UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176-BB
03-11087-BB

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

RENE GONZALEZ,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA
(CASE NO.: 98-721-CR-LENARD)

EN BANC REPLY BRIEF OF APPELLANT RENE GONZALEZ

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STATEMENT OF THE ISSUE

Whether the district court violated Fed. R. Crim. P. 21(a), and the defendants' rights to due process and an impartial jury by denying a change of venue.

REPLY ARGUMENT

The government's answer brief seeks to minimize the nature and extent of publicity prior to and during trial by characterizing it as largely "factual" or unrelated to the case, and thus not prejudicial. Gov't Brief 26 ("The few case-related articles are fundamentally factual and not inflammatory."). The government also seeks to minimize the significance of community survey evidence with respect to the presence of prejudice within Miami-Dade County. This reply brief is directed to those two contentions, by setting forth, and placing within the context of the issues at trial, relevant media content and by examining the precedent relevant to consideration of the significant confirmation of prejudice by the public opinion evidence obtained in a community survey focused on the underlying events of this case.

I.

THE MAGNITUDE AND TENOR OF PUBLICITY SURROUNDING THE CASE, BOTH BEFORE AND DURING TRIAL, REVEALED PERVASIVE COMMUNITY PREJUDICE IMPAIRING THE FAIRNESS OF THE TRIAL.

A. The voluminous and intense media coverage was perceived by the district court as a substantial threat to juror impartiality.

The district court, in an order entered midway through trial, *see* Appendix A (Order, Feb. 16, 2001, addressing substantial likelihood of prejudice due to witness involvement in significant case-related media events), recognized that the defendants had premised their venue motions, in part, on the "onslaught" of pretrial publicity and the expectation of continued prejudicial publicity at trial and further recognized that "[s]ince the trial began, this case has been the daily bread for the local press and media." R7:978:16. The district court's awareness of this publicity was formed not only by its consideration of specific articles submitted in connection with the motion to change venue, but its review of additional media coverage appearing on a daily basis within the community. R7:978:9 n.5 (noting that "[a]rticles about this case *have appeared daily* in the *Miami Herald* and *El Nuevo Herald*" and that "[l]ocal televised news programs, particularly those affiliated with the Spanish-

speaking channels, have *featured* coverage of the trial *since it began*") (emphasis added).

Recognizing the "*voluminous publicity* attached to this trial," the district court further found that such publicity "*has only intensified* as the trial has progressed."[1] R7:978:15 (emphasis added). *See also* Gov't Brief 28 n. 28, 38 (recognizing significance of trial judge's perceptions of community; citing *Mu-Min v. Virginia*, 500 U.S. 415, 427, 111 S.Ct. 1899, 1906 (1991)(trial judge "brings to his evaluation of [venue] claim his own perception of the *depth* and *extent* of news stories that might influence a juror") (emphasis

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[1] The district court, recognizing the disturbing nature and magnitude of media coverage in this case, R7:978:15 (court likens "voluminous" publicity to the "sensationalized" reporting in *New-Journal Corp. v. Foxman*, 939 F.2d 1499 (11th Cir. 1991)), nevertheless declined to grant a change of venue, when renewed pursuant to a motion for mistrial three months after trial had begun following witnesses Basulto and Lares' holding a televised press conference, on the basis that it would be "imprudent" to change venue or sequester the jury, because either action would "further disrupt the lives of these jurors *and those in the community who follow this matter with interest*." R7:978:18. In doing so, the district court impermissibly subordinated the right to a fair trial for the accused – recognized by the court itself as the "'most fundamental of all freedoms,'" R7:978:7 (case citations omitted) – to the vagaries of community "interest," a concern wholly inimical to a venue challenge based on prejudicial publicity or, as here, a claim of pervasive community prejudice.

added). The government's claim that the record does not show intense and adverse trial publicity, *see* Gov't Brief 43 ("Appellants allege 'intense' and 'one-sided' media coverage during the trial, but document nothing, negating their claim."), is contradicted by the district court's findings, as well as counsel's uncontradicted proffers at trial and the articles themselves, of which the government, during trial, claimed awareness.

Moreover, while the government speculates that jurors who served "had been exposed to little or no media coverage of the case," *see* Gov't Brief 15 (making no distinction between knowledge of underlying events, such as BTTR shootdown, and knowledge of subsequent prosecution of case itself), the record does not support the government as to media exposure. Rather, voir dire questions on publicity asked only what media content the jurors consciously "remember[ed]" about "the case" and whether they could recall the media sources. Gov't Brief App. G. Jurors Buker and Yagle cited articles in the Miami Herald, R25:748; R27:1299; Barnes cited local television channels, R25:805; Portalatin cited a Miami Spanish-language television channel, R25:864; Loperena cited the newspaper, R26:974; and Garcia, Campbell, and Holland could not remember the source, R25:889; R25:1038; R27:1360.

Even among jurors who could not recall media reports, there were concerns about community reaction and impact (Hahn, R27:1344) and underlying bias (Cento, R27:1128). A notable comparison is provided by the Court's recent decision in another highly-publicized case. In *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1032 (11th Cir. 2005), "*no one* who had been exposed to pretrial publicity served as a juror or alternate." *Id.* at 1032 (emphasis added).

Further, while the trial judge instructed jurors not to read or listen to news reports about the case, this instruction did not prevent them – as the district court itself perceived – from reading headlines or hearing lead-ins to case-related broadcast news. R7:978:15, 17 (district court finds that "not even the most emphatic instruction or the most searching voir dire question" could "shield" jurors from newspaper headlines, out-of-court witness statements, or conduct that the court recognized would receive "extensive coverage" and, thereby, likely "taint the unsequestered jury"). Nor did it prevent jurors from reading other articles involving Cuba, such as feature stories about pilots' families or shootdown commemorative ceremonies (in which trial witness Basulto or pilot relatives were reported as seeking support for prosecution of

Castro as the pilots' "murderer" or "assassin"), frequent news and commentary highlighting evils of the Cuban regime, or reports of difficulties besetting community members expressing viewpoints not in keeping with prevailing exile preferences. *See* R7:978:5; R3:397:Ex. J-1; and additional articles noted *infra*. Further, while the jurors were also instructed not to respond to others' comments about the case, the instruction did not prevent their *hearing* such comments made in their presence.

Contrary to the government's depiction, the barrage of media coverage was hardly peripheral or objective: it featured articles and commentary detailing – *emotionally* and at length – the *suffering* of community members caused by the defendants, while proclaiming – prior to jury selection and throughout trial – the *certainty* of their guilt. This was substantiated by media coverage of events related to the shootdown of rescue airplanes that was at the heart of the government's case, including a televised press conference held during trial by two witnesses, Guillermo Lares and Jose Basulto, calling, in the presence of a mother of one of the downed pilots, for the indictment of Fidel Castro on charges of murder, R7:978:5; memorial masses each year on the shootdown anniversary occasioning condemnation of the defendants and the

Castro regime as "murderers" and "terrorists," R3:397:Ex.J-1; and courthouse protests during trial demanding that the defendants "be killed," R59:6096-108, 6145-49.

Crucially, voir dire revealed that jury service in this case was fraught with apprehension, stemming from pretrial press publication of juror identity[2] and expressed fears among the venire of exile reaction if they were to acquit the defendants. *See*, *e.g.*, R25:1012, 1025, 1049, 1058-62. Ongoing media attention directed to the jury, which continued during trial and deliberations, consisted of televising jurors as they entered and left the courthouse, filming jurors' license plates, and additional attempts to seek out jurors' identities – all of which caused jurors to feel concern and pressure. *See United States v. Campa*, 419 F.3d 1219, 1252-53 & record citations therein (11th Cir. 2005).

B. Media coverage intensified passions within the venue by stressing harms to the community as a result of the defendants' activities and the shootdown incident; by characterizing those harms in inflammatory terms as "murders" and "terrorism;" and by labelling the perpetrators, identified not only as the defendants, but also as the Cuban government and Castro himself, as guilty beyond doubt.

In the English-speaking press alone, injury to the Miami-Dade

[2] *See* R22:111-16.

community arising from the charged offenses was a perpetual theme: "Spies Among Us" was a headline featured prominently, and repeatedly, in news and opinion pieces alike. Far from constituting dry factual recitations, articles highlighted concern for harms caused by the defendants, aligning the prosecution with efforts to combat the Castro regime.[3] Editorials similarly lauded prosecution efforts, echoing the government's theory of the case and characterizing it – long before jury deliberations – as established without any doubt.[4]

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[3] *See, e.g., SPIES AMONG US – Castro Agents Keep Eye on Exiles – Missions of Betrayal*, Miami Herald, Apr. 11, 1999, at 1L (detailing Cuban spies as provocateurs among exile community; ending with emotional and graphic description of suicide committed by elderly Miami Cuban man after learning he had been "living with a spy") (R2:329:Ex. D); *Shadowing of Cubans a classic spy tale – 5 set for trial in September – Spies Among Us?*, Miami Herald, Aug. 16, 1999, at 1A (noting deceptiveness stemming from spies' dual identities within community; quoting neighbor of defendant Medina as asserting, without any foundation in charges, "Who knew he wanted to overthrow my country?") (R2:329:Ex. E).

[4] *See Spies among us*, Miami Herald, Sept. 15, 1998, at A14 (congratulating the FBI and U.S. Attorney's Office for combatting *"Castro's reach into our community*") (R2:329:Ex. F); Opinion – Four Brothers – Remembering Feb. 24, 1996 (boxed editorial), Miami Herald, Feb. 24, 2001, at 6 ("*Five years ago the Fidel Castro regime coldly murdered four Miami men*; asserting *BTTR was flying "a routine search in international airspace*; with no warning, they were

The government mischaracterizes two editorials submitted by Campa in support of his motion to change venue as "extolling the presumption of innocence." *See* Gov't Brief 6 n. 8 ("Of the case-related articles … two were editorials (R2:329:Ex.F, G [*Miami Herald*, extolling 'presumption of innocence'])." Contrary to the government, Exhibit G appears in Broward County's Fort Lauderdale Sun-Sentinel, *not* in the Miami Herald. *Id.* Additionally, with respect to Exhibit F, reference to the formality of a presumption of innocence is dismissive and obligatory, introducing as "a sad fact … Castro's reach into our community [that] still gives us cause to mistrust one another. Kudos to the FBI and the U.S. Attorneys' office for their diligence." This passage in the editorial follows six paragraphs delineating what the editors characterized as the "hard evidence" garnered by the FBI in this case, opining that "[w]hat's surprising is that such arrests haven't happened sooner." *Id.*

Although the government portrays an earlier editorial as addressing merely a shootdown "anniversary," Gov't Brief 6 n. 8, in fact the editorial

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shot from the sky. *None of this is in doubt."*; castigating Cuba as *"the terrorist state that killed [the Miami men]"*) (article among those noted by counsel in moving for mistrial, R70:7130-31).

focused on the need to bring to justice the BTTR pilots' "proven" Cuban "murderers." Headlined in large, bold letters – "**TERRORISM MUST NOT WIN in Brothers to the Rescue Shoot-Down**" – the editorial asserted that the shootdown incident was "*proven* to have been premeditated;" that "four years of exhaustive investigation have *proven*" that the BTTR planes "were in "international waters when they were destroyed – in contempt of law, international treaties and all humanity;" and that, following the memorial masses and prayers to be held for the pilots on this four-year anniversary of the shoot-down "*nothing could honor their memory more than to call to account their murderers.*" The editorial culminated in analogizing the shootdown to the hostage-taking of Americans by Iran to and other Iran-sponsored terrorism, calling it "Cuban-state terrorism." *TERRORISM MUST NOT WIN in Brothers to the Rescue Shoot-Down*, Miami Herald, Feb. 24, 2000, at 8B (R3:397: Ex.J-1).

An additional article, published on the same date and written by the sister of a killed pilot, similarly characterized the shootdown incident as "murders" perpetrated by "terrorists," representing additionally, as documented facts, that "[t]he Cuban government accepted responsibility for the

murders and admitted premeditation," and asking for punishment on behalf of herself and other family "victims of terrorism." *Punish Cuba for murders of Americans*, Miami Herald, Feb. 24, 2000, at 9B.[5] These accusations were published in the context of broad denunciations of Cuba, which were legion in the local media.[6]

Definitive assertions of the defendants' guilt, as well as that of Cuban

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[5] *See also Shot-down Brothers remembered – Five services honor four rescue pilots*, Miami Herald, Feb. 25, 2000, at 2B (reporting courthouse rally pleading for Castro's indictment for pilots' "premeditated murder") (R3:397:Ex. L-1); *Brothers plane shoot-down a Castro trap?*, Miami Herald, Feb. 24, 2001, at 1A (quote from leader of prominent exile organization, Cuban American National Foundation (CANF), printed in large font, set off in center of article: "'*What is clear from the trial is that Brothers to the Rescue were set up and that murder was committed.'" – Joe Garcia, executive director, CANF"*) (article noted generally, R70:7130-31).

[6] *See, e.g., To the Point-Mr. President, Define 'Handshake,'* Miami Herald, Sept. 11, 2000, at 6B (editorial condemning Castro as "head of a terrorist state" and U.S. "arch-enem[y]") (R5:656:Ex. D); *Witnesses link Castro, drugs – Castro 'is allowing drug traffickers to use Cuba as a syringe for injecting drugs into American streets and schoolyards*, Miami Herald, Jan. 4, 2000, at 3B (R2:329:Ex. J); *FORMER U.S. POWS DETAIL TORTURE BY CUBANS IN VIETNAM,* Miami Herald, Aug. 22, 1999, at 1A (R2:329:Ex. I); *Cuba toughens crackdown – Biggest wave of repression so far this year,'* Miami Herald, Nov. 11, 1999, at 1A (R2:239:Ex. J).

government and Castro, thus appeared repeatedly in the press, both before and during trial.[7] Prior to and during trial, defense counsel were portrayed in the media as surrogates for and collaborators with the Cuban government, demeaning both the integrity and substance of the defense case.[8] Additionally emphasized in the press was the view that the prosecution was directed against *Cuba itself*, rather than merely the individual defendants.[9] Such articles were

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[7] *See* R70:7130-31 (counsel notes "another article today by Liz Balmaseda" and "a number of new articles" appearing over the weekend, Feb. 24 and 25, 2001, including a Miami Herald editorial "that flatly condemns the Cuban government for this terrorist act").

[8] *See* Rui Ferreira, *Cuba helps defense at spy trial,* Miami Herald, Aug. 18, 2000, at 1B (R5:656:Ex. A); Rui Ferreira, *Funcionarios cubanos iran al juicio de los espias,* ("Cuban functionaries to attend spy trial") El Nuevo Herald, Aug. 18, 2000, at 17A (R5:656a:Ex. B); *Cuba colaborara en juicio por espionaje,* ("Cuba will collaborate in the spies' trial"), El Nuevo Diario, Aug. 19, 2000, at 61 (R5:656:Ex. C); Rui Ferreira, *Un misterioso coronel cubano se suma al caso de los espias,* ("A mysterious Cuban Coronel is involved in spy case"), El Nuevo Herald, Aug. 21, 2000, at 21A (R5:656:Ex. D).

[9] *See Downed pilots remembered with flight, flowers*, Miami Herald, Feb. 25, 2001, at 3B (Basulto, together with BTTR and relatives of pilots, seek indictments of additional Cuban officials, including Castro, said by Basulto to have ordered shoot-down); *Shot-down Brothers remembered – Five services honor four rescue pilots*, Miami Herald, Feb. 25, 2000, at 2B (culpability ascribed to Castro and others by Basulto and supporters) (R3:397:Ex. L-1).

supplemented by emotionally-charged recitations of injury suffered by families of the Miami BTTR pilots.[10]

C. Media coverage directed to the disclosure of jurors' identities, together with local publicity in the year trial commenced, confirmed that reprisals and reactions by community elements to notable deviations from accepted exile positions – such as a verdict to acquit Castro-aligned defendants – were well-within the public consciousness, engendering concern among the venire.

Widespread media coverage simultaneously reflected perceived risks to members of the Miami community were they to serve on the jury and vote for acquittal. Fears expressed by prospective jurors of violent retaliation by Cuban exiles in the event they were empaneled and voted for acquittal were reported in the local press.[11] These concerns were reportedly fueled by pretrial

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[10] *See In Memory of Mothers Who Died at Sea – Mother's day memorial for Elian's mother*, Miami Herald, May 15, 2000, at 1B (featuring photograph of a grief-stricken Eva Barbas, described as mother of Pablo Morales, one of 4 BTTR fliers, with daughter; large photograph, with text inset)(R4:498:Ex. D-4); *Downed pilots remembered with flight, flowers*, Miami Herald*,* Feb. 25, 2001, at 3B (recounting memorial ceremony for downed BTTR pilots, at South Florida locale renamed "*Martyrs Point*").

[11] *See* Rui Fereira, *Miedo a ser jurado en el juicio a espias cubanos* ("Fear of Being Cuban Spy Trial Juror")*,* El Nuevo Herald, Dec. 3, 2000, at 6A (reflecting newspaper's express decision to publish during voir dire, over counsel's

publication of prospective juror names, *id.* (discussing apprehension felt by prospective jurors Lawhorne, Briganti, and Cuevas, identified as the father of three minor children, stemming from media revelation of their names); *see* R25:830-31; R26:1049, 1058-62.

Such fears were heightened at trial when the media again sought jurors' names, filmed jurors as they left the courthouse, and televised jurors – *during their deliberations* – both entering and exiting the courthouse "all the way to their cars," with their license plates likewise filmed – all of which engendered juror concern and feelings of being pressured. *See Campa*, 419 F.3d at 1252-53.

Numerous instances of adverse consequences over the course of decades stemming from expression or behavior perceived as deviating from the dominant exile position included evidence, introduced at the instant trial, of past exile violence, *see*, *e.g.*, Gov't Brief 48 (noting uncontradicted characterization of menacing nature of some exile witnesses), as well as

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objection, names of prospective jurors who admitted fear of exile reaction to an acquittal; newspaper explained as its reasons for naming such jurors: "Legally there is nothing to prevent it: the court is a public place.").

displays of the vehemence of José Basulto, who testified to his approval of illegal violence with respect to Cuba and, during questioning, accused defense counsel of himself being a Cuban spy.

A political cartoon printed in the Miami Herald in the same year as jury selection in the instant case depicted the state of community fear about the expression of a position at variance from that of the dominant exile viewpoint:

> Cuba [woman at home, speaking on telephone]:
>
> > I cannot speak my mind. I could lose my job, be threatened with violence, be made a social outcast and be ostracized by the community…
>
> Miami [man at home, holding placard saying, "Return Elian to his Dad!," speaking on telephone]:
>
> > *Same here*.

Jim Morin, Miami Herald, Jan. 20, 2000 (R2:329:Ex. P).

Several months after the publication of this cartoon, the Herald reported threats of violence against officials at odds with the prevailing exile position

concerning Elian Gonzalez.[12] This was accompanied by national publicity detailing violent disturbances in the community at large following the raid to return Elian to federal custody. During this period, the fever-pitch intensity of anti-Castro sentiment among the exile community aroused by the Elian controversy, including its most prominent members, was well-noted in the press, which reported 100,000 people – described as a "river of outrage, unity and mourning" – who took to the streets of Miami "to demonstrate their

[12] *See W. Dade home of attorney general on alert; Police say an anonymous caller phoned in bomb threat April 13*, Miami Herald, Apr. 30, 2000, at 45A (reporting bomb threat to home of Attorney General Janet Reno, as well as her being "vilified" in the community, with depictions of her on a "Wanted" poster and on placards as a "Gestapo storm trooper, a child abuser and even the malevolent goat-sucker of Puerto Rican legend, or *chupacabras*") (R4:498:Ex. A-4); *Media watch events closely – and get watched in return – Hot words on radio scrutinized* (reporting death threats to President Clinton and other officials), Miami Herald, Apr. 5, 2000, at A15 (R4:483:Ex. A-3); *Crowds target Reno's home*, Miami Herald, Apr. 6, 2000, at 2B (*posters of Reno with devil's horns*)(R4:483:Ex. A-3); *INS agent targeted by death threats*, Miami Herald, May 6, 2000, at 1A (female federal agent Mills, who carried Elian from his Little Havana home during government raid, "*has received multiple death threats* and is now getting special protection;" Mills seen on videotape at the Gonzalez home possibly being thrown to the ground by bystanders, in effort to stop her from retrieving Elian, and thereafter being pulled into the bushes by a man before being rescued by other agents) (R4:498:Ex. B-4).

anger" at the seizure of Elian from his Miami relatives' home.[13]

Beyond the vast outpouring of exile rage, the media reported instances of job loss to members of the community resulting from conduct not in conformity with the prevailing exile position, as exemplified in the front-page reporting of the firing of Miami's city manager, as well as the loss of employment by the city's police chief, who was forced to resign, when each was perceived as not cooperating in the exile community's preferred course of action with respect to Elian.[14] In addition, serious concern for the status and

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[13] *See Thousands Protest Seizure*, Miami Herald, Apr. 30, 2000, at 1A; *Family Defies Order – In a show of solidarity, VIPs flock to visit boy*, Miami Herald, Apr. 14, 2000, at 1A (reporting support by leading community figures for Elian's Miami relatives: article beginning, "The *cream of Cuban Miami* crowded into the Gonzalez family dining room – priests, politicians, a famous actor, exile leaders...") (R4:483:Ex. G-3); *Castro-challenging pilot offered parade, honors*, Miami Herald, Jan. 4, 2000, at 1B (Basulto and others honoring Tong, a Saigonese pilot on a mission to rally Cubans to overthrow communism; reporting Tong's flight to Havana on New Year's to drop leaflets over the city and his statement that "a Cuban exile whom he declined to name *offered him a private plane if he would drop a bomb on the Cuban capital*") (R2:329:Ex. M).

[14] *See CAROLLO FIRES WARSHAW*, Miami Herald, Apr. 29, 2000, at 1A (well-publicized firing of Miami's city manager and also its police chief for having cooperated with federal authorities in connection with the Elian Gonzalez matter).

well-being of employees of the Immigration and Naturalization Service (INS) employees was reflected in the press.[15]

While the government would limit the significance of publicity concerning the Elian matter on the basis that it did not involve the specific facts of the instant case,[16] the two events were, in fact, linked in the press,

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[15] *INS agent targeted by death threats,* Miami Herald, May 6, 2000 (R4:498:Ex. B-4).

[16] Notwithstanding the government's dismissal as irrelevant of publicity concerning Elian or other Cuba-related matters generating controversy in the community, the natural effect of such publicity cannot be cabined so narrowly. Given that with respect even to the Elian matter, involving considerations of a father's right to custody of his minor son and the fundamental parent-child bond, a divergence of opinion was present – *see Protest and Passion Spread to the Streets – Sit-ins block intersections and disrupt Dade traffic – The Saga of Elian Gonzalez*, Miami Herald, Jan. 7, 2000, at 1A ("'When everybody talks about the Cuban exile community supporting this kid, what are they talking about?', said Jorge Castro, who left Cuba in 1961. 'They may control the Spanish radio stations that try to manipulate everyone with their propaganda, *but they don't represent the entire Cuban community in Miami.*'") (R2:329:Ex. 0); *Pained Cuban exiles disagree on what's best for Elian,* Miami Herald, Jan. 7, 2000, at 17A (reporting support for Elian's return to his father by some in exile community empathizing with pain of family separation) (R2:329:Ex. 0) – in the instant case involving allegations of espionage and murder on the part of Cuban government spies, no such countervailing consideration or divergence of viewpoint was ever noted or expressed, thereby heightening the inevitable strain

pursuant to commentary analogizing the incidents and the involvement in both of BTTR and Basulto.[17]

The spillover effect of exile passions aroused during the Elian controversy towards additional controversies involving Cuba was, in fact, readily perceived within the community. *See Groups 'warned' on Cuba resolution – Activist at odds with arts industry,* Miami Herald, May 15, 2000, at 1B (President of Miami Beach Chamber of Commerce, commenting on exile pressure against opposition to county ban on business with Cuba, stated: "*It's been expressed to me that there's a great deal of sensitivity now, and if you bring up another issue that deals with Cuba you only add fuel to the flames*") (R4:498:Ex. E-4).

During the instant proceedings, as in other controversies such as the

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and apprehension stemming from the possibility of entertaining a non-exile position.

[17] *See Raid's Prelude: How talks failed/Missed signals helped doom deal* and Sara Olkon, Diana Marrero, and Elaine de Valle, *Thousands protest seizure/Separate rally backs Reno's actions,* Miami Herald, Apr. 30, 2000, Apr. 30, 2000, at 20A-23A (featuring Basulto's picture and name in special section, "Prominent Players in Elian Saga"; "The [pro-Miami Elian Gonzalez family] crowd cheered as two BTTR planes flew overhead") (R4:498:Ex. C-4).

Elian and business-ban incidents, the press was rife with reports of adversity faced by anyone perceived as deviating from the prevailing exile position on Cuban policy. *See The Burden of a Violent History*, Miami New Times, Apr. 20-26, 2000 ("*Lawless violence and intimidation have been hallmarks of el exilio for more than 30 years. Given that fact, it's not only understandable many people would be deeply worried, it's prudent to be worried*;" detailing numerous incidents of violence by Cuban exiles in Miami, including during Elian controversy) (R15:1636:Ex. 10).[18] Jurors at trial also heard evidence of violence attributed over the years to Miami exile groups, including towards members of the community deemed insufficiently anti-Castro. *See United States v. Campa,* 419 F.3d 1219, 1244-1245 (11th Cir. 2005).

Serious risks faced by those seeking even purely commercial,

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[18] *See also Police say an anonymous caller phoned in bomb threat April 13,* Miami Herald, Apr. 30, 2000, at 45A (reporting "*scores of bomb threats and actual bombings*" attributed to anti-Castro exile groups as far back as 1974, including bombing of a Spanish-language publication, Replica, and, two years later, incident in which "radio journalist Emilio Milian's legs were blown off in a car bomb after he spoke out against exile violence," bombing in 1980's of Mexican and Venezuelan consular offices in retaliation for their governments' establishing relations with Cuba) (R4:498:Ex. A-4).

nonpolitical interactions with Cuba were reported.[19] Likewise, any effort to relax a Miami-Dade business ban in the context of cultural or sports events was reported as being met with virulent opposition.[20]

One highly-publicized instance of censure involving a Cuban band

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[19] *See More exiles maneuvering for business with Cuba*, Miami Herald, Mar. 5, 2000, at 1A (noting that business contacts and deals with Cuba remain secret, in part because of concerns that anyone engaging in such activity will be branded by exiles as Castro "collaborators"; *"'Put my name in the newspaper today and I'll get death threats tomorrow,'* said one Cuban-born businessman in Miami, even though his contacts with Havana are legal") (R3:455:Ex. A); Miami Herald, Apr. 2000, *Police say an anonymous caller phoned in bomb threat April 13* (reporting bombers' targeting of many small businesses promoting any contacts with Cuba) (R4:498:Ex. A-4).

[20] *See Groups 'warned' on Cuba resolution – Activist at odds with arts industry,* Miami Herald, May 15, 2000, at 1B (reporting pressure on Miami Beach arts groups by prominent Miami Cuban-American attorney and others, including business leaders, to withdraw opposition to county ban on business with Cuba; attorney quoted as advising Miami City Ballet that Miami Cuban community "*would take any steps they could to punish the ballet if [the ballet] did not do what they wanted them to do*," including a boycott and problems for its line of credit and certificate of occupancy; Miami City Ballet Artistic Director Edward Villella noting "chilling" nature of communication, containing "scent of threat;" attorney also wrote letters asking another arts group to drop lawsuit challenging policy in light of what he called "community sensitivities") (R4:498:Ex. E-4).

concert held in Miami resulted in exiles' hurling bottles at, and videotaping of, the concertgoers, who were denounced as "Castro sympathizers" for attending the concert[21] – not unlike the filming, and subsequent televising, of jury members as they entered and left the courthouse during the instant trial and again during their deliberations, accompanied by media requests for their names, all of which caused juror consternation and feelings of being pressured. *See Campa*, 419 F.3d at 1252-53 & record citations therein.

Contrary, therefore, to the government's contentions, the large volume

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[21] *See Protest, taping set to follow Van Van show*, Miami Herald, Sept. 28, 1999, at 3B ("*Cuban radio commentator advocated videotaping concertgoers as they enter the arena in order to identify people he called "Fidel Castro sympathizers*": "We should film everyone who enters the concert, so that later we can show the images publicly, Amador Rodriguez said during his radio program, En Caliente, which airs on Radio Mambi WAQI-710 AM from 9 to 10 A.M. weekdays;" "*Leaders from at least one exile group . . . said they will film those attending the show*" *to identify "people they suspect of being Castro's Miami sympathizers*.") (R2:329:Ex. L); *see also Miami may bar Van Van next time – County's Penelas also opposed*, Miami Herald, Oct. 13, 1999, at 1B ("Cuban exiles, demonstrating outside" Miami Arena, "hurl[ed] slurs and bottles" at audience attending concert of popular Cuban dance band; 11 people arrested; Miami-Dade mayor and city attorney seeking to deny band visa and return visit; Mayor Penelas called invitation for return engagement a "'provocation' to the exile community") (R2:329:Ex. L).

of community-wide publicity surrounding this case, whether offered as feature, news, or commentary, was presented virtually entirely from an intensely prosecutorial, guilt-assuming, and exile-community perspective, asserting repeatedly – prior to jury deliberations – that the defendants, along with the Cuban government and Castro himself, were guilty beyond doubt of the offenses charged.

When considered in conjunction with events occurring at trial itself – i.e., witness Basulto's impugning of defense counsel as engaged in espionage; evidence at trial of exile-instigated incidents of violence over the years; courthouse protests, covered by local television, by community members carrying placards demanding the defendants "be killed"; the filming and televising of jurors, as well as media requests for their names, before the verdicts were returned; and highly improper and inflammatory remarks by the prosecution in closing argument – this publicity, viewed on its own or in combination with the abiding anti-Castro fervor within the venue, as reflected in the additional reportage of a broad spectrum of Cuba-related matters likewise presented largely from an exile perspective and supplemented by

numerous articles reporting negative, if not dangerous, consequences arising from a perceived failure to embrace the exile viewpoint, tainted the fairness of the trial in this case.

II.

THE RESULTS OF A COMMUNITY SURVEY SUPPORTED BY EXTENSIVE UNDERLYING DATA AND ADDITIONAL EMPIRICAL STUDIES, WHICH CONFIRMED THE DEPTH OF COMMUNITY ANIMUS AND APPREHENSION SURROUNDING THE ISSUES IN THIS CASE, WAS OF SIGNIFICANT VALUE IN ASSESSING THE DEFENDANTS' CLAIM OF PERVASIVE PREJUDICE.

The government's proposition that community surveys have "scant value" in determining the merits of a motion to change venue, Gov't Br. 24, is accompanied by citation to cases that are both inapt and wholly distinguishable from the legal and factual circumstances presented here. Two such cases involve no community survey at all, but merely individual witness observations. *See United States v. Chapin*, 515 F.2d 1274 (D.C. Cir. 1975)(affidavit unsupported by empirical study or personal familiarity with venue or voir dire procedure); *United States v. Blumenfield*, 284 F.2d 46 (8th Cir. 1960)(testimony by media personnel).

None of the government's cases stand for the "scant value" proposition the government asserts, and all of the cases recognize the importance of the surrounding circumstances of the case. An examination of such factors here, including a survey supported by substantial data as well as extensive hostile and emotion-laden publicity within the venue and multiple recent manifestations of intense community reactions across a broad range of social and political strata, establishes that the Moran survey in this case was plainly of value to the consideration of community prejudice. *See, e.g., United States v. Haldeman,* 559 F.2d 31, 63 (D.C. Cir. 1976) (cited at Gov't Br. 25; recognizing that, with respect to consideration of change-of-venue claims based on prejudice, "'each case must turn on its special facts'") (quoting *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171 (1959)).

First, contrary to the government, the Court in *United States v. Chapin*, 515 F.2d 1274 (D.C. Cir. 1975), did *not* suggest that surveys lack value, but rather *specifically recognized the value of a public opinion survey as an accepted basis for supporting a change of venue*. *Id.* at 1286 (recognizing that, under ABA Standards on Fair Trial and Free Press, "proof of prejudice

sufficient to require a change of venue may be made by 'qualified public opinion surveys…as well as other materials having probative value'"). *Chapin* did *not* involve a community survey at all but merely a psychiatrist's affidavit, where the witness lacked empirical study, personal knowledge of the venue, or any understanding of voir dire procedure. *Id.* at 1286. *Chapin*'s analysis falls squarely *against* the government's sole evidence in the venue proceedings: a stale, three-year old affidavit by psychologist witness McKnight, who had no familiarity with the district or jury surveys, and did not even examine–as far as the record shows–the survey submitted by the defense. In addition, although the government now characterizes the *Chapin* affidavit as an "expert's assessment," Gov't Br. 24, there was no indication that the affiant was an "expert;" rather, his affidavit was construed as a mere sociological background, lacking the hard numbers of a "public opinion" survey. 515 F.2d at 1286-87.

In *Chapin*, the defendant's *acquittal* on substantial portions of the indictment reflected a paucity of proof of prejudice. *Id.* at 1287. Defendant Chapin's status as a "minor functionary" of the Nixon administration, whose

involvement in its wrongdoings was "small," whose job "was almost entirely administrative with no policy responsibilities," and whose crime bore no direct relation to anti-Democratic activities, was simply not a target of *measurable* levels of animosity. *Id.* at 1287. The contrast with the instant case, of course, is glaring: the defendants here were no mere administrative "functionaries," but rather admitted agents of the Castro government engaged in a secret mission viewed as hostile by the community; their crimes, both as charged and as tried, bore a *direct* relation to anti-exile activities and included a conspiracy to murder members of the community viewed as humanitarian exiles; and the survey itself–conducted by a longtime faculty member of the venue community's largest public university, accompanied by all underlying poll data, and confirmed by additional empirical polling results–as well as evidence of intense and voluminous media coverage, met exactly the terms of utility set forth in *Chapin*.

Similarly unpersuasive is the government's invocation of *United States v. Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), where the Court noted, unremarkably, that a trial judge is not *required* to accept expert evidence. *Id.*

at 64 n.43. In the specific circumstances of that case, where the sole issue was "Watergate publicity," the court concluded that the district court did not err in relying *"less heavily"* on a private poll than on very detailed examination of publicity in voir dire directed to assessing the existence of publicity-engendered bias. 559 F.2d at 64 n.6, 66.[22] Importantly, the court in *Haldeman* noted that even if voir dire had not been effective in excluding any effect of preconceptions due to publicity, the jury's sequestration immediately upon being selected–a remedy not available in the instant case due to the length of the trial–enhanced the likelihood that such bias was dissipated. *Id.* at 63 n.39, 71 n.58. Of additional significance was that a number of venirepersons believed that prosecution of the defendant was *unfair*, and that the overwhelmingly factual and "unemotional" publicity in *Haldeman* was primarily national in scope rather than of "peculiar interest" to residents of the

[22] Similarly, a district court preference for voir dire over poll data as a means of assessing juror prejudice, in *United States v. Mandel*, 431 F. Supp. 90, 100-101 (D. Md. 1977), cited by the government's amicus, arose in the context of a claim of actual, not pervasive, prejudice based on "straight-forward factual reporting," favorable to the defendant and government alike, unlike the uniformly anti-Cuba, pro-government posture of media coverage here which revealed pre-existing passions.

venue, 559 F.2d at 61-62, 64 n. 43–circumstances at odds with the revealing, emotional local media coverage surrounding the instant defendants' charges, which was, as the government even now does not contest, unparallelled in the national news, let alone in any other venue in the country. *See supra* at Section I; R7:398:9, 15, 16.

The government likewise cites inaptly the decision in *United States v. Blumenfield*, 284 F.2d 46 (8th Cir. 1960), which, like *Chapin,* did *not* involve a survey but merely a request for testimony by a local radio station manager and other media personnel as to the level of prejudice among the venire. *Id.* at 51 & n.6. Given the witnesses' lack of qualifications to offer their opinions on prospective jurors' states of mind, such testimony was excluded. *Id.* The exclusion was affirmed in view, *inter alia*, of the jury's verdict, which acquitted the defendants on most of the charges, thereby "negating the claim of prejudice." *Id.* at 51-52.

The lone case from this Circuit cited by the government for survey-minimization, *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988), is a habeas case in which, *after* a change of venue was *granted*, the state judge in the

transferee county declined to grant an evidentiary hearing for the defendant's *second* motion to transfer the case away from the new venue. Rejecting claims predicated on the asserted prejudicial publicity, this Court found, first, that the media coverage was merely factual in nature, *id.* at 1425; and, second, that the public opinion poll, disclosing familiarity with the defendant's name and an opinion of his guilt by a fraction of the venue residents, did not establish a presumption of community prejudice. *Id.* at 1425. In so ruling, this Court found no fault with the survey, assuming the accuracy of its results; rather, it concluded that presumed prejudice does not arise merely from factual *publicity* concerning a defendant. *Id.* (concluding that, pursuant to *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031 (1975), prejudice is not presumed simply because defendant's criminal past is well publicized).

Unlike both *Murphy* and *Bundy*, publicity in the instant case did not involve mere impressions gained from media coverage of the defendant; instead, appellants' claim of presumptive prejudice arose from longstanding passions against their status as agents of a despised regime, and inflammatory

media coverage ascribing to them acts of murder, terrorism, and repression directed against community victims. *See supra* at Section I.

The government cites *United States v. McVeigh,* 918 F. Supp. 1467 (W.D. Okla. 1996), for its recognition of the limits of survey evidence, failing to note that the survey rejected there was one propounded by the government seeking to show a *lack* of venue prejudice arising from pretrial publicity; and that the primary failure of the survey, in the court's view, was its failure to encapsulate concerns arising in the context of the issues to be tried. *Id.* at 1473. The court likewise found that the emotional nature of publicity in the venue did not readily lend itself to objective measurement, because potential jurors would want to claim that they could be fair; on that basis, the court transferred venue, concluding that "there [was] so great a prejudice" against the defendants in Oklahoma that they could not obtain and fair and impartial trial in the state. *Id.* at 1474. *McVeigh* thus supports the defendants' claim of pervasive prejudice which similarly saturated the Miami venue in that the

defendants were part of the Castro "regime," as clearly seen in both media coverage and the underlying data in the community survey.

In the present case, the publicity was, in the words of the district court, "voluminous," providing "the daily bread" for local media; with the long-awaited commencement of court proceedings, media coverage "only intensified," R7:978:15; and the Moran survey was clear support for the intuitively-expected premise that a community heavily affected by a massive exile population would be hostile to agents of the very government from which the population was in exile. Moran's survey–with the support of substantial underlying data and additional comparative polling studies–showed that the entirety of the Miami community, both exile and non-exile, was affected by abiding anti-Castro animus impacting adversely on the exercise of impartial judgment with respect to the unique circumstances and setting of this case.

CONCLUSION

Appellant requests that the Court remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 6,970 words.

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PHILIP R. HOROWITZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 27th day of January 2006 to OFFICE OF THE UNITED STATES ATTORNEY, Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132; Paul A. McKenna, Esquire, 200 South Biscayne Boulevard, Suite #2940, Miami, Florida 33131; Joaquin Mendez, Esquire, Assistant Federal Public Defender, 150 West Flagler Street, Suite #1500, Miami, Florida 33130, William Norris, Esquire, 8870 S.W. 62nd Terrace, Miami, Florida 33173, Leonard Weinglass, Esquire, 6 West 20th Street, Suite #10-A, New York, New York 10011, Ricardo J. Bascuas, Esquire, 1870 Coral Gate Drive, Miami, Florida 33145; Peter Erlinder, Esquire c/o William Mitchell College of Law, 875 Summit Avenue, St. Paul, Minnesota 55105; and Edward G. Geudes, Esquire, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131, and further certify that on the 27th day of January 2006 an electronic brief was provided by uploading the foregoing brief to the court's internet web site.

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