# THE CUBAN FIVE:

## LEGAL SUMMARY OF THE CASE

**Gerardo Hernández Nordelo, Ramón Labañino Salazar, Antonio Guerrero Rodríguez, Fernando González Llort and René González Sehwerert are imprisoned in the United States since 1998**

## A Message from Gerardo Hernández on the Tenth Anniversary of the Unjust Imprisonment

*Dear compañeras y compañeros:*

*We arrive at the 10th anniversary of the arrest of the Cuban Five at a crucial moment of our legal process (That is what they call it, although perhaps "illegal process" would be more appropriate.) The 11th Circuit Court of Appeals, based in Atlanta, has just ended our appeal.*

*That is to say, if it were up to them, things would stand as is, and some day my bones would be sent to Cuba, after death frees me from two life sentences.*

*The court in question has given unmistakable signals of the type of "justice" that the Five can aspire to in this country. When there was a decision 3-to-0 in our favor, with 93 pages of solid arguments in which the three-judge panel characterized our trial as "The Perfect Storm," the full panel, against all predictions, not only agreed to review the decision, but reversed it without much explanation. The "perfect storm" quickly became simply a drizzle.*

*Yet, this time, when the decision was 2-1 against the Five, with obvious legal errors, with a judge arguing in 16 pages that the prosecution presented absolutely no proof that sustains the charge of conspiracy to commit murder, and with a judge who-although voting against us-recognized that it is a "very close case," and with several defense arguments were not even seriously analyzed, the 11th Circuit categorically refused to review it.*

*As we say in Cuba: "Not even water is as clear." We have said time and again that this is a political case, and those who do not see it as such, choose not to see it.*

*Someone recently mentioned that now the Supreme Court has the last word. I would say, the second-to-last word. The final word in the case of the Cuban Five rests with you, our sisters and brothers of Cuba, the United States and the whole world, who throughout all these years have been our principal source of encouragement. Our hopes are not placed in any court. Ten years are more than enough to have cured us of any such naïve notion.*

*You are our hope, who through sacrifice and swimming against the current, have succeeded in making people on all continents aware of the injustice committed against the Five. You are the ones who are not taking time out or resting in your homes but instead are honoring us with your presence in different activities, commemorating the 10th anniversary of our imprisonment. You continue struggling to unmask the double standard of a government that invades other countries to supposedly fight terrorism, at the same time that it harbors and protects infamous terrorists, and imprisons those who are trying to stop those criminal acts.*

*We have confidence in you to expose the hypocrisy of the corporate media and of certain international organizations, which portray mercenaries-who betray our people*

*for a handful of dollars or a visa-as suffering political prisoners. Yet they are disgracefully silent in the case of two women who have been deprived for a decade of the basic right to visit their husbands in prison.*

*We know that right is on our side, but to win true justice we need a jury of millions of people throughout the world, and we need you, defenders of just causes, to make our truth known.*

*The injustice committed against the Five has kept us away from our homeland for ten years, but it has not kept us from accompanying our people through joyful times and also the suffering. A few days ago Hurricane Gustav caused great damage in Cuba, mainly on the Isle of Youth and in Pinar del Río, two territories from where we have received a multitude of support and love all these years.*

*We are certain that all the people of Pinar del Río and Isle of Youth, together with local and national leadership, with the solidarity of all dignified Cubans and many friends of the world, will become stronger in these difficult moments and-as is characteristic of revolutionaries-will convert the setbacks into victory. Although it is not possible for us to be there physically, today more than ever the Cuban Five are with you in our hearts, with our brothers and sisters in the Isle of Youth and Pinar del Río, who have done so much to support the struggle for our liberation.*

*Compañeras y compañeros: Ten years after that September 12, 1998, we thank you once again for walking this long and rough road together with us. We know, that to continue this march, we can keep counting on you, and you can also always count on our firm determination to resist, with our heads held high, for as long as it takes.*

*¡Hasta la Victoria Siempre!*

Gerardo Hernández Nordelo
Victorville Federal Prison, California
September, 2008

**BRIEF SUMMARY OF THE CASE OF THE CUBAN FIVE**

After decades of enduring attacks within its own borders (acts of arson, sabotage, assassinations and the use of biological weapons) perpetrated by anti-Cuban terrorist groups based in southern Florida that enjoy the support and consent of the US government, and after the United States repeatedly refused to implement measures to prevent such attacks, a group of unarmed men traveled from Cuba to the United States to monitor the activities of mercenary groups responsible for those attacks and organizations that support them and to warn Cuba of their aggressive intentions.

In September 1998, five of these men, who would later be known as the Cuban Five, were arrested in South Florida by FBI agents and kept in isolation cells for 17 months before their case was even brought before a court. Initially, they were accused of the vague crime of conspiracy which, according to US law, constitutes a commitment to carry out acts of espionage (the US government never accused them of actual espionage, nor did it affirm that real acts of espionage had been carried out, as no classified military document had been confiscated from the men). In addition the men faced minor charges associated with the use of false names and for failing to inform federal authorities that they were working on US soil on behalf of Cuba.

## On Count Two: Conspiracy to Commit 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.**

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.

"In his opening statement to the jury, the prosecutor conceded that the Five did not have in their possession a single page of classified government information even though the government had succeeded in obtaining over 20,000 pages of correspondence between them and Cuba. Moreover, that correspondence was reviewed by one of the highest ranking military officers in the Pentagon on

intelligence who, when asked, acknowledged that he couldn't recall seeing any national defense information. The law requires the presence of national defense information in order to prove the crime of espionage."

**Source: Leonard Weinglass[1] in Le Monde Diplomatique, December 2005**

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 Lieutenant General, U.S. Air Force, retired James R. Clapper, Jr. 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. Clapper 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."

*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.* (05/16/01, page 13156)
*Defense Counsel Paul McKenna, for defendant Gerardo Hernández:*
*- What you do see is that he is telling somebody to get public information; correct?*
*- Yes*
(05/16/01, page 13226)

An expert witness for the defense was Edward Breed Atkeson, Major General, U.S. Army. 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)

[1] US civil rights activist and defence lawyer who has worked on cases that have left a mark on the political history of US social struggles in the past 30 years: the Chicago Seven, the Pentagon Papers, Jane Fonda in his suit against Richard Nixon, the Afro-American activist Angela Davis, black community leader Mumia Abu Jamal and others. Currently, he is a member of the team of lawyers defending the Cuban Five, imprisoned in the United States for fighting terrorism.

## On Count Three: Conspiracy to Commit Murder

Seven months after the indictment, a new charge was brought against the accused: again, that of conspiracy, but this time to commit murder. This charge was brought specifically against one of the Five, Gerardo Hernández, the result of an intense public campaign which sought to avenge the downing, by Cuba's Air Force, of two light airplanes piloted by members of an anti-Castro group and the death of its four crew members, an event that had taken place more than three years before, when those airplanes were within Cuban airspace. The planes belonged to an organization which, in the 20 months preceding the incident in which they were downed, had penetrated Cuban airspace 25 times, something which had been denounced repeatedly by the Cuban government. The downing of the planes took place after Cuban authorities had officially warned the United States that it would defend its airspace.

### Excerpts of the EMERGENCY PETITION FOR WRIT OF PROHIBITION submitted by the US Government to the Court of Appeals on May 25, 2001

(p. 4, 5)

The United States of America, faced with erroneous jury instructions that jeopardize national security and **constructs nearly insurmountable barriers for a prosecution involving foreign agents**, one of whom conspired to murder American citizens, takes the unprecedented step of petitioning this Court for a writ of prohibition … **The United States files this petition fully aware of the numerous obstacles it must overcome.**

(p. 21)

…In light of the evidence presented in this trial, **this presents an insurmountable hurdle for the United States in this case, and will likely result in the failure on the prosecution on this count.**

(p. 27)

In light of these cases, and the government's proposed instruction regarding the actual location of the murders in this case, the government should not be required to prove that defendant Hernandez agreed that the murders would occur in the special maritime and territorial jurisdiction of the United States. The instructions as proposed by the United States with the additional element noted permit a finding by the jury that will support **federal** jurisdiction. The contrary proposition, urged by defendant Hernandez and accepted by the district court, **imposes an insurmountable barrier to this prosecution**.

## On Venue and the Jury

In spite of the vigorous objections raised by the Five's defense, the case was tried in Miami, Florida, a community that is home to more than half a million Cuban exiles with a long history of hostility toward the Cuban government, an environment that a US federal court of appeals would later describe as a "perfect storm" of prejudices, which, in this case, prevented the holding of a fair trial. Each and every one of the 12 members of the jury selected to try the case expressed negative opinions regarding the Cuban government and was a hostile jury member. The three potential jury members who expressed a neutral stance toward Cuba were disqualified by the government

The trial, which lasted over six months, became the longest trial that the United States had known until then. More than 119 volumes of testimony and over 20,000 pages of documents were complied, including the testimonies of three retired Army generals, a retired admiral, a former Clinton advisor on Cuban affairs (all called by the defense) and high Cuban officials. Near the trial's conclusion, when the case was about to be presented to the jury for its consideration, the US government presented an extraordinary appeal before a higher court, seeking its intervention, recognizing that it had failed to prove the main charge of conspiracy to commit murder and alleging that it was facing an "insurmountable obstacle" in connection with winning the case. After that appeal was turned down, the jury nonetheless found the Five guilty of all charges, under intense pressure brought to bear on them by the local media, whose cameras followed jury members even while driving, so that their license plate numbers were made public, and by anti-Castro activists, who did not cease their protests before the court.

## The Sentences

Found guilty, the Five were given unprecedented long sentences and imprisoned in five completely separate maximum security prisons. Gerardo Hernández was given two life sentences, Antonio Guerrero and Ramón Labañino a life sentence each, Fernando González 19 years and René González 15 years. The three men sentenced to life imprisonment became the first three people ever to be sentenced to life imprisonment for espionage in the United States in a case where no secret document was ever handled.

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|---|---|
| **Gerardo Hernández Nordelo** | **2 life terms plus 15 years** |
| **Ramón Labañino Salazar** | **1 life term plus 18 years** |
| **Antonio Guerrero Rodríguez** | **1 life term plus 10 years** |
| **Fernando González Llort** | **19 years** |
| **René González Sehwerert** | **15 years** |

After seeking maximum sentences, the prosecution introduced in court proceedings its theory of "incapacitation": in addition to the exorbitant sentences imposed on the accused, they were to be subjected to very specific restrictions after their release.

They could never again be free men. Beyond the years in prison, which included four life sentences, they were to suffer a special regime designed to protect the terrorists. Places were defined which they could not go near, locations they could not visit, streets they would be forbidden to walk in.

The judge accepted the government's request and in the sentences pronounced on René González (15 years imprisonment) and Antonio Guerrero (life, plus ten years), both US citizens by birth, expressed the restrictions in the following terms:

***"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 45-46)

## The Appeal Process

The initial appeal process lasted 27 months and concluded with a decision by a three-judge panel of the court of appeals that revoked all of the convictions on the grounds that the five accused had not received a fair trial in Miami.

## BRIEF OF THE 11TH CIRCUIT COURT OF APPEALS' DECISION ON THE CASE OF THE CUBAN FIVE

On August 9, 2005, the 11th Circuit Court of Appeals released their opinion on the case of Antonio Guerrero, Fernando Gonzalez, Gerardo Hernández, Ramón Labañino and René Gonzalez, unanimously ruling to reverse their convictions and order a new trial.

Form the first paragraph of its opinion the Court affirms to be in agreement with the fact that the pervasive community prejudice against Cuba and its government and the publicity before and during the trial combined to create a situation where the Cuban Five were unable to obtain a fair and impartial trial[1]. It recognized also the right of the Five to be tried fairly in a non coercive atmosphere and to have a fair trial as contemplated in the US Constitution.

The Court points out that to adopt this opinion reviewed the totality of the circumstances surrounding the trial: "the indictments, the motions for change of venue, voir dire, the court's interactions with the media, the evidence presented at trial, jury conduct and concerns during the trial, and the motions for new trial." Nevertheless, its analysis is focused only in the facts relating to the venue.

**The Analysis of the Evidence**

The Court stated that in this case the review of the evidence is more extensive than is typical because the trial evidence itself created safety concerns for the jury which implicate venue considerations.

In this sense, it is significative that the Court recognizes the defense's arguments in relation with the terrorist actions against Cuba of the anti-Cuban groups that operate in Florida, considering them as part of the circumstances to examine in this case: "The evidence at trial disclosed the clandestine activities

[1] "They appeal their convictions, sentences, and the denial of their motion for new trial arguing, inter alia, that the pervasive community prejudice against Fidel Castro and the Cuban government and its agents and the publicity surrounding the trial and other community events combined to create a situation where they were unable to obtain a fair and impartial trial. We agree, and REVERSE their convictions and REMAND for a retrial."
*(Opinion of the US Court of Appeals for the Eleventh Circuit US vs. Ruben Campa, No. 01-17176, 03-11087, p.3)*

of not only the defendants, but also of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area" and concluded: **"The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable."**

In its opinion the Court identifies these groups, naming Alpha 66, Brigade 2506, Brothers to the Rescue, Independent and Democratic Cuba ("CID"), Comandos L, Cuban American National Foundation (CANF) and others, all of them responsible of multiple terrorist actions against Cuba, and amply outlining the war actions in which they are being involved, the weapons, ammunitions and other warlike equipments which have been seized.[2]

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[2] "The Cuban exile groups of concern to the Cuban government included Alpha 66 **[168],** Brigade 2506, BTTR, Independent and Democratic Cuba ("CID"), Comandos F4 **[169],** Commandos L, CANF **[170]** , the Cuban American Military Council ("CAMCO"), the Ex Club, Partido de Unidad Nacional Democratica (PUND) or the National Democratic Unity Party (NDUP), and United Command for Liberation (CLU)."
*(Idem pp. 45-47)*

> **[168]** Orlando Suarez Pineiro, a Cuban-born permanent resident of the United States, served as a captain in Alpha 66 for about six years. R90 at 10373-74. On 20 May 1993, he and other Alpha 66 members were arrested while on board a boat with weapons in the Florida Keys. Id. at 10391-92, 10397-401, 10415-16. The weapons included pistols with magazines and ammunition, 50 caliber machine guns with ammunition, rifles with clips, and an RK. Id. at 10397-400. Pineiro was tried and found not guilty of possession of a Norinko AK 47 rifle and two pipe bombs. Id. at 10424. Pineiro and other Alpha 66 members were also stopped and released while on board a boat on 10 June 1994, but their weapons and boat were seized. Id. at 10409, 10411-14. The seized weapons included a machine gun and AK 47s. Id. at 10411-14.
> United States Customs Agent Ray Crump testified that, on 20 May 1993, he participated in the arrest of several men whose boat was moored at a marina in Marathon, Florida. Id. at 10429. The boat held: several handguns; automatic rifles, including one fully automatic rifle; four grenades; two pipe bombs; a 40 millimeter grenade launcher; a 50 caliber Baretta semiautomatic rifle; and a bottle printed with "Alpha 66" which contained "Hispanic propaganda . . . , . . . crayons, razors, stuff of that nature." Id. at 10431-33, 10434. He also participated in an investigation of a vessel south of Little Torch Key, about ten miles south of Marathon, Florida, on 11 July 1993. Id. at 10433-34.
> The vessel was carrying four men, numerous weapons, and "Alpha 66 type propaganda." Id. At 10434. The weapons on the vessel included an AR 15, two 7.6 millimeter rifles and ammunition magazines. Id. at 10438. Following this investigation, the men were not arrested, and the weapons and vessel were not seized. Id. at 10438-39.
> United States Customs Agent Rocco Marco said that he encountered four anti-Castromilitants on 27 October 1997, after their vessel, the "Esperanza", was stopped in waters off Puerto Rico. R90-10449. He explained that U.S. Coast Guard officers searched the vessel and found weapons and ammunition "hidden in a false compartment underneath the stairwell leading to the lower deck." The officers found food, water bottles, camouflage military apparel, night vision goggles, communications equipment, binoculars, two Biretta 50 caliber semiautomatic rifle with 70 rounds of ammunition, ten rounds of 357 hand gun ammunition, and magazines and clips for the firearms. R90 at 10453-59. The leader of the group, Angel Manuel Alfonso of Alpha 66, confessed to Rocco that they were on their way to assassinate Castro at ILA Marguarita, where he was scheduled to give a speech. Id. at 10452, 10467. Alfonso explained to Rocco that "his

purpose in life was to kill [Castro]" and that it did not "matter if he went to jail or not. He would come back and accomplish the mission." Id. at 10468.

Debbie McMullen, the chief investigator with the Federal Public Defender's Office, testified that Ruben Dario Lopez-Castro was an individual associated with a number of anti-Castro organizations, including PUND and Alpha 66. R97 at 11267. Lopez and Orlando Bosch planned to ship weapons into Cuba for an assassination attempt on Castro. Id. at 11254. Bosch had a long history of terrorist acts against Cuba, and prosecutions and convictions for terrorist-related activities in the United States and in other countries. Campa Ex. R77 at 18-35.

**[169]** Rodolfo Frometa testified that, although he was born in Cuba, he was a citizen of the United States. R91 at 10531. He explained that he was a United States representative of a Cuban organization called Comandos F4, which was organized "to bring about political change in a peaceful way in Cuba" and included members both inside of and exiled from Cuban. Id. at 10532.He identified himself as the Commandate Jefe, or commander-in-chief, of F4 in the United States. Id. at 10534. He stated that, since 1994, all F4 members must sign a pledge that they will "respect the United States laws" and not violate either Florida or federal law. Id. at 10535. Frometa stated that, before Comandos F4, he was involved with Alpha 66, another organization supporting political change in Cuba, from 1968 to 1994 and served as their commander "because of his firm and staunch position . . . against Castro." R91 at 10541-42. As a member of Alpha 66, Frometa was stopped by police officers and questioned regarding his possession of weapons. He was first stopped on 19 October 1993, while in a boat which had been towed to Marathon, Florida, and was questioned regarding the onboard weapons. Id. at 10564-66. The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini 14 rifle caliber 223 with a scope. Id. at 10564-66. On 23 October 1993, he was again stopped

while he and others were driving a truck which was pulling a boat toward the Florida Keys. Id. At 10542-44. Frometa explained that they were carrying weapons to conduct a military training exercise in order to prepare for political changes in Cuba or in the case of a Cuban attack on the United States, and once the officers determined that their activities were legal, they were sent on their way. Id. at 10544-48, 10563. The weapons were semi-automatic and included an R15, an AK 47, and a 50 caliber machine gun. Id. at 10545-47. Frometa and several other Alpha 66 members were once more stopped and released on 7 February 1994 for having weapons on board his boat. Because a photograph of the group was "published in the newspapers" "[e]verybody in Miami" knew that they were released. Id. at 10569. On 2 June 1994, Frometa, by then a member of F4, was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" in order to kill Castro and his close associates in Cuba. Id. at 10571-72, 10574-76, 10579-80. Frometa acknowledged that the use of the C4 explosive could have injured Cubans who worked at a military installation, id. at 10579, but that they had caused the "death of four U.S. citizens, the 41 people including 20 or 21 children who died; the mother of the child Elian, plus thousands and thousands who have died in the Straits of Florida." Id. at 91-10581.

**[170]** Percy Francisco Alvarado Godoy and Juan Francisco Fernandez Gomez testified by deposition. R95 at 11012; R99 at 11558-59. Godoy, a Guatamalan citizen residing in Cuba,described attempts between 1993 and 1997 by affiliates of the CANF to recruit him to engage in violent activities against several Cuban targets. 2SR-708, Att. 2 at 10-13, 21-24, 27-28, 33-34, 44- 46, 61, 63-64. He said that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. Id. at 44-46. In connection with the same plot, he flew to Guatemala in November 1994 to obtain the explosives and detonators to be used and met with, among others, Luis Posada Carriles, a Cuban exile with a long history of violent acts against Cuba. Id. at 49, 52, 56-58. Unknown to the CANF members, Godoy was cooperating with

In the opinion Luis Posada Carriles is described as "a Cuban exile with a long history of violent acts against Cuba."

The Court reflects the evidence presented by the Defense in the trial regarding the terrorist actions carried out by these groups, mentioning among them the Alpha 66's and the CANF's attacks against hotels and tourist installations from 1992 to 1997; the Brothers to the Rescue's airspace violations from 1994 to 1996 and the attempts to assassinate Cuban president organized by the Independent and Democratic Cuba, Comandos F4 and the National Democratic Unity Party (PUND).

It also includes the defense's argument that "following each attack, Cuba had advised the United States of its investigations and had asked the United States' authorities to take action against the groups operating from inside the United States."

**Motions for Change of Venue and New Trial**

The Appeals Court confirms that the defense lawyers filed in the Miami Court motions asking for a change of venue before the trial started until a year after it was over, and all of them were rejected by the court.

The motions were submitted on January, 2000; September, 2000; February, 2001; March, 2001; July, 2001; August, 2001 and November, 2002, the last three asking a new trial.

The Court affirms in its opinion that "**the evidence submitted [before the Miami Court] in support of the motions for change of venue was massive.**"[3]

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the Cuban authorities, denounced their plans, and later testified at the trial of one of the conspirators in Cuba. Id. at 22, 24, 26, 31, 58-59, 65, 70, 76, 81-82, 86, 90, 109.
Gomez, a citizen and resident of Cuba, described numerous attempts between 1993 and 1997 by persons associated with the CANF to recruit him to engage in violent activities against several Cuban targets. Gomez also testified that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. In 1996 and 1998, Gomez was approached by Borges Paz of the anti-Castro organization the Ex Club, 2SR-708, Att. 1 at 9, 12-14, 20, 39; Gomez said that Paz invited him to join their organization to build and place bombs at tourist hotels and at the Che Guevara Memorial in Santa Clara, Cuba. Id. at 16, 19, 22.
After returning to Cuba, Gomez informed the Cuban authorities of the Ex Club's plans. Id. at 20, 35-36. As a result of his work for the United States government, Gomez said that he was estranged from his family in the United States, including a daughter in Florida, and had received threatening phone calls. Id. at 64-66.

[3] "In January 2000, Campa, Gonzalez, Guerrero, and Medina moved for a change of venue, arguing that they were unable to obtain an impartial trial in Miami as a result of pervasive

prejudice against anyone associated with Castro's Cuban government. The motions for change of venue were based on pretrial publicity and "virulent anti-Castro sentiment" which had existed in Miami as "a dominant value . . . for four decades." The motions were supported by news articles and Moran's poll to substantiate "an atmosphere of great hostility towards any person associated with the Castro regime" and "the extent and fervor of the local sentiment against the Castro government and its suspected allies."
The evidence submitted in support of the motions for change of venue was massive. **[18]"**

*(Idem pp. 12-14)*

> **[18]** The following articles specifically addressing the conspiracy and the indicted defendants were attached as exhibits in support of the motions for change of venue: George Gedda, Federal officials say 10 arrested, accused of spying for Cuba, MIAMI HERALD, Sept. 14, 1998, R2-334, Ex.; Manny Garcia, Cynthia Corzo, Ivonne Perez, Spies among us: Suspects attempted to blend in, Miami, MIAMI HERALD, Sept. 15, 1998, at A1, R2-334; David Lyons, Carol Rosenberg, Spies among us: U.S. cracks alleged Cuban ring, arrests 10, MIAMI HERALD, Sept. 15, 1998, at A1, R2-329, Ex. A; R2-334, Ex.; Spies among us, MIAMI HERALD, Sept. 15, 1998, at 14A, R2-329, Ex. F; Fabiola Santiago, Big news saddens, angers exile community, MIAMI HERALD, Sept. 15, 1998, R2-334, Ex.; Juan O. Tamayo, Arrest of spy suspects may be switch in tactics, MIAMI HERALD, Sept. 15, 1998, R2-334, Ex.; Javier Lyonnet, Olance Nogueras, Cae red de espionaje de Cuba/FBI viro' al revés casa de supuesto cabecilla and Pablo Alfons, Rui Ferreira, Cae red de espionaje de Cuba/Arrestan a 10 en Miami, NUEVO HERALD, Sept. 15, 1998, at A1, R2-329, Ex. B; La Habana Contra El Pentagono("Havana versus the Pentagon")/Estructura de la Red de Espionaje, NUEVO HERALD, Sept. 15, 1998, R2-329, Ex. C; Arrest of alleged Cuban spies demands vigorous prosecution, SUNSENTINEL, Sept. 16, 1998, at 30A, R2-329, Ex. G; Juan O. Tamayo, Miscues blamed on military's takeover of Cuban spy agency, MIAMI HERALD, Sept. 17, 1998, at 13A, R2-334, Ex.; David Kidwell, Motion could delay trials of alleged 10 Cuban spies, MIAMI HERALD, Oct. 6, 1998, at B1, R2-334, Ex.; David Lyons, Cuban couple pleads guilty in spying case, MIAMI HERALD, Oct. 8, 1998, at A1, R2-334, Ex.; David Kidwell, Three more accused spies agree to plead guilty, MIAMI HERALD, Oct. 9, 1998, at 4B, R2-329, Ex. H; R2-334, Ex.; Carol Rosenburg, Couple admits role in Cuban spy ring, MIAMI HERALD, Oct. 22, 1998, at 5B, R2-329, Ex. H; Juan O. Tamayo, U.S.-Cuba spy agency contacts began a decade ago, MIAMI HERALD, Oct. 31, 1998, R2-334, Ex.; David Kidwell, U.S. tries to tie espionage case to planes' downing, MIAMI HERALD, Nov. 13, 1998, at A1, R2-334, Ex.; Carol Rosenberg, Identities of 3 alleged spies still unknown, Nov. 14, 1998, at B1, R2-334, Ex.; Juan O. Tamayo, Spies Among Us/Castro Agents Keep Eye on Exiles, MIAMI HERALD, Apr. 11, 1999, R2- 329, Ex. D; R2-334, Ex.; Carol Rosenberg, Shadowing of Cubans a classic spy tale, MIAMI HERALD, Apr. 16, 1999, at A1, R2-329, Ex. E; R2-334, Ex.; Cuban spy indictment/Charges filed in downing of exile fliers/The Brothers to the Rescue Shootdown: David Lyons, Castro agent in Miami cited by U.S. grand jury, Juan O. Tamayo, Brothers to the Rescue Shootdown/Top spy planned Brothers ambush, and Elaine de Valle, Relatives: Charges fall short, MIAMI HERALD, May 8, 1999, R2-334, Ex.; Confessed Cuban spy receives seven years, MIAMI HERALD, Jan. 29, 2000, at B1, R2-355 at C- 2; Contrite Cuban spy couple sentenced, MIAMI HERALD, Feb. 3, 2000, at B5, R3-355 at D-2; Miami Spy-Hunting, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. G-1; Carol Rosenberg, confessed Cuban spies sentenced to seven years, MIAMI HERALD, Feb. 24, 2000, at 1B, R3-397, Ex. I-1; Terrorism must not win in Brothers to the Rescue shoot-down, MIAMI HERALD, Feb. 24, 2000, at 8B, R3-397, Ex. J-1 ("More than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down."); Brothers Pilots Remembered (photo), MIAMI HERALD, Feb. 25, 2000, at B1, R3-397, Ex. K-1; Marika Lynch, Shot-down Brothers remembered, MIAMI HERALD, Feb. 25, 2000, at 2B, R3-397, Ex. L-1.

Regarding the motion filed by the Defense asking for a new trial on November, 2002, the Court points out that "**the evidence is of such a nature that a new trial would reasonably produce a new result**" and that, denying it, the Miami Court did not consider the "interests of justice".

In its decision the Court of Appeals gives a particular importance to the analysis of this motion, which principal purpose was to argue the facts' and law's tergiversation carried out by the prosecution in the case of the Cuban Five. A year later, on June 25, 2002, the United States Attorney filed a motion before this same Miami Court asking for a change of venue in the case Ramirez vs. Ashcroft, because considered that with the prejudice and the effect of the external influence in that community, it will be virtually impossible to ensure that the defendants will receive a fair trial.[4]

When the defendants were representatives of the Cuban government, the US Attorney said that it was possible that they had a fair trial. When the defendant was the Attorney General of the United States in a civil case for a demand of labor discrimination, he argued that it was "virtually impossible".

The Appeals Court affirms that the Miami Court denied the motion alleging that "the situation in Ramirez differed from the facts of this case in numerous ways" and declined to consider any of the exhibits submitted. It points out that if the effect of the community's prejudice is clear in a civil case of alleged employment discrimination, it is manifest in the case of the Cuban Five.

**Jury**

The Appeals Court concludes that "voir dire highlighted the community's awareness of this case and also of that of Elian Gonzalez." and in these circumstances "there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire; thus, a change of venue was required."[5]

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[4] "In November 2002, Guerrero renewed his motion for a new trial based on newly discovered evidence; the motion was adopted by Campa, Gonzalez, Hernandez, and Medina. Guerrero argued that a new trial was warranted because of "misrepresentations of fact and law made by the United States Attorney in opposing the . . . motion for change of venue" and submitted an appendix to support his argument. He also argued that the government's position regarding change of venue was contradicted by its position in a motion for change of venue which the government filed in Ramirez v. Ashcroft, No. 01-4835-Civ-Huck (S.D. Fla.) on 25 June 2002."
*(Idem pp.68-69)*

[5] "Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue–some of which focused on the defendants in this case and the government for whom they worked, but others which focused on relationships between the United States and Cuba–flooded Miami both before and during this trial. The trial required consideration of the BTTR shootdown and the martyrdom of those persons on the flights. During the trial, there were both 'commemorative flights' and public ceremonies

The decision refers that since the first day of the voir dire, the potential jurors were exposed to the community pervasive atmosphere[6] and it dedicates 12 pages to reflect the answers of those persons, making evident their prejudices and points of view against Cuba and its Government, as well as the fear that they felt for their personal security.

In the decision is registered that one of those persons, David Buker, who stated that he believed that *"Castro is a communist dictator and … I would like to see him gone and a democracy established in Cuba"…* was subsequently seated on the jury and named as its foreperson.[7]

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to mark the anniversary of the shootdown. Moreover, the Elian Gonzalez matter, which was ongoing at the time of the change of venue motion, concerned these relationships between the United States and Cuba and necessarily raised the community's awareness of the concerns of the Cuban exile community. It is uncontested that the publicity concerning Elian Gonzalez continued during the trial, "arousing and inflaming" passions within the Miami-Dade community. Despite the district court's thorough and extensive voir dire and its many efforts aimed at protecting the jurors' privacy, voir dire highlighted the community's awareness of this case and also of that of Elian Gonzalez. In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire; thus, a change of venue was required. The evidence at trial validated the media's publicity regarding the "Spies Among Us" by disclosing the clandestine activities of not only the defendants, but also of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable. Further, the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions."
*(Idem pp. 86-87*)

[6] "On the first day of voir dire, the district court addressed isolating the jurors following their exposure to a press conference held by the victims' families on the courthouse steps and their approach by members of the press. The trial judge instructed that she would no longer permit the victims' families to be present during voir dire "if there are efforts made to pollute the jury pool" and instructed the government to speak to the victims' families regarding their conduct. The court also noted that, because some of the potential jurors were approached by news media with cameras, she would question them regarding their discussions with the media and instruct the marshals to accompany the jury, with their juror tags removed, as they left the building. The district court then extended the gag order to cover the witnesses and the jurors.

Later that same day, a copy of the Miami Herald which contained an article about the case was found in the jury assembly room. The next day, after Hernandez's attorney commented that the previous day's article was "disturbing," Guerrero's counsel mentioned that he had viewed one of the potential jurors reading the article while in the courtroom."
*(Idem pp. 86 -87)*

[7] "During voir dire, the venire members were questioned about their political opinions and beliefs. Some venire members were clearly biased against Castro and the Cuban government… When asked about the impact any verdict in the case might have, David Cuevas stated that he "would feel a little bit intimidated and maybe a little fearful for my own safety…"
*(Idem pp. 23-25)*

On this aspect the Appeals Court analyzes the evidences that the Miami Court declined to consider, in particular the testimony of the Florida International University's Professor of Sociology, Dr. Lisandro Pérez that "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 . . . even if the jury were composed entirely of non-Cubans, as it was in this case" and his explanation that the Cubans created a "true ethnic enclave" which exercised strong economic and political influence within the Miami-Dade County community.

The decision also adds the analysis of the legal psychologist Dr. Kendra Brennan, who characterized the results of a poll conducted in Miami as reflecting "an attitude of a state of war . . . against Cuba."[8]

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"Other venire members indicated negative beliefs regarding Castro or the Cuban government…" *(Idem p. 27)*

[8] "The appendix filed in support of the motion for new trial included an affidavit by Professor Moran, news articles, and reports by Human Rights Watch regarding threats to the freedom of expression within the Miami Cuban exile community.
The news articles addressed the numerous incidents of violence and threats by anti-Cubans in the decade preceding the trial. The Human Rights Watch reports covered harassment and intimidation suffered by Miami Cuban exiles in expressing moderate political views as to Cuban relations or Fidel Castro's government. The motion for new trial was also supported by a public opinion survey conducted by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez. By affidavit, Dr. Brennan characterized the results of a poll of Miami Cuban-Americans as reflecting "an attitude of a state of war . . . against Cuba." She reviewed Moran's survey and stated that it "accurately reflects profound existing bias against those associated with the Cuban government in Miami[-]Dade County" where "[p]otential jurors . . . would be impervious to traditional methods of detecting and curing bias through voir dire and court instruction." Brennan determined that, although 49.7 percent of the local Cuban population strongly favored direct United States military action to overthrow the Castro regime, only 26 percent of the local non-Cuban population and 8.1 percent of the national population favored such action. Similarly, 55.8 percent of the local Cuban population strongly favored military action by the exile community to overthrow the Cuban government but only 27.6 percent of the local non-Cuban population and 5.8 percent of the national population favored such action. She concluded that there was "an attitude of a state of war between the local Cuban community against Cuba" which had "spilled over to the rest of the community" and had a "substantial impact on the rest of the Miami-Dade community." She found that the documented community bias showed a 'deeply entrenched body of opinions [so entrenched as to often not be consciously held] that would hinder any jury in Miami-Dade County from reaching a fair and impartial decision in this case.'
Dr. Pérez concluded that "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 . . . even if the jury were composed entirely of non-Cubans, as it was in this case." His conclusion was based on a number of factors, including the demographics of the area and the cohesiveness, political impact, interests, and emotional concerns of the Cuban community. Specifically, he noted that "persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in the venue group in Miami-Dade County, comprising two out every seven residents." He explained that the Cubans created a "true ethnic enclave" which exercised strong economic and political influence within the Miami-Dade County community…"

The judges exhaustively analyze all the harassing actions organized by the anti-Cuban groups and the local media against the jurors during the trial and the repeatedly warnings given by the Miami Court judge. [9]

They point out that "some of the jurors indicated that they felt pressured and even expressed concern that they were filmed "all the way to their cars and [that] their license plates had been filmed." This compelled the judge to take measures to protect the jurors' privacy.

**Considerations**

- "When the jurors are to be drawn from a community which is already permeated with hostility toward a defendant … the court should examine the various methods available to assure an impartial jury. Those methods include … **granting a change of venue when the community has been repeatedly and deeply exposed to prejudicial publicity.**"[10]

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"The district court denied the motion, stating that 'the situation in Ramirez differed from the facts of this case in numerous ways' because it 'related directly to the INS's handling of the removal of Elian Gonzalez from his uncle's home, an event which, it is arguable, garnered more attention here in Miami and worldwide'."
"The district court did not consider the "interests of justice" issue and thus declined to consider any of the exhibits submitted in support of this argument, including Dr. Brennan's survey and conclusions and Dr. Pérez's study."
*(Idem pp. 72-77)*

[9] "The district judge stated that she was 'increasingly concerned' that various persons connected with the case were not following her order based on the 'parade of articles appearing in the media about this case'… She warned all counsel and agents associated with the case that appropriate action would be taken and that the U.S. Attorney's Office would be held responsible."

"As the case proceeded to trial, media attention expanded. On the first day of voir dire, the district court observed that one of the victims' families conducted a press conference which was filmed outside of the courthouse during the lunch break and that some of the jurors were approached by the media. She then acknowledged that "[t]here is a tremendous amount of media attention for this case."
*(Idem p. 38-39)*

[10] "A fair trial in a fair tribunal is a basic requirement of due process," requiring not only "an absence of actual bias," but also an effort to "prevent even the probability of unfairness." *(Idem p.78)*
"When the jurors are to be drawn from a community which is "already permeated with hostility toward a defendant," whether that hostility is a result of prejudicial publicity or other reasons, the court should examine the various methods available to assure an impartial jury... and granting a change of venue when the community has been repeatedly and deeply exposed to prejudicial publicity."
"While a change of venue or a continuance should be granted when prejudicial pretrial publicity threatens to prevent a fair trial, a new trial should be ordered if publicity during the proceedings threatens the fairness of the trial."

- "If community sentiment is strong, courts should place "emphasis on the feeling in the community rather than the [result] of voir dire" which may not "reveal the shades of prejudice that may influence a verdict."

- **"Empanelling an [impartial] jury in this community was an unreasonable probability because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami."**

- **"The perception that these groups [of Cuban exiles that continue to operate in the Miami area] could harm jurors that rendered a verdict unfavorable to their views was palpable."**

- **"It is uncontested that the publicity concerning Elian Gonzalez continued during the trial [of the Cuban Five], "arousing and inflaming" passions within the Miami-Dade community. In these circumstances "there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire".**

- "A prosecutor may not make improper assertions, insinuations, or suggestions that could inflame the jury's prejudices or passions. His obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction."[11]

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"It is unnecessary to determine whether prejudice is disclosed during voir dire if the evidence reflects a 'generally hostile atmosphere of the community' which causes the jurors to "inherently suspect circumstances of . . . prejudice against a particular defendant." Pamplin v. Mason, 364 F.2d 1, 6, 7 (5th Cir. 1966). Further, where community hostility is prevalent, "[i]t is unnecessary to prove that local prejudice actually entered the jury box." Id. at 6. If community sentiment is strong, courts should place "emphasis on the feeling in the community rather than the transcript of voir dire' which may not 'reveal the shades of prejudice that may influence a verdict'."
Presumed prejudice has been found "where prejudicial publicity so poisoned the proceedings that it was impossible for the accused to receive a fair trial by an impartial jury . . . and the press saturated the community with . . . accounts of the crime and court proceedings." United States v. Capo, 595 F.2d 1086, 1090 (5 Cir. 1979). Factors to be considered in determining prejudice include the extent of the dissemination of the publicity, the character of that publicity, the proximity of the publicity to the trial, and the familiarity of the jury with the charged crime."
*(Idem pp. 80-83)*

[11] " …the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions."
"The grant of a new trial may be based on pretrial publicity, a prosecutor's improper closing argument…"
"Attorneys representing the United States are burdened both with an obligation to zealously represent the government and, as a "representative of a government dedicated to fairness and equal justice to all," an overriding obligation of fairness" to defendants. United States v. Wilson, 149 F.3d 1298, 1303 (11 Cir. 1998). A prosecutor may not make improper assertions, insinuations,

- **In this case a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the improper prosecutorial references.**

## CONCLUSION

**"In light of the foregoing discussion, the defendants' convictions are REVERSED and we REMAND for a new trial."**

**To see the full text of the decision of the Court of Appeals**
**http://www.ca11.uscourts.gov/opinions/ops/200117176.pdf**

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or suggestions that could inflame the jury's prejudices or passions. United States v. Rodriquez, 765 F.2d 1546, 1560 (11 Cir. 1985). Such an obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction." United States v. Crutchfield, 26 F.3d 1098, 1103 (11 Cir. 1994) (internal citation omitted). A trial may be rendered fundamentally unfair by the prosecution's use of factually contradictory theories. See Smith v. Groose, 205 F.3d 1045, 1051-52 (8 Cir. 2000) (holding that the prosecution's use of contradictory theories for different defendants in a murder trial violated due process). A prosecutor's reliance on a legal position despite "knowing full well" that it is wrong is "reprehensible" in light of his duty "by virtue of his oath of office."
*(Idem pp.87-90)*
"During closing arguments, the government commented that Hernandez's attorney had called the shootdown "the final solution" and noted that such terminology had been "heard . . . before in the history of mankind." It argued that the defendants had voluntarily joined "a hostile intelligence bureau" that saw "the United States as its prime and main enemy." It stated 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 convicted the "Cuban sp[ies] sent to . . . destroy the United States."
*(Idem pp. 62-62).*

In a very exceptional move, the government asked the twelve judges of the Court of Appeals of the Eleventh Circuit to review the panel's decision through a so-called *en banc* procedure. Exactly one year later, in spite of the strong disagreement voiced by the judges who made up the panel, the Court plenum revoked, by majority, the 93-page decision of the three judges and refuted the claim that a climate of violence and intimidation prevailed in Miami. In the quarter century before this decision, that court had never ruled in favor of a person accused of a federal crime.

## Excerpts of the DECISION OF THE EN BANC COURT, August 9, 2006

**Dissenting Opinion of Judge BIRCH joined by Judge KRAVITCH:**

**P. 70-71**

I respectfully dissent. I remain convinced that this case is one of those rare, exceptional cases that warrants a change of venue because of pervasive community prejudice making it impossible to empanel an unbiased jury. The defendants, as admitted agents of the Cuban government of Fidel Castro, were unable to obtain a fair and impartial trial in a community of pervasive prejudice against agents of Castro's Cuban government, whose prejudice was fueled by publicity regarding the trial and other local events. Accordingly, I would reverse their convictions and remand for a new trial.

I am convinced that, based on circuit precedent, our consideration of the denial of a motion for change of venue requires an independent review of the totality of the circumstances surrounding the trial.

…

My review of the evidence at trial is more extensive than is typical for consideration of an appeal involving the denial of a motion for change of venue because I conclude that the *trial evidence itself* created safety concerns for the jury which mandate venue considerations.

…

Moreover, in this media-driven environment in which we live, characterized by the ubiquitous electronic communications devices possessed by even children (e.g., the cell phone, the I-pod, the laptop, etc.), this case presents a timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age. Given the multiple resources for almost instantaneous communication and the plethora of media extant today, the considerations embraced by the Court in earlier times fail to address these developments.

**P. 74**

The evidence submitted in support of the motions for change of venue was massive.

**P. 107**

A. Denial of Motion for Change of Venue

This case presents the opportunity to clarify circuit law to conform with Supreme Court precedent. The district court misfocused its inquiry under Federal Rule of Criminal Procedure 21(a).

**P. 112 – 113**

In this case, however, the district court focused solely on the prejudicial publicity prong of the analysis. *It made no findings regarding the prejudice within the community.* In denying a change of venue, the district court ignored its own recognition of the substantial likelihood of prejudice as a result of witnesses' press events and the unsequestered jury's exposure, the community events and memorials honoring the victims of the shootdown, and the fear created in the minds of the jurors from the evidence of spies and weapons in their neighborhoods, and the history of violence practiced by some members of the Cuban-exile community.

Despite the district court's numerous efforts to ensure an impartial jury in this case, I am not convinced that empaneling such a jury in this community was possible because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami. Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue–some of which focused on the defendants in this case and the government for whom they worked but others which focused on relationships between the United States and Cuba--flooded Miami both before and during this trial.

**P. 114**

With the emotional intensity of the events in the community and the publicity of those events, which relate both directly and indirectly to these defendants, the "jurors may well have been affected even if they were attempting to follow the court's instructions." In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire; thus, a change of venue was mandated.

**P. 118**

Here, a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the prosecutor's improper prosecutorial references and position regarding a change of venue. Moreover, the evidence at trial strongly suggested not only adverse economic consequences for jurors voting for acquittal, but the prospect of violence from an already impassioned and emotional community possessed of firearms and bombs.

**P. 119**

In light of the foregoing discussion, I can only conclude that the defendants' convictions should be reversed and the case should be remanded for a new trial.
I am aware that, for many of the same reasons discussed above, the reversal of these convictions would be unpopular and even offensive to many citizens.

## Recent Developments of the Appeal Process

Given the *en banc* Court sent the case back to the three-judge panel to examine the remaining issues of the appeal, on August 20, 2007, an oral hearing called by this panel took place at the Atlanta Court of Appeals for the 11th Circuit. As in the two previous hearings held in March 2004 and February 2006, the parties —US government and the defense—put forth their arguments and replied to the questions put to them by the judges.

This hearing was yet another step in the long appeal process for the Cuban Five undertaken the moment they were sentenced in 2001. On this occasion, the US government once again proved unable to refute the arguments of the defense or to substantiate its accusations.

The defense, however, offered irrefutable proof of the improper conduct shown by the government throughout the legal proceedings brought against the Five, a flagrant violation which affects the entire case, related to prosecution's invention of crimes which it could not prove during the trial, promotion of a hostile atmosphere and manipulation of the evidence and the jury.

The lack of evidence needed to substantiate the two main charges —conspiracy to commit espionage and conspiracy to commit first-degree murder—and the imposition of completely irrational and unjustifiable life sentences, has been another key argument advanced by the defense in its efforts to reveal the arbitrary nature of the process. The government itself recognized during the trial that it could not produce a single secret document to prove the charge of espionage and that it had met an "insurmountable obstacle" in its efforts to prove the charge of conspiracy to commit murder.

On June 4, 2008, the 3-judge panel expressed its opinion, ratifying the guilty verdicts of the Five; ratifying the sentences of Gerardo Hernández and René Gonzalez; annulling the sentences of Antonio Guerrero, Fernando González and Ramón Labañino and referring the cases once again to the Miami District Court so they could be re-sentenced.

**Excerpts of the 11TH CIRCUIT COURT OF APPEALS' OPINION ON THE CASE OF THE CUBAN FIVE, June 4, 2008**

## 3. Medina's sentence

## P. 72 – 74

We agree with Medina. The district court did not find that top secret information was gathered or transmitted.

…

The district court erred. Like the Guideline that we interpreted in Chastain, section 2M1.3 clearly contemplates a completed event: the actual gathering or transmission of top secret information. Because the district court did not find that top secret information was gathered or transmitted, we remand for resentencing.

…

We remand to the district court to consider in the first instance whether a departure is appropriate in the light of our conclusion that section 2M3.1(a)(1) is inapplicable in the absence of a finding that top secret information was gathered or transmitted.

**5. The Sentences of Guerrero and Hernandez**

**P. 80- 81**

As we explained before, the district court erred when it applied section 2M3.1(a)(1) instead of section 2M3.1(a)(2) in the absence of a finding that top secret information was gathered or transmitted.

…

We remand to allow the district court to resentence Guerrero in the light of our ruling, but we need not remand for resentencing of Hernandez. Because he was sentenced to life imprisonment on his murder-conspiracy conviction, any error in the calculation of Hernandez's concurrent sentence for conspiracy to gather and transmit national-defense information is "irrelevant to the time he will serve in prison."

## Concurring Opinion of Judge Birch

## P. 83

As evident from the dissent on the issue of conspiracy to commit murder, this issue presents a very close case.

I remain convinced, for all the reasons and facts set out in my prior dissent that the motion for change of venue should have been granted. The defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed.

Given the technological advances and 24-hour news cycle that have become prevalent in our nation since 1984, I respectfully suggest that this case provides a timely and appropriate opportunity for the [Supreme] Court to address the issue of change of venue in this internet and media permeated century.

## Dissenting Opinion of Judge Kravitch

## P. 84

I concur in the majority opinion with the exception of section 3.c. (the court's affirmance of Count 3, conspiracy to commit murder), from which I respectfully dissent. In my view, the Government failed to present evidence sufficient to prove beyond a reasonable doubt that Hernandez agreed to participate in a conspiracy.

**P. 94 – 99**

Furthermore, "parties must have agreed to commit an act that is itself illegal—parties cannot be found guilty of conspiring to commit an act that is not itself against the law."
…

A shoot down in Cuban airspace would not have been unlawful; thus, Hernandez could not have been convicted of conspiracy to murder unless the Government proved beyond a reasonable doubt that he agreed for the shoot down to occur in international, as opposed to Cuban, airspace.

**…**
Here, the Government failed to provide sufficient evidence that Hernandez entered into an agreement to shoot down the planes at all. None of the intercepted communications the Government provided at trial show an agreement to shoot down the planes.

As discussed below, because there is no evidence that Hernandez agreed to such a shoot down, I dissent.

**…**

But the Government presented no evidence that when Hernandez agreed to help "confront" BTTR that the agreed confrontation would be a shoot down.

Moreover, even assuming that Hernandez agreed to help Cuba shoot down the BTTR planes, the Government presented no evidence that Hernandez agreed to a shoot down in international airspace. It is not enough for the Government to show that a shoot down merely *occurred* in international airspace: the Government must prove beyond a reasonable doubt that Hernandez *agreed* to a shoot down in international airspace.
…

The Government cannot point to *any evidence* that indicates Hernandez agreed to a shoot down in international, as opposed to Cuban, airspace.
At most, the evidence demonstrates that Hernandez agreed to a confrontation in either Cuban *or* international airspace. But such an agreement is not enough to sustain a conspiracy conviction.

**To see the full text of the decision of the Court of Appeals (http://www.ca11.uscourts.gov/opinions/ops/200117176.opn3.pdf)**

On September 2nd, 2008 the 11TH Circuit Court of Appeals (en banc) denied the petitions of rehearing filed by the defense and ratified the June 4, 2008 decision.