No. 08-987

IN THE

Supreme Court of the United States

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* JOSE RAMOS-HORTA, WOLE SOYINKA, ADOLFO PEREZ ESQUIVEL, NADINE GORDIMER, RIGOBERTA MENCHU, JOSE SARAMAGO, ZHORES ALFEROV, DARIO FO, GUNTER GRASS, AND MAIREAD CORRIGAN MAGUIRE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IDENTIFICATION OF *AMICI CURIAE*[1]

Ten Nobel Prize winners are *Amici Curiae*:

Jose Ramos-Horta was awarded the Nobel Peace Prize in 1996. He is the President of East Timor. Prior to being elected President, he was elected as the country's first Foreign Minister in 2002 and appointed Prime Minister in 2006. Ramos-Horta studied International Law at The Hague Academy of International Law and is a Senior Associate Member of the University of Oxford's St. Antony's College.

Wole Soyinka was awarded the Nobel Prize in Literature in 1986. A Nigerian author, Soyinka is considered Africa's most distinguished playwright. He was the first African to win the Nobel Prize in Literature. An outspoken critic of authoritarian Nigerian regimes, Soyinka was imprisoned for nearly two years during the Nigerian Civil War for his attempts to broker a peace accord. During the dictatorship of General Sani Abacha (1993-1998), Soyinka lived in exile in the United States. He is a Professor at the University of Nevada-Las Vegas, as well as a Professor in Residence at Loyola Marymount University.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part. *Amici* state that no person or entity other than *amici* and their counsel made any monetary contributions for preparation of this brief.

Adolfo Pérez Esquivel was awarded the Nobel Peace Prize in 1980. Born in Argentina, he is the co-founder of the Christian peace organization, Servicio Paz y Justicia, which promotes human rights throughout Latin America. Pérez Esquivel was imprisoned and tortured in Ecuador and Argentina in the late 1970's as a result of his peace and human rights work, which included the creation of an international campaign that urged the United Nations to create a Human Rights Commission. He has been awarded the Pope John Paul XXIII Peace Memorial.

Nadine Gordimer was awarded the Nobel Prize in Literature in 1991. Gordimer was born in South Africa and has spent her life there. Her literary work confronts moral and racial issues, and in particular--apartheid. Some of her works were banned by the South African apartheid government. She was active in South Africa's anti-apartheid movement and joined the African National Congress. She has continued her political work most notably in anti-censorship campaigns, as well as HIV/AIDS causes.

Rigoberta Menchú was awarded the Nobel Peace Prize in 1992. A Quiche Indian from Guatemala, Menchú was active in reform efforts in Guatemala, particularly concerning women's and Indian peasants' rights. Her family, including her brother, mother, and father, was arrested, tortured and killed by the Guatemalan government. Menchú was forced into exile in Mexico in 1981, where she authored the internationally renowned book, *I,*

Rigoberta Menchú. She is currently a UNESCO Goodwill Ambassador and continues her work on behalf of Guatemala's Indian peasant communities.

José Saramago was awarded the Nobel Prize in Literature in 1998. Born in Lisbon, Portugal, Saramago co-founded the National Front for the Defense of Culture in 1992. Saramago is a novelist, playwright and journalist. His writing is known for its empathy for the human condition. He continues to write about human rights issues.

Zhores Alferov was awarded the Nobel Prize in Physics in 2000. He is a Russian physicist and invented the heterotransistor, a technological breakthrough that helped advanced electronic computer technology, including cellular phones, bar-code readers and music players. Alferov has been active in Russian political affairs and has been a member of the Russian Parliament since 1995.

Dario Fo was awarded the Nobel Prize in Literature in 1997. Fo is an Italian playwright, director, stage and costume designer and music composer. His work was often found to be controversial in Italy and resulted in his receiving death threats. His work has been performed throughout the world.

Günter Grass was awarded the Nobel Prize in Literature in 1999. A prolific author, Grass won a number of literary awards and an archival museum was founded in his honor in Bremen, Germany.

Grass has been active in German political life, including the peace movement and electoral politics. He is currently working to create a German-Polish museum for artworks lost during World War II.

Máiread Corrigan Maguire was awarded the Nobel Peace Prize in 1976 in recognition of her work pursuing peace and resolution in armed conflicts. She is the co-founder of the Community of Peace People, an organization that urged a non-violent resolution to the Troubles in Northern Ireland. She continues this work and has traveled to over 25 countries. In 1992 she was awarded the "Pacem in Terris" Peace and Freedom Award, named after Pope John XXIII.

INTERESTS OF *AMICI*

The *Amici Curiae* are ten Nobel Prize winners of diverse political ideologies who have spent much of their lives concerned with issues of justice. All are from countries where the existence of fair and impartial tribunals has been an issue of grave concern during their lifetimes. They and their countrymen have looked for leadership to the United States legal system, its Constitution, and its legal protections guaranteeing fair and impartial trials. They are alarmed by the convictions in this case and believe, if left standing, they will set a negative example in countries where the rule of law is not firmly established and denigrate the esteem in which the United States justice system is held.

As members of the international community, *Amici* wish to underscore violations of international legal norms that mandate a fair and impartial trial,

norms modeled on U.S. standards. International treaties ratified by the United States as well as customary international law reflect the U.S. constitutional requirement of a fair trial. The International Covenant on Civil and Political Rights provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171. Numerous other international treaties and declarations do likewise.[2]

For a number of years *Amici* have been attentive to this case. For example, in 2003, Amicus Nadine Gordimer wrote to the *The New York Times* stating, "[t]he trial was held in Miami where the . . . charges . . . could not be heard by anything other than a biased jury, since the area has a dominant presence of avowed enemies of Cuba." Nadine Gordimer, Letter to the Editor, *Case of Five Cubans*, N.Y. TIMES, Apr. 13, 2003, at D12. In 2005 *Amici* signed a letter to Attorney General Alberto Gonzales protesting Petitioners' continued incarceration after the

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[2] *E.g.*, African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/rev.5; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948). The U.S. State Department in its Country Reports on Human Rights Practices evaluates countries based on their compliance with fair trial requirements. *E.g.,* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, & MACAU), §1(e) (Mar. 11, 2008).

Eleventh Circuit had reversed their convictions because of the inability to obtain a fair and impartial trial in Miami, Florida. Wole Soyinka et al., Open Letter to the Attorney General of the United States of America (Feb. 9, 2005) *available at* http://www.embacubasiria.com/loscinco310805e.html (last visited Feb. 25, 2009).

In that letter, which was subsequently signed by thousands of prominent international personalities, the *Amici* addressed the 2005 opinion of the Working Group on Arbitrary Detentions of the U.N. Human Rights Commission that the incarceration of Petitioners was arbitrary and in violation of Article 14 of the International Covenant on Civil and Political Rights. Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add.1, at 60-65 (Oct. 19, 2005). This was the first time that the Working Group found a U.S. judicial proceeding violated the prohibition on arbitrary detentions. The Working Group found that the "climate of bias and prejudice against the accused" was so extreme that the proceedings failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a fair trial" and "confer[red] an arbitrary character on the deprivation of liberty." (*Id.* at 65.) Dozens of organizations and individuals around the world—including, for example, national parliaments and parliamentary committees on human rights joined in the condemnation. (Pet. App. 469a-91a.) No criminal trial in modern American history has received such international approbation.

Amici raise concerns about juror intimidation, selective enforcement of the law, and the biased community atmosphere in which the trial occurred. *Amici* have been aware of acts of violence and harassment against the Cuban government and of efforts to silence individuals, especially those living in Miami who are labeled "friendly" or even open to dialog with Cuba. They are also aware that at times the U.S was unwilling to prevent or punish unlawful actions against Cuba or against persons who expressed an interest in the normalization of relations with Cuba, and failed to enforce laws prohibiting and regulating the possession of weapons and explosives by those supporting the overthrow of the Cuban government.

Amici believe that, in these circumstances, Petitioners could not have received a fair and impartial trial and that their convictions and sentences were wrongful.

REASONS FOR GRANTING THE WRIT

I. Petitioners Did Not Receive A Fair And Impartial Trial Because Jurors Could Not Decide This Case Free From Fear Of Retaliation By The Anti-Castro Community

Persuasive evidence of prejudice in the Miami community against the Cuban government and its agents is set forth in the record and the Petition. However, that prejudice, and whether local jurors could decide the case free from this bias, is not the only lens for determining whether Petitioners received a fair trial. Assuming some jurors were free from that prejudice, a crucial question remains about the role that fear and intimidation played. Even if a

juror harbored no bias against the Cuban government or its agents, or even Petitioners who were so identified, he or she might have felt it was too risky to fail to support conviction. Fears would have ranged from shunning, to difficulties with Hispanic and Cuban friends, to workplace retaliation, to physical injury and possibly even death.

A number of objective factors show that jurors could not decide this case free from fear and intimidation and thus demonstrate that Petitioners did not receive a fair trial: (1) pervasive intimidation in the Miami community including violence against those deemed "sympathetic" to the Cuban government; (2) jurors' voir dire testimony; (3) media focus on the jurors, ensuring that their identities and faces were widely recognized and that they could not escape the community's eyes; (4) the fight over Elián González and the commemoration of the fifth anniversary of the shoot down of BTTR; and (5) the prosecutor's summation, which reinforced juror fear and intimidation.

These factors also made it difficult for jurors to voice their fears since such articulation alone could lead to negative consequences. In the Miami-Dade venue, there was simply no way to protect the jury from being enveloped in a cloud of intimidation—intimidation that had followed the dominant narrative in Miami for decades and that continued through the trial. The fact that no Cuban-Americans served on the jury did not guarantee a fair and impartial trial. On the contrary, no member of the community could escape the dominant community ethos of punishing and ostracizing those perceived as sympathetic to the Cuban government. Jurors' fears

of such reprisal arose not only from the Miami community's historical violence against and intimidation of those deemed not sufficiently hostile to the Castro regime, but also from contemporaneous acts of retaliation.

1. A demand for strict allegiance to an anti-Castro narrative has pervaded the Miami community for decades. The dream of returning to Cuba and overthrowing Castro had become an overriding community passion, and dissent from that vision was a punishable offense. *See* JOAN DIDION, MIAMI *passim* (1987). In April of 2000, The New York Times reported, "In Miami, Cuban Americans who favor more open relations with Havana say that advocating an end to the American embargo of Cuba or closer ties to the island has always brought scorn and threats and, in some cases, violence." Juan Forero, *The Elian Gonzales Case: The Cuban Americans; In Miami, Some Cuban Americans Takes Less Popular Views*, N.Y. TIMES, Apr. 27, 2000, at A1. In 1992, Human Rights Watch released a report documenting harassment, intimidation, and violence (including bombings, beatings and death threats) against Miami residents because of their moderate political views toward Castro or Cuban relations. HUMAN RIGHTS WATCH, DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY (1992). A second report was issued in 1994 when Miami residents who attended a conference in Cuba were besieged by death threats, bomb threats, verbal assaults, and economic retaliation. (Pet. App. 296a.)

Appendix A to this brief entitled, "Chronology of News Accounts Concerning Cuba-Related Violence in the Miami Area" lists acts that occurred between

1987 and 2000. This chronology does not describe the myriad other forms of retaliation, short of physical violence, employed to intimidate dissenters. Acts of harassment and violence by anti-Castro exile groups date at least as far back to the 1974 bombings of a Spanish-language publication, *Replica*. (Pet. App. 171a.) Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence. (*Id.*) As set forth in Appendix A, such incidents have continued for more than twenty-five years. They include bombings and arson attacks against businesses involved in or promoting commerce with, travel to, or humanitarian aid to Cuba; bombings of radio stations and print news offices, and death threats against journalists advocating dialogue with Cuba; and harassment of and assaults against Cuban artists and musicians performing in Miami.

In his dissent from the Eleventh Circuit's *en banc* decision, Judge Birch noted that trial evidence detailed the clandestine activities of "various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area," such that "the perception that these groups could harm jurors that rendered a verdict unfavorable to their views was *palpable*." (Pet. App. 312a.)

2. Voir dire testimony revealed that many prospective jurors feared for their safety or community standing if they voted to acquit Petitioners. When asked about a verdict's potential impact, prospective juror David Cuevas stated, "I would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban

community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba—anything dealing with communism they are against," he believed "they would have a strong opinion" about the outcome. (Pet. App. 176a.)

Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, was "concern[ed] how ... public opinion might affect [his] ability to do his job" because he dealt with developers in the Hispanic community and knew that the case was "high profile enough that there may be strong opinions" which could "affect his ability to generate loans." (Pet. App. 176a-77a.) The trial judge also referred to the "impassioned Cuban exile community residing within this venue." (Pet. App. 126a.)

The fear reflected by these voir dire responses is confirmed in the results of a survey conducted by Professor Gary Patrick Moran on behalf of Petitioners. Over one-third of those polled said they would be worried about community criticism if they served on a jury that reached a not-guilty verdict in a Cuban spy case. (Pet. App. 236a.)

3. The media's attention to the trial and broad dissemination of jurors' names and identities meant that they could not escape community scrutiny. The jurors could not help but consider how the community might respond to a vote that contradicted the dominant community narrative. On the first day of voir dire, potential jurors were exposed to a press conference held by the victims' families on the courthouse steps. At that time, members of the press approached some of the prospective jurors. (Pet. App. 175a.) During the second week of jury selection, one

prospective juror complained of media harassment as he left the courthouse. (Pet. App. 253a.) As late as March 13, nearly four months into the trial, the court noted on the record that jurors were still being harassed by media. (Pet. App. 290a.)

On the first day of deliberations, jurors complained of feeling intimidated because television cameras were following them. The court responded by modifying the path of their entry to the courthouse. Despite this, the jurors were filmed again entering and leaving the courthouse "all the way to their cars." (Pet. App. 291a.) Well into the second week of jury selection, a prospective juror complained of media harassment as he left the courthouse. (Pet. App. 253a.) The district court commented on the "tremendous number of requests" for disclosure of jurors' voir dire questionnaires (Pet. App. 412a) and requests for the names of deliberating jurors once deliberations began (Pet. App. 124a). As late as March 13, nearly four months into the trial, the Court noted on the record that jurors were still being harassed by media. (Pet. App. 290a.) The district court repeatedly expressed concern about the media's intrusiveness and the futility of attempting to insulate the jury, but took no remedial action.

As Judge Birch noted in his dissent, "The electronic eyes of the community were focused upon them and the jury could not help but understand that focus." (Pet. App. 201a.) *See also* HUMAN RIGHTS WATCH, DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY (1992) (describing historic role of the Spanish-language media in identifying and warning those

who expressed opinions that differed from the anti-Castro community).

4. Two contemporaneous events reinforced jurors' fears of violence against them should they support a verdict favoring Petitioners. First, the case of Elián González stoked the exile community's fervor against the Cuban government and perceived sympathizers. The media focus on the Elián González matter was continuous and pervasive, persisting from November 1999 to at least June 2002. It was impossible to insulate the jury from these volatile sentiments. Published interviews of Cuban-Americans reveal the passions aroused by the matter. Dr. Max Castro, a senior research associate at the University of Miami who studies the exile community, said "I've never seen it so polarized." Forero, *supra*, at A1. Hilda Cossio Cohen said she was disheartened by what she heard after coverage of the Elián case began. "I think this thing has set us back 40 years," she said. "It's driven a wedge in the Cuban community." *Id.*

Second, the fifth anniversary of the shooting of the BTTR planes occurred during the trial. Over the February 24, 2001 weekend, commemorative flights, demonstrations, and public ceremonies marked the anniversary and the deaths of the people on the flights. Television interviews and newspaper articles amply covered those events. (Pet. App. 121a-2a, 194a-5a, 242a-3a.)

Petitioners asked the trial court to declare a mistrial because the commemoration "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial." (Pet. App. 122a.) They maintained that "[n]o amount of voir dire or

instructions to the jury [could] cure the taint, whose ripple effects are difficult to measure." (*Id.*) They also requested a mistrial so that a fair trial could be held "in a venue where community prejudices against the defendants [were] not so deeply embedded and fanned by the local media." (*Id.*)

Within the context of such actions by Miami exile community, it is difficult to imagine that a jury could have acted free from fear of harm or repercussion if the trial resulted in an outcome favorable to Petitioners.

5. The prosecutor's trial summation fed on the dominant narrative to opposition to the Castro regime, which was literally enforced by the exile Miami community. The prosecutor argued that the jurors had to choose between a verdict for the Cuban government and a verdict for the community. He said that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they found Petitioners guilty and convicted the "Cuban sp[ies] sent to ... destroy the United States." (Pet. App. 10a, 196a, 288a.) Sustaining an objection to this line of argument did not and could not cure the harm. The prosecutor – the attorney for the United States – confirmed what many jurors already feared: a verdict for Petitioners contradicted the interests and desires of the Miami community. Such official endorsement could only reinforce the perception that harm would result if the jurors did not vote to convict.

II. Petitioners Did Not Receive A Fair And Impartial Trial Because The Jurors Could Not Decide This Case Free From Pervasive Community Prejudice Against Anyone Associated With The Cuban Government

The only way to avoid finding that community bias against the Cuban government had so infected public debate that a change of venue was required for a fair and impartial jury, was to ignore the evidence. This is precisely what the Eleventh Circuit and the trial court did. In evaluating the prejudice against Petitioners, the Eleventh Circuit refused to consider any evidence that did not directly name Petitioners or their alleged crimes. The district court refused to hear evidence "relate[d] to events other than the espionage activities in which the Defendants were allegedly involved." (Pet. App. 330a.) In other words, both courts refused to review or weigh any factual support for the seemingly self-evident proposition that anti-Castro prejudice pervades the Miami-Dade community. Not only did the Eleventh Circuit make "no findings regarding the prejudice within the community" (Pet. App. 211a), it also refused to consider the effect of contemporaneous occurrences such as the fate of Elián González. It found such evidence *per se* irrelevant to whether Petitioners could receive a fair trial in Miami. (Pet. App. 136a.)

The presence of the powerful anti-Castro sentiment in the Miami community was demonstrated in Petitioners' motions for a change of venue. In his dissent from the Eleventh Circuit's decision, Judge Birch noted that "the evidence submitted in support of the motion . . . was massive." (Pet. App. 164a.) In addition, the voir dire

demonstrated that the community was virulently anti-Castro. Finally, the survey results submitted by Petitioners substantiated the "atmosphere of great hostility towards any person associated with the Castro regime." (Pet. App. 164a) The anti-Castro bias was so powerful that real or apparent deviation from it was avoided.

The fact that the crimes of militant exiles were treated with impunity reinforced the validity of the community's anti-Castro sentiment. That militant exiles could possess illegal weapons and explosives yet not be charged with breaking the law served as government sanction of the harassment and intimidation practiced by the exile community.

For example, the jury was informed that a member of Alpha 66, Rodolfo Frometa, was stopped on October 19, 1993 while in a boat which had been towed to Marathon, Florida, and was questioned regarding weapons onboard. (Pet. App. 187a.) The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini-14 rifle with a scope. (*Id.*) On October 23, 1993, he was again stopped while he and others were driving a truck that was pulling a boat toward the Florida Keys. (Pet. App. 188a.) Frometa explained that they were carrying semi-automatic assault rifles in order to conduct a military training exercise to prepare for political changes in Cuba or in the case of a Cuban attack on the United States. Then they were sent on their way. (*Id.*)

At trial it was shown that Alpha 66 members were stopped and released on February 7, 1994 for having weapons onboard their boat. Because a subsequent photograph of the group was "published

in the newspapers," "[e]verybody in Miami" knew that they had been released. (*Id.*)

On June 2, 1994 a member of F4 was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" to kill Castro and his close associates in Cuba. (*Id.*)

The far-reach of the community bias was further reinforced to the jurors through trial evidence showing the United States government's failure to respond to Cuba's requests to investigate terrorist acts in Cuba perpetrated by persons from the United States between 1990 and 1998. The Cuban government provided FBI agents with documentation of these attacks. (Pet. App. 192a.) The acts included an explosion on April 12, 1997 which destroyed the bathroom and dance floor at the discotheque Ache in the Media Cohiba Hotel; a bombing on April 27, 1997 at the Cubanacan offices in Mexico; the April 30, 1997 explosive device found on the 15th floor of the Cohiba Hotel; the July 12, 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies; the August 4, 1997 explosion at the Cohiba Hotel which created a crater in the lobby ; explosions on September 4, 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant; and the discovery of explosive devices at the San Jose Marti International Airport in a tourist van on October 19, 1997 and underneath a kiosk on October 30, 1997. (*Id.*) The explosions on September 4, 1997 killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused

property damage at all locations. (*Id.*)

The existence of bias against the Castro regime and the overwhelming support for exile groups, such as Brothers to the Rescue, is also illustrated by the treatment received by two of the most famous anti-Castro militants--Luis Posada and Orlando Bosch. Posada and Bosch were implicated in the October 6, 1976 attack on a Cubana airliner that killed all 73 persons aboard. David Binder, *Some Exiles Are Still at War With Castro,* N.Y. TIMES, Oct. 20, 1976, at 3. Bosch and Posada had received extensive training from the Central Intelligence Agency. *Id.* After the bombing, Posada was jailed in Venezuela at a minimum-security prison and remained there until he escaped in 1985. Simon Romero & Damien Cave Weiner, *Venezuela Will Push U.S. to Hand Over Man Tied to Plane Bombing*, N.Y. TIMES, Jan. 23, 2009, at A5. He surfaced in Panama where he was arrested with 33 pounds of C-4 explosives. Tim Weiner, *Cuban Exile Could Test U.S. Definition of Terrorism* N.Y. TIMES, May 9, 2005, at A1. In April 2004, he received an eight-year sentence in the U.S., but was pardoned in 2008. *Id.*

Bosch and his associates were linked to the assassinations of Cuban exiles who disagreed with them, various bombings, and an attack on Cuban fishing boats. Binder, *supra.* Bosch was also linked to a 1976 bombing that killed two Cuban officials at the Cuban Embassy in Lisbon, a bombing at the Cuban United States Mission, a bomb explosion in a luggage cart in Jamaica, the bombings of Cuban airlines office in Barbados and Panama, and the kidnapping of two Cuban embassy officials in Argentina. *Id.* When Bosch surfaced in Miami in 1989, the Justice

Department tried for a short time to deport him, saying that he "has repeatedly expressed and demonstrated a willingness to cause indiscriminate injury and death." Jeffrey Schmalz, *Furor over Castro Foe's Fate Puts Bush on the Spot in Miami*, N.Y. TIMES, Aug. 16, 1989, at A1. But the Cuban exile community came to his defense, and the Bush Administration overruled the deportation. Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile Brings Both Glee and Rage*, N.Y. TIMES, May 10, 2007, at A20; Weiner, *supra*.

Posada, who snuck into the U.S. in March or April of 2004, admitted to plotting attacks that damaged tourist spots in Cuba and killed an Italian visitor in 1997. Ann Louise Bardach & Larry Rohter, *A Bombers Tale: A Cuban Exile Details the 'Horrendous Matter' of a Bombing Campaign*, N.Y. TIMES, July 12, 1998, at A10. The U.S. refused to charge him, although the Justice Department called him "an unrepentant criminal and admitted mastermind of terrorist plots and attack on tourist sites." Mark Lacey, *Castro Foe With C.I.A. Ties Puts U.S. in an Awkward Spot*, N.Y. TIMES, Oct. 8, 2008, at A14. Venezuela has sought to extradite him, but thus far the U.S. has refused. Romero & Weiner, *supra*; Goodnough & Marc Lacey, *supra*.

The breadth and depth of the local community's anti-Castro bias was not lost on the prosecutor during Petitioners' trial. He shamelessly pandered to these prejudices, telling the jury that Cuba is a repressive government that did not believe in human rights (Pet. App. 199a); that it employs the "death penalty" for minor offenses (Pet. App.193a); that it lacks "due process where courts and defenses are

allowed" (R122:14072); that "Castro wiped out the entire family" of witness Frometa (R24:14482); that Cuban government's "lies" are "an abomination to the Lord" (R124:14530-31); that "we are not operating under the Rules of Cuba, thank God" (Pet. App.123a); that the laws of "our great country" are superior to those of the "enemy," "the communist country of Cuba" (Pet. App.457a); that the defense utilized Cuban "propaganda" and that the propaganda must end (R122:14119). Finally, the prosecution wrongfully ascribed the words "final solution" to defense counsel's argument, suggesting that Cuba had invoked the infamous Nazi policy of extermination to justify the shooting of two aircraft (Pet. App.123a).

III. The Conviction Of Gerardo Hernandez For Conspiracy To Commit Murder Demonstrates That Impaneling A Jury Free From Anti-Castro Prejudices, And Free From The Fear Of Intimidation Was Necessary For A Fair And Impartial Trial

Hernandez was indicted for conspiracy to commit murder, a conspiracy that applies only to an "unlawful killing." To constitute an "unlawful killing" the jury had to find beyond a reasonable doubt that Hernandez had agreed to shoot down the plane in international airspace and not in Cuban airspace, as the latter would not have been unlawful. (Pet. App. 453-65a, 350a.) To say the evidence was thin on this point would be a gross exaggeration.

On appeal, the Eleventh Circuit upheld Hernandez's conviction in a divided opinion, with two judges affirming the conviction and one judge

dissenting. The dissenting judge found insufficient evidence that an agreement to shoot down the plane existed, much less one to shoot it in international airspace: "At best, the evidence shows an agreement to 'confront' BTTR planes." (Pet. App. 85a.) But the dissent went even further. It pointed out that even if "confront" somehow meant to shoot down the planes, it was not proof that Hernandez had agreed to a shooting in international, not Cuban, airspace. In fact, as the dissent noted, "the evidence point[ed] toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act." (Pet. App. 87a.)

The majority's conclusion that there was evidence to support the existence of the requisite agreement relies on two inferences. First, the majority relies on evidence that Hernandez was told not to let Cuban agents fly with BTTR on certain days. Even if this was somehow sufficient for the jury to infer that Hernandez had agreed to shoot the plane (although other equally possible inferences could be drawn, such as the possibility Hernandez agreed to a forced landing), it is insufficient to prove beyond a reasonable doubt that an agreement existed. Second, the majority says that because Hernandez said the operation was successful and the Cuban government issued a commendation shows agreement. However, these facts cut against the existence of any agreement. The Cuban government has consistently maintained that the shooting took place in Cuban airspace. That Hernandez deemed the operation successful and received a commendation demonstrates, if anything, that if an agreement existed it concerned a confrontation in Cuban airspace. Again, as the dissent says, "the evidence

points toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act." (Pet. App. 83a-6a.)

Judge Birch, who voted to uphold Hernandez's conviction on the conspiracy to commit murder charge, wrote a special concurrence saying that, "this issue presents a very close case." (Pet. App. 71a.) However, because of the appellate court's "standards of review with regard to Hernandez's conviction," Judge Birch affirmed it. (*Id.*) He had dissented in the *en banc* decision on the grounds that the request to change venue should have been granted. Read in this light, Judge Birch's concurrence upholding Hernandez's verdict appears illogical. It is difficult to understand, as it should be, how he could uphold a jury verdict in a "very close case," where he previously concluded that the jury had been unfair and biased. (*Id.*)

While Judge Birch felt compelled to point out that the case was "close," the dissenting judge believed there was no evidence to uphold the guilty verdict. Cases fitting such a description cry out for a jury that is unblemished by even a perception of intimidation or partiality. That is not the jury that was impaneled in this case. Instead, Petitioner Hernandez was tried by a jury so tainted by the community's bias against anyone remotely aligned with the Cuban government, that in the absence of sufficient evidence, they still found him guilty. Petitioners' motion for a change of venue should have been granted in the first instance, and Hernandez's conviction for conspiracy should be reversed.

IV. The Failure Of The Courts Of The United States To Reject A Jury Verdict Infected By Intimidation And The Fear Of Violence Encourages A Disregard For The Right To A Fair Trial

Amici are acclaimed internationally for their efforts to advance human rights in many parts of the world. They view the trial in this case as inimical to basic legal standards. It is well known that anti-Castro forces in Miami enforce their ethos with impunity--instilling fear through acts of violence and intimidation. If fear of retribution is permitted to infect jury deliberations in a United States courtroom, the world has become a less safe place for the protection of individual rights.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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