

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:10-21957-cv-JAL  
(98-721-cr-JAL)

GERARDO HERNANDEZ,  
Movant,

v.

UNITED STATES,  
Respondent.

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**MOTION FOR LEAVE TO AMEND GROUND FIVE OF MOVANT'S MOTION TO  
VACATE SENTENCE (DE1)**

COMES NOW Movant Gerardo Hernandez, by counsel, and moves for leave to amend ground five of his motion to vacate sentence (DE1), pursuant to Rule 15(a)(2), Fed.R.Civ.P., in event that the Court determines that the facts alleged in DE53 are not within the scope of the original Motion to Vacate (DE1), as follows:

**GROUND FIVE**

a. The Government secretly and illegally paid many journalists to publish propaganda through writings, speeches, and radio and television broadcasts that violated the integrity of the trial and the Constitution of the United States, in an attempt to persuade the jury to wrongfully convict Movant and the jury, as a result of the Government's wrongful actions, did wrongfully convict Movant.

b. A Government agency, the Office of Cuban Broadcasting and Radio/TV Marti, deliberately hired and paid secret propagandists committed to influencing the jury to convict Movant;

c. This Government's international propaganda machine was wrongfully turned on the environment of Movant's American trial. This structural constitutional error insults both the integrity of the trial itself and the integrity of the community for whom the jury speaks;

d. The use and actions of secret propagandists to influence Movant's jurors in a criminal trial prosecuted by the Government, is forbidden by the Constitution for it violates, among other sections, Movant's due process rights and his right to a fair trial.

e. An unknown number of journalists and media outlets were paid from 1996 to 2001 to secretly write, speak, and propagandize against these defendants without identifying the government payments in order to intimidate and persuade the jury to wrongfully vote for Movant's conviction;

f. Many, of these journalists who were handpicked by the Government were either Bay of Pigs combatants, jailed in Cuba or by the American Government for anti-Castro activities;

g. The Government's selection process for journalists shows they did not hire or pay anyone who did not have a commitment to the conviction of the Cuban Five and who were willing to work for that conviction;

h. Most or all of the paid journalists passed background checks administered by the Government to make sure they had the necessary commitment to wrongfully aid the prosecution, all in violation of constitutional rights;

i. The amount of money wrongfully paid to the secret journalists and the media outlets exceeded hundreds of thousands of dollars.

j. The covert journalists were rewarded for their success, both with payments of more and more money and more and more government information.

k. Control and influence of Radio Marti passed to Jose Basulto, Brothers to the Rescue, and colleagues after 1996 and that Radio Marti moved to Miami in 1996 and performed unconstitutional acts in order to, among other things, secure Movant's wrongful conviction.

l. Jose Basulto, through his colleagues and associates in the Government (including Jorge Mas Canosa) who influenced and controlled Radio Marti and other substantial Government funds, received government funds and Radio Marti, after the shoot-down made the conviction a priority.

m. The five years of Radio Marti broadcast, along with other media outlets (some of which were clandestine), were meant to, and did, influence and intimidate the Cuban Five trial jury.

n. The heretofore undisclosed Radio Marti files, tapes, and broadcasts into Miami will conclusively show the Government meant to, and did, intimidate and influence the jurors and the community they were part of.

o. The prosecution knew all of the foregoing, or now knows all the foregoing, and has for years sought to suppress the information that would substantiate Movant's claim. Movant has recently learned a very small amount of the facts and evidence that substantiates this claim.

p. The following further facts concerning a small sampling of the secret journalists paid by Government funds as shown in public records and databases recently examined are also part of the proposed Ground Five:

q. Alberto Muller: The first journalist, Alberto Muller was reportedly jailed in Cuba. He received, as far as Movant had been told, a total of \$39,871.00. Movant relies here, and in other instances, on government information and other previously published information. For example, page 152 of "Bandidismo: Derrota de la CIA en Cuba" ("Banditry: Defeat of the CIA in Cuba"), by Pedro Etcheverry Vazquez and Santiago Gutierrez Ocegüera, states some of Alberto Muller's

history, why he was selected by the Government, and the alleged reasons for Muller's Cuban imprisonment. It is reported that before the Bay of Pigs invasion, the CIA conceived two plans for overthrowing the newly instated Communist government in Cuba. The first plan was the "Plan of Sabotage" and the second the "Plan of the Guerrillas". Alberto Muller was given the task of leading the latter, and Muller supposedly became a CIA agent. Muller's task, according to "Bandidisimo", was to create a "guerrilla front" in Cuba by recruiting armed forces in various zones. He allegedly used his connections to create a network of 150 guerrillas with the intention of rising up against Fidel Castro. Muller and 135 of his 150 men in the force were arrested on April 20, 1961. The Government knows the essential facts about the man they hired. The Broadcasting Board of Governors' contracts obtained by the second FOIA petition show Government payments to Muller from October 1, 2004 to March 31, 2010. Earlier, during the Movant's trial, he wrote incendiary articles about the case and the BTTR plane shoot-down.

On February 20, 2001, in the midst of the trial, Muller wrote an article titled "Murderers" in *Diario Las Americas*, whose opinion editor, the daughter of the paper's owner, also received Government funds:

The last minutes in the life of four pilots downed in international waters by Castro's MiG planes were filmed and recorded for posterity. What we needed to hear ... live ... shamelessly uninhibited, accented with bloody premeditated calculation ... the subordinates asking the commander in chief for the go-ahead to pulverize the defenseless airplanes of Brothers to The Rescue with a Soviet missile... Five years have passed since the horrendous crime committed over international waters. That's why the matter should be put to the legal and humanitarian powers of every organization of human justice, from the International Criminal Court at the Hague to the Human Rights Commission at the United Nations. The Criminal Confession ... in the very voice of the underling executioner ... we have finally heard it with absolute clarity ... during the trial of Castro's spies who infiltrated Miami. What more is needed now to make the decision to try Fidel Castro? What more is needed

now to make the decision to seat Fidel Castro in the dock at an international legal trial? Well, nothing. All the elements of the inquiry are at hand. No crime should remain unpunished ... but one that is executed in the open skies ... against defenseless human beings who were flying over international waters in search of Cuban rafters on the high seas deserves the strictest and unmistakable repudiation by all of humanity ... due to its filthy genocidal character. The act is so despicable by its nature as a crime against humanity that it suggests the accused should be in the dock, whether they are subordinate executioners or executioners among the maximum leadership. (Emphasis added)

r. Pablo Alfonso: The second journalist, was a longtime reporter for *El Nuevo Herald* and the author of at least 96 articles related to Movant's trial. He was allegedly jailed in Cuba for eight years for publishing an underground newsletter. The contracts released by the FOIA suit show that Alfonso, one of the highest paid journalists received BBG payments of \$58,600 during the period between November 1, 1999 and December 31, 2001. His total payments were \$252,325 through August 22, 2007. The Federal Procurement Data System, which allows users to search Government documents, gives limited information regarding Government paid journalists. For example, the FOIA documents released by the Broadcasting Board of Governors in their March 11, 2009 response shows that Pablo Alfonso, who wrote extensively about the shoot-down and trial in Miami, received \$252,325 in Government monies, while the Federal Procurement Data System shows only \$71,200 in awards for the same span of time.

s. Humberto Cortina: A third covert journalist was Humberto Cortina, a Bay of Pigs veteran who admits his involvement with paramilitary forces in Cuba that were trying to overthrow the Cuban government. A TV commentator and elected official, Cortina has acknowledged in print and in videos his views about the American Government, Cuban-American relations and the necessity to kill people to achieve his democratic result. The only information available about Cortina concerning monies is from the contracts that were obtained under FOIA. Cortina received \$2,700 from BBG/OCB from Jan. 16, 2001 to March 12, 2001 (and in FOIA information, a total of \$4,450).

t. Julio Estorino: A fourth Government paid secret journalist, Julio Estorino's history and resume shows membership in Junta Patriotica Cuban, which formed in the early 1980s. Estorino's resume – from Broadcasting Board of Governors documents obtained in the Liberation newspaper FOIA – shows his U.S government employment by the Broadcasting Board of Governors goes back to at least March 1998, several months before the Movant's arrest. Estorino's resume annexed to Luis Medina's habeas petition states: "Employer: U.S. Government, Office of Cuba Broadcasting..... Miami Florida." This information found in the FOIA suit shows that Estorino was employed by the Government from March of 1998 to the present, and *El Nuevo Herald* from 1988-1996. Estorino FOIA applications were not adequately replied to. The Government must have more information about Estorino, but did not furnish it. Information made available by its Federal Procurement Data System website shows that Estorino was paid \$27,000 on November 15, 1998 by the United States Information Agency (Award ID 00009199811BP9092015). This payment was awarded to Estorino two months after the arrest of the Movant. This money may have been related to the conviction. The material obtained in the FOIA suit shows he was paid \$14,950 from October 16, 2002 to January 31, 2004. Estorino's own resume, written by him, clearly states that his employment with Radio/TV Marti began in March 1998, yet Movant had little to no access to payment records from this crucial time. None of this information was available for the defense counsel at the initial trial because the Federal Procurement Data System website where it was found was not created until fiscal year 2004, according to a staff member at the website. Julio Estorino on May 14, 1999 in his writings that are in the database, immediately after Gerardo Hernandez was indicted for conspiracy to commit murder, exalts Jose Basul to and condemns Hernandez and his colleagues. He argues for the need for more cooperation between the Brothers to the Rescue, and the Government, so we can "properly address Castro's long criminal arm here, on U.S. soil itself", pointing out that the "mid-air" execution "was deliberately planned and executed by the

Cuban Movement Intelligence Director ate. The brutal attack was not a heated response to a provocation, but a coldly calculated aggression; a crime in every sense...”

The Estorino article ends with:

The Cuban exiles have waited for years for the beginning of recognition, even an implicit one, that their denunciations about the vile and wicked nature of Fidel Castro and the system of government he has imposed on our people have not been exaggerations, mistakes, or lies. The vileness and wickedness has already reached U.S. territory and its citizens and it's time for the consequent actions to be taken: that it's time for justice to be done.

Since 1997, Estorino has been a regular columnist for the Miami newspaper *Diario las Américas*.

In “Malice Aforethought,” in *Diario Las Americas* on May 14, 1999, Estorino writes:

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. More than once I've heard an unfortunate insinuation about at least part of the responsibility for the tragic end of the mission on that February 24th resting with the president of Brothers to the Rescue. It's not hard for me to imagine how much this barb to Basulto's heart must have hurt, and yes, it is hard for me to understand how we can allow, often in such a self-destructive way, for trivial things to rob us of our greatness.

Estorino's resume shows that he worked for Radio Paz in Miami from November 1997 to at least August 2003. To the extent that anything in this case is typical, the work history and involvement of Muller, Alfonso, Cortina, and Estorino, according to the published information, seems typical. Other propagandists were often in management and secretly directed and drove the policies of their stations. Estorino was, according to published material, a significant part of the management team at WACC, a radio station that appealed both to Spanish-speaking and English-speaking listeners. It had a wide audience and is one of the most important stations in the Miami area. Estorino was involved in both news and opinion shows and had been the executive director of the Morning

Show . "El Portal de Miami" is one of the most listened-to radio programs in Miami and focuses on Cuba-related issues. He had a variety of "employers" at that radio station. They consisted, for example, of Pax Communications and Fenix Broadcasting Co. The Government's Response attempts to block attempts to find out more information about Estorino. The Government does not deny that their FOIA responses concerning Estorino were filtered, redacted, and edited. Other sources on the Internet show that he received an additional \$28,000 on February 15, 2001 as well as \$34,000 on January 15, 2000. Movant cannot tell whether or not this information was deliberately withheld.

According to Mr. Estorino's resume, the shows he did for Radio/TV Marti were among the most listened to in Cuba, and the shows he did with Radio WACC were among the most listened to in Miami. The information for both of Estornio's programs was the same the published record shows. Facts repeated again and again, set in a propaganda context on Government radio was decided by the government as perfectly appropriate for the Miami audience.

u. Carlos Alberto Montaner: A fifth purported journalist, Carlos Alberto Montaner , who was first mentioned in The Miami Herald September 8, 2006 story, according to a published book titled "The Cuban Exile Movement" by Hernando Calvo Ospina and Katlijn Declercq, was found guilty in 1961 in Cuba of having participated in a CIA-sponsored terrorist organization that hid explosives in packages of cigarettes. He wrote at least 11 articles. He was jailed and then escaped, sought political asylum, left Cuba and in 1962 joined the Cuban Special Forces in the U.S. Army. He was later, according to Ospina and Declercq's book, recruited by the Central Intelligence Agency. A contributing columnist for *The Miami Herald* and *El Nuevo Herald*, Montaner received \$41,150 from October 25, 2000 to August 26, 2006, according to the first FOIA response by

the Broadcasting Board of Governors of March 11, 2009. According to “The Cuban Exile Movement,” after Montaner came to the United States he continued his active political life as he wrote extensively about the need for reprisals against those in Cuba who have cooperated with the present Cuban government. He issued a statement from Madrid, quoted on page 17 of the Columbia Case Study, that material for his Radio/TV Marti shows were taken from his columns.

v. Olance Noguerras: A sixth purported journalist, Olance Noguerras, who received monies from the Government, wrote a September 21, 1998 article in *El Nuevo Herald*, shortly after the arrest of the defendants entitled, “Experts Believe that Cuba sold information of the spies.” In it he quotes, as an expert, another propagandist, Enrique Encinosa, who received from the Broadcasting Board of Governors \$5,200 during the time of the Five prosecution, and \$10,400 between December 7, 2000 and November 4, 2003. This creation of a closed ring of “experts” is shown in the public record throughout the print, radio, and television reports of the propagandists.

w. Enrique Encinosa: A seventh journalist, Enrique Encinosa, the author of “Cuba, The Unfinished Revolution” who, the records show, advocates the bombing of Cuban Hotels and glorifies Luis Posada Carrilas, was employed by the U.S. Government while he was working as an “independent” and principle commentator on the powerful right-wing Spanish-language station in Miami, WAQI. Encinosa in an Internet radio interview said: “I arrived in the United States in 1961. I became involved in the anti-Castro paramilitary organizations when I was 16. I participated in a number of military and covert operations into Cuba as a very young man. I worked cloak and dagger in covert operations ...” The interview was in 2010. During the trial, Encinosa had a regular program on WQBA as well as WAQI “Radio Mambi”, Miami’s 50,000 watt station, and frequently commented on Movant’s arrest and prosecution. I am told that he received \$5,200 to host a weekly

Government show from October 1, 2000 to September 30, 2001. In 2005, in an interview for the documentary titled "638 ways to kill Castro", Encinosa supported the bombings that shook Havana hotels in 1997, one of which killed an Italian tourist, Fabio Di Celmo. In the film, Encinosa says:

I personally think it's an acceptable method. It's a way of damaging the tourist economy. The message that you, one, tries to get across is that Cuba is not a healthy place for tourists. So, if Cuba is not a healthy place for tourists because there's a few windows being blown out of hotels, that's fine.

Government-paid agents, according to published sources, were involved in other clandestine, and at times covert and illegal, activities. Encinosa co-hosted a clandestine shortwave radio station in Miami called "La Voz de la Resistencia." It was broadcast into Cuba on a weekly basis, and Encinosa would call for listeners to wage violent attacks on economic targets, as well as advocating assassinations of Cuban individuals. Movant believes the record will show wrongful CIA involvement in the successful attempt to wrongfully persuade the jury to convict Movant. In an interview several days after the Movant's arrest, published on September 21, 1998 in *El Nuevo Herald*, Encinosa, now cited as an intelligence expert, stated that the arrests occurred because U.S. Intelligence "has detected or has indications that the information [supposedly gathered by the Movant and his co-defendants] is passing through terrorist organizations outside the United States." Olance Noguera, the author of the article, "establishes" Encinosa as an intelligence expert; he also received payments from the Government. Government monies were used not only to covertly publish misleading stories, but to deliberately violate the Court's orders, and to deliberately give the jurors information, some of which the Court said the jury should not hear. For example, after the Court sustained a defense objection and excluded evidence so that the jury would not hear it, the same information appeared publicly

through, Movant believes, the use of Government funds.

x. Ariel Remos: The eighth journalist, is a longtime reporter and commentator for *Diario Las Américas*. Remos received BBG payments of \$11,750 during the Movants' trial from November 1, 1999 to December 12, 2001—roughly the same time span as Alfonso. His total pay was \$24,350 through November 20, 2006. He wrote propaganda articles about Movants case. On November 28, 1999 he wrote:

[I]n the case of U.S. v. Gerardo Hernandez, in which Caroline Heck-Miler has been serving as the prosecutor and where the chain of command and cause for the death of the four members of Brothers to the Rescue – three of them citizens of the US and one resident – supposedly begins with Fidel Castro. Castro, therefore, is in the referenced case accused of murder and under investigation for murder; and if he sets foot on United States territory he can be arrested and brought before the justice of this country. That is the opinion of attorney Fernandez, and that is how he just told it to DIARIO LAS AMERICAS.

y. Luis Aguilar Leon: A ninth covert paid Government journalist is Luis Aguilar Leon. In a February 27, 1996 editorial three days after the shoot-down, published in *El Nuevo Herald*, Aguilar writes that Fidel Castro is “Hitlerian” and uses incendiary language and threats as a call-to-arms for Cuban exiles. Aguilar writes:

One wishes for the power to send three well-armed fighter jets to the Cuban coastline to see if these henchmen of the air can prove themselves as courageous when the adversary above them is armed. Or to fly over Varadero [beach], shooting to delight in the image of a stampeding bunch of lewd tourists, the kind who believe that in Cuba everything is for sale, jumping over fences and fleeing across the sand on which they trod.

Aguilar co-hosted a twice-weekly radio program on Government radio, along with Omar Lopez Montenegro, who received Government funds. Despite his extensive employment with the Government, there is no evidence of Aguilar's payments in any released records (FPDS or FOIA), but his co-host Lopez

Montenegro received a documented \$49,050 between October 1, 2004 and June 29, 2009. Aguilar's obituary claimed he worked for the Government since 1985. Aguilar also participated as an independent journalist in a public panel that convened in order to examine issues of "political meddling and poor administration" of Radio/TV Marti. It seems, from the written record, that the Government did not disclose his Government connection.

z. Wilfredo Cancio Isla: A tenth covert journalist, also paid by the Government and mentioned in *The Miami Herald* story, is Wilfredo Cancio Isla. Cancio was paid by the Government \$4,725 during the detention and trial of Movant, and \$21,800 from 2000 to 2006. He wrote at least 123 articles. He wrote that Movant and "other" Cuban spies were given hallucinogens by Castro. Cancio wrote an article on April 19, 2001 titled "The Prosecution Fears Cuban Control in Spy Trial: Cuba is Preparing a Fabricated Version of the Facts."

aa. Helen Ferre: An eleventh covert Government-paid journalist is Helen Ferre. She is an editor of *Diario Las Americas*, an important media source for Spanish speaking Miamians. Except as otherwise mentioned, it is not known how many other journalists at that paper received government funds. She received, available records show, \$1,125 during the trial as part of a \$6,025 total. After she learned of the investigation into payments to her and other members of the media, she told *The Miami Herald* she did not see any conflict of interest. She did not disclose to *The Miami Herald*, that she and her newspaper received Government funds. She oversaw the publication of an editorial, during the trial period, titled "The Importance of the Arrest of 10 Castro Spies". Working with another covert journalist, Ariel Remos, and editing Orlando Bosch, Ferre helped direct a paper that many believed to be independent.

bb. Caridad Roque: A twelfth Government-paid covert journalist who broadcasted numerous commentaries during the time in question and influenced Movant's trial is Caridad Roque.

Roque, a political prisoner in Cuba for sixteen years, received at least \$51,975 from the Government. It is not unreasonable to infer that she was paid by the Government during the trial, although the Government records do not have any direct proof of that. An article in *El Nuevo Herald* on November 11, 1998, says Roque helped lead a delegation which filed suit in Madrid, Spain to demand the arrest and trial of Fidel Castro. The article was written by Olanec Noguera, a writer who received Government funds. Roque also had a regular program on WCMQ radio called "Hablando con Cuba".

cc. Enrique Patterson: A thirteenth journalist, Enrique Patterson, received over \$100,000 from the Government while working with the Government since 1996. While Patterson has been working with the Government for over 17 years, there are no available Government records of payments before 2002. According to a book by Rosa Miriam Elizalde and Luis Baez titled "Dissidents", Patterson recruited people for the CIA while in Cuba.

dd. Research of the Miami media was conducted, of the period from November 27, 2000 to June 8, 2001, dates that correspond from the beginning of the trial against the five Cuban defendants, to the date they were convicted by the jury. It is a total of 194 days. The method utilized was reviewing all the articles published in The Miami Herald and El Nuevo Herald newspapers during that period.

ee. The texts of those articles can be accessed in their electronic editions, by means of the "Newsbank" database of The Miami Dade Public Library, or in Florida International University (FIU) and also by microfiche in the Miami Dade Main Public Library.

ff. The articles that discussed the case as well as those that discussed Cuba in such a way as to create a negative atmosphere during the trial were compiled. Other articles that attacked the Cuban government but which were doubtful as to their possible influence on the trial, were disregarded.

gg. Numerous press dispatches by the news agencies that contained negative information were not included.

hh. These criteria were adopted in order to reduce the subjective factor to a minimum in the selection of the articles. Even so, the media over-saturation against the five defendants of the selected articles is evident, in contrast to the total absence of information, opinion or commentaries that were neutral or in favor of the Five.

ii. This research reveals the following: In 194 days *El Nuevo Herald* published 806 articles that would negatively influence the trial. In that same interval *The Miami Herald* published 305 articles.

jj. In *The Miami Herald* and *El Nuevo Herald*, 1,111 articles were published - an average of more than five per day - on themes related to the defendants.

kk. Of the 806 articles in *El Nuevo Herald*, 120 are attributed to the "staff" or "staff services" including numerous editorials. Of the 305 in *The Miami Herald*, 67 are attributed to "Herald Staff" or "Herald Wire Services". Of the 686 other articles of *El Nuevo Herald*, 239 (35%) carry the byline of four journalists who we know received money from the Government: 123 by Wilfredo Cancio Isla, 96 by Pablo Alfonso, 11 by Carlos Alberto Montaner and 9 by Olga Connor. Some of the journalists in the remaining 65% may have been on the Government payroll.

DATED: November 16, 2012.

Martin Garbus

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing motion for leave to amend was filed electronically this 16th day of November, 2012, and served by that means on all counsel of record.

Richard C. Klugh

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Richard C. Klugh