UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT

Case No. 03-11087-BB

United States of America,	)	
	)	
	)	Appeal from the United States
v.	)	District Court for the
	)	Southern District of Florida
	)	Case No. 98-0721-CR
Antonio Guerrero, et al.	)	
	)	
Appellant,	)	

BRIEF *AMICUS CURIAE* OF THE NATIONAL LAWYERS GUILD URGING ANEW TRIAL FOR DEFENDANT ANTONIO GUERRERO

Prof. Peter Erlinder
Counsel for *Amicus Curiae*
National Lawyers Guild

c/o Wm. Mitchell College of Law
875 Summit Ave.
St. Paul, MN 55105
(651) 290-6384
(651) 290-6406 (fax)
perlinder@wmitchell.edu

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. 26.1 and 11th Cir. R. 26.1-1 through 26.1-3, Amicus hereby lists the trial judge, attorneys and defendants/appellants who have an interest in the outcome of this appeal:

Hon. Joan A. Lenard

David Buckner, Assistant United States Attorney

Caroline Heck Miller, Assistant United States Attorney

John S. Kasternakes, Assistant United States Attorney

Ruben Campa, Defendant/appellant

Joaquin Mendez, Attorney for Defendant Ruben Campa

Rene Gonzalez, Defendant/appellant

Philip Horowitz, Attorney for Defendant Rene Gonzalez

Gerardo Hernandez, Defendant/Appellant

Paul A. McKenna, Attorney for Defendant Gerardo Hernandez

Antonio Guerrero, Defendant/Appellant

Leonard I. Weinglass, Attorney for Defendant Antonio Guerrero

Luis Medina, Defendant/Appellant

William M. Norris, Attorney for Defendant Luis Medina

Prof. Erik Luna, Attorney for Amicus

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

Supreme Court

Circuit Court of Appeals

District Court

Statutes

Books

INTEREST OF *AMICUS CURIAE*

Identification of *Amicus*

The National Lawyers Guild [NLG] is a non-profit professional association incorporated under the laws of the State of New York with offices in New York City, New York. The NLG was founded in 1937 and is the oldest human rights/ public interest bar association in the nation. The NLG represented the United States at the founding conference of the United Nations in 1945 and was a founding member of the first UN-accredited human rights NGO, the International Association of Democratic Lawyers [IADL], based in Brussels, Belgium.

The National Lawyers Guild has more than 5,000 members, in more than 100 chapters, who are active in many areas of legal practice and who are concerned with upholding the integrity of the American legal system and improving the quality of justice in that system. The National Lawyers Guild has a long history of providing representation to disfavored or unpopular clients and of upholding the protections provided in the Bill of Rights, and other guarantees of fairness, in the American legal system.

The National Lawyers Guild has often been the first organization in the legal profession to advocate for fair treatment of controversial persons during periods when fundamental guarantees provided by our Constitution have not been

respected. The National Lawyers Guild demanded fair treatment for organizers of industrial unions in the 1930's and 1940's, for victims of McCarthy-era attacks in the 1950's[1], for civil rights activists and voting rights workers in the South in the 1960's[2], and for anti-Vietnam War protestors in the 1970's.[3] In retrospect, many of the positions taken by the National Lawyers Guild eventually came to be embraced by the legal profession in general, and by the nation as a whole.

Interest of *Amicus*

Throughout its history, the National Lawyers Guild has had a strong interest in calling upon the American legal system to live up to its promise of providing fundamental fairness by advocating for the protection of the rights granted by our Constitution for those who the larger society, or particular parts of society, have been willing to sacrifice. For example, when civil rights activists in the South faced both physical attacks and discriminatory state criminal prosecutions, National Lawyers Guild members successfully halted discriminatory and retaliatory state court criminal proceedings in *Dombrowski v. Pfister,* 380 U.S. 479 (1965). When federal officials claimed the power to conduct unlimited electronic

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[1] *Dennis v. United States*, 341 U.S. 494 (1951)

[2] *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

[3] *Dellinger v. United States*, 472 F.2d 340 (1972).

surveillance of anti-Vietnam War activists, National Lawyers Guild members successfully argued that Fourth Amendment limitations applied to President Nixon in *United States v. United States District Court*, 407 U.S. 297 (1972).

In this case, the Office of the United States Attorney appears to have misrepresented its own assessment of wide-spread and pervasive prejudice in the Miami-Dade Cuban-exile community to manipulate the outcome of venue issues before the Court.

Rather than putting the Court in a position to fairly decide the venue issues before it, the misrepresentation of facts known to the prosecution created an appearance of unfairness that tainted the entire trial process. This apparent misuse of the prosecutor's power to mislead the Court, and the Court's apparent failure to control the media and to limit extraneous pressures on jurors in a case involving highly unpopular defendants, such as occurred in this case, is of great interest to *amicus*.

The brief of *amicus*, National Lawyers Guild, is limited to an elaboration of the due process requirement that "justice must satisfy the appearance of justice" which protects the integrity the legal system and the judiciary. *See, Sheppard v. Maxwell*, 384 U.S. 333, 350-353 (1966); *Adams v. BellSouth Communications, Inc.*, 2001 WL 34032759 (S.D. Fla.); *United States v. Trice*, 864 F.2d 1421, 1427

(8th Cir. 1987); *Dyer v. Calderon*, 151 F.2d 970, 983 (9th Cir. 1998); *Minnesota v. Republican Party of Minnesota*, 122 S.Ct. 2528 (2002).

Since the misrepresentations made to the trial court by the United States Attorney, go to questions that undermine the integrity of the legal system and the judiciary, this Court has a rare opportunity to re-establish public confidence in the legal system that the absence of an "appearance of justice" in the first trial has diminished. Because the courts control neither the purse nor the sword, their ultimate authority rests on "public faith of those who don the robe." [*See*, *Minnesota v. Republican Party of Minnesota*, 122 S.Ct. 2528 (2002)].

Further, the trial court's failure to grant Defendant's Rule 33 Motion, AFTER being presented with evidence of misconduct that had prevented the trial court from properly considering jury bias issues that "infected" the first trial, further erodes the "appearance of justice" upon which the integrity of the judiciary depends. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship," *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

For the reasons stated above, counsel respectfully requests leave of this Court to file the attached brief of *amicus curiae*, the National Lawyers Guild, in support of Defendant Guerrero's Motion for a New Trial. Counsel for defendant Guerrero

has given consent to the filing of brief of *amicus*. Counsel for United States has objected to filing of brief by other *amici.* (*See*, United States Response in Opposition filed in this cause.)

ARGUMENT

I. INTRODUCTION

Antonio Guerrero, and the other defendants should receive a new trial, because not only was the trial infected with actual prejudice against him, but because it lacked the Constitutionally necessary subjective appearance of a just proceeding. As the Supreme Court noted in *Estes v. Texas*,

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness...[T]o perform its high function in the best way '***justice must satisfy the appearance of justice***.'

381 U.S. 532, 542-543 (1965), citing *Offutt v. United States*, 348 U.S. 11, 14 (1954) (emphasis supplied).

The relevant facts set forth in Defendant Guerrero's Motion for a New Trial at 1-11 make clear that the United States Attorney misled the trial court with respect to the existence of deep-seated bias in the Cuban-exile community in Miami-Dade County, of which the United States Attorney for the Southern District of Florida must have been aware. The apparent misrepresentations by the United States Attorney, together with extraneous pressures on the jury which were not

cured by the court, created a "probability of unfairness" that deprived the entire trial of the "appearance of justice."

During hearings on the change of venue motion of defendants in this case, the United States Attorney argued that the "community bias" test of *Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966) did ***not*** apply to venue issues in Miami-Dade County because of its "heterogeneous, diverse and politically non-monolithic" nature. Yet, one year after the trial in this case, that same United States Attorney argued exactly the opposite position in *Ramirez v Ashcroft*, case no. 01-4835, (S.D.Fla. 2001).

The United States Attorney also cited the events surrounding the Elian Gonzalez matter in support of the change of venue motion in *Ramirez*. The Elian Gonzalez incident occurred nearly a year ***before*** the jury was empaneled in this case and the inflamed passions in the Cuban-exile community ***must*** have been known by the United States Attorney when defendants' change of venue motions were litigated in this case.

Consequently, when ***defending*** officials of the United States government in a civil matter brought by Hispanic plaintiffs, the United States Attorney argued in *Ramirez* that "deep seated prejudices" in the Cuban-exile community made a fair

trial of even high placed federal officials impossible in Miami-Dade County. *Ramirez,* Tr. at 25:

> [I]t would be ***virtually impossible*** to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County,...the inhabitants of Miami-Dade County are so infected by...prejudice, bias and preconceived opinions that ***jurors could not have possibly put these matters out of their mind and try the instant case solely on the evidence presented in the courtroom***. (quoting United States Attorney for the Southern District of Florida in *Ramirez v Ashcroft*).

Even if the United States Attorney did not ***intend*** to mislead the trial court to defeat defendants' change of venue motion, the subsequent admissions by the United States Attorney in *Ramirez v. Ashcroft*, compel the conclusion that the trial of Defendant Guerrero did not "satisfy the appearance of justice" required by the United States Supreme Court in *Offutt* and subsequent cases. *E.g.*, *In re Murchison*, 349 U.S. 133, 136 (1955); *Estes*; *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 487 (1988); *Marshall v Jerrico, Inc.*, 446 U.S. 238, 242-43 (1971); and *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

Further, the admissions by the U.S. Attorney regarding the existence of pervasive bias, against defendants whose interests conflict with the Cuban-exile community in Miami-Dade County, compel the conclusion that the efforts of the trial court to prevent the media, and other extraneous factors, from fatally infecting the trial were inadequate to prevent ***actual*** prejudice, much less the "appearance of

justice" required to protect the integrity of the judicial system. *See, Sheppard v. Maxwell*, 384 U.S. 333, 350-353 (1966).

Finally, the integrity of the jury is such a centrally important element in the achievement of a fair trial that the appearance of justice is particularly vulnerable where issues of jury selection and independence from external pressures are involved; thus there is a long history of presuming jurors untrustworthy when exposed to the kinds of serious external pressure present in this case.

II. THE "APPEARANCE OF JUSTICE" WAS DESTROYED WHEN THE U.S. ATTORNEY WITHHELD INFORMATION FROM THE COURT WHICH WAS NECESSARY TO FAIRLY RULE ON THE CHANGE OF VENUE MOTION

By withholding or manipulating facts to achieve a particular outcome, the United States Attorney deprived the trial court of important information regarding the central issue in *voir dire* and destroyed the "appearance of justice" which undermines the integrity of the criminal justice system itself.

Had the United States Attorney advised the trial court, during the venue arguments in the case, that it would be "virtually impossible" for even the Attorney General of the United States to receive a fair trial in Miami-Dade County, if his interests might appear to be at odds with the Cuban-exile community, the trial

court would have had ***no*** factual basis upon which to deny the defendants change of venue motion.

The inconsistent positions advanced by the United States Attorney with respect to the "virtual impossibility" of receiving a fair trial in Miami-Dade County also violated his professional obligations as an attorney and as a prosecutor. His opposition to, and subsequent reliance on, *Pamplin* to argue for a contrary outcome on the same issue in to two separate cases, appears calculated to intentionally violate the "appearance of justice" required to maintain public confidence in the judicial process.

Florida Bar Rule 4-8.4 (b) provides that lawyers not engage in "fraud, deceit or misrepresentation." This rule is also consistent with the ABA Standards for Criminal Justice: The Prosecutorial Function, 1993, Sec. 3-2.8(a): "A prosecutor should not intentionally misrepresent matters of fact or law to the court."

The purpose of these rules is not only to protect individual clients from the misdeeds of attorneys, but to protect the integrity of the legal system:

> As Justice Frankfurter famously wrote, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Public confidence in the integrity of our legal process is essential to conferring the rule of law with moral and political legitimacy. It is therefore incumbent on the legal bar to refrain from actions **which erode that confidence...** *Adams v. Bellsouth Communications*, 2001 WL 34032759, *12, (S.D. Fla.).

Concern for maintaining the "integrity of the legal process" has also motivated the Eleventh Circuit Court of Appeals to condemn litigants who take inconsistent positions. *Solomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1308 (11th Cir. 2001) and *Burns v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002).

Furthermore, because the misrepresentations in this case had a bearing upon the credibility of the evidence before the trial court, regarding competing interpretations of attitudes in the Cuban-exile community, the United States Attorney was, in effect, "vouching" for his evidence by putting the prestige of his office behind assertions that he knew to be false. "Improper prosecutorial vouching occurs when the prosecutor 'places the prestige of the government behind the witness' by providing 'personal assurances of [the] witnesses veracity.'" *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981).[4]

[4] *See also United States v. Garza*, 608 F.2d 659, 665 (5th Cir. 1979); *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969);*United States v. Carol*, 26 F.3d 1380, 1388 (6th Cir. 1994); *United States v. Edwards*, 154.3d 915, 921(1998); *United States v. Smith*, 962 F.2d 923, 936 (1992). The Eleventh Circuit Court of Appeals has also held that a government attorney may not act as a prosecutor if: (1) he uses inside information to testify indirectly...that he has special knowledge or insight, or (2) he is a witness to facts not otherwise ascertainable. *United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986). Note as well that prosecutorial misconduct has been viewed historically as so damning that special curative procedures exist for it at common law, such as the writ of error *coram nobis*.

III. IN LIGHT OF ADMISSIONS OF TRIAL JURY BIAS BY THE U.S. ATTORNEY IN *RAMIREZ,* THE TRIAL COURT'S FAILURE TO CURE THREATS TO THE JURY'S INDEPENDENCE PREVENTED THE TRIAL FROM ACHIEVING AN "APPEARANCE OF JUSTICE"

In addition to the trial court being misled with respect to the facts and law upon which to decide the change of venue motion, the subsequent rulings of the Court also failed to provide the "appearance of justice" necessary to maintain public confidence in the judicial process.

Defendant Guerrero's Motion for a New Trial details the efforts by the Court to seat a qualified jury under the extremely difficult conditions presented by this case. [pp. 16-21]. However, in light of the revelation that the United States Attorney ***agrees*** that it is "virtually impossible" for defendants whose interests are contrary to those of the Cuban-exile community to receive a fair trial in Miami-Dade County, the efforts undertaken by the Court were plainly insufficient to preserve the "appearance of justice," required in the Federal Courts. *See*, *Offutt.*

There can be little dispute that the conduct of the judiciary is central to achieving justice that satisfies the "appearance of justice." The judiciary is obligated to "satisfy the appearance of justice" by conducting *voir dire* and the trial in a manner which minimizes the impact of racial, ethnic or other improper bias on

the jury[5], and by conducting the trial in a manner which prevents or minimizes the prejudicial impact upon the jury of the media, or other extraneous influences. *See, Estes* and *Sheppard*, *supra*.

In *Sheppard*, the trial court failed to prevent publicity from infecting the trial, or to control the conduct of the trial. In reversing the conviction, the Court noted that "our system of law has always endeavored to prevent even the probability of unfairness." 384 U.S. at 352, citing *Murchison*. Further, it recalled that "at times a procedure employed by the State involves such a probability that prejudice will result that is deemed inherently lacking in due process." *Id.*, citing *Estes* at 542-543.

In this case, the Court failed to prevent extraneous political/media pressure from further "infecting" a jury that the United States Attorney admitted ***must*** also have been so infected by "prejudice, bias and preconceived opinions that ***jurors could not possibly put these matters out of their mind and try the instant case solely on the evidence presented in the courtroom***." *Ramirez*, *supra*, Defendant's Motion at 15.

[5] *Batson v. Kentucky*, 476 U.S. 79,90 (1986); *Turner v. Murray*, 476 U.S. 28, 35-38 (1986); *Rose v. Clark*, 478 U.S. 579, 587 (1986); *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2nd Cir. 1989).

In its order denying a change of venue, the trial court in this case noted that it possessed a variety of alternative tools to assure a fair trial. Had the pervasive community prejudice not rendered a fair trial in this venue "virtually impossible," the trial court might have sequestered the jury, issued collateral orders restricting the conduct of third parties which could influence the jury, or undertaken various other curative measures. Yet, despite the inherent duty of the Court to take such measures to assure a fair trial – even to issue such orders *sua sponte* – the trial court did not effectively cure a stream of events which compromised the integrity of the jury.

A brief outline of these events, demonstrating apparently conscious efforts on the part of interested members of the Cuban-exile community to influence the jury, including the Cuban-exile news media, and the Court's response to these events – particularly when viewed in light of the subsequent admissions by the United States Attorney regarding the "prejudice, bias and preconceived opinions" that made a fair trial in Miami-Dade County "virtually impossible" – reveals the complete failure of the Court to eliminate the *Sheppard*-like atmosphere that ***reinforced*** the already prejudicial conditions in Miami- Dade County to which the United States Attorney has admitted in *Ramirez*:

(a). On the first day of jury selection, a press conference held by the families of anti-Castro victims, whose presence *en masse* during *voir dire* clearly revealed an intention to influence jury selection, was noted by the trial court (Vol. 1:111) but did not result in any meaningful attempt to cure or reduce its impact on the jury.

(b). When members of the *venire* were observed talking to the press in spite of the strong instruction that the trial court "thought" it had given (Vol.3, Tr. 111), no curative measures were taken by the trial court.

(c). No curative measures were taken by the trial court following "inappropriate" behavior by the former regional director of the anti-Castro Cuban-American National Foundation (CANF), which appeared to be designed to expose the *venire* to "opinions that will strike the whole panel." (Vol. 3:308).

(d). When a prospective juror reported media harassment, as he left the courthouse, (Vol. 5:1026) the trial court took no action.

(e). Even though several prospective jurors, and defense lawyers quite honestly expressed concern for their safety (Defendant Guerrero' Motion for a New Trial, 21-23), the trial court did not act. These expressions of concern should have been understood in light of the well established history of violent reprisals by anti-Castro exile groups against their ideological opponents, which would further

contribute to the condition later admitted by the United States Attorney, that under such circumstances, "***jurors could not possibly put ...out of their mind and try the instant case solely on the evidence presented in the courtroom***," *Ramirez*, *See*, Defendant's Motion at 15.

(f). Even though the trial court noted that the jurors were being photographed and video taped as they left the courthouse during the trial, the trial court neither sequestered the jury nor took any effort to limit media access to the jurors outside the courtroom. (Vol.58:9005).

(g). In spite of repeated expressions of concern by jurors regarding media intrusiveness and coverage designed to identify jurors to the Cuban-exile community, which was noted by the trial court (Vol. 104:14644, 14645-46), and brought to the court's attention by defense counsel during jury deliberations (Vol. 104:14643), the trial court did not take any curative measures.

Thus, even if the United States Attorney had not misrepresented facts and law in arguing against the change of venue, the trial court in this case failed to prevent the "circus" atmosphere that resulted in the Supreme Court reversing the conviction in *Sheppard* and *Estes*. That responsibility belongs uniquely to the trial court. As recently as last term, in *Minnesota v. Republican Party of Minnesota*, 122 S.Ct. 2528 (2002), the Supreme Court has held that, because the courts control

neither the purse nor the sword, their ultimate authority rests on public faith of those who don the robe, *citing Mistretta v. United States*, 488 U.S. 361, 407 (1989), ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship").

IV. THE "APPEARANCE OF JUSTICE" IS ESPECIALLY THREATENED BY INFLUENCES PREVENTING AN INDEPENDENT AND FAIR-MINDED JURY

When misrepresentations have an impact on the jury selection process, the impact on public confidence is particularly pronounced:

> The importance of ***voir dire*** to the American legal system is tied to the role that juries play in our legal system, as well as the interplay between the judge and jury. Juries have both practical and political roles. The practical roles include a jury's collective memory, and its community insight. More important, juries have several political roles**, *including maintenance of public confidence in the judicial process***... Elements of voir dire continue to implicate greater societal rights. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986***). Improper jury selection can undermine public confidence in the judicial process.... Voir dire communicates to the people by satisfying the axiom that to perform its highest function in the best way justice must satisfy the appearance of justice.*** *Swain v. Alabama*, 380 U.S. 202 (1965), cited at *United States v. Trice*, 864 F.2d 1421, 1427 (8th Cir. 1988). (emphasis added)

Jury selection plays a much greater role than merely assuring the rights of an individual defendant.[6] "It is an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the guarantees of the Sixth Amendment and section 2 of Article III themselves." *United States v. Ford*, 824 F.2d 1430, 1435 (5th Cir. 1987) (Higgenbotham, J.).

When the impartiality and integrity of the jury is called into question, either by intentional misrepresentation by jurors or by failure of the Court to take sufficient measures to ensure its impartiality,[7] as occurred in this case, public confidence upon which the judicial process depends is compromised in a manner that requires a new trial:

> "[m]ore is at stake than the rights of the petitioner; 'justice must satisfy the appearance of justice,' *Offutt v. United States*, 348 U.S. 11, 14 (1954). An irregularity in the selection of those who will sit in judgement "casts a very long shadow." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987). A perjured [or intimidated] juror is as

[6] The Supreme Court has noted that the role of the judge during *voir dire* is akin to that of jurors during a trial. Both must rely on their own evaluations of demeanor. evidence and of responses to questions. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981)(plurality opinion). Thus, misrepresentations by the United States Attorney to the Court at this stage should be viewed in the same manner as misrepresentations to the jury at trial.

[7] In *Clark v. United States*, 289 U.S. 1, 11 (1933), the Supreme Court upheld the rule that a court must prevent seating jurors who have an "appearance" of self-interest. A self-interested juror "would be a juror 'in name only' and prejudice must be inferred from the juror's relationships, conduct, or life experiences, without a finding of actual bias."

> incompatible with our truth seeking justice as a judge who accepts bribes. Cf. *Bracey v. Gramley*, 520 U.S. 899 (1997). *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998).

The principle that a self-interested jury results in a "presumption of bias" has been recognized in American jurisprudence since at least 1807 in Aaron Burr's trial for treason in which Chief Justice Marshall, sitting as a district judge, held that a juror under the influence of personal prejudice "is ***presumed*** to have a bias on this mind which will prevent an impartial decision of the case, according to the testimony...He may declare that notwithstanding these prejudices he is determined to listen to all the evidence and be governed by it; ***but the law will not trust him***." *United States v. Burr*, 25 F. Cas. 49, 50 (D.Va. 1807). (emphasis supplied).

In light of the revelations by the United States Attorney in *Ramirez*, and the record presented to the trial court in the Motion for a New Trial by Defendant Guerrero, despite any juror declarations to the contrary, the trial court was obligated to ***presume*** bias. Denying Defendant Guerrero's Motion for a New Trial, based on the record of newly discovered evidence, including the admissions of the United States Attorney in *Ramirez*, was yet ***another*** failure of the trial court to prevent the "probability of unfairness" by assuring that, "justice must have the appearance of justice'' *Offut*, 348 U.S. at 14 and yet another violation of due process to be considered on appeal.

V. THE TRIAL COURT'S FAILURE TO GRANT DEFENDANT GUERRERO'S MOTION FOR A NEW TRIAL UNDER RULE 33, AFTER THE COURT HAD BEEN MADE AWARE OF ADMISSIONS BY THE UNITED STATES ATTORNEY OF JURY BIAS IN MIAMI, FURTHER DIMINISHES THE "APPEARANCE OF JUSTICE" IN THIS CAUSE.

As this Court is aware, prior to filing this appeal, counsel for defendant Guerrero filed a Motion for a New Trial pursuant to Rule 33, in which the trial court was put on notice of the admissions made by the United States Attorney in the *Ramirez* case that contradicted his representations in this case, regarding the possibility of receiving a fair trial in Miami when the interests of the Cuban-exile community was involved. Although it might be argued that the trial court was not aware of these realities before or during trial, the record is absolutely plain that the Rule 33 motion put this issue before the trial court in a manner that allowed the court yet another opportunity to cure the prejudice that had not been cured earlier, by granting a new trial.

The cumulative impact discretionary rulings by the trial court, which ignored or failed to cure the evidence of influence of the Cuban-exile community on the jury, must now be viewed by this Court on a record that includes evidence that the United States Attorney failed to make known at any time that his own office agreed with defense contentions that a fair trial could not be had in Miami, as revealed in the *Ramirez* admissions. And, the failure of the trial court to grant the Motion for a

New Trial, after the court had been made aware of the *Ramirez* admissions, creates the strong impression that the court was disinclined to seriously consider *any* evidence of jury bias or prejudice, no matter how strong the record on those issues.

The concern of the prosecution regarding the weakness of the evidence presented to this tainted jury was amply documented by the extraordinary *mandamus* petition filed by the prosecution, regarding jury instructions. Had the United States Attorney's Office been confident that their case clearly had been made, it is inconceivable that a prosecutor would go to the extreme length of seeking a *mandamus* relief for jury instruction issues.

The virtual admission by the United States Attorney that the evidence presented to the jury was insufficient to support a conviction, together with the admission by that same office that it is impossible for even John Ashcroft to receive a fair jury trial in Miami, when a case may be of interest to the Cuban-exile community, certainly creates at least the "appearance" that the convictions in this case arose from jury bias that the trial court failed to cure before trial, during trial or after trial.

VI. CONCLUSION

In sum, the admissions by the United States Attorney for the Southern District of Florida in *Ramirez*, that it would be impossible to receive a fair trial in Miami-Dade County in a case in which the Cuban-exile community had an interest, call into question the integrity of his office in making contrary assertions in this case. These contradictory positions on an issue central to the fairness of the entire proceeding fail to "satisfy the appearance of justice," upon which the integrity of the judicial system depends.

Moreover, by failing to reveal to the trial court that a fair trial was "virtually impossible," the U.S. Attorney deprived the court of essential information upon which to base its rulings regarding venue, its protective measures to be taken during trial, and the impact of publicity and other prejudicial factors. In such circumstances, justice cannot be effectively rendered by any court. These misrepresentations caused precisely the sort of procedural failure "involves such a probability [that] prejudice will result" that this Court should find that it is "inherently lacking in due process", as did the Supreme Court in *Estes v. Texas*.

Finally, the failure of the trial court to grant the Motion for a New Trial of defendant Guerrero, even *after* the court was presented with the *Ramirez* admissions, further demonstrates that this trial did not "satisfy the appearance of

justice" standard required by the Supreme Court. Further, by reversing these convictions and ordering a new trial in a jurisdiction which does not suffer from the jury bias issues admitted by the United States Attorney in *Ramirez*, this Court will uphold the integrity of the legal process upon which respect for the judicial system ultimately depends.

Respectfully submitted,

_____
Prof. Peter Erlinder
Counsel for *Amicus Curiae*
National Lawyers Guild

c/o Wm. Mitchell College of Law
875 Summit Ave.
St. Paul, MN 55105
(651) 290-6384