Nos. 01-17176 & 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

ANTONIO GUERRERO,

Defendant/appellant.

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

EN BANC REPLY BRIEF OF THE APPELLANT ANTONIO GUERRERO

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STATEMENT OF THE EN BANC ISSUE

Whether the district court improperly denied defendants' motions for change of venue and motion for new trial based on newly discovered evidence.

REPLY ARGUMENT

The government, in its answer brief, fails to engage the core argument of the defense: that in the Miami venue, pervasive preexisting prejudice against Cuba, its agents and allies, recently inflamed by the Elián González controversy and media coverage surrounding the instant case, rendered it a uniquely improper venue for trial of the defendants.

By deflecting attention from the "special facts" of the Miami venue, see Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173 (1959), the government avoids any consideration of the "totality of circumstances" so critical to a presumed prejudice analysis. See Murphy v. Florida, 421 U.S. 724, 798-99, 95 S.Ct. 2031, 2035-36 (1975). Thus, the identity of the defendants and the charges against them, reflecting their admitted status as agents of the Castro regime sent to spy on and sow dissension among the exile community, and compounded by additional accusations of conspiracy to murder community victims–all of which was highlighted by ongoing, consistently condemnatory media coverage and an abiding atmosphere of virulent anti-Castro passion, see Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966), and confirmed by empirical data–are all either parsed separately or omitted

from the government's brief, masking the presumed prejudice so clearly apparent if all were considered in conjunction, as compelled by prevailing law.

I.

The District Court Abused its Discretion in Denying the Pretrial Motion for Change of Venue by Applying an Erroneous Legal Standard for Deciding the Rule 21(a) Motion.

A. The "Virtual Impossibility" Standard Set Forth in Ross, and Used by the District Court to Deny the Defendant's Rule 21(a) Motion, Exceeds the Applicable Standard for Addressing Change of Venue Claims.

The government notably does **not** contest that, as a matter of law, the district court lacked discretion to deny appellant's Rule 21(a) motion for change of venue, pursuant to the unfairly heightened, arguably unconstitutional, "virtual impossibility of a fair trial" standard taken from a state, publicity-based habeas case, Ross v. Hopper, 716 F.2d 1528, 1540 (11th Cir. 1983). Instead, the government tries to circumvent the clear legal error infecting the district court's July 27th order by claiming that this Court "need not resolve the issue of whether the 'virtual impossibility' or 'reasonable likelihood' standard should apply" because the district court did not actually hold appellants to the "virtual impossibility standard." Gov't-Br:30. Rather, the government claims, the court applied an "arguably more generous test (as would impair their right to a fair trial) than either the virtual-impossibility or the substantial-likelihood standard." Gov't-Br:30 (emphasis in original). This

baseless argument is starkly belied by the district court's several statements in the July 27th order, to the effect that: the relevant standard for deciding the Rule 21(a) motion derived from the "third inquiry" in Ross; the Ross standard required a showing of a "virtual impossibility of a fair trial; and the government was correct that the defendants failed to show an impossibility of a fair trial, such that prejudice would not be presumed under Ross.[1]

B. The constitutional standard does not govern the district court in ruling upon a Fed. R. Crim. P. 21(a) motion.

The government does not dispute that this Court has **never** (until this case) been asked to determine the appropriate standard to be applied in deciding a pretrial motion for change of venue under Rule 21(a). Cf. Guerrero Initial Br:26 n.6.

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[1]See July 27th Order (DE586) at 4 (citing Ross v. Hopper for proposition that "in seeking a change of venue under Rule 21 prior to trial, the defendant bears the burden of demonstrating...(3) sufficient evidence that the pretrial publicity has been 'so inflammatory and prejudicial and so pervasive or saturating the community as to render **virtually impossible** a fair trial by an impartial jury, thus raising a presumption of prejudice'"); at 10 n. 2 ("the Court construes Defendants' Motions as directed primarily toward the issue of 'pervasive community prejudice,' and accordingly, the Court's analysis focuses on the **third inquiry set forth in Ross**. See Ross, 716 F.2d at 1540"); at 10 (noting government's assertion "that the Defendants have failed to carry their burden of demonstrating that it is **impossible** to select a fair and impartial jury in this community (D.E.#441 at 3)"); at 11 ("Based on its review of the materials presented by Defendants, the Court finds that the pretrial publicity has not been 'so inflammatory and pervasive as to raise a presumption of prejudice' among the potential jury venire in this case. **Ross, 716 F.2d at 1541**"); at 16 ("[T]he Court finds that Defendants have not adduced evidence sufficient to raise a presumption of prejudice against Defendants as would impair their right to a fair trial by an impartial jury in Miami-Dade court. See Fuentes-Coba, 738 F.2d at 1194-95; **Ross, 716 F.2d at 1541**.")(emphases added).

However, the government claims, the Eighth Circuit's decision in United States v. Blom, 242 F.3d 799, 803-804 (8th Cir. 2001), indicates that the Rule 21(a) standard is actually "more stringent" than the "substantial or reasonable likelihood of prejudice" standard advocated by the defendants here. Gov't-Br:29.

Contrary to the government's suggestion, the "substantial or reasonable likelihood of prejudice" standard for pretrial motions for change of venue is **not** an "invention" of the five defendants in this case. Actually, it is a well-seasoned standard that has been advocated by the American Bar Association since 1980; adopted and applied by most states for almost two decades, see, e.g., Brecheen v. Oklahoma, 485 U.S. 909, 108 S.Ct. 1085 (1988) (as recognized by Marshall, J., dissenting from denial of certiorari); and applied in virtually all of the reported federal district court decisions that exist on Rule 21(a)–including United States v. Marcello, 280 F. Supp. 510 (E.D. La. 1968); United States v. Holder, 399 F. Supp. 220, 227 (D. S.D. 1975); United States v. Moody, 762 F. Supp. 1485 (N.D. Ga. 1991); United States v. Tokars, 839 F. Supp. 1578 (N. D. Ga. 1993)(all cited in Guererro's Initial En Banc Brief at 24-25, 31, but simply ignored by the government).

While the Supreme Court has not addressed Rule 21(a) specifically since Singer v. United States, 380 U.S. 24, 35, 85 S.Ct. 783, 790 (1965), where it noted that the rule permitted a change of venue "when there is a well-grounded fear of prejudice," the government unfairly ignores Singer. A "well-grounded fear of

prejudice" standard is consonant with a "substantial or reasonable likelihood of prejudice" standard. The Supreme Court certainly intimated as much in Singer, by citing with approval the "reasonable likelihood" standard of Sheppard v. Maxwell, 384 U.S. 333, 683, 86 S.Ct. 1507, 1522 (1966).

Against this backdrop of authorities, the government urges the Court to hold–based solely upon Blom–that a "more stringent" standard than "substantial or reasonable likelihood of prejudice" (specifically, the constitutional due process standard applicable on collateral review) is also required in deciding pretrial Rule 21(a) motions. Gov't-Br:29. Plainly, however, if the Rule 21(a) standard were coextensive with "due process," the Supreme Court would not have needed to use its supervisory authority to formulate a separate Rule 21(a). See, e.g., McNabb v. United States, 318 U.S. 332, 340-341, 63 S.Ct. 608, 613 (1942)(rules for federal criminal trials [such as the evidence rules] have been formulated by the Court in an exercise of its supervisory authority over the administration of criminal justice in the federal courts, and are **not** restricted to principles derived solely from the Constitution; rather, they are derived from basic principles of justice).

The Eighth Circuit's decision in Blom–which, again, is the sole authority the government posits for its counter-intuitive, and counter-precedential, "constitutionalizing" of Rule 21(a)–is unhelpful to the government, on the cited proposition, for several reasons. First, and importantly, Blom is not actually a Rule

21(a) case. The defendant in Blom never sought a venue change to another district under Rule 21(a). Rather, he sought an **intra-district transfer** (within the district of Minnesota) away from the northeastern (Duluth) division some 40 miles from where the crime occurred, to Fergus Falls, in western Minnesota (approximately 260 miles away from the crime scene).[2] Accordingly, Blom is more properly considered a Rule 18 case. See infra at III (further discussing Blom in that regard).

Secondly, although the Eighth Circuit did find in Blom that the district court had not abused its discretion in denying the requested intra-district transfer because Blom had not shown a "due process" violation from the adverse pretrial publicity, the district court in Blom did not in any way embrace the clearly-discredited "virtual impossibility" standard (applied by the district court here) as the relevant "due process" standard. Rather, the court applied the standard from Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303 (1977), a standard unique to cases premised "**exclusively on the quantum of publicity**." Blom, 242 F.3d at 803. As pointed out by Guererro's Initial En Banc Brief at 28-31 (but continually ignored by the government), the very different standards governing pretrial publicity cases, as set forth by this Court's predecessor in Mayola v. Alabama, 623 F.2d 992, 998, 1000-

[2]The court may take judicial notice of the various distances between these locations, which counsel has confirmed through the internet website, www.Mapquest.com.

1001 (5th Cir. 1980), do not govern cases such as the instant one, which are not premised "exclusively" or even "primarily" upon "the quantum of [case-related] publicity."

C. Even if a Rule 21(a) movant is held to the heightened constitutional standard for "presuming prejudice," and even if– in a pretrial publicity case–that heightened constitutional standard requires a showing of the "virtual impossibility of a fair trial," the pretrial publicity standard should not govern a "hybrid" case like this one, where there was not merely adverse, case-specific pretrial publicity, but also "pervasive community prejudice" apart from that publicity. In such a case, the district court should have applied the "probability of prejudice" standard of Pamplin v. Mason.

In asserting that "proof of pervasive community prejudice is **almost always** linked with demonstration of pervasive prejudicial publicity," Gov't-Br:31, the government chooses its words carefully. Here, the operative word is "**almost**," for the government cannot ethically assert that pervasive community prejudice is "**always**" linked with pervasive case-related publicity.

The government acknowledges the decision in Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966), in which this Court's predecessor found that "pervasive community prejudice" derived from "inherently suspect circumstances of racial prejudice." Id. at 5.[3] Pamplin, of course, directly controverts the government's specious claim that

[3] Unable to distinguish Pamplin "factually," the government attempts to do so "procedurally" by emphasizing that the trial court in Pamplin failed to hold a change-of-venue hearing at which the defendant was permitted to present witnesses regarding community hostility, which denied him "procedural due process." Gov't-Br:31-32,

"proof of prejudice must be directed against the defendant, not a larger class of which he may be a member."[4] While other circuit courts may have reached results contrary to Pamplin, such conflicting decisions are not persuasive, given the Supreme Court's citation of Pamplin with approval in Groppi v. Wisconsin, 400 U.S. 505, 508, 91 S.Ct. 490, 492 (1971), and express recognition in Groppi that "because of prejudicial publicity **or for some other reason**, the community from which the jury is to be drawn may already b[e] permeated with hostility toward the defendant." Id. at 509-510, 91 S.Ct. at 493 (emphasis added).

The government erroneously suggests that a trial court is always "counseled to proceed to voir dire before determining whether prejudice exists to justify a venue transfer." Gov't-Br:28. Likewise, the government's amicus, the Cuban American Bar Association (CABA), contends that irrespective of the specific nature of the

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n.32. While the government claims that the "process" in the instant case was "exemplary" because the court considered all of the defendants' "evidentiary submissions before denying the venue motion," id., that is untrue. See infra at B (explaining that the court's erroneous view of the applicable legal standard caused it to improperly disregard and/or discount all of the defendants' evidentiary submissions here).

[4]See also Frazier v. Superior Court, 486 P.2d 694, 699 (Cal. 1971)(defendant accused of murdering well-regarded community victims could not receive fair trial because, as member of group towards which there existed "pervasive community attitude" of "hostility," he ran risk "of being judged not for what he has done, but for who he is, or what he appears to be"); United States v. Holder, 399 F.Supp. 220, 228 (D. S.D. 1975)(ordering change of venue based not only on publicity, "but more significantly a deeply-felt prejudice toward Indians which was tremendously reinforced by the" offense).

"pervasive community prejudice" claim, the district court has complete discretion to deny a pretrial motion for change of venue, and "test" the asserted prejudice "in the crucible of voir dire." CABA-Br.:2. The government and CABA, however, misunderstand that any preference in the caselaw for voir dire as a "crucible" to test prejudice is limited to pretrial publicity cases: both Ross and Fuentes-Coba involved exclusively pretrial publicity. In the very different case presented here, where the asserted prejudice derives primarily from "inherently suspect" biases that are pervasive in the community, Pamplin does not merely "warn" against reliance upon voir dire. 364 F.2d at 5, 6. It directs that the court "**must** suspect the response of prospective jurors even on individual examination," id., and holds that the "resulting probability of unfairness **requires** suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." Id. at 5 (emphasis added).

Since the "discretion" possessed by the district court is minimal at best after a showing that there is an "inherently suspect bias" pervasive in the community, the district court erred as a matter of both fact and law, and clearly abused the much narrower discretion it possessed here, in holding that "voir dire, conducted in a manner similar to Ross, 716 F.2d at 1540, and Fuentes-Coba, 738 F.2d at 1194-95, and careful instructions to the jury throughout trial will enable the Court to safeguard Defendants' right to a fair and partial jury in Miami-Dade County." July 27th Order at 17.

II.

Due to its misunderstanding of the applicable legal standard, the district followed improper procedures in considering the submitted evidence and making its factual determinations – disregarding the most crucial evidence of pervasive community prejudice.

Both the Supreme Court and this Court have recognized that where, as here, a lower court makes findings pursuant to an incorrect legal standard, such legal error taints the ensuing "findings," and they are stripped of the ordinary deference. See, e.g., Kyles v. Whitley, 514 U.S. 419, 440-441, 115 S.Ct. 1555, 1569 (1995) (refusing to defer to lower court's factual determination where there was "room to debate" whether lower court applied correct–cumulative prejudice–standard); Rogers v. Richmond, 365 U.S. 534, 543-547, 81 S.Ct. 735, 741-743 (1961) ("findings of fact may often be ... influenced by what the finder is looking for;" even "[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions"); Harris v. Oliver, 645 F.2d 327, 330 (5th Cir. Unit B 1981) (new trial is required if finder of fact "has been guided by an erroneous standard of law"); Corley v. Jackson Police Department, 566 F.2d 994, 1001 (5th Cir. 1978)(findings induced by or resulting from misapprehension of the controlling legal standard lose insulation of "clear error" standard, and judgment based thereon cannot stand; remanding for new trial).

Here, as a result of the court's misguided beliefs that Ross set forth the Rule

21(a) standard, that Pamplin was of no moment, that the only relevant consideration (as in both Ross and Fuentes-Coba) was the effect of case-related pretrial publicity, and that Fuentes-Coba permitted the court to test the asserted prejudice, through voir dire, the court's findings as to the submitted evidence were themselves an abuse of discretion.

III.

The district court gave no weight to, nor did it even discuss, the non-case-related articles that documented pervasive community prejudice (such as those documenting the galvanizing effect of the Elian Gonzalez matter upon the exile community in Miami-Dade county), or the argument/proffers of defense counsel at the hearing on the motion for change of venue (a hearing, which was held only two days before Elian was returned to Cuba), nor did the court accord requisite consideration to the Moran survey, which was supported by significant empirical and community data.

The government's claim that the district's pretrial order "reflects careful consideration of all the evidence," and indeed, that the "court reviewed the articles [submitted by the defense] as to **both** their pervasive community prejudice and prejudicial publicity claims," Gov't-Br:23, is refuted by the record citation given (R5:586:10-11). Instead, the district court expressly limited its finding with respect to the press materials to one sentence, in which the court clearly considered the articles **solely as to their prejudicial publicity value**: "Based on its review of the materials presented by Defendants, the Court finds that the pretrial publicity has not been 'so inflammatory and pervasive as to raise a presumption of prejudice' among

the potential jury venire in this case." R5:586:11 (citing Ross v. Hopper, 716 F.2d 1528, 1541 (11th Cir. 1983)); see also R7:978:15-17 (district court reiterates that its review of pretrial and trial publicity was limited to evaluating the prejudicial effect of information conveyed by such media reports).

Nowhere in the July 27th order denying the motion for change of venue does the court acknowledge the uniquely inflamed environment in Miami during the four months preceding its order–on the streets, and in homes and businesses, all publicized with intensity by the local media–consisting of riots, rallies, death threats, bomb threats, and job firings in connection with the attempt to return a minor child, Elian Gonzalez, to his father in Cuba, supported in significant instances by local government; as well as menacing warnings by prominent exile community members of serious economic retaliation in response to all perceived efforts to relax the county ban on business with Cuba. *See* Gonzalez Reply Br:2-23. Nor does the court acknowledge the documented history of similar conflagrations arising in the community with respect to any controversy involving Cuba–a circumstance of crucial pertinence to the consideration of a venue change with respect to the instant charges, premised on Cuban agent espionage and conspiracy to murder local residents. Id.

The district court's failure to consider this glaringly hostile and impassioned community environment, apparently construing it as peripheral even though coincident in time with the instant prosecution, is at odds with any reasonable

consideration of the facts concerning the nature of the venue–where the claim of venue change was predicated on prejudice within the venue arising not solely from publicity but from abiding, longstanding passions evoked by the trauma of exile and pervading all aspects and elements of the community, exile and non-exile alike–which was exacerbated by the publicity surrounding this case.[5] See Groppi v. Wisconsin, 400 U.S. 505, 510, 91 S. Ct. 490, 491 (1971)("Mr. Justice Holmes stated no more than a commonplace when...he noted that '[a]ny judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.'")(citation omitted; emphasis added). See also RBox1:514:22-36 (defense argument detailing community anger creating a prejudicial emotional atmosphere precluding the selection of an impartial jury, including specific threatening incidents; noting elements in community "absolutely hateful of anybody in any way, shape or form connected with the Castro regime," and causing significant pressures to others in the community not expressive of similar sentiments; advising court that community's anti-Castro ire would be directly invoked

[5] The government contends, meritlessly, that the argument of appellants that pretrial publicity contributed to community bias conflicts with their pre-trial position. Gov't-Br:25. Indeed, the government conceded on appeal appellants' raising of this very argument. See Gov't Br:App. A at 5 n.3 (recognizing Campa argued prejudice from "sensational pretrial publicity); R7:978:17 (district court recognized defendants' argument that "onslaught" of publicity would engender community prejudice); and the government, in its original brief at 50, argued: "Appellants based their [venue] argument on pre trial publicity and community bias." (Emphasis added.)

by the "*very core of our theory of defense*")(emphasis added).

Similarly, the court's interpretation of articles, submitted by the defense in support of its pervasive prejudice claim, as primarily factual, non-inflammatory, and non-case specific, falls short of any reasonable reading of those submissions and their impact on community passions. *See* Gonzalez Reply Br.:2-23 (citing media reports in record accusing defendants–together with Castro and the Cuban regime–of certain guilt of "murder" and "terrorism" in connection with offenses; noting ongoing theme of "Spies Among Us," in favor of verdict for "us"–the Miami community).

Likewise improper was the district court's rejection in its July 27th order of the validity and import of the Moran survey, despite confirmation of the survey's conclusions by underlying data, additional respected empirical studies, and the pervasively hostile atmosphere in the community in the wake of the Elian controversy, all of which established–in the period immediately preceding the November 2000 commencement of trial–heightened community prejudice against anyone associated with the Castro regime. See Medina Reply Br.:15-23 (comprehensive analysis of trial court's erroneous handling of survey results).

Indeed, the entirety of the evidence before the district court–local publicity, community opinion surveys, threats and violence connected to Cuba-related issues, as well as incidents occurring after submission of the initial venue motion–established "a community atmosphere ... pervasively inflamed" against the specific

"target group" to which defendants belonged. Pamplin v. Mason, 364 F.2d 1, 7 (5th Cir. 1966).

The government's brief, in an effort to avoid addressing Miami's impassioned community atmosphere, recites cases in which media coverage may have created prejudicial opinions in an otherwise disinterested venue. Such opinions–products of information and intellectual processes–respond to voir dire, judicial instructions, evidence, and reason. In the ordinary case, publicity does not fall on the fertile soil of a community already inflamed by virulent revulsion against defendants who fall into a "target group" of pre-existing prejudice, as evidenced in this case by demonstrations, riots, bombings and decades of violence directed against their principal, Cuba. Analysis of venue motions based primarily, if not exclusively, on pre-trial publicity, rests typically on counting news articles and considering only those that are directly relevant to the defendants and the issues on trial, assessing prejudice from their content. That formulaic approach fails to deal with the reality of a venue already saturated with deep seated passions into which the publicity is merely a dropped match:

> Extensive publicity before trial does not, in itself, preclude fairness.
> . . . .
> Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true

> when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.

United States v. McVeigh, 918 F.Supp. 1467 (W.D.Okla. 1996)(emphasis added).

Miami is home to many thousands of Cuban exiles who have made their personal suffering a significant part of the county's public agenda. Here, and nowhere else in the country, the shootdown of the Brothers to the Rescue planes opened old wounds, and created new ones, giving the community a "personal stake in the outcome" of the trial, and a "sense of obligation to reach a result which will find general acceptance." Id. at 1473. In Miami, the trial of these defendants was not just another high-publicity, high-drama trial, but part of a decades-old community trauma.

Pretrial publicity usually provides information. Pamplin and its progeny acknowledge that in communities with certain histories and experiences, trials that touch upon deeply held prejudicial beliefs and attitudes ought to be held elsewhere. They also recognize that, unlike opinions formed by reading the news, community passions cannot be sanitized out of the jury box through rational discourse. Perhaps the most revealing finding of Professor Moran's survey was that of those who admitted having an opinion, **90% admitted that the evidence would not change it.** Moreover, over a third of those surveyed admitted they feared personal consequences should they vote to acquit, while jurors apparently remote from the Cuban community

understood that serving on a jury that returned a verdict not in agreement with what that community expected could mean negative consequences in their business and personal life. See Campa Br:App. A.

IV.

In addition to its misunderstanding of the applicable legal standard for motions for change of venue under Rule 21(a), the district improperly failed to consider the different standard applicable to the alternatively-requested intra-district transfer to Ft. Lauderdale under Fed. Crim. R. 18.

While acknowledging only as a passing reference in its factual recitation that during the June 26, 2000 hearing on the Rule 21(a) motion for change of venue, the defendants ultimately "modified" that request, asking the Court to consider, at minimum, an intra-district transfer to Ft. Lauderdale, Gov't-Br:8, the government thereafter wholly ignores the intra-district transfer issue in the argument portion of its brief. Not only does the government fail to respond in any way to Guerrero's argument at pages 9 and 41-43 of his Initial En Banc Brief that the district court abused its discretion by failing to consider whether to order an intra-district transfer, but the government **does not even acknowledge the existence of Fed. R. Crim. P. 18** (entitled "Place of Prosecution and Trial" providing that "The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, **and the prompt administration of justice**") (emphasis added), or the 1979 Advisory Notes to that Rule (amendment was intended to preclude

erroneous prior interpretation that trial was not allowed in any division other than that in which the offense was committed; trial of a case is only guaranteed "within a particular judicial district" – **not** in any particular "division within" that judicial district).

Consistent with local district court rules, intra-district transfers may be ordered, inter alia, "in the interest of justice." S.D. Fla. L.R. 3.1(H). Defense counsel pointed this out at the June 26th hearing, RBox1:514:43, following the court engaged in a lengthy colloquy with the parties as to the logistics of an intra-district transfer and asserted that it would inquire into the feasibility of such a transfer. RBox1:514:53-56. The prosecutor noted that in anticipation of a request for an intra-district transfer, she had found that the registered voters in Miami-Dade County, from which the jury pool would be chosen, were 43.95% "Hispanic," while in Broward County, Hispanic voters comprised only 6.04% of the total, and in Palm Beach County, even less – 2.84%." RBox1:514:56-58. While stating that, in the government's view, the defense had not met the requisite standard, nevertheless the prosecutor acknowledged that "the defense's position that the case can be fairly tried within the Southern District of Florida as opposed to requiring to be moved outside of the district gives the Court certain options that may be able to optimize all the interests here presuming that the logical problems can be solved. RBox1:514:65.

Such candor is not present in the government's en banc brief. While the

government would "wish away" the Rule 18 issue altogether, its reliance upon Blom brings the intra-transfer issue full front and center. While the court in Blom denied the defendant's specific request for a transfer to Fergus Falls,[6] Blom's significance lies in the fact that the district court there **did ultimately transfer the case away from Duluth to Minneapolis (over 150 miles away),** and that intra-district transfer was a primary factor convincing the Eighth Circuit that there had been no abuse of discretion by the lower court. See also id. at 803-804 (district court did not abuse its discretion in denying Blom's pretrial motion for change of venue, because it took this "precautionary measure designed to assure the selection of an unbiased jury"–as well as ordering further "that the jury be chosen from a statewide jury pool that excluded the Fifth Division where Moose Lake and Kerrick are located" and the crime occurred; recognizing court had "supervisory power to order a new trial" "for reasons that do not amount to a due process violation," but declining to exercise such power due to such precautionary measures).

Here, in contrast to Blom, the district court took no similar "precautionary measure." And, in the clearest abuse of its discretion in that regard, the district court failed to ever follow through with "investigation" on the issue it had promised at the hearing. The record is devoid of evidence that the court made any "inquiry" into the logistics of a transfer to Ft. Lauderdale or West Palm Beach, or indeed, if the court

[6]There is no federal courthouse in Fergus Falls.

did make such inquiry, what the inquiry disclosed. To have denied the requested intra-district transfer **without making any inquiry** concerning the feasibility of a transfer to the Ft. Lauderdale division (only 27.4 miles from Miami) or to West Palm Beach (approximately 70 miles from Miami); without mentioning what the situation actually was vis-à-vis available courtroom space,[7] whether there was a judge in Ft. Lauderdale willing to make a "switch" if necessary, and whether bringing jurors from other divisions in the district was a viable alternative; and ultimately, without any mention of Rule 18 or its underlying policies and concerns, the district court clearly abused its discretion. Such error mandates a new trial. United States v. Burns, 662 F.2d 1378, 1383, 1385 (11th Cir. 1981)(remanding for new trial "because of district court's error in ruling on defendants' motion for change of venue; district court's exercise of discretion in setting trial in particular division of district over proper objection by defendant "must be supported by a demonstration in the record that the judge gave due regard to the factors now incorporated in Rule 18;" record that does not "furnish any hint of a reason" why trial could not be held in division of district desired by defendant "within a reasonable time" was insufficient to satisfy requirements of Rule 18).

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[7]Cf. United States v. Pepe, 747 F.2d 632, 639 (11th Cir. 1984) (precise record evidence as to available courtroom space in Miami at the scheduled for trial, convinced Court that transfer of a Miami-based racketeering case–over the defendants' objection–from Miami to Ft. Lauderdale was not "an abuse of the district court's Rule 18 discretion in designating the place for trial").

CONCLUSION

Appellant requests that the Court reverse his convictions.

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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 5,190 words.

Leonard I. Weinglass

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was hand-delivered 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; Orlando do Campo, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1500, 200 South Biscayne Boulevard, Miami, Florida 33130-1555, Miami, Florida 33131; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; William M. Norris, 8870 SW 62nd Terrace, Miami, FL 33173; 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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