Nos. 01-17176 & 03-11087

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

LUIS MEDINA,

Defendant/appellant.

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

***EN BANC* REPLY BRIEF OF THE APPELLANT LUIS MEDINA**

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REPLY ARGUMENT

By failing to consider media evidence of the passionate concerns and prejudices of the community, rejecting a survey of community attitudes for invalid reasons, and accepting claims of fairness by selected jurors in an atmosphere of bias, the court below erred in denying motions for change of venue.

The government's brief and that of its amicus rest on a reading of the record that is contradicted by overwhelming evidence of pervasive prejudice. The brief filed by the government's amicus rests on several flawed premises, including that the defendants' repeated requests for a change of venue were predicated on an ethnic stereotype of "inherently defective Cuban-American jurors." Cuban American Bar Association (CABA) Amicus Br. 1. Even a brief review of the record citations and legal authorities advanced by the defendants here and below reveals the plain inaccuracy of these premises both factually and in terms of the relevant precedent.

1. <u>No basis for suggestion of ethnic bias</u>.

First, contrary to both the government's brief and its amicus's claim of interest, the government *did not* raise a *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), objection to any of the peremptory challenges used by appellants in selecting the jury. The government has repeatedly mischaracterized the record on this point, to appellants' prejudice, misleadingly claiming even in its *en banc* brief that "[a]ppellants struck every Cuban-American prospective juror, notwithstanding the government's reverse-*Batson* objection," Gov't Br. 14, thereby leading CABA to

erroneously claim that the government made "repeated objections" to striking Cuban-Americans from the jury. CABA Amicus Br. 1. In fact, while the government, *after* the jury and the first alternate were selected, advised the district court that it was "concerned" as to the defense challenge of a prospective second *alternate*, Luis Hernandez, R28:1508-09, the district court rejected out of hand the government's concern, noting that Hernandez was one of several prospective jurors who first stated he doubted his ability to ever believe the testimony of a Cuban agent, only to be rehabilitated later by district court questioning and advice. R28:1511 (court finds that "number one, [the juror's] demeanor and number two his original answers versus his ultimate answers when further questioned by the Court" explained the defense strike). The government did not dispute these facts and expressly conceded similar facts as to prior defense strikes.[1] *Id.*

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[1] CABA also ignores that nearly half of the seated jurors were Hispanic; that the Supreme Court has not extended *Batson* to national-origin categories, *see*, *e.g.*, *Rico v. Leftridge-Byrd*, 340 F.3d 178, 182 (3d Cir. 2003); and that this Court has previously rejected the argument that subcategories of racial or ethnic groups can claim the protection of *Batson*. *See United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) ("it would be inappropriate for us to narrow the 'cognizable racial group,' for [*Batson*] purposes"). While Hispanic ethnicity is a recognized category for *Batson* analysis, *see Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866 (1991), CABA offers no authority for the premise that Cuban-Americans constitute a distinct *ethnic* group – as opposed to a recognized *political exile* group. Even assuming a legal status for Cuban-American ethnicity, CABA's unfair claim of ethnic bias in the litigation of the venue claim is factually unsupportable and demeans the efforts of defense counsel. *Batson* does not change the burdens or review standards applicable in this case.

Second, and more importantly, CABA plainly mischaracterizes appellants' claim that the entire community was sensitized to the Cuban *exile* experience by more than four decades of exile presence and activity in Miami, recharacterizing that argument as a claim of ethnic bias. Appellants argue – and have always argued – that it is the *exile* status, not the *ethnic* status, of the dominant group in the community that has caused passions to boil over regarding significant events, and that the community understands and "feels the pain" of the demographically predominant exile group. Thus, the two major American political parties both formally support the exile position, and CABA, in turn, can cite only marginal incidents in which people who do not know the community have come to an *ethnic* view, rather than a personal-history and present-pain view, of the Cuban-American exile experience and position. CABA Amicus Br. 18 n. 17.[2]

Appellants therefore *reject* the CABA argument that appellants' efforts in this criminal prosecution to limit the influence of passionate hostility to these defendants

[2] CABA's recharacterization of appellants' exile-based argument in ethnic terms parallels the premise under which plaintiff Ramirez pursued his employment discrimination lawsuit against the Department of Justice – alleging that his employers discriminated against him as an Hispanic because federal agents believed Cuban-American actions in the Elian Gonzalez matter reflected ethnic temper rather than core human passions based on personal experience with the Castro government. Both CABA's claim and Ramirez's are byproducts of anti-Castro passions. In reality, appellants' position is that – *as CABA also apparently concedes* – Cuban exile community passions are *not* due to ethnicity, but reflect highly-personal reactions to actual, ongoing injury from the Castro government, as perceived by the community.

by the dominant group in the community are akin to the discrimination against which Dr. Martin Luther King Jr. struggled. CABA Amicus Br. 19. Contrary to CABA, Dr. King's focus on the dignity of all human races cannot be interpreted to justify subjecting criminal verdicts to the interests of a particular community or group – whether or not such interests are warranted, as CABA would assert, by 47 years of personal anguish, economic loss, political persecution, familial separation, and exile. *See Groppi v. Wisconsin*, 400 U.S. 505, 509-10, 91 S.Ct. 490, 492-93 (1971) (recognizing that Sixth Amendment right to impartial jury may be violated where, for reasons other than "poisonous pretrial publicity," the "community from which the jury is to be drawn may already by permeated with hostility"); *see also id.*, 400 U.S. at 508 & n. 6, 91 S.Ct. at 492 & n. 6 (citing with approval prejudice analysis in *Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966)); NACDL Amicus Br. 6-26.[3]

2. Scope of factual inquiry.

CABA's terse analysis of the record is also unavailing. CABA argues that defendants' venue submissions did not show "actual evidence" of hostility to Cuban intelligence agents and that the district court was warranted in proceeding with voir

[3] CABA ignores both that the only *Batson* issue raised in this appeal concerned the government's striking of African-American jurors and that appellants do not claim that *only* Cuban-Americans in the community were prejudiced against them, but to the contrary, that the prejudice and sensitivity were pervasive throughout the broad spectrum of the county's population, including jurors such as Mrs. Cento, who is the wife and mother of Cuban-Americans and whom the defendants did not strike.

dire because the defendants relied merely on ethnic "assumptions" about the community. CABA Amicus Br. 4, 10, 15, 18. CABA seeks to exclude from the pervasive prejudice analysis the entirety of the record showing of prejudice and even the district court's own finding of the venue's "impassioned Cuban exile-community." R13:1392:14. CABA also dismisses the government's post-trial concessions of pervasive community prejudice and mischaracterizes the Elian matter as involving merely "immigration" and "family relations" issues and not community passions concerning the Cuban government. CABA Amicus Br. 4 n.3. Contrary to CABA, the relevant facts of pervasive community hostility to these defendants were made clear by the uncontradicted polling, media, and community history evidence submitted by the defense. There was no ethnic bias in the attempt to obtain a fair trial by an impartial jury.

CABA's claim of ethnic disparagement pursues a theme that the government instigated in its petition for rehearing *en banc*. Reh. Pet. 12 ("Even though no jurors were Cuban-Americans, who the panel believed were too prejudiced to be fair jurors, ... the panel still afforded no deference to the district court's findings ... ."). That the panel found a "perfect storm" of prejudice – not merely pervasive prejudice deriving from local political, media, and business dominance by political exiles who happen to be of the very same ethnicity as the defendants (and some of their lawyers) – does

not in any way imply racism or ethnicism.[4] The issue is one of intensely-affecting experiences of hundreds of thousands of members of the community and the impact of the resulting exile condition on the surrounding community. There was no claim by the panel that freedom-loving Germans or Moroccans would be less affected by exile than Cubans; indeed, the defense unsuccessfully requested that prospective jurors be specifically asked about *exile* history in their families, rather than focusing on immigration from Cuba. Trans. (Nov. 2, 2000 hearing) at 24-26 (district court denies defense request to ask jurors whether they or their families were exiles from communism and limits inquiry to whether juror's family previously lived in Cuba). Notwithstanding inflammatory rhetoric and insinuations of ethnic bias, CABA Amicus Br. 1-2, 13, 18 n.17, there is nothing ethnically-based in the pain and suffering of exile.

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[4] *See United States v. Campa*, 419 F.3d 1219, 1222-57 (11th Cir. 2005) ("perfect storm" of prejudice against admitted Cuban intelligence agents tried in Miami in immediate aftermath of Elian Gonzalez case – including prejudicial trial events; prosecutorial appeals to passion and patriotism; intense media coverage; and trial evidence touching on important community interests and fears – heightened pre-existing community prejudice and juror concerns and undermined trial's fairness; focus on Cuba's intent to murder humanitarian community exiles – whose martyrdom in opposing Castro government was recognized throughout community – made case more sensitive, particularly following series of traumatic disturbances in Elian case; government's later concession of venue prejudice and other showings of prejudice required new trial), *rehearing en banc granted, opinion vacated by*, 428 F.3d 1011 (11th Cir. 2005) (*en banc*).

3. <u>Legal test for pervasive prejudice analysis</u>.

The legal focus of the CABA argument is a comparison of the instant case with that of the drug conspiracy defendants in *United States v. Capo*, 595 F.2d 1086 (5th Cir. 1979). CABA Amicus Br. 7-8. But apart from the community survey, the case-related pretrial publicity, and other significant evidence deeply linking community concerns with the instant prosecution, CABA fails to note that the pervasive prejudice analysis undertaken in *Capo* did not end, as CABA's analysis does, with the first submissions in support of the venue change motion, but instead included an analysis of all relevant prejudice factors, including voir dire and other "court proceedings," up to and including the jury's deliberation and verdict. *Id.* at 1090; *see also United States v. Partin*, 552 F.2d 621, 640 (5th Cir. 1977) (on claim of pervasive prejudice court of appeals affords "independent" review of "responses on voir dire" in "gauging whether community prejudice is so great that a defendant cannot receive a fair trial in a given locale").

CABA fails to note that the rate of bias reflected in cause excusals during jury selection in this case was more than *three times higher* than that found in *Capo*. *See* Campa Br. App. A & B. Pointedly, CABA ignores not merely the voir dire record of numerous cause excusals for volunteered expressions of inability to be fair, but the content of, and concerns raised by, the jurors' actual voir dire responses, as to both jurors who felt they could and jurors who felt they could not overcome either personal

interest or community concerns.

CABA ignores that the sole prejudice claimed in *Capo* was *media references* to the inadmissible fact that the drug conspiracy charged in that Tallahassee prosecution had *some relation* to uncharged murders committed over 100 miles away in Panama City, Florida.[5] As a result of news coverage, a few jurors were aware of "some connection" between the murders and the drug case, but could not relate the two events in a way that would prejudice the particular defendants on trial. *Id.* at 1091 n. 5. There was no suggestion in *Capo* of any media editorialization of the defendants' guilt or any connection at all between the murders – of which no mention was made at trial – and the distant state-capital community of Tallahassee, other than "news coverage" that "had subsided substantially" when the trial took place "almost a year after the occurrence of the alleged offenses." *Id.* Unlike the Miami community in the instant case, the Tallahassee community had no intrinsic connection to the *Capo* case at all, much less the intense, abiding interest of the Miami community in both the defendants as Cuban agents and their charged offenses, as to which even the government conceded extraordinary community sensitivity. *See*, *e.g.*, R24:535 (acknowledging religious "masses ... all over town" for the victims); R65:6735 ("we are talking about under any view of the evidence ... the death of four people who were

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[5] *See id.* at 1091 ("The trial was held at Tallahassee over 100 miles from Sandy Creek, the site of the crimes, and some distance from the sinkholes where the bodies were discovered.").

cared for very deeply by people in this community").

Capo provides important contrasts to the instant case. Unlike the *Capo* voir dire process, in the instant case, the district court denied numerous defense requests for examination relevant to prejudice. *See* R25:898-99 (objecting to failure to afford "follow-up" questioning once prospective jurors are partially rehabilitated); *see also* Trans. (10/24/2000 hearing) and Trans. (11/2/2000 hearing).[6] In *Capo*, unlike the instant case, the district court "propounded [all] questions requested by the defense," rather than limiting significant defense questioning and followup, *id.* at 1091, and "questioned [each juror] *at length* concerning the extent of his or her knowledge of" prejudicial matters with questioning as to both impartiality and case-related opinions. *Id.* (emphasis added). In this voir dire process "[s]ome ten of the [73] veniremen who *appeared to have an opinion* were challenged and dismissed for cause." *Id.* However, apart from fact-based opinions, apparently none of the *Capo* jurors manifested any claim of partiality or of being otherwise unable to be fair. Nothing more than *opinion* based on news coverage was at issue in the excusals, with the rate of such excusal-worthy opinions standing at a mere 13.7% (10÷73=0.1369). Unsurprisingly, all of the jurors stated "emphatically" that any news information

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[6] Although the government previously filed a pleading indicating supplementation of the record with these transcripts, *see* Gov't Initial Br. 51, it is presently unclear whether they are in the appellate record. Counsel will again move to supplement the record with these transcripts.

about the uncharged murders would not affect their decision. *Id.* at 1091 n. 5.

Most importantly, the *Capo* Court looked at the trial itself and the vital fact that the jury *acquitted four defendants*, including those most affected by pretrial publicity. *Id.* at 1092 ("In reaching this conclusion, we certainly cannot ignore the jury's acquittal of four of the defendants, two of whom, according to the briefs on file, were subsequently convicted of first degree murder."). The Court concluded its analysis by noting that such a reality check of the verdict, while not "dispositive," was nevertheless a significant factor in overcoming other indicia of prejudice. *Id.* In the instant case, unlike *Capo*, the jury in a matter of a few days reached guilty verdicts on all 33 counts, without asking a single question of the court, a factor that, contrary to the government's assertion, Gov't Br. 43 n. 44, is consistent with other evidence of prejudice facing the defendants, particularly in light of the government's pre-closing, unsuccessful emergency petition for writ of prohibition claiming not only "insurmountable barriers" in proving elements of its case, but that the jury instructions were so convoluted and contradictory that the jury would inevitably be confused and ask questions. *See* Petition for Writ of Prohibition (No. 01-12887) at 4, 27, 31.[7]

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[7] The district court noted the "uniqueness of the jury's rapid decision" but found that the "prompt, inquiry-free decision" was only "speculative, circumstantial evidence of ... prejudice." (R13:1392:15).

4. **Survey and opinion evidence**.

In presenting its own characterization of relevant community prejudice, the government's amicus offers polling data indicating that anti-Cuban government passions in the Miami venue sometimes take divergent forms, but ignores poll findings that the Elian events that occurred immediately prior to trial in the instant case reflected "monolithically" focused efforts to influence the result of that crucial litigation in which Castro was again seen as extending his reach into the Miami community. CABA Amicus Br. App. 2 at p. 3. Plainly, CABA's polling evidence confirms the merit of defendants' uncontroverted representations regarding pervasive prejudice in Miami-Dade County. *See* CABA Amicus Br. 13 & App. 2 (local non-Cubans and Cuban-Americans *more than twice as likely* to support illegal military action by exile groups–the focus of the trial defense–and U.S. military invasion of Cuba than rest of nation; entire Miami community far more likely than nation as a whole to report that a political candidate's position on Cuba is important to their vote).

The claim by the government's amicus that in the post-Elian period in 2000 Miamians viewed the Cuban government and Fidel Castro no differently than did the rest of the country simply does not hold up to scrutiny. Instead, polling and media-based evidence indicates that the Elian events were cataclysmic in stirring the relevant prejudices and in reawakening members of the non-exile community to the

intensity and reach of the exile cause. Indeed, it was in the context of Elian-related events that the news media reminded the community of the history of violence and reprisals in connection with issues of core significance to the exile cause.[8] CABA's claim that appellants were merely imagining concerns that numerous jurors, including the jury's foreman, R25:745-46, expressly recognized is akin to willful blindness to the record, the news media, the history of the county, and published precedent.[9]

The government's amicus argues that defendants might have faced prejudice wherever their case was tried. CABA Amicus Br. 10 n.10 & App. 1 (citing 2002 national survey showing 78% of Americans had an "unfavorable" opinion of Fidel Castro). Such an unfavorability rating for Castro, with whom the United States has not had diplomatic relations for nearly 50 years, is hardly surprising. Moreover, considering other high profile personalities, it is not uncommon to find high rates of

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[8] *See* R2:329, Ex. L & M (local governmental support of illegal acts of aggression against Cuba and of harassment and intimidation of local citizens patronizing Cuban artists), Ex. O (economic retaliation; street traffic blockades); R3:397, Ex. N-1 (local governmental laws barring Cuban cultural performances); R4:498, Ex. A-4 (bomb threats), Ex. B-4 (death threats), Ex. E-4 (political retribution); R15:1636, Ex. 10 (listing 30-year history of well-publicized exile reprisal actions, from firebombings and bomb threats to murders, assaults, boycotts and other economic injuries).

[9] *See*, *e.g.*, *United States v. Arocena*, 778 F.2d 943, 945 (2d Cir. 1985) (describing Omega 7 domestic terror campaign that included bombings and murders in Miami; addressing involvement of Ramon Sanchez); *cf.* R29:1590 (government opening statement describing Ramon Sanchez's exile organization, Movimiento Democracia, as trying to "liberalize the Government of Cuba and ... bring about Democratic reforms through peaceful protest").

unfavorability, without drawing the inference appellee's amicus suggests that the same abiding, personal, and *passionate hatred* of Cuba and Castro that exists in Miami – due to the highly personal experiences of the exiles and their families – exists throughout the country. For example, in 2003, over 60% of Americans had an unfavorable opinion of Jacques Chirac; in 2001, 55% of Americans had an unfavorable opinion of former U.S. President Clinton; and in 1992, 79% of Americans had an unfavorable opinion of David Duke. *See* Appendix A.[10]

Contrary to CABA, that public policies or personal lives cause individuals to be viewed unfavorably does not mean that Americans feel they are *personally* victimized or exiled by, for example, French president Chirac. The national unfavorable view of Fidel Castro in 2002 – falling somewhere between Jacques Chirac and David Duke – does not counter all other evidence, including not only every relevant community survey and the massive pretrial and trial publicity but the core of much of the government's presentation at trial, that in the post-Elian period in 2000, Miamians viewed the Cuban government and Fidel Castro with a *personal* and *passionate* level of hostility not comparable to anything found elsewhere.

In fact, in response to the defendants' submission of survey evidence in Miami-

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[10] Although Americans' overall opinion as to Cuba was more mixed in 2002 – with 31% favorable versus 60% unfavorable, *see* Appendix A (results of surveys reported by Gallup) – than in Miami, in that, for example, there were no prospective jurors in this case who expressed an overall favorable opinion of Cuba, these mere popularity polls are not what is relevant to the question of community passions.

Dade County establishing the intensity of community antipathy to Cuban agents such as the defendants, the government argued, contrary to CABA, that the defendants were unable to show that the same level of prejudice existed in all parts of the venue. Gov't Br. App. A at 12 (asserting that defendants' survey evidence does not dispel "their ability to be tried fairly in other divisions of the District outside Miami-Dade County"). It was in response to this argument by the government that the defendants acceded at the venue hearing on June 26, 2000 to transferring the case for trial in Broward County. At that hearing, the government cited demographic figures supporting the thesis that the exile population's influence in Broward was significantly lower than in Miami-Dade. RBox1:514:58 ("The [demographic] figures are certainly not conclusive, but they do reinforce what all of us have as an intuitive feeling ... ."); *id.* at 63 (government concedes that Broward provides the district court with "a practical and pragmatic solution" that may "optimize all the interests here").

5. <u>Unique impact of criminal activity on particular community</u>.

CABA's analogy to the Oklahoma City bombing case, *United States v. McVeigh*, 918 F.Supp. 1467, 1472 (W.D. Okla. 1996), in which venue was transferred is highly relevant. Gov't Br. 12. The effects of that bombing were national and international, and no reasonable person had a favorable opinion of suspect Timothy McVeigh. But it was Oklahoma City that had experienced the personal pain and loss occasioned by McVeigh's actions, just as it is the community in Miami that has

experienced every moment of the effects of the Castro government in Cuba. *Cf. McVeigh*, 918 F.Supp. at 1471-1472 ("The nation was interested in the human story of suffering and renewal, but in a more general sense;" noting, by contrast, that in Oklahoma City, "[p]rominently displayed in the state capitol building is the artwork of survivors and families" and that "[m]any Oklahomans view a trial of this case as an additional challenge[,] want the opportunity to demonstrate their ability to be fair in spite of this extraordinary provocation of their emotions of anger and vengeance," and "seek participation in the trial to demonstrate an ability to overcome a tragedy with such powerful emotional impact;" "prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude").

For the exile community, Castro's actions and continuance in power do remain "living, breathing wounds," in the words of attorney (and 2003 CABA President) Victor Diaz. R15:1636, Ex. 9 (May 25, 2000) (explaining that "[t]here are 10,000 people in this town who had a relative murdered by Fidel Castro [and] 50,000 people in this town who've had a relative tortured by Fidel Castro"). As a Cuban-American juror related to the district court, this case "is a little bit too close" to expect the dispassionate judgment associated with impartiality. R23:203 (response by Arlene Vargas). One week after the filing of CABA's brief, Miami Herald sports columnist Dan Le Batard explained the depth and intensity of the anti-Castro passion: "Fidel Castro is our Hitler, our Saddam, our bin Laden. ... Castro has the blood of my

people on his hands. His prisons, his firing squads, his politics, his evil. ... Yes my pain is borrowed. Learned. Passed down. It is not mine. I have not earned it. But I feel it today nonetheless, on behalf of those who felt it so I never would, and it stings in my eyes." Dan Le Batard, *Friday's decision hurts deep down*, Miami Herald, at 1C (Jan. 21, 2006) (commenting on decision allowing Cuba to play in World Baseball Classic), attached hereto as Appendix B.

6. District court's recognition of intense media coverage and prejudice.

CABA disputes the level of attention paid to the case by local media and the recognition in the community of prior expressions of community passions in relation to the principal Cuban-exile concerns regarding not merely elements of the Castro government such as the defendants, but to anyone seen as politically aiding the Castro government. CABA Amicus at 8 & 17 n. 15. However, the media coverage relating just to the defendants and their trial was remarkable. The difficulty of tracking all of the media – including Spanish language media – in Miami-Dade disfavors the government's position in this case; in fact, it shows how difficult it is to monitor the environment for prejudice, all the more so when particular organizations in the community are active in their own publications and information efforts.

In unsuccessfully seeking to enforce a gag order on witnesses, the district court recognized the intense level of media coverage of the trial:

At the conclusion of each day, the news media views the evidence

> admitted into the trial record. The Court has also made copying facilities available to the news media. Moreover, the *members of the news media have been present inside the courtroom for each day of trial*. The Court has *reserved seating for members of the press* and media and furnished computer monitors for those in the gallery, including the news media representatives, to view video or computer evidence admitted into the trial record. Articles about this case have appeared *daily* in the *Miami Herald* and *El Nuevo Herald* ... . Local *televised news programs*, particularly those associated with the Spanish-speaking channels, have *featured coverage of the trial since it began*.

R7:978:9 n. 5 (Order of Feb. 16, 2001) (emphasis added). The district court found that the media "coverage has only *intensified* as the trial has progressed" and that "unrestricted statements by trial participants would only serve to increase the already *voluminous publicity attached to this trial*." R7:978:15 (emphasis added). Observing that "publication of extrajudicial statements and actions by the trial participants may very well taint the unsequestered jury in this case," the court concluded "that there is a substantial likelihood that the extrajudicial comments and conduct by the trial participants in this case would prejudice the Court's ability to conduct a fair trial." *Id.*

The district court recognized further that the defendants had argued in their motions to change venue that "the onslaught of publicity would prejudice both the jury pool prior to trial and the jury during trial." R7:978:16. The district court found that "*not even the most emphatic instruction or the most searching voir dire question*

can shield the jurors from banner headlines or *ex parte* statements and conduct by witnesses or counsel that would undoubtedly receive extensive coverage." *Id.* (emphasis added); *see also* R7:978:16-17 (acknowledging that "[s]ince the trial began, this case has been the daily bread for the local press and media," but adding that the Miami press attention to the case was "understandable;" reasoning, however, that alternative to gag order, granting change of venue after three months of trial, would "disrupt the lives" of "jurors and *those in the community* who follow this matter with interest") (emphasis added).

As the district court's order of February 16, 2001, entered in the days approaching community recognition of the fifth anniversary of the shootdown of Brothers to the Rescue workers suggests, unlike many venue cases, in which the overwhelming evidence of pretrial and trial publicity is relevant only to juror exposure to the media itself, the fact of the media coverage here is relevant to what the community values actually are. (For example, internet media searches reveal at least 250 articles about this case in just the Miami Herald and El Nuevo Herald from the date of the defendants' arrest until their conviction.) This media coverage is stark confirmation not only of the district court's findings in its order of February 16, 2001, but of the very passions that the government conceded in the Ramirez case and which the district court, relying on its own knowledge of the community, referred to in recognizing "the impassioned Cuban exile-community residing within this venue."

R13:1392:14.[11]

7. Cumulative prejudicial atmosphere undermining fairness.

Beyond the general facts about the community and its attitudes and prejudices in the aftermath of the Elian matter are the unique circumstances that marked this case and must be factored into the risk of unfair prejudice. The government argues that this case was unlike the disturbing atmosphere discussed in *Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522 (1966). Gov't-Br:43. But indeed the government compares apples and oranges. Nothing in *Sheppard* compared to the following matters that characterized the instant case:

- a dramatic in-court accusation by a community leader – and key witness on the most prejudicial charge – attacking defense counsel as a communist spy doing the work of Cuban "intelligence," R81:8945;
- jurors expressing fears after being chased to their cars by the media at the start of deliberations and having their license numbers filmed by Spanish-language television and other media, including government-sponsored media, R126:14644-47;
- a televised demonstration by a domestic paramilitary group like Commandos F-4, R91:10603-04, and another demonstration by a group

[11] It is not merely the volume, however, but the content of the publicity about this case and about related community concerns that shows the unprecedented intensity of the relevant prejudice. *See* Gonzalez En Banc Reply Brief at 2-24.

demanding on televised coverage that the defendants "be killed," R59:6145, such that the district court had to take measures to protect the jury from personal exposure;

- editorializations of the fundamental community importance of obtaining convictions in the case on the most serious of charges, with editorials in print and broadcast media, *see* R3:397, Ex. J-1;
- multiplicitous foreign language broadcasts relating to the case, but inaccessible to English-speaking counsel, R7:978:9;
- the recent riot, boycotts, traffic blockades, demonstrations of anger, calls for revenge, and threats of political retribution that were actually carried out in the wake of the Elian matter, *see* R2:329, Ex. O;
- a newspaper column by a prominent community leader, just prior to jury deliberations, attacking the judge for even allowing the defendants to explain their actions in defense of the espionage and murder charges, Hernandez Br. App. F;
- jury exposure to victim press conferences during voir dire and to daily in-court media presence and frequent headlines over the course of 7 months of trial, *see* R22:111-16;
- widespread community events during trial honoring the victims as community martyrs, killed by the defendants and Castro, R65:6759;

- televised commemoration of the government's version of the martyrdom of the victims who were depicted as having acted in the cause of the community, R70:7130-31;
- religious masses and governmental recognition in streets and monuments honoring the victims and their cause in fighting Cuba, one street identifying the victims as "Martyrs" and a government monument proclaiming that events happened in the manner alleged by the government, *see* R24:535;
- a closing argument with dozens of sustained objections to government improprieties and levels of emotionalism and passion drawing on community prejudice, including a jury told by the government that it must "do the right thing" and convict because a foreign enemy wanted the defendants to be acquitted, R124:14536;
- attorneys for victims and government witnesses so demonstrative in their courtroom actions that the court issued admonishments and, finally, ejected from the court a victim-organization lawyer, with the lawyer then continuing to try to influence the trial in media commentary designed to avoid the effect of the court's gag order, R56:5602-5;
- a defense attorney attacked unfairly by the government for failing in opening statement to note that the government had the burden of

proving all elements of the offense beyond a reasonable doubt, such that the government told the jury that any defense of the murder charges other than that espoused by the Cuban Air Force was necessarily a lie by the defense attorney, R124:14511;

- defense counsel castigated as being pawns of the Cuban government who were being used to destroy America, "paid for by the American taxpayer," R124:14482;

- defendants linked unmistakably to the most hated – utterly reviled – figure in the history of the community, and then linked in closing to hated figures of the first half of the 20th century, including Hitler, R44:3699-3700, R124:14474;

- jurors continually exposed during trial to testimony about the virulence and violence of community elements in response to persons deemed Castro collaborators or those who are viewed to somehow facilitate the Castro regime, *see* R90:10411-14;

- defense attorneys forced to beg the jurors to overcome the community fears and prejudices that were open and obvious at trial, R124:14469-70;

- a majority of the venire that was hostile to the defendants based on who they are – not white, male physicians, like Dr. Sheppard – but

because they stood as representing Fidel Castro, the focus of the community's hostility;

- a trial court that acknowledged on the record that widespread public commemoration of the martyrdom of the victims in the middle of the trial would create a "substantial likelihood of prejudice" to the defendants, R7:978;
- involvement of media where the very name of the station itself, e.g., "Radio Mambí," means fierce opposition to the allies and associates of the defendant;
- convictions despite a government petition for a writ of prohibition admitting that the government could not prove the most serious charges;
- a post-trial admission by the prosecutor that the venue was poisoned by community prejudice regarding fundamental Cuban exile interest issues, R15:1636.

While the government's amicus seeks to limit the analysis to the admitted biases of prospective jurors and the content of just the media concerning the defendants themselves, the entire record, including the uniquely prejudicial events at the time and place of this trial must also be considered. The perfect storm of prejudice in this case – not anyone's view of ethnicity – is the basis for appellants' claim for a new trial.

CONCLUSION

Appellant requests that the Court reverse and 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, this brief contains 5,718 words.

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William M. Norris

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, Miami, Florida 33130-1555, Miami, Florida 33131; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; Leonard I. Weinglass, Esq., 6 West 20th Street, Suite 10A, New York, NY 10011; Ricardo J. Bascuas, Esq., 1870 Coral Gate Drive, Miami, Florida 33145; Peter Erlinder, 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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APPENDIX A

APPENDIX B