

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23966-CV-LENARD  
(Crim. Case No. 98-721-CR-LENARD)

ANTONIO GUERRERO,  
Movant,

vs.

UNITED STATES OF AMERICA,  
Respondent.

---

**REPLY TO GOVERNMENT’S RESPONSE TO MOTION TO VACATE**

The Movant, Antonio Guerrero, through undersigned counsel, replies to the government’s responsive memorandum of law in this case and states:

**I. The Movant Was Denied Due Process of Law Because the Government Surreptitiously Funded a Highly Inculpatory, Anti-Cuba Propaganda Campaign in the Community in Which the Defendant Was Tried.**

Antonio Guerrero was denied due process because the government funded an anti-Cuba propaganda campaign in the Miami area, paying at least seven Miami-area journalists hundreds of thousands of dollars to formulate anti-Cuba and anti-Castro messages that carried over into these journalists’ reporting on movant’s trial and as to the adverse influence and effects of Cuban government adherents in general. The government’s conduct—funding a propaganda campaign in the venue of the trial—constitutes an unprecedented violation of a criminal defendant’s right to a fair trial, and cries out for a remedy.

The government challenges the factual basis for movant’s claim by arguing that payments to journalists for their appearances on Radio and TV Martí did not influence those same journalists’ articles in other publications, that there was no prejudice from any improper news coverage because movant cited only limited articles in his opening memorandum, and because this Court took steps to insulate the jury from outside influences.

The government does not address—at all—the fact that the United States federal government was directly complicit in creating the publicity at issue. That fact alone places this case beyond the precedents cited by the Government, and also distinguishes the issues considered on appeal. Movant’s allegation is not only that negative press might have improperly prejudiced the jury—although that almost certainly was the case. Movant’s allegation is also that the Executive Branch of the United States federal government prosecuted movant and his co-defendants while simultaneously paying a small fortune to journalists who saturated the local media with stories designed to prejudice the defendants. The prosecution never disclosed this fact, even as it opposed movant’s request for a change of venue. The appearance of impropriety is overwhelming, and taints the verdict in the eyes of the world.

The government’s failure to disclose its payments to local (Miami Division) reporters publishing inflammatory anti-defendant articles unduly skewed the litigation of fundamental constitutional arguments in pretrial and trial proceedings, allowing the government to simply maintain that the Miami Division was no more prejudicial to the defendant than Broward County.

The point of the defense argument is not that the government has no right to use propaganda or counter-propaganda to influence and destabilize foreign governments, but rather that the operation of that campaign using the very molders of local public opinion – e.g., the jurors’ Cuba-related opinion noted by the *en banc* court in its decision on the venue change denial issues – whose effects could not be fully monitored by the defense represents a fundamental departure from the American system of justice and rendered the Court’s gag order on press communication a nullity as to one party – the plaintiff, represented by the United States Attorney.<sup>1</sup>

---

<sup>1</sup> See October 22, 1998 Order directing “all Parties and Counsel” to abide by Local Rule 77.2 (RELEASE OF INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS) (DE 122) (ordering *parties* and counsel to “refrain from releasing ‘information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation’ where ‘such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.’” *Id.* (quoting, S.D. Fla. L.R. 77.2 (A)(1)).

By paying nominally independent reporters to formulate political attitudes against Cuba – when the prosecution itself in this trial rested much of its case on the unreliability of Cuban evidence or perceptions of Cuban good faith – went to the core of the fundamental due process rights of the defendant. There are specific indications that the movant can support at an evidentiary hearing that the news reports by funded reporters had a direct impact on the jury selection process. Indeed, some of the key articles in the jury selection phase sought to condition responses to voir dire questions so as to minimize the defense’s ability to root out prejudice or fears regarding the case. The government sought to cabin any favorable articles from even government agent witnesses – such as Richard Nuccio, a high-ranking government official at the time of the underlying conduct – while feeding reporters cash to conceive of and disseminate harsh characterizations of the intentions and purposes of the Cuban government and its agents. *See* DE 818.

The prosecutors’ attempt to influence the media understanding of what the trial evidence established was successful. On December 28, 2000, an article appeared in the Miami Herald based on the prosecutors’ motion. Gail Espstein Nieves, U.S. Denies Knowing of Shoot-down Threat, *The Miami Herald*, Dec. 28, 2000. *See* Defendant Luis Medina’s Reply to Governments Motion to Enforce Court’s Directive Concerning Witness Comments to News Media, DE 820:6.

The government knew the risks of pro-Cuban or pro-defendant press, and not only enforced a gag order as to the Cuban agents, their witnesses, and their lawyers, but tilted the playing field by paying the journalists who could have provided balanced coverage.

Most importantly, in terms of process, as a direct result of the government’s non-disclosure, defense counsel was deprived of an opportunity to present compelling evidence to support a change of venue of the criminal trial and/or moving for sanctions to be imposed against the government for engaging in such manipulation of the news media and efforts in flooding the community with prejudicial, inflammatory news articles and Radio/TV commentary, via its paid journalists. Defense counsel would have sought sanctions ranging from dismissal of the indictment to striking some of the core evidence to be presented by the government at trial. There were a variety of sanctions

available, including a mistrial, to impose against the government for committing such serious misconduct during the course of the criminal proceedings.

The Court was troubled by the issue. The Court ordered the counsel for the parties to control their witnesses and took the care to obtain an on-the-record acknowledgment from counsel for each party. Trans. (Dec. 6, 2000) at 1546-47. The court was concerned about insulating the jury from community sentiment. The Court attempted to insulate the jury from community sentiment, and explained its efforts during trial, Trans. at 11415-6.

“It is axiomatic that the government must turn square corners when it undertakes a criminal prosecution. ... It follows that courts must be scrupulous in holding the government to this high standard as to sympathetic and unsympathetic defendants alike.” *Ferrara v. United States*, 456 F.3d 278, 280 (1st Cir. 2006). The government’s attorneys’ interest in this case “is not necessarily to win, but to do justice.” *United States v. Chapman*, 524 F.2d 1073, 1088 (9th Cir. 2008). Further, a conviction that lacks legitimacy of consistent adherence to principles of both law and fairness ultimately does more harm than good. The Eleventh Circuit has expressed the importance of the federal government’s recognition of its “dedicat[i]on to fairness and equal justice to all,” such that “Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer.” *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998).

The government’s (whether or not every person assisting in the accumulation of pertinent evidence was aware of it) concealment of its activities and control of the inflammatory and prejudicial publicity generated by paid opinion molders, creates more than merely a horrible appearance of an aggressive pursuit of the government’s propaganda campaign in a manner that minimized the likelihood of a fair trial. Media permeate modern society. To deny the likelihood of such permeation in a one-week trial is one thing, but to deny it in a trial stretching over eight calendar months (November 2000 to June 2001) and two presidential administrations is to rest the scales of justice on a flimsy reed.

One example – among many – points to the proper resolution of the claim in this case. Government paid journalist Pablo Alfonso was perhaps the most prolific of all of those paid to be part of the government’s network of opinion shapers, writing an average of more than 200 articles each year for El Nuevo Herald. Mr. Alfonso wrote about the accusation against Fidel Castro for the plane-shoot-down, always referencing the criminal charges against the Cuban Five in the news articles. The reporters referenced prosecution evidence, without context, in a manner that hid the paid nature of their work. No one had any idea that the government would deny that there was any special bias ongoing during trial, while it continued day after day.

Reporter Wilfredo Cancio revealed to the community the claim made in court by the prosecution on April 18, 2001 that Cuba would be “preparing a fabricated version of the facts,” after defense counsel Paul McKenna requested permission to return to Cuba to obtain additional witness testimony, in April 2001. This linked the defense so strongly to Cuba – the target of the paid journalistic prejudice – that to separate out individual items of prejudice against individual defendants was unnecessary.

The government vehemently opposed efforts to change the venue or even move the trial to Fort Lauderdale to reduce the prejudice, in order to get out of Miami-Dade County where the community was saturated with the inflammatory and highly prejudicial publicity which was one sided for the government and totally unfavorable to Cuban agents. Had defense counsel known of the government’s conduct described above, counsel would have presented a more concrete case justifying the change of venue to outside the Southern District of Florida, on these additional grounds. Indeed, so much time has passed now, that there is really no way to be sure how much effect government paid journalism had and how far it extended. The conclusion the Court should reach is that this simply no way to run a constitutionally-based justice system.

The Supreme Court has held, “A rule declaring that a prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process . . . . Prosecutors’ dishonest conduct or unwarranted concealment should attract no judicial approbation.”

*Banks v. Dretke*, 540 U.S. 668 (2004). This rule applies of course to the government, not just its legal representative. The government's intentional refusal or failure to disclose its payments to news reporters and TV commentators to generate inflammatory and prejudicial publicity surrounding the criminal trial during the course of the proceedings to former trial counsel caused counsel to forego presenting evidence in support of change of venue, imposition of sanctions against the government, and/or due process violations. The prosecutor is imputed with having knowledge of the withholding of the government's deeds described supra by the government and its agents as a matter of law – acts which deprived Defendant of a fundamentally fair and reliable criminal process and trial. See *Kyles v. Whitley*, 514 U.S. 419, 432, 437 (1995); see also *Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) (duty to disclose favorable evidence exists whether or not the prosecutor knew of the existence of the evidence if the evidence was in the possession of the government's arm or generally provided only to governmental entities).

The trial record clearly demonstrated this Court, the parties and counsel were all concerned about the media blitz pounding the airwaves and in print about the Cuban Five. In the absence of this damning evidence against the government now subject of the instant habeas proceedings, counsel did not request this Court to sequester the jury. Given evidence that the government was paying all sorts of local media types, the defense would have been justified in seeking a sequestered jury, a right forfeited due to the government's non-disclosure.

Indeed, the global outcry against the government's propaganda campaign and its effect on the verdict has been remarkable. In 2005, the United Nations Working Group on Arbitrary Detention adopted an opinion that the United States had failed to guarantee the defendants a fair trial as required by Article 14 of the International Covenant on Civil and Political Rights. See U.N. Working Group on Arbitrary Detention, Opinion No. 19/2005, U.N. Doc. E/CN.4/2006/7/Add.1, at 61 (adopted May 26, 2005). To movant's knowledge, the United Nations has never before condemned a U.S. trial on these grounds. Numerous domestic and international human rights organizations, including Amnesty International, have likewise expressed concerns regarding the conviction and

conditions surrounding the trial. *See, e.g.,* Amnesty Int'l, *USA: Amnesty International seeks review of case of the "Cuban Five,"* AMR 51/096/2010 (Oct. 13, 2010), available at <http://www.amnesty.org/en/library/asset/AMR51/096/2010/en/675bdaf0-ff18-46ce-bfee-694211b2e43b/amr510962010en.html> (specifically referencing this Motion's claims relating to journalists); *see also* Amnesty Int'l, *The Case of the Cuban Five*, AMR 51/093/2010 (2010), available at <http://www.amnesty.org/en/library/asset/AMR51/093/2010/en/9911673a-a171-49db-b757-581f2fbdfel1/amr510932010en.pdf>. In addition to these established advocates, grassroots organizations have sprung up to advocate specifically for movant and his co-defendants. *See also* Nat'l Comm. to Free the Cuban Five, <http://www.freethethefive.org> (last visited Aug. 15, 2011); Int'l Comm. for the Freedom of the Cuban Five, <http://www.thecuban5.org> (last visited Aug. 15, 2011). And when movant filed a petition for certiorari in the Supreme Court, twelve amicus briefs were filed in support of his petition—an unprecedented number for a petition seeking review of a criminal conviction. Organizations as diverse as the National Association of Criminal Defense lawyers, a group of Cuban-American scholars, a coalition of Nobel laureates, the National Jury Project, and the Senate of United Mexican States, joined by several European national parliaments and parliamentary committees, urged the Supreme Court to reverse the Eleventh Circuit's decision. *See* United States Supreme Court Docket No. 08-987 (listing amici). Even former United States President Jimmy Carter has stated his belief that "the detention of the Cuban Five makes no sense," and that "there have been doubts [about the trial] expressed in U.S. courts and by human rights organizations around the world. They have now been in prison 12 years and I hope that in the near future they will be freed to return to their homes." *See* Jimmy Carter's Havana Press Conference: <http://www.freethethefive.org/updates/CubanMedia/CMCarterPressConf33011.htm> (Trans., Apr. 1, 2011) (last visited Aug. 15, 2011). The weight of global opinion presses heavily against the government's assertion that the trial was free from prejudice.

During the months leading up to movant's trial, as well as during the trial itself, the Office of Cuba Broadcasting paid Miami-area journalists hundreds of thousands of dollars through Radio

and TV Martí, on which the journalists appeared to deliver anti-Castro messages. Those very same journalists then published inflammatory and inculpatory stories in which they asserted that movant was guilty of the crimes for which he was being tried, and linked him to a much broader pro-Castro and anti-American agenda; the journalists also published fervent anti-Cuba and anti-Castro propaganda, in supposedly independent media. The government dismisses these stories as essentially a coincidence, expecting this Court to believe that any link between the previously undisclosed payments and the stories is the product of conjecture, that is, that the government had no idea the paid opinion makers would spread their views to the local community laden with Cuban exiles.

The government's protests blink reality. As noted in movant's memorandum, on September 8, 2006, the Miami Herald published a front page story under the headline "10 Miami Journalists Take U.S. Pay." The story documented that, pursuant to FOIA requests, the Miami Herald had discovered that ten of the "most popular" journalists in South Florida had been receiving thousands of dollars in U.S. government pay while simultaneously reporting on issues involving Radio or TV Martí for their news organizations. Two of the journalists, Pablo Alfonso and Wilfredo Cancio Isla, were discharged for the conflict of interest.<sup>2</sup> Although the journalists subsequently were reinstated, an independent review determined that "the [government payment] story . . . was factually accurate and raised a serious and legitimate issue. Journalists taking payment for appearing on government-run broadcast outlets put themselves in an inherently compromised position, because the credibility

---

<sup>2</sup> Alfonso received \$58,600 in payments during the trial alone, and a total of \$252,325 in payments between November 1, 1999 and February 5, 2009. Alfonso published twenty-two pieces, *see* App. C, including those cited in movant's memorandum, and another on October 21, 1998, in which he quoted the ex-director of Radio Martí as stating that "according to his reports, the FBI had been able to examine 'dozens of documents and diskettes and it is surprised at the breadth of Castro's espionage network as well as the aggressiveness of its plans.'" Pablo Alfonso, *Cortina de Humo Sobre Espionaje*, El Nuevo Herald, Oct. 21, 1998 (headline translated: "Smokescreen About Espionage"). Cancio received \$4725 during the trial, and \$21,800 from September 30, 2000 to November 20, 2006. In addition to the pieces cited in movant's opening memorandum, Cancio published a speculative, inflammatory piece on June 4, 2001, alleging that Cuba used hallucinogens to train its spies. Wilfredo Cancio Isla, *Cuba uso alucinogenos al adiestrar a sus espías*, El Nuevo Herald, June 4, 2001 (headline translated: "Cuba uses hallucinogens to train its spies").

of independent news media depends on the public's trust that we are free from outside influences, especially government influence." Joe Strupp, *Hoyt's Report on Flawed "Miami Herald" Coverage*, Editor & Publisher (Nov. 17, 2006). It is clear that under prevailing professional norms, payments for appearances on Radio and TV Martí gave rise to a strong impression that those journalists' coverage of Cuba issues was tainted.

Indeed, the government's protests that movant's allegations lack a "factual basis" for the link between the payments and the inflammatory stories border on the outrageous given the government's repeated efforts to delay and outright obstruct FOIA requests seeking precisely the information that the government now complains is lacking in movant's memorandum—for example, the contracts between the journalists and the Office of Cuba Broadcasting. Notably, although movant has described the arduous, unproductive and unending FOIA effort undertaken by the National Committee to Free the Cuban Five, the government makes no effort to either dispute or explain the difficulties that the Committee has encountered. That effort continues to shed light on the scope of the ties between journalists covering the trial and the government. An affidavit from Mara Verheyden-Hilliard, enclosed with this Reply as Appendix A, substantiates the difficulties that activists, the media, and attorneys have encountered in obtaining transparency on this issue. *See Verheyden-Hilliard Aff.* ¶¶ 4–8. An evidentiary hearing would shed further light on the truth.

Next, the government contends that the media's environment was not pervasively negative because movant's original memorandum highlighted only three journalists and eight stories. But the cited pieces represent but a sampling of the work of journalists paid by the government before and during the trial. In addition to the cited pieces, movant has other pieces, including an article by paid journalist Julio Estorino, published on May 14, 1999, and headlined (translated from Spanish) "Malice Aforethought," which contained statements (translated) that:

It is clear from the prosecution's arguments that the brutal attack was not a heated response to a provocation, but a coldly calculated aggression; a crime in every sense, aggravated and perfidious.

This ought to make us think a bit about our own conduct and the ease with which we often allow for the weeds to grow among us, all of us victims of the same victimizer.

Julio Estorino, *Premeditación y alevosía*, Diario Las Americas, May 14, 1999, at A-4. On January 5, 2001, Estorino wrote a column headlined (translated) “Espionage and Indifference,” in which he stated (translated) that:

The trial that is ongoing in Miami against a number of Cubans accused of being spies for Castro’s regime is serving, if for nothing else, at least, to prove, at least, the good sense and seriousness of the exiles who have been proclaiming forever their conviction that Fidel Castro is capable of everything evil, false and unscrupulous, above all if it can be directed against the United States or against the most distinguished people and organizations among the exiles. . . .

For if the insanity shown in the downing of the airplanes from Brothers to the Rescue over international waters, with cold, malicious calculation, were not enough, now it comes to light that Castro’s secret services have been trying to find infiltration points for weapons and explosives on the coastlines of this country, a task that was assigned to some of those implicated in this spy network . . . .

Julio Estorino, *Espionaje e indiferencia*, Diario Las Americas, Jan. 5, 2001, at A-4.

These articles represent only a small sampling of materials written before and during the trial. Movant is prepared to present additional examples at a hearing. As an initial showing, Appendix A to this Reply sets forth fifty-four relevant articles by seven paid journalists, all of which can be translated and presented to this Court. And contrary to the government’s claim that these articles were obscure, the vast majority were published in El Nuevo Herald, a publication with a daily readership of approximately 200,000, *see* About El Nuevo Herald, <http://www.miamiherald.com/about-el-nuevo/> (last visited Aug. 15, 2011), and in Diario Las Américas, which has a daily circulation of over 45,000, *see* Echo Media, <http://www.echo-media.com/mediaDetail.php?ID=6075> (last visited Aug. 15, 2011). These are among the most heavily circulated Spanish-language papers in the nation, and in a locale like Miami with such a large Hispanic population, they constitute major sources of public information.

The government next attempts to downplay the significance of movant’s allegations by arguing that the stories cited by movant could not have had any effect on the jury because they were

published either too far in advance of the trial or too late to influence the jury, which was being admonished by the court regularly not to read any media accounts about the trial. But this argument cannot be reconciled with the argument that the government itself made while seeking the enforcement of a gag order for witnesses involved in the trial. Beyond the issue of whether the movant can actually demonstrate jury bias resulting from the government's payments to journalists, the payments corrupted the trial process itself. For the same reason, the fact that the trial was ongoing when many of the articles were published does not mitigate the risk of prejudice. True, the Court admonished the jury not to heed outside input, but given the pervasiveness of the negative press, and the diligence with which the media pursued members of the jury themselves, it simply was impossible to guarantee that outcome.

The government's remaining contentions—that movant is not entitled to relief because he cannot show any impact on his trial from the government's media campaign generally, and that movant's allegations are merely a variation on his community prejudice arguments—fail for the same reasons. The conviction should be reversed for several independent reasons: (1) the government's sponsorship of the anti-Cuba media campaign negated “the fundamental conception of trial” enshrined in the Due Process Clause, *see Estes v. Texas*, 381 U.S. 532, 564 (1965)); (2) the government's campaign created a “constitutionally intolerable probability” of influencing movant's trial, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262 (2009)); (3) the deprivation of due process qualifies as structural error because it results from government misconduct “with consequences that are necessarily unquantifiable and indeterminate,” *see Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)); and (4) reversal is required here because of the extraordinary circumstances of this case. The Government makes no real effort to dispute any of this. Instead, it argues only that there is nothing in the record to support a claim of any impact on movant's trial.

This argument fails. As the Court is well aware, jurors were harassed by the media during the trial, a fact that forced the Court to take corrective action to protect the jurors and their objectivity. Clearly, the intense media attention surrounding the trial was cause for concern.

Furthermore, as movant’s memorandum made clear, a conclusive showing of prejudice is not required as long as the circumstances “pos[e] such a risk of actual bias or prejudgment that the [Government] practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Caperton*, 129 S. Ct. at 2255 (citation and internal quotation marks omitted). The Government tries to downplay the significance of this language, insisting that the cases movant cites do not dispense with an actual nexus of impact on the criminal justice process. But this assertion is belied by *Caperton*, in which the Supreme Court specifically reiterated that it was neither questioning the lower court Justice’s “subjective findings of impartiality and propriety” nor “determin[ing] whether there was actual bias.” 129 S. Ct. at 2263. Rather, as the Court explained, “[d]ue process requires an objective inquiry” into the *risk* of bias or prejudgment. *Id.* at 2264. All objective indicators indicate that such a risk was overwhelming here. The government’s ties to the journalists who assaulted movant’s innocence in print cast doubt on the objectivity of the trial process, and call the verdict into question.

Finally, the Government points to *Campa 2* to argue that this issue has already been decided. But the Government overreads *Campa 2*. First, the Eleventh Circuit reviewed this Court’s decision under a deferential “abuse of discretion” standard. *See Campa*, 459 F.3d at 1144. But at the time of trial and appeal, neither this Court nor the Eleventh Circuit knew that government-paid journalists had produced the propaganda alleged to have affected the trial, so on the crucial point of this Motion, there is no decision or reasoning to which the court could defer. Furthermore, in its discussion of the news articles, the Eleventh Circuit held that “pretrial publicity regarding peripheral matters that do not relate directly to the defendant’s guilt for the crime charged” was not sufficient to create a presumption of prejudice. *Id.* However, the articles that movant has cited to this Court, and most particularly those by Alfonso, Estorino, and Remos, unambiguously *do* relate “directly to [movant’s] guilt for the crime charged.” The Eleventh Circuit also noted that the “volume, saturation, and invidiousness of news coverage” was not sufficient to presume prejudice. *Id.* at 1145. But as the FOIA process has proceeded, and as additional news stories have been uncovered, it has become

clear that journalists published dozens of inflammatory pieces about movant, while being paid by the government, during the proceedings. Clearly, no court contemplated the sort of government-paid media campaign alleged. For these reasons, movant is entitled to a hearing on his due process claim.

**II. Movant's Due Process and Fair Trial Rights Were Violated by the Government's Abuse of the CIPA Process and its Failure to Comply with *Brady* and the Government Undermined the Effective Assistance of Counsel by Failing to Disclose Material Exculpatory Evidence.**

The government's response to the claims pertaining to *Brady* and CIPA disclosures is that the claims are futile because there has been no revelation yet of the totality of information that the government possessed regarding Cuban espionage in the relevant period and hence the defense will be unable to prove that the government knew of the existence, function, and practice of actual Cuban espionage operations, evidence that would have placed into context the non-espionage actions and focus of the five defendants, including Guerrero, who despite being on a minor military installation, was not accused of ever even *attempting* to possess national security material. In his memorandum, Guerrero alleged that

the material withheld was discovery regarding actual Cuban espionage efforts and that these channels and means of espionage were fundamentally different in nature from the activities at issue in this case. In summary, government investigational and analytical materials showed that the actual espionage efforts by Cuba were entirely distinct from social-networking or ground-level community monitoring efforts at issue in this case. Similarly, the government suppressed evidence that would more clearly have shown the compartmentalization of operations by Cuban intelligence.

Memo at 19. Unsurprisingly, the government's you-can't prove-it response is unsupported by any affidavit, ignores the course of revelation of actual espionage prosecution efforts against Cuban agents since the convictions in this case, and rests entirely on the movant's lack of knowledge of what exactly the government withheld. The government's failure to respond *factually* to the allegations – i.e., the government's failure to deny that it had information as to how Cuba's actual espionage operations differed, strikingly, from the non-espionage operation in this case – is insufficient to overcome the movant's well-pleaded allegations. *See United States v. Magini*, 973

F.2d 261, 264 (4th Cir. 1992) (hearing is necessary”where material facts are in dispute involving inconsistencies beyond the record”).

The extraordinary status of this case – the only espionage conspiracy prosecution *ever* without even an allegation of an attempt to obtain classified information – coupled with the post-conviction historical record of actual Cuban espionage operations that functioned in a remarkably different manner than the street-level, focused community monitoring functions in this case, so as to completely undermine the “expert” testimony offered by the government as to the nature of the defendants’ conduct, is plainly enough to warrant an evidentiary hearing. At a minimum, the government should be compelled to respond factually to the allegations that it – or agencies within its scope of access – had, as of May 2001, information that revealed that the ring of agents in this case did not function in the manner associated with Cuba’s actual espionage activities and was not, in any sense, an espionage ring.

WHEREFORE, the Movant respectfully requests that Court grant his motion to vacate conviction and grant him an evidentiary hearing and other appropriate relief.

Respectfully submitted,

/s/ John E. Bergendahl

John E. Bergendahl  
Fla. Bar No. 327761  
Counsel for Antonio Guerrero  
LAW OFFICES OF JOHN E. BERGENDAHL  
Ingraham Building  
25 S.E. 2nd Avenue, Suite 1105  
Miami, Florida 33131  
Tel. (305) 536-2168 Fax (305) 536-2170  
E-Mail lojeb@bellsouth.net

#### **CERTIFICATE OF SERVICE**

I HEREBY certify that on August 16, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ John E. Bergendahl

John E. Bergendahl

# **APPENDIX A**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 10-21957-Civ-LENARD**  
Criminal Case No. 98-721-Cr-LENARD

GERARDO HERNANDEZ,

Movant,

**AFFIDAVIT OF MARA VERHEYDEN-HILLIARD**

v.

UNITED STATES,

Respondent.

\_\_\_\_\_ /

I, Mara Verheyden-Hilliard, declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am Executive Director of the Partnership for Civil Justice Fund (the "PCJF"), headquartered at 617 Florida Ave., NW, Washington, D.C., 20001. I make this affidavit in support of Gerardo Hernandez's motion to vacate, set aside or correct judgment and sentence under 28 U.S.C. § 2255, filed on June 14, 2010.

2. The PCJF is a public interest legal organization dedicated to the defense of human and civil rights secured by law, the protection of free speech and dissent, and the elimination of prejudice and discrimination. The PCJF has extensive experience litigating civil rights issues in the federal courts, with an emphasis on the intersection between First and Fourth Amendment issues. The PCJF also pursues issues of government transparency, often by filing requests under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

3. On September 8, 2006, the Miami Herald published an article headlined "10 Journalists Take U.S. Pay." This article, which relied on FOIA requests for information, revealed for the first time that numerous journalists who had reported on Cuban issues, including on the trial of movant and his co-defendants (together, the "Cuban Five"), had received significant payments from the U.S. Government, specifically from the Office of Cuba Broadcasting, a propaganda agency that pursues U.S. foreign policy toward Cuba. This revelation sparked a broader investigation of the role that propaganda efforts play in shaping domestic public opinion about issues relating to Cuba, and specifically about the influence of paid journalism on the outcome of the trial of the Cuban Five.

4. On January 23, 2009, the National Committee to Free the Cuban Five (the “Committee”) submitted a FOIA request to the Broadcasting Board of Governors (the “Board”), an arm of the State Department that houses the Office of Cuba Broadcasting. The request sought production of records “in the possession of the Broadcasting Board of Governors and Office of Cuba Broadcasting, regarding all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by U.S. media communications entities in television, newspaper, radio and Internet, from the Office of Cuba Broadcasting and the Broadcasting Board of Governors,” as well as “any and all records, including correspondence and contracts regarding the purpose of those grants, payments and/or transfers from the [Board] and [Office of Cuba Broadcasting] to those individuals, organizations and vendors.”

5. In response to initial communication from the Board, in order to facilitate processing, the Committee provided to the Board initial prioritized lists of reporters for whom it was seeking information. The Board responded with a summary chart listing payments to a subset of journalists, and demanded more than \$30,000 in fees for a more complete disclosure. The Committee followed up by providing the Board with a list of contracts for disclosure, listed by name, number, and date, and reiterating its grounds for a fee waiver. The Committee offered to pay for the production of the contracts relating to the journalists it had named, while reserving its right to protest the fees later. However, over the months that followed, the Board refused to provide any further disclosure, despite repeated requests from the Committee, and despite the Board’s acknowledgement that some if not all of the requested materials were easily accessible to the Board.

6. On September 9, 2009—after six months of efforts and administrative appeals, during which the Board offered a range of excuses and justifications for non-disclosure, but no additional contracts despite the Committee’s willingness to pay for the production of the contracts—the PCJF filed a lawsuit on behalf of the Committee, seeking injunctive relief in the form of a response to the FOIA request.

7. On October 20, 2010, *Liberation* Newspaper submitted separate FOIA requests with the Board and the State Department seeking the production of the contracts of journalists who were paid by the U.S. government. The Board responded by releasing at least some of the contracts and records relating to its extensive payments to journalists based in Miami. *Liberation* has analyzed the disclosed materials and begun publishing articles about its findings. *Liberation* has established a website devoted to its investigation into the U.S. Government’s funding of the Miami media at Reporters for Hire <http://www.ReportersforHire.org>. The disclosed materials have also been made available for public search and review on the website.

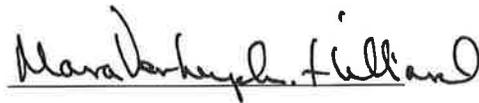
8. The State Department, which was requested by *Liberation* Newspaper to disclose the responsive documents in its possession for the period covering January 1998 to December 2002, has not done so. The State Department is understood to possess or have control over the responsive information that was previously in the possession of the U.S. Information Agency, the predecessor agency to the Broadcasting Board of Governors and the Office of Cuba Broadcasting. The U.S. Information Agency was integrated into the Department of State. We have filed an appeal on behalf of *Liberation* Newspaper regarding the failure of the State Department to produce responsive information.

9. The difficulties faced by the Committee, by *Liberation*, and by the PCJF in the FOIA process have demonstrated the Government's strong reluctance to disclose its financial arrangements with Miami-area journalists. It is perhaps telling that when the Committee, an organization expressly dedicated to public exposure of the injustice suffered by the Cuban Five sought the documents in question, it was met with dilatory tactics and resistance from the Board. The State Department has not provided contract documents with Miami journalists, which are believed to be in its control, which cover the period of the Cuban Five's arrest through trial. For instance, contracts obtained in the *Liberation* FOIA request show that one of the journalists, Julio Estorino, was employed by the Government from 2002 to 2003. However, Estorino's own CV states that he was employed by the Government as of 1998. The difficulties encountered thus far raise concerns that there are more payments, and perhaps more journalists, whose existence the Government has not yet disclosed, and so the investigation remains ongoing.

10. The Office of Cuba Broadcasting and the Broadcasting Board of Governors, and their predecessor agency, the U.S. Information Agency, which was integrated into the Department of State, are responsible for the operation of Radio Martí and TV Martí, by which the U.S. Government broadcasts into Cuba and into Florida.

11. The U.S. Information Agency, the Board, and the State Department were and are barred by law from propagandizing the U.S. public under the Smith-Mundt Act, 22 U.S.C. § 1461. To what extent the government was and is engaged in covert propaganda operations that would illegally influence U.S. domestic public opinion on Cuba and the Cuban Five is a critical issue.

12. The U.S. Government appears to have paid journalists in Miami who also published reports that were inflammatory and prejudicial towards Cuba and the Cuban Five tried in Miami. Those journalists, who presented themselves as independent reporters, did not disclose that they were paid by the U.S. Government despite publishing and airing stories in the Miami media during the prosecution and trial that were supportive of the U.S. Government's prosecution of the Cuban Five and which contained hostile and false information about the Cuban Five. Disclosure of these contracts may evidence serious government malfeasance in intentionally and covertly funding the "independent" U.S. media to propagandize and influence domestic public opinion including the jury pool and sitting jury during the high-profile government prosecution and resulting conviction of the Cuban Five. However, the Government has to date refused to provide complete disclosure of these documents.



Mara Verheyden-Hilliard

Washington District of Columbia  
Subscribed and sworn to before me, in my presence,  
this 16<sup>th</sup> day of August, 2011  
by Mara Verheyden-Hilliard  
[Signature] Notary Public  
My commission expires 9/17/14

LEONARD A. SMITH, JR.  
Notary Public, District of Columbia  
My Comm. Expires Sept 14, 2014

# **APPENDIX B**

## APPENDIX C: Overview of Relevant Paid Propaganda Journalists

Based on the information obtained in FOIA requests, the following journalists were paid by the Government to engage in propaganda, and also covered the trial or closely related subjects.

1. Pablo Alfonso received a total of \$252,325 from November 1, 1999 to August 22, 2007, including at least \$58,600 during the time of the trial of the Cuban Five. He may have received payment prior to November 1, 1999, but that information has not yet been disclosed. He published twenty-two articles relevant to the subject matter of the trial. The citations are:
  - a. *No Aparecen Pruebas Contra Hermanos al Rescate*, El Nuevo Herald, Mar. 9, 1996
  - b. *Abre Pesquia: La OEA Sobre Derribo de Aviones*, El Nuevo Herald, Mar. 9, 1996
  - c. *U.S. Lawmaker to Present Cuba's Rights Record*, Miami Herald, Apr. 10, 1996
  - d. *¿Dió Raúl Castro la Orden?*, El Nuevo Herald, May 10, 1996
  - e. *U.S. Turns Over Tapes of Brothers Drowning. Raul Castro May Have Spoken to Jet Pilots*, Miami Herald, May 10, 1996
  - f. *Inteligencia de EU no Sabe Si Raúl Castro Habla*, El Nuevo Herald, May 10, 1996
  - g. *Preocupa Supuesta Proximidad a EU de Cazas Cubanos Perseguidores de Avioneta*, El Nuevo Herald, July 3, 1996
  - h. *Cae Red de Espionaje de Cuba, Arrestan a 10 en Miami*, El Nuevo Herald, Sept. 15, 1998
  - i. *Posible Alianza con Terrorismo*, El Nuevo Herald, Sept. 16, 1998
  - j. *Espías: Un Viejo Consejo de Krushchev*, El Nuevo Herald, Sept. 20, 1998
  - k. *Fundación apoya pedido de Helms sobre espías*, El Nuevo Herald, Oct. 1, 1998
  - l. *Cuba en cimero puesto en la ONU*, El Nuevo Herald, Oct. 17, 1998
  - m. *Frente*, El Nuevo Herald, Oct. 21, 1998
  - n. *Cortina de humo sobre espionaje*, El Nuevo Herald, Oct. 21, 1998
  - o. *Analizarán infiltración de espías entre anticastristas*, El Nuevo Herald, Oct. 27, 1998
  - p. *Sentencia de Juez Genera Conflicto entre Cuba y EU*, El Nuevo Herald, Feb. 14, 1999
  - q. *Hermanos al Rescate volará al punto del derribo*, El Nuevo Herald, Feb. 23, 1999
  - r. *Todo está listo en Seattle para recibir a Fidel Castro*, El Nuevo Herald, Nov. 24, 1999
  - s. *Castro, la incognita de la reunion de Seattle*, El Nuevo Herald, Nov. 28, 1999
  - t. *Castro rehúsa venir por temor a ser arrestado*, El Nuevo Herald, Nov. 30, 1999
  - u. *Díaz-Balart pide a Alemania arrestar a Castro*, El Nuevo Herald, July 20, 2000
  - v. *Llevarán El Caso De Hermanos Al Gobierno De Bush*, El Nuevo Herald, Jan. 14, 2001
2. Wilfredo Cancio Isla received a total of at least \$21,800 from September 30, 2000 to November 20, 2006, including \$4725 during the trial. He published at least five relevant articles during the period of documented payment. The citations are:
  - a. *La fiscalía teme que Cuba controle el juicio a espías 'Cuba prepara una version arreglada de los hechos', dijo*, El Nuevo Herald, Apr. 19, 2001

- b. *Llaman Patriota a Acusado de Espía*, El Nuevo Herald, May 31, 2001
  - c. *Califican a los Espías de 'Protectores' de EU*, El Nuevo Herald, June 1, 2001
  - d. *Cuba usó alucinógenos al adiestrar a sus espías*, El Nuevo Herald, June 4, 2001
  - e. *Los Presuntos Espías Esperan por el Veredicto*, El Nuevo Herald, June 5, 2001
3. Julio Armando Estorino received \$15,050 from October 16, 2002 to December 1, 2003. His CV (which is undated, but was obtained in a FOIA request), states that he has worked for T.V. Martí, and the "U.S. Government," from March 1998 to the present. It also states that he worked for Radio Martí from March 1998 until August 2001. Further documentation of payments he received during his employment is being pursued. He published at least five relevant articles. The citations are:
- a. *Los espías de La Habana y las intenciones de Washington*, Diario las Américas, Sept. 18, 1998
  - b. *Washington, La Habana . . . y Miami*, Diario las Américas, Oct. 2, 1998
  - c. *Premeditación y alevosía*, Diario las Américas, May 14, 1999
  - d. *Espionaje e indiferencia*, Diario las Américas, Jan. 5, 2001
  - e. *Espías y malas lenguas*, Diario las Américas, Feb. 2, 2001
4. Helen Ferre was the editor of the editorial page at Diario las Américas. She received at least \$6025 from September 30, 2000 to November 20, 2006, including \$1125 during the trial. She wrote or edited at least four relevant articles. The citations are:
- a. *La Trascendencia de la Captura de los Espías de Castro en la Florida*, Diario las Américas, Sept. 16, 1998
  - b. *Crimen sin castigo*, Diario las Américas, Feb. 10, 2001
  - c. *La Tiranía Totalitaria de Castro Sí Es Una Amenaza Para Los Estados Unidos de América*, Diario las Américas, Feb. 16, 2001
  - d. *El Rayo*, Diario las Américas, May 15, 2001
5. Alberto Muller received at least \$39,871 from October 1, 2004 until April 15, 2010. Documentation relating to prior payments is being pursued. During the trial, he published at least two particularly incendiary articles.
- a. *Fidel Castro asesino, instigador y terrorista*, Diario las Américas, Nov. 21, 2000
  - b. *Asesinos*, Diario las Américas, Feb. 20, 2001
6. Ariel Remos received at least \$24,350 from September 30, 2000 until November 20, 2006, including at least \$11,750 during the trial. She published at least fifteen relevant articles both before and during the period of documented payment. The citations are:
- a. *Ataca a la seguridad nacional la descubierta red de espionaje cubana*, Diario las Américas, Sept. 16, 1998
  - b. *Espías y agentes de influence castrista*, Diario las Américas, Sept. 20, 1998
  - c. *Respalda la Fundación el pedido de "enérgica respuesta" hecho por el senador Jesse Helms*, Diario las Américas, Oct. 2, 1998

- d. *¡Arresten a Castro!*, Diario las Américas, Oct. 21, 1998
  - e. *Demandan arresto de Castro*, Diario las Américas, Oct. 22, 1998
  - f. *Insiste Basulto en que la Administración pudo evitar el derribo de las avionetas*, Diario las Américas, Oct. 24, 1998
  - g. *Volará Hermanos al Rescato a “Punto Mártires” durante la Cumbre*, Diario las Américas, Nov. 12, 1999
  - h. *Castro podría ser arrestado y enjuiciado en Estados Unidos*, Diario las Américas, Nov. 18, 1999
  - i. *Llevarán a Bush el caso de Hermanos al Rescate*, Diario las Américas, Jan. 11, 2001
  - j. *Castro representa un reto continuo a la seguridad de EE.UU.*, Diario las Américas, Jan. 16, 2001
  - k. *Castro planeó el asesinato en EE.UU de Jesús Cruz Flor*, Diario las Américas, Jan. 19, 2001
  - l. *Piden al president Bush que enjuice a Castro*, Diario las Américas, Feb. 8, 2001
  - m. *\$93 millones para familiares de Hermanos al Rescate*, Diario las Américas, Feb. 14, 2001
  - n. *Recibe Jeb Bush y llevará al Presidente carta pidiendo enjuiciamiento a Fidel Castro*, Diario las Américas, Feb. 27, 2001
  - o. *Jeane Kirkpatrick pide a Aschcroft encausar por terrorismo internacional a funcionarios cubanos*, Diario las Américas, Feb. 27, 2001
7. Enrique Encinosa is a long-time news commentator on Radio Mambí WAQI, which covered the Cuban Five extensively from the time of their arrest. He received at least \$10,410, including \$5200 during trial. Research thus far has revealed one relevant item. The citation is:
- a. Olance Nogueras, *Expertos Creen Que Cuba Vendía Información de Espías*, El Nuevo Herald, Sept. 21, 1998 (article in which Encinosa is interviewed, and states the possibility that Cuban spies are spying on the United States so that they can then sell the information to parties in Africa and the Middle East).

In addition, Encinosa has been cited and quoted as advocating terrorism against the Castro regime on at least four occasions. The citations are:

- b. *Alpha 66 Celebra Cumpleaños con Nuevo Campamento*, El Nuevo Herald, Nov. 20, 1996 (article about Encinosa, who was the keynote speaker at Alpha 66’s inauguration of a new military training camp)
- c. Kathy Glasgow, *Overthrow on the Radio*, Miami New Times, Feb. 13, 1997 (article about Miami radio discussing a broadcast in which Encinosa expressly advocates the overthrow of the Castro regime)
- d. *638 Ways to Kill Castro* (documentary film) (Encinosa is interviewed, and advocates the bombing of hotels in Havana as a means to pressure the Castro regime)
- e. Abdala, <http://www.terrorfileonline.org/es/index.php/Abdala> (articles about the terrorist organization Abdala, naming Encinosa as a leader)