

The case of the Miami Five raises serious questions about the US justice system, argues **Steve Cottingham**, who says it also calls into question America's attitude to terrorism

# MIAMI FIVE: WHO ARE 'TERRORIS

**T**he Five are Gerardo Hernandez Nordelo, Ramon Labanino Salazar, Antonio Gurrero Rodriguez, Fernando Gonzalez Llort and Rene Gonzalez Sehowerert. Both Antonio Guerrero and Rene Gonzalez are US citizens. They have been charged, and convicted following a profoundly flawed trial, of conspiracy to commit offences against the USA and of acting as agents of the government of the Republic of Cuba. One of them, Gerard Hernandez, was also convicted of knowingly and wilfully conspiring to perpetrate murder.

The Five deny all the charges. Their trial was unfair, their conditions in prison were inhumane, and they were fall guys in an attempt to cover up the US's support for illegal activity to overthrow the government of the Republic of Cuba.

#### Who are the terrorists?

Since 1959 the US has waged a terrorist war against Cuba. Testifying before the Senate Committee investigating the CIA's attempts to assassinate Fidel Castro, Richard Helms, the former CIA Director, admitted that 'We had task forces that were striking at Cuba constantly. We were attempting to blow up power plants. We were attempting to ruin sugar mills. We were attempting to do all kinds of things in this period. This was a matter of American government policy.'

In *Terrorism and Civil Society as Instruments of US Policy in Cuba*, Philip Agee, a former CIA operative, points out that no US administration since that of Eisenhower has renounced the use of state terrorism against Cuba. True, President Kennedy gave an undertaking to Khrushchev that the US would not invade Cuba at the end of the 1962 missile crisis. This commitment was ratified by successive US administrations but disappeared when the Soviet Union ceased to exist in 1991. As Agee says: 'terrorism against Cuba has never stopped'.

Cuban exile terrorists groups, mostly based in Miami have continued attacks against Cuba. Agee again: 'whether or not they have been operating on their own or under CIA direction, US authorities have tolerated them'.



# THE TS'?



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These terrorists include a group called Brothers to the Rescue. Its founder, Jose Basulto, has been accused of terrorist attacks against Cuba. His group operate openly in Florida.

## **The shutdown**

On 24th February 1996, Basulto and Brothers to the Rescue took off from Florida in three aircraft. Once airborne, they disregarded their flight plans and flew towards Cuba. Basulto and his cohorts had overflown Cuba a number of times in the past. This time, they were warned by Cuban Air Control that they were entering a prohibited area. The Cuban authorities say that Basulto’s aircraft continued to fly towards Cuba. Once inside Cuban airspace, they were intercepted. Two aircraft were shot down by the Cuban Airforce. Although a number of Basulto’s colleagues were killed, his own plane was not hit and he returned safely to Miami. Basulto and the US government argued that the shutdown took place over international waters and not in Cuban airspace.

The shutdown was a cause celebre among Cuban exiles in Miami. A street and plaza were named after those who died. A monument was erected in a county building in their honour.

## **Shooting the messengers**

Some Cubans (including some US citizens) attempted to infiltrate these exile groups. Their activities were not directed against the US government. No classified information was ever obtained.

In 1997 there were a number of bombings of tourist locations in Havana. An Italian tourist was killed.

Following the 1997 bombing campaign, the Cuban government gave the FBI information that had been obtained concerning terrorist activities. A diplomatic note sent by the US State Department to the Cuban Interests Section at Washington DC dated 5th November 1999 confirms this.

Instead of taking action against the terrorists in their midst, the US authorities arrested a number of Cubans (including some Cuban Americans) on 12th September 1998. Two days later, a Grand Jury in the Southern District of Florida indicted the Five. For the next 17 months, they were held in solitary confinement in Miami.

## **Miami**

The cases against the Five were due to be heard in Miami. It was immediately clear to the Five’s defence team that it would not be possible for them to have a fair trial in the city. The Five’s defence team commissioned a survey on attitudes in Miami. The results showed that the Five would not get a fair trial there.

The Court-appointed defence expert on psychology, Dr Gary Moran PhD, testified that 69 per cent of all respondents to a survey in Dade County and 74 per cent of all Hispanic respondents were prejudiced against people charged with the types of activities outlined in the indictment. Dr Moran also found that nearly 49 per cent of all respondents actually said they could not be fair or impartial. Approximately 90 per cent of the respondents said there were no circumstances that would change their opinions. Knowing that the local population was hostile to the Five, the defence team applied to the Court several times to transfer the case away from Miami. Each application was refused.

The case against the Five remained in Miami.

## **The jury**

Prior to the hearing the local press in Miami described the Five as spies. Gerardo Hernandez was called an ‘assassin’.

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▶ This type of reportage inflamed the situation and put more pressure on those Miami residents selected to serve as jurors.

The jury selection process took seven days. During selection, the defence team managed to remove every Cuban American from the jury. By the time the process had been concluded, the jury was composed of approximately one third African American, one third whites and one third non-Cuban Latinos.

During selection, all candidates were asked whether they agreed to the US trade embargo against Cuba. All potential jurors who expressed an opinion against the embargo were disqualified.

The foreman of the jury, when asked his attitude about Cuba, said that he regarded Fidel Castro as a communist dictator and would be pleased on the day he was removed. Another juror agreed with him and acknowledged that his daughter had been an employee of the FBI for 10 years.

Although the jurors were not Cuban exiles, they felt pressured by that community's aims and expectations. This was understandable. News reporter Jim Mullin from Miami has written an article about the 'lawless violence and intimidation (which) had been the hallmarks of the el exilo for more than 30 years'. This included bombings, assaults, murder attempts and even assassinations in Miami and elsewhere by anti Cuban terrorists.

On 2nd December 2000, the Nuevo Herald newspaper published an article dealing with fear among the jurors, which said: 'Fears of a violent reaction by Cuban exiles against the jury that decides to acquit the Five men accused of spying for Cuba has caused many potential jurors to ask the judge to excuse them from their civic duty.' It quoted one potential juror as saying: 'Sure I'm afraid for my safety, if the verdict doesn't suit the Cuban community there.'

These issues confirmed the grave misgivings of the defence team about the attitude of a Miami courtroom.

### The trial

The trial began in Miami in November 2000. The indictment contained 26 separate counts. As well as the relatively minor charges relating to the use of false identification, the most serious charges concerned conspiracy.

The Court heard evidence from 43 witnesses for the prosecution and 31 for the defence over a period of nearly seven months. The jury also had to consider hundreds of documents. These included documents seized from the Five at the time of their arrest. Although these documents were used by the prosecution, they were helpful to the defence. There were no documents that were classified nor any that compromised US security. The law on espionage in the United States is clear. Information generally available to the public cannot form the basis of an espionage prosecution. This documentation was 'open source' intelligence, that is it contained information available to anyone in the public domain.

A key witness for the prosecution was General James R Clapper Jr, who had 30 years experience in the military working in intelligence. He had been director of the Defence Intelligence Agency. Having reviewed all the documents seized by the government, he was asked in cross examination if they contained secret national defence information that was transmitted to Cuba. He responded: 'Not that I recognised, no.'



The prosecution were unable to prove that classified information had been obtained or that any harm had been done to US interests. This did not stop them arguing at the conclusion of the trial that the Five were in the country 'for the purpose of destroying the United States'.

The Five did not simply defend themselves by denying that they were spies and showing they received no classified information. Their defence team called a number of impressive expert witnesses. These included Eugene Carroll, a retired Rear Admiral in the US Navy with 35 years active service. At the time of trial he was Vice President for the Centre for Defence Information in Washington DC. He stated categorically 'Cuba is not a military threat to the United States'. Edward Breed Aitkisen was a Major General in the US Army. He described the Cuban military threat to the United States as 'zero'.

Gerardo Hernandez alone was charged with conspiracy to commit murder. This related to the shutdown on 24th February 1996. The prosecution produced two high frequency messages allegedly sent by Havana to Gerardo Hernandez in Miami. These, they said, showed that Gerardo Hernandez was aware of, and complicit in, the shutdown.

Lawyers for Gerardo Hernandez argued that the Brothers to the Rescue planes were shot down over Cuban sovereign territory, which as an act of government could not amount to a crime by an individual.

When the evidence had been concluded, the US government had not entered any evidence in support of the allegation that Gerardo Hernandez had conspired to commit murder. The prosecution became seriously concerned that Gerardo Hernandez would be acquitted. In an unusual move, the prosecution filed an extraordinary appeal to the Court of Appeals for the Eleventh Circuit. This emergency application tried to persuade the trial judge to present the legal position to the jury in a way that favoured the prosecution. The Court of Appeal, to its credit, refused to intervene.

Despite the lack of evidence of espionage or damage to US interests the jury took a remarkably short time to convict all the Five on all counts on 8th June 2001. After months of testimony and having considered hundreds of pages of documentation, the jury asked no questions. There was also concern that the jury also announced the date on which it was to give its verdict. All of this suggested that the defence team's worst fears about the trial venue were entirely justified.

### Sentence

The Five remained in prison, often in solitary confinement, until sentencing in December 2001.

- Antonio Guerrero was sentenced to life plus 10 years imprisonment.
- Rene Gonzalez was sentenced to 15 years imprisonment.
- Fernando Gonzalez was sentenced to 19 years imprisonment.
- Ramon Labanino was sentenced to life plus 18 years imprisonment.
- Gerardo Hernandez was sentenced to two terms of life imprisonment plus 15 years.

The Five were then dispersed to jails in different parts of the USA. Family members from Cuba were denied visas and visiting rights. Despite being model prisoners, the Five were frequently placed in solitary confinement.

An appeal was lodged with the Eleventh Circuit Appeal Court in Atlanta.

### The first appeal hearing

The first appeal hearing took place in March 2004. The main argument for the Five concerned the trial venue. The Five's



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lawyer, Leonard Weinglass, argued that the trial should never have been permitted in a community where more than 500,000 residents ‘have lost their homes, their businesses and their livelihood to the government that sent the Five to the US’.

The Appeal Court took nearly 18 months to give their decision. Throughout this time the Five remained in prison, sometimes in solitary confinement and often in appalling conditions.

In May 2005 the United Nations Working Group on Arbitrary Detentions reviewed the Five’s case. They criticised the US government for keeping the Five in solitary confinement for 17 months which prevented them from preparing properly for the hearing; denying the Five’s legal team access to certain documents which would have assisted their defence; and the ‘climate of bias and prejudice against the accused in Miami [which] [...] helped to present the accused as guilty from the beginning’.

#### **The first appeal decision**

In August 2005, the three judges from the Appeal Court overturned the Five’s convictions and ordered a re-trial. Although the Five appealed on a number of points, the decision itself concentrated on the issue of the trial venue. The judgment concluded that the Five did not get a fair trial in Miami.

The Appeal Court decision records the trial judge complaining that people were briefing the media as there was a ‘parade of articles appearing in the media about this case’. Also jurors were filmed and photographed outside the court and were shown on television. The decision also quotes prospective jurors expressing their hostility to the Cuban system during the selection process. One candidate, David Cuervas, was reported as saying ‘I will be a little nervous and have some fear ... for my own safety if I didn’t come back with a verdict that was in agreement with the Cuban community at large’.

The Appeal Court judges were particularly critical of the conduct of the prosecution in the last stages of the trial in Miami. The prosecution made a number of offensive remarks about Cuba. It was also alleged that the Five were ‘bent on destroying the United States’ and were ‘paid for by the American tax payer’. The Five’s lawyers made frequent objections to these inaccuracies. The trial judge agreed and instructed the jury to ignore these remarks, reminding them that the prosecution’s comments were not evidence.

The Appeal Court judges appeared particularly impressed

by the surveys, reports and news articles used in support. They quoted Dr Lisandrio Perez, Professor of Sociology at Florida International University and Director of the Cuban Research Institute, who emphasised the influence of Cuban Americans in the Miami area and Dr. Kendra Brennan, a legal psychologist, who analysed the survey results presented to the court by the Five’s defence team and concluded that the documented community bias showed a: ‘deeply entrenched body of opinions (so entrenched as to often not be consciously held) that would hinder any jury in Miami ... from reaching a fair and impartial decision in this case’.

The Appeal Court reviewed US case law and concluded that the courts attempts to remove community prejudice in the jury selection process did not work. Publicity about the shutdown and the Elian Gonzalez case had aroused passions within the Miami community. The local media’s ‘Spies Among Us’ campaign was cited. The presence of Cuban exile groups and paramilitary groups in the Miami area was seen as highly relevant. The Judges believed that a re-trial was necessary because of: ‘the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with improper prosecutorial references’.

The decision concluded by stating that a fair trial should be given to all defendants no matter how unpopular they may be as ‘our constitution requires no less’.

Leonard Weinglass hailed this Appeal Court ruling as a landmark decision on the question of trial venue in US law. The judges’ reasoning was based on existing case law with specific reference to the US constitution. It was hoped that the US government would either allow the retrial to take place or alternatively free the Five completely. Unfortunately it was not to be.

#### **The second appeal**

This first appeal had been heard by three judges out of a panel of twelve covering the Florida area. The prosecution then exercised its right to appeal to all twelve judges in an attempt to overturn the decision to award the Five a retrial.

The appeal hearing took place in Miami in February 2006. It was heard by all 12 judges on the circuit including two of the original appeal judges, one having retired.

Again the Five had to wait for the decision. When the result arrived in August 2006, it was a major disappointment to the Five as the full panel of judges overturned the original hearing decision for a retrial.

The Court of Appeals found in favour of the prosecution and upheld the original trial judge’s assessment of jury credibility and impartiality. They stated that the trial judge, as a member of the community, was best placed to evaluate whether there was a reasonable certainty that prejudice against the Five would prevent them from obtaining a fair trial. In the circumstances they did not believe that the Five were denied a fair trial.

Judges Birch and Kravitch put forward a strongly argued dissenting judgment along the lines of their original findings in the initial appeal.

#### **The next step**

The Five’s case does not end here. If all else fails they have the right to reply to the Supreme Court.

Under the lengthy and complex US procedure the Five have not exhausted their rights at the Court of Appeals stage. This is because the Court of Appeal has only really looked at the question of venue. There are a number of aspects to the Five’s appeal which have yet to be resolved. These include the question of whether the evidence was sufficient to convict the

► Five on charges of conspiracy; whether the conviction of Gerardo Hernandez on conspiracy to commit murder was safe based upon the apparent lack of evidence; whether the prosecutors committed misconduct in their final remarks to the jury; whether the sentencing was lawful as it was the maximum for everyone; whether the government violated the Five's basic rights in breaking into their apartments to download computers (pursuant to the Foreign Intelligence Surveillance Act); whether evidence was wrongly withheld from the Five's defence team (under the Classified Information Procedures Act) and other related issues.

The decision of the 12 judges in August 2006 sent the case back to the original three judges for consideration of these outstanding issues. With the retirement of Judge Oakes, another judge was appointed to sit with Birch and Kravitch to decide these points.

The hearing in August 2007 was attended by a large number of foreign observers, jurists and political activists. This was testament to the ever growing campaign to defend the Five.

After the hearing Weinglass told reporters: 'The court is having difficulty with this [lack of evidence].'

While they await the result of this latest stage of the appellate process in the US, the Five remain in prison. They have been there for nine years. Their relatives have the greatest difficulty in seeing them. Cuban based relatives are often refused visas to enter the United States and so have no chance of seeing their loved ones.

Despite the injustice of their arrest, conviction and incarceration, the Five remain in good spirits. They know that they have done nothing wrong. They have not attempted to obtain classified information or otherwise act against the interests of the USA. Their sole aim was to protect their homeland from terrorist attacks.

The US government and its legal process has been left with some difficult questions to answer. They have imprisoned the Five at a time when they are apparently prosecuting a war on terror. Terrorist organisations have been allowed to act with impunity in Florida. Orlando Bosch and also Luis Posada Carilles who have a history of complicity in terrorist activity.

For the Five the labyrinthine US appeal process grinds slowly on. It is likely that at least one further appeal will be lodged, possibly to the Supreme Court. Meanwhile the Five remain in prison, separated from their families, with their lives on hold. An ever-growing international campaign in support of the Five is developing. The support for the Five is becoming more vocal, the longer the case drags on.

Last year Weinglass sent a message to the Five's British supporters: 'First I would like to thank those of you who have stood by the Five during these last eight years, as well as those who are new to their cause. Your support, as well as that of thousands of others has already achieved success in making their case known to the public. However we are now at a critical juncture. If we lose before the court currently considering the case, the possibility of bringing the Five home to Cuba in the near future will be greatly reduced. This is the time to renew and expand our efforts in building up support. It was world wide support that saved the life of Angela Davis. The same could and should happen to the Miami Five.'

The Five's case has already been taken up by the United Nations Working Group on Arbitrary Detention. Amnesty International has written letters to the US authorities concerning the human rights aspects of the US government's treatment of the Five. Activists, jurists and celebrities are continuing to pledge their support.

It is fervently hoped that the Five will win their freedom through the US legal system. However it is clear that a political campaign in support of the Five is vital to ensure that justice is eventually done.

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