conducting a hearing. DE1678:9 ("Absent any 'newly discovered evidence" within the meaning of Rule 33, Defendants are not entitled to a new trial in this case.").

Standard of Review

This Court's "review of the district court's denial of a motion for a new trial based on newly discovered evidence is subject to the abuse of discretion standard." United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998) (citing United States v. Obregon, 893 F.2d 1307, 1312 (11th Cir. 1990)). The abuse of discretion

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report directed to Dr. Moran's survey in the present case.

standard also applies to the district court's denial of an evidentiary hearing. Id. ("Similarly, we review the district court's denial of an evidentiary hearing for abuse of discretion.") (citing United States v. Massey, 89 F.3d 1433, 1443 (11th Cir.1996)). Prosecutorial misconduct is reviewed de novo and requires reversal if there is a reasonable probability that the misconduct prejudiced the defendant's substantial rights. United States v. Beasley, 72 F.3d 1518, 1525 (11th Cir. 1996).

SUMMARY OF THE ARGUMENT

The district court erred in denying without an evidentiary hearing, or a hearing of any kind, the defendants' motion for new trial based on newly-discovered evidence. The motion for new trial was premised on the government's contradictory representations and manipulation of the forum for trial in order to take advantage of community prejudices well known to exist in Miami. The fortuitous disclosure of the government's contradictory position on Miami's status as a site where emotional Cuba-related issues cannot fairly be tried provided insight into the government's persistent trial tactic of poisoning the well against the defendants by trying not only them but their country, whose face the defendants represented in Miami, and by using every available means to prejudice the defendants in the eyes of the Miami jury due to the defendants' connections to and associations with Cuba. Knowing – as the Ramirez documents show – the

incendiary effect in Miami of a barrage of politically prejudicial suggestions, innuendoes, and tangential evidence tarring the defendants by association with the worst possible views of the Cuban regime, the government clearly tried to maximize the benefit of the forum-shopping victory it had won by playing to local hostility to and fear of Cuba and Castro in order to overshadow the technical legal issues and narrow defenses in the case. The trial tactics and evidence showed an overriding focus on issues likely subject to the influence of local community passions and prejudices. Similarly, additional newly-discovered evidence concerning the handling of community surveys supporting defense assertions of intense community prejudice warranted the granting of the motion for new trial or, at a minimum, the conducting of hearing on the motion. Hence, the district court's denial of the motion should be reversed.

ARGUMENT AND CITATIONS OF AUTHORITY

The district court erred in summarily denying the defendants' motion for new trial based on newly-discovered evidence.

The district court erred in denying the defendants' motion for new trial, where the district court: (1) failed to conduct an evidentiary hearing before reaching factual conclusions regarding whether the new evidence showed prosecutorial misconduct or otherwise warranted a new trial; (2) misconstrued Fed. R. Crim. P. 33 in failing to consider the interests of justice, evidentiary submissions in the motion for new trial, and surrounding evidence relevant to determination of the motion; and (3) failed to take into account the record as a whole, which established a series of improper prosecutorial actions designed to take advantage of community prejudice.

In essence, the motion for new trial raised two categories of information that were not within the discoverability of counsel: (1) that the government was taking a false position with respect to its representations as to the state of community prejudices and deep-seated convictions on issues closely tied to hostile actions by the Cuban government, and (2) that the defense's ability to counter the government's submission of opinion evidence, now known to be contrary to the government's own knowledge of the facts, was undermined by events outside the

defendants' knowledge or control, relating to the CJA expert hired to mathematically determine community attitudes. The motion also incorporated matters of public record, which the government did not factually contest, such as the naming of Miami's streets after anti-Castro Cuban exiles and the fact that for several years the Miami-Dade County government building (which also houses the central transportation hub, Metrorail) has displayed a monument to the victims of the Brothers to the Rescue shootdown with explanatory text accusing the Cuban government of murder.

A. The district court erred in determining, without an evidentiary hearing, that the government's contradictory positions on venue did not affect the fairness of the resolution of the venue motions.

In submitting numerous affidavits and record evidence showing that the venue motions were unfairly denied due to a series of improprieties, the defendants made it plain that such documents were proffered in support of an evidentiary hearing in accordance with the request made in the motion for new trial. See, e.g., United States v. Espinosa-Hernandez, 918 F.2d 911, 913-14 (11th Cir. 1990) (explaining district court authority to conduct hearing on newly-discovered evidence new trial motion during pendency of appeal); Mayo v. Cockrell, 287 F.3d 336, 345 (5th Cir. 2002) ("While a motion for new trial is not a prerequisite to appeal in every case, for a meaningful appeal of some issues a defendant must prepare, file, present, and obtain a hearing on a proper motion for new trial in order

to adduce facts not otherwise shown by the record.").

The district court dismissed the importance of the government's "recantation" as to venue, and premised its denial of the motion for new trial on the theory that the newly-discovered evidence of the government's forum-shopping approach to venue representations in the district court did not constitute misconduct, because "[t]he situation in Ramirez differed from the facts of this case in numerous ways." DE1678:8. See United States v. Gates, 10 F.3d 765, 768 (11th Cir. 1993) (error to dismiss out-of-hand a recantation on a critical issue).

Although there were of course distinctions between the two cases – the instant case and Ramirez – none made the government's duplicity excusable. They include:

(1) Relationship of defendants to hostile environment.

In Ramirez, the factor that motivated popular demonstrations, anger and the resulting hostile publicity against the Attorney General was nothing other than the pervasive hostility against the Cuban government. The controversy around Elián Gonzalez was merely a dramatic manifestation of that sentiment, an exposed nerve which drew pain even from comments by the plaintiff and his counsel. In the instant criminal case, however, the **defendants were part of the very government that was at the core of the community's animus**. In Ramirez, the Attorney

General, in executing the laws of United States, simply stepped into the line of fire against anyone perceived as being helpful to these defendants' principal. Whatever derivative prejudice the successor Attorney General (sued only in his official capacity) faced was substantially less than that directed at these defendants who were not just perceived as helping Cuba, but were actually a part of the enemy in the "state of war" atmosphere that existed in Miami.

(2) Intensity of prejudice directed at defendants.

In Ramirez, the ultimate issue for the jury was whether a U.S. governmental agency had been motivated by ethnic or national-origin animus against Hispanics when it made an unfavorable employment decision as to a Mexican-American. The Elián case was merely partial backdrop against which certain INS employees may have created a hostile work environment. See DE1660 (attaching copy of Ramirez complaint alleging that INS agents referred to Cuban exile-dominated Miami as a "banana republic").[5] By contrast, in the criminal case, the ultimate issue for the jury was whether the defendant Cuban agents secretly conspired to violate espionage and other laws and conspired to murder four local Miami heroes. Anti-Cuban animus may have been tangentially relevant to the jury's decision in Ramirez, but the passions aroused by mild allegations of INS agency bias paled in

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[5] The government's contention, in opposing to the new trial motion, that Ramirez was "**about** the Elián Gonzalez matter" is incorrect. DE1660:15 Plaintiff's counsel in Ramirez stated at oral argument: "This is not an issue about Elián Gonzalez. I would be prepared to say that to the jury during voir dire. It is not Elián Gonzalez, whether he went to Cuba." DE1636:Ex.8 at 21.

comparison to those stirred by Brothers to the Rescue murder allegations and charges of espionage.

(3) Perception of defendants by the jury.

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

The government, in its opposition to the motion for new trial, observed that the defendants necessarily chose not to exercise peremptory challenges on the jurors who served in this case. See DE1660:5 n. 2. The government's apparent argument – that the defendants thought the jurors it failed to strike would be more fair than those the defense struck – does not mitigate the level of community prejudice or its potential for influence on the jurors. Pamplin v. Mason, 364 F.2d 1, 8 (5th Cir. 1966) (transcript of voir dire will not reflect full extent of community prejudice nor serve to eliminate influence of such pervasive prejudice). In fact, several of the jurors who served, including the foreperson made strong statements of opposition to the Cuban government. See DE1472:741 (juror who would become foreman states: "Castro is a communist dictator and ... I would like to see him gone"). That the defense felt compelled to accept such jurors, particularly given the government's exercise of peremptory challenges as to the total of three prospective jurors who failed to express negative views toward Cuba, in no way

diminishes the level of community-wide prejudice. See, e.g., DE1472:861; DE1474:1296-97 (anti-Cuba comments of jurors who served); DE1472:767,810; DE1473:939 (jurors who expressed neutrality to Cuba challenged by government).

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

In Ramirez, pretrial publicity included, according to the government, a damaging report of possible discrimination within the INS from an Administrative Law Judge. In this case there were, among other things, press reports of guilty pleas by co-defendants who publicly confessed to being part of the charged conspiracy. DE397:Ex. H & I-1. An editorial in the local paper openly advocated punishment for those responsible for the shootdown and pointedly suggested that a conviction here could bring down the Castro government. DE397:Ex. K-1. Moreover, a damaging comment about this case by the former head of the local FBI office, appearing in an article in the local newspaper on the opening day of trial, was found open in the jury assembly room. DE1245:171. But the defense in Ramirez did not claim it could meet the stringent tests for unfair pretrial publicity (created for the protection of criminal defendants). Rather, it relied upon the concept of pervasive community prejudice, citing Pamplin v. Mason. In the criminal case, where the prejudice was clearly a more direct threat to defendants' rights, the prosecution disavowed Pamplin as having no relevance to a large, metropolitan, diverse jurisdiction such as Miami-Dade.

And the government's contention here that the post-Elián litigation that struck south Florida was not relevant to the underlying pressures on members of

the community who might dare to take a position contrary to the accepted Cuban exile position on a core anti-Castro issue is not credible. The Ramirez litigation was just one manifestation of the damage that can befall an individual – or, as in Ramirez, the entire U.S. government – by opposing the Cuban exile viewpoint regarding the evils of dealing with Fidel Castro.[6]

To say that the government's concession of pervasive community prejudice on issues dealing with Elián is somehow inapplicable to issues of murder by the Cuban government of four Miami Cuban exile members of Brothers to the Rescue or to an espionage conspiracy by Castro agents is linguistic distortion truly worthy of Lewis Carroll. The government can not maintain the excuse that the Elián controversy was about something other than the deeply-held belief in the Miami Cuban exile community that Castro's regime is a murderous, Nazi-like tyranny to which no child should be forcefully returned.[7] See DE1660:13-14 (government argument regarding prejudice to defendants from Ramirez's counsel's use of "Nazi reference" in relation to the sending of Elián back to Cuba).

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[6] The government's reliance on adverse pretrial publicity cases, such as United States v. Fuentes-Coba, 738 F.2d 1191, 1194-95 (11th Cir. 1984), to distinguish Ramirez from the instant case is therefore misplaced. The prejudice manifested in Ramirez points to an even more united community hostility to admitted pro-Castro agents than could possibly be true as to Attorney General John Ashcroft; and, as noted, the very fact of the publicity attendant to retaliatory lawsuits as a result of the government's neutral position toward Castro in the Elián matter would heighten any Miamian's expectation of consequences from any acquittal of Cuban government agents charged with espionage and murder conspiracies.

[7] As defense counsel noted, without dispute by the government, at the district court hearing on the motions for change of venue, "I think we all agree in this community [that Castro] is considered by members of this community to be the personification of evil. ... You are taught this by the priest, by the teachers in these [Cuban American] communities" in Miami. DE514:29.

(5) Proximity in time.

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

(6) The pervasiveness of the community prejudice.

In Ramirez, there was "divided sentiment in the community regarding the handling of the Elián Gonzalez case," according to government counsel DE1636:Ex.11 at 24-25. Whereas, in the criminal case, the shootdown created a "reaction to the incident (that) was uniform throughout Miami as both Cubans and non-Cubans stood united in their outrage and condemnation of the Cuban government." DE1636:Ex.5 at 10 (affidavit of Dr. Lisandro Perez).

(7) Relation to legal norms and procedures.

In Ramirez, there was no civil equivalent to Fed. R. Crim. P. 21(a), which mandates transfer of the case whenever local prejudice threatens a fair trial. In the criminal case, Rule 21(a) incorporates due process protections afforded criminal defendants. Civil defendants, such as the Attorney General in Ramirez, not faced with the loss of liberty, are not similarly protected.

(8) Consequences of decision resulting from community prejudice.

In Ramirez the United States risked having to pay modest damages. In the

criminal case, five individuals risked loss of liberty – three of them for the rest of their lives.

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

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

The district court erred in failing to conduct any sort of a hearing on the motion, effectively presuming the innocence and good faith of the government without considering such relevant questions as: Has the government ever before sought a change of venue because it could not receive a fair trial? What do the files and records of the United States Attorney's office show as to the decision-making in acknowledging the government's inability to receive a fair trial in Miami?

The district court similarly left unanswered the many questions raised by the affidavit of Dr. Moran, the discounting of which seemingly was a crucial determinant of the venue ruling. If the improper handling of the expert's request for payment prejudiced the defense – by denying it crucial expert testimony on an issue of great significance to the defendants' due process and fair trial rights, see

Chambers v. Mississippi 410 U.S. 284 (1973) – then the district court's failure to even address the issue by way of a hearing must be reversed. The district court failed to consider Moran's evidence either before or after filing of the motion for new trial. The district court's summary resolution, without testing any of the proffers made by the government in its response to the motion did not fairly resolve the substantial questions raised by the motion.

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

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

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

trial motion, it was nevertheless given consideration by district court and court of appeals and found to support affirmance of district court's granting of motion for new trial).

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

Given the instant newly-discovered evidence, the context provided by the additional submissions adds not merely to the interests of justice favoring granting relief, but also to the likelihood that the newly-discovered evidence, considered in relation to the actual status of community attitudes and prejudices in this case,

would rise to the level of a probability of an erroneous denial of the change of venue motions. See id. (recognizing that juror bias impugns integrity of verdict). As is true of other new trial motions based on newly-discovered evidence, the probabilities in this evaluation must be determined in light of other factors that may counter or support the newly-discovered evidence. See, e.g., United States v. Devila, 216 F.3d 1009, 1017 (11th Cir. 2000) (court of appeals considered post-conviction certifications submitted by government in weighing significance of newly-discovered evidence as to maritime drug enforcement jurisdictional element; post-conviction affidavit offered by government "was obtained long before any **retrial**, and therefore would be sufficient evidence to establish United States jurisdiction") (emphasis added).

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

accordance with its choice of whether a given party should have the same fair trial rights that the government seeks for itself in civil litigation.

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

In United States v. Williams, 523 F.2d 1203 (5th Cir. 1975), the former Fifth Circuit explained that the prejudicial nature of trial in a venue susceptible to community bias is most pronounced when the manner of prosecution of the case stirs the same passions already present in the community. See id. at 1208-09 (holding that where constitutional fair trial issues arise, community prejudice and prosecutorial misconduct capitalizing on such prejudice must be considered in "tandem").

The clear premise of the government misconduct here – unfair attempts to thwart a meritorious venue motion combined with the intent to use community prejudices, from opening through trial and closing, warranted the district court's holding, at a minimum, of a hearing on the motion and an opportunity to present evidence as the defense requested. See Espinosa-Hernandez, 918 F.2d at 913-14 (error to foreclose evidentiary development where defense claimed pattern of government misconduct designed to skew presentation of evidence, including suppression of informant). The most strident of the governmental arguments – the rebuttal references to the "final solution" of the Holocaust, the moral equivalency of Pearl Harbor, and taxpayer funding of defense counsel to help the defendants

destroy America – was just the most visible part of the "iceberg" of underlying prejudice confronting these defendants. See DE1636:Ex.5 at 12 (affidavit of Dr. Lisandro Perez).

The government's rebuttal closing hit the core Cuba button in Miami when comparing Cuba and the actions of the defendant agents to Nazi Germany and the actions of the Nazis who ran the death camps of the Holocaust. The massive Holocaust memorial on Miami Beach symbolizes the extent to which the government sought to bring in every community prejudice that it knew existed against a regime that the government directly equated with the most vile, genocidal racists of the 20th century.

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

Similarly, while the government argued in attempting to distinguish the

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

Miami media, including the MIAMI HERALD, successfully litigated at the outset of the trial to obtain a ruling by the district court providing for media inspection, on a daily basis, of all evidence entered into the record. United States v. Hernandez, 124 F.Supp.2d 698, 705 (S.D. Fla. 2000) (finding "Defendants' foreshadowing of a 'hostile, prejudicial environment' resulting from the media's access to the evidence too speculative, at this point"; allowing media examination of documentary evidence prior to its presentation to the jury; recognizing risks to fair trial of "widely publicized case"). The intense media coverage continued throughout the months-long trial. See, e.g., DE978; DE988.

Just prior to closing arguments, the MIAMI HERALD took the unprecedented step of publishing in its editorial opinion page a lengthy column attacking the district court for allowing the defense to present evidence in support of their claims

as to the murder and espionage conspiracies. See Appendix F (Luis J. Botifol, "The Cuban Spies' Case vs. Credibility of the U.S. Judiciary," MIAMI HERALD, May 16, 2001 at 9B). The author of the article, Cuban exile Luis Botifol, was identified by the HERALD as "a Miami banking pioneer and a longtime community activist." Id. In the column, which jurors may have inadvertently seen even if they were trying to avoid news articles in the paper, Botifol ridiculed the district court for allowing the defendants to offer evidence "presenting Castro as the victim and the Cuban exile community as the guilty party." Id. Botifol argued that even by allowing the defendants to present their defense, the district court had "diminish[ed] the trust and credibility of the judiciary on which our democracy rests." See also id. ("Notwithstanding the silence imposed on those who participate in this case, the media's reports generate unfavorable comments in the community, which attributes the judge's permissiveness as stemming from an association with prominent members of the past administration who don't sympathize with the exile community, especially after the Elián case."). This type of unmitigated venom directed at a judge for merely allowing the defense to put on a case had no rebuttal in the HERALD, which made its position clear by elevating Botifol's status as a "banking pioneer" and community activist.[8]

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

The pressure had reached such a level by the time the jury was sent out to deliberate that the jurors – hounded by local new media outside the courthouse – expressed fear to the district court of being identified before giving their verdict. DE1585:14644-46.

The government knew at the time of this trial what it later acknowledged in an attempt to minimize civil damages after the trial: Issues of such importance to the Cuban exile community as their right to engage in anti-Castro activities without interference from Cuban spies are not susceptible to freedom from community pressure. The defendants, as the district court expressly observed in denying the motion for reconsideration as to venue, DE723:2, had made plain prior to trial that their defense – premised on evidence offered to support a necessity defense and a lack of intent to violate the law, but rather to protect Cuba from actions by Cuban exiles – would likely be viewed in terms of an attack on the prevailing beliefs underlying the community in Miami.[9]

"[T]he Due Process Clause requires conduct of a prosecutor that it does not require of any other participants in the criminal justice system, such as the duty to

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[9] See Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 424 (2000) (Thomas, J., dissenting) ("The Framers, of course, thought ... that faction would infest the political process. As to controlling faction, James Madison explained, 'There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.' The Federalist No. 10, p. 78 (C. Rossiter ed.1961)."); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428 (1995) ("'No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time ... .' The Federalist No. 10, p. 79 ... . See In re Murchison, 349 U.S. 133, 136 ... (1955) ('[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an

disclose evidence favorable to the accused." Smith v. Groose, 205 F.3d 1045, 1049 (8th Cir. 2000) (granting habeas corpus relief based on state's use of factually inconsistent theories to convict defendants in two criminal cases, in violation of due process); see ABA Standards for Criminal Justice: The Prosecutorial Function, 1993, Section 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court.").

This Court has consistently admonished every attorney representing the United States to "remember that he is the representative of a government dedicated to fairness and equal justice for all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer." United States v. Wilson, 149 F.3d 1298, 1303 (11th Cir. 1998). See also United States v. Crutchfield, 26 F.3d 1103 (11th Cir. 1994) (emphasizing that a United States Attorney has a duty to refrain from using improper methods to secure a conviction). See also Wilson, 149 F.3d at 1303 ("We recall the duties in a criminal prosecution of a lawyer for the United States: 'A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all ... .'") (quoting Dunn v. United States, 307 F.2d 883, 885 (5th Cir.1962)).

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interest in the outcome.')).").

"[J]ustice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954). Related to that premise is the doctrine of judicial estoppel. See New Hampshire v. Maine, 532 U.S. 742, 750 (2001) ("Courts have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle ... . Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be 'clearly inconsistent' with its earlier position. ... Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled ... .") (internal quotations, citations, and alterations omitted). The government's use of the contradictory representations in this case meets the judicial estoppel standard and represents a serious shortfall in the appearance of justice, even absent a judicial finding of intentional misconduct.

From the indictment to opening statements to closing arguments, it is clear that the prosecution proceeded in this case to take maximum advantage of the "impassioned," DE1392:10, location of the trial. The very fact that the government drafted the indictment's allegations of murder conspiracy to assert that conspiracy resulting in murders on February 24, 1996 began "in or about January, 1996, and **continu[ed] until on or about September 12, 1998**," more than two and one-half years after the shootdown, showed the extent to which the

government sought to portray Cuba and its agents as bloodthirsty and bent on destroying the United States. The government's closing arguments, see DE1583:14474-14520, continued this theme and went even further to discredit the defense lawyers, portraying them as being used by the Cuban agents to destroy the country (presumably by infiltrating Miami Cuban exile organizations such as Basulto's Brothers to the Rescue).

The trial reveals a laundry list of attempts by the government to make the case one of proving how bad Cuba is – tarnishing in that way the character of the defendants who personified Cuba in Miami as much as Martians would personify Mars anywhere on earth.[10] Here, the government went on and on about Cuba, when the defendants had admitted from the start that they were Cuban agents, doing the work of the Cuban government in the United States. The government thus knowingly used the "give a dog an ill name and hang him" approach in a community that already hated dogs. See United States v. Boyd, 446 F.2d 1267, 1273 (5th Cir. 1971) (reversing conviction due to government's "improper use of other crime evidence"); United States v. Rodriguez, 765 F.2d 1546, 1560 (11th Cir.

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[10] See, e.g., DE1491:3699 ("Q. Tell the ladies and gentlemen of the jury who is at the top of the Cuban intelligence pyramid? A. The top of the Cuban intelligence pyramid is Fidel Castro."); DE1505:6007-18 (government witness – a Miami Cuban exile – testifies to political persecution in Cuba and repression of independent political organizations with ties to Miami; characterizing Basulto as leader of support for political dissent in Cuba); DE1537:8748, 8754 (government cross-examination of former White House official to show that Cuba is politically "repressive" and a "dictatorship"); DE1542:9214-17 (government questioning of Basulto directed to showing Cuba's violation of human rights and efforts by Miami Cuban exiles in support of human rights); DE1583:14475 (government rebuttal closing: "We are not operating under the rules of Cuba. Thank God."); id. at 14530 (disparaging credibility of Cuban government witnesses in defense case by invoking name of Adlai Stevenson, who revealed Soviet misstatements in the Cuban missile crisis of 1962).

1985) (prosecutor "may not appeal to the jury's passion or prejudice"); cf. United States v. Masters, 118 F.3d 1524, 1525 & n. 4 (11th Cir. 1997) (government's conduct in taking legal position "knowing full well" it was wrong was "reprehensible" and violated "oath of office").

Particularly where the matters at issue touch the rawest of community nerves – such as here in Miami where admitted pro-Castro agents were accused by the prosecutor of being sent by Castro to destroy the Miami Cuban exile community – the prosecution's denial of facts it later admits, in a civil case in which fundamental liberty interests and due process rights were not in jeopardy, and its use of the prejudice as a component of its trial strategy, compel reversal in the interest of justice. See Williams, 523 F.2d at 1207.

In Williams, the former Fifth Circuit explained that where such misconduct is present, review is not limited to the district court's discretion in considering a motion to change venue, but rather "we widen the breadth of our consideration to the tandem effect created by the intense pretrial publicity and the closing argument offered by the United States." Id.; see also id. ("[T]hese two factors operating together deprived appellant of a fair trial.").

The government and the district court in the Ramirez case correctly determined that pretrial publicity ancillary to the Elián events – in which the government was portrayed in the Cuban exile community as the handmaiden of the Castro regime's demand for Elián's return to Cuba – fostered such prejudice and hostility against the government that a change of venue was necessary. But if so, it

can hardly be denied that forty years of widespread, virulent anti-Castro publicity and events in Miami even more clearly contributed to pervasive local prejudice against actual agents of Fidel Castro, such as the defendants. They were acknowledged Cuban agents who proudly admitted working on behalf of the Cuban government against local exile groups and individuals (whom they characterized as extremist), yet they disputed the highly-sensitive allegations of murder and espionage conspiracy among other charges in the indictment, including charges that the government conceded would be "insurmountable" for the government to meet if the jury followed the district court's jury instructions.[11]

The conceded logical difficulty of the government's case surely encouraged the government to exceed reasonable limits in closing – calling on the very community prejudices, the existence of which it later conceded – in order to obtain the convictions in this case. The district court's summary denial of the motion for new trial and failure to consider the entire record and the interests of justice should be reversed.

CONCLUSION

Based upon the foregoing, the Court should reverse the district court's denial of the motion for new trial based on newly-discovered evidence, and direct the district court to grant the defendants a new trial. Alternatively, the Court should

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

remand to the district court for an evidentiary hearing on the motion.

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 13,031 words.

LEONARD I. WEINGLASS, ESQ.

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

CERTIFICATE OF SERVICE

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

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