



International Committee for the Freedom of the Cuban 5

Alarcon: Unrelentingly demanding that President Obama free the 5 will be our promise of the New Year

Excerpt from a speech by the President of the National Assembly of the Republic of Cuba, Ricardo Alarcon de Quesada, on the occasion of the 50th anniversary of Cuban Institute of Friendship with the Peoples (ICAP)



...with the power that the imperialists have they have been able to practice against the Cuban population the most prolonged genocide in history. In the meantime, they provide shelter for their worst assassins such as the one who lives in Miami and recently published an infamous book where he boasts of his crimes. At the same time they unjustly imprison 5 Cubans who sacrificed their lives to save their fellowmen from the evil deeds of terrorists that Washington has tacitly tolerated and granted impunity.

Now, the day is coming when the US has to respond to the petition of Habeas Corpus on behalf of Gerardo Hernández Nordelo, which is his last legal recourse. At the same time the media in Miami is miserably and cowardly slandering him and trying to deceive and diverting attention to confuse the solidarity movement. Other from the right of Cuba to defend its sovereignty, there was not any evidence produced to directly link Gerardo Hernandez to the alleged crime. At this juncture they are trying to trick us and make us forget that in May 2001, in a dramatic and urgent demand before the Court of Appeal, the prosecutors recognized that they were lacking proof of direct knowledge and requested to modify the original accusation presented against our compañero. Despite that, he was sentenced to an extraordinary amount of time for a crime that he did not commit or could have physically carried out. It is hardly possible to find a similarly planned injustice.

We have made a call to the solidarity movement and to all honest people to raise their voices in defense of Gerardo. The United States government knows he is innocent and that they never had any proof to accuse him. We have to demand that they free him now. To free him and also Ramon, Antonio, Fernando and René, five Heroes of the Republic of Cuba. President Obama can and should free them right now, without conditions, immediately. All of them, and each and every one of the Five without exception.

Unrelentingly demanding that President Obama free them will be our promise for the New Year. Let the whole world continue to ask President Obama to free them. He knows that he can and that he should do it.

Miami Herald's gross distortion of Gerardo's appeal and its implications



By Karen Wald
12/29/2010

The Miami Herald and related media are putting out a seriously misleading story in relation to Gerardo Hernandez' new appeal: A banner headline Dec. 26 read:

"In about-face, Cuban spy says planes were shot down over international waters"

Since many people will be shocked and confused by this assertion, even if they know quite well how the Miami Herald functions and are able to discount both the repeated use of the terms "spy" and "spymaster" and the MH spin on what this means (its repeated assertions that this puts Gerardo at odds with the Cuban government on this matter), it is important to set the record straight.

The spin that the MH is putting on the new appeal for Gerardo, in which his defense attorneys say that Paul McKenna, his court appointed attorney in the original trial of the Five, did not provide an adequate defense for Hernandez, is that by acknowledging testimony claiming the planes were over international water when they were shot down means that Gerardo is now disavowing a major contention of his government regarding the historic shooting down of planes that had been routinely trespassing over Cuban airspace.

That, they go on, means a break between Gerardo Hernandez and the Cuban government.

Nothing could be farther from the truth, but to understand the essence of his appeal requires a review of some of the very lengthy history of this case.

Three of the five defendants tried for acting as undeclared agents of a foreign government and conspiracy to commit espionage (they couldn't be charged with espionage itself because none had access to classified information) were given life sentences. Gerardo was given a double life sentence because the jury bought hook, line and sinker the prosecution's contention that he was also guilty of murder conspiracy in the 1996 shooting down of 2 of the planes led by Jose Basulto - a well-known anti-Castro terrorist -- that had blatantly and illegally flown into Cuban airspace in 1996.

The MH emphasizes the part of the appeal that says, in effect, McKenna did not do a good job defending Hernandez because he over-emphasized the question of whether or not the planes were inside Cuban airspace (within 12 miles from Cuban shoreline) when they were hit by Cuban missiles. This aspect of the appeal criticizes that part of the defense strategy because it overshadowed the more important fact that Hernandez did not know in advance about his country's plans to finally put an end to those illegal and dangerous overflights, and because (though not mentioned by MH) the defense attorney did not object when Judge Lenard surprising changed the jury instructions by telling them the question of where the planes were was not at issue and that they did not need to decide that question to find Gerardo guilty of First Degree Murder. (More on this essential point later).

The MH acknowledges that evidence of Gerardo's advance knowledge of the planned shutdown was crucial to proving his role in the murder conspiracy. They don't acknowledge that not only did the prosecution fail to present any evidence that Gerardo knew of these plans -- in fact, the prosecutors asked the judge to dismiss that specific count of first degree murder against Gerardo (reduce it to second degree- see explanation of charges and instructions below) because they did not have any evidence that Gerardo knew of those plans, as required for a first degree conviction, and were afraid that their inability to prove this would make the jury find him not guilty on that charge.

To her shame, Judge Lenard refused the prosecution's request to reduce this charge, saying that it should be left to the jury to decide.

The prosecution then asked the appeals court for a "writ of prohibition" to get the murder charge reduced to second degree, explaining that "in light of the evidence presented in this trial, this [the instructions to the jury] presents an insurmountable hurdle for the United States in this case, and will likely, result in the failure of the prosecution on this count." (Emergency Petition for Writ of Prohibition, May 30, 2001, pages 4 and 21).

The Appeals court also refused to allow the change, and the final instructions to the jury included the first degree murder-conspiracy accusation against Gerardo Hernandez that the prosecution had already admitted it couldn't prove. But while she kept the seemingly improvable first degree murder charge in place, Judge Lenard changed the jury instructions in a different way to give the prosecution a better chance at conviction: she told them that if they believed the testimony that the planes were in international waters when shot down --although contradictory evidence on this point had been presented by the two sides -- one of the requirements for finding the defendant guilty of first degree murder would have been established (see notes in appendix below)

Gerardo's attorney did not object to this vital change; he had focused more heavily on the location of the planes than on the overriding fact that Gerardo had no prior knowledge of the plans to shoot the planes down and there was absolutely no testimony to indicate that he did. Gerardo is now serving two consecutive life sentences plus 15 years because of a first degree murder charge that even the prosecutors knew was not backed up by any evidence.

The jury, as we now know, heavily influenced by prior anti-Cuban hostility and the pressures coming from the Miami rightwing Cubans and media (including, above all, the Miami Herald) went into the jury room at the end of the trial determined to convict all five "Castro agents" on all counts, no matter what the evidence and testimony showed.

Whatever the Cuban government alleged --including the location of the planes when shot down -- was simply disregarded by them. But if the focus had been on the lack of evidence that Gerardo had any way to know of those plans, the outcome might have been different.

On appeal, the 3-judge Federal Circuit Court panel initially ruled the case should be retried due to the many errors committed during the trial -- above all Judge Lenard's refusal to move the trial out of Miami where there was no chance of five men who admittedly were working secretly for the Cuban government getting a fair trial. But in a highly unusual politically-motivated move, the prosecution asked for the case to be reheard by the entire 11-judge appeals court panel, and for those same political reasons, that court overturned the initial panel's very thoroughly documented decision.

It is notable, however, that Appeals Court Justice Kravitch, in her dissenting vote, several times mentioned the point now being raised by Gerardo's appeals attorneys: "the Government failed to provide sufficient evidence that Hernández knew something about an agreement to shoot down the planes at all, in international airspace or an any other place."

This reinforces the current defense position that it was a serious mistake on McKenna's part to over-emphasize the question of where the planes were shot down, and the Cuban government's right to do so, instead of focusing on the key issue: that Gerardo in any case was not part of that decision and knew nothing about it -- and then not objecting when the Judge undermined that entire line of defense in her instructions to the jury.

It is also important to recall some of the other undeniable facts in this matter:

**Whether or not the planes that were hit by the MiG missiles had reached international air space at the point of impact, there has never been any doubt that the planes led by Jose Basulto (a sworn enemy of Cuba who had carried out violent attacks against the island) on that date had flown into Cuban airspace, had been warned by radio that they were in a military defense zone and that Basulto had replied that he didn't care because as a "free Cuban" he would go where he wanted;

**there is also no dispute that his planes --US military Cessna's formerly used in the Vietnam war, and obtained for his group by Ileana Ros-Lehtinen -- had previously carried out flights over Havana during which they dropped anti-government leaflets -- and could have dropped anything else, including cluster bombs, grenades, etc because no one inspected their planes before they departed on their illegal flights;

**that the planes were in violation of US as well as Cuban law because they filed false flight plans and could have easily caused an air hazard with other, commercial, flights since they were flying "blind" as far as air control was concerned; and that there was never any evidence presented showing that Gerardo had any information that if Basulto's planes entered Cuban airspace that day they would be shot down.

All of the above is factual.

None of that is contradicted by any US or international authority.

So whether or not the planes shot down had returned to international air space by the time the missiles hit them, they had been in clear violation of Cuban, US and international law -- and in this day and age, the US would have done exactly the same thing.

How many Americans wish the US had done exactly that on Sept 11, 2001 before those first planes hit the twin towers?

Instructions to the Jury (June 4 , 2001) Fragment referred to Gerardo

Count 3 charges that defendant Gerardo Hernandez conspired with other persons to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought and premeditated intent in the special maritime and territorial jurisdiction of the United States.

...
Count 3 charges defendant Gerardo Hernandez.

Title 18, United States Code, Section 1117 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something, which if actually carried out, would amount to a violation of Title 18, United States Code, Section 1111. So, under this law, a conspiracy is an agreement or kind of partnership in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense, it is not necessary for the government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered into any formal type of agreement, or that the members had planned together all of the details of the scheme or the overt acts that the indictment charges would be carried out in an effort to commit the intended crime.

Also because the essence of a conspiracy offense is the making of the agreement itself, followed by the commission of any overt act, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First. That two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment.

Second. That the defendant, knowing the unlawful purpose of the plan, willfully joined in it.

Third. That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods or overt acts described in the indictment.

Fourth. That such overt act was knowingly committed at or the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An overt act is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing who all of the other members are. So, if a defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that defendant for conspiracy even though the defendant did not participate before and even though the defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

Title 18 United States Code, Section 1111 makes it a federal crime or offense for anyone to murder another human being within the special maritime or territorial jurisdiction of the United States. A defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt.

First. That the victims named in the indictment are dead.

Second. That the defendant caused the death of the victims with malice aforethought.

Third. That the defendant did so with premeditated intent.

Fourth. That the killing occurred within the special maritime or territorial jurisdiction of the United States.

The special maritime or territorial jurisdiction of the United States includes an aircraft belonging in whole or in part to the United States or to any citizen thereof, or to any corporation created by or under the laws of the United States or any state, while such aircraft is in flight over the high seas. The high seas include all waters beyond the territorial seas, twelve nautical miles of the United States and beyond the territorial seas, twelve nautical miles of the Republic of Cuba.

To kill with malice aforethought means to kill another person deliberately and intentionally; but the government need not prove that a defendant hated the person killed or felt ill will toward the victim at the time.

Killing with premeditated intent is required in addition to proof of malice aforethought in order to establish the offense of first degree murder. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused deliberates or thinks the matter over before acting.

The law does not specify or require any exact period of time that must pass between the formation of the intent to kill and the killing itself. It must be long enough for the killer after forming the intent to kill, to be fully conscious of the intent.

You are instructed that the location of the alleged murder, as described in the indictment, if you find beyond a reasonable doubt that such offense occurred there, would be within the special maritime or territorial jurisdiction of the United States.

International Committee for the Freedom of the Cuban 5

[Join Our Mailing List!](#)

[To learn about the latest developments on the case of the Cuban 5 www.thecuban5.org](http://www.thecuban5.org)