IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176 & 03-11087

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

EN BANC REPLY BRIEF OF APPELLANT GERARDO HERNANDEZ

PAUL A. MCKENNA, ESQ.
MCKENNA & OBRONT
Attorneys for Hernandez
2940 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Tel. No. (305) 373-1040

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTORY AND OTHER AUTHORITY:

STATEMENT OF *EN BANC* ISSUES

I. Whether the district court erred in denying defendants' motions for change of venue.

II. Whether the district court abused its discretion in denying the defendants' motion for new trial based on newly-discovered evidence.

REPLY ARGUMENT

1. The government's analogies to venue claims of general or diffuse prejudice are not pertinent to the specific, profound prejudice faced by these defendants–the only such Cuban-government agents ever tried in Miami–on community-sensitive charges of murdering humanitarian exiles viewed as martyrs and disrupting and suppressing exile opposition to the Cuban government and Fidel Castro.

The government argues that the defendants cannot claim to be targets of Miami's passionate and "pervasive community bias against Cuba and Castro" because the law does not, in the government's view, recognize prejudice against "a large class of which [the defendant] may be a member." *See* Gov't-Br:32 (citing *United States v. Washington*, 48 F.3d 73, 78 (2d Cir. 1995); *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972); *United States v. Jordan*, 223 F.3d 676, 686 (7th Cir. 2000); *United States v. Affleck,* 776 F.2d 1451,

1455 (10th Cir. 1985); *United States v. Chapin*, 515 F.2d 1274, 1285-86 (D.C. Cir. 1975)). The government's position is factually and legally erroneous: (1) the case law does not support discounting bias that is directed toward a large group; and (2) the prejudice at issue here was focused directly on these defendants and the specific nature of the offenses charged, not on a large group of people or a broad class of offenses.

The cited cases clearly reject the theory that broadly-based bias or prejudice, e.g., hostility toward a racial, religious, or political group, is irrelevant to venue analysis, much less that the law is concerned only about narrow prejudices premised on information previously learned about the case. To the contrary, in each case, the courts carefully examined the entire record and found no animating prejudice whether viewed broadly or narrowly. *Jordan*, 223 F.3d at 685 (no showing of significant anti-Puerto Rican bias apart from defendant's bald claim, defendant's motion premised not on jury bias, but convenience of parties under Fed. R. Crim. P. 21(b); defendant "was not moving separately for transfer under Rule 21(a) on the grounds of pretrial publicity, but wanted the pretrial publicity to be weighed with his

Rule 21(b) arguments"); *Affleck*, 776 F.2d at 1455 (no showing of prejudice in Mormon community where "[f]rom the panel of 77 who were available for oral voir dire, only three were dismissed for expressing their opinion as to appellant's guilt"); *Chapin*, 515 F.2d at 1288 (no showing of noteworthy political-party prejudice where jury partially acquitted defendant and "of the 120 prospective jurors ... *no one* appears to have formed a definite opinion of his guilt or innocence") (emphasis added); *Washington*, 48 F.3d at 78 (no member of the venire "had beliefs about drugs, firearms, defendants' race, or the fact that defendants hailed from New York City, that would prevent their impartial deliberation"); *Farries*, 459 F.2d at 1060-61 (appellate court's "*independent evaluation of the circumstances*," including jury's partial acquittal, unprejudicial "nature and content of the media reports," and voir dire showing of no pervasive community bias, such that "few of the prospective jurors had any prior knowledge of the case," *dispelled* claim of prejudice) (emphasis added).

The government's brief avoids applying the record-specific analysis that the Second, Third, Seventh, Tenth, and D.C. Circuits and other courts employ

in determining whether pervasive community bias exists in regard to a particular case. The government ignores that the present case involved Cuban government agents sent to Miami for the purpose–according to the government–of harming the very exile community that, in demographic terms, predominates in Miami.

Conceding merely that high levels of prejudice exist in Miami against the Castro government, the government argues that this prejudice should be viewed as diffuse and peripheral to these defendants. *See* Gov't-Br:32 ("appellants contend that proof of a pervasive community bias against Cuba and Castro is sufficient to *extrapolate* that bias against them individually as Cuban agents") (emphasis added). But the government's strained claim of *extrapolation* in linking these defendants to Castro and Cuba is belied by the indictment, the trial evidence, the closing arguments, and most tellingly, by the government's own post-verdict characterization that conviction of these defendants "protected the community from '*Castro's tentacles*.'" Gail Epstein Nieves, Alfonso Chardy, *Cuban Spies Convicted*, MIAMI HERALD, June 9, 2001, at 1A (quoting U.S. Attorney) (emphasis added). The government ignores

that any necessary "extrapolation" from Castro to these five defendants was accomplished merely by the presentation of the government's case in chief, without even considering the Cuban repression themes in government cross-examination of Cuban and U.S. government witnesses or the government's passionate closing arguments tying the defendants to Castro personally and focusing on both hate of Cuban repression and fear of Cuban violence.

Contrary to the government, no one has argued in this case that "'peripheral matters not related to defendant's guilt,'" the charges, or the prosecution theory, warrant a change of venue. Gov't-Br:33 (quoting *United States v. Awan*, 966 F.2d 1415, 1428 (11th Cir. 1992)). Indeed in *Awan*, there was *no* motion for change of venue at all, but instead a due process "pretrial publicity" claim relating principally to two news articles linking a defendant to matters bearing at most a tangential relationship to any issue at trial. 966 F.2d at 1427. This Court, applying independent review of the record, found no basis for presuming prejudice "from *publicity* about *events* indirectly connected with the matter on trial." *Id.* at 1428 (emphasis added).

The government effectively concedes, in quoting *Meeks v. Moore*, 216

F.3d 951, 963 n.19, 967 (11th Cir. 2000), that the question of pervasive prejudice turns on whether bias is drawn out by the "defendant's 'specific case.'" Gov't. Br. 33; *see Meeks*, 216 F.3d at 966 (finding no impact on defendant's case: "*No* [*prospective*] *jurors* in either [trial] were dismissed on account of bias against Meeks.") (emphasis added).

Awan and *Meeks* demonstrate that a claim of prejudice based on pretrial publicity requires, at a minimum, a review of the proceedings to determine whether prejudice attaches to the defendants and the charges. In *Awan*, the government did not argue or even hint that Noriega told the defendants to commit a money-laundering offense in the United States, or that Noriega had any knowledge or participation in the offense. 966 F.2d at 1428. And in *Meeks*, race played no role in the publicity. 216 F.3d at 967 ("Meeks has presented us with no newspaper accounts of the murders that even identified him as an African-American."). The government, however, does not follow the *Awan*/*Meeks* approach here and ignores what the charges, evidence, and prosecution theory and arguments in the instant case were about, i.e., *Castro*'s purpose in responding to anti-*Castro* passions in the Miami community and

the steps *Castro* (Cuba) took to respond to those passions by sending these five defendants to the United States. That is the way the government indicted the case, tried the case, and argued the case, *not indirectly*, but *directly* stating to the jury: "The Commander-in-chief Fidel Castro ... Fidel Castro, he is meeting with them on this operation. ... He *was very pleased with the job done*." R124:14522 (emphasis added). Castro's intent became, in the government's argument, the defendants' intent. The government's attempt on appeal to ignore the record and to resituate Castro, Cuba, and community passions on the "periphery" of the case defies credibility and should be rejected.

2. The government's minimization of the import of the survey evidence rests on the same mistaken premise: that passionate anti-Castro sentiment and sensitivity were merely peripheral.

Significantly, the district court did not *completely* reject the Moran survey or opinion–despite the government's urging, R5:586:12–and instead merely "decline[d] to afford the survey and Professor Moran's conclusions the weight attributed by Defendants," concluding that Moran's focus on anti-Castro passion as the primary target of prejudice, his use of "non-neutral" language (like "ambush") to describe the offense, and his reliance on other

generic polling evidence of intense community prejudice toward the Cuban government, did not–in the district court' pretrial view of the case–translate into a reliable prediction of community prejudice in a case that the district court described as "a Cuban espionage ring that infiltrated and reported on United States military activities." R5:586:1, 13-14. The defendants sought to convince the district court that because the defense would concede that the defendants were Castro's agents, the anti-Castro passions that the court recognized would fall directly on the defendants. R6:723:1-2. And it was clear that the district court saw a heavy risk that passions could become inflamed toward the defendants and for that reason sought to maintain a gag order when confronted with witnesses holding press conferences and public events as a means of seeking a superseding indictment charging Castro and other Cuban government officials. R7:978:2-7.

Although the district court did not, in pretrial denials of the motion to change venue, accept the premise of the defense that the defendants would be the target of the prejudice, R6:723:1-2, by the end of the trial, it should have been clear to the court that the questions asked in Moran's survey were

essentially the questions the jury was again being asked to resolve in deliberations: during the final government closing argument, Moran's term "ambush" turned into "Pearl Harbor"-like attack, R124:14535; Moran's "undermine legitimate Cuban exile organizations" became the prosecutor's "destroy the United States," R124:14481; and Moran's reference to exile flotillas that "honor fallen comrades" became "brutally, mercilessly" murdering humanitarian exiles who were helping "people in Cuba ... stand up for their rights." R124:14520. If the district court had the benefit of the government's closing arguments *before* ruling on Moran's survey, the conclusion as to the survey's word choice likely would not be the same.

The government surmises that in *United States v. Fuentes-Coba*, 738 F.3d 1191 (11th Cir. 1984), this Court was "dismissive of the *analysis*" done by a "purported" expert in jury prejudice. Gov't-Br:7 n. 9. But *Fuentes-Coba*'s use of the term "purported" meant to convey nothing other than an absence of a finding on the subject one way or the other. Nor does *Fuentes-Coba* suggest that survey evidence is unhelpful. Instead, in *Fuentes-Coba*, the ultimate conclusion of the purported expert was rejected after review of the voir dire

responses that *contradicted* the opinion. Unlike *Fuentes-Coba*, the voir dire responses in the instant case *confirmed*–as defense counsel argued, R27:1374-75–the *statistical results* of the survey as to prejudice against these Cuban agents. Notwithstanding the government's "peripheral prejudice" arguments, it is clear that the prejudice against the defendants exemplified by the results of the community survey was pervasive in the community and that the conduct of trial drew upon that prejudice.

3. The government compounds the impropriety of its inconsistent positions regarding pervasive community prejudice in relation to the Miami division of the district court, by taking new and unsupportable positions as to both the prior admissions of the government and the justifications offered for prosecutorial arguments directed to the very prejudices acknowledged.

Pervasive prejudice due to core issues of concern to the exile community in Miami was not only demonstrated by the survey and the record as a whole but was *conceded* by the United States in a civil case litigated to completion while the instant case was still on appeal, *Ramirez v. Ashcroft, et. al.*, Case No. 01-4835 Civ-HUCK. This fact distinguishes this case from other venue cases. That the government – in the instant case – stridently opposed a finding of

such pervasive prejudice in Miami-Dade County and later admitted essentially all of the factual and legal arguments made by the defense is made more significant because the government went to great lengths to undermine defense efforts to establish such prejudice, engaging in ad hominem attacks on the defense survey expert, disputing the defense's reading of the community fervor aroused by the Elian Gonzalez events, and claiming that pervasive prejudice law cannot apply to a large community such as Miami. R3:443.

The government does not dispute that there are direct contradictions between its two contemporaneously-taken positions. One clear contradiction is the government's *Ramirez* admission that Miami is susceptible to pervasive prejudice on core exile concerns.[1] The government's brief concedes that based on those arguments, it eventually succeeded in obtaining a transfer of the location of trial in the *Ramirez* case, which then was resolved out of court.

[1] *See* R3:443 & RBox1:514:63 (government, both in writing and in proffers to the district court at the hearing on the motions, that Miami-Dade County is "extremely heterogeneous," "politically non-monolithic," with "great diversity," and therefore immune from "outside influences" that would preclude seating a fair jury in the trial of admitted Cuban agents charged with murder and other crimes targeting Cuban exiles).

Gov't-Br:57. The government disputes however that there is a sufficient connection between the anti-Castro passions involved in the Elian case and the anti-Castro passions involved in the Brothers to the Rescue shootdown and community reaction to Cuban agents charged with secretly undermining anti-Castro efforts of exiles in Miami.

The government also argues that even if such a contradiction in positions and factual representations were established, the government cannot be bound by the *Ramirez* position and faces no judicial estoppel bar or due process consequence because of the unsworn nature of its contradictory positions. Gov't-Br:58 n. 60. Further, the government argues that trial misconduct and prejudicial events should be discounted. Gov't-Br:17 (Basulto outburst followed question: "Did you go to Mexico in 1995 and meet with a group called Partido Accion Nacional, PAN?"); *id.* at 46-50 (newly-minted government arguments that defense scheme was to have trial in Miami so that counsel could pursue anti-Cuban-American defense and that defense counsel's recognition that relief on venue claim does not guarantee change of venue on retrial supports belated government accusation). The government's

theories for justification of the prejudice in this case are meritless as is the government's pursuit of a constricted view of the right of a defendant to a fair trial.

a. The government minimizes prejudicial events and testimony, belatedly proposing the theory that the defendants wanted to be tried in the community most prejudiced against them as long as persons of Cuban descent were not on the jury.

The government argues that the defense response in the immediate aftermath of the disturbing in-court accusations by Brothers to the Rescue president Jose Basulto–the lead pilot in the three-plane BTTR squadron on February 24, 1996, whose plane violated Cuban airspace in the moments prior to the shootdown–manifested "incongruity" in that the defense

> ... asked the court to consider the incident in conjunction with earlier mistrial and change-of-venue motions and, alternatively, asked the court for a strong curative instruction, instructing jurors to consider the statement in assessing Basulto's credibility (R81:8947-49). The court highlighted the incongruity in appellants' positions by noting that it already had stricken the offending remark at appellants' request, yet the proposed instruction 'seems to indicate you want the jury to consider the comment in determining credibility' (*id.*). Appellants agreed to the court's proposal for an instruction that the remark was

inappropriate and unfounded (R81:8953).

Gov't-Br:16. The government's "incongruity" argument is misplaced: counsel clearly did not want Basulto's highly prejudicial argument repeated, but wanted some sort of curative action taken. Such extreme in-court misconduct demands condemnation, but the risk of calling further attention to it is such that curing its effects are difficult.

Defense counsel also faced prejudice in presenting evidence that their actions as Cuban agents in Miami were *defensive*, rather than *offensive*: for example, to show the absence of any intent on Hernandez's part to commit murder or to knowingly participate in any aspect of Cuba's shootdown of aircraft, and the absence of appellants' intent to commit espionage or to interfere with governmental functions or obstruct law enforcement, as charged in Counts 1 and 2. When defense counsel – in order to show that the focus of their work as agents of the Cuban government was to monitor groups seeking illegally to harm Cuba – put on evidence showing the violent and, in some cases, intimidating nature of certain exile groups, the jurors were exposed to two inferences: one favorable (premised on inferences of

defendants' non-espionage intent), and one unfavorable (premised on the risk of the jurors' own concern that an accepting defense arguments and acquitting the defendants of such specific intent offenses carried the risk of inflaming these same extremist elements of the exile community, as both exile and non-exile prospective jurors had explained in voir dire). The unfavorable inference, and the one the defense feared even in the Basulto incident, was that the jurors would learn of the unbounded levels of violent reaction to those viewed as aiding the Castro government and sabotaging the exile cause. Thus, as the defendants noted in their pretrial venue motions, the nature of the defendants' status and defense increased the prejudice particularly as jurors became sensitized to the very violence and intensity of elements of the Miami exile community. This same type of inference was conveyed by the media during the Elian Gonzalez matter. *See* Appendix A (compendium of exile acts of violent and other reprisals in Miami; reported during Elian).

Added to the double-edged burden of presenting such defense evidence and defense theories of lack of specific intent on the conspiracy charges was the government's polemic response, which has carried over to the briefing,

mocking appellants' theory of defense as "seeking approval as protectors of the [Miami] community," and claiming, in feigned blindness to the record of mistrial and renewed venue change motions, that "[i]t was only after that strategy failed that appellants sought to repudiate the jury." Gov't-Br:48. The defense was doubly difficult because to accept it, jurors faced a genuine risk of appearing to make very negative judgments about prominent community figures and organizations, all for the sake of Cuban "spies." The government's brief does not offer any explanation as to why these extra burdens of trying the case in Miami could, under any construction of this evidence, warrant ignoring the pervasive community prejudice manifest in the record.

b. The government continues to confuse the pervasive and presumptive prejudice claim raised by the defense with an actual prejudice claim of specific biased jurors, which the defense did not raise.

Blurring the distinction between appellants' pervasive prejudice claim and the actual prejudice/voir dire inadequacy claim in *Mu'Min v. Virginia*, 500 U.S. 415, 420-21, 111 S.Ct. 1899, 1902-03 (1991)–a case in which no widespread

prejudice was revealed by any aspect of the record–the government claims evidentiary inferences relevant to community prejudice from the fact that the defense did not seek to strike for cause the jurors who served, and did not claim actual bias of these jurors either at the conclusion of voir dire or thereafter when the government sought to substitute one juror. Gov't-Br:38; *see also id*. at 37 (arguing regarding the tactical exercise of strikes in the district court's strike pool jury selection scheme, but failing to address the detailed analysis of the issue in Campa Br. 14-15; mistakenly citing cases dealing with actual prejudice, e.g., *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir. 1985); *United States v. Gorel*, 622 F.2d 100, 103-104 (5th Cir. 1979), and ignoring that appellants have not raised actual prejudice claim).[2]

---

[2] The government argues that "[a]ppellants' current argument that pretrial publicity contributed to community bias conflicts with their pre-trial position." Gov't-Br:25. But this claim is belied by the record and the district court's express findings. The government even conceded that this was not true, as an appendix to its brief reveals–Gov't-Br:App. A at 5 n. 3 (government response to motion to change venue recognizing Campa argued prejudice from "sensational pretrial publicity"); R7:978:17 (district court recognized defendants' argument that "the onslaught of publicity would prejudice both the jury pool prior to trial and the jury during trial"). Similarly, in its initial brief before the panel, the government argued: "Appellants based their [venue] argument on pretrial publicity *and* community bias." Gov't-Initial-Br: 50 (emphasis added).

The government takes its misplaced actual-prejudice arguments to a new level when it asserts, without any supporting authority, that appellants' renewal of a pervasive prejudice venue claim during trial, due to misconduct and other events adding to the presumption of prejudice in the trial atmosphere, "came too late to claim an inherent problem in the empaneled jury." Gov't-Br:37.[3] The government's phraseology appears limited to the absence of defense claims of actual prejudice as to specific jurors. But again the government fails to acknowledge that appellants' well-preserved claim is of *pervasive community prejudice* made all the worse by trial events, such as witness misconduct and press contacts, press intrusiveness, prosecutorial misconduct, and testimony drawing on community prejudice and security concerns. In essence, the case as tried rendered the effects of community prejudice even more overwhelming. Defense objections, made when the prejudicial events occurred, were clearly not too late, because they could not

[3] At another point in its brief, the government argues that appellants' arguments are undermined by their "silence below." Gov't-Br:44 (ignoring numerous motions for mistrial and for change of venue made at various stages of trial, including two motions for mistrial during government closing arguments).

have been lodged earlier.[4] Most importantly, the record shows that the government never suggested at trial that appellants objections, motions for mistrial, or renewed motions to change venue, which remained unresolved until the close of the case, R120:13895, were in any sense untimely.

Notably, regard to outside demonstrations covered by the media, the government claims there was only one such demonstration noted in the record. The record shows demonstrations with television coverage, both of them with menacing aspects and the badges of intimidation–one, on February 7, 2001, with placards demanding that the spies be killed, R59:6145; the second, on March 27, 2001, with participants wearing the garb of a paramilitary organization, Commandos F-4, several of whose members had been arrested in the past for automatic weapons and explosives offenses. R91:10603-04*; see also* R59:6098 (prosecutor states fear that if court schedule is changed, outside groups will feel they can intimidate court). Commandos F-4 is the paramilitary group led by witness Rodolfo Frometa, whom the government now claims defense counsel maligned in closing argument by

4

referring to his acts of anti-Castro violence. Gov't-Br:48. Frometa would later claim that his group Commandos F-4 had carried out an assassination attempt against a fugitive codefendant in this case, Juan Roque, wounding but not killing him. Elaine de Valle, *Anti-Castro group claims shooting of spy in Cuba,* Miami Herald, Dec. 31, 2002, at 2B.

c. Government distorts defense closing arguments and fails to take responsibility for misconduct in the government's closing and rebuttal closing.

The government wrongly attempts to blame its improprieties in closing argument on defense attempts to put forth their theory of defense that they were not committing espionage but were investigating illegal and violent actions by various anti-Castro groups. Gov't-Br:47-48. In particular, however, the government seeks to justify three categories of closing argument misconduct by cryptic references to defense argument. Gov't-Br:46 (Defendants "asked the jury to approve their conduct as socially beneficial. It was fair response to argue that appellants' work was destructive to the US."); *id.* ("Defense counsel paraded their court-appointed status."); *id.* at 47

("Hernandez's counsel made a chilling argument ... . The 'final option' euphemism was unmistakable."). Each of these attempted justifications distorts the record.

i. Contrary to the government's brief, Gov't-Br:48, the multiple, unfounded "destruction of America" arguments–*see* R124:14481-82, 14535 ("sent to destroy the United States,""bent on the destroying the United States paid for by the American taxpayer," and "bent on the destruction of the United States"), cannot be viewed as an invited reply or "fair response" to a factually-supported claim of lack of specific intent. Defendants did not argue that they were protectors of the Miami community; they argued that they were sent by Cuba to investigate exile groups engaged in unlawful attacks on Cuba, not Miami. The government's response that the defendants were trying to destroy America – whether the government meant to imply physical destruction or overthrow of the government is not clear – went beyond wild speculation and implied some secret information that no one else in the courtroom could have imagined, an unfairly prejudicial attack on the defendants in retaliation for presenting a defense.

ii. The government's prejudicial attacks on the defendants extended to using against the defendants the understandable, inoffensive efforts by two attorneys to distance themselves personally from Cuba (such as by mentioning that they are court-appointed and by Guerrero's attorney noting that it is a greatness of America that it affords court-appointed counsel for defendants charged with these offenses). Gov't-Br:46. That defense counsel felt compelled to make such statements is itself testament to the prejudice, and it cannot justify the government's raising the issue of taxpayer funding as a basis to complain to the jury that the defendants went to trial: "They forced us to prove their guilt beyond a reasonable doubt. They received the able[st] of counsel who argued every point and called many witnesses and cross-examined our witnesses. These are for people bent on destroying the United States, paid for by the American taxpayer." R124:14482. Certain comments are particularly offensive only when certain institutional role players say them. *See United States v. Mena*, 863 F.2d 1522, 1534 (1989) (noting significance of prosecutor's institutional role in affecting likely understanding and intent of comment on failure to testify). When the

government attacks defendants for having court-appointed counsel, the defendant is penalized for the exercise of his Sixth Amendment rights; the same is true when the government complains that the defendant has gone to trial and cross-examined witnesses. The government, which introduced the concept of propaganda just as the defense was to begin its closing arguments may have been displeased that the defense attorneys would distance themselves personally from Cuba, but that did not justify using their court-appointed status to claim the defendants were destroying America at taxpayer expense.

iii. The government claims that the argument that the military option is always the "final option," is a "chilling" reference to genocidal extermination. Gov't Br. 47 (introducing out of whole cloth the idea that undersigned counsel claimed Cuba acted out of genocidal design). It should be noted that government-requested jury instructions in this case provide that even if invading aircraft were viewed as civil, rather than state or hostile, if Cuba's actions were undertaken as a last resort, they would not be deemed

unlawful.[5] Defense counsel's use of the term "final option," was consistent with the jury instructions and with the same concept of last resort used regularly by the United States in discussing the military option as the final option. The government's continued attempt to defend the "final solution" and "history of mankind" attack is without support in law or fact.

d. The government fails to address unique judicial estoppel and due process issues presented by the government's actions in this case.

The right to an impartial jury is self-evidently fundamental to the exercise of constitutional liberty. For the government to dismiss as beyond sanction or remedy its post-trial concession of pervasive community prejudice in Miami devalues that fundamental right. In its brief, the government again attempts to construct an argument for finding greater prejudice against the government in the Ramirez case than faced by these defendants. Gov't-Br:56. Suffice it to say that, unlike central shootdown and spying-on-exiles focus of

[5] R125:14610 ("It is for you to determine whether or not an aircraft acted as a state aircraft or a civil aircraft. Interception of civil aviation will be undertaken only as a *last resort*.") (emphasis added). Petition for Writ of Prohibition (No. 01-12887) at 31-33 (referring to above-quoted instruction as permitting "the jury to divine and the attorneys to argue the legal significance of those provisions in the ICAO").

the instant case, there were no regular editorials, masses, or other public commemorations of Ramirez's ethnic discrimination claims. The government notes that Ramirez's attorney – who was also Basulto's attorney in successfully opposing the district court's gag order in the instant case – contacted the media. But this an insufficient explanation for the government's finding pervasive prejudice due to anti-Castro passions in *Ramirez*, but not here. The press attention to the instant case was so great and efforts to avoid the district court's gag order so great that the district court could not prevent televised press conferences and other prejudicial press contacts by witnesses. hostile to the defense. And, notably, examination of the voir dire record in the instant case, *see* Campa Br. App. A &B, shows that any prejudice against the United States regarding the handling of the Elian was far exceeded by expressions of prejudice against the five defendants.

With regard to the documentary submissions accompanying the Fed. R. Crim. P. 33 motion, the district court concluded that if the *Ramirez* evidence constituted newly-discovered evidence, the court would consider the interest of justice "issue" but otherwise would not consider the supporting materials.

R15:1678:6 n. 3. The district court declined to consider supporting evidence in relation to the question of whether the government's explanations for finding prejudice in *Ramirez* but not in the instant case made sense and whether the misrepresentations were materially false. *Id.*

The district court erred in failing to consider most of this evidence at all for several reasons: (1) the evidence consisted largely of matters of general public knowledge concerning the history of the Cuban exile community in Miami; (2) evidence relating to community prejudice, if true, was relevant to determining whether the government had intentionally taken a misleading position using stale evidence to obtain an unfair trial advantage; and (3) evidence concerning the relevant community prejudice contradicted the government's claim that Elian-related prejudice was distinct the overall passions against Castro's impact the exile community. All of the evidence offered in support of the motion for new trial challenged the government's strained theory of community passion for post-Elián "footnotes" or afterthoughts such as the *Ramirez* case, but no such passion for the BTTR shootdown prosecution that defendant Hernandez faced.

The government effectively concedes that it chose Miami as the division of the court for trial, even though arrests, seizures, and surveillance evidence would also have warranted bringing the case in either Broward or Monroe Counties. *See*, *e.g.*, R31:1961 (arrest of defendants in Broward County and search of residence); R61:6337 (surveillance of defendants in Broward County).

The government argues for a narrow application of the judicial estoppel doctrine, however, relying on premises more apt in the case of estoppel regarding the government's position as to an underlying fact in a criminal offense, such as whether defendant A or defendant B fired a fatal shot. Even on that ground however, at least one court of appeals has found a due process violation in a state's use of factually inconsistent theories to convict defendants in two criminal cases. *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2000) (granting habeas corpus relief based on violation of due process). The Supreme Court has yet to squarely address that issue. *See also Bradshaw v. Stumpf*, __U.S.__, 125 S.Ct. 2398, 2409 (2005) (Souter, J., concurring)("'serious questions are raised when the sovereign itself takes inconsistent positions in

two separate criminal proceedings'")(internal citation omitted).

Unlike the question of contradictory factual allegations as to underlying facts of an offense – for which application of an estoppel bar might unfairly allow the guilty to escape without prosecution – there is no policy reason to justify allowing the government to manipulate the forum so as to deprive a defendant of an impartial jury. *See Burnes v. Pemco*, 291 F.3d 1282, 1285 (11th Cir. 2002) (noting the absence of inflexible rules in determining whether a party's conduct in taking contradictory positions seriatim offends the integrity of the judicial process).

Apart from traditional applications of judicial estoppel to bar the government from taking the position on this appeal that Miami is not susceptible of pervasive community prejudice on issues of core importance to the exile community–particularly in a case that is tied significantly to core anti-Castro objectives and where, as here, there is no competing interest to balance exile concerns–the nature of the inconsistency is nevertheless relevant to the Court's application of supervisory standards in the resolution of a venue or intradistrict transfer issue, both of which are presented here.

Thus, even if the formal prerequisites for application of the judicial estoppel doctrine were lacking in this case, that would not end this Court's effective review of the matter. Ultimately, the Court must consider the record as a whole under its "supervisory authority" over the administration of criminal justice in the lower federal courts–authority which the Supreme Court itself has recognized is

> *not confined to ascertainment of Constitutional validity*. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force.

McNabb v. United States, 318 U.S. 332, 340; 63 S.Ct. 608, 613 (1943) (emphasis added). What is at issue in such review is not just the "reality" of justice but, as well, its "appearance." *See Offut v. United States*, 348 U.S. 11, 13-18, 75 S.Ct. 11, 13-18 (1954) (without impugning Court of Appeals' legal constitutional, and technically correct legal rulings, noting that such rulings did *not* resolve the Court's own "moral" considerations vis-à-vis the proceedings; emphasizing that "*justice must satisfy the appearance of justice*," and that to

satisfy the "appearance of justice," a remand required)(emphasis added).

Since *Offut*, the Supreme Court has frequently invoked its supervisory authority to assure that justice satisfies "the appearance of justice" in criminal cases. Indeed, the failure to pay sufficient attention to the "appearance of justice" in cases involving possible bias by the fact-finder has drawn harsh comments. *See Liteky v. United States*, 510 U.S. 540, 565, 114 S.Ct. 1147, 1161 (1994)(Kennedy, J., concurring, joined by Blackmun, Stevens, and Souter, JJ.)("I do not see how the appearance of fairness and neutrality can obtain if the bare possibility of a fair hearing is all that the law requires. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 [] (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "generat[es] the feeling, so important to a popular government, that justice has been done") (internal quotation omitted).

While the government cites *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173 (1959), amidst a string citation in its brief at 30, *Marshall* is notable because the Court based a new trial entirely upon "the appearance of justice" in that case, refusing to defer to either the trial court's or appellate

court's findings crediting juror assurances that they would not be swayed by prejudicial news accounts which filtered into the trial.

The government's reference to *Marshall* appears amidst a string citation of non-binding lower court decisions declining to exercise supervisory authority in factually-distinct contexts. Gov't-Br.:30. However, in *United States v. Williams*, 568 F.2d 464, 469 (5th Cir. 1978), this Court's predecessor expressly rejected the suggestion of other courts and commentators that "*Marshall* ha[d] been discredited by a line of Supreme Court cases dealing with the constitutional dimension of juror bias,"[6] and indeed invoked its supervisory powers explicitly to reverse the defendant's conviction and remand for a new trial notwithstanding jurors' statements that said that they could disregard a prejudicial newscast and decide the case solely on the evidence adduced in court:

---

[6]The government misplaces reliance upon *United States v. Haldeman*, 559 F.2d 331, 362-63 (D.C. Cir. 1976) ("invocation of appellate court's supervisory power to require venue-change absent denial of due process would be inappropriate and would create uncertainty in litigating controversial cases")(Gov't-Br.:30). The cited view from *Haldeman* was expressly considered–and rejected–in *Williams*. *See* 568 F.2d at 469 n. 11.

> [T]he *Murphy* decision is a clear indication of [*Marshall's*] continuing vitality, and we follow it in this case, a federal criminal trial. It is plain that the *Marshall* rule is considerably broader than the constitutional standard and provides more protection against prejudice. For example, in *Murphy* the court explicitly rejected the defendant's argument that *Marshall* was applicable in state courts and emphasized that the principle had never been accorded constitutional status. 421 U.S. at 798, 95 S.Ct. 2031. And in a concurring opinion, Chief Justice Burger wrote that he "would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case...." *Id.* at 804, 95 S.Ct. at 2038.

Williams, 568 F.2d at 469.

Whether under Fed. R. Crim. P. 33, ordinary review for trial error, or the Court's exercise of its supervisory powers, the Court should, as it did in *Williams*, protect the "appearance of justice" and integrity of criminal proceedings, by reversing this case and remanding it for a new trial.

CONCLUSION

Appellant requests that the Court reinstate the panel decision.

Respectfully submitted,

. PAUL A. McKENNA, ESQ.
McKenna & Obront
Attorneys for Hernandez
2940 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Tel. No. (305) 373-1040

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 6,215 words.

PAUL A. McKENNA, ESQ.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by mail this 27th day of January, 2006, upon Anne Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111; Orlando do Campo, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1700, Miami, Florida 33130-1556, 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.

_____

PAUL A. McKENNA, ESQ.

APPENDIX A

EVENTS PUBLICLY REPORTED AS PART OF SYSTEMIC ISSUE OF MIAMI EXILE VIOLENCE

BOMB THREATS

1972 – Julio Iglesias, performing at a local nightclub, says he wouldn't mind "singing in front of Cubans." Audience erupts in anger. Singer requires police escort. Most radio stations drop Iglesias from playlists. One that doesn't, Radio Alegre, receives bomb threats.

1974 – Several small Cuban businesses, citing threats, stop selling *Replica*.

1988 – Bomb threat against Iberia Airlines in protest of Spain's relations with Cuba.

1988 – Bomb threat against WQBA-AM after commentator denounces Herrera bombing.

1988 – Bomb threat at local office of Immigration and Naturalization Service in protest of terrorist Orlando Bosch being jailed.

1994 – Bomb threat to law office of Magda Montiel Davis following her videotaped exchange with Fidel Castro.

1997 – Bomb threats, death threats received by radio station WRTO-FM following its short-lived decision to include in its playlist songs by Cuban musicians.

1998 – Bomb threat empties concert hall at MIDEM music conference during performance by 91-year-old Cuban musician Compay Segundo.

1998 – Bomb threat received by Amnesia nightclub in Miami Beach preceding performance by Cuban musician Orlando "Maraca" Valle.

1999 – Bomb threat received by Seville Hotel in Miami Beach preceding performance by Cuban singer Rosita Fornes. Hotel cancels concert.

2000 – Karl Ross, *W. Dade home of attorney general on alert,* and *Police say an anonymous caller phoned in bomb threat April 13,* MIAMI HERALD, Apr. 16, 2000 (R4:498, Ex. A-4)

BOMBINGS

1974 – Bomb blast guts the office of Spanish-language magazine *Replica*.

---

[7] Unless otherwise noted, these events are as reported in *The Burden of a Violent History,* MIAMI NEW TIMES, Apr. 20, 2000 (R15:1636, Ex. 10).

1974 – Three bombs explode near a Spanish-language radio station.

1975 – Another bomb damages *Replica*'s office.

1976 – Car bomb blows off legs of WQBA-AM news director Emilio Milian after he publicly condemns exile violence.

1979 – Bomb discovered at Padron Cigars, whose owner helped negotiate release of 3600 Cuban political prisoners.

1979 – Bomb explodes at Padron Cigars.

1980 – Another bomb explodes at Padron Cigars.

1980 – Powerful anti-personnel bomb discovered at American Airways Charter, which arranges flights to Cuba.

1981 – Bomb explodes at Mexican Consulate on Brickell Avenue in protest of relations with Cuba.

1981 – *Replica*'s office again damaged by a bomb.

1982 – Bomb explodes at Venezuelan Consulate in downtown Miami in protest of relations with Cuba.

1982 – Bomb discovered at Consulate of pro-Cuban government of Nicaragua.

1983 – Another bomb discovered at *Replica*.

1983 – Another bomb explodes at Padron Cigars.

1983 Bomb explodes at Paradise International, which arranges travel to Cuba.

1983 – Bomb explodes at Little Havana office of Continental National Bank, one of whose executives, Bernardo Benes, helped negotiate with Cuba in the release of 3600 Cuban political prisoners.

1987 – Bomb explodes at Cuba Envios, which ships packages to Cuba.

1987 – Bomb explodes at Almacen El Español, which ships packages to Cuba.

1987 – Bomb explodes at Cubanacan, which ships packages to Cuba.

1987 – Car belonging to Bay of Pigs veteran is firebombed.

1987 – Bomb explodes at Machi Viajes a Cuba, which arranges travel to Cuba.

1987 – Bomb explodes outside Va

Cuba, which ships packages to Cuba.

1988 – Bomb explodes at Miami Cuba, which ships medical supplies to Cuba.

1988 – Bomb explodes outside Cuban Museum of Art and Culture after auction of paintings by Cuban artists.

1988 – Bomb explodes outside home of Maria Cristina Herrera, organizer of a conference on U.S.-Cuba relations.

1988 – Bomb explodes near home of Griselda Hidalgo, advocate of unrestricted travel to Cuba.

1988 – Bomb damages Bele Cuba Express, which ships packages to Cuba.

1989 – Another bomb discovered at Almacen El Español, which ships packages to Cuba.

1989 – Two bombs explode at Marazul Charters, which arranges travel to Cuba.

1990 – Another, more powerful, bomb explodes outside the Cuban Museum of Art and Culture.

1994 – Two firebombs explode at *Replica* magazine's office.

1996 – Firebomb explodes at Little Havana's Centro Vasco restaurant preceding concert by Cuban singer Rosita Fornes.

1996 – Firebomb explodes at Marazul Charters, which arranges travel to Cuba.

1998 – Firebomb explodes at Amnesia nightclub preceding performance by Cuban singer Manolín

ATTACKS OF PHYSICAL VIOLENCE

1968 – From MacArthur Causeway, pediatrician Orlando Bosch fires bazooka at a Polish freighter. (City of Miami later declares "Orlando Bosch Day." Federal agents will jail him in 1988.)

1974 – Exile leader José Elias de la Torriente murdered in his Coral Gables home after failing to carry out a planned invasion of Cuba.

1974 – Hector Diaz Limonta and Arturo Rodriguez Vives murdered in internecine exile power struggles.

1975 – Luciano Nieves murdered after advocating peaceful coexistence with Cuba.

1976 – Rolando Masferrer and Ramon Donestevez murdered in internecine exile power struggles.

1977 – Juan José Peruyero murdered in internecine exile power struggles.

1979 – Cuban film *Memories of Underdevelopment* interrupted by gunfire and physical violence instigated by two exile groups.

1982 – Two outlets of Hispania Interamericana, which ships medicine to Cuba, attacked by gunfire.

1983 Gunfire shatters windows of three Little Havana businesses linked to Cuba.

1986 – South Florida Peace Coalition members physically attacked in downtown Miami while demonstrating against Nicaraguan contra war.

1991 – Using crowbars and hammers, exile crowd rips out and urinates on Calle Ocho "Walk of Fame" star of Mexican actress Veronica Castro, who had visited Cuba.

1992 – Union Radio employee beaten and station vandalized by exiles looking for Francisco Aruca, who advocates an end to U.S. embargo.

1993 – Inflamed by Radio Mambí commentator Armando Perez-Roura, Cuban exiles physically assault demonstrators lawfully protesting against U.S. embargo. Two police officers injured, sixteen arrests made. Miami City Commissioner Miriam Alonso then seeks to silence anti-embargo demonstrators: "We have to look at the legalities of whether the City of Miami can prevent them from expressing themselves."

1996 – Patrons attending concert by Cuban jazz pianist Gonzalo Rubalcaba physically assaulted by 200 exile protesters. Transportation for exiles arranged by Dade County Commissioner Javier Souto.

1996 – Arson committed at Tu Familia Shipping, which ships packages to Cuba.

1999 – Violent protest at Miami Arena performance of Cuban band Los Van Van leaves one person injured, eleven arrested.

January 26, 2000 – Outside Miami Beach home of Sister Jeanne O'Laughlin, protester displays sign reading, "Stop the deaths at sea. Repeal the Cuban Adjustment Act," then is physically assaulted by nearby exile crowd before police come to rescue.

April 11, 2000 – Outside home of Elian Gonzalez's Miami relatives, radio talk show host Scot Piasant of Portland, Oregon, displays T-shirt reading, "Send the boy home" and "A

father's rights," then is physically assaulted by nearby exile crowd before police come to rescue.

OTHER ACTS OF INTIMIDATION

1974 – Several small Cuban businesses, citing threats, stop selling *Replica*.

1992 – Cuban American National Foundation mounts campaign against the *Miami Herald*, whose executives then receive death threats and whose newsracks are defaced and smeared with waste.

1996 – Music promoter receives threatening calls, cancels local appearance of Cuba's La Orquesta Aragon.

1996 – Archdiocese of Miami receives threats after providing humanitarian aid to Cuban victims of Hurricane "Lili".

1999 – Marika Lynch, Fernando Almanzar, *Protest, taping set to follow Van Van show,* MIAMI HERALD, Sept. 28, 1999, at 3B (R2:329, Ex. L)

1999 – Tyler Bridges, Andres Viglucci, *Miami may bar Van Van next time/County's [Mayor] Penelas also opposed,* MIAMI HERALD, Oct. 13, 1999, at B1 (R2:329, Ex. L)

2000 – Carol Rosenberg, *INS agent targeted by death threats,* MIAMI HERALD, May 6, 2000 (R4:498, Ex. B-4)

2000 – Jordan Levin, *Groups "warned" on Cuba resolution,* MIAMI HERALD, May 15, 2000, at 1B (R4:498, Ex. E-4)

2000 – Sara Olkon, Gail Epstein Nieves, Martin Merzer, *The Saga of Elian Gonzalez/Protest and Passion Spread to the Streets/Sit-ins block intersections and disrupt Dade traffic* and *Politicians, lawyers work to halt 6-year-old's return,* MIAMI HERALD, Jan. 7, 2000 (R2:329, Ex. O)

CITY OFFICIALS' SUPPORT FOR EXILE LAW VIOLATIONS

1968 – From MacArthur Causeway, pediatrician Orlando Bosch fires bazooka at a Polish freighter. (City of Miami later declares "Orlando Bosch Day." INS agents will jail him in 1988.)

1982 – Miami Mayor Maurice Ferre defends $10,000 grant to exile commando group Alpha 66 by noting that the organization "has never been accused of terrorist activities inside the United States."

1983 – Miami City Commissioner Demetrio Perez seeks to honor exile terrorist Juan Felipe de la Cruz, accidentally killed while assembling a

bomb. (Perez became a member of the Miami-Dade County Public School Board and owner of the Lincoln-Martí private school where Elian Gonzalez was enrolled.)

2000 – Marika Lynch, *Castro-challenging pilot is offered parade, honors,* Jan. 4, 2000, at B1 (R2:329, Ex. M)

2000 – Jordan Levin, *Miami-Dade threatens to cancel film fest grant/Cuban movie collides with county law,* MIAMI HERALD, Feb. 25, 2000, at 1A (R3:397, Ex. N-1)

REACTION FROM HUMAN RIGHTS GROUPS

1992 – Americas Watch releases report stating that elements of the Miami exile community have created an environment in which "moderation can be a dangerous position."

1994 – Human Rights Watch/Americas Group issues report stating that elements of Miami exile community urge intolerance of dissident opinions, that related radio programming promotes aggression, and that local government leaders refuse to denounce acts of intimidation.