Nos. 01-17176 & 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

RUBEN CAMPA,
Defendant/appellant.

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

EN BANC REPLY BRIEF OF THE APPELLANT RUBEN CAMPA

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

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The district court manifestly erred in denying a change of venue where it was virtually impossible to select, from a cross-section of the Miami-Dade community, an impartial jury uninfluenced by community passions.

The government's brief, which discusses little of the overwhelming factual record of pervasive community prejudice below, erroneously argues: (1) against federal supervisory standards in the application of Fed.R.Crim.P. 21(a); (2) for a standard of review of the district court's pervasive prejudice ruling equivalent to that applicable in habeas cases; (3) for discounting the compelling evidence revealed in voir dire, by mischaracterizing both the extensive district court litigation of the venue claim and the content of the jurors' responses; and (4) for discounting prejudicial events at trial on the unfounded theory that they were either ignored by counsel or invited by the defense.

The government's arguments are unfounded. But even under the government's high-burden/low-review theories, the compelling, uncontroverted record facts so clearly establish a violation of both Rule 21(a) and the Fifth and Sixth Amendment guarantee of a trial free of pervasive prejudice that–as the panel unanimously concluded–justice compels reversal of the convictions and a new trial.

1. The government ignores precedent applying federal supervisory standards and seeks to limit the "independent review" obligation of the reviewing court. The government argues against resolving the instant venue issues

under a federal supervisory standard and urges instead the habeas corpus review standard for constitutional violations. Gov't-Br:29. Similarly, the government argues that appellate review of venue issues is "independent" in name only and that habeas deference principles govern this case. Gov't-Br:21.

A. Federal supervisory authority. Precedent supports using federal supervisory standards on direct appeal of venue-related issues where a severe risk of pervasive prejudice exists. *United States v. Herring*, 568 F.2d 1099, 1105 (5th Cir.1978) (applying supervisory powers over district courts in reversing–due to voir dire insufficiency–despite absence of "publicity so pervasive and expressly prejudicial" as to require reversal under constitutional standard). The government's brief ignores both *Herring* and this Court's endorsement of *Herring* in *Jordan v. Lippman*, 763 F.2d 1265, 1279 n. 17 (11th Cir. 1985). *See also Murphy v. Florida*, 421 U.S. 794, 804, 95 S.Ct. 2031, 2038 (1975) (Burger, C.J., concurring) (explaining application of federal supervisory standard would have warranted reversal of petitioner's conviction, despite absence of constitutional violation); *United States v. Williams*, 568 F.2d 464, 469 (5th Cir. 1978) (citing, with approval, Chief Justice Burger's concurrence in *Murphy*). The supervisory standard is particularly appropriate here, where the defendants acceded to requesting the lesser relief of an intra-district transfer to minimize any burdens upon the court. RBox1:514:52.

B. Independent review. While the government concedes that "[i]n determining whether an unbiased jury was empaneled, this Court independently evaluates the circumstances," Gov't-Br:21, the government argues that independent review on direct appeal is limited by a presumption of correctness of underlying factual findings, such that direct review would be indistinguishable from habeas review. Gov't-Br:21, 27 n. 28 (citing *Patton v. Yount*, 467 U.S. 1025, 1031-32 & n.7, 104 S.Ct. 2885, 2889 (1984) (reviewing state-court factual findings under 28 U.S.C. § 2254); *Presnell v. Zant*, 959 F.2d 1524, 1534 (11th Cir. 1992) (habeas standard)). Notably, this Court has interpreted the *Patton v. Yount* deference holding as relating to habeas review of *actual juror prejudice*, where no sufficient showing of pervasive prejudice has been made, such that "a state trial judge's determination of *an individual juror's impartiality* is entitled to a 'presumption of correctness' on *habeas* review under 28 U.S.C.A. § 2254(d)." *Jordan v. Lippman*, 763 F.2d at 1275 n. 11 (emphasis added) (citing *Patton v. Yount*, 467 U.S. at 1038, 104 S.Ct. at 2892).[1]

In a footnote of its brief, the government appears to concede that on direct appeal of a pervasive prejudice claim, while factual findings of the district court are

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[1] In *Patton v. Yount*, the Supreme Court concluded that the state court's voir dire findings that each juror would be impartial were not "manifestly erroneous," even though several years *previously* there had been "pervasive media publicity" regarding the case when it was first tried, where at the time of Yount's second trial, four years later, prejudicial publicity "was greatly diminished and community sentiment had softened." 467 U.S. at 1031-32, 104 S.Ct. at 2888-89.

reviewed for "clear error," the "application of the law to those facts is reviewed *de novo*." Gov't-Br:27 n. 28 (citing *United States v. Bervaldi*, 226 F. 3d 1256, 1263 (11th Cir. 2000)). Unlike the purely factual question of the credibility of a juror's claim of impartiality, the question of pervasive prejudice involves a mixed question of law and fact and thus warrants a less-deferential standard of review. Independent review of pervasive prejudice involves more than face-to-face demeanor and credibility evaluation of witnesses (i.e., jurors) and rulings on cause challenges, *see Patton v. Yount*, 467 U.S. at 1038, 104 S.Ct. at 2892 (individual juror prejudice "determination is essentially one of credibility, and therefore largely one of demeanor"),[2] but rather evaluation of other circumstances, the totality of which determines whether prejudice was so pervasive that its influence could not reliably be cabined by voir dire. *Cummings v. Dugger*, 862 F.2d 1504, 1510 (11th Cir. 1989) (as to claims of pervasive community prejudice, "this Circuit has treated the standard as a mixed question of fact and law"). This mixed–and thus ultimately *de novo*–review standard is also used in reviewing a ruling on a generic claim of

[2] The Supreme Court highlighted, in *Patton v. Yount*, that there was cross-examination of prospective jurors in attorney-conducted voir dire. 467 U.S. at 1034, n. 10, 104 S.Ct. at 2890. Similarly, in this Court's single prior decision concerning anti-Castro prejudice in Miami, 20 years ago in *United States v. Fuentes-Coba*, 738 F.3d 1191, 1195 (11th Cir. 1984), the cross-examination of attorney-conducted voir dire contributed to the court's finding of no prejudice. By contrast, in the instant case, the district court, *see* R22:6, did not permit its rehabilitation of jurors to be subject to cross-examination.

prosecutorial misconduct. *See United States v. McVeigh*, 153 F.3d 166, 1179 (10th Cir. 1998) ("The court of appeals undertakes this review of the overall circumstances of the publicity *de novo*."; distinguishing *de novo* review of pervasive prejudice claim from abuse of discretion review applicable to actual prejudice claims).

The government's argument for a novel form of *independent* review that is wholly *dependent* on district court rulings would convert the right to an impartial jury guaranteed by the Sixth Amendment into a mere possibility of not facing trial in a community where prejudice is pervasive. Plainly this Court's "independent review" must not simply defer to the district court's underlying factual findings or factual inferences; rather, the Court must independently weigh relevant facts and apply the law to those facts in order to determine whether the level of prejudice is sufficiently pervasive to undermine the right to an impartial jury. *United States v. Capo*, 595 F.2d 1086, 1090 (11th Cir. 1979). The district court below found a "degree of pervasive community prejudice," but held that it was not sufficient to "preclude" selecting an impartial jury. R5:586:10, 17 (citing *Ross v. Hopper*, 716 F.2d 1528, 1540 (11th Cir. 1983)). The district court's ultimate legal conclusion does not withstand independent review.

Even if the Court were to apply a more deferential review standard, the evidence in this case–including the district court's factual findings regarding evidence

relating to community prejudice and pretrial and trial publicity and the district court's resolution of juror excusals for demonstrated cause–is so overwhelming that it leads to only one conclusion: denial of a change of venue in the face of pervasive community prejudice was manifestly erroneous.

2. The government's claims that defense employed anti-Cuban-American "strategy" and was "satisfied" with venue are unsupported by, and contrary to, the record. The government's post-appeal claims that the defendants were satisfied with the jury and declined invitations to renew their motions for change of venue contradict both the record and the government's concession in the district court that defendants "extensively litigated" and renewed their motions for change of venue at every appropriate opportunity, before, during, and after trial. *See* R15:1643:4. Neither in the district court nor on appeal before the panel did the government question the veracity of defense counsel's repeated professions of *personal* belief that Miami was not a fair location for the trial. *See* RBox1:514:It is only now, on *en banc* review, that the government changes position and claims that counsel had a "strategy of appealing to non-Cuban parochial concerns." Gov't-Br:47-48.

The government ignores that the defense theory–lack of specific intent–was based on government-decrypted communications and reports of defendants'

penetration of targeted groups–activity the *government* highlighted in opening and closing statements. Contrary to the government's unfounded suggestion that the defense pursued, in near-suicidal fashion, an ethnic-attack strategy, and that "[i]t was only after that strategy failed that appellants sought to repudiate the jury," Gov't-Br:48, the record clearly shows that the principal defense–i.e., that the defendants lacked specific intent to commit the conspiracy offenses and were sent to the United States to investigate groups that Cuba believed were engaged in illegal attacks against Cuba–including terrorist bombings of restaurants and hotels–was consistent and unequivocal from the time of the first venue motion, R2:317, RBox1:514:45-51, to the close of the case,[3] and was the specific premise for the defendants' motion for reconsideration of the denial of a change of venue. R6:723:1-2 (district court notes theory of defense as factor *favoring* change of venue).

The defense was well-founded upon voluminous message traffic between Cuba and the defendants and by the fact that *not a single bit of classified information* was ever obtained or transmitted by these agents–in the more than *20 man-years of their presence* in the United States–or by anyone else involved in the case, including numerous codefendants who pled guilty and cooperated with the government. The

[3] The government also ignores that juror Migdalia Cento is the wife and mother of Cuban-Americans; to leave her on the jury if the defense plan was ethnic character assassination would be the height of absurdity.

government itself announced in opening statement that the thrust of the defendants' actions was to investigate groups that jurors saw as both anti-communist and humanitarian in this community. R29:1589-90. The government tried at trial to turn non-espionage investigations of groups engaging in illegalities into an attempt to undermine not just the entire Cuban-American community, but the entire Miami community. R29:1591-92.

And now, on rehearing, the government employs the same community-defense attacks that it used with the jury. The government's character-attack approach to the defendants and their counsel worked at trial,[4] but should ***not*** prevail in this Court. *See* Gov't-Br:48 n. 49 (arguing, illogically, that defense evidence that these Cuban agents were informing on groups who possess "grenade launchers and machine guns" and who plot to attack Cuba shows that defense was *content* with Miami jury).

3. The district court did not invite renewals of the venue motions at voir dire and instead appreciated counsel's "spirit of cooperation" with the court's rulings concerning the selection of the jury. The government claims, for the first time on *en banc* review, that even though the district court and the parties treated the venue motion as remaining open throughout trial, and the court did not

[4] 'Because the defendants are Cuban agents,' the government would have it, 'their claims of trying to protect Cuba from illegal attacks must be false; they must instead be trying to destroy not just Cuban-Americans but everyone in the community.' *See* Gov't-Br:48.

finally resolve the motions until the close of all the evidence, R120:13895, defense counsel effectively turned down a district court "*invit*[*ation*]" to renew the venue motion at voir dire. Gov't-Br:10 (claiming the district court was "inviting renewal" of venue motions at voir dire).[5]

The government made no such suggestion in the district court, for the actual language of the district court's initial order denying a change of venue was more restrictive and conditional, providing that "Defendants may renew this Motion" during jury selection "*if* the Court determines during voir dire that a fair and impartial jury cannot be empaneled," i.e., that renewal of the motion would naturally *follow* in the event that voir dire did not produce a jury panel. R5:586:17 (emphasis added). Lest there was doubt as to the actual intent of that order–that renewal of the motion was *not* invited *unless* the court first were to find that its voir dire plan had failed–the district court pointedly *reiterated* that very limitation in succinctly denying the defense motion for reconsideration. R6:723:2 (renewal permissible "'if the Court determines during voir dire that a fair and impartial jury cannot be empaneled'")

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[5] *Cf.* Gov't-Initial-Br:51 (describing order not as invitation, but, rather, conditional "willingness"). The government makes this argument to invoke language from *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003), where the court noted the defendant's failure to renew a venue-change motion ***at any time*** after voir dire–in combination with his failure to identify taint of pretrial publicity in voir dire responses–was "an indication that counsel was satisfied that the voir dire resulted in a jury that had not been tainted by publicity." Here, unlike *Yousef*, there was overwhelming voir-dire evidence of pervasive prejudice, as well as trial prejudice, and, most importantly, multiple renewals of the venue motion at trial.

(quoting R5:586:17).

By the terms of the order, the district court plainly did not invite renewal of the motion at voir dire, because it had already overruled counsel's objections that the voir dire procedure was inadequate to eradicate the effects of community prejudice; the court had resolved the issue. RBox1:514:68 (rejecting defense arguments that "voir dire is not the issue [and] voir dire cannot go to the subconscious influences that cause the type of prejudices that we are talking about"); *id*. at 68-69 ("[A]ll we could do is get [a] juror who comes in here and promises [to] be fair and impartial and listen. ... *It is not only Cuban Americans we are talking about, it is anybody* ... . In making this motion and making these arguments, we have done it *anticipating* that type of proceeding") (emphasis added); *id*. at 72-73 ("The problem is we can't separate those people from their environment. ... We can get perhaps 12 people or 18 people who are absolutely sanitized, but we can't keep them from the community and we can't keep them from those pressures and that is part of what we are afraid of and part of what the cases are talking about.").

With the definitive, detailed pretrial resolution of the issues relevant to jury selection, including a hearing on October 24, 2000 (when the district court denied the reconsideration motion) and a second hearing on November 2, 2000, the parties understood from the district court's *two* orders and *three* hearings that there would be no need for further relitigation of the venue issue at voir dire *unless* the district

court's jury selection technique did not produce a panel.[6]

Nevertheless, and despite the fact that all parties deemed the issue fully litigated and preserved, during voir dire the defendants *re-raised* the Moran survey and their contentions that many jurors claiming to have no opinions or prejudices could not be believed, offering the district court an additional opportunity to rethink the issue. R27:1373-74, 1376 ("whether you accept his opinion or not, his statistical analysis I think has been borne out"; as Moran predicted, "there is a percentage of the population out there that can't come into Court and admit their underlying prejudices"). The government strongly opposed defense claims that the survey was vindicated, even though voir dire prejudice percentages mirrored Moran's survey. R27:1378 (government disputes "Mr. Norris' point [that] somehow this proves Professor Moran to be right"). The Moran issue was thus re-raised–and relitigated–at voir dire, and the government prevailed. The district court concluded it was able to pick a jury and did so. There was no district court "invitation" to renew the venue motion, and the court's explanation of its position after voir dire, commending the

[6] *Cf. Jordan v. Lippman*, 763 F.2d at 1273 (defense counsel properly preserved for appeal issue concerning prejudicial community influence on jury where counsel stated position clearly and court ruled adversely; "Despite his understanding of the trial court's ruling, defense counsel laid out his request in an obvious attempt to preserve the issue on appeal.").

defense simply for cooperating with the court's orders,[7] cannot be taken as defense "satisfaction" with the jury, much less the venue, nor does it in any way "end the inquiry." Gov't-Br:38.

Counsel's remarks in voir dire were premised on one object: establishing for the record that voir dire both confirmed the prejudice and confirmed that many jurors would not candidly reveal their relevant opinions and prejudices, including, as Hernandez's counsel expressly noted, Mrs. Cento who ultimately served as a juror. R27:1382. Counsel's point was that many jurors, including some who eventually sat on the jury, claimed to have no opinions about matters everyone would be expected to have opinions about in Miami, such as any aspect of the Elian case, anything about the Cuban government or Castro, or anything about the exile community. *See* R27:1382 (objection by counsel for Hernandez–quoted in full at Campa-En-Banc-Br:42–listing a sample of jurors who were not forthcoming about prejudice).

Plainly, no one at trial contemplated that anything the defense did at voir dire ended the matter, least of all the government. *See* Gov't-Br:App. I at 4 (as late as 2 years after the verdict, in response to the defendants' motion for new trial in 2003,

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[7] R28:1513 ("THE COURT: ... [I]t was a *spirit of cooperation* and I appreciate that and I hope it will continue, I expect it will continue throughout the trial.") (emphasis added). This Court has recognized that counsel's "commendable civility" in the face of adverse rulings provides a poor evidentiary inference of retreat from a legal position. *United States v. Siegel*, 153 F.3d 1256, 1263 (11th Cir. 1998).

stating: "Defendants have had, and have *utilized extensively*, multiple opportunities for change of venue;" arguing that defense venue "motions were *extensively litigated*;" acknowledging defendants "moved for reconsideration;" that the venue "motion was *renewed* during trial ... and denied;" that the venue "claim was reasserted as part of the post-trial motions;" and that the "defense has had four tries at this claim: the pre-trial motion; the pre-trial motion to reconsider; the in-trial motion; and the post-trial motions") (emphasis added). The government's 180° turn now on rehearing is disingenuous and should be rejected.

4. The government misstates the record as to counsel's objection to government's mid-trial motion to replace a minority female juror. The government claims–again in defiance of the voir dire record–that appellants stated their "satisfaction" with the jury by "vigorously objecting to the prospect of a juror being dismissed due to scheduling problems, *without even knowing the juror's identity*." Gov't-Br:38 (emphasis added) (citing defense counsel's comments: "This juror is a qualified juror. She should not be struck by the government at this late stage."). The government claims that when Guerrero's trial counsel made his assertion about "[t]his juror," he did not know he was talking about the African-American female juror, Debra Vernon, who had advised the court at the beginning of jury selection that if the case lasted several months she would have a problem because

she was planning to go and help her daughter move from college–the *only* juror who made any such comment. R22:125. No other conclusion could be drawn from voir dire when that same juror, Vernon, advised the court that her "daughter, age 21" is a "senior in college." Juror Vernon was the only juror to make such a comment. R22:153. Indeed, only one other juror had a child in college outside Miami, Diana Barnes, who also is African-American. R24:601.

While the government itself may not have been paying attention in voir dire, and for that reason stated that "[t]he record should reflect *we have no idea from our side* who this juror is," R104:12098 (emphasis added), *no similar statement was made by the defense*. The court's response–that it had not "revealed it to counsel from either side other than the fact it is a female" juror who needed two trial days (creating a four-day weekend) in order to attend her daughter's college graduation, *id.*, in combination with the voir dire record, shows that the defense knew that the juror in question was either Debra Vernon or Diana Barnes, both of whom were African-Americans whom the defense fought to keep on the jury. Clearly, no one *ever* argued at trial that any such efforts were meant to convey that there no longer existed pervasive community prejudice, that the defendants were withdrawing their still-pending mid-trial motions for change of venue–which were not denied for another two months, R120:13895–or that counsel's comments were anything more than an

objection to replacing juror Vernon with alternate Torroba, a Venezuelan native who acknowledged language difficulties.[8]

5. The voir dire record confirms pervasive prejudice. Without disputing any of the facts set forth in Campa's chart of juror responses to the opinion and prejudice questions asked by the district court, the government nevertheless attempts to restrict consideration of voir dire-demonstrated prejudice to the 32 prospective jurors whom the *government* now labels as admitting Miami-based prejudice. As noted *supra*, however, this Court independently reviews the record of voir dire responses for prejudice. *See United States v. Partin*, 552 F.2d 621, 640 (5th Cir. 1977) ("independent" appellate review of "responses on voir dire" in resolving claim of pervasive prejudice); *Jordan v. Lippman*, 763 F.2d at 1269 (discussing both 21 excused jurors and 17 jurors with possible bias that defense sought to excuse). Acknowledging "Cuba-related partiality" for 32 of the 88 jurors who were fully questioned about prejudice against the defendants, the government reaches a 27% prejudice rate by excluding from its own prejudice calculus 5 jurors whose close association with victims and witnesses led the district court to find presumed

[8] *See* R23:204 (Torroba: "sometimes it is hard for me to understand ... legal terms used in this type of event").

prejudice;[9] 5 additional jurors excused, during case-specific questioning, for bias; 7 jurors the district court described as "*very close*" calls due to equivocation on bias;[10] and numerous other jurors whose concerns for community reaction, personal impact, effect on employment, and doubts concerning crucial fairness issues reveal pervasive community prejudice. *See* Campa-Br:27-38.

The government proposes its novel mathematical formula to make the "pervasiveness" of the relevant prejudice appear comparable to pretrial publicity prejudice discussed in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031 (1975), a habeas case. *See* Gov't-Br:54 (citing *Murphy*, but ignoring opinion of Chief Justice Burger stating that on direct appeal, reversal would be required under federal supervisory standard). The government's formula is fatally flawed. Its underlying premise–that 77 jurors not interviewed as to case-specific prejudice should be counted as non-prejudiced and, alternatively, that 10 jurors who volunteered Miami-based prejudice should not be counted because they were not asked case-specific

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[9] *See* R28:1441–42 (explaining prejudice analysis regarding such jurors). The court found one such juror also lacked credibility regarding ties to Basulto. R23:386 ("THE COURT: ... I asked him directly whether he had an opinion as to Jose Basulto and on a credibility basis, his answers made me feel uncomfortable.").

[10] The finding that these jurors were very close calls is particularly significant given that *the court* rehabilitated these jurors from initial expressions of bias and ***barred counsel*** from examining the jurors, such that the fact findings were more doubtful than with testimony subjected to cross-examination.

questions–is logically unjustified and without precedential support. Gov't-Br:54 (arguing prejudice rate of 27% if 10 prejudiced jurors are excluded). No prior decision has either hypothecated the level of prejudice in jurors not questioned or excluded consideration of admitted-bias jurors. Instead, precedent compels a focus on information actually obtained from prospective jurors as in *Murphy*–as indeed, the appellants have done. *See* Campa-Br:App. A & B., *cf. United States v. Fuentes-Coba*, 738 F.3d 1191, 1194-95 (11th Cir. 1984) (no member of the venire "expressed concern about the influence of outside factors [or] possible bias").

Here, a total of 98 people were asked at least *some* questions about relevant bias against the defendants–based on intense hostility and personal and family experience and relationships–and 49 responded positively, of whom 42 were struck for cause. Campa-Br:App. A & B. The *cause* strike rate, 43% (42 of 98), does not fully reflect bias, however, because "close call" jurors also revealed actual biases, and it is appropriate to consider them for purposes of community prejudice analysis. Including the "close call" jurors brings the admitted prejudice rate to at least 50%.

The government argues, erroneously and without any legal support, that information produced in voir dire is relevant to prejudice only if the *sole* reason the juror was excused for cause was Miami-based prejudice factors, rather than a mix of

factors, including bias against the defendants.[11] However, the law is clear that *all* special circumstances of the case must be considered on appeal, *Capo*, 595 F.2d at 1090, and the recognition of such admissions of bias and of prejudice considerations revealed even in voir dire responses of jurors who claimed they themselves could be fair provides additional compelling evidence of pervasive community prejudice.

6. The government's invited-reply/ignored-error claims regarding prejudicial evidence and arguments are belied by the record, including sustained objections and repeated defense motions for mistrial and change of venue.[12]

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[11] Contrary to the government, Gov't-Br:42, prospective juror Niskin admitted bias against both the defense and government. The government wanted Niskin excused–*see* Campa-Br:App.A:3a–based on Niskin's belief that the government was not acting *strongly enough* against terrorism that had affected her family. But Niskin also volunteered her bias against defendants due to her belief that Castro was allied with terrorist supporters. R24:454 ("So I have information against both sides."). Jack Blumenfeld, counsel for Guerrero noted that the government was taking inconsistent positions on whether bias alone warranted excusal. R24:540-41 (Niskin's ultimate answer–she "thought" she could be fair–was "the same answer that sustained some of the others" for whom defense cause challenges were denied); R25:850 (government opposed striking jurors who admitted bias but ultimately claimed fairness). Likewise, juror George admitted bias after acknowledging friendship with a BTTR victim. R24:570. Brantley noted bias against the defendants after hesitating on one case-specific question; the district court assumed the relevant prejudice without resorting to further case-specific questions. R25:813-815.

[12] The government correctly notes that trial lasted 7 months, but ignores that the 12,000 transcript pages of trial testimony would ordinarily equate to a shorter trial, no more than ten weeks at 250-300 pages of transcript per day. Thus, the case could be retried in about 2 months.

The district court's half-day trial procedure allowed jurors to work part of each day, extending the trial's length. This half-day procedure, while giving jurors freedom to maintain their lives in the community, increased jurors' exposure to outside influences during the work week.

Despite 28 sustained objections to its final closing argument, hundreds of defense objections at trial, a dozen motions for mistrial[13] (including two motions for mistrial during the rebuttal argument), and renewals of defense motions for change of venue which the district court treated as a standing motion throughout the bulk of the trial, the government maintains that "appellants' *silence* below" bars relief and that "almost all the matters" defendants cite as prosecutorial actions contributing to or eliciting community prejudice "garnered no objection." Gov't-Br:44; *see also* Gov't-Br:45 n. 45 ("This clear import of their non-objection distinguishes [*United States v.*] *Williams,* 523 F.2d [1203,] 1209 [(5th Cir. 1975)], where a well-founded and preserved misconduct claim, in combination with a venue claim, resulted in a new trial.").

In so arguing, *see* Gov't-Br:44-48, the government errs in two fundamental regards: *First*, whether the government's actions at trial are ultimately found to be proper or improper is not dispositive. Instead, the primary relevance to the venue issues is to confirm that the trial proceeded along lines which played upon and drew out community prejudice. *Second*, viewing government misconduct as a contributing or cumulative factor justifying a new trial, the attempt to distinguish *Williams*–in which a single comment directed to matters distinct from pretrial publicity was held

[13] *See* R42:3423-25; R46:3985; R47:4128, 4171; R54:5277-79; R68:6952-56; R70:7130; R76:8338; R81:8949; R88:10027; R:113:13127; R124:14482-83, 14540.

to warrant reversal in tandem with prior prejudice–is meritless. Here, unlike *Wiliams*, there were *multiple* prejudicial arguments and evidentiary presentations and multiple motions for mistrial during the trial and closing argument. The defendants moved for mistrial after the fourth sustained objection during rebuttal, when the prosecutor linked defendants' representation by court-appointed counsel to what the government, for the first time in the case, claimed, without any evidentiary support, was their plan to "destroy America," R124:14482, and moved for mistrial again when the government sought to insinuate additional uncharged national security offenses of which no evidence was offered. R124:14483.

Plainly, the defendants did not "invite" or "ignore" prosecutorial misconduct used to heighten the prejudice already faced by the defendants in Miami. While the government refuses to acknowledge that this community-impact theme–throughout trial, from government opening to government closing–drew out the prejudice, *see Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 1635 (1981) ("critical factor" in determining whether community prejudice affected trial is whether issues drawing out such bias are "'inextricably bound up with the conduct of the trial'") (internal quotation omitted), the government's final closing offered a litany of improper prosecutorial remarks directed to the focus of community prejudices:

- inflammatory appeals to God, patriotism, community, anti-

communism, and fundamental fears of destruction of America;

- telling jurors their decision should be influenced by how "extremely important" the case was to the U.S. and that "repressive" Cuba–described as America's enemy and a friend of America's enemies–had a "huge" stake in the case;
- using unfairly prejudicial and inflammatory language, such as "they use dead babies;"
- invoking the Holocaust and Nazism in attributing to defendants and counsel a disregard for life;
- disparaging counsel and the defendants as untruthful by claiming–falsely–that the defense failed to announce evidence supporting its theories of innocence, and its reliance on the absence of a burden of proof, at beginning of trial (and shifting to the defense the obligation to do so);
- personal attacks on defense counsel's integrity and accusing defendants of harming this country by forcing the government to prove their guilt at trial with defense counsel "paid for by the American taxpayer;"
- focusing on villainous images of Castro to convey to the jury that anyone linked to him acts with murderous intent (while understating the government's actual burden of proof on murder conspiracy);

- linking the jurors' duty to convict to honoring Pearl Harbor;
- warning the jury that dissidents in Cuba would not "stand up for their rights" if Hernandez were not punished; and
- vouching for the prosecutors' belief in the defendants' guilt, the quality of the prosecution, and evidence that would have been presented but for the "bosses in Havana."

Admittedly, not every instance of false personal attacks on the defendants and their counsel, vouching, burden-shifting, and emotional appeals to community, patriotism, and religious feelings drew an immediate objection; however, the defendants–particularly with their two mistrial motions during rebuttal–sufficiently preserved the issue of misconduct in relation to government appeals to passion and prejudice. *United States v. Wilson*, 149 F.3d 1298, 1302 (11th Cir. 1998). Like this Court, the Supreme Court has recognized that counsel cannot be held to a standard of objecting to every prosecutorial comment, especially where numerous objections are made and a motion for mistrial is preserved during the argument. *See United States v. Young*, 470 U.S. 1, 13, 105 S.Ct. 1038, 1045 (1985) (recognizing that "interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously").[14]

[14] The government does not contend that the evidence on the conspiracy counts was overwhelming, and the government does not now–nor did it before the panel–make any claim of harmless error.

Contrary to the government's assertion that its excesses in closing were "invited reply," there was no misconduct in the defense closing which would have even warranted a reply. Notably, attorney McKenna's closing affirmed his personal respect for the prosecutors and the agents: "I respect every [government] lawyer at that table and I respect every agent that works for the government." R124:14460. The defense closing's most telling moments were the continued apologies to try to distance appointed counsel from the Cuban government:

> Ms. Miller stood up here the other day and said she wanted the propaganda to stop. Well, I don't know exactly what she meant by that but I did want to say this. Nothing that I have done in this case was propaganda. I will go anywhere to find the evidence. I will go to the moon and I am not ashamed I went to Cuba. I am glad I went there and I would go there again and I would go to the ends of the earth if I had to to find the evidence and find the truth and I am not a stooge of Castro and I am not some dupe. I don't like communism. ... I am no communist and I didn't like being called one in this trial and I don't like it being insinuated I am a propagandist for Cuba. I am not.

R124:14469. The rebuttal to this "inviting" argument, which begins on the following page of the transcript–including accusing McKenna of being a fraud for failing to raise specific intent as a defense in opening statement (even though McKenna had plainly done so), an apologist for Cuba, a U.S. taxpayer-funded tool of the defendants' plan to destroy America, and an advocate of Nazi-like tactics–was devastating, but improper.

The prejudice of the government misconduct is seen particularly in the

vagueness of the government's conspiracy theories. Plainly, what the government sought to overcome in rebuttal was not comments by the defense, but rather this Court's rejection of the government's unprecedented petition for writ of prohibition seeking to make the jury instructions more government-favorable.[15] It was that rejection that provoked the outrageous rebuttal, in order to make up for perceived evidentiary and legal-theory deficiencies. The government, at closing, felt victimized by the district court's rulings on the instructions and this Court's denial of the prohibition writ and felt it could not win without injecting passionate appeals to core prejudice.

Under *Young*, "the remarks must be examined *within the context of the trial* to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the *probable effect* the prosecutor's response would have on the jury's ability to judge the evidence fairly." 470 U.S. at 12, 105 S.Ct. at 1044 (emphasis added); *see id.*, 470 U.S. at 18-19, 105 S.Ct. at 1047-48 ("prosecutor's vouching for the credibility of witnesses and expressing his personal opinion ... may induce the jury to trust the Government's judgment"; "prosecutor was also in error to try to exhort the jury to 'do its job' [an argument the government employed in the instant case]; that kind of *pressure*, whether by the prosecutor or

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[15] *See* Petition for Writ of Prohibition (No. 01-12887) at 4, 27 (acknowledging that the petition was "unprecedented" and that the government faced"insurmountable barriers" on multiple counts, including the key murder conspiracy count).

defense counsel, has no place in the administration of criminal justice") (emphasis added).[16]

The government vouched for the "fabulous" job done by the FBI, denigrated defense counsel, accused the defendants of uncharged crimes much more heinous that the charges, put forth a strawman argument as to what the defense position was and then used the strawman to equate defense counsel with not just Nazi Germany, but the Holocaust; referred to information not in evidence; used highly inflammatory language such as "the bosses in Havana," giving a cabdriver a "tune-up," "wiping out" a witness's entire family–all without a shred of evidence –and put the jury above the law by telling them to "do the right thing" as if urging on a mob to exact vengeance for the murder of four young martyred members of the community at the hands of brutal authorities. *See Young*, 470 U.S. at 18-19; 105 S.Ct. at 1048 (rejecting invited-reply excuse for improper argument even absent *any* defense objection to government closing); *accord Darden v. Wainwright*, 477 U.S. 168, 182, 106 S.Ct. 2464, 2472 (1986) (invited reply does not excuse misconduct even where defense counsel has actually made improper comments).

The prosecutorial abuses here are remarkably similar to those held to require reversal in *Davis v. Zant*, 36 F.3d 1538, 1546-51 (11th Cir. 1994), which, like the

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[16] *See* R13:1392:15 (district court notes "uniqueness of the jury's rapid decision," but concludes "prompt, inquiry-free decision" was only "speculative, circumstantial evidence of ... prejudice").

present case, involved an emotionally-wrenching murder accusation. In *Davis*, the Court explained that the prosecutor's closing–which was marked by misleading accusations, arguing that "defense was a last minute fabrication," "disparaging and egregious comments with a rambling and highly improper commentary on the defense management of the trial," and highlighting counsel's failure to explain the defense in opening statement–was fundamentally unfair and, absent overwhelming evidence of guilt, required a new trial. Here, the Government exceeded even the *Davis* limits, sparing no impropriety to inflame the jury against the defendants and their counsel. And here, the misconduct occurred with (if not because of) the government's knowledge that the community harbored special animus toward the defendants and–as was manifested by witness misconduct–toward defense counsel.

An example of the continuing, intentional effort to prejudice the defendants–beginning in opening statements and continuing throughout trial–is the government's numerous, improper suggestions that Campa might have engaged in espionage. *See* R29:1583 (in opening statement, prosecutor improperly speculated Campa might have spied on Fort Bragg). The district court sustained objections to the government's actions and granted a motion to preclude further unwarranted suggestions of spying on military facilities. R54:5277-82; R68:6935.

Since this did not deter the government, the district court later, while denying a motion for a mistrial following prejudicial testimony, had to clearly instruct the

government to *refrain* from further improper insinuation and speculation about illegal activity by the defendants. R68:6957-58 (ordering government "not to bring up in closing argument" speculation about other crimes or acts of espionage "unless you have and can proffer concrete evidence"); *see also* R76:8272-73 (sustaining objection, but denying motion for mistrial, as to prosecutor's attempt to prejudice Campa by innuendo during the testimony of retired U.S. Admiral Eugene Carroll; instructing jury to disregard government's improper suggestion).

Still undeterred by the district court's repeated rulings, the government again, during rebuttal closing, argued uncharged offenses and an intent to destroy the United States paid for by the taxpayers, eliciting the first motion for mistrial during rebuttal. R124:14482. After vehemently describing defendants as people "bent on destroying the United States," the prosecutor provoked the second motion for mistrial by dramatically turning to the defendants and demanding: "Let's ask, why are you on military bases? Why are you in Key West, Florida at Boca Chica Naval Air Station? Why are you in Fayetteville, North Carolina?" R124:14483. The district court held that the matter was a "close question," but denied the motion. R124:14543-45.

These improper "suggestions, insinuations, and assertions" by the government were certainly more egregious than those that have resulted in new trials based *solely* on prosecutorial misconduct. In *United States v. Blakey*, 14 F.3d 1557, 1559-60 (11th Cir. 1994), for instance, this Court reversed a defendant's conviction on bank fraud

based on improper closing arguments which merely included references to the lack of quality witnesses called by the defense at trial, an attack on the defendant's character based on the number of aliases he possessed, and the statement that the defendant was "a professional, a professional criminal" (where there had been no evidence concerning the defendant's prior criminal record introduced at trial and the defendant's prior record consisted of only two relatively minor offenses). "Thus," the Court held, "the prosecutor's comment went outside the evidence, and impugned Blakey's character with an inaccurate characterization." *Id.* at 1560.

While the prosecutor's assertion in *Blakey* that the defendant was "a professional criminal" was "clearly improper because it encouraged the jury to convict Blakey based on facts not admitted as evidence," *id.*, similarly here, the prosecutor's outrageous remark that Campa and his codefendants were "bent on destroying the United States," when Campa's most serious charge was failing to register as an agent, was clearly designed to brand the defendants as part of a Cuban-government menace against whom action must be taken. *See Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969) ("shorthand characterizations that are not based on the evidence, such as calling the defendant a "hoodlum," are especially prejudicial because they are "especially likely to stick in the minds of the jury and influence its deliberations"). The repeated, emotionally-delivered, unfounded accusation that the defendants were trying to destroy the United States served, along with other appeals

to passion–including the political attacks on Cuba, the direct linkage to Castro, torture, repression, and even murder of dissidents, and the final call to do the "right thing"–made clear to the jury that they would be called to account in the community if they did not convict.

Given the thinness and hotly-contested nature of the evidence, particularly on the most serious charges; the community hostility to these defendants and pervasiveness of community passions and prejudice even without prosecutorial misconduct; and the government's prejudicial, emotionally powerful, and plainly effective attacks, reversal of the convictions is compelled.

CONCLUSION

Appellant requests that the Court remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 6,972 words.

Orlando do Campo

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by hand delivery this 27th day of January, 2006, upon Anne R. Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111; Paul A. McKenna, Esq., 2940 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; William Norris, Esq., 8870 S.W. 62nd Terrace, Miami, Florida, 33173; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; Leonard I. Weinglass, 6 West 20th Street, New York, NY 10011; Ricardo J. Bascuas, Esq., 1870 Coral Gate Drive, Miami, Florida 33145; Peter Erlinder, Esq., c/o William Mitchell College of Law, 875 Summit Avenue, St. Paul, Minnesota 55105; and Edward G. Geudes, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131.

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