

## THE CASE OF CUBAN FIVE UNJUSTLY INCARCERATED IN US JAILS

Update: January 2013

In September 1998, five Cuban men Gerardo Hernandez, Ramón Labañino, Fernando Gonzalez, Antonio Guerrero and René Gonzalez were arrested in Miami by FBI agents. Their mission in the United States was monitoring the activities of the groups and organizations responsible for terrorist activities against Cuba, basically anti-cuban groups in Florida.

They were all accused of conspiracy against US. Three of them, Gerardo, Ramón and Antonio were also accused of conspiracy to commit 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 document had been confiscated from them.

A key witness of the prosecution was General James R. Clapper, Jr., a man with 32 years of experience in military working, exclusively on intelligence matters and who rose to become the Director of the Defense Intelligence Agency before his retirement. He had 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."

Another expert presented by defense who also denied founding classified documents to Cuban Five was Edward Breed Atkeson, US Army Major General.

In spite of the vigorous objections raised by the Five's defense, the case was tried in Miami, Florida, a community with more than half a million of Cuban exiled and 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, becoming 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 compiled, including the testimonies of three retired Army generals and a retired admiral, who agreed that, did not existed evidence of espionage.

Seven months later, a new charge was brought against Gerardo Hernández: that of conspiracy, but this time to commit murder, as 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 took place on February 24th, 1996. 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.

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, recognizing that it had failed to prove the main charge of conspiracy to commit murder imposed to Gerardo Hernandez, alleging that « in the light of evidence presented to this trial, this is an "insurmountable obstacle" for US, in connection with winning the case.

The jury nonetheless found the Five guilty of all charges, under intense pressure brought to bear on them by the local media.

After seeking maximum sentences, the prosecution introduced in court 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.

The Judge accepted the government petition and added special restrictions to sentences imposed to Rene Gonzalez, 15 years and Antonio Guerrero, 1 life term plus 10 years, both born American citizens: Rene, 3 years of supervised release in US territory and Antonio 5 years.

#### **INITIAL SENTENCES:**

- **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 (plus 5 years of supervised release in US territory)
- **Fernando González Llort:** 19 years
- **René González Schwerert:** 15 years (plus 3 years of supervised release in US territory)

#### **THE APPEAL PROCESS**

The appeal process began on March 2004, and 3 judges of the Court of Appeals for the Eleventh Circuit of Atlanta were in charge of analyzing appeal arguments from both parts, studying official records and materials collected related to the case, etc.

All the while, on May 27, 2005, the UN Working Group on Arbitrary Detention, after reviewing the arguments advanced by the family of the Cuban Five and the US government, concluded that their imprisonment was arbitrary and urged the US government to take the measures needed to rectify the situation.

The Working Group stated that, based on the facts and the circumstances in which the trial was held, the nature of the charges and the severity of the convictions, the imprisonment of the Five violates Article 14 of the International Convention on Civil and Political Liberties, to which the United States is a signatory.

Never before, the UN Working Group on Arbitrary Detention has denounced as arbitrary the privation of liberty in a case judged in the United States due to violations committed during the legal process.

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 in the course of all

the appeal process another key argument advanced by the defense in its efforts to reveal the arbitrary nature of the process.

On August 2005 a three-judge panel of the court of appeals revoked all of the convictions on the grounds that the five accused had not received a fair trial in Miami. In an unexpected 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 banc procedure. Exactly one year later, on August 2006, in spite of the strong disagreement voiced by two of the three judges who made up the panel, the Court revoked, by majority, the decision of the three judges.

On September 2, 2008, the Court of Appeals ratified the guilty verdicts of the Five; ratified the sentences of Gerardo Hernandez and René Gonzalez; considered wrongful the sentences of Antonio Guerrero, Fernando Gonzalez and Ramón Labañino and revoked them, referring the cases once again to the Miami District Court so they could be re-sentenced.

In that occasion the full Court of Appeals recognized that not secret or national defense information was obtained or transmitted in the case of the defendants in the charge of conspiracy to commit espionage.

On January 30<sup>th</sup>, 2009 a petition to review to case was introduced to US Supreme Court.

On March 6<sup>th</sup>, 12 documents of Court's friend (*amicus curiae brief*) were presented to US Supreme Court to support the petition of Cuban Five lawyers to review the case. It's about an unprecedented fact because it represents the biggest number of amicus ever presented until nowadays to this top American judicial organ to review a penal process.

In May, US government presented to Supreme Court its opposition to accept reviewing the Cuban Five case, which makes clear once again Cuba – US disagreement and political character of the case.

On June 15, 2009 the U.S. Supreme Court announced, without explanation, its decision not to review the case of the Five, in spite of the solid arguments made by the defense attorneys from the obvious and multiple legal violations committed during the whole trial.

The US Supreme Court also ignored the universal backing to the petition and to the Five, expressed by "amicus curiae" like:

Ten Nobel laureates, among them Timor Leste President Jose Ramos Horta, Adolfo Perez Esquivel, Rigoberta Menchu, Jose Saramago, Wole Soyinka, Zhores Alferov, Nadine Gordimer, Gunter Grass, Dario Fo and Mairead Maguire, as well as the Mexican Senate, the National Assembly of Panama, and Mary Robinson, the former President of Ireland (1992-97) and former UN High Commissioner for Human Rights (1997-2002), and UNESCO General Director Federico Mayor.

They were joined by hundreds of parliamentarians around the world, among them 75 members of the European Parliament, including two ex-presidents and three current vice presidents of this Legislature; as well as numerous legal and human rights associations of different countries of Europe, Asia and Latin America, international personalities and legal and academic organizations in the United States.

With this US Supreme Court decision, legal resources to appeal the Atlanta Court's ruling that ratified their convictions practically ran out.

On October 13, 2009, in the US District Court for the Southern District of Florida took place the sentencing hearing of Antonio Guerrero, during which, the same Judge that in December 2001 condemned him to a life sentence plus 10 years, was obliged to admit that in Antonio's case does not exist evidence of gathering nor transmitting secret information. However, she imposed him an unfair sentence of 21 years and 10 months of imprisonment plus 5 years of supervised release. US government agreed impact of Cuban Five solidarity worldwide campaign while justifying its demand for a minor sentence to Antonio. "This case has produced a big controversy and clamor worldwide."

The sentencing hearings for Fernando González and Ramón Labañino took place on December 8, 2009. The original sentence of Fernando González (19 years) was changed to 17 years and 9 months of imprisonment, while the Ramon Labañino's sentence (life plus 18 years) was reduced to 30 years of imprisonment.

On June 14, 2010, a collateral appeal (also known as habeas corpus) was filed in Miami Federal Court in the name of Hero of the Republic of Cuba Gerardo Hernandez. This is the last legal recourse for him within the U.S. system. Its presentation call into question all aspects of Gerardo's sentence, focused on two aspects:

First of all, there is no evidence regarding most serious accusation made against Gerardo Hernández – conspiracy to commit murder, in connection with shooting down two light planes belonging to Brothers to the rescue. Overwhelming evidence document that Gerardo had nothing to do with the Cuban decision of shooting-down two planes and the fact that facing violations of Cuban airspace fully complies with international law.

Second, trial held in Miami, most hostile city toward Cuba – was essentially unfair because the jury was contaminated by US government financed propaganda. In 2006 it was known that journalists in Miami were paid to fully cover trial and write in local Medias, radio and tv, confirming Cuban Five guilty and stimulating fear and prejudice in the community. Those journalists also harassed Judge and jury members causing protest among them.

Also were included violations committed by government regarding evidence manipulation, falsification and often concealment to obstruct justice. Technical aspects of defense procedure were analyzed.

In October 2010 Amnesty International make public a report about the case that concludes; *"However, the organization believes that the concerns outlined above combine to raise serious doubts about the fairness of the proceedings leading to their*

*conviction, in particular the prejudicial impact of publicity about the case on a jury in Miami. Amnesty International hopes that these concerns can still be given due consideration by the appropriate appeal channels. Should the legal appeals process not provide a timely remedy, and given the long prison terms imposed and length of time the prisoners have already served, Amnesty International is supporting calls for a review of the case by the US executive authorities through the clemency process or other appropriate means ».*

On April 25, 2011 US government asks the Court to reject Gerardo Hernandez Nordelo's Habeas Corpus demand and to not allow a new process to analyze his arguments and pretended evidence used against him. The same procedure was used in relation to Antonio Guerrero and René González's motions.

On August 16, 2011 Gerardo introduced his reply to US government response, in which all arguments were answered and an affidavit from Gerardo, extended by his former lawyer, Paul McKenna, that support main proposals conforming Habeas Corpus's demand; an affidavit from Mara Verheyden-Hilliard, executive director of Partnership for Civil Justice Fund, an organization with a long experience in civil rights litigation into Federal Courts, with emphasis on themes related to First and Fourth amendment, as well as themes related to government transparency. Finally, an appendix listing journalist paid by government to publish negative articles about Cuban Five during the process in Miami.

About Antonio, he also introduced his reply to the government response in August, which emphasizes, like Gerardo, in the use of employees paid by Radio and Marti TV in order to publish articles aiming anger and hostility toward Cuba and Cuban agents.

Now, the decision of accepting or not those motions it's on the Court of District's hands.

Gerardo and Antonio documents were also valid for René, Ramón and Fernando's case, who also asked for their Habeas Corpus. They presented their motion by the second semester of 2011 and use the same arguments previously explained.

On October 7<sup>th</sup>, 2011, Rene Gonzalez was released and began his 3 year-supervised release period in US territory, characterized by many restrictions. Till now, Rene has received several death threats, and his life it's in permanent danger due to his exposition to anti-Cubans groups.

Even if his lawyer has presented two times a "Modifying Motion for conditions of Supervised release", requesting to allow him to travel to Cuba to finish this period, Judge Lenard has refused such possibility.

On March 2012 Rene asked for a permission to travel to Cuba for two weeks to visit his brother Roberto Gonzalez, who died short after of cancer. The permission, granted by Judge Lenard was a right decision, but it doesn't mean that justice will be served in his case car Rene was compelled to return to USA once the period was over.

During 2012 Gerardo's lawyers also request a new legal recourse included in his collateral appeal: the Discovery Motion, which asks for a new oral process and seeks the Court order US government to release documents and other materials in its power unpublished throughout the legal process. This recourse is based on the right of petitioner and co-accused to know the range of the negative pub campaign financed by US government, in order to guarantee their guilty verdict.

Its main goal is to obtain, through interrogatories, documents, depositions and summons, all necessary evidence so it can be examined by Jury during the process and prove that sentences should be cancelled.

US government is against admitting a new oral process for Gerardo and now Judge Lenard must give her verdict.

## ADDITIONAL INFORMATION

Fernando: Cell share with other 10 prisoners. No place to keep his personal belongings, books, etc. He would be released on February 27, 2014. He was 35 years old when incarcerated. Now he is 49 years old.

Tony: He was 40 years old when incarcerated. Now he is 54 years old. He would be released on September 18, 2017, and should stay 5 more years in US territory under supervised release. His mother Mirta is 80 years old.

Ramón: He was 35 years old when incarcerated. Now he is 49 years old. He would be released on October 30, 2024.

Gerardo: He was 33 years old when incarcerated. Now he is 49 years old. Both life terms sentences plus 15 years condemn him to be in prison for the rest of his life. His wife is continuously refused by US government to visit him, which makes impossible for them to conceive a child.

René: He was 42 years old when incarcerated. He was released on October 7, 2011, and started his 3 year-supervised release period. Now he is 56 years old.

Adriana Pérez, Gerardo Hernandez's wife has been continuously denied the possibility to visit him, depriving her on one of the most elemental human rights, having a child and make a family. Adriana has requested President Barack Obama allow her to have a child with Gerardo, without an answer yet.

Rosa Aurora Freijanes and Fernando González couldn't either conceive a child. Biological clock limited their possibility to have a child.

Antonio Guerrero is still separated from his mother Mirta Rodriguez, who hold out hope to be alive and meet her son in 2017 when release, despite of her age and her health problems.

Olga Salanueva couldn't visit René either. US visa has been repeatedly denied. Ramón's daughters have grown up without their father, who holds out hope to be with his family before 2024, despite his health problems.