AN OVERVIEW ANALYSIS OF THE TRIAL

"As a further special condition of supervised release the defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, and organized crime figures are know to be or frequent".

Transcript of Sentencing Hearing
Before The Honorable Joan A. Lenard
12/14/01 (Pages 42-43 and 45-46)

UNITED STATES
V.
GERARDO HERNÁNDEZ NORDELO
RAMÓN LABAÑINO SALAZAR
ANTONIO GUERRERO RODRÍGUEZ
FERNANDO GONZÁLEZ LLORT
RENÉ GONZÁLEZ SEHWERERT
FIVE CUBAN POLITICAL PRISONERS: THE CASE FOR A FAIR TRIAL

Hostages to Miami politics

Gerardo Hernández Nordelo, Ramón Labañino Salazar, Antonio Guerrero Rodríguez, Fernando González Llort, and René González (not related) are five young Cubans arrested in Florida in September 1998. They were tried and convicted of espionage and related charges in the one place they could not get a fair trial: Miami.

Their case is typical of the political trials the United States criticizes as contrary to respect for human rights when they occur in other countries. Unless overturned on appeal, it is also likely to be cited as precedent for denying a fair trial to other men and women tried in the United States.

In what has become standard treatment for those whose political or religious beliefs or national origin are deemed suspicious by the United States, the five were held without bail for 33 months between arrest and trial. The arrests were all carried out without incident, and there was no suggestion that any had weapons, or had ever lived as anything other than peaceful members of the community. Two are U.S. citizens, having been born in the United States to Cuban parents who fled the reign of corruption and terror of Cuban dictator Fulgencio Batista. All were well-regarded in the communities where they lived and worked.

In spite of all that, they were not only denied the right to bail, but also kept, for 17 months, in solitary confinement cells used to punish prisoners guilty of assault and other violent behavior after being sentenced. They were completely cut off from their families and young children, and not even able to communicate with each other. Even under these extreme conditions, however, the prosecution failed in its objective of making the arrested men so disoriented and desperate that one or more would falsely confess and implicate others in exchange for a promise of leniency. Rather, they went to trial with the truth as their defense, calling retired U.S. military officials and Miami-based leaders of plots to overthrow the government of Cuba to show that their only offense was using false identities (with the exception of Antonio Guerrero and Rene Gonzalez who were U.S. citizens and used their true identities)) to enable them to help protect their country from violence perpetrated by US-based organizations and to assess the likelihood of military attack by the United States.

Loyal Cubans, Yes; Spies, No.

Espionage on behalf of Cuba and murder involving the shoot down of 2 aircraft over Cuban waters, the most serious allegations, were not charged as crimes actually committed, but as conspiracies, together with other related lesser offenses. As pointed out below, the use of "conspiracy" relieved the prosecution of the burden of proving that these offenses actually occurred.

Unique in the annals of American jurisprudence was the charge of conspiracy to murder leveled against Gerardo Hernandez . It became the focal point of the trial and involved the February 24, 1996 downing of 2 planes belonging to the Miami-based organization calling itself "Brothers to

the Rescue" by the Cuban Armed Forces as they persisted in flying into Cuban airspace. The group was led by Miami-based Bay of Pigs veteran, José Basulto. The Five were all in Miami at the time, and none was involved in making or executing the order to shoot down the planes after they ignored warnings not to proceed into Cuban airspace.

The Five were working with the Cuban Government to protect Cuba from invasion and terrorism organized, funded and launched from Miami and presented evidence to show the serious threat posed by Miami-based terrorism. They showed how they had infiltrated some of the Miami-based organizations, and how US law enforcement had failed to act on evidence turned over by Cuban authorities before their arrest. They also presented evidence to show that the only military information to which they had access was publicly available. Furthermore, they presented testimony from high-ranking former U.S. military and intelligence officials to the effect that Cuba poses no military threat to the United States, but is only interested in knowing what it needs to know in order to defend against the threat of attack, either by the United States or US-based mercenaries.

The passionate climate that surrounds every issue even remotely related to Cuba in Miami made any objective evaluation of the evidence impossible. Despite the fact that it heard 74 witnesses (43 for the prosecution and 31 for the defense) over a period of nearly seven months, a Miami jury only deliberated for short periods of time during 4 days without even submitting a single note or query to the court to find all five defendants guilty as charged in each of the 26 counts of the indictment. It asked not a single question about the complex principles of law involved, and did not make a single request to review any of the testimony.

The five are now hostages to the irrational hatred of the extraordinarily powerful enclave of Cuban exiles who have made Miami the provisional capital from which they work—with the support of federal, state and local government—to overthrow the government of Cuba. This group has so dominated public opinion in Miami about anything even remotely related to Cuba that the human rights organization Americas Watch published two reports titled"Dangerous Dialogue" (1992) and "Dangerous Dialogue Revisited" (1994). Along with newspaper and other media reports, they document the scores of assassinations, and hundreds of bombings and arsons as well as threats and extortion used to control public opinion about Cuba in Miami.

"An impossible place for justice"

"When it comes to Cuba, Miami is an impossible place for justice," Antonio Guerrero told the judge at his sentencing. By that time, the defense had filed no less than five motions to move the trial to a more neutral site. It was obvious that Miami was the last place in the world the five Cubans could get a fair trial. Social science backs up Guerrero's observation. One of the nation's foremost experts in the Cuban exile phenomenon, Dr. Lisandro Pérez[1], wrote, "the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero."

Weighing against the defendant's right to a fair trial before impartial jurors was intense local pressure for revenge for the shoot-down. When the defense pointed out that under the prevailing law,

[1] Professor of Sociology and Anthropology and Director of the Cuban Research Institute at Florida International University

the hostile climate of opinion in Miami resulted in such a probability of unfairness as to "require . . . a change of venue to assure a fair and impartial trial," the prosecution responded indignantly that the defense was unfairly comparing the cosmopolitan Miami to the small Texas town involved in the case upon which the defense relied. (Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966). In fact, as the chief U.S. Attorney for the District was later to acknowledge when he represented a client facing a civil trial in Miami, the similarities were more significant than the differences. With respect to the trial of these five Cubans, Miami was not a diverse cosmopolitan area in which no single group or ideology controlled public opinion, but one in which embittered Cuban exiles wielded political and economic power and, when that did not work, resorted to terrorism, to control public opinion on any issue involving Cuba. News reporter Jim Mullin of Miami, in a long news article which was presented to the Court as an exhibit on venue, decried the "lawless violence and intimidation (which) have been hallmarks of *el exilo for more than 30 years*" and then detailed scores of bombings, assaults, murder attempts and even assassinations in Miami and elsewhere (such as Letellier-Moffit in D.C.) by anti-Cuban terrorists.

In no other district would the defendants face prospective jurors at least 20% of whom were men and women who had left Cuba because they disagreed with the government the defendants were trying to protect. Among those reporting for jury service was a director of the Cuban-American National Foundation, which provided funding for Basulto's flights into Cuban airspace, as well as more obviously terroristic ventures. He was eliminated only because of what even the judge characterized as his "bizarre behavior." In no other jurisdiction would the defendants be forced to use nine of their 15 peremptory challenges just to eliminate Cuban exiles, or their children, from the jury. In no other jurisdiction would they face at least sixteen prospective jurors who personally knew someone identified in the indictment as a victim, or a family member. One told how Basulto was afforded official VIP status at the local airport.

Only in Miami would these defendants be tried by a jury drawn from a community permeated by what Dr. Pérez termed an "exile ideology" which favors US military intervention to topple Cuba's government and supports armed invasions by exiles—attitudes confirmed by independent polling unrelated to the case. So well-known are these positions—and the consequences of diverging from them-- that prospective jurors readily admitted they would be afraid of retaliation "*if I didn't come back with a verdict in agreement with what the Cuban community feels, how they feel the verdict should be."*

Miami stands alone as the only city in the United States where Cuban musicians cannot perform and Cuban artists cannot display their art without meeting riotous protest, and organizers of academic conferences require special protection because Cuban academics will be attending. Miami is the only city in the United States that would prefer to cancel international sporting events to having Cuban athletes present. Even the prestigious Latin Grammys had to be transferred out of Miami twice after violence and threats of violence caused it to be moved to another venue. Miami-Dade County is the only jurisdiction that passed an unconstitutional ordinance requiring all who sought funds for the arts swear that they had no dealings with Cuba for the past ten years. And it is the only jurisdiction with a monument to those downed in the incident inside the County government building, and streets and a plaza that bear their names.

These facts reflect the extraordinary power of an exile community that has managed to dominate local politics in Miami-Dade in a manner unique in the immigrant experience. Within two

generations, it has elected three adamantly anti-Castro Cubans to the United States Congress. One, Ileana Ross Leithen, was tipped off about the defendant's arrest as a matter of professional courtesy. Her husband is the former United States Attorney; her campaign manager was Jeb Bush. Six of the Miami-Dade County Commissioners are Cuban, as is the Mayor, the State Attorney, the county police chief, the fire chief, the superintendent of schools, and the head of the public university and community college systems. Cubans are not the largest minority in Miami, but the largest single ethnic group, period. Unlike most immigrants, they represent not the poor and oppressed, but the most wealthy and privileged sector of their homeland. In Maimi, their right-wing power-brokers ensure that only the candidates who adopt the most hard line with respect to Cuba progress to represent the community at the polls and in other seats of power. They are also among the main employees and the major financial contributors to both political parties and control most of the local media.

According to Dr. Lisandro Pérez, two events in recent years served to galvanize this community and reinforce its peculiar "exile ideology" characterized by a "state of war" mentality. One was the controversy which inspired Miami's mayor to announce that he would not authorize local police to help carry out a federal order to return a child—Elián González—to his father. The other was the incident at the heart of the charges against the Five: the February 24, 1996 decision to shoot down the planes.

It was against this backdrop that the trial proceeded in Miami.

Lacking Proof of Criminal Conduct, the Prosecution Charged Conspiracy, Controlled the Evidence the Jury was Allowed to Consider, and Committed a Gross Act of Misconduct in Addressing the Jury.

The indictment contained 26 separate counts, each charging from one to five defendants with specific offenses. Most were minor charges relating to the use of false identification. The most serious charges, however, alleging espionage and murder, carried life sentences. The indictment did not actually charge the defendants with those crimes, but rather, conspiracy to commit them. This relieved the prosecution of actually having to prove that any defendant had actually engaged in espionage or committed murder, or even that these offenses had actually occurred. Conspiracy, called the "darling of the prosecutor's nursery," makes the agreement or "meeting of the minds" a criminal offense if either the purpose or the means to be used are illegal. It also makes the prosecution's job easier, as it permits much evidence that would otherwise be banished as hearsay.

This was not to be the only advantage given the prosecution. By invoking the highly controversial and secret provisions of the Classified Information Procedures Act the prosecution was able to control the evidence the jury was allowed to see by denying the defense access to materials the prosecution had gathered during it's investigation, some of it being documents taken from the defendants upon their arrest.
With their case failing and in disarray, the prosecutor, in his last argument to the jury, falsely and prejudicially escalated the government's rhetoric against The Five by declaiming, no less than three times, that the defendants had come to America "in order to destroy the United States."

No Espionage

While the headlines repeatedly screeched "Spies Among Us," when the prosecution had to explain its legal position, it backed away from any burden to actually prove that "any co-conspirator actually committed espionage, or actually gathered any information, public or non-public." At the time of the arrests, spokesmen for the FBI reassured the country that military information was "never compromised," while the Pentagon spokesman added "there are no indications that they had access to classified information or access to sensitive areas."

Rather, what the prosecution had was proof that one of the five, Antonio Guerrero, had worked in a metal shop on the Boca Chica Navy training base in Southern Florida for five years. The base was completely open to the public, and even had a special viewing area set aside to allow people to take photographs of planes on the runways. While working there, Guerrero had never applied for a security clearance, had no access to restricted areas, and had never tried to get into any. Despite intense intimidation from the prosecution, some fellow-workers testified that he was an ordinary, hard-working, out-going person who showed no particular interest in secure areas. Indeed, while the FBI had him under surveillance for two years before the arrests, there was no testimony from any of the agents about a single act of wrongdoing on his part.

And, while the government had seized thousands of pages of documents from the Five at the time of their arrest, missing was the hallmark of all espionage cases in the past: there was not a single page of classified material.
A key witness for the prosecution was General James R. Clapper, Jr.[2], a man with 32 years of experience in the military working exclusively on intelligence matters and who rose to become the Director of the Defense Intelligence Agency before his retirement. He had

[2] Lieutenant General, U.S. Air Force, retired. Commissioned in 1961 he served for 32 years in active duty in the U.S. Air Force and at the time of his trial testimony was serving as Vice president and Director of the Intelligence Program at S.R.A. International in Fairfax, Virginia. Among his duties he served for over three years as Director of Air Force Intelligence Programs and Systems in the Pentagon, and later on as Commander of the Air Force Technical Application Center, Patrick Air Force in Satellite Beach, Florida. He also served as Director of Intelligence for the U.S. Forces in Korea, as Director of Intelligence for the entire U.S. Air Force during Operations Dessert Shield and Dessert Storm, concluding his active service for a 4-years period as Director of the Defense Intelligence Agency (D.I.A.), the senior military analytic organization for the Department of Defense, which has a worldwide global mission to study foreign military activities and operations. (05/16/01, pages 13089 – 13235)
Defense Counsel William Norris, for defendant Ramón Labañino:
- Would you agree, General Clapper, the hallmark, or the distinguishing characteristic of open source intelligence is that it is not espionage?
- That is correct.
Defense Counsel Paul McKenna, for defendant Gerardo hernández:
- What you do see is that he is telling somebody to get public information; correct?
- Yes

reviewed all the documents the government had seized and was asked on cross examination if he had "come across any secret national defense information that was transmitted (to Cuba)?" His response, "Not that I recognized, no."

Far from providing damning evidence for the prosecution, the documents seized from the defendants were used by the defense because they made clear the non-criminal nature of Guerrero's activity at the base. He was to "discover and report in a timely manner the information or indications that denote the preparation of a military aggression against Cuba" on the basis of "what he could see" by observing "open public activities." DGE141(E). This included information visible to any member of the public: the comings and goings of aircraft. He was also cutting news articles out of the local paper which reported on the military units stationed there.

Former high-ranking US military and security officials[3] testified that Cuba presents

[3] Eugene Carroll, Rear Admiral U.S. Navy, retired, 35 years of active service, including the command of two aircraft squadrons, two warships, including an aircraft carrier, and command of the carrier battle force of the U.S. Sixth Fleet. He currently serves as the Vice president of the Center for Defense Information in Washington D.C. and has visited Cuba. (Trial transcript 03/06/01, pages 8196 – 8301)
- *"What information about United States Navy Tactics and training levels would be of any use to the Cuban military?"*
- *"I know of none. We have been sending teams down to Key West to train and learn fighter tactics for decades and it is a given fact that these planes come and go, come and go" (at pages 8229 – 8230)*
Edward Breed Atkeson, Major General, U.S. Army; West Point graduate, Master's Degree from Syracuse University and PhD. University of Luton, United Kingdom. Commissioned in 1951, he went up the ranks, first in artillery, anti-aircraft battery commanding and eventually intercontinental ballistic missiles and military intelligence detachment. He ended up in the intelligence field serving under the Director of the Central Intelligence Agency (C.I.A), retiring from active duty in 1984, since then he has been a consultant to Rand Corporation, serving as an instructor at the Defense Intelligence College and for the last 10 years serving as a Senior Fellow in the Institute for land Warfare (Trial Transcript, 04/11/01, pages 11049 – 11199)
Defense Counsel Paul McKenna, for Defendant Gerardo Hernández:
- *"In your review of all the materials, did you ever come across any taking for people to get a hold of classified materials?"*
- *"No".*
- *"Did you ever find any specific tasking to get a hold top secret material?"*
- *"No".*
- *"Did you ever come across any tasking directing agents to find materials that would be harmful to the United States?"*
- *"No".* (At pages 11100 – 11102)
Charles Elliot Wilhelm, General, U.S. Marines Corps, retired. Commissioned in 1964, he went up all the ranks to becoming General, Four Stars, and the highest rank in the U.S. Armed Forces. He served as the Commander-in-Chief of the United States Southern Command (1997 on); headquartered in the Miami metropolitan area. The court certified General Wilhelm as an expert in the policy and physical systems for security at Southcom. (Trial Transcript 04/16/01, pages 11491 – 11547)

no military threat to the United States, that there is no useful military information to be obtained from Boca Chica, and that Cuba's interest in obtaining the kind of information presented at trial was "to find out whether indeed we are preparing to attack them" (Major General Edward Breed Atkeson (US Army, instructor at US Defense Intelligence College).

The law on espionage in the United States is clear: information that is generally available to the public cannot form the basis of an espionage prosecution. Once again, General Clapper, when asked, "Would you agree that open source intelligence is not espionage?" replied, "That is correct." So lacking in convincing evidence of espionage was the prosecution's case that after all the evidence had been presented, it was compelled to argue to the jury that they should convict merely if they believed there was an agreement to commit espionage at some unspecified time in the future. Nonetheless, after hearing the prosecution's highly improper argument, repeated 3 times, that the five Cubans were in this country "for the purpose of destroying the United States," the jury, more swayed by passion than the law and evidence, convicted. This finding is being appealed to the 11th Circuit Court of Appeals.

No Murder

In addition to espionage, the other serious charge--conspiracy to commit premeditated murder-- was levelled against Gerardo Hernandez. It was based upon the February 24 incident. The facts presented at trial made it obvious that Hernández was not responsible for the fate of the men in the planes, it was not the result of any premeditated murder, and there was no agreement that if the plane was downed, it should be in international, rather than Cuban waters. All three are required for conviction.

The evidence showed that on February 24, 1996, in what was by then a familiar scenario, Basulto and his cohorts took off from Florida in 3 planes and, once airborne, veered off their flight plans and headed straight for Cuba. After being warned by Cuban air control that they were entering a prohibited area, they were intercepted, and two were shot down by the Cuban Air Force. Miami residents died. In a recording played at trial, Basulto, who piloted one of the planes, could be heard laughing as the planes deliberately violated the order to turn back. He returned safely to Miami. Prosecutors used the law of conspiracy to argue that Hernández, who had played a role in infiltrating groups such as Brothers to the Rescue and was alerting Cuba of its plans, was responsible for murder.

There were a number of problems with this theory. In the first place, it is not a crime for Cuba to shoot down aircraft flying over its own territorial waters or land. Thus, the trial judge ruled that In order to convict Hernández of this charge, the prosecution would have to prove that long before the planes even took off, there was a specific plan or agreement to shoot down them down before they reached Cuban territory. Otherwise, the United States would have no jurisdiction and prosecution could not prove an essential element of the charge: that the critical events were to take place not in Cuban territory, but in what United States claims as its "special maritime or territorial jurisdiction."

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*"My view was that Cuba's Armed Forces posed no conventional threat to the United States" (*at page 11546)

The prosecution conceded that it had no evidence whatsoever regarding any agreement about where intruding planes might be stopped. It thus filed an extraordinary appeal to the Court of Appeals for the 11th Circuit, complaining that, given the evidence presented at trial, the ruling created an "insurmountable obstacle" for conviction[4]. The appeal was rejected, and the jury was instructed that it must find beyond a reasonable doubt that there was a specific agreement to shoot down the planes in international waters. It hardly noticed the "insurmountable obstacle," and convicted in record time.

Moreover, Cuba did not provoke the February 24 incident. Rather, it tried to prevent it. Those responsible are those "who did not relent in their efforts to provoke an armed conflict between the United States and Cuba" so that the US military "can do for them what they themselves have not managed to do in forty years: overthrow the government of Cuba, regardless of the cost in human life."

The defense placed evidence before the jury about the history leading up to the decision to shoot down the planes on February 24, 1996. It subpoenaed Basuto, to testify. A bitter opponent of the Cuban government (and ally of Jeb Bush), he was one of the founders of "Brothers to the Rescue," which purported to be a "humanitarian organization" created to rescue those who left Cuba and attempted to enter the United States by sea in violation of both Cuban and U.S. laws. The organization lost its reason for being, however, in 1995, when the U.S. and Cuba entered into an agreement which effectively stopped the practice of luring people to take to sea and head for Florida on the promise of riches. With no one left to "rescue," Basulto steered the group toward more aggressive action, repeatedly flying into Cuban airspace, dropping propaganda leaflets, medals and other objects over Havana, and otherwise invading Cuban airspace, harassing, endangering and threatening tourists, government agencies and Cuban civilians, all in violation of U.S. laws and F.A.A. regulations.

René Gonzalez, himself a pilot, had infiltrated the organization to learn of its plans and warn Cuban authorities. Among other things, he learned that the organization attempted to test bombs, acquire more sophisticated aircraft, and even planed to use remote aircraft to crash into a public gathering in Cuba. Taken for a regular member of the group, he was also asked to smuggle drugs. He promptly reported the incident to the FBI.

The propaganda drops and other over flights were indispensable to the success of the group's more ambitious—and dangerous projects. Cuba repeatedly protested to the United States about the overflights and violations of US laws. The protests were largely ignored. In the 20 months just before February 24th 1996, there were at least 25 deliberate illegal flights into Cuban airspace. As their frequency increased, the Cubans urgently sought American assistance in preventing an incident that could make relations between the two nations even worse—one of the goals of Basulto.

As 1996 began, there were two more flights over Cuba, one on January 9th and the other on the 13th, dropping over a half million leaflets calling on the Cuban people to revolt. The last flight was followed by an appearance by Basulto on TV Marti—a virulently anti-

[4] In its emergency petition for writ of prohibition to the Court of Appeal on May 25, 2001, the U.S. Attorney's Office recognized that *"in light of the evidence presented in this trial, this presents an insurmountable hurdle for the United States in this case, and will likelly result in the failure of the prosecution on this court"* (page 21) since it *"imposes an insurmountable barrier to this prosecution in contravention of the established law"* (page 27). The government was afraid of the fact that *"it is highly probable that the jury will request further elaboration on this issue"* (pages 20 – 21). (Emergency Petition for Writ of Prohibition).

Castro program paid for by US tax dollars funneled through the Cuban American National Foundation. He triumphantly announced that the Castro regime "isn't invulnerable," and urged his "compatriots on the island...to take personal risks...and to consider all the things that can be done."

When, pushed by right-wing Cubans and Florida politicians, the U.S. Congress passed the draconian "Helms-Burton" Act in response to the shoot-down, Basulto gloated at the success of his efforts to make US-Cuba relations even more strained—and to make living conditions in Cuba even more difficult.

In addition to Basulto and a number of former military and intelligence officials, the defense also subpoenaed Richard Nuncio, who testified that he "made Cuba policy on behalf of the President." He testified that he was concerned when he received Cuba's protests about the incursions, but found he could do little to stop them. He recalled his alarm as he watched Basulto's provocative announcement. He read to the jury a memo penned by an assistant in the State Department which reflected not only a decision not to interfere with Basulto's clearly illegal activities, but also some concern that when the Cuban government finally responded to the continual provocations, responsibility might be laid at the feet of an agency of the United States government:

> "...this latest overflight can only be seen as further taunting of the Cuban Government. State is increasingly concerned about Cuban reactions to these flagrant violations...worst case scenario, is that one of these days the Cubans will shoot down one of these planes and the FAA better have all its ducks in a row."

The Cubans, from the very highest level of their military, warned their American counterparts that the policy of restraint only seemed to encourage the aviation outlaws. The Cubans could no longer abide the wholesale violations of their sovereignty and security, and spoke openly of taking defensive measures against the overflights.

U.S. Admiral Eugene Carroll, retired, testified for the defense. Just three weeks before the February 24 incident, while attending a military conference in Havana, he was taken aside by the chief of the Cuban Air Force and told "very pointedly" that the Cubans had the ability to shoot down these aircraft, referring specifically to recent overflights and Basulto's televised boasting. Admiral Carroll immediately advised the State Department and Defense Intelligence Agency officials of the warning.

According to another memo presented at trial, one day before the fatal flight, on February 23rd, the State Department received word of "...an unauthorized flight into Cuban air space tomorrow." It decried the fact that the FAA was powerless to prevent "flights such as this potential one" and pessimistically, but prophetically, concluded, that in the face of repeated and increasingly frequent and brazen over flights " . . . the government of Cuba would be less likely to show restraint in an unauthorized flight scenario this time around." Still, nothing was done to stop Basulto.

On February 24th 3 aircraft took off from Florida and headed toward Cuba. The FAA, not the defendant Hernandez, notified the authorities in Cuba of their flight plan after it was filed. As they were approaching Cuban waters the planes were warned by Cuban flight control "We inform you that the area North of Havana is activated. You are putting yourself in danger by flying below 24 North." Basulto, in the lead plane, the only one to survive the mission, laughed and continued ahead. On the basis of this evidence, the jury convicted Gerardo Hernandez, who had no contact with the Cuban Air Force or other authorities about the decision to shoot down the plane, of conspiracy to commit premeditated murder.

The Real Problem: Terrorists with Impunity

The law in the United States is clear: if one acts to prevent a greater harm**,** even if he/she violates the law in the process, he will be excused from any criminality because society recognizes the necessity - even the benefit - of taking such action. Thus, if one sees his neighbors house on fire he may trespass onto his neighbors property to extinguish the blaze without fear of prosecution. Likewise, if one is aware of threatened violent action against his fellow citizens - and there is a history of such actions - he may take steps to protect potential victims**,** and no criminality will attach since those acts were committed out of necessity. Thus, the Five, who admitted using false identities (except for Guerrero and Gonzalez) and failing to register with the Attorney General as foreign agents,[5] argued that all 26 charges against them ought to be excused under the doctrine of necessity since they arose out of their actions in attempting to stop a greater harm - violence directed at their country.

The trial judge was asked to instruct the jury that they may acquit the Five if they believed they acted out of necessity to prevent violence. This the court refused to do even though the defense had presented 35 documents demonstrating the very real threat posed by the terrorist network acting out of Southern Florida and furthermore called to the witness stand members of that network who confessed to crimes against Cuba and Americans, as well as FBI agents who acknowledged their failure to stop such actions even though it was obvious Cubans and Americans would be injured or killed.

First the Court limited the defense evidence to a narrow time frame - from 1992 to 1998 - even though ample evidence existed of terrorist violence for four decades**.** Then, after hearing and seeing the abundant evidence of terrorist acts in that limited time frame, it inexplicably took from the jury the right to exonerate the Five on the basis of necessity.

That ruling is being actively appealed to the appellate court. But then, things got even worse. When the Sociedad Cubana De Ciencias Penales sought to file a Friend of the Court brief (known as an Amicus brief) in order to assist the appellate Court in reviewing the trial court's determination, it was rejected out of hand by the appellate court despite the scholarly writing of the Society's attorney, Professor Erik Luna, a distinguished professor at the University of Utah Law School.

Nontheless, the necessity issue has been appealed and is before the 11th Circuit Court of Appeals which will decide the issue without the benefit of the Sociedad's brief.

Shoot the Messengers

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[5] The defendants admitted using assumed identities (except for Antonio and Renee, as previously noted) and failing to formally register as agents of a foreign government. They argued that the latter requirement did not apply to them, and that their lives as well as their work would be jeopardized by using their own identities. In addition to Basulto and "Brothers to the Rescue" they were watching some of the most dangerous of all the exiles who had amply demonstrated their willingness and ability to use murder and terrorism in pursuit of their objectives. One was Orlando Bosch, responsible for the 1976 bombing of a Cuban civilian airplane which killed 73 civilians, including Cuba's entire Olympic fencing team. Once deemed by INS an undesirable alien because of terrorist history, he was granted resident status by George Bush, Sr., and now moves freely about Miami. The Five were also watching other paramilitary organizations such as the one headed by Luis Posada Carriles, who masterminded the plot to assassinate Fidel Castro at a meeting of heads of state in Venezuela, and those responsible for the 1997 Havana hotel bombing that killed an Italian tourist and wounded others.

Just months before the arrest of the Five, on June 17, 1998, the Cuban government had turned over to US law-enforcement officials a memorandum summarizing evidence gathered on the Miami-based 40-year campaign of murder, bombings, arson and other attacks against Cuba. At a historic meeting in Havana, the Cubans implored U.S. law-enforcement officials to act on that evidence in order to end the cycle of terror.

The evidence turned over to the FBI—documents, photos, surveillance and other evidence—showed several extreme right-wing organizations based in Miami were desperate about signals that support for the US embargo against Cuba was dwindling, and that Cuba was recovering from the collapse of the Soviet bloc. They hoped to provoke a crisis that could be used to mobilize hostility and provoke an attack or invasion by the United States military. Cuban officials asked the FBI to end the impunity of these right-wing terrorists before any more blood was shed.

The FBI should have had plenty of evidence already. Over the past 43 years, hundreds of terrorist acts have been launched against Cuba and Cubans, most from Miami. The FBI and local police are aware of these incidents, including assassinations and bombings, but rarely make arrests. An April 2000 Miami Times article titled "The Burden of a Violent History" documented the "lawless violence and intimidation" which have "have been the hallmarks of *ex Exilio* for more than 30 years." It listed scores of incidents.

The FBI promised the Cuban authorities it would act on the information provided at the Havana meeting within weeks. Luis Posada Carriles, for one, was not worried. On July 12 and 13, he boasted to the New York Times that "the FBI and the CIA don't bother me, and I'm neutral with them. Whenever I can help them, I do." Rather than going after Posada Carriles, Bosch, Basulto, or those who funded their terrorist activities, the FBI arrested the source of the information: the five Cubans.

The theme of the prosecution and the press throughout the trial was, as a Miami Herald editorial put it, "Terrorism shall not win." Indeed, stopping terrorism was precisely the objective of the defendants. As Gerardo Hernández told Judge Lenard at his sentencing, quoting words he had written before the September 11 attacks:

"Cuba has the right to defend itself from the terrorist acts that are prepared in Florida with total impunity, despite the fact that they have been consistently denounced by the Cuban authorities. *This is the same right that the United States has to try to neutralize the plans of terrorist Osama Bin Laden's organization, which has caused so much damage to this country and threatens to continue doing so.* I am certain that the sons and daughters of this country who are carrying out this mission are considered patriots, and their objective is not that of threatening the national security of any of the countries where these people are being sheltered."

A New Trial: Necessary to Avoid a Mockery of Justice

The swift verdict was not the result of a careful analysis of the facts presented at trial and dispassionate application of the law. Rather, it was the virtually inevitable result of the refusal to move the trial to a district less saturated with community prejudice and passion about issues relating to Cuba. It was also the product of the prosecution's decision to pretend that justice could be done in this case in Miami.

Then, a year after the defendants' conviction, the same United States Attorney who had argued that the five accused of conspiring to spy for the Cuban government could get a fair trial in Miami did a complete about face. He took the extraordinary step of himself asking for a change of venue in a civil case, arguing that his client—the Attorney General of the United States—could not get a fair trial there. In a case charging the INS with

employment discrimination against Latinos, he cited many of the same factors the Cubans had argued showed the kind of community prejudice that made a fair trial impossible for them. In the case of the Cubans, he ignored the possibility of community prejudice altogether, and insisted that they were not the victims of overwhelming pretrial publicity. But when it came to his own client, he pointed to events such as the furor over the decision to return Elián González as evidence of community bias. The furor over Elián González peaked just six months before the trial of The Five, and eighteen months before the U.S. Attorney cited it as proof of bias in his employment case.

Not only did the prosecutor rely upon the same facts he had previously rejected as insignificant, but he also did a complete about-face with regard to the law as well. In the Cubans' case, he argued that because Miami was an "extremely heterogeneous, diverse and politically non-monolithic metropolitan area," the leading case relied upon by them was completely irrelevant. In his own brief, he cited it as the controlling law.

By assuming these two absolutely contradictory positions with regard to the possibility of getting a fair trial in Miami in cases that would inevitably stir up the passions manifested in regard to the Elián case, the prosecutor ignored the responsibility of the public prosecutor as a representative of what the Court of Appeals called "a government dedicated to fairness and equal justice for all," to safeguard the rights of defendants. United States v. Wilson, 149 F.3d 1298, 1303 (1998). Taking one position at one moment and its opposite at another, depending on which position is most advantageous in the particular case, has been specifically condemned by that Court, which reviews all appeals from Miami and thus that same United States Attorney, as making "a mockery of the justice system." (Salomen Smith Barney, v. Harvey, 260 F.3d 1302l, 1304 (2001).

The discovery of the prosecution's about-face has led attorneys for The Five to file a motion for a new trial that fully documents the impossibility of holding a fair trial in Miami. That motion was also denied and now joins the other issues as an additional argument on appeal.

The Appeal Process in Atlanta

On April/May, 2003, the Attorneys for the Five presented their appeal statements before the United States Court of Appeals for the 11th Circuit in Atlanta.

The principle arguments of the defense are the following:

1. The defendants were denied a fair trial, since Miami was the one venue in which they could not receive a just consideration of their case.

2. Conspiracy to commit espionage was not proven beyond a reasonable doubt. 3. Conspiracy to commit murder by Gerardo Hernandez was not only not proven beyond a reasonable doubt (as conceded by the government), but was a charge that has no precedent in American law, since the shoot down was an act of a sovereign state in protecting its sovereignty , land and people.

4. The sentences handed down were excessive and in violation of the appropriate guidelines.

5. The secret procedures invoked by the government and the conduct of the trial were fundamental violations of the US Constitution.

6. Any acts taken by the Five, all unarmed and involved in allegations of espionage, were justified by the Doctrine of Necessity, and therefore excusable in Law.

On September 29, 2003, the United States Government filed its written answer to the briefs filed by the Five. The defense filed its written reply on November 17. That concluded the written presentations to the Court of Appeals

The case has now been set down for oral argument on March 10th, 2004 in Miami, Florida.

The Defendants

The five defendants remain in some of the worst prisons in the United States, most are held in high-security prisons. By separating the Five into prisons in California, Wisconsin, South Carolina, Texas and Colorado, the government has prevented their attorneys from easily having access to all Five. This has had a disruptive effect on their ability to prepare and file the appellate papers.

From February 28, 2003 to March 31, 2003 the U.S. Department of Justice decided to keep them in solitary confinement alleging "national security" reasons. They were again sent to "the hole", preventing their contact with the world. Their communications with the lawyers were cancelled. The visits were prohibited, including the consular ones; they were not allowed to receive correspondence, or to use the phone, or even to communicate with their families and lawyers. This measure was adopted by the Government of the United States in a crucial stage of the legal process, when the lawyer-client contacts are vital and the lawyers were focused their attention in the preparation of the appeal statements.
For five years, the American authorities have denied the visas to the wives of Gerardo Hernandez and Rene Gonzalez. In the case of Adriana Pérez Oconor, she has not been able to visit Gerardo since his arrest in 1998, and in the case of Olga Salanueva she has not been able to visit René since 2000, when she was deported from the United States, and nor has their little daughter Ivette, who hardly knows her father since she last saw him in prison when she was 4 months old.
On June 20, 2003, Olga Salanueva and Adriana Pérez lodged once again applications with the U.S. authorities for visas to travel to the United States in order to visit their husbands. More than four months after they applied for the visas the U.S. authorities officially announced that the visas for both women had once again been denied.
Organizations such as Amnesty International have confirmed the constant and flagrant human rights and children's rights violations to which these prisoners and their families have been subjected. Amnesty has so written to the Attorney General and the Federal Bureau of Prisons of the United States.
This is not only a violation of international human rights, but a violation of the US Constitution as recently expressed by the US Supreme Court in the case of Overton v. Bazzetta. It is even a violation of the regulations of the Federal Bureau of Prisons (28 CFR Sec.540.40). The continued isolation of Gerardo and Rene from their families is completely unjustified as a matter of law, and morally intolerable.

The Gathering Protest in Response

The appeal has been joined and supported by some of the most prestigious associations of lawyers and jury experts in the United States and abroad.

The National Jury Project, made up of the leading experts on the jury system in the United States, has filed a brief with the trial court urging a new trial. In addition, the National Lawyers Guild, representing nearly 5,000 attorneys in the United States, has also filed a formal pleading with the court, arguing for a new trial in a fair venue. That pleading was joined in by the International Association of Democratic Lawyers, with members in 90 countries and consultative status at the United Nations. These motions were rejected by the South Florida Court.

On April, 2003, the Cuban Society of Criminology filed through Professor Erik Luna, University of Utah College of Law, an Amicus Curiae in Support of Appellants before the Court of Appeal for the Eleventh Circuit The ruling judge rejected the brief in a terse legal order. Still, those who read the brief described it as very well-written and containing compelling arguments.
On June of this year, the National Lawyer Guild filed an Amicus Curiae urging a New Trial before the Court of Appeal that was supported by the International Association of Democratic Lawyers and it was accepted by the Atlanta Court.

On November, 2003, the delegates to the XIII Continental Conference of the American Association of Lawyers, in Argentina, agreed to condemn the unfair legal process followed against the Five Cubans.

Both in the United States and throughout Europe, Asia and Latin America more than 200 groups have been organized to create support networks in an effort to overturn the injustice of the case and return the Five to their country and families.

December, 2003