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June 4, 2014

The Hon. President Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

The Hon. Eric Holder, Jr.  
Attorney General  
U.S. Department of Justice  
Washington, DC

Re: Report on the convictions of and disproportionate sentences imposed on the Cuban Five and legal frameworks available for the humanitarian release and repatriation to Cuba of three members of the Five continuing to serve prison sentences in the U.S.

Dear President Obama and Attorney General Holder,

The accompanying report regarding the case of the Cuban Five is submitted on behalf of the Center for Human Rights and Constitutional Law, an organization dedicated to protecting and promoting respect for and compliance with human rights norms and constitutional provisions intended to safeguard the rights of vulnerable groups and insular minorities. We have attempted to objectively review the critical evidence of record in the Cuban Five case and, for the first time that we are aware, synthesize the case in one comprehensive document for consideration by your Administration. Based on our review of the record, we believe there are strong grounds for humanitarian release of the remaining three members of the Cuban Five still serving federal prison sentences in the U.S. and their removal to Cuba, whether under Article II, Section 2 of the U.S. Constitution or pursuant to the well-established Presidential power to enter into Executive Agreements with other governments affirmed. *E.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (“our cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate ... this power having been exercised since the early years of the Republic.”)

On May 10, 2014, Josefina Vidal, the top official in the Cuban Foreign Ministry handling North America, said in a CNN interview, “We have made clear to the U.S. government that we are ready to have a negotiation in order to try and find a solution, a humanitarian solution to Mr. [Alan] Gross’ case on a reciprocal basis.” Gross, a U.S. citizen, visited Cuba several times working as a U.S. government subcontractor for the U.S. Agency for International Development as part of a program funded under the 1996 Helms-Burton Act. In 2011 he was convicted in Cuba of acts against the independence and territorial integrity of the State and is currently serving a 15-year prison sentence there. Vidal added “Cuba has legitimate humanitarian concerns related to the situation of the Cuban Five.” The U.S. State Department immediately rejected such

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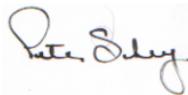
reciprocity, stating “There is no equivalence between these situations ... So we are not contemplating any release of the Cuban Five, and we are not contemplating any trade.”

In July 2010, this Administration authorized a prisoner swap with Russia involving ten people convicted of conspiring to act as agents of the Russian government. In announcing the swap on July 9, 2010, Attorney General Eric Holder argued that none of the ten defendants passed classified information to Russia and none were charged with espionage. The same can be said of the Cuban Five. None passed classified information to Cuba and none were charged with espionage.

The State Department’s rejection of any consideration to release the three remaining members of the Cuban Five imprisoned in the U.S. ignores several critical points: (1) The Cuban Five never gathered or transmitted to Cuba a single classified national security document; (2) under any objective standard the conviction of Gerardo Hernández for “conspiracy to commit murder” in relation to Cuba’s 1996 shoot down of two Brothers-to-the-Rescue planes and life sentence were entirely unjustified (as explained in detail in the attached report); and (3) the three remaining members of the Cuban Five still incarcerated here have already served sixteen years in U.S. prisons, a very long period when their actual activities are considered objectively.

For reasons discussed in the accompanying report, the humanitarian release of the remaining three members of the Cuban Five would clearly serve the national interest and interests of justice, increase opportunities for steps towards normalization of commercial and diplomatic relations with Cuba, and encourage the reciprocal humanitarian release of U.S. citizen Alan Gross. We urge members of this Administration to review and impartially consider the accompanying report.

Respectfully,



Peter A. Schey  
President and Executive Director  
Center for Human Rights and Constitutional Law



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## I. INTRODUCTION

This report provides a detailed review of the legal case of the Cuban Five and explains in objective terms why the sentences handed down in the case were disproportionate to the activities in which the Cuban Five actually engaged.

The primary purpose of this report is to provide the United States Administration with a better understanding of the sentences and conviction of the Cuban Five and to encourage serious consideration of releasing and returning to Cuba the three remaining members of the Five still serving prison sentences in the U.S.

Section II of this report provides a brief overview of the historical background justifying Cuba's assignment of intelligence officers to South Florida, the history of illegal penetrations of Cuban airspace by the U.S.-based Brothers-to-the-Rescue (BTTR) and Cuba's repeated public and diplomatic efforts to curb these illegal flights without resorting to force.

Section III reviews all relevant Cuban Government messages to the Cuban Five prior to the February 24, 1996 shoot down of two BTTR planes and explains how these messages in no way justified or supported the later conviction of Gerardo Hernández for conspiracy to commit murder.

Section IV discusses in detail communications within the U.S. Government on the day before the BTTR shoot down. These communications reveal that the U.S. Government was likely better informed than Gerardo Hernández about what Cuba would do the following day, yet took no steps to stop the BTTR from its planned mission.

Section V reviews in detail the events as they unfolded on February 24, 1996 leading to Cuba's shooting down of two BTTR planes. The chronology makes clear that Gerardo Hernández had *no involvement* whatsoever in the events that would later justify his conviction for conspiracy to commit murder. The U.S. Government (not Gerardo Hernández) shared information with the Cuban Government about the BTTR's planned mission and missed several opportunities during the day to avoid the shoot down. As this section explains, there was nothing Gerardo Hernández could have done to stop the shoot down.

Section VI discusses the inconsistent radar evidence regarding the location of the BTTR shoot down. Although it is universally acknowledged that Gerardo Hernández's conviction could not stand had the BTTR shoot down taken place in Cuban waters, this section also makes clear that Gerardo Hernández is not guilty of conspiracy to commit murder *regardless* of where the shoot down took place.

Section VII reviews all Cuban Government messages to Gerardo Hernández in the days and weeks following the BTTR shoot down and explains how these messages in no way show that he was part of a criminal conspiracy to commit murder.

Section VIII includes a brief summary of the legal proceedings against the Cuban Five in the U.S. federal courts.

Section IX provides an analysis of the “Conspiracy to Commit Murder” conviction and life sentence of Gerardo Hernández *for a crime he did not commit*. This section also explains in objective terms that Hernández’s actions were so completely unrelated and inconsequential to the shoot down that his sentence to life in prison without the possibility of parole is an extreme miscarriage of justice.

Section X discusses why the sentences of Hernández, Guerrero and Labañino for conspiracy to commit espionage were excessive and disproportionate to their actual involvement in any criminal conduct.

Section XI addresses three methods consistent with U.S. laws and historical practice to arrange for the release and return to Cuba of the three Cuban intelligence officers still serving sentences in U.S. prisons, including possible reduction in sentences, withdrawing of convictions and entering of new guilty pleas with reduced sentences, and/or reciprocal humanitarian release.

## **II. OVERVIEW: THE HISTORICAL BACKGROUND JUSTIFYING CUBA’S ASSIGNMENT OF THE CUBAN FIVE TO SOUTH FLORIDA, THE BROTHERS-TO-THE-RESCUE REPEATED VIOLATIONS OF CUBAN AIRSPACE AND CUBA’S DIPLOMATIC PROTESTS**

The men known as the Cuban Five are Cuban nationals Gerardo Hernández Nordelo, Ramón Labañino Salazar, Antonio Guerrero Rodríguez, Fernando González Llort, and René González Schwerert. They were arrested in Florida in September 1998. The case of the Cuban Five cannot be understood outside of the context of relations between Cuba and the United States.

Were these relations somewhat normalized, there may have been no need for Cuba to assign agents to the U.S. to monitor groups engaged in a range of activities aimed at overthrowing the Cuban Government and a couple of military bases from which attacks could be launched against Cuba on short notice. Cuba is situated less than 100 miles (160 km) from the coast of Florida, yet the two nations have had no normal diplomatic relations since 1961. The U.S. Government tolerated numerous attacks on Cuba’s national security launched by private exile groups from U.S. soil in the years before the Cuban Five were assigned to gather information about these groups.

### **1. Brief overview of the circumstances that led Cuba to assign Intelligence Officers to South Florida in the early 1990s**

In the first 15 years after the Cuban revolution half a million Cubans arrived in Miami.<sup>1</sup> Within this community, some of the exiles developed a number of anti-Castro organizations, and received considerable funding from the CIA and right-wing figures.<sup>2</sup>

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<sup>1</sup> <http://www.economist.com/node/21550419> - Three of the four congressional districts in Miami are held by Cuban-American Republicans, as is one of Florida's Senate seats.

<sup>2</sup> <http://www.spartacus.schoolnet.co.uk/JFKanticastr.htm>; Jefferson Morley, Revelation 19.63, Miami Daily News (12th April, 2001).

For national security reasons, Cuba was naturally concerned with the expansion and U.S. tolerance (and often CIA-funding) of numerous exile groups committed to the overthrow of the Cuban Government, including Alpha 66, Brigade 2506, Brothers To The Rescue (“BTTR”), Independent and Democratic Cuba (“CID”), Comandos F4, Comandos L, the Cuban American Military Council (“CAMCO”), the Ex Club, Partido de Unidad Nacional Democratica (“PUND”), the National Democratic Unity Party (“NDUP”), Coordination of United Revolutionary Organizations (“CORU”), Insurreccional Movement of Revolutionary Recovery (“MIRR”), and United Command for Liberation (“CLU”). Several of these groups were not above committing violent attacks against their former homeland.

CORU, for example, was an umbrella organization for several violent exile groups, including Alpha-66 and Omega 7. It was established by Orlando Bosch and Luis Posada. According to U.S. Government documents, CORU was responsible for more than 50 terrorist operations, including the September 1976 car-bomb assassination of Chilean diplomat Orlando Letelier in Washington, D.C..

On October 6, 1976, two bombs downed a Cubana passenger plane just west of Bridgetown, Barbados, killing all 73 people aboard. The victims included two-dozen Cuban fencers, most of them teenagers returning home from an international fencing championship. In Miami’s exile community, such actions were not universally condemned. As Alfredo Duran, the chair of the Dade County Democratic Party, explained at the time: “The Cuban community believes the struggle against Castro is a war, and in a war that kind of activity is not frowned upon.” The Cuban Government has long maintained that the downing of Cubana Flight 455 was the work of extremist exiles based in South Florida.

It is well known that throughout the 1980s and early 1990s exile terrorist attacks including numerous bombings continued in Cuba. The U.S. Government took no meaningful steps to prosecute those responsible despite numerous requests by the Cuban Government urging the U.S.G. to enforce its laws to stop these terrorist attacks and prosecute the perpetrators.

By the early 1990s the situation had considerably worsened. In October 1993, the Associated Press reported that Cuban exile “training camps” were operating freely in the Florida Everglades. Andrés Nazario Sargén, head of Alpha 66, was quoted saying: “There is already a rebellion inside Cuba. We are in a countdown. It’s a matter of 80 or 90 days.” He bragged that Alpha 66 had already staged five recent missions inside Cuba. Tony Bryant with Comandos L was quoted as saying, “We are in the process of learning where every general lives ... [and they] will be targeted to be eliminated.”<sup>3</sup>

In October 1993 Cuban authorities arrested José Marcelo García Rubalcaba at Havana airport after discovering hand grenades and Alpha 66 propaganda in his luggage.

In November 1993 a Cuban pilot employed by Cuba’s agriculture department stole a plane at gunpoint that he then flew, along with other Cubans, to Florida.<sup>4</sup> He was welcomed in the U.S.

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<sup>3</sup> Jane Franklin, *Cuba and the United States: A Chronological History*, page 323 (1996)

<sup>4</sup> *Id.*, page 329.

In February 1994, the Miami Herald reported that three Alpha 66 leaders had circulated threatening letters warning that all those who visit Cuba or “dialogue” with Cuban authorities “directly or indirectly” would become military targets of Alpha 66.<sup>5</sup>

On May 8, 1994, Cuban commercial airline pilot Basilio Garcíá Breto hijacked a passenger plane and forced it to land in Miami. Although no other crewmembers or passengers sought “asylum” in the U.S., Basilio Garcia appeared at a press conference where he was fêted as a hero by the Cuban American National Foundation. The FBI dismissed the matter as a “diversion” of the plane rather than a hijacking.<sup>6</sup>

On May 10, 1994, Rodolfo Frometa and Fausto Marimón announced they and other members of Alpha 66 were forming a new group, Comandos F4, to pursue a more openly violent strategy against Cuba. They illegally purchased weapons including a Stinger missile.

On August 8, the third vessel in 1994 was hijacked by force and sailed to the U.S. This time one of its officers, Roberto Aguilar Reyes, was murdered and his body fell or was pushed overboard. Three others were forced to jump overboard. The hijackers headed to Florida. Cuba informed the US Coast Guard and provided the name of the leader, Leonel Macías González, who was wanted for the murder of Reyes in Cuba.<sup>7</sup> Despite being wanted in Cuba to face a murder charge, González was hailed as a “hero” by exile groups and granted “asylum” in the U.S. in April 1995.<sup>8</sup>

*Under these circumstances involving repeated violent and terrorist attacks and hijackings, the Government of Cuba logically decided to place intelligence officers in South Florida to gather information about exile groups planning terrorist attacks on Cuba. Under similar circumstances the U.S. Government would certainly have done as much to defend its security and the security of its citizens.*

## **2. Brothers-to-the-Rescue**

Prominent among the Miami groups dedicated to overthrowing the Cuban government was BTTR, headed by José Basulto.

After coming to the U.S. from Cuba to study in 1959, Basulto returned to Cuba in 1960 to the underground resistance against the new regime.<sup>9</sup> Soon after arriving in Cuba, he was recognized by the CIA and selected for eleven months of training in intelligence, explosives, and sabotage in Panama, Guatemala, and the United States. He once told a reporter for the Miami Herald “I was trained as a terrorist by the United States, in the use of violence to attain

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<sup>5</sup> *Id.* page 330.

<sup>6</sup> Los Angeles Times, *Cuban Pilot Flies Airliner to Miami, Asks Asylum* (May 9, 1994).

<sup>7</sup> New York Times, *U.S. Lets Cubans From Hijacking Stay, Detaining One* (August 11, 1994).

<sup>8</sup> Orlando Sentinel, *Accused Cuban Hijacker Granted Asylum in U.S.* (April 20, 1994).

<sup>9</sup> Lawrence and Van Hare, *Betrayal: Clinton, Castro and the Cuban Five* at 25, (2009) (“Betrayal”). *Betrayal* is a book generally sympathetic to the actions of the BTTR. One of the authors, Thomas Van Hare, was a pilot with BTTR.

goals.” After his CIA training, Basulto returned to Cuba to serve as a clandestine radio operator to prepare the ground for the Bay of Pigs Invasion.<sup>10</sup>

In 1961, under CIA sponsorship, Basulto infiltrated Cuba for a commando operation intended to sabotage an alleged missile site. The mission that was later aborted. In 1962 Basulto organized an expedition of the Directorio Revolucionario Estudiantil, taking a boat to Cuba and firing a 20 mm cannon at the Hotel Rosita de Ornedo.<sup>11</sup>

In 1991 Basulto founded BTTR ostensibly to fly missions searching for rafters from Cuba in the Florida Straits. However, when in 1996 the governments of the U.S. and Cuba reached migration accords effectively ending the phenomena of Cubans fleeing in small boats, BTTR’s income dwindled. Basulto then refocused his actions directly at overthrowing the Cuban Government.

### **3. Repeated illegal penetration of Cuban airspace and waters by U.S.-based private aircraft and vessels prior to February 24, 1996 and Cuba’s unheeded protests**

Cuba’s decision to down two BTTR planes in February 1996, an action that resulted in Gerardo Hernandez’s conviction for conspiracy to commit murder, cannot be evaluated without an understanding of the history of illegal and often dangerous penetrations of Cuba’s airspace by BTTR and other planes based in South Florida.

On May 17, 1994, two Cessna 337 aircraft (registration N58BB and N108LS) coming from Florida violated Cuban airspace flying between 1.5 and 5.5 miles off Cuba’s coastline. On May 25<sup>th</sup> and 29<sup>th</sup>, 1994, five aircraft from Florida again violated Cuban airspace. On May 29, 1994, five aircraft from Florida again violated Cuban airspace. On July 10, 1994, an aircraft coming from the United States again violated Cuban airspace.<sup>12</sup>

By Diplomatic Note no. 908, dated July 21 1994 to the Interest Section of the United States (Embassy of Switzerland), the Ministry of Foreign Affairs of Cuba informed the U.S. Government that aircraft operating from Florida had violated Cuban airspace on numerous occasions. These aircraft also “made unlawful use of radio frequencies established for air traffic control and have interfered with the efforts to detect and control drug trafficking in the [Flight Information Region [“FIR”]] of Cuba.” The Note further stated that on numerous occasions, aircraft had flown into active Cuban danger areas; specific information was provided on the dates of these incursions, the danger areas, aircraft models and registrations. The Ministry requested that the “U.S. authorities adopt the appropriate measures to put a stop to these practices.”<sup>13</sup>

On November 10, 1994, two C337 aircraft took off from Guantanamo Naval Base and promptly violated Cuban airspace. During the over flight, the aircraft released hundreds of

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<sup>10</sup> *Id.*

<sup>11</sup> Silvia Pedraza, *Political Disaffection in Cuba's Revolution and Exodus*, Cambridge University Press (2007), page 103.

<sup>12</sup> Report of the ICAO Fact-Finding Investigation (June 1996), U.N. Security Council, S/1996/509, at 37.

<sup>13</sup> *Id.*

leaflets against the Cuban Government. On November 18, 1994, the Ministry of Foreign Affairs of Cuba informed the U.S. by Diplomatic Note No. 1443 of the incursions on November 10<sup>th</sup>. The Government of Cuba formally requested “the Government of the US to act responsibly and to adopt permanent measures to put an end to the illegal and provocative activities that might have negative consequences and are not in the interest of either of our two countries.”<sup>14</sup>

On April 4, 1995, a C337 aircraft violated Cuban airspace in areas to the north of the western region between Santa Fe and Guanabo, Havana Province, over a length of 5 miles, keeping a distance from the Cuban coast which varied between 5 and 10 miles. By Diplomatic Note No. 694 dated May 25 1995, the Cuban Ministry protested to the United States “the violation of Cuban airspace [on April 4, 1995] by a small aircraft from the territory of the U.S.” The Ministry wanted to “make perfectly clear the worrisome danger of a situation that violates the sovereignty of Cuba and puts at risk air traffic in the area.” The Ministry again requested that “U.S. authorities adopt effective measures to put a stop to activities like the one described above.” As best we can determine, the U.S. did not respond to any of the above Diplomatic Notes.

On July 5, 1995, Cuba sent another Diplomatic Note, No. 882, stating that radio stations in the United States had “been broadcasting information about the organization of a flotilla of boats that intends to depart from ports in the United States territory and arrive at the 12 mile boundary which demarcates Cuban territorial waters, with the explicit purpose of carrying out provocative actions and defying the Cuban Government and people. According to ‘Radio Marti’...one of the boats intends to ... approach the Cuban coast up to a 6-mile distance ...” The Ministry, *inter alia*, emphasized that “Cuban authorities will not tolerate the slightest violation of the territorial integrity of Cuba and will [not] bear any liability for measures taken in legitimate defense of its territory.”

In 1995, Basulto and the BTTR publicly announced their new plan to commit “civil disobedience” within Cuban territorial waters. Basulto announced that while the BTTR would continue to look for rafters, “*I would also say that flying into Cuban airspace and showing solidarity with the Cuban people is itself a rescue action.*” (Emphasis added).<sup>15</sup>

On July 7, 1995 the Department of State (DOS) issued a statement that it was “aware of preparations being made to dispatch a ‘flotilla’ of privately owned vessels from Florida to enter Cuban territorial waters in order to lay wreaths and hold commemorative ceremonies at the site of the sinking of the tug boat ‘Trece de Marzo’ on July 13, the first anniversary of that tragedy.” The statement continued: “The Cuban government has informed the DOS that it is very concerned about the proposed action and that its normal practice is to detain those who enter Cuban territory without permission.”

On July 13, 1995, four BTTR aircraft lead by Basulto entered Cuban airspace and overflowed Havana at a very low altitude in a dangerous manner. As Basulto and his cohorts entered Cuban airspace, Havana Air Traffic Control warned the planes to leave. Despite the presence of MiGs circling the BTTR planes, Basulto chose to ignore the warnings. At great

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<sup>14</sup> *Id.* at 38.

<sup>15</sup> Kimber, Stephen, *What Lies Across the Water* (Kindle, 2013) page 187.

risk to himself and Cuban civilians, Basulto kept flying towards downtown Havana and then buzzed the city at a low altitude for 13 minutes dropping nearly 20,000 leaflets.<sup>16</sup>

Each time a BTTR pilot filed a false flight plan with the FAA, he was engaged in a felony violation of the criminal laws.<sup>17</sup> The U.S. Government could have used these violations to bring felony criminal charges against the BTTR pilots--or at least threatened BTTR pilots with criminal prosecution--if the illegal conduct continued. Under FAAS rules, the U.S. Government also could have taken prompt administrative action against Basulto.

Rather than taking immediate steps to ground Basulto for his dangerous and illegal actions, on August 8, 1995, the U.S. Department of State issued an announcement warning BTTR and other pilots that entering Cuban airspace without prior authorization from the Cuban government may cause one to be subject to arrest or other enforcement action by Cuban authorities for violation of Cuban law:

In a public statement issued on July 14, the Cuban government asserted its “firm determination” to take actions necessary to defend Cuban territorial sovereignty and to prevent unauthorized incursions into Cuban territorial waters airspace ... “Once more (the Cuban Government) warns that ... *any airplane [illegally penetrating Cuban airspace may be] downed.*” The Department takes this statement seriously ... If persons enter Cuba territorial waters or airspace without prior permission, they may place themselves and others at serious risk...

(Emphasis supplied). BTTR was clearly on notice that future provocations of the Cuban Government could result in their planes being “downed.”

On August 28, 1995 the U.S. Federal Aviation Administration (FAA) also issued a NOTAM (Notice to Airmen) that warned BTTR and other pilots to avoid airspace in Cuban territory. The NOTAM referred to Cuba’s determination to take actions against aircraft violations of Cuban airspace and that “*any airplane may be downed for incursions into its airspace.*” (Emphasis added).

These warnings to BTTR pilots are important because the U.S. Government would later convince a jury to convict Gerardo Hernández of conspiracy to commit murder when Cuba finally shot down two BTTR planes in large part arguing that Hernández should have “warned” the BTTR pilots of the risk they faced if they penetrated Cuban airspace. In fact, the BTTR pilots had been repeatedly warned of the risks they were taking by both the U.S. Government and (as explained below) by Cuban air controllers and yet consistently ignored these warnings.

By Diplomatic Note No. 1100 dated August 21, 1995, the Cuban Ministry of Foreign Affairs forwarded a copy of a letter from the Civil Aviation Institute of Cuba (“IACC”) to the FAA Administrator. The Cuban letter referenced the BTTR’s incursion into Cuban airspace on July 13, 1995 and stated: “I beg you to take the actions that your administration deems convenient to prevent such actions from reoccurring... According to information published in some US media, ... anti-Castro organizations established in the U.S. intend to carry out [a]

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<sup>16</sup> Report of the ICAO Fact-Finding Investigation *supra*, at page 40.

<sup>17</sup> 18 U.S.C. § 1001 (2013).

new action in violation of our laws on September 2, 1995 ... In the face of this situation, we call on your Administration to take all the necessary measures to prevent this publicized provocation to Cuban sovereignty from happening, in view of the unpredictable outcome this action may have.” *The Cuban Government warned that the U.S. Government’s failure to stop BTTR pilots from illegally entering Cuban air space “may bring grave consequences,” and requested that the FAA promptly undertake “whatever measures are necessary” to insure that the illegal flights into Cuban air space and over Havana’s rooftops be halted. Indeed, the Cuban Government again made very clear that if the BTTR flights continued to illegally invade Cuban air space, “[the] aircraft [may be] downed.”*

On January 9<sup>th</sup> and 13<sup>th</sup>, 1996, Cuban authorities again detected two light aircraft coming from Opa Locka Airport in Florida, which, according to Cuba, overflew the Havana Province and released propaganda encouraging actions against the Cuban Government. The leaflets were scattered all over the Province. Two days later Basulto took credit for dropping the leaflets in an interview with the Miami Herald, but said “I cannot give you any of the technical details of how we did it.” When later interviewed by the ICAO, Basulto incredibly claimed that the leaflets were dropped over international waters outside Cuba’s airspace and the wind carried them for 12 miles over the ocean to Havana.

On January 16, 1996, the Ministry of Foreign Affairs of Cuba again transmitted to the U.S. “its concern over the serious situation that has been created in the airspace of [Cuba] by aircraft from the territory of US.” The Note went on: “[T]he recent serious incidents ... demonstrate clearly that the measures taken are not strong enough to obviate the risk of dangerous acts whose perpetrators come from the U.S. For this reason [Cuba] must demand of the [U.S.] that it adopt all additional measures necessary for the immediate halt of [these] incidents ...”

On January 19, about a month before the BTTR shoot down, Bill Richardson, one of President Bill Clinton’s closest confidantes on foreign policy, visited Cuba with Calvin Humphrey, a senior counsel to the U.S. House of Representatives Intelligence Committee. They met with Fidel Castro and top officials including President of the National Assembly Richard Alarcón.

Castro made clear to Richardson that Cuba was deeply disturbed by BTTR’s provocations and that he expected the U.S. Government to take necessary measures to stop the BTTR from again invading Cuban airspace. Cuban officials involved in the meetings were convinced that the U.S. Government would reign in the BTTR, though Richardson later denied he made any such commitment.

On January 22, 1996, Cecilia Capestany, employed by the Office of International Aviation of the FAA, in charge of communicating with the U.S. State Department regarding Basulto and the BTTR, distributed an email to several FAA officials in which she stated:

In light of last week’s intrusion [into Cuban airspace by the BTTR], this latest over flight can only be seen as further taunting of the Cuban government. [The U.S. State Department] is increasingly concerned about Cuban reactions to these flagrant violations. They are also asking from the FAA, “What is this agency doing to prevent/deter these actions?” ... *Worst case scenario is that one of these days the*

*Cubans will shoot-down one of these planes and the FAA better have all of its ducks in a row.* (Emphasis added).

During the first week of February 1996—just three weeks before the shoot down—Robert White, the former U.S. Ambassador to El Salvador, traveled to Havana with a group of retired military and foreign service officers, including Eugene Carroll, a retired U.S. rear-admiral. The U.S. delegation visited several Cuban military training sites and met with the chief of staff of the Cuban Armed Forces and senior Cuban military officers. During these meetings the Cubans repeatedly raised their security concerns about BTTR flights into Cuban airspace. Cuban Air Force Brigadier General Arnaldo Tamayo Mendez complained that the U.S. Government had effectively ignored Cuba's numerous diplomatic protests. Carroll and White would later recall that Tamayo asked, "What would be the reaction of your military if we shot one of those planes down? We can, you know." *White felt this was "a calculated warning ... We were meant to take away the very clear impression that the Cubans had reached the limit of their tolerance of the Brother's flights."* (Emphasis added).<sup>18</sup> Ambassador White and his group conveyed Cuba's concerns to officials of the U.S. Defense Intelligence Agency and State Department.<sup>19</sup>

On February 14, 1996, Basulto held a press conference in Miami to announce BTTR's support for and financial backing of a proposed 3-day national conference to start February 24 by Concilio Cubano, a coalition of dissident groups in Cuba. (February 24 is a symbolic date in Cuban history marking the beginning of Cuba's war of independence from Spain.) Basulto was clearly planning another BTTR mission for February 24. At a press conference he announced: "The process of change in Cuba cannot wait for the government of the United States."

On February 21, René González Schwerert, one of the Cuban Five, had a meeting with Basulto after which he wrote a note to Gerardo Hernández that he believed Basulto was planning something expressly for the upcoming Concilio meeting on February 24.

In summary, the February 24 BTTR shoot down took place after a long series of often dangerous and illegal penetrations of Cuban airspace by BTTR planes. Of importance to the later conviction of Gerardo Hernández for alleged conspiracy to commit murder, all of Cuba's public and diplomatic announcements threatening to "down" BTTR planes involved concern over BTTR's penetration of Cuban airspace. *Not once did the Cuban Government ever indicate that it had any plan to shoot down any aircraft in international airspace.* Equally important to note is the specificity and consistency of Cuba's warnings to the U.S. Government, and in turn the U.S. Government's warnings to the BTTR pilots. As discussed in the next section, Cuba's communications about its intentions sent to Gerardo Hernandez were not nearly as explicit as its diplomatic messages to the U.S. Government. While the Cubans sent to monitor BTTR in Florida were only told about a possible "confrontation" with BTTR if it persisted in violating Cuban airspace, the U.S. Government was repeatedly told the consequence could be the "downing" of the BTTR planes.

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<sup>18</sup> Carl Nagin, *Backfire*, New Yorker, January 26, 1998.

<sup>19</sup> *Id.*

### III. CUBAN GOVERNMENT MESSAGES TO INTELLIGENCE OFFICERS IN FLORIDA PRIOR TO THE BTTR SHOOT-DOWN FAIL TO IMPLICATE GERARDO HERNÁNDEZ IN ANY CONSPIRACY TO COMMIT MURDER

The messages sent by Cuban authorities to Gerardo Hernández and one other Cuban agent in South Florida in the weeks prior to the February 24 shoot down of two BTTR planes do not show in any way that Hernández was guilty of a conspiracy to commit murder.

Hernández was on vacation in Cuba from November 1995 to January 26, 1996, when he returned to Miami. In his absence, a Major in Cuban intelligence, Manny Ruiz, at the time known to Hernández only as “A-4” or “Miguel,” took over Hernandez’s duties and even lived in his apartment in North Miami.<sup>20</sup> Hernández provided Ruiz with a decoding disk containing a program required to decode high frequency radio messages to and from Cuba. Hernández also briefed Ruiz on the assignments of the intelligence officers reporting to him.

Juan Pablo Roque (code name German), another Cuban agent in Florida who had previously infiltrated the BTTR as a pilot but had not flown a BTTR mission in many months was increasingly vocal about his desire to return to Cuba. Cuban officials agreed as early as March 1995 that Roque should return to Cuba, but arrangements for his return were delayed.

In December 1995, while visiting in Cuba, Hernández was informed of a plan entitled “*Operation Venecia*” designed to “neutralize the counterrevolutionary actions of BTTR” developed by the Cuban Directorate of Intelligence.<sup>21</sup> Operation *Venecia* involved having Roque safely return to Cuba where he would publicly expose his infiltration of the BTTR and “call attention of the national and international public opinion” to the activities of the BTTR in violating Cuban sovereignty and international law.<sup>22</sup> Hernández was instructed to work on Roque’s return by “the end of the February or beginning of March 1996.” (Emphasis added)<sup>23</sup> *Since Roque’s return to Cuba was authorized any time through early March, it was not part of a criminal conspiracy to shoot down BTTR planes on February 24, as the U.S. Government would later argue at Hernández’s trial.*

An encrypted message from Cuban authorities transmitted on January 25, 1996, clearly stated the strategy underlying Operation *Venecia*: “Despite [Roque’s] opposition to come by plane, headquarters is interested in this variable. Analyze again with him. Give him the argument that plane will not be stolen nor violent action be taken. It can be any BTTR plane. Look for opportune moment. Travel alone. That way we can denounce BTTR's role with spectacular proof and raise the spirit of the population facing BTTR's impunity. It will be the culmination of the heroic activity carried out by a loyal pilot. Inform extremely urgent [Roque’s] decision.”<sup>24</sup> Nevertheless, the plan for Roque’s returning to Cuba in a stolen BTTR plane never took hold.

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<sup>20</sup> Affidavit of Gerardo Hernández, March 16, 2011, U.S. District Court, Case No. 10-21957-Civ-LENARD (“Hernández Affidavit”), ¶ 6J.

<sup>21</sup> *Id.* ¶ 6D.

<sup>22</sup> *Id.* ¶ 6G.

<sup>23</sup> *Id.*, ¶ 6H.

<sup>24</sup> U.S. Government's Exhibit HF 112; *See* Trial Transcript Vol. #17, at 01-01-01, U.S. Government Witness Susan Salomon (translator of intelligence related documents for the FBI).

Plane tickets introduced as evidence at the trial showed that Hernández did not return to Miami until January 26, 1996.

A message from Cuban authorities likely addressed to and received by Manny Ruiz dated January 29, 1996, stated that, “superior headquarters approved Operation *Scorpion* in order to perfect the *confrontation* of CR [counterrevolutionary] actions of Brothers to the Rescue.”<sup>25</sup> (Emphasis added). Communications continued the following day, January 30, 1996, and stated, “In addition report types of planes flying, registration, pilots and passengers, permission for flight, day and time, altitude, distance, what type of action will be taken. If German [Roque] and Castor [González] are asked to fly at the last minute without being scheduled, find excuse not to fly....”<sup>26</sup> At most, all this message conveyed was that Cuba wanted to “confront[ ]” the “actions of Brothers to the Rescue,” and that Roque and González should not fly with the BTTR if asked to do so “at the last minute.”

From all appearances, Operation *Scorpion* was not an operation aimed at shooting down BTTR planes. Cuba’s agents in Miami had failed to anticipate the surprise January incursion of BTTR planes into Cuban airspace and dropping of hundreds of thousands of leaflets and Cuba now wanted its agents to be more vigilant, to improve their observation of BTTR activities, and to report on those activities. It expected its agents to more accurately start reporting on “[the] types of planes flying, registration, pilots and passengers, permission for flight, day and time, altitude, distance, what type of action will be taken.”

Regardless of how one interprets this message, at most it talks about “confront[ing]” the BTTR; this is nothing close to a criminal plan to shoot down BTTR planes in international airspace, the charge later leveled against Hernández by the U.S. Government and on which he was found guilty. Nor is this message as clear as the diplomatic notes sent to the U.S. Government that repeatedly stated that unless the BTTR illegal flights into Cuban airspace stopped, the planes would be shot down.

The U.S. Government claims that Hernández relayed these “no-fly” instructions to Cuban agent Rene González in a communication dated February 13 that was signed using Ruiz’s and Hernández’s code names. Hernández declares that he was unaware that Ruiz sent this message to González. *Hernández would not have sent the message because he knew that González had not flown with the BTTR for two years and would not be flying with BTTR regardless.* During cross-examination at trial, FBI Supervisory Special Agent Giannotti confirmed that González had not flown with BTTR since 1994.<sup>27</sup>

A message dated February 13, 1996, related to Operation *Venecia* and instructed Hernández (“Giro”) to help Roque return to Cuba, flying from Tampa to Cancun and then to

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<sup>25</sup> U.S. Government's Exhibit HF 115; See Trial Transcript Vol. #17, at 01-01-01, U.S. Government Witness Susan Salomon (translator of intelligence related documents for the FBI).

<sup>26</sup> *Id.*

<sup>27</sup> See Trial Transcript Vol. #31, at 01-21-01, U.S. Government Witness Giannotti (“Q. And [Gonzalez] quit flying with Brothers to the Rescue in 1994, and became a member of the air group for the Democracy Movement some time in 1995? A. Yes, the documents reflect that.”)

Cuba on February 23 or February 27.<sup>28</sup> Roque was allowed to choose the date. Both Cuban and U.S. Government officials knew the BTTR would launch a mission on February 24th. If there was a conspiracy to shoot down the BTTR planes, and Roque's return to Cuba was part of a "murder" conspiracy as the U.S. Government argued at the trial, Cuban authorities would have insisted that Roque return on February 23 so he could issue public statements about the BTTR in Cuba on February 24, and not given him the option of returning three days *after* a planned shoot down. *In any event, nothing in this message states or implies that Cuba had a plan to shoot down BTTR planes on February 24 in international airspace.*

The next Cuban message was transmitted on February 18 and said that neither Roque nor Castor (Rene González) should fly with the BTTR "on days 24, 25, 26 and 27 coinciding with celebration of Concilio Cubano *in order to avoid any incident of provocation that [BTTR] may carry out and our response to it.*"<sup>29</sup> (Emphasis added). Nothing in this message says or implies that Cuba planned to shoot down BTTR planes, let alone in international airspace, the charge later made against Hernández. On its face the message states that *if* BTTR carried out a provocation on February 24 through 27, Cuba did not want its agents on board the BTTR planes "to avoid ... our response" to the provocation.

There was no need for Hernández to instruct Roque and González not to fly with the BTTR on February 24-27. By February 23, Roque would be on his way back to Cuba as part of Operation Venecia, and Hernández knew that González had not flown with BTTR in two years and was no longer even listed as a BTTR pilot.

In a message from Cuba on February 24, 1996, the day of the shoot down, Cuban authorities stated: "When *Venecia* return is made public, Castor's [González's] first reaction should be incredulity then condemnation. He should call Montoto<sup>30</sup> to verify news. His contact with BTTR should be extremely cautious. Express solidarity and without instigating action, he should say they will return the blow at the opportune moment and place."<sup>31</sup> *In short, even on the day of the shoot down, Cuba's instructions focused only on how González should react to the news of Roque's return to Cuba, not his reaction to a shoot down of BTTR planes.* This message would give Hernández no clue that a shoot down was planned for that day.

Whether the pre-shoot down messages sent by Cuba to Hernández and/or "A-4" ("Miguel") are considered separately or together, there is no rational way to read them to convey to Hernández a Cuban plan, let alone make him part of the plan, to shoot down BTTR planes on February 24 in international airspace, the "conspiracy to commit murder" charge for which Hernández was later found guilty.

#### **IV. DEVELOPMENTS INVOLVING THE U.S. GOVERNMENT THE DAY BEFORE THE BTTR SHOOT DOWN**

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<sup>28</sup> Exhibit HF123-G3.

<sup>29</sup> U.S. Government's Exhibit HF 123.

<sup>30</sup> Refers to FBI Special Agent Oscar Montoto.

<sup>31</sup> U.S. Government's Exhibit HF 125G-3; *See* Trial Transcript Vol. #17, at 01-01-01, Government Witness Susan Salomon (translator of intelligence related documents for the FBI).

On February 23 1996, the U.S. Department of State's Office of Cuban Affairs contacted the FAA's Office of International Aviation to indicate that because the Government of Cuba had denied Concilio Cubano permission to hold a public meeting on February 24, 1996 "the BTTR might attempt a flight to demonstrate solidarity with dissidents and in defiance of the Cuban government ... Information suggests that the Cubans are in a 'rough mood'."

The FAA in turn alerted several agencies to monitor data from three radar sites in South Florida. FAA officials in Miami also asked that a B-94 radar balloon at Cudjoe Key be sent up for this special occasion. The FAA message sent by Cecilia Capestany entitled "Cuba Alert Urgent" stated in part:

[T]he FAA cannot PREVENT flights such as this potential one, but we'll alert our folks in case it happens and we'll document it (as best we can) for compliance/enforcement purposes. [The U.S.] State [Department] has also indicated that the [Cuban government] would be less likely to show restraint (in an unauthorized flight scenario) this time around...

The FAA's message to an "unauthorized flight scenario" again shows that Cuba's numerous warnings about confronting the BTTR or a "shoot down" all involved illegal penetration of Cuban airspace, not flights in international airspace.

The FAA's email noted that Cuba had denied Concilio's request for permission to hold its meeting commencing February 24, several dissidents had been arrested, and BTTR had announced a mission on February 24 to mark the 101<sup>st</sup> anniversary of "the rallying cry of José Martí that began the War of Independence" and to express solidarity with the dissidents arrested in Cuba.

Capestany's message makes clear that BTTR would likely make another "unauthorized flight into Cuban air space tomorrow" and that the Cuba Government would be less likely to "show restraint" should BTTR carry out an unauthorized flight "this time around."

She claimed that the FAA could not prevent such flights, but that the FAA would "document" what took place for "compliance and enforcement" purposes. In fact, the FAA possessed more than sufficient evidence of Basulto's filing of false flight plans and illegal incursions into Cuban airspace that it long ago could have taken administrative action to stop him from flying. *Indeed, the FAA could have initiated criminal charges against Basulto (or threatened to do so) because making a false statement to a U.S. government official is a federal felony. The threat of a criminal charge or the filing of a criminal charge could have easily been used to stop Jose Basulto from further flights into Cuban airspace.*

Late on February 23, Richard Nuccio, President Clinton's point man on Cuba, most likely having received a copy of Capestany's urgent message, emailed Sandy Berger, President Clinton's deputy national security advisor, warning that another penetration of Cuban airspace by the BTTR on the next day "may finally trip the Cubans toward an attempt to shoot-down or force down the planes." Nuccio got no response from Berger until the next day, after the Cuban air force shot down two BTTR planes.

*The communications discussed above make clear that by the evening of February 23, high and mid-level U.S. Government officials in the FAA, the U.S. State Department, and the White House, were fully aware that a BTTR mission on February 24 could result in a shoot-down. Indeed, the U.S. Government was at least as aware of the dangers as the BTTR pilots themselves, yet did nothing to stop the BTTR's planned mission scheduled for the next day.*

BTTR leader Basulto publicly testified that he was aware of Cuba's warnings "for a long time," and that he and the other pilots all knew a consequence of entering Cuban airspace could be a shoot down. When flying missions he would communicate by radio with Cuban pilots and ground controllers, ignore their warnings, and urge Cuban pilots to defect in their planes, an act that would be criminal under Cuban law (as it would under U.S. law if a pilot defected to Cuba in a A-10 Thunderbolt II).

**V. THE FEBRUARY 24, 1996 SHOOT DOWN OF TWO BTTR PLANES: THE RECORD SHOWS THAT GERARDO HERNÁNDEZ HAD NO INVOLVEMENT WHATSOEVER IN THE SHOOT DOWN FOR WHICH HE WAS LATER CONVICTED**

According to the Commander of the Anti-Aircraft Defense and the Air Force of Cuba, February 24, 1996, was a "special day," the 101st anniversary of the start of the Cuban War of Independence.<sup>32</sup> Several large public events were planned in Cuba. BTTR had announced plans for that day and so the Commander went to the Air Force Command Center. The record in the Cuban Five case shows that the Commander had no communication with Gerardo Hernández on or before February 24, 1996.

On the morning of February 24, Basulto and supporters of the BTTR assembled at the hangar at Opa Locka Airport. At 9:12 A.M. Basulto, the pilot of the Cessna 337C commenced filing Visual Flight Rules (VFR) flight plans with the Miami Automated International Flight Service Station (AIFSS). The flight plans were for six BTTR aircraft to depart for a "rafter rescue flight" with a planned departure of 10:15 A.M.<sup>33</sup> *Gerardo Hernández had no idea about these flight plans. He had no communication whatsoever with Basulto and had not in any way encouraged Basulto to fly a mission that day.*

The planned routing would take the BTTR planes through both the Miami and Havana Flight Information Regions (FIRs). The planned route would cross MUD-8, MUD-9 and MUD-14, all "danger areas within the Havana FIR."<sup>34</sup> These danger areas had been notified as "active from 08:00 to 18:30 hours on 24 February 1996 by NOTAMs [FAA Notice to Airmen]."<sup>35</sup> Miami AIFSS verified that Basulto had checked applicable NOTAMs.

At 10:12 A.M. Cuban air defense radar detected three unidentified aircraft south of the 24N parallel, the outer boundary of the Cuban air defense identification zone (ADIZ). At 10:34 A.M. Cuban Anti-Aircraft Defense interceptor aircraft took off under direction of the Air Force Commander to persuade these aircraft to withdraw.<sup>36</sup> The unidentified aircraft retired to the

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<sup>32</sup> Report of the ICAO Fact-Finding Investigation (June 1996) *supra*, at 51 ¶ 2.3.1.1.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 51.

north at 11:17 A.M. in response to the military interceptor aircraft patrol, which then returned to base. Cuba's treatment of the unidentified aircraft tends to show that it had no plan to shoot-down civilian aircraft that did not persist in violating Cuban airspace.<sup>37</sup> Gerardo Hernández, of course, had no idea this incident took place.

*The U.S. Government did not inform the BTTR pilots at Opa Locka Airport that Cuban MiGs had been dispatched to intercept the unidentified planes that had flown close to Cuba earlier that morning.*

At 11:47 A.M., the BTTR amended three flight plans and allowed the remaining three to expire. They provided a new departure time of 12:30 P.M. for three aircraft. The routing plan was not changed and the revised plans were again submitted to Miami ARTCC and Havana ACC. *Gerardo Hernández had no idea about the revised flight plans.*

In addition to Basulto (call sign "Seagull One") and his spotter Arnaldo Iglesias and guests anti-Castro activists Andres and Sylvia Iriondo, a second plane with tail number N2456S was to be piloted by Carlos Costa with call sign "Seagull Charlie," and his observer, Pablo Morales. The third plane with tail number N2506 was to be piloted by Mario de la Pena, with call sign "Seagull Mike," and his observer, Armando Alejandro, Jr. *Gerardo Hernández had no idea about how many planes were flying or who would be on board.*

Before taking off, Basulto, the other BTTR pilots, the spotters and Basulto's guests discussed the dangers of the mission. Everyone was reminded of the risks of flying at an altitude of 500 feet and below close to the coast of Cuba. The risks were also outlined on a large sign that hung on the hangar wall, including the risk of death.<sup>38</sup>

At 1:07 P.M. Opa Locka TWR reported to Miami ARTCC, in response to an earlier request for information on BTTR activity that three BTTR Cessna aircraft had taxied for departure. At 1:14 P.M. Opa Locka TWR informed Miami ARTCC that the three BTTR aircraft were airborne. *Gerardo Hernández had no idea that three BTTR planes had left the Opa Locka airport. The U.S. Government, not Gerardo Hernández, advised the Cuban air controllers that the BTTR planes had taken off.*

Miami AIFSS was contacted by each of the three Cessna aircraft after take-off to activate their visual flight rules (VFR) flight plans.

The U.S. military's radar and intelligence officers at the North American Aerospace Defense Command (NORAD) were informed when the BTTR planes took off and focused on air traffic in the Florida Straits. They immediately became aware that the Cuban air defense system's five radar sites around Havana had come alive and would be tracking the BTTR planes. *Gerardo Hernández knew nothing about Cuba's radar sites coming alive. For its part, the U.S. Government did not advise the BTTR pilots that the Cuba's air defense system's five radar sites around Havana had come alive and would be tracking the BTTR planes.*

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<sup>37</sup> During this incident, the U.S. scrambled jets from Florida. It is possible that presence of U.S. jets was detected by Cuba and contributed to officials' decision to recall the Cuban MiGs to base.

<sup>38</sup> Lawrence and Van Hare, *supra* at 35.

As recorded by United States air defense radar, “the three Cessna aircraft did not follow the route given in the VFR flight plans.”<sup>39</sup> As the ICAO report makes clear, the actual route taken by the three BTTR planes was entirely different from the planned route.<sup>40</sup>

At 2:39 P.M. Cuban air defense radar detected aircraft north of the 24N parallel. Two Cuban military interceptor aircraft at Sam Antonio de los Banos air base, a MiG-29 UB and a MiG-23 ML armed with air-to-air heat seeking missiles took off at 2:55 P.M. to patrol 15 to 20 km north of the Cuban coast at altitudes between 200 and 500 m.

The three BTTR planes were broadcasting their position via transponders with their assigned codes. Based on these signals, the Cubans were able to track the BTTR planes positions and altitude.

The 24<sup>th</sup> Parallel is a demarcation line marking the U.S. Military’s Air Defense Identification Zone (“ADIZ”). It’s a line that triggers an automatic intercept by the U.S. military should any unidentified aircraft be heading north towards the United States.

At 3 P.M. Cuban air defense radar reported aircraft 12 NM south of the 24N parallel. Just prior to flying south of the 24N parallel, each BTTR pilot communicated with Havana ACC. Havana ACC replied to Basulto: “*Sir, we inform you that the area north of Havana is activated; you are taking a risk by flying south of twenty four.*”<sup>41</sup> (Emphasis added).

The Cuban Government had earlier announced that it would be conducting air and navy exercises between February 21 and 28 and had declared the area a “military danger zone.”

*Basulto responded to Havana ACC: “We know that we are in danger each time we fly into the area south of twenty four, but are ready to do so as free Cubans.”*<sup>42</sup> The U.S. Government would later argue that one of the primary reasons for Hernández conviction for conspiracy to commit murder was his failure to inform the BTTR that Cuba had sent messages to its agents in Florida talking about a possible “confrontation” with the BTTR if the group “provoked” Cuba (i.e. entered its airspace). *Any such warning would have been useless since as discussed earlier in this report the U.S. Government had warned Basulto and the BTTR pilots of this several times and Havana ACC again warned them as they crossed the 24<sup>th</sup> parallel.*

By this time U.S. radar had already sighted two Cuban MiGs flying off the north coast of Cuba at over 550 miles an hour. The Cuban Five had no knowledge that these MiGs had taken off. *The U.S. Government knew there were two Cuban MiGs in the area, but did not communicate this information to the BTTR pilots.*

Cuban radar showed that N5485S entered Cuban territorial airspace at 3:18 P.M. At about the same time, U.S. air defense radar showed N5485S as being just north of Cuban

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<sup>39</sup> Report of the ICAO Fact-Finding Investigation (June 1996), *supra* at 6.

<sup>40</sup> *Id.* at 5 (diagram of actual versus planned routes).

<sup>41</sup> Report of the ICAO Fact-Finding Investigation (June 1996), *supra* at 7.

<sup>42</sup> Lawrence and Van Hare, *supra* at 7.

territorial airspace.

From 3:17 to 3:21 P.M. the MiG-29 maneuvered under instructions of ground control and based on its own visual sighting of N2456S. Cuban ground control requested identification of the aircraft by type, color and registration.

The pilot of the MiG-29 held the rank of Lieutenant Colonel. He had about 500 hours flying experience in MiG-29 aircraft over 19 years and was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force regulations.<sup>43</sup> He reported to Cuban ground control that he was going to make a “warning pass” on the Cessna 337 (N2456S) flown by Carlos Costa. He did this by moving forward to the left of the Cessna and then turning sharply to the right above and ahead of the aircraft. According to the pilot, the Cessna “paid no attention to the pass and continued towards Havana at an altitude of 270 m.”<sup>44</sup>

As the MiG-29 again approached the Cessna from behind, Cuban ground control authorized destruction of the Cessna. *While the U.S. Government was tracking these events on radar, Gerardo Hernández had no idea these events were unfolding over the ocean north of Cuba.* The MiG-29 fired a Soviet-built R-23 air-to-air missile which seconds later downed the Cessna.

At the time it was downed U.S. radar showed the Cessna was just north of Cuban airspace.<sup>45</sup> The aircraft immediately disappeared from Miami Center’s and NORAD’s radars. Cuban radar showed the Cessna entered Cuban airspace at 3:08 PM and was shot down at 3:21 P.M. five nautical miles north of Baracoa, Cuba.<sup>46</sup> The ICAO concluded that the significant differences between the radar data provided by Cuba and the U.S. “could not be reconciled.”<sup>47</sup>

*Members of the Cuban Five, including Gerardo Hernández, of course, had and to this day have no independent way of knowing whether the BTTR planes entered Cuban airspace or not.*

The U.S. Government did not communicate to the remaining two BTTR planes that the Cessna 337 (N2456S) had just disappeared from Miami Center’s and NORAD’s radars.

At the same time as the first shoot-down, Basulto was communicating with Havana Center ground controllers: “Warm greetings. We report to you from twelve miles from Havana ... Havana looks just fine from up here ...”<sup>48</sup>

By about 3:21 or 3:22 P.M. Basulto had noticed a Cuban MiG in the area. At 3:22 P.M. N5485S informed Basulto that there was a MiG in the air. Basulto laughed: “We have the MiG around. Hee, hee, hee.”<sup>49</sup> On his plane’s intercom, which was recorded, he is heard saying

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<sup>43</sup> Report of the ICAO Fact-Finding Investigation (June 1996), *supra* at 15, ¶ 1.5.4.1.

<sup>44</sup> *Id.* at 10; *see also* page 52 ¶ 2.3.3.2.4.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 74 ¶ 2.3.5.3.2.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.*, *citing* GH-Ex. 40, page 10 (audiotape of Basulto’s cockpit radio traffic).

“They throw a MiG at us ... Barbarous, they are going to shoot ...”<sup>50</sup>

Immediately after the destruction of N2456S, Cuban air defense ground control dispatched a search and rescue (SAR) helicopter to the supposed area of impact. Interestingly, the helicopter was directed to an area less than six miles off the coast of Havana, consistent with Cuba’s asserting that the shoot-down took place within Cuban airspace.

According to U.S. air defense radar sources, Basulto’s plane (N2506), being flown by Arnaldo Iglesias while Basulto was filming the Cuban coastline, reached its southernmost position 1.5 nautical miles inside Cuban airspace at 3:20 P.M.

Cuban radar records showed that Basulto’s plane entered Cuban airspace at 3:15 P.M. and remained until 3:23 PM, reaching within 4 nautical miles from the coast north of Havana.<sup>51</sup> Despite both U.S. and Cuban radar showing Basulto entered Cuban airspace, he would later deny having done so.

After the shoot-down of N2456S, the MiG-29 was instructed to remain in the area. At 3:24 P.M. the MiG pilot reported seeing a second Cessna (N5485S). According to the pilot, he made a similar warning pass over the Cessna, turning sharply above and ahead of the Cessna from the left, “but the Cessna paid no attention to the pass.”<sup>52</sup> An eyewitness on the Norwegian cruise ship Majesty of the Seas who observed the shoot-down of N2456S would later report that he did not observe the MiG doing a warning pass. However, the warning pass may have taken place before any witnesses noticed the Cessna heading towards the ship about four to five nautical miles away.

At about 3:25 P.M. the pilot of the MiG-29 was authorized to destroy the second Cessna. He later stated that it was heading towards Havana when he fired a missile that destroyed the aircraft.<sup>53</sup> According to the log of the cruise ship Majesty of the Seas, the Cessna was observed “bearing 095 degrees.”<sup>54</sup> This would be a heading due east. After the destruction of the second Cessna, the MiG-29 and the MiG-23 returned to base.

The Cuban SAR helicopter was re-directed to the second impact site. According to Cuban radar this plane was shot down 6 nautical miles off the coast of Havana.<sup>55</sup>

The occupants in Basulto’s plane saw the shoot-down of the second Cessna. Basulto lowered his altitude to avoid Cuban radar and headed northwest back across the 24<sup>th</sup> N. parallel. At 3:46 P.M. Basulto called Miami AIFSS and reported the possible loss of two aircraft.

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<sup>50</sup> Lawrence and Van Hare, *supra* at 720.

<sup>51</sup> Report of the ICAO Fact-Finding Investigation (June 1996), *supra* at 12.

<sup>52</sup> *Id.* at ¶ 1.1.40

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at page 74, ¶ 2.3.6.1.3

<sup>55</sup> *Id.* at ¶ 1.1.41.

Following the shoot-down, the FAA revoked Basulto's pilot's license due to his actions; the FAA found that Basulto's reckless operation of his aircraft on February 24, 1996 contributed to the deaths of four members of BTTR in the shoot-down.<sup>56</sup>

In summary, the record discussed in detail above shows that Gerardo Hernández had no involvement in the shoot down. He didn't encourage the BTTR to fly on February 24. He didn't know whether they were flying that day or when they were flying or how many planes were flying. Hernández was not part of the chain of command involved in the decision to shoot down the BTTR planes. The U.S. Government (not Hernández) advised Cuba when the BTTR planes took off. The U.S. Government watched on several radars as events unfolded. The U.S. Government not Hernández could have warned the BTTR planes to leave the area once they observed Cuban interceptors in the air.

## **VI. DUELING RADARS: THE DISPUTE OVER THE LOCATION OF THE SHOOT DOWN**

The U.S. Government and the U.S. District Court agreed that a conspiracy to commit murder charge required proof that the shoot down took place in international airspace rather than in Cuban airspace. In fact, even if Hernández somehow was involved in a plan to shoot down the BTTR planes, which he was not, no one including the White House, the FAA, U.S. intelligence agencies or Hernández would have ever predicted that a shoot down would take place in international airspace. Hernández was therefore never part of any plan to shoot down BTTR planes in international airspace.

The U.S. Government's evidence at the Cuban Five trial addressing the location of the shoot-down focused on radar data collected by the 84th Radar Evaluation Squadron at Hill Air Force Base, Utah (RADES).<sup>57</sup>

Lanny Clelland, associate director of RADES, testified at the trial regarding the radar position of the downed planes and their distance from the Cuban shore.<sup>58</sup> The U.S. radar evidence indicated that the two BTTR aircraft were shot down just outside (within 4.8 and 9.5 miles respectively) of Cuban territorial waters.<sup>59</sup> These aircraft had flown behind the lead BTTR plane and, before the shoot-down, came within 1.7 and 5.2 miles, respectively, of Cuban territory.<sup>60</sup> The third BTTR aircraft, number N2506, piloted by Basulto had traveled 2.1 miles into Cuban territory when the shoot-down occurred.<sup>61</sup>

The Cuban Five defense presented evidence of Cuban Air Force radar results, relied upon by the Cuban Air Force at the time of the shoot-down, showing that all three planes in the BTTR group had penetrated Cuban airspace and were within Cuban territorial waters.

U.S. radar operator Major Jeffrey Houlihan, based in March Air Force Base in Riverside, California, also observed the BTTR planes heading to the Cuban Air Defense

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<sup>56</sup> *Id.*, citing GH-Ex. 18MM.

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* citing DE1521:6527.

<sup>59</sup> *Id.* citing DE 1522:6683, 6688.

<sup>60</sup> *Id.* citing DE 1522:6684, 6689.

<sup>61</sup> *Id.* citing DE1522:6686.

Identification Zone. His post was in the Domestic Air Interdiction Coordination Center (DAICC). His displays were linked to radar sites the length of the southern U.S. border. He saw one of the planes penetrate Cuba airspace by at least three nautical miles, and observed MiGs launched from Cuba circling the BTTR planes.

On the day of the shoot-down Major Houlihan had received orders to pay special attention to the Straits of Florida between Key West and Cuba. The FAA had asked that DAICC save some screen shots of the BTTR flights that day. The DAICC was using long-range radar sites based in Tamiami and Key West, as well as a B-94 Aerostat Balloon based on Cudjoe Key, Florida.

Major Houlihan was sufficiently concerned with what he observed unfolding that he made a “911” call to the Southeast Air Defense (SEADS).

He spoke with Colonel Frank Willy, a Senior Director Technician at the Tyndall Air Force Base. As part of the NORAD network, Tyndall Air Force Base had responsibility to coordinate any intercept of the airborne MiGs. Major Houlihan asked whether they saw the BTTR planes and was informed that SEADS was monitoring the planes.<sup>62</sup> Colonel Willy informed Major Houlihan that that SEADS had been briefed about the planned BTTR flight. Houlihan said it looked like a MiG-23 heading towards the U.S. and Colonel Willy responded “we’re handling it, don’t worry.”<sup>63</sup>

The U.S. could have scrambled interceptor F-15 Eagle fighter planes based at Homestead Air Force Base, as was done three hours earlier when Cuban MiGs were spotted flying north of Cuba close to the 24<sup>th</sup> parallel. Earlier in the day, when the U.S. planes headed towards the 24<sup>th</sup> parallel, the MiGs patrolling off the coast of Cuba south of the U.S. ADIZ returned to their base.

Instead, during the BTTR confrontation, the F-15 Eagles were taken down from alert from 3:20 to 3:35 PM, the period that included the two shoot-downs.<sup>64</sup> The U.S. military would later claim that the F-15 Eagle fighter planes were not authorized to take off because the NORAD radar system went off line for a short period of time, coincidentally the same time as the shoot-downs. Major Houlihan would later testify that the U.S. fighter planes taking off from Homestead AFB or and from the Naval Air Station at Boca Chica, near Key West, could have been at the site of the shoot-downs in less than five minutes.<sup>65</sup>

## **VII. CUBAN GOVERNMENT MESSAGES TO GERARDO HERNÁNDEZ AFTER THE SHOOT-DOWN IN NO WAY SHOW THAT HE WAS PART OF A CRIMINAL CONSPIRACY TO COMMIT MURDER**

At the trial of the Cuban Five and during subsequent appeals the U.S. Government claimed and the U.S. Court of Appeals agreed that messages between Cuba and Hernández after the BTTR shoot down somehow show that Hernández was part of a criminal conspiracy

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<sup>62</sup> Lawrence and Van Hare, *supra* at 1083.

<sup>63</sup> *Id.* at 1093.

<sup>64</sup> *Id.* at 1103.

<sup>65</sup> *Id.* at 1136.

to kill BTTR pilots on February 24, 1996, in international airspace. In fact, these communications involved the return of Roque to Cuba on February 23 and had nothing to do with the BTTR shoot-down.

A few days after the shoot-down, on February 29, 1996, Cuban authorities transmitted the following message: “*Operacion Venecia* has been a success. The commander-in-chief met with all of us on two occasions in order to analyze steps to be taken to continue the operation. Lorient should urgently inform of any changes at the base, specifically reinforcements, increased security measures and state of alert of the unit. Since February 24, bases at Homestead and McDill have been at maximum state of alert.”<sup>66</sup> (Emphasis added). *To the extent it mentions the “success” of a mission, this message directly refers to Operacion Venecia, the operation to have Roque safely return to Cuba, not the BTTR shoot down.*

On March 1, 1996, Cuban authorities sent the following message, congratulating Hernández for his role in the operation to return German (Roque) to Cuba: “On behalf of intelligence headquarters received together with Gerardo our profound recognition for Operacion German. Everything turned out well. The commander-in-chief visited him twice. German being able to exchange the details of the operation. We have dealt the Miami right a hard blow in which your role has been decisive.”<sup>67</sup> At trial, FBI translator Salomon testified that the congratulatory note was in reference to Operation *German* (also known as Operation *Venecia*):

Q. There is a distinction between Operacion Escorpion and Operacion Venecia or German in these messages; is that correct? They seem to be two different operations?

A. I can't answer that.

Q. There are two distinct translations that you have made, one called Operacion Escorpion and another one called Operacion Venecia or German?

A. Again, that is according to the Spanish.

Q. That is the translation that you did?

A. Right.

Q. Back to HF 128G-3 which is the translation that deals with recognition for Giraldo for Operacion -- what?

A. German.

Q. Not Scorpion?

A. No.<sup>68</sup>

The U.S. Government also relied on another message, sent on April 24, 1996. This message stated: “*Because of German's Operation Venecia*, Giraldo [Hernández] was given recognition by the head of the DI. Congratulations on behalf of all the comrades here. ...” (Emphasis added). Although this congratulatory message was clearly referring to Hernández’s role in Operation Venecia to return Roque to Cuba, and not to the BTTR shoot down, the U.S.

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<sup>66</sup> Government’s Exhibit HF 127.

<sup>67</sup> Government’s Exhibit HF 128.

<sup>68</sup> See Trial Transcript Vol. #17, at 01-01-01, Government Witness Susan Salomon (translator of intelligence related documents for the FBI).

Government insisted Hernández was guilty of conspiracy to commit murder because “Operation Venecia is linked ... [to] the events of February 24, 1996 ...”<sup>69</sup>

The U.S. Government also relied upon Hernández’s April 29, 1996, response to the Cuban message of April 24, 1996: “It’s a great satisfaction and source of pride to us that the operation to which we contributed a grain of salt [ended] successfully. It is our greatest hope in this job for which we will continue to work so that it will always be like that.”<sup>70</sup> The message to which he responded specifically referred to “Operation Venecia,” and Hernández has repeatedly maintained that his response referred to his involvement in Operation Venecia, not the BTTR shoot down.

Finally, the U.S. Government relied on another message from Cuba transmitted on June 8, 1996 to Hernández which reiterated the prior congratulations for Operation Venecia: “Just as we informed you via radio, you were recognized by the head of the DI for Operacion Venecia ...”<sup>71</sup> This transmission is also clearly a reference to Operation Venecia (the safe return of Roque to Cuba) and to the work Hernández did monitoring the U.S. response to the shoot down which Cuba believed could include a U.S. military response. Hernández’s attorney explained at trial:

It is misleading for the record to show this message shows somehow his direct involvement in a conspiracy to commit murder ... The confusing part is the bottom part which the government has misinterpreted and that is where it says "grant recognition for the outstanding results achieved on the job during the provocations carried out by the government of the United States." That is not Brothers to the Rescue. That is the government of the United States and what happened on February 24 and the day after, February 25th, is that everybody was on a very high state of alert. The United States ... considered military options for this incident, had considered a strike against Cuba and these spies ... had the duty of checking the buildups at the Boca Chica Naval Air Station, at all the other military installations that they could, to get information back to Cuba about the build up, about what was happening and that is what they are getting congratulated for. Nothing to do with Brothers to the Rescue. Brothers to the Rescue is not the United States. It did not say Brothers to the Rescue. [The Cuban Government] would never confuse Brothers to the Rescue with the United States Government.<sup>72</sup>

In short, none of the post February 24, 1996, messages from or to Hernández indicate that he was part of any “conspiracy” to shoot-down BTTR planes in international airspace on February 24, 1996.

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<sup>69</sup> See Trial Transcript Vol. #100, at 05-03-01, Summations for U.S. Attorney Caroline Heck Miller.

<sup>70</sup> U.S. Government’s Exhibit DG 127A.

<sup>71</sup> Government’s Exhibit DG 108A.

<sup>72</sup> See Trial Transcript Vol. #52 at 03-05-01, Rule 29 Motions.

## VIII. SUMMARY OF THE LEGAL PROCEEDINGS AGAINST THE CUBAN FIVE

### 1. Indictment (1998-1999)

The Cuban Five (Gerardo Hernández Nordelo, Ramón Labañino Salazar, Antonio Guerrero Rodríguez, Fernando González Llort, and René González) were arrested in Florida in September 1998.

The United States filed a superseding indictment on May 7, 1999. 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 these crimes.

In essence, the indictment charged that the primary intelligence agency of Cuba, the Directorate of Intelligence (DI), maintained an organization for espionage in South Florida known as *La Red Avispa* (also known as the Wasp Network). Gerardo Hernández, Ruben Campa, and Luis Medina III (also known as Ramón Labañino–Salazar) were intelligence officers in the Wasp Network. They supervised a network of agents, including René González and Antonio Guerrero.

Hernández, Labañino, and Guerrero were charged with conspiring to deliver to Cuba “information relating to the national defense of the United States, . . . intending and having reason to believe that the [information] would be used to the injury of the United States and to the advantage of [Cuba],” in violation of 18 U.S.C. §§ 794(a), (c), and 18 U.S.C. § 2.<sup>73</sup>

Hernández was indicted for conspiracy to perpetrate murder in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 1111 and 2, in connection with the Cuban military's shoot-down of two BTTR aircraft on February 24, 1996, in violation of 18 U.S.C. §§ 1117 and 2.<sup>74</sup> No other defendant was named in this charge (count three).

Hernández, Labañino, and Campa were indicted for possession of counterfeit United States passports, in violation of 18 U.S.C. §§ 1546(a) and 2, and possession of fraudulent identification documents in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), (c)(3), and 2.<sup>75</sup>

Labañino was indicted for making a false statement to obtain a United States passport, in violation of 18 U.S.C. §§ 1542 and 2.<sup>76</sup>

Hernández, Labañino, and Campa were indicted for causing individuals they oversaw to act as unregistered foreign agents without prior notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 and 28 C.F.R. §§ 73.1 *et seq.*<sup>77</sup>

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<sup>73</sup> Second Superseding Indictment (May 7, 1999) Page 11-13.

<sup>74</sup> *Id.* at 13-16.

<sup>75</sup> *Id.* at 16-22.

<sup>76</sup> *Id.* at 20.

<sup>77</sup> *Id.* at 23-31.

## 2. Procedural Overview of the Cuban Five Court Proceedings

### a. The District Court Trial & Jury Verdict (2000-2001)

The six-month long trial against the Cuban Five commenced in Miami, Florida in late 2000. More than 119 volumes of testimony and over 20,000 pages of documents were entered into evidence, and numerous witnesses called to testify, including three retired Army generals, a retired admiral, a former Clinton advisor on Cuban affairs (all called by the defense) and high Cuban officials.

The Cuban Five did not deny acting as unregistered agents for the Cuban government. However, they denied the most serious charges against them and contended that their role was to focus on Cuban exile groups responsible for hostile acts against Cuba, and visible signs of U.S. military action towards Cuba, rather than to breach U.S. national security. No evidence was presented against them at trial to show that the accused had handled or transmitted a single classified document or piece of information, although the U.S. Government contended that this was their *future* intention.

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

### b. Eleventh Circuit Court of Appeals (three-judge panel) (2005)<sup>78</sup>

In August 2005, a three-judge panel of the 11<sup>th</sup> Circuit Court of Appeals unanimously overturned the convictions of the Cuban Five finding that pervasive community prejudice against the Castro government in the trial venue of Miami-Dade County merged with other factors to prejudice their right to a fair trial.

The three-judge panel concluded that 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.”<sup>79</sup>

The court reasoned that an impartial jury was not a reasonable probability in this case: Despite the district court's numerous efforts to ensure an impartial jury in this case, we find that empaneling such a 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. 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

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<sup>78</sup> *United States v. Campa*, 419 F.3d 1219 (11th Cir. Fla., 2005).

<sup>79</sup> *Campa*, 419 F.3d at 1263.

focused on relationships between the United States and Cuba-flooded Miami both before and during this trial. The trial required consideration of the BTTR shoot-down and the martyrdom of those persons on the flights. During the trial, there were both "commemorative flights" and public ceremonies to mark the anniversary of the shoot-down.

Moreover, the Elian González 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 González continued during the trial, "arousing and inflaming" passions within the Miami-Dade community ...

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.<sup>80</sup>

The court ordered a new trial outside Miami.

c. Eleventh Circuit Court of Appeals (en banc) (2006)<sup>81</sup>

The U.S. Government asked the judges of the 11<sup>th</sup> Circuit Court of Appeals to review the three-judge panel's decision through an "en banc" procedure. One year later, in spite of the strong disagreement voiced by two of the three judges who were part of the "en banc" panel, the Court revoked, by majority of 10-2,<sup>82</sup> the 93-page decision of the three judges and rejected the claim that a climate of violence and intimidation prevailed in Miami and denied the Cuban Five their right to a fair trial. Judge Wilson expressed the majority's reasoning:

Based on our thorough review of this case, we rely on the trial judge's judgment in assessing juror credibility and impartiality. The trial judge, as a member of the community, can better evaluate whether there is a reasonable certainty that prejudice against the defendant will prevent him from obtaining a fair trial. The judge brings to the courtroom her own perception of the depth and extent of community prejudice and pretrial publicity that might influence a juror.

Miami-Dade County is a widely diverse, multi-racial community of more than two million people. *Nothing in the trial record suggests that twelve fair and impartial jurors could not be assembled by the trial judge to try the defendants impartially and*

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<sup>80</sup> *Campa*, 419 F.3d at 1261.

<sup>81</sup> *US v. Campa*, 459 F.3d 1121 (11th Cir. 2006).

<sup>82</sup> One of the three judges in the earlier panel decision had since retired and had been replaced by another judge.

*fairly*. The broad discretion the law reposes in the trial judge to make the complex calibrations necessary to determine whether an impartial jury can be drawn from a cross-section of the community to ensure a fair trial was not abused in this case. Although it is conceivable that, under a certain set of facts, a court might have to change venue to ensure a fair trial, the threshold for such a change is rightfully a high one. The defendants have not satisfied it.<sup>83</sup>

d. Second three-judge panel decision (2008)

The case was referred back to a three-judge panel to rule on all remaining issues involved in the appeal. In June 2008, the court upheld the convictions in all five cases but vacated the life sentences imposed on Ramón Labañino and Antonio Guerrero for conspiracy to commit espionage because no top secret or classified information had in fact been gathered or transmitted to Cuba. Ramón Labañino was subsequently resentenced to 30 years on that charge and Antonio Guerrero to 21 years and 10 months, both to be served concurrently with sentences on other counts.

The court found that Hernández's life sentence for conspiracy to gather and transmit national defense information had also been wrongly enhanced on the same grounds as in Labañino and Guerrero's sentences. However, it refused to remand him for resentencing because he was already serving a life sentence for conspiracy to murder, and any error in the recalculation of his sentence on the conspiracy to commit espionage charge was "irrelevant to the time he will serve in prison." Hernández is the only one of the Five now serving life in prison.

As discussed below in Section IX, the June 2008 decision to uphold the convictions was not unanimous. One of the three judges, Senior Circuit Judge Kravitch, dissented from the decision to uphold the conspiracy to commit murder conviction of Gerardo Hernández on the ground that the government had failed to prove that he had entered into a conspiracy to shoot-down the BTTR planes in international airspace and kill the occupants.

e. Supreme Court Petition for Certiorari (2009)

In June 2009 the U.S. Supreme Court denied a petition for a Writ of Certiorari to review the convictions of the Cuban Five without comment. The petition for a Writ of Certiorari was supported by amicus curiae briefs submitted on behalf of numerous organizations and individuals, including ten Nobel prize winners and the bar associations of various countries.

**IX. ANALYSIS OF THE "CONSPIRACY TO COMMIT MURDER" CONVICTION AND LIFE SENTENCE OF GERARDO HERNÁNDEZ FOR A CRIME HE DID NOT COMMIT**

**1. Gerardo Hernández never participated in a Conspiracy to Commit Murder and his conviction on this charge manifests an extreme miscarriage of justice**

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<sup>83</sup> *Campa*, 459 F.3d at 1154 (emphasis added).

To obtain a conviction for conspiracy, the U.S. Government must prove beyond a reasonable doubt: (1) an agreement by two or more persons to achieve an unlawful objective (in this case the killing of the BTTR pilots); (2) the defendant's knowing and voluntary participation in the agreement (to kill the BTTR pilots); and (3) an overt act committed in furtherance of the conspiracy.<sup>84</sup>

Such an agreement may be proven with circumstantial evidence, but inferences are only permitted when "human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts."<sup>85</sup> "Charges of conspiracy are not to be made out by piling inference upon inference."<sup>86</sup> Knowledge of the criminal act "must be clear, not equivocal."<sup>87</sup>

*i. The Jury Verdict Ignored the Evidence and Could Only Have Been Based on a Complete Lack of Impartiality*

The district court agreed that the charge that Hernández had conspired to commit murder, which applies only to an "unlawful killing" (18 U.S.C. § 1111), required the government to prove beyond a reasonable doubt that the conspirators planned to shoot-down the BTTR planes in U.S. jurisdiction (i.e. in international airspace), rather than during an illegal incursion into Cuban airspace. The U.S. Government itself acknowledged that, "[i]n light of the evidence presented in this trial, [such a requirement] presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution on this count." The prosecution thus introduced no direct evidence of *an agreement* to shoot-down the BTTR planes in the international airspace.

Instead, the Government introduced what it called "smoking gun" communications between Cuban authorities and Hernández from which it argued "inferences" could be drawn that there was a Cuban plan to shoot down BTTR planes in international airspace and Hernández was part of that plan.

I have already discussed these messages in detail above in Section II (pages 9-12). Under no circumstances would a fair and impartial reading of these messages indicate that Cuba was planning to shoot down BTTR planes on February 24, 1996, in international airspace and that Hernández was somehow part of that plan.

It is not even proven that Hernández received the messages dated before the shoot down, but even if he had, at most they instructed him to warn two Cuban agents who had infiltrated the BTTR (Roque and González) not to fly on certain dates because of Cuba's possible "response" if provoked by the BTTR flights. One message mentions a possible "confrontation." However, as discussed above in Section I, Part 3 (pages 5-9), this message concerned the quality and timeliness of intelligence Cuba was receiving regarding BTTR. In any event, the U.S. Government and the BTTR had repeatedly been warned by Cuba in even

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<sup>84</sup> *US v. Adkinson*, 158 F. 3d 1147, 1153 (11<sup>th</sup> Cir. 1998) The evidence must establish a common agreement to violate the law. (*US v. Parker*, 839 F.2d 1473, 1478 (11<sup>th</sup> Cir. 1988).

<sup>85</sup> *US v. Villegas*, 911 F.2d 623, 628 (11<sup>th</sup> Cir. 1990).

<sup>86</sup> *Ingram v. US*, 360 US 672, 680 (1959).

<sup>87</sup> *Id.* at 678-80.

clearer terms that continued illegal incursions into Cuban airspace could result in the “downing” of the BTTR planes.

The U.S. Government claims that an expense report from Hernández indicates that he met with Roque on February 22 and González on February 23. However any meeting with Roque would have been about his planned return to Cuba the following day. Hernández would not have met with González on February 23 about not flying with the BTTR on February 24 through 27 because he knew that González (who reported to him) had not flown with the BTTR in two years and was no longer even listed as a BTTR pilot.

As discussed above in Section II (pages 12-13), the day before the shoot down the U.S. Government knew more about Cuba’s plans than did Hernández.

Furthermore, absolutely nothing in the record shows Hernández’s knowingly agreed to join a conspiracy to shoot down BTTR flights in international airspace. Instead, the evidence showed that both the Cuban and U.S. Governments considered BTTR flights into Cuban airspace both illegal and likely to eventually provoke a shoot down.

The Cuban radar reports indicated and Cuba believed that on February 24 1996, all three BTTR aircraft had again illegally entered Cuban airspace. Cuba had never before taken action against U.S. aircraft or vessels outside Cuban territory. The record fails to show a Cuban governmental intention to violate U.S. law in international airspace.

To attribute to Hernández a level of knowledge and/or decision-making power that was not within his rank as a field agent is fundamentally unreasonable. There is no evidence whatsoever that he was in any consulted or had any role in the decision to shoot down the BTTR planes. No evidence indicated that Hernández in any way encouraged the BTTR pilots to fly a mission towards Cuba on February 24, 1996.

No evidence indicated that had Hernández warned the BTTR pilots that his country intended to “confront” any BTTR planes that “provoked” Cuba between February 24 and 27, 1996, that this would have made any difference in BTTR’s plans. The BTTR pilots had been repeatedly warned by U.S. authorities that they even faced shoot-down and none of these prior warnings deterred them from flying their missions. Indeed, they continued heading towards Cuba on February 24 even after being warned by Cuban air controllers that by doing so they were placing themselves in danger.

The U.S. Government, not Hernández, warned Cuba when the BTTR plans took off heading south towards Cuba. And the U.S. Government, not Hernández, was tracking the BTTR planes and Cuban interceptors on radar and could have warned the BTTR planes to leave the area.

Finally, as discussed above, the U.S. Government, not Hernández, was in a position to actually stop the BTTR pilots from taking off because they had previously filed false flight plans with the FAA, both a civil and criminal violation of U.S. laws.

None of these facts stopped the jury from convicting Hernández of conspiracy to commit murder in international airspace.

ii. ***11<sup>th</sup> Circuit Majority Opinion Weaves a Complex Web of Legal Theories to Uphold Hernández's conviction for conspiracy to commit murder***

In a bizarre two-to-one decision, the Eleventh Circuit Court of Appeals upheld Hernández's conviction for conspiracy to commit murder. The decision is “bizarre” and highly unusual because in reality only one of the three judges (Judge William Pryor) supported the conviction. While a second judge called it a “close case” and joined the logic of Judge Pryor, that judge also made clear he would have vacated the conviction because Hernández's change of venue motion should have been granted (because he did not get a fair trial in Miami). The third judge (Phyllis A. Kravitch) dissented and would have set aside Hernández's conviction for conspiracy to commit murder.

To reach the conclusion that Hernández was guilty of conspiracy to commit murder, Judge Pryor had to engage in some complex legal gymnastics.

18 U.S.C. § 1111(a) states: “Murder is the unlawful killing of human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree.”

Section 1111(b) states: “Within the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.”

Judge Pryor reasoned that although § 1111(a) explicitly describes the *mens rea* (intention to kill with “malice aforethought”) required for murder, § 1111(b) is silent about *mens rea* (intention) *that the murder occur in the special jurisdiction of the United States*.

Judge Pryor next reasoned that when a criminal statute is silent on *mens rea*, *no proof of mens rea is necessary for elements that are “jurisdictional only.”*<sup>88</sup> (Emphasis added). The required “jurisdictional” element in § 1111(b) is that the shoot-down takes place in “the special maritime and territorial jurisdiction of the United States.” That is, in international airspace over which the U.S. Government asserts jurisdiction. Judge Pryor concluded that the existence of the fact that confers U.S. jurisdiction (i.e. the killing takes place in “the special maritime and territorial jurisdiction of the United States”) “need *not* be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.”<sup>89</sup> (Emphasis added).

His analysis seems to ignore the fact that § 1111(a) describes the actual crime, while § 1111(b) is focused on the punishment for the crime – “[w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life.”

If this highly technical argument is correct, then Hernández's conviction did not require that he knew that a shoot down was planned for international airspace. In other words, Judge Pryor believed Hernández could be convicted of conspiracy to commit murder *even if*

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<sup>88</sup> *Id.* at 1006, quoting *United States v. Feola*, 420 U.S. 671, 677 n. 9 (1975).

<sup>89</sup> *Id.* at 1007.

*Hernández believed a shoot down would take place in Cuban airspace, an action all courts agreed would not be a crime.*

Having decided that where Hernández may have thought any shoot down would take was unimportant, Judge Pryor next turned to how the jury may have concluded that Hernández was a participant in a conspiracy to commit murder:

When the evidence is viewed in the light most favorable to the [U.S.] government, there are at least *two reasons to conclude that the government proved that a shoot down was contemplated*. First, the instructions that Hernández received from the Cuban Directorate of Intelligence and relayed to the agents who had infiltrated Brothers *support an inference that a shoot down was planned*. Second, the correspondence from Hernández written after the shoot down that recognizes that the operation "ended successfully" establishes Hernández 's guilt.

A reasonable jury could *infer* that Hernández recognized that the Cuban Directorate of Intelligence instructed him to ... tell the agents not to fly ... on the days of and around the shoot down ... because the Directorate wanted to ensure that the lives of Cuban agents were not placed in danger. *A forced landing, warning shots, or a forced escorted journey would not have placed the agents in danger even if they had been on board the aircraft at the time*. A reasonable jury could [infer] that agents were not to fly because a shoot down was planned.

The dissent contends that "[i]t is just as reasonable to conclude that the Directorate of Intelligence did not want its agents flying on those days because of the dangers inherent in any confrontation involving airplanes." ... This inference ... is irrelevant under our standard of review. The jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial ... but we do not enjoy the same freedom. We "must accept all reasonable inferences . . . made by the jury. The inference the jury drew from the evidence that Hernández understood that a shoot down was planned is reasonable. *Other reasonable inferences the evidence might support are immaterial. Id. . . .*

A reasonable jury was entitled to find that, when Hernández said the operation ended successfully, he meant it. Hernández and his co-conspirators succeeded when the aircraft were shot down.<sup>90</sup> (Emphasis added) (internal quotations and citations omitted).

In essence, Judge Pryor finds that it is acceptable to convict Hernández of conspiracy to commit murder and sentence him to life imprisonment because a jury could "reasonably" adopt an "inference" that Hernández knew a shoot down was planned because Cuba ordered its agents not to fly with the BTTR on certain days in February 1996.

*Even had Cuba intended to fire warning shots or force the BTTR planes to land in Cuba, where the BTTR pilots would have been charged with criminal conduct, Cuba would not have wanted its undercover agents on the BTTR planes. Indeed, Judge Pryor agrees that such*

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<sup>90</sup> *Campa*, 529 F.3d at 1011. (emphasis added).

*an inference is “reasonable,” but the fact that it was ignored or rejected by the jury is, in his opinion, simply “immaterial.”*

Similarly, even if Hernández’s later message to Cuba agreeing that the “operation” was a success referred to the shoot-down, which it did not, as already pointed out, Cuba believed that the shoot-down took place in Cuban airspace and no evidence exists to show why Hernández would have disbelieved his own government on this question. Even months after the incident and an extended investigation, the International Civil Aviation Organization was unable to resolve where the shoot-down took place based on the conflicting radar claims of Cuba and the U.S. However, Hernández’s message *clearly* referred to Operation Venecia, the project he worked on to implement Roque’s return to Cuba. *No “reasonable” jury could “infer” that the message dealt with the shoot down when the message clearly states that it deals with Operation Venecia, not the shoot down.* Nevertheless, Judge Pryor says that “Hernández’s statement after the shoot-down that the operation ended successfully ... allows a finding by a reasonable jury that the conspirators intended to commit an unlawful killing. If the plan had been to prepare Cuba to defend itself with a justified shoot-down over Cuba, then the plan would have failed.”<sup>91</sup> This reasoning ignores the fact that (1) the message clearly addresses Operation Venecia, and (2) even if the message was about the shoot down, which it was not, Cuba believed the shoot-down took place in Cuban airspace. So there was no reason for Cuba or Hernández to communicate that any plan had “failed.”

Judge Pryor’s decision manipulates the facts and piles inference upon inference, all adverse to Hernández, and all completely counter-intuitive.

Senior Circuit Judge Kravitch dissented. She believed the conspiracy to commit murder conviction should be reversed because the U.S. Government failed to prove that Hernández had entered into a conspiracy to shoot down the BTTR planes in international airspace and kill the occupants. Senior Judge Kravitch observed that “the question of whether the Government provided sufficient evidence to support Hernández’s conviction turns on whether it presented sufficient evidence to prove that he entered into an agreement to shoot-down the planes in international, as opposed to Cuban, airspace.”<sup>92</sup> In this respect she agreed with how the U.S. District Court had viewed the law and written the jury instructions.

While Senior Judge Kravitch agreed that a conspiracy may be proven with circumstantial evidence, she pointed out that “inferences” are only permitted when “human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts.”<sup>93</sup> Charges of conspiracy should *not* to be made out “by piling inference upon inference.”<sup>94</sup> Guilt cannot be based upon speculation, and knowledge of the criminal act “must be clear, not equivocal.”<sup>95</sup>

Applying reasoning that appears to be straightforward and consistent with U.S. law in the majority of U.S. Circuit Courts, Judge Kravitch wrote:

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<sup>91</sup> *Id.*

<sup>92</sup> *Campa*, 529 F.3d at 1024.

<sup>93</sup> *Quoting U.S. v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990).

<sup>94</sup> *Quoting Ingram v. United States*, 360 U.S. 672, 680 (1959).

<sup>95</sup> *Quoting Ingram*, 360 U.S. at 678-80.

[Judge Pryor's] opinion ... fails to address ... whether the Government produced sufficient evidence to prove beyond a reasonable doubt that Hernández agreed to commit an unlawful act. Such a discussion is necessary because our conspiracy law requires that those entering into a conspiracy have an agreement to commit an unlawful act and the substantive murder offense requires that the killing be unlawful. *A shoot-down in Cuban airspace would not have been unlawful; thus, Hernández 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 Hernández 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. At best, the evidence shows an agreement to "confront" BTTR planes. But a "confrontation" does not necessarily mean a shoot-down ... [T]he Government presented no evidence that [even if] Hernández agreed to help "confront" BTTR that the agreed confrontation would be a shoot-down. To conclude that the evidence does show this goes beyond mere inferences to the realm of speculation ...<sup>96</sup>*

Senior Judge Kravitch's opinion is logical from both a legal and practical perspective. There was and to this day remains insufficient evidence to show that Hernández entered into a conspiracy with the Government of Cuba to murder the BTTR pilots in international airspace. As Judge Kravitch stated, the evidence the U.S. Government offered could have reasonably been interpreted in ways that did not implicate Hernández in any conspiracy to commit murder. The evidence the U.S. Government presented went "beyond mere inferences [into] the realm of speculation ..."

At bottom, Hernández's guilt of conspiracy to commit murder was not shown by anything close to the U.S. and international law standard of "beyond a reasonable doubt." His conviction for conspiracy to commit murder is a serious miscarriage of justice.

**2. Hernández's involvement in the shoot down was so completely insignificant and inconsequential that to sentence him to life imprisonment without the possibility of parole is grossly disproportionate to any culpability he shares for the shoot down.**

On December 12, 2001, the district court sentenced Hernández to concurrent terms of life imprisonment on Counts 2 (espionage conspiracy under 18 U.S.C. § 794) and 3 (murder conspiracy under 18 U.S.C. § 1117).

In seeking to impose a sentence of life in prison for conspiracy to commit murder, the U.S. Government argued the following:

The defendant continues to resist this basic truth, reflected in the jury's verdict of conviction on every count ...

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<sup>96</sup> *Campa*, 529 F.3d at 1024 (emphasis added).

[Hernández] joined a concert of action that shot four men out of the sky, their bodies so destroyed that death certificates were issued without remains being recovered ... The appropriate sentence for the murder conspiracy, had there been but one death, is life in prison. That life sentence is even more called for here, where four lives were taken. ... The conspiracy that brought about their deaths merits the prescribed life sentence.<sup>97</sup>

However, it is undisputed that Hernández had nothing to do with the decision made in Cuba to shoot down the BTTR planes. He had nothing to do with the BTTR's decision to fly planes on February 24, 1996, towards Cuba or for one or perhaps all three planes to enter Cuban airspace. He did not inform the Cuban Government when the BTTR planes took off, the U.S. authorities did this. He in no way encouraged or solicited the BTTR pilots to enter Cuban airspace and he had no power to stop them.

As discussed in detail above, the U.S. Government was fully aware of the dangers posed by the BTTR flights towards Cuba. The U.S. Government had been repeatedly warned that future BTTR penetrations of Cuban airspace could result in a shoot down. The night before the shoot down the U.S. President's White House point man on Cuba, Richard Nuccio, warned that a penetration of Cuban airspace by the BTTR on the following day "may finally trip the Cubans toward an attempt to shoot-down or force down the planes." Finally, the U.S. Government, not Gerardo Hernández, had various avenues available to stop the BTTR from its Cuban missions.

Under all of these circumstances, sentencing Hernández to serve life in prison for his alleged absolutely minimal role in any criminal conspiracy to shoot down the BTTR planes on February 24, 1996, is an egregious miscarriage of justice.

Had Hernández known that a shoot down in international airspace was planned by Cuba, and had he encouraged the BTTR pilots to fly on February 24, 1996, so as to place their lives in grave danger, a life sentence may have been appropriate. But none of these facts are present in Hernández's case.

The only way the U.S. Government has ever argued that Hernández may have avoided the shoot down would have been to warn the BTTR pilots that a "confrontation" would take place on February 24, 1996, if they provoked Cuba by again penetrating its airspace. However, it is extremely unlikely such a warning would have deterred the BTTR pilots. They had been warned before by the U.S. Government that their continued provocations of Cuba could result in a shoot down. They were warned by Cuban air controllers on the day of the shoot down that if they continued flying south they were placing themselves in danger. None of these warnings made any difference to the BTTR pilots.

Furthermore, it is absurd to impose a life sentence on Hernández because he did not warn the BTTR pilots about a possible confrontation, when the U.S. Government was in a better position than Hernández to warn the BTTR pilots, and indeed to stop them from flying at all on February 24, 1996, yet did nothing to prevent their deaths.

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<sup>97</sup> United States Motion in Aid of Sentencing Gerardo Hernández: *U.S. v. Gerardo Hernández et al.*, United States District Court Southern District of Florida Miami Division, Case No. 98-7210Cr-LENARD/DUBÉ (s)(s) (Filed: December 4, 2001).

Under U.S. Sentencing Guideline 5K2.10 (Victim's Conduct), the District Court could have taken into account the prior illegal and provocative actions of the BTTR and their full understanding that they faced a shoot down if they continued to provoke the Cuban Government. When a victim's wrongful conduct contributes significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the District Court could have considered, among other factors, the “persistence of the [BTTR’s] conduct and any efforts by the [Cuban Government] to prevent confrontation;” “the danger reasonably perceived by the defendant, including the victim's reputation for violence;” and “any other relevant conduct by the victim that substantially contributed to the danger presented.”

As discussed above in Section II, in this case the BTTR for several years provoked, taunted, and disobeyed the Cuban Air Traffic Control system, the Cuban Civil Aeronautic Association, and the Cuban Air Force. These provocations were well documented during the Cuban Five trial.

Following the air space violation of January 13, 1996, in which Basulto and other aircraft dumped approximately half a million leaflets over the Cuban territory, Basulto appeared on Radio Marti, a U.S. Government-owned radio program transmitted into Cuba, and taunted the Cuban government and Air Force as follows:

"David Otorodon: Basulto to what do you attribute the fact that the Cuban government did not have, did not have a military response against you, lack of organization, surprise ... ?

Basulto: That is the same question that our compatriots on the island should ask themselves when they go to fear the government at a time they plan on doing something against it. *We have been willing to take personal risks for this, they must be willing to do the same.* Let them see that this regime is not vulnerable, that Castro can be penetrated, that many things can be done at our disposal ... (Emphasis added).<sup>98</sup>

The FAA finally issued an Emergency Order of Revocation outlining all the previous provocations, air space violations and dangerous activity Basulto and Brothers to the Rescue had engaged in.<sup>99</sup> The emergency order of revocation cited the fact that on February 24, 1996, Basulto directly contributed to the deaths of the other pilots and passengers:

Your operation of civil aircraft N2506, in the manner and under the circumstances described above, was careless or reckless so as to endanger the lives and property of others.”<sup>100</sup>

In short, there were reasonable grounds for the District Court to reduce Hernández’s sentence based upon the conduct of the victims leading up to the BTTR shoot down.

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<sup>98</sup> See GH37.

<sup>99</sup> Defendant's Exhibit GH Composite 18MM.

<sup>100</sup> *Id.* paragraphs 16 through 20.

Another basis for lowering Hernández's sentences under the Sentencing Guidelines (5K2.10), was the danger created by the BTTR's prior conduct. The Cuban government had every reason to perceive a legitimate danger and threat. Jose Basulto, the BTTR leader, was wanted in Cuba for bombing a civilian hotel in the early 1960's. Furthermore, Cuban intelligence on Basulto had revealed that he was testing weapons that could be dropped into the Cuban territory for attempts either against the Cuban leader, Fidel Castro or other terrorist acts. BTTR's repeated illegal incursions into Cuban airspace and low-level buzzing of Havana presented extreme hazards to air control operations and to the civilian population. The dangers posed to Cuban air control and civilian populations by BTTR's incursions was testified to by various witnesses at the trial including Colonel Buchner, Captain Leonard, Fidel Ara Cruz, President of the Cuban Civilian Aviation, and others.

Part E of the Presentence Report identifies in Paragraph 140, an additional factor that also could have warranted a lesser sentence for Hernández: "A possible mitigating issue which was not contemplated by the United States Sentencing Commission during the formation of the Sentencing Guidelines has been identified. The Defendant states that he came to the United States under an assumed identity not to harm the citizens of this country or the government, but in an effort to protect his country from the terrorist acts of individuals operating against his homeland." The United States Probation Officer identified what was at the heart of the defense in this case: that the Cuban Five never intended to act against the interest of the American people or nation, but were here defending their own country against terrorist acts originating in Florida.

In summary, the evidence is absolutely clear that Hernández's role in the BTTR shoot down was completely minimal and inconsequential. To impose a life sentence without the possibility of parole is grossly disproportionate to his involvement in or responsibility for the shoot down.

**X. THE SENTENCES OF HERNÁNDEZ, GUERRERO AND LABAÑINO FOR CONSPIRACY TO COMMIT ESPIONAGE WERE EXCESSIVE AND DISPROPORTIONATE TO THEIR INVOLVEMENT IN ANY CRIMINAL CONDUCT**

The sentences of the Hernández, Guerrero and Labañino for conspiracy to commit espionage are unusually harsh given that nothing they did involved any significant threat to the national security of the United States. It is undisputed that the Cuban Five were primarily engaged in what the Cuban Government and the Five considered "counter-terrorist" activities, penetrating anti-Castro groups like Alpha 66, the F4 Commandos and Brothers to the Rescue.

Hernández, Guerrero, and Labañino were sentenced under §2M3.1 of the U.S. Federal Sentencing Guidelines - Gathering or Transmitting National Defense Information to Aid Foreign Government.<sup>101</sup>

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<sup>101</sup> §2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

(a) Base Offense Level: (1) 42, if top secret information was gathered or transmitted; or (2) 37, otherwise.

Commentary: Statutory Provisions: 18 U.S.C. § 794; 42 U.S.C. §§ 2274(a), (b), 2275.

The Espionage Act of 1917 was enacted shortly after the U.S.'s entry into World War I. It has been amended numerous times over the years and is codified at 18 U.S.C. §§ 792 *et seq.* The law seeks to protect and to keep inviolate our military secrets from foreign powers, whether friendly or hostile.<sup>102</sup>

*Military experts at the Cuban Five's trial, including President Obama's Director of National Intelligence, James Clapper, testified that the Cuban Five presented no substantial threat to national security.*<sup>103</sup> At the time of the trial, Clapper was director of the National Geospatial Intelligence Agency (2001-2006) and testified based on his 33 years of work experience in the U.S. intelligence community.

*Defense counsel asked the following question to Clapper, the government's expert intelligence witness: "In your review of these documents, did you come across any secret, national -- national defense information that was transmitted? Did you come across any?" Clapper answered, "Not that I recognized, no."*

Antonio Guerrero worked as a civilian employee at Boca Chica Naval Air Station. His entire employment history at Boca Chica was a series of menial jobs. It was presented at trial that Guerrero counted planes landing and taking off to infer whether or not there was an increase in military aircraft that may signal a potential attack on Cuba. This information was not a military secret, but rather was available to the public by driving along U.S. Highway 1 and observing the planes taking off and landing.

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Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order 13526 (50 U.S.C. § 435 note).
2. The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted. See Chapter Five, Part K (Departures).
3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.

Background: Offense level distinctions in this subpart are generally based on the classification of the information gathered or transmitted. This classification, in turn, reflects the importance of the information to the national security.

<sup>102</sup> *United States v Rosenberg* (1953, DC NY) 109 F Supp 108, *affd* (1953, CA2 NY) 204 F2d 688.

<sup>103</sup> See Trial Transcript Vol. #92, at 05-16-01, "Defense Counsel: You would not in any way, shape or form, as a man with your background in intelligence, classify Cuba as a military threat to the United States?"

General Clapper: Absolutely not. There is not a conventional threat posed by Cuba by any stretch of the imagination."

Most of the charges against Guerrero deal with his failing to register with the U.S. Attorney General as a foreign agent and his falsifying his identity, activities *any* intelligence officer whether employed by Cuba, the U.S. or any other country would engage in. At bottom, the central offense charged was a conspiracy to gather information about the activities at Boca Chica, however (i) none of this information was secret, (ii) the information sought was of interest to Cuba in terms of its defense, *not any interest in potential offensive military action against the U.S.*, and (iii) all of the information could have been gathered by observing activities at Boca Chica without even entering the base or by civilian employees with no “security clearances” working on the base.

At trial, the U.S. Government alleged that Guerrero worked inside building A-1125 and he had transmitted to Cuba that the building was to be used for a top secret activity. Guerrero never did anything to obtain a plan of the building A-1125. The plans of the building were hanging on walls in the area and civilian workers of the Public Works Department could all view these plans.

According to base offense level 42, sentencing could range from 360 months to life imprisonment. However, in order to secure a conviction for life, the prosecution, with the Judge’s agreement, added 2 additional points by applying Sentencing Guidelines §3B1.3 - Abuse of Position of Trust or Use of Special Skill, a groundless accusation.<sup>104</sup> Thus, Guerrero’s offense level reached level 44. The district court erroneously sentenced Guerrero to life imprisonment as to Count Two (conspiracy to gather and transmit national defense information), and five years as to each of the remaining counts. As a result of this erroneous sentence, later reversed by the Court of Appeals, Guerrero served eight years in a maximum security federal prison.

Guerrero appealed his sentence. The Court of Appeals found that rather than a section of the then-mandatory guidelines, Section 2M3.1(a)(1) with a base offense level of 42, which required an *actual* gathering or transmitting of *top-secret* information, Guideline 2M3.1(a)(2) with a base level of 37, should have been applied.

At resentencing before the U.S. District Court, Guerrero’s attorney and the U.S. jointly recommended that the Court impose a sentence on the conspiracy to commit espionage conviction as follows: (1) 240 months' incarceration and (2) a term of supervised release of five years with conditions of supervision. Guerrero likely agreed to this joint recommendation solely because by then it appeared to him that he would never receive fair and impartial treatment in the U.S. courts.

Although Judge Lenard acknowledged that “the Government did not present and prove evidence in this case that [Guerrero] actually obtained top-secret information,” she maintained

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<sup>104</sup> “If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).”

that “the evidence in this case did indicate that [Guerrero] very much *wanted* to and was working as an agent for the Directorate of Intelligence to obtain such information.” (Emphasis added).

Judge Lenard refused to accept the 240 month joint sentencing recommendation. She instead resentenced Guerrero to 262 months (21 years and 10 months) in prison. James Clapper, the U.S. Government’s expert intelligence witness, testified that Guerrero never gathered or transmitted to Cuba secret national defense information. The information he gathered was intended to be used by Cuba solely for self-defense purposes. No one has ever suggested that Cuba intended to use this information to mount a military attack against the U.S. In light of these circumstances, a sentence of 262 months in prison is disproportionate to the activities in which Guerrero actually participated.

Ramón Labañino had observed the number of planes landing and leaving MacDill Air Force Base in Tampa, Florida. The prosecution entered into evidence a tasking document by the Cuban Directorate of Intelligence (DI) where Labañino was asked to attempt to gather information relating to increase of physical training and military personnel at the base for aerial combat, increased movements of resources for logistic support, installation of new centers for communication, increase of Coast Guard and Naval units, and presence of aircraft carrier. This information could likely all be gathered by visual observation from numerous public areas outside the base. Labañino later supervised Santos, who was tasked with investigating and reporting on matters of public information regarding the United States Southern Command and the neighborhood in which this Command was located.<sup>105</sup>

In 2001, Labañino was convicted of one count of conspiracy to gather and transmit national-defense information, in violation of 18 U.S.C. § 794(c). Following his conviction, on December 13, 2001, Labañino was sentenced to life in prison for conspiracy to commit espionage and given lesser sentences on the remaining charges. In calculating Labañino’s sentence, the Court applied section 2M3.1(a)(1) of the Sentencing Guidelines, which carries with it a base offense level of 42, and is appropriate “if top secret information was gathered or transmitted.”

Labañino argued on appeal that section 2M3.1(a)(2), which carries with it a base offense level of 37, and is “otherwise” applicable, should have been applied in the absence of a finding that top-secret information was actually gathered or transmitted. Labañino also argued on appeal that the Court erred by failing to consider application note 2 to section 2M3.1, which provides “[t]he Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation’s security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted.”<sup>106</sup>

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<sup>105</sup> In May 1997, Labañino was asked by the DI to gather information regarding various local, state, and federal agencies located in Florida, including the Coast Guard, the Immigration and Naturalization Service (“INS”), and the FBI. None of this information was secret or classified. Operation Fog involved Campa and Labañino monitoring the activities of Roberto Martin Perez, a member of the board of directors of CANF, which the Cuban government believed was responsible for two July 1997 hotel bombings. Operation Giron was an attempt to infiltrate CANF.

<sup>106</sup> U.S.S.G. § 2M3.1 n.2 (2002).

In June 2008, the 11th Circuit Court of Appeals reversed Labañino's sentence, finding that section 2M3.1(a)(2) is the applicable sentencing guideline (because no top secret information was gathered or transmitted) and instructed 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."<sup>107</sup>

When the case returned to the U.S. District Court, the parties entered into a stipulation that, in essence, recommended to the court a 360-month (thirty year) sentence as an end to the extended litigation. Labañino agreed to this because by then it was clear to him that he would never receive fair and impartial treatment in the U.S. courts. On December 8, 2009, Judge Lenard resentenced Labañino to 30 years in prison.

The sentences of Gerardo Hernández, Antonio Guerrero, and Ramón Labañino for conspiracy to commit espionage are unusually harsh given that their actions did not pose any significant threat to the national security of the United States and because no secret national defense information was actually transmitted to Cuba.

By way of comparison, David Henry Barnett, a CIA officer was convicted of espionage for the Soviet Union in 1980. Barnett had revealed the identities of some 30 CIA officers and transmitted other classified information to the KGB in exchange for money. Barnett pleaded guilty to espionage in 1980, and served 10 years before being paroled in 1990.

Harold James Nicholson is the highest ranking CIA official ever convicted of spying for a foreign power. Nicholson was apprehended in 1996 at a Washington-area airport with rolls of film bearing images of top-secret documents. He was subsequently charged with espionage and accused of hacked into CIA computers to provide the Russians with every secret he could steal. He was convicted of espionage and sentenced to 23 years in prison, seven years fewer than Ramón Labañino.

#### **XI. ALTERNATIVE METHODS AVAILABLE TO THE ADMINISTRATION TO REDUCE THE SENTENCES OF GERARDO HERNÁNDEZ, ANTONIO GUERRERO AND RAMÓN LABAÑINO AND RETURN THEM TO CUBA**

In December 1997, the families of Armando Alejandro, Carlos Costa and Mario de la Pena, the three U.S. citizens killed in the BTTR shoot-down, won a \$187 million "default" judgment in the U.S. District Court in Miami. Cuba refused to appear in court to defend the case. The family of the fourth man killed, Pablo Morales, could not join the judgment because he was not a U.S. citizen. Four years later, the families of the three U.S. citizens were paid \$58 million in damages -- money that came from frozen U.S. bank accounts belonging to the Cuban Government. The relatives of Alejandro, Costa and Pena reportedly agreed to give Morales's family \$3 million of the \$58 million awarded to them.<sup>108</sup>

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<sup>107</sup> *United States v. Campa*, 529 F.3d 980, 1015 (11th Cir. 2008).

<sup>108</sup> CNN Law Center at

[http://www.cnn.com/2003/LAW/08/21/cuba.pilots/index.html?\\_s=PM:LAW](http://www.cnn.com/2003/LAW/08/21/cuba.pilots/index.html?_s=PM:LAW)

While Cuba has consistently maintained that the shoot down took place in Cuban airspace and was lawful, it has also expressed regret over the loss of life, as has the Cuban pilot who fired the missiles at the BTTR planes.

With the families having received large money awards for the loss of their loved ones, and the passage of over 18 years since the shoot-down, it is time to release the three remaining members of the Cuban Five in U.S. prisons and return them to Cuba.

**1. Executive authority to commute the sentences of or pardon the remaining three members of the Cuban Five confined in U.S. prisons**

Under the pardon power set forth in Article II, § 2 of the U.S. Constitution, the President can pardon Cuban Five (restoring their rights) or commute their sentences (shorten their prison terms, often to time served).<sup>109</sup> As the U.S. Supreme Court has stated, “the heart of executive clemency ... is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.” *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998).

U.S. Presidents have for over two hundred years used their executive authority to pardon or commute the sentences of people accused of espionage and similar crimes:

President George Washington pardoned Philip Vigol and John Mitchell convicted of treason in the Whiskey Rebellion.

President John Adams pardoned John Fries convicted of treason for his role in Fries's Rebellion.

President Thomas Jefferson pardoned David Brown convicted of sedition under the Sedition Act of 1798.

President Theodore Roosevelt pardoned Servillano Aquino who received a death sentence for anti-American activities in the Philippines.

President Woodrow Wilson pardoned Frederick Krafft convicted for violation of the Espionage Act.

President Warren Harding commuted the sentences of Eugene V. Debs and Kate Richards O'Hare, both convicted of sedition under the Espionage Act of 1917.

President Calvin Coolidge pardoned and ordered deported Lothar Witzke, a German spy and saboteur.

President Gerald Ford pardoned Iva Toguri D'Aquino – "Tokyo Rose" – convicted of treason.

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<sup>109</sup> U.S. CONST. art. II, § 2; 28 C.F.R. § 1.1 (2009) (listing commutations among the various forms of executive clemency that may be granted by presidents).

President George H. W. Bush pardoned Myra Soble for her conviction for involvement in the Rosenberg spy ring.

President Bill Clinton pardoned Elizam Escobar convicted of seditious conspiracy, Samuel Loring Morison convicted of espionage, and commuted the sentences of 16 members of FALN, a Puerto Rican group convicted of setting off over 100 bombs in the United States and conspiracy and sedition, and sentenced with terms ranging from 35 to 105 years in prison.<sup>110</sup>

Since taking office, President Obama has granted several commutations of sentences for offenders with life sentences related to cocaine distribution and possession.<sup>111</sup>

Under 28 C.F.R. § 1.3, commutation of a prison sentence can be granted in “exceptional circumstances” even to defendants with pending writs of habeas corpus. One of the listed exceptional circumstances is the severity (harshness) of the sentence. This report has discussed the severity of the sentences imposed when measured against the actual conduct of Hernández, Guerrero, and Labañino. Another listed “exceptional circumstance” that clearly applies to Gerardo Hernández is “ineligibility for parole ...” According to the United States Attorneys' Manual, Section 1-2.113 Standards for Considering Commutation Petitions, another factor that may be considered is “the amount of time already served ...” In this case the remaining three members of the Cuban Five in U.S. prisons have been incarcerated for about sixteen years.

## **2. Executive authority to reciprocate for the release of U.S. A.I.D.-official Alan Gross**

The President has power to enter into Executive Agreements. The great majority of international agreements that the United States enters into are not treaties but executive agreements—agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent. Congress generally requires notification upon the entry of such an agreement. Although executive agreements are not specifically discussed in the Constitution, they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical practice.

In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003), the U.S. Supreme Court made clear that “our cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate ... this power having been exercised since the early years of the Republic.” In *United States v. Belmont*, 301 U.S. 324, 330 (1937), the Supreme Court similarly stated that “an international compact ... is not always a treaty which requires the participation of the Senate.”

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<sup>110</sup> Numerous pardons have also been received by people convicted of manslaughter and murder including President John Tyler who pardoned Alexander William Holmes, a sailor convicted of manslaughter. President Grover Cleveland pardoned James Brooks, a Texas Ranger indicted for manslaughter. And President Richard Nixon who pardoned William Calley convicted of murder for his involvement in the My Lai Massacre in Vietnam.

<sup>111</sup> <http://www.justice.gov/pardon/statistics.htm>

In July 2010, President Obama and the U.S. Attorney General authorized a prisoner swap with Russia involving ten defendants convicted of spying for Russia. Each of the defendants had pleaded guilty to conspiring to act as agents of the Russian government. On July 9, 2010, Attorney General Eric Holder announced that none of the ten defendants passed classified information to Russia and therefore none were charged with espionage. The same, as has been seen, is true of the Cuban Five: None passed classified information to Cuba and none were charged with espionage.

White House Chief of Staff Rahm Emanuel was reported on July 8 as saying that President Barack Obama approved the prisoner exchange deal. On July 9, the Russian Ministry of Foreign Affairs confirmed the release of four prisoners in exchange for the U.S.'s releasing ten Russian citizens. The releases were prompted by "humanitarian considerations" and in the interests of "constructive partnership development."

The case of Alan Gross has been widely publicized in the United States. Gross traveled to Cuba five times starting in 2009 to implement an USAID project distributing international communication equipment. He was working with Development Alternatives Inc. (DAI), a contractor with USAID awarded \$6 million by the U.S. Government to engage in "democracy-promotion" in Cuba. The law authorizing this contract requires that USAID programs in Cuba be aimed regime change.

Gross was convicted of breaking Cuban law by smuggling and distributing satellite communications technology intended to circumvent Cuban Government networks.

Sixty-six (66) U.S. Senators have co-signed a letter to President Obama urging him to "take whatever steps are in the national interest to obtain [Gross's] release." Fourteen (14) Senators signed a letter urging the President to demand Gross's "immediate and unconditional" release.

Gross's detention and conviction are considered "arbitrary" by the UN Working Group on Arbitrary Detentions that analyzed his case. According to that panel of experts, his trial in Cuba lacked the international minimal standards of a fair and just legal process. The same UN body similarly considered "arbitrary" the 1998 detention and convictions of the Cuban Five. On April 8, 2004, the UN Working Group issued a decision stating in part:

Following their arrest ... [the Cuban Five] were kept in solitary confinement for 17 months, during which communication with their attorneys, and access to evidence and thus, possibilities to a adequate defense were weakened ... As the case was classified as one of national security, access by the detainees to the documents that contained evidence was impaired ...

The jury for the trial was selected following an examination process in which the defense attorneys had the opportunity and availed themselves of the procedural tools to reject potential jurors ... Nevertheless, the Government has not denied that even so, the climate of bias and prejudice against the accused in Miami persisted and helped to present the accused as guilty from the beginning. It was not contested by the Government that one year later it admitted that Miami was an unsuitable place for a trial where it proved almost impossible to select an impartial jury in a case linked with Cuba ...

[F]rom the nature of the charges and the harsh sentences given to the accused ... the trial did not take place in the climate of objectivity and impartiality which is required in order to [comply with] the standards of a fair trial, as defined in Article 14 of the International Covenant on Civil and Political Rights, to which the United States of America is a party ... [T]he severe sentences received by the [Cuban Five], [are] incompatible with the standards contained in Article 14 of the International Covenant and Civil and Political Rights ...

The UN Working Group requested that the U.S. Government “adopt the necessary steps to remedy the situation, in conformity with the principles stated in the International Covenant on Civil and Political Rights.”

The U.S. Administration could now “remedy the situation” by agreeing to the reciprocal humanitarian release of Hernández, Guerrero, and Labañino and Alan Gross.

The primary obstacle to reciprocal humanitarian release may be the argument that Gross was convicted of a less serious offense than Hernández and while Gross received a fifteen-year sentence Hernández received a life sentence. However, as explained in detail in this report, Hernández’s conviction for conspiracy to commit murder was a major miscarriage of justice and his life sentence is nothing less than absurd and inexplicable given the completely inconsequential involvement he had in the BTTR shoot down.

### **3. Executive authority to set aside the convictions of Hernández, Guerrero, and Labañino and permit the entry of guilty pleas with new sentences**

A third but somewhat more complex framework could be adopted to bring about reciprocal resolution of the Cuban Five and Alan Gross cases. This approach would also require discussions and agreement between the U.S. and Cuba.

Hernández, Guerrero, and Labañino have writs pending in the U.S. federal courts to set aside their convictions. Gross could likewise petition the Cuban courts to set aside his conviction.

For humanitarian reasons already discussed, the U.S. Government could request that the District Court vacate the convictions of Hernández, Guerrero, and Labañino with the understanding that they would immediately enter guilty pleas to agreed upon crimes, and be re-sentenced to time already served allowing their immediate release and return to Cuba.

At the same time, the Cuban Government could agree to set aside Gross’s conviction in return for Gross entering a guilty plea to an agreed upon crime and be re-sentenced to time already served allowing for his immediate release and return to the United States.

## **XII. CONCLUSIONS**

Gerardo Hernández, Antonio Guerrero, and Ramón Labañino have now been imprisoned for over fifteen years. They have been model prisoners. Both to correct what has been a significant miscarriage of justice in their cases, and for purposes of taking steps towards the normalization of relations with Cuba, the U.S. Government should end its incarceration of

Hernández, Guerrero and Labañino, commute their sentences to time already served, and repatriate them to Cuba.

As has been seen, the U.S. Government has historically condoned the activities of anti-Castro terrorist groups in Florida which justified the Cuban Government's deployment of intelligence officers to Florida; the U.S. Government failed to take adequate measures to block illegal BTTR flights into Cuban airspace in 1995 and 1996; the U.S. Government knew as much if not more than the Cuban Five about the dangers faced by BTTR pilots if they penetrated Cuban airspace on February 24, 1996; the Cuban Five did not receive a fair trial in Miami; the sentences imposed were unduly harsh and excessive; Gerardo Hernández's involvement in the BTTR shoot-down was entirely inconsequential; Hernández did *nothing* to encourage or entice the BTTR pilots to fly on February 24; the BTTR pilots knew the risk they were taking and assumed that risk; the U.S. Government not Hernández informed the Cuban Government about the BTTR's flight plans on February 24, 1996; Hernández had nothing to do with high Cuban military officials giving the authorization for a MiG pilot to shoot down two of the BTTR planes; the U.S. Government not Hernández tracked the BTTR planes and MiG jets in the air on February 24 on several radar systems and failed to warn the BTTR pilots that they were in danger of being shot down by the MiGs; the Cuban Five never gathered or transmitted top secret U.S. national security information to Cuba; the Cuban Five believed their primary mission was to fight terrorism.

For all of these reasons, the case of the Cuban Five should now be ended by releasing the remaining three members of the Five serving long sentences in U.S. prisons and permitting them to return home and rejoin their families in Cuba. From the standpoint of justice and sensible foreign policy, this would be the rational, moral, and humane step to take to bring this 16-year old case to an end.

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