

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 BRIEF OF THE APPELLANT LUIS MEDINA

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

**United States v. Luis Medina
Case Nos. 01-17176 & 03-11087**

Appellant Luis Medina files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT C1

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT REGARDING ADOPTION

OF BRIEFS OF OTHER APPELLANTS v

STATEMENT OF JURISDICTION v

STATEMENT OF THE *EN BANC* ISSUE 1

STATEMENT OF THE CASE 1

Preliminary Statement 1

Course of Proceedings, Disposition, and Statement of Facts 4

Standard of Review 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

BY FAILING TO CONSIDER MEDIA EVIDENCE OF THE
TEMPER 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 7

1. This appeal addresses the need for change of venue in the face of
pervasive community prejudice 10

2. Narrow, deferential review for abuse of discretion is inappropriate
because denial of due process and an impartial jury due to community
conditions extending beyond the courtroom requires independent
evaluation of the facts 12

3. The Moran survey was powerful documentation of pervasive
community prejudice, but the logical conclusions from the survey
results were discounted by the district court for clearly invalid reasons .. 14

4. Voir dire proved that the Moran survey was correct, and the protective
measures adopted by the court were not sufficient to supplant change
of venue 23

CONCLUSION 29

APPENDIX A – Excerpts from Voir Dire 30

CERTIFICATE OF WORD COUNT 53

CERTIFICATE OF SERVICE 53

TABLE OF CITATIONS

CASES:

<i>Estes v. Texas</i> , 381 U.S. 532, 85 S.Ct. 1628 (1965)	10
* <i>Irvin v. Dowd</i> , 366 U.S. 717, 728, 81 S.Ct. 1639 (1961)	5, 12, 14
* <i>Pamplin v. Mason</i> , 364 F.2d 1 (5th Cir. 1966)	10, 24
* <i>Rideau v. Louisiana</i> , 373 U.S. 717, 83 S.Ct. 1417 (1963)	10
<i>Sheppard v. Maxwell</i> , 384 U.S. 333, 86 S.Ct. 1507 (1966)	10
<i>Sherrer v. Sherrer</i> , 334 U.S. 343, 68 S.Ct. 1097 (1948)	1
<i>Touchston v. McDermott</i> , 234 F.3d 1133 (11th Cir. 2000)	1
<i>Turner v. Louisiana</i> , 379 U.S. 466, 85 S.Ct. 546 (1965)	10
<i>United States v. Capo</i> , 595 F.2d 1086 (5 th Cir. 1979)	13
<i>United States v. Fuentes-Coba</i> , 738 F.2d 1191 (11 th Cir.1984)	21
<i>United States v. Hernandez</i> , 106 F.Supp.2d 1317 (S.D. Fla. 2000)	8, 15
<i>United States v. Moody</i> , 762 F.Supp 1485 (N.D.Ga.1991)	11-12
* <i>United States v. Williams</i> , 523 F.2d 1203 (5th Cir. 1975)	13-14, 26

STATUTORY AND OTHER AUTHORITY:

U.S. Const. art. III, § 2, ¶ 3	9
U.S. Const. amend. V	7
U.S. Const. amend.VI	7

18 U.S.C. § 3742	v
28 U.S.C. § 1291	v
Fed. R. App. P. 28(i)	v
Fed. R. Crim. P. 21(a)	7, 13, 28
Oscar Corral & Alfonso Chardy, “Luis Posada Carriles Case: Backer’s Arrest Clouds Case,” <i>The Miami Herald</i> , Nov. 29, 2005	2
Oscar Corral & Jay Weaver, <i>U.S. Arrests Key Ally of Posada</i> , <i>The Miami Herald</i> , Nov. 21, 2005	2
Mauricio A. Font, <i>Shift in U.S. Policy Toward Cuba</i> , www.soc.qc.edu./cuba/fontwvm.html	26
Robert M. Levine, <i>Secret Missions to Cuba – Fidel Castro, Bernardo Benes, and Cuban Miami</i> 218 (Palgrave 2001)	1, 2, 3
Grenier, Guillermo J. & Pérez, Lisandro, <i>The Legacy of Exile: Cubans in the United States</i> 87 (Allyn and Bacon 2003)	8, 23-24
Alejandro Portes & Alex Stepick, <i>City on the Edge – The Transformation of Miami</i> 106, 220, 256 (U. Cal. Press 1993)	1
Alex Stepick, Guillermo Grenier, Max Castro & Marvin Dunn, <i>This Land is Our Land – Immigrants and Power in Miami</i> (U. of Cal. Press 2003)	2

**STATEMENT REGARDING ADOPTION
OF BRIEFS OF OTHER APPELLANTS**

Appellant Luis Medina, pursuant to Fed.R.App.P. 28(i), hereby adopts the *en banc* appellate briefs filed in the instant appeal by co-appellants Gerardo Hernandez, Ruben Campa, Antonio Guerrero, and Rene Gonzalez, including their issue statements and all other portions of their *en banc* briefs.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with offenses against the laws of the United States. The court of appeals has jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over final decisions and sentences of United States district courts. The appeal was timely filed on December 20, 2001, from the final judgment and commitment order entered on December 20, 2001, that disposes of all claims between the parties to this cause.

STATEMENT OF THE *EN BANC* ISSUE

Did the district court err in denying a change of venue, or transfer within the venue, in light of the special circumstances of this case in 2000-2001 in Miami?

STATEMENT OF THE CASE

Preliminary Statement

The instant appeal arises from an unusual, perhaps unique, time and place. To fully address the legal issues presented by this case—encompassing the question of whether these defendants could be fairly tried in Miami-Dade County in 2000-2001—it is crucial to recognize what has made Miami different. “We cannot as judges be ignorant of that which is common knowledge to all men.” *Touchston v. McDermott*, 234 F.3d 1133, 1134 (11th Cir. 2000) (Tjoflat, J., dissenting) (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 366, 68 S.Ct. 1097, 1102 (1948)).

We speak of our country as a nation of immigrants, the blending of many diverse places. Miami is singular; it holds great significance as a place of *exile*.¹

¹ See Alejandro Portes & Alex Stepick, *City on the Edge – The Transformation of Miami* 106, 220, 256 (U. Cal. Press 1993) (work by professors at Johns Hopkins University and Florida International University) (Miami is the “choice place of exile settlement” for Cuban Americans, where, “[f]or more than three decades, ideological fervor and tight social controls have been maintained on the strength of a single theme: irreconcilable opposition to Castro”; noting influence of “the Cuban exile media [that] has furnished the frame according to which all other domestic and world events are interpreted”). See also Robert M. Levine, *Secret Missions to Cuba – Fidel*

The ethos of exile has long driven the Cuban community of Miami-Dade County, Florida, as was made evident during the Elián Gonzalez-related disturbances in 2000.² While the exile community is often quiet, raising its children, earning a living, and observing the passage of years, its passions have nevertheless always been present.³ It is a powerful spirit, born of the violent uprooting of the

Castro, Bernardo Benes, and Cuban Miami 218 (Palgrave 2001) (by Director of University of Miami's Center for Latin American Studies) (“As late as 2000, 77 percent of Miami Cubans polled in an independent survey said that they consider each candidate's position on Castro, regardless of the office sought.”).

² Alex Stepick, Guillermo Grenier, Max Castro & Marvin Dunn, *This Land is Our Land – Immigrants and Power in Miami* 56 (U. of Cal. Press 2003) (work by academicians at University of Miami and FIU) (discussing “enormous passions” unleashed in Cuban American community by Elián affair, which, among other things, “unleashed a spate of violence in [the] Little Havana [section of Miami]”); *see also* Levine, *Secret Missions to Cuba* 264 (noting, in context of Elián controversy, pre-Elián documentation of reprisals, creating community atmosphere—fanned by statements of public officials in Miami—hostile to opposition to exile views).

³ Media reports have regularly emphasized that the exile community sees the hand of Fidel Castro in local events and accordingly expresses outrage. *See* Oscar Corral & Jay Weaver, *U.S. Arrests Key Ally of Posada*, *The Miami Herald*, Nov. 21, 2005, at A1-2 (in context of arrest of anti-Castro activist for “possession of automatic weapons, including some with the serial numbers obliterated; a silencer not properly registered; [grenades and a grenade launcher;] and a false passport,” reporting Miami Cuban-American activists' criticism of arrest as “attempt to appease Fidel Castro at a time when the Cuban president is stepping up his rhetoric against [Luis] Posada [Carriles] and his associates;” expressing former Miami U.S. Attorney's concern that “government will try to charge [defendant] in a court outside Miami-Dade County to help secure a more favorable jury for the government's position”). This article has particular relevance to the specific intent issue in the instant case: appellant Medina, accused of espionage, admitted to working for the Cuban government, but presented evidence that his purpose was to infiltrate exile organizations responsible for bombing hotels in Havana, and killing an Italian tourist, principally focusing on Luis

community from its mother island.⁴ When awoken, the ethos of the Cuban exile cannot be ignored. As the voir dire in this case confirmed, such reactions can be vengeful and automatic in the censure of persons seen as challenging the core premises of the exile community.

The trial judge—despite formulating voir dire questions that implicitly recognized the broad-based community passions in Miami following the still-fresh Elián disturbances—proceeded in the hope that the ethos of exile could be kept from the courtroom, and that defendants demonized as agents of the very cause of the exile condition could be tried impartially, simply by asking prospective jurors questions touching on some of the passionate emotions, eliciting rehabilitative statements as to putting aside biases and fears, and then repeatedly telling jurors not to read about the case. The district court misunderstood the significance of the exiles’ deep-seated feelings and influence within the Miami-Dade community and misinterpreted the law regarding change of venue where pervasive community passions are at stake. The denial of Luis Medina’s motion for change of venue was error. The conviction should be reversed.

Posada Carriles. *See also* Oscar Corral & Alfonso Chardy, *Luis Posada Carriles Case: Backer’s Arrest Clouds Case*, *The Miami Herald*, Nov. 29, 2005, at B1-2.

⁴ *See* Levine, *Secret Missions to Cuba* 265 (recognizing that the narrative of Miami Cubans “internalizes betrayal and defeat,” with a self-perception as victims having “long memories of dispossession and disorientation”).

Course of Proceedings, Disposition, and Statement of Facts

Defendant Luis Medina adopts the statement of facts in the *en banc* brief of Appellant Rene Gonzalez. Medina is incarcerated, serving a life sentence for his conviction, in this case, of conspiracy to commit espionage. He received lesser concurrent sentences totaling 120 months' imprisonment on the remaining counts of conviction. R14:1435.

Standard of Review

The issue of the standards of review applicable to constitutional and rule-based motions for change of venue is addressed in the body of the argument as to the government's rehearing contention that the panel should not have engaged in independent review of relevant facts to resolve the presumptive prejudice claim. Appellant submits—as the government *conceded* in its original brief—that the court of appeals must “independently evaluate[] the circumstances” where a defendant claims pervasive prejudice undermined the reliability of the voir dire to insure an impartial jury. Gov't Answer Br. 29. Appellant further submits that application of this independent review standard to the legal question of whether the record establishes pervasive prejudice is a mixed question of law and fact subject to this Court's *de novo* review. *See Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522 (1966).

SUMMARY OF ARGUMENT

This is an appeal from a trial that was preordained to result in a conviction, a trial held in the very teeth of the exile community's censure. This brief addresses flawed analysis by the court below of both the facts supporting change of venue and the law governing when that change should be made.

Precedent of the Supreme Court and this Circuit requires a change of venue under Fed. R. Crim. P. 21 when a community harbors such a deep antipathy for persons such as these defendants that it cannot render a fair and impartial verdict, regardless of whether prejudice has been shown to invade the jury box. The trial court misapprehended the decisional law, both in applying Rule 21 as discretionary and in requiring and in failing to properly weigh evidence establishing pervasive prejudice.

The defendants presented the district court documentation of media showing deep-seated animus in the community for Fidel Castro, the Government of Cuba, and anyone associated with them. Not until the panel to which this case was assigned addressed these articles was there was judicial appreciation of the picture they painted. The district court did not properly evaluate this evidence.

Supplementing this proof was a survey conducted by Professor Gary Moran, confirming pervasive community-wide prejudice. In discounting the survey, the

district court misperceived its import. The court below simply did not appreciate that the Moran survey was not a study of whether there was media-induced bias, but rather a study of deep-seated community prejudice against anyone acting *on behalf* of the Government of Cuba. Further, the district court erred in rejecting self-evident survey conclusions because prior surveys anticipating community prejudice in fundamentally different types of cases of American businessmen had been called into question by actual experience in voir dire.

Having rejected the defense efforts to prove what everyone knew, that there was such an animus in Miami that an agent of Fidel Castro could not get a fair trial in the aftermath of Elián, the court constructed a careful voir dire. This voir dire, however, showed that the Moran survey was correct, by confirming the existence of a deep-seated and persistent animus in the community.

Prospective jurors who admitted to an animus were excluded, but those whose expressions of opinion, on the record, concerning their own reactions to the exile community or to their commitment to the exile cause were more circumspect, or who expressed no opinion at all, were allowed to stay. The trial court did not heed precedent calling for deep skepticism in accepting such jurors' assurances that they could be fair.

Rather than change the venue to insure a fair trial, the court pushed ahead

with trial in Miami. Events at trial overtook the court and overwhelmed due process.

ARGUMENT

BY FAILING TO CONSIDER MEDIA EVIDENCE OF THE TEMPER 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.⁵

The Sixth Amendment guarantees to defendants in criminal prosecutions the right to “an impartial jury” and the Fifth Amendment assures the right to due process. U.S. Const. amends. VI, V. Rule 21(a), Fed.R.Crim.P., implements these rights by directing that “the court **must** transfer the proceeding to another district,” that is, grant a motion for change of venue, “if the court is satisfied that

⁵ The first and second questions counsel are requested to address, in the Court’s letter of instruction to counsel dated November 15, 2005:

Did the district court abuse its discretion by denying the defendants motions to change venue, after finding that an impartial jury could be selected from a cross-section of the community to ensure the defendants a fair trial?

Did the district court abuse its discretion when it ruled that the defendants failed to demonstrate prejudice sufficient to warrant application of the presumed prejudice standard, i.e., that pretrial publicity was so pervasive as to render virtually impossible a fair trial by an impartial jury drawn for the community?

The component parts of these two questions are addressed in the context of what the court below considered and did not consider in rejecting the defense motions for change of venue.

there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.” *Id.* (emphasis added, to make clear that change of venue is mandatory under Rule 21 if sufficient showing is made).

Luis Medina made and renewed timely motions for change of venue.⁶ The motions were denied.

Appointment under the Criminal Justice Act to represent an accused “Cuban Spy” such as Luis Medina presented a sobering challenge. Counsel was not raised in Miami, but had lived there long enough to know that “the revolution” and the upheaval of exile from “the island” are the central realities around which many in the community organize their affairs.⁷ A man accused of committing espionage and

⁶ The motion sought transfer to another district. It was only at oral argument on the motion, to accommodate the court, that the defendants offered a transfer to Fort Lauderdale. RBox1:514:51 (June 26, 2000). *United States v. Hernandez*, 106 F.Supp.2d 1317 (S.D. Fla. 2000).

⁷ See Grenier, Guillermo J. & Pérez, Lisandro, *The Legacy of Exile: Cubans in the United States* 87 (Allyn and Bacon 2003) (part of The New Immigrants Series):

The forging and maintenance of the exile identity have contributed to the creation of a particularly “Cuban” way of looking at the social and political environment. . . .In many ways, this world view differentiates Cubans from non-Cubans in Miami and in the rest of the country. . . .

The exile ideology has three principal and interrelated characteristics: (1) the primacy of the homeland; (2) uncompromising hostility towards the Castro government; and (3) emotionalism, irrationality and intolerance.

community attacks while acting as a spy for Fidel Castro and, further, implicated in a spy ring that was allegedly responsible for the assassination of four heroes flying with Brothers to the Rescue could not get a fair trial in the Miami community in which the trauma of these incidents was still fresh. Rule 21(a) was meant for just such a case as this in which one community alone stands out as the place where the fairness of the trial would be most suspect. The challenge was how to prove what everyone knows.

The Constitution grants the right to trial in the district when the offense was committed. U.S. Const. art. III, § 2, ¶ 3. Like other rights, this can be waived, but courts are reluctant to change venue. This is so because there are powerful presumptions favoring the belief that the people who live where the charges are brought can fairly evaluate the evidence against the accused, and there is rarely if ever need to move the place of trial to insure the accused his right to a fair trial. The linchpin of this faith is the belief that careful voir dire examination will expose the juror who cannot be fair. However, beginning with the Supreme Court's decision in *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645 (1961), the full faith given to jury commitments began to recede, even as to jurors' claims of ability to overcome initial impressions gained from media reports. Here, the required commitment to be fair went much deeper than merely putting news reports out of

one's mind and required jurors to say they would not consider their most profound, lifelong biases.

The facts of this case therefore made it different from the ordinary case of a wash of media coverage being dried off in voir dire. A fair trial could not and, ultimately, was not given to these defendants in Miami-Dade County because who they were and what they were accused of doing was fundamentally antagonistic to the community.

1. This appeal addresses the need for change of venue in the face of pervasive community prejudice.

The former Fifth Circuit in *Pamplin v. Mason*, 364 F.2d 1, 4 (5th Cir. 1996), began its review of denial of change of venue in the habeas corpus context with *Irvin v. Dowd*, characterizing that case as finding “a pattern of deep and bitter prejudice” and “a clear nexus between the community prejudice and the possibility of jury prejudice.” The *Pamplin* court went on to say: “More recent Supreme Court cases hold that evidence of pervasive community prejudice is enough for reversal, even without the showing of a clear nexus between community feeling and jury feeling.” *Pamplin* reviewed Supreme Court precedent⁸ and concluded, 364

⁸ In addition to *Irvin v. Dowd*, *Pamplin* looked to *Rideau v. Louisiana*, 373 U.S. 717, 83 S.Ct. 1417 (1963); *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546 (1965); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628 (1965); and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966).

F.2d at 5: “As we read the Supreme Court cases, the test is: Where outside influences affecting the community’s climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.”

While not binding circuit precedent, Judge Devitt of the District of Minnesota, sitting by designation in the northern district of Georgia, granted a defense motion for change of venue in *United States v. Moody*, 762 F.Supp 1485 (N.D.Ga.1991), concluding that review of the relevant authority comes from the exercise of the Supreme Court’s supervisory powers, and the guidance given to the lower courts has reflected a demanding standard of fairness. *Id.* at 1490 n.6. Judge Devitt wrote:

The court finds further support for a venue transfer in the context of the Supreme Court's exercise of its supervisory powers. Federal appellate courts exercise supervisory power over federal district courts in their administration of the federal criminal laws, *Bruno v. United States*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), and in this capacity have provided an even more exacting fairness standard on this issue. The Supreme Court in *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), in the exercise of its supervisory powers, granted a new trial to defendant when news accounts of defendant's criminal record reached some of the jurors. The trial judge had found such evidence inadmissible. The United States Supreme Court said:

The prejudice to defendant is almost certain to be as great when

that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. ... It may indeed be greater for it is then not tempered by protected procedures.

In the exercise of our supervisory powers to apply proper standards for enforcement of the criminal laws in the Federal courts, ... we think a new trial should be granted.

Id. at 1490.

Judge Devitt concluded in *Moody* that: "Defendant has made a proper showing under the established due process standards that there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, and a strong showing under the Supreme Court's 'supervisory standard' that he is entitled to a change of venue." *Id.* Here, the defendants showed a pervasive community prejudice. Denial of the motion for change of venue in the face of this showing and under this standard was error.

2. **Narrow, deferential review for abuse of discretion is inappropriate because denial of due process and an impartial jury due to community conditions extending beyond the courtroom requires independent evaluation of the facts.**

As the Court's questions implicitly reflect, in the ordinary case where a defendant claims actual bias warranted a new venue, the correct standard of review is "abuse of discretion," still limited by the Court's independent evaluation of the relevant circumstances. However, where the issue, as here, goes to the fundamental question of pervasive community prejudice precluding the district court from taking

mere corrective voir dire and trial measures, precedent in this Circuit supports a more demanding standard of review. When a criminal defendant alleges that pretrial publicity precluded a trial consistent with standards of due process, “an appellate court is obligated to make an independent evaluation of the special circumstances involved in the case.” *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979).

Luis Medina appealed to this Court for review of his conviction and sentence to life in prison. This result reflected a denial of due process of law. While outcomes sometimes can be preordained based on narrow review standards, that is not the case here, where under any standard of review, the error in denying a change of venue was manifest.

Taking stock of the entire record and the circumstances shown both before and after voir dire, a violation of due process and the right to an impartial jury was established here. *See United States v. Williams*, 523 F.2d 1203 (5th Cir. 1975).⁹ The

⁹The court of appeals observed in *Williams* that the case was before it “in the form of a challenge to the district court’s denial of his Rule 21(a) motion for change of venue. The well established rule vests substantial discretion in the district court as to the granting or denying of a motion for transfer, and absent an abuse of discretion, the district court’s ruling will not be disturbed on appeal.” This, of course, does not hamstring the reviewing court. “We are not prepared, nor are we required to hold that the district court abused its discretion in denying appellant’s Rule 21 motion. Rather, we widen the breadth of our consideration to the tandem effect created by the intense pretrial publicity and the closing argument offered by the United States. We intimate no view as to whether the pretrial publicity or the closing

Williams court restated the question in the review of a denial of a change of venue motion, but recognized that restating the issue had avoided, and not answered, questions which are critical to this appeal.¹⁰

3. The Moran survey was powerful documentation of pervasive community prejudice, but the logical conclusions from the survey results were discounted by the district court for clearly invalid reasons.

Moran's survey results should have given the trial court pause. They showed that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons charged with engaging in activities charged in the indictment; 57 percent of Hispanic respondents and almost 40 percent of all

argument alone would necessitate reversal of appellant's convictions. We do hold, however, that these two factors operating together deprived appellant of a fair trial." *Id.* at 1208-09. Like *Williams*, the case now before the court only began with a change of venue motion. Many events during trial, including tenacious and aggressive media coverage and outrageous abuse of closing argument by the prosecutor, combined to deny Luis Medina his right to a fair trial.

¹⁰ See *Williams*, 523 F.2d at 1209 n. 11 ("With the issue thus framed, we decline consideration of two threshold problems that would inhere in an examination of the trial court's exercise of discretion in denying appellant's Rule 21 motion. First, the relationship between the discretion that a trial judge can exercise in denying a Rule 21 motion and the applicable due process standards is not altogether clear. Certainly, due process standards place a bottom line on the discretion exercisable by the district court, but the real question is the degree by which the district court's discretion operates within boundaries somewhat narrower than those set by due process. Second, the extent to which a reviewing court can look to the actual conduct of the trial in passing on the denial of a Rule 21 motion is similarly a concern not completely free from difficulty."). *Williams* withheld "any suggestion as to the correct resolution of these issues." *Id.*

respondents said that they would find it difficult to be a fair and impartial juror in a case involving alleged Cuban spies; and 35.6 percent of the respondents said they would be worried about criticism in the community if they reached a not-guilty verdict. Further, of those who said they could not be impartial, 89.8% of all respondents, and 91.4% of Hispanic respondents, stated that no circumstances would change their opinions. R2:321, Ex A at 10-12, 16.

The district court presented six reasons for declining to give “substantial weight” to Professor Moran’s survey conclusion that there is pervasive prejudice in the Miami-Dade community. The court below rejected Moran’s conclusions in reliance on a 1997 critique by Professor J. Daniel McKnight of some of Moran’s earlier work in *United States v. Broder*, No. 97-267-Cr-GRAHAM, an unrelated case.¹¹ R5:586 (order denying motions for change of venue). These criticisms are addressed in some detail. They are unfounded and manifestly erroneous.

(1) The court challenged the size of the survey. This was error. The trial judge concluded that since McKnight did not believe 250 participants to constitute

¹¹ McKnight opined that Moran lacked “empirical rigor” as to the 1997 case in which a smaller sample was polled than in the 2000 survey. The government, however, did not obtain McKnight’s opinion—or at least did not advise the defense if it did—as to the empirical rigor of the 2000 survey. *Hernandez*, 106 F.Supp.2d at 1323 & n. 5. McKnight gave Moran no credit for what Moran had learned about the tenor of the Miami-Dade County community, where Moran lived and taught over three decades, since 1973. McKnight did not have any experiential information as to Miami and its people.

a large enough population in the prior survey, the 300-person survey¹² in the instant case was insufficient for meaningful results.¹³ The survey had a sampling error of 5.3%. R2:321:Ex. A at 16. That is a statistical fact of unanimous agreement in the science based on a random selection of 300 subjects in a community of 2 million. By comparison, reliable surveys of 110 million voters on presidential elections are premised on samples of 600-900 persons, with a 3-4% margin of error. *See, e.g.,* <http://www.gallup.com>. That the court relied on a 1997 affidavit contesting a survey of 250 persons is also error. This conclusion is not only an unsubstantiated leap of faith, since there is nothing in the record to support the conclusion that a 300-person survey is too small to support accurate findings, it is also a complete reversal of the court's position. A 300-person survey is exactly what the court had authorized counsel to undertake for reimbursement under the Criminal Justice Act. *See* R1-280:3; R2-303. Tellingly, the government itself raised no challenge to the 300-person survey, even though the government participated in the hearing on a defense-

¹² 702 respondents were contacted for Moran's survey. Of that number, 147 refused to participate; 36 were not registered as voters; 48 had a language barrier; and 171 lacked anyone available to speak at the time of the calls, which were between the hours of 5-9 p.m. weekdays, and between 10:00 a.m. and 6:00 p.m. weekends.

¹³ "Similarly, the size of the statistical sample in this case (300 respondents) is too small to be representative of the population of potential jurors in Miami-Dade County." R5:586:15. Other than the court's bald assertion, there is nothing in the record to support this conclusion. Nor did the trial court indicate why the sampling error of 5.3% was not a statistically accurate gauge.

initiated *ex parte* application for CJA funding under of the survey before it was conducted; said nothing to impugn the survey size at the relevant time; and, even after the survey results were submitted, offered no evidence contrary to the sampling error statistic of 5.3%.

(2) The court criticized the survey's use of benign characterizations of the victims and adverse characterization of the crimes.¹⁴ Presumably, the terms the court chose to emphasize—"ambush," "undermine legitimate," "agents" and "honor fallen comrades"—are the non-neutral, subjective terms it found to be "contrary to standard scientific procedure." R5:586:14. However, the language used in the survey merely tracked that of the indictment; it was, in fact, far tamer than that used by the government in its opening statement, and mild in comparison to the government's

¹⁴ The court gave these examples, supplying the indicated emphasis which was not present in the survey itself:

2. These defendants are charged with setting up the **ambush** of the Brothers to the Rescue planes in which four people were killed. This type of activity is characteristic of the Castro regime.
3. The aim of Castro is to **undermine legitimate** Cuban exile organizations.
5. Castro's **agents** have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which **honor fallen comrades**.

R5:586:14.

fierce verbal onslaught during its closing argument. The court gave no explanation as to why “neutral” terms were required for scientific accuracy of the survey, when the survey was intended to measure probable juror reaction in trial, an adversarial locale where the terms used were anything but “neutral.” Imposition of this requirement is imaginative, but error.

(3) The court criticized the survey because Moran discovered that a large plurality of citizens in the community were not aware of the prosecution of these defendants, and he did not exclude such persons from the survey’s queries concerning community prejudice.¹⁵ This criticism on the part of the district court is ill-founded and betrays a fundamental misperception of the survey’s focus: the existence of deep-seated community bias concerning the type of individuals the defendants were said to be, i.e., spies of the Castro government charged with espionage and murder conspiracy and with disrupting exile community organizations, regardless of whether the survey’s respondents had read or heard about the particulars of the instant case. Such criticism of the survey is therefore perplexing. As referenced in his motion to change venue, Luis Medina did not predicate his request simply on the dissemination of pretrial publicity that inflamed the local

¹⁵ “First, the Court finds that 54% of all respondents and 48.5% of Hispanic respondents stated that they were not aware of this case altogether.” R5:586:14.

population against him—although ironically, even Medina’s request for CJA funds for the survey garnered media attention, alerting the government to and precipitating the government’s participation regarding the survey funding request. Rather, he sought to transfer venue because attitudes in the community were so hostile to Fidel Castro that no one who acted on his behalf, particularly someone charged with infiltrating exile organizations, could receive a fair trial. The criticism that among those surveyed were people who did not know of Medina’s case, but were still so hostile to agents of Castro’s Cuba that they could not afford them a fair consideration of their case, is error, an error apparently based on the court’s misapprehension of the question at issue.

(4) The court claimed that prejudice evidence must be related to a specific social target and that only some of the prejudice questions focused on the defendants as the social target of prejudice. It is difficult to follow this criticism and to understand what it means in the context of this case, where it was clear in the survey that the targets were Cuban nationals, sent by the Cuban government to Miami, to spy, and that those targets of indictment were charged with espionage and murder conspiracy. The court below attributed this criticism to the Knight affidavit, which, of course, did not review this specific survey relating to Cuban nationals who were

Cuban government agents, nor consider this specific case. The Moran survey was used by the defense to quantify community prejudice, aimed not just at these particular defendants, but more broadly aimed at persons serving as secret agents of the government of Cuba. There is nothing in the court's analysis that suggests any reason that any further definition of the "social target" of the community's prejudice was possible without actually using the defendants' names in the survey; what the survey did capture was the targeting essential to a conclusion as to pervasive prejudice against persons situated as are the defendants in this case.

(5) The court criticized survey questions as ambiguous.¹⁶ The court gives the single example of question 10, which asks "are there any circumstances that would change your opinion?," but does not, according to the court, "clarify" what opinion might be changed. Of course, question 10 immediately follows (and reiterates) question 9, which asks whether respondents' feelings about Castro's government would make it difficult to be a fair and impartial juror in a trial of alleged Cuban spies. In addition, Moran explained the function of question 10 in the report itself. " Question 10 is an open ended item allowing the respondent to qualify his (her) ability to serve as an impartial juror as reported in item 9." R2:321, Ex. A at 7

¹⁶ "Fourth, several of Professor Moran's questions are ambiguous, casting further doubt on the accuracy of the response provided." R5:586:14-15.

(Declaration of Gary P. Moran, Ph.D.). Thus, what the district court mistakenly criticized as ambiguity was in fact an intentionally open ended invitation for the respondents to clarify his or her answer to the immediately prior question. What is important, and what the voir dire proved even more clearly, is that at least 39.6% of the respondents and 57.4% of the Hispanic respondents could not say that they would be impartial and fair.

(6) The core reason the court below rejected the Moran survey is that Moran adopted earlier work by Jay Schulman in *United States v. Fuentes-Coba*, 738 F.2d 1191 (11th Cir.1984).¹⁷ It may be that the court below rejected Moran’s projection of juror impartiality because on prior occasions, social scientists in the employ of the defense had predicted biased juries, but had been wrong, leading to a proverbial boy-crying-wolf reaction. There was an absence of a hated social target in those cases—which dealt with businessmen charged with violating trade regulations. Although such cases nominally involve “Trading with the Enemy,” i.e., Cuba, the local jurors had no difficulty affording the presumption of innocence to persons claiming that they did not intentionally violate regulatory restrictions where the

¹⁷“Finally, and most significantly, Professor Moran attempts to bolster his conclusion that community prejudice exists by referencing the earlier study of anti-Cuban sentiment in South Florida that was introduced in *Fuentes-Coba*” R5:586:15.

targets of prosecution, U.S. businessmen, were not suspect and hated in the way that Castro spies are in Miami. Further, the voir dire responses in the instant case showed and even exceeded the pervasive community prejudice Moran anticipated.

Exactly what happened in the prior case in which Professor Moran had been involved is not clear. There is little about it in this record. The case was *United States v. Broder*, Case No. 97-267-CR-GRAHAM, but there is no published consideration by Judge Graham of the change of venue issue, nor review by this court. Before that, however, the issue arose in *United States v. Fuentes-Coba*. Professor Moran was not involved in the *Fuentes* case, but he did make reference to the survey results there as substantiating his own research.

What the district court overlooked is that the prior survey did not err in measuring anti-Castro sentiment in the community, nor did this Court so find in *Fuentes-Coba*. That prejudice plainly exists and not even the government has dared to deny it. Where the prior survey erred is in predicting that prejudice would arise against Fuentes. The point is this: Fuentes was a Cuban-American charged with violating the trade embargo. Even as to the charge—apart from the target—the trade embargo is a much more layered controversy. The community appears to support embargo because trade tends to support the Castro regime; but embargo also harms

relatives still living on the island. Further, Fuentes had *no* association with the Castro regime; his trial was simply about whether he followed the correct regulatory framework existing 25 years ago in trying to make money off of Cuba. The present case has none of this layered ambivalence. The defendants are Castro's spies. For many in the community, that is the end of the matter.

4. Voir dire proved that the Moran survey was correct, and the protective measures adopted by the court were not sufficient to supplant change of venue.

There were serious defects in the reasoning by which the district court discounted Moran's conclusions, and ambiguity in the extent to which the court did or did not rely on any of the underlying data.

While the Court rejected Moran's study, academicians recognize as true what Moran's survey discovered. "Hard-line attitudes toward the anti-Castro struggle prevail within the community," according to Professors Grenier and Pérez in *The Legacy of Exile: Cubans in the United States*,¹⁸ at 92. These authors document the hard-line attitude of the exile in a way which is pertinent to this case:

The FIU Cuba Poll 2000¹⁹ found that over 60 percent of the Cuban

¹⁸ See footnote 4, *supra*.

¹⁹ The FIU [Florida International University] Cuba Poll, which has been conducted every two years since 1991, is the "only regularly conducted scientific

American population in Miami still favors military action against the Cuban government, either by the United States or by exile groups. The military option is not far from the minds of many hard-liners. After the February 1996 crisis initiated by the downing of two Cuban American Cessnas over the Straits of Florida by Cuban Air Force pilots, the majority of Miami Cubans did not hesitate in calling for a United States invasion of the island.

Id. Denied the opportunity to invade Cuba, the community had these defendants as proxies for retaliation against as to a defining moment in the history of the exiles.

The venire was clear in its condemnation. The court had set up a two-stage voir dire process, but with so many jurors stating personal associations with the victims and their families, many of the prejudice issues surged to the fore even before questioning could begin.²⁰

This Court has embraced the proposition that “[i]t is immaterial that the voir dire did not demonstrate community prejudice,” and, certainly, there is no requirement “to prove that local prejudice actually entered the jury box.” *Pamplin v. Mason*, 364 F.2d at 6. This does not mean that the trial court is “precluded from

survey of the attitudes of the Cuban American community in Miami towards the island.” Grenier & Pérez, *The Legacy of Exile* 3.

²⁰ Professors Grenier and Pérez write of staunch emotionalism as a respected quality in the exile battle against Castro. “Of course, many Cuban exiles will readily, and even proudly, admit to not being rational in matters that have touched them so deeply.” *Id.* at 92.

utilizing the voir dire to help gauge the intensity of community prejudice.” *Id.* at 6 n. 9. The key point is that the determination of fairness should not rest solely on “prospective jurors’ own protestations against their individual bias.” *Id.* “The court must make an independent determination of whether a fair trial can be obtained in the community based upon all the evidence available at the time.” *Id.*

Ultimately, Moran’s survey found extensive prejudice against persons accused of being Castro’s spies. This prejudice was deep-seated; most respondents did not believe anything would change their mind. The survey showed that the prevalence of the prejudice was remarkable. Certainly, the voir dire reinforced Moran’s survey. While the survey numbers anticipate 40% of all respondents and 57% of Hispanics would be unable to be fair, the voir dire showed a total rate approaching 50%. But it is not just the numbers, but the heartfelt expressions of both Cuban-American and other jurors that confirm the truth of the survey. A sampling of responses by a mixture of jurors gives a flavor of the community’s concerns, fears, and passions. *See infra* at 30-52, Appendix A (containing pertinent excerpts from voir dire responses of 43 prospective jurors).

The critical corollary is the impact of this extensive prejudice on other people in the community. Even people who did not hold such a prejudice themselves expressed a concern with community reaction if they returned a verdict contrary to

the popular sentiment. Some prospective jurors had no opinions about anything, at least any opinions that they were willing to verbalize.

The problem with the district court's analysis is that whatever methodological imperfections Moran's survey may or may not have had, in some abstract, academic world, Moran's conclusions were fully supported both by his own survey and by the extensive, two-tiered voir dire designed by the court. The voir dire showed a pervasive community prejudice against persons in the employ of Fidel Castro and the crystallization of that prejudice in a case which had at its centerpiece the defining martyrdom event that has governed U.S.-Cuba relations since 1996.²¹

The district court chose to accept the protestations of fairness of some of the prospective jurors, and to trust in its ability to keep community prejudice at bay with repeated instructions to the jury. The observation of this Court in *Williams* applies here:

The court below conditioned its denial of appellant's Rule 21 motion on the ability of voir dire examination to produce a fair and impartial jury. Holding a final decision on the motion in abeyance pending the conclusion of voir dire is clearly the preferable procedure. This is not to say that the trial court should attach undue emphasis to the results of voir dire examination. While the results of voir dire examination are an important factor in gauging the depth of community

²¹ See, e.g., Professor Mauricio A. Font, *Shift in U.S. Policy Toward Cuba*, www.soc.qc.edu/cuba/fontwvm.html (addressing "major shift" in U.S. policy toward Cuba following 1996 shutdown incident, resulting in significant heightening of hard-line stance through passage of Helms-Burton Act).

prejudice, continual protestations of impartiality from prospective jurors are best met with a healthy skepticism for the bench.

523 F.2d at 1209 n. 10 (citations omitted).

A particularly troubling indicator that due process was denied is the guilty verdict on a charge that even the government conceded, prior to deliberations, it could not prove beyond a reasonable doubt: Court III, which charged Hernandez with conspiracy to murder the four members of Brothers to the Rescue shot down by the Cuban Air Force. The government conceded that, under the controlling law, their evidence would not serve to convict. On the eve of closing arguments the government acknowledged unresolvable evidentiary deficiencies in the murder conspiracy accusations. Gov't Emergency Pet. for Prohibition (11th Cir. No. 01-12887) at 4, 6, 21 (claiming jury instructions created “insurmountable barriers for a prosecution of foreign agents” and an “insurmountable hurdle” on murder conspiracy, and made “prosecution of such offenses a virtual impossibility”). Yet the jury returned a guilty verdict without a single question about the complicated and conflicting instructions and arguments relevant to Count III. The verdict seemed to serve as a substitute for the community’s desire to invade Cuba in retaliation for this event.

The grounds the district court gave for denial of the defendants’ post-verdict motion for new trial illustrate the thinking of that court, and illuminate the error in

having denied the modest venue transfer request put forward as an accommodation by the defense:

Aware of the *impassioned Cuban exile-community* residing within this venue, the Court implemented a series of measures to guarantee Defendants' right to a fair trial. Among these efforts included a searching, seven-day jury empaneling and voir dire process, daily administered instructions to the jurors not to speak with any members of the media about this case or to read or listen to any reports about this case, and gag orders on all trial participants including the parties, lawyers, and witnesses not to speak to the media about the trial. . . .

Accordingly, through the Court's methodical, active pursuit of a fair trial from voir dire, to the presentation of evidence, to argument, and concluding with deliberations and the return of verdict, any potential for prejudice in this venue was assured. As such, the Court finds no prejudice inure to Defendants, and in the interest of justice a new trial is unwarranted.

R13:1392:15 (emphasis added).

The district court claimed to be "aware of the impassioned Cuban exile-community," even though it refused to credit Moran's survey conclusion that this passion would infect the jury. The trial court persisted in this belief after voir dire demonstrated that the survey was correct.

Rule 21(a) requires that in such a situation, the court must grant a motion for change of venue. Instead, the court relied on the "daily administration of instructions." This did not protect Luis Medina's right to due process.

CONCLUSION

Counsel were invited to address the issue of whether the court below abused its discretion by denying the motions for change of venue, “after finding that an impartial jury could be selected from a cross-section of the community to ensure the defendants a fair trial.” Such a finding would be clearly erroneous. Such a finding could be sustained only if the media sampling submitted by the defense was not analyzed; if the Moran survey was misanalyzed; if the voir dire assurances of the few prospective jurors who did not admit to disqualifying bias were accepted at face value; and if the trial had not proved to be an exhausting, media intensive and emotional debate about the very essence of community concerns, such that no one with any concern for his or her future, or the future of their children, would have been able to deliberate without knowing that an acquittal on any count carried real and manifold risks. The jurors need not have been placed in that position.

Even under a deferential standard of review of abuse of discretion, such a ruling would be manifest error. Medina submits that, in light of the due process concerns in this case, a less deferential standard of review, and a review of the venue decision in light of the events of the entire trial, are appropriate. Such review should produce reversal. Whether on retrial emotions have cooled sufficiently to allow the prosecution to proceed in Miami is a subject for subsequent determination.

Over five years have passed. New survey results may show a mellowing of community sentiment in that period. We seek only justice in this one case for this one unique time and place in history.

Respectfully submitted,

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APPENDIX A

Excerpts from Voir Dire, with Transcript Page in Brackets

[R26:1070] **David Cuevas.** [Third round of questioning of prospective juror]
Q. Would you fear for your safety if you were a member of the jury and the jury came back with a verdict of not guilty?

A. Yes.

[R23:297] [in open court]

A JUROR: **Rene Silva.** I knew the boys who were shot down on the plane.

[R23:302] [in open court] I know very well Arnaldo Iglesias, the co-pilot who escaped from being shot down.

[R23:304] [at sidebar] Q. Could you be a fair and impartial juror on this case? A. Absolutely not, but I would love to be on.

[R25:685] **George Plasencia.**

Q. Do you have an opinion about Mr. Basulto and the work that he does?

A. Yes, I admire their work a lot.

Q. Would you be able to set aside that opinion?

A. For me this case in particular is tough—it is a case where it would be hard for me to set aside my beliefs and my values towards the way I was raised as a Cuban American. I was raised in a very Cuban home, a home where we had very strong feelings towards many things having to do with Cuba and although I have heard a lot about this case throughout the last few months, I have read about it; I think it would be hard for me to be impartial just because of the way I was raised and what my family went through when they came from Cuba. [I]t is hard for one not to use one's heart.

[R22:29]

Q. **Ms. [Irma] Montes?**

A. I have a problem since I do know the Alejandro family and I do have preconceived feelings what happened with Brothers To The Rescue.

[R26:932] **Sandra L. Padron.**

Q. Is there anything about [the charges] that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. Honestly, I am of Cuban descent and my fiancé was a political prisoner in Cuba for four years, so even though I am a fair person, I think maybe it might affect my judgment.

Q. I will ask you a few more questions. Witnesses may be called in this case who have admitted to spying for Cuba. People in this case may be members of the Cuban military or government. Would you disbelieve such witnesses without comparing it to other witnesses or evidence in the case?

A. I would still have that thing behind me that my fiancé was involved in this. I haven't talked about this with him but he is always speaking about the bad times. Even though I am a fair person, it will be in the background and

it may affect my judgment.

Q. Would you be able to put aside your fiancé's experience and sit and listen to the evidence presented in this case and be fair to both the prosecution and the defense?

[933] A. I don't think so.

Q. Thank you, ma'am.

[R26:1057]

A. **Jess Lawhorn, Jr.** ...

Q. ... Is there anything about [the charges] that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. I think I could be fair. I guess I have a concern just how maybe the Court of public opinion might affect my ability to do my job afterwards one way or the other, but it wouldn't affect me.

[1058] Q. Have any of your family members or close friends lived in Cuba?

A. I do have a close friend that was born there, yes.

Q. Can you keep your voice. Under what circumstances did they come to the United States?

A. I believe it was in the Mariel boat lift. ... [1059]

Q. If you are chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of your community might view you?

A. Only what I said originally as to how that might or might not impact my ability to do business in the community.

Q. Do you feel that a verdict of guilty or not guilty might affect your ability to do business in the community?

A. I don't know. I know this is a high profile case. I don't know a lot of the details. I don't know whether or not people I do business with have strong feelings one way or the other but because it is high profile, I feel there might be some feelings one way or the other.

[R27:1148]

A. **Lilliam Lopez.**

Q. Is there anything about [the charges in this case] that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. Well, I am a U.S citizen and I am against the Republic of Cuba. I don't like the fact they are a communist country. I have relatives living there under that system. ...

[1149] Q. Do you know of any reason why you may be prejudiced for or against the United States or the defendants because of the nature of the charges?

A. Well, I am always for the U.S.

Q. You are always for the U.S.?

A. Basically, yes, I am.

[1151] ... Q. Would your opinion affect your ability to weigh the evidence in this case fairly and with an open mind and follow the Court's instructions on the law?

A. I would have to say I would do my best.

[R27:1161]

A. **Luis Mazza.** [1162]

Q. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or evidence in the case?

A. I don't know.

Q. Would you be able, sir, if a witness got on the witness stand and the witness admits to spying as an agent for Cuba, would you be able to fairly evaluate their testimony, determine their credibility from the witness stand and compare their testimony fairly with other testimony of other witnesses and other evidence?

A. I have never been in that position before, so I don't know what to say. Maybe you have to be there, I don't know. [1162]

[R26:1011] **John McGlamery.**

Q. Have any of your family members or close friends lived in Cuba?

A. No. Excuse me, I do live in a neighborhood where there are a lot of Cubans. Yes, I do have neighbors and acquaintances who have lived in Cuba but no family members. The neighborhood I live in is full of people that come from Cuba; yes.

Q. Do you know under what circumstances they came to the United States, any of them?

A. There are over a million people in this County who have come from Cuba - . [1012]

Q. If you were chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of your community might view you?

A. I am answering that with some care. I personally don't have any problem with that, but I do respect if the case were to get a lot of publicity, it could become quite volatile and yes people in the community would probably have things to say about it.

Q. If that were the case, would you be concerned about returning a verdict?

[1013] A. ... I would not intend it to be so. ...

[1014] Q. How about considering the evidence fairly and with an open mind, can you do that?

A. I believe I could do so.

Q. Believe so or know so?

A. As far as I know I could. ...

[1018] ... Q. Jurors in this case will be instructed that they must not read, listen to or otherwise allow themselves to be exposed to any information, news reports or public or private discussions about this case, unless and until they have been permanently discharged by the Court in serving on the jury. Will you be able to follow such instruction?

A. I would make every effort to do so but it would be difficult given the community in which we live.

Q. What would be difficult?

A. Simply because it is an area that involves the Cuban Government and the exile community which I am surrounded with [1019] all the time and it would be very difficult to avoid hearing somebody express an opinion on it.

Q. If somebody started to express an opinion, would you be able to tell them to stop, you are sitting on the jury?

A. I don't know what instructions you would give the jurors in that case. I don't know whether the instructions I have received so far is not to discuss it with anyone. That is not to say I was even involved in the case. I would follow whatever instructions I would be given, but it would be difficult because there would be a lot of exposure if the case gets a lot of publicity in the media.

Q. Given it would be difficult, would you be able to follow the instructions?

A. I would make every effort to do so.

[R26:1021]

A. **Hans Morgenstern.** ...

Q. The case includes allegations that the defendants were agents acting on behalf of the Republic of Cuba.

A. I don't think I would have any sort of prejudices either way.

Q. Are you sure?

A. I am not sure, no.

[1022] Q. What gives you doubt?

A. The environment that we are in. This being Miami. ...

[1024] Q. If you were chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of your community might view you?

A. Yes.

Q. Why is that, sir?

A. There is so much to say about that. The way situations have come up here. I have issues with the way the government is run here in Miami. ...

[1025] ... I really don't trust a lot of our Cuban political people. Being involved in the Miami Film Festival, I remember when we showed a Cuban

film. It was very anti-Cuban. Still the Cuban exiles here made us lose a lot of grant money because we showed it because it was still a Cuban film. ...

Q. ... Would you be able to put aside whatever concerns you have about any verdict that may be rendered by the jury and sit and listen to the evidence presented in this case and be fair to both the prosecution and the defense?

A. I don't think I would be.

Q. You wouldn't be fair?

A. You mean I wouldn't be distracted by the idea that other [1026] people would be criticizing me being in this jury either way?

Q. Would you be able to put aside whatever concerns you have about that?

A. Yes.

Q. And sit and listen to the evidence in this case and be fair to both the prosecution and the defense?

A. I think it would be difficult.

Q. How so?

A. This is a high profile case. When I left the courtroom, the media were outside for this.

Q. Did anyone try to talk to you from the media?

A. I was videotaped, but no one tried to talk to me. I put my badge into my pocket. They were out there for this, I could tell. ...

Q. Would you be able to put aside whatever concerns you have about how a verdict may be received in your community and make a decision on a verdict based upon the evidence presented at trial and for no other reason?

A. I definitely would be thinking about the fact what would happen when we render this verdict and what would people say. [1027] That definitely is going to be in the back of my head.

Q. Do you have a concern on the impact that a verdict might have on any individuals or communities in the United States, Cuba or anywhere else?

A. I have a concern how the verdict will be received in the courtroom.

Q. What is your concern?

A. There is so much bias between someone just being Cuban involved in anything. I think there are so many judgments passed on people because they

are Cuban in this community. ...

Q. Do you have an opinion about the current government in Cuba?

A. It is a tyrannical government.

[1028] ...Q. So your opinion of the Government of Cuba would affect your ability to weigh the evidence in this case or follow the Court's instructions on the law?

A. Yes, it would.

Q. How is that, sir?

A. I have my own biases, I guess. ...

Q. Would you be able to put aside whatever obvious mistrust you have of the [Cuban] government or your own biases and sit and listen to the evidence presented in this case and be fair to both the prosecution and the defense?

A. I don't think I could.

[R25:725] **Maritza Parilla.**

Q. The charges include allegations... .

A. Well, I am not sure because you are supposed to think they are innocent before they are proved guilty, right? ...

[727] Q. Do you understand that any verdict in this case must be based solely on the evidence presented at trial?

A. It wouldn't be easy, I have to make an effort. Not to be prejudiced against—let me see. I at any time think of the worst of the government and whatever they do To me they are liars. They lie through their teeth. I would have to make an effort not to think that way when I was listening to the testimony. If they are in the pay of the government? They think the government can do no wrong.

[730] Q. [Re: Cuban exile community]

A. I think many of them are fanatics and they hurt their own cause. ...

[732] Q. In your mind, do they start out with strikes against them?

A. Yes. Well, if I was the defendant, I would be afraid my feelings were stronger than my sense of righteousness or justice.

[R25:799] **Cecilia Paz.**

Q. The charges in this case

A. My convictions towards that country and the fact what my family has gone through. I have a problem with that knowing so much about—not so much about the case. I just feel I am going into it thinking they are guilty and they have to prove their innocence.

[R24:563]

A JUROR: My name is **Mercedes Perez**. I have a conflict in this case --
BY THE COURT:

Q. Why don't you come up.

(Side bar.) ... Q. Yes?

A. In this case I am a member of the Movimiento Democracia. I know Rene Gonzalez. He was a member of that movement, of that organization.

[R26:937] **Michelle Peterson.**

Q. Have any of your family members or close friends lived in Cuba?

A. I have some close friends.

[938] ... Q. Do you have a concern on the impact the verdict might have on any individuals, communities, Cuba or the United States?

A. I would have a concern about that.

Q. What would be your concern?

A. I think I would be concerned about the reaction that might take place. ...

[R26:975] **Mario Pla.**

Q. I know you were out there waiting. The charges in this case include allegations that the [976] defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. Probably.

Q. What is that, sir?

A. The reason why I am in this country is because of the government in that country and my parents brought me to the land of freedom and I would probably have some thoughts that probably would not be beneficial to the case.

Q. Witnesses may be called in this case who have admitted to spying as agents for Cuba or who are members of the Cuban military or government. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or other evidence in the case?

A. Your Honor, if I said I would believe them I would be lying to you. I have to be honest.

Q. The question is when a witness gets on the stand and testifies, would you make a determination as to whether or not you believe them based upon their testimony and based upon comparing it with the testimony of other witnesses or other evidence in the case and not because they are a member of the Cuban military or government, solely because of that, and not [977] because of whether they have admitted or not admitted to spying as agents for Cuba?

A. No, ma'am. They are manipulated by the government so I wouldn't have a fair assessment of their testimony.

Q. Do you understand any verdict in this case must be based solely on the evidence presented at trial?

A. Yes, ma'am.

Q. Can you follow such an instruction?

A. Yes.

Q. Can you set aside whatever feelings you have about Cuba and sit and listen to the evidence in this case and be fair to both the prosecution and the defense?

A. No.

Q. Thank you, sir.

[R23:297]

A JUROR: **Maria Rams.** I know the sister of one of the gentlemen that was

shot down.

[R28:1463] **Shelly Ruiz.**

Q. Do you remember what the source of the information was [of media reports of jury selection]?

A. I think it was 87.7 because that is what I listen to on the way home, which is NBC 6.

[R28:1456] **Jenine Silverman.**

Q. What do you remember hearing, reading or seeing about this case in the news media?

A. Not much. I don't believe I read anything about it. I know pilots were shot down. That is about it.

Q. Do you remember what the source of the information was?

[1457] A. Probably the newspaper and the TV.

Q. Do you know what newspaper?

A. I only get the Herald.

Q. Do you remember what television station?

A. I usually watch NBC, but I am sure it was on every station.

[R27:1336] **Miguel Torroba.**

Q. Do you have an opinion about the way the United States handles its relations with Cuba?

A. Do I have an opinion?

Q. Yes.

A. I trust what the United States is doing about it. [1340]

Q. What do you remember hearing, reading or seeing about this case in the news media?

A. I would say probably about a year ago maybe I heard about the four people that got killed on a plane in the ocean and they were saying that Castro is the one who killed these people.

Q. What was the source of the information, sir?

A. Newspapers, TV.

[R27:1211]

A. **Leilani Triana.**

Q. The charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability to fairly and impartially consider the [1212] evidence in this case and follow the Court's instructions on the law?

A. My parents are from Cuba and my mother's story could probably bring some question to my mind.

Q. I am sorry?

A. My mother's story of things she lost over there.

Q. What is your mother's story?

A. Her grandfather was in the political party before the Castro regime and they lost everything they had once Castro came into power. ...

Q. Have any of your family members or close friends lived in Cuba?

[1213] A. My parents. I would say about 90 percent of my friends and my husband was born in Cuba.

Q. Under what circumstances did they come to the United States; first of all your parents?

A. My mother came as a political prisoner, her family.

Q. Did she have an exit visa?

A. I think so. My dad escaped.

Q. Your husband?

A. He came with the Mariel boat lift.

Q. Do you have family or close friends living in Cuba at this time?

A. Yes, I do.

[R23:245] **Christian Urrego.**

A. Yes. For personal reasons I know I would not be objective.

Q. Why is that, sir?

A. My grandfather was a soldier for the Batista when he [246] controlled

Cuba and when Fidel came in and got thrown in jail he died there. That alone, I know I won't be objective. I have a lot of hatred towards the Fidel regime and that is my reason for it.

Q. Could you be a fair and impartial juror in this case?

A. Not in this case.

[R23:203] **Arlene Vargas.**

Q. Would you be able to sit and listen to the evidence in this case and be a fair and impartial juror?

A. I don't know. Cubans, it is a little bit too close.

[R27:1235] **Debra Vernon.**

A. I think we are very lenient with Cuba in the past with a lot of the political things going on such as with Elián, we were very liberal with the Cubans.

Q. How strong is that opinion?

A. Just thinking about how we have other people that come over and don't get the same opportunities as the Cuban people do. It is always happening in the news. If Haitians come over and Cubans come over there is different treatment because of the political side of it.

[R27:1295] **Eugene Yagle.**

Q. Have any of your family members or close friends lived in Cuba?

A. Close friends, acquaintances.

Q. Do you know under what circumstances they came to the United States?

A. One came in the freedom flights back in the 1960s.

Q. Do you have family or close friends living in Cuba today?

A. No, I do not. The only thing I must admit, my son who is a photo journalist did a story on Cuba that was broadcast on a CBS station in Tampa, relative to the conditions there. ...

[1296] Q. Do you have an opinion about the current Government of Cuba?

A. Only from what I read in the newspaper.

Q. How strong is your opinion?

A. I would say it is probably a strong opinion. I cannot [1297] reconcile myself to that form of Government.

[R27:1319] **Juan Lombillo.**

A. Number one, my wife is an active member of MAR, Mothers [1320] Against Repression. She was in Washington with the Elián Gonzalez issue. Secondly, I operated on Jose Mas Canosa, president of the Cuban American National Foundation. The physician who later on became the president, I also saw patients from him.

[R25:772] **Vada Burns.**

Q. [Re: witnesses who admit spying]

A. I wouldn't believe them.

[R25:773] **Rosa Giumarelli.**

Q. The charges in this case.....

A. I am Cuban American. I know about all the situations that have been going on in Cuba since I was born, so my parents informed me about that country.

[R25:782] **Peggy Beltran.**

Q. [Re: witnesses who admit spying]

A. You are asking me—I am saying yes, I wouldn't believe them.

[R25:783] **John Garzia.**

Q. [Re: prejudice]

A. My wife is Cuban and I grew up here all my life in Hialeah. All my friends are Cuban.

[785] Q. Can you return a verdict in this case based on the evidence ... ?

A. I don't know.

Q. Do you have an opinion about the current government of Cuba?

A. It is a communist government that has killed people in the past and is still killing people.

Q. Would your opinion affect ... ?

A. I would think so.

[R25:797] **Lourdes Ponte.**

Q. The charges in this case.....?

A. Your Honor, I don't think I would be fair or impartial juror for the simple matter I feel Cuban, both my parents are Cuban and I have heard something about the case outside of this when it happened; so I think it would affect me.

Q. [Re: witnesses who have admitted spying]

A. I most likely would disbelieve them, whatever they had to say.

[798] Q. [Re: opinion of Cuba.]

A. I have no respect for the government in Cuba and I very much don't respect even having to come in here with the people that are being accused of this. I have prejudice but as soon as I walked in the room, you know how you said, you have to believe people are innocent from the beginning. To me it is very difficult to have that judgment right now because of the way I have been brought up and my surroundings all my life.

[R22:139]

A JUROR: **Gerardo Alvarez.** My son or my wife and I [140] work with—I know very well the De La Pena family. BY THE COURT:

Q. You work with Miguel De La Pena. Who was the second name?

A. The husband.

Q. With your church?

A. Yes.

[R23:267] THE COURT: Mr. Alvarez, Gerardo Alvarez, would you come forward, please. BY THE COURT:

Q. Mr. Alvarez, you indicated you knew someone, one of the [268] names I read to you?

A. Mario and Miriam De La Pena.

Q. How do you know them?

A. We work together something with the Catholic church called marriage encounter some time ago where people want to get married, they participate in that marriage encounter with me and my wife and some other people. It was a group. That was about two years ago.

Q. How long did you spend with them?

A. We spend the weekend and we have accidental relations once in a while.

Q. Would you consider them an acquaintance, a friend?

A. They are friends. We were together. As I say, they don't go to marriage encounters any more, my wife and myself don't go to marriage encounters any more.

[R27:1206] **Hugo Arroyo.**

Q. Do you have a concern about the impact the verdict might have on any individuals, community or in the United States, Cuba or anywhere else? ...

A. It is really hard this type of case here in Miami. I don't know how people will react with a judgment either way.

[R25:811] **Marco Barahona.**

Q. What are the pros and cons that you have about the Cuban community?

A. I find they are very hard working people. I also believe sometimes they only want to hear their opinion, nobody else. If somebody disagrees, it is totally wrong.

[R25:737] **Rolando Bello.**

Q. Mr. Bello, the charges in this case

A. Yes, it will affect me

Q. How will it affect you, sir?

A. The reason I am in this country is because of the political system in Cuba.

[R28:1429] **Connie Palmer.**

Q. Based on what you have read, have you formed any opinion as to whether the defendants are guilty or not guilty?

A. I do feel that they are guilty from reading that because it is spying.

[R25:818] **Joseph Paolercio.**

Q. Do you have an opinion about the way the United States handles its relations with Cuba?

A. [E]ver since the Mariel boat lift it doesn't sit right with me. I don't like the way they are allowed to come into the United States and where we have other people trying to get into the United States and they have to go through a lot of immigration and things like that yet the Cuban people seem to come in because of the 1996 act they put in place.[820]

Q. [Re: exile community.]

A. The only thing I feel about the Cuban exile community, I just don't like the way—I feel like sometimes I am a stranger in my own country, when I walk around or go into a store, I get spoken to in Spanish first and I have to stand there and ask them to speak English.

[R25:749] **Victor Pichs.**

Q. The charges in this case

A. Sort of. The only problem is, my father and my grandfather

[750] A. I don't interact with like Mr. Basulto but I do know them when I see them. I don't interact with them but I do know the way they think in terms of, I also know like my father's opinions, my grandfather, my whole family is Cuban. I do understand what is going on.

[751] Q. [Re: prejudice]

A. I sort of have some loyalty to my background. That is the only reason I will be prejudiced.

[R26:933]

A. **David Castellanos.** ...

Q. The charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. Yes.

Q. What is that?

A. Being a Cuban American as I am, I will put my feelings in front of hearing both parties than give a fair trial.

Q. Witnesses may be called in this case who have admitted to [934] spying as agents for Cuba. Witnesses may be called in this case who were members of the Cuban military or government. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or evidence in the case?

A. Probably, yes.

Q. Do you know of any reason why you may be prejudiced for or against the United States or the defendants because of the nature of the charges?

A. Can you repeat that again?

Q. Do you know of any reason why you may be prejudiced for or against the United States or the defendants because of the nature of the charges?

A. Growing up in a system like that, it is pretty hard. You have the memories and all that. It is just hard putting your emotions to the side and understanding both parties and giving a fair trial. ...

Q. Have any of your family members or close friends lived in [935] Cuba?

A. Basically all my family.

Q. Do you have family or close friends living in Cuba now?

A. Yes, a good part of my family lives in Cuba.

Q. Do you have any relatives or close friends who were politically involved in Cuba?

A. Not that I know of.

Q. Have you or a member of your family or close friend traveled to Cuba?

A. My parents last year.

Q. How long were they there?

A. I believe a week.

Q. Why did they go?

A. To see my grandmother on my father's side.

Q. If you were chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of your community might view you?

A. No.

Q. Do you have a concern on the impact any verdict might have in this case on any individual community in the United States, in Cuba or anywhere else?

A. No.

Q. Do you have an opinion about the current Government of Cuba?

A. I would like to keep that personal.

[936] Q. I need to know what your opinion is.

A. My opinion of the Government of Cuba?

Q. Yes.

A. It is horrible. There is no word to describe it in my opinion.

Q. How strong is your opinion?

A. Very strong against the government.

Q. Will that opinion affect your ability to weigh the evidence in this case fairly and with an open mind and follow the Court's instructions on the law?

A. Yes.

[R26:930] **Roberto Codner.**

Q. Mr. Codner, the charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability to fairly impartially consider the evidence in this case and follow the Court's instructions on the law?

[931] A. As a Cuban, Cuban American, my decision is, if they want to come to this country to unstable the government, I think that is not right.

Q. You understand that all defendants that come before the Court charged by indictment are presumed innocent; do you understand that?

A. Yes.

Q. Would you be able to follow that instruction in this case?

A. I don't know at that moment.

Q. You don't know?

A. No.

Q. So when you look at the defendants here this morning, are they presumed innocent in your mind?

A. I don't believe so.

Q. Thank you, sir. You may step outside.

[R27:1344] **Marjorie Hahn.**

Q. Do you have a concern about the impact the verdict might have on any individuals or communities in the United States, Cuba or anywhere else?

A. Would you repeat that?

Q. Do you have a concern about the impact any verdict might have on individuals or communities in the United States, Cuba or anywhere else; an impact the verdict might have on individuals or communities in the United States, Cuba or anywhere else?

A. Do I have a concern about that?

Q. Yes.

A. I would say yes.

Q. What is that concern?

A. Any verdict one way or the other might affect either community. ...

Q. Do you have an opinion about the Cuban exile community in the United States?

A. Yes.

Q. What is that opinion?

A. I think most of the Cuban exile community has been a benefit to our society. Then there are some that have not.

Q. How strong is that opinion?

A. Strong enough to say that I have it.

[R27:1361]

A. **Esteban J. Hernandez.**

Q. The charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability to fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. I think I told you, Your Honor, I do fly with my son. He flew I think it was three missions for Brothers to the Rescue and before I was called to this jury duty read about the case in the paper whenever it was; so I am a little aware of the [1362] situation.

Q. When did your son fly the three missions for Brothers to the Rescue?

A. I will say like about maybe four years ago, three years ago, something like that.

Q. Is he actively involved with the group since that time?

A. No, not any more.

Q. Was he actively involved in the group in 1996?

A. Not really.

Q. When were the three missions that he flew?

A. Exactly I cannot tell you, but I know that he flew three missions for them.

Q. Witnesses may be called in this case who have admitted to spying as agents for Cuba. Witnesses may be called in this case who are members of the Cuban military or government. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or evidence in the case?

A. In all honesty, I would say so.

Q. Thank you, sir. You may step outside.

[R27:1263] **Gloria Hernandez.**

Q. ... Is there anything about [the charges] that would affect your ability to

fairly and impartially consider the evidence in this case and follow the Court's instructions on the law?

A. I will try to keep an open mind but to tell you the truth, I am here because of Castro. My family suffered a lot. As far as I am concerned they all should be thrown in a jail in Cuba.

Q. Who?

A. The defendants. I don't know much about the case.

[R27:1277] **James E. Howe, Jr.**

Q. Do you have a concern on the impact any verdict might have on any individuals or community in the United States, Cuba or anywhere else?

A. I certainly do.

Q. What is the concern?

A. My concern is that no matter what the decision in this case, it is going to have a profound effect on lives both here and in Cuba. That is my opinion at least. ...

[1283] Q. Would you consider those matters if it is not part of the evidence in the case?

A. I believe I could be impartial. I know I would try to be fair as much as I could know anything. I believe I could be impartial; but I have to tell you, I am carrying some opinions about the pressures that people may be under as they present evidence, and I will do my best to be objective and impartial as I hear what they have to say.

Q. You didn't answer my question.

A. Please help me.

Q. If it is not part of the evidence in the case as to pressures that people may have or not have, it is just not part of the evidence, I don't know whether it would be or not, but if it is not part of the evidence, are you going to consider that? Obviously if it is part of the evidence you could consider it. Do you understand any verdict in this case must be based solely on the evidence presented at trial?

A. Yes, I do understand that.

Q. If that evidence or that information is not part of the [1284] evidence, are you going to consider it?

A. If that evidence is not part of the evidence am I willing to consider it?

Q. Are you going to consider it?

A. No, I will not consider it if it is not part of the evidence. ...

[1286] A. I read when the indictments first came down I read that at least one of the suspected spies, if my memory serves me well, had returned to Cuba and was possibly responsible for the downing of one of the Brothers to the Rescue plane. That this perhaps could only be or some suggest only the tip of the iceberg in terms of espionage that has been conducted for some time and opinions that this vindicated the many claims through the years that the community was infiltrated and that is why sometimes there were some embarrassing incidents that did not serve the best interests of how the Cuban American community wished to be perceived here. Those were the kinds of opinions, the kinds of news articles and so forth that I focused on.

Q. Do you remember what the source of the information was?

A. Most of my information was from the Miami Herald, but I do have, as you may have guessed, I am talking to people all the [1287] time about things that are important to this community and what they believe and some of my information too is coming from the various people I talked to, many of which are Cuban immigrants who have their opinions and seek to educate me as best they can.



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 13,998 words.

William M. Norris

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was hand-delivered this 15th day of December 2005, 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 Datan Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; and Leonard I. Weinglass 6 West 20th Street, Suite 10A, New York, NY 10011.

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