

NATIONAL COMMITTEE TO FREE THE CUBAN FIVE

Comité Nacional por la Libertad de los Cinco Cubanos



Interview with Leonard Weinglass

This interview with Leonard Weinglass, appeals attorney for Antonio Guerrero was conducted by Gloria La Riva, coordinator of the National Committee to Free the Cuban Five, on August 1, 2007.

Gloria La Riva: Mr. Weinglass, the oral argument hearing in the Cuban Five appeals will take place before the 11th Circuit Court of Appeals in Atlanta, on Aug. 20. Can you please explain the current stage of the Cuban Five case? What are the issues which the defense will present?

Leonard Weinglass: The argument will be before a two-judge court. Possibly that court will be increased to a three-judge court but we won't know that until a week before the argument. This is the same court that initially heard the case and decided in Aug. of 2005 that the Five did not receive a fair trial in Miami.

That 2005 decision was reversed by the entire 12 judge panel of the 11th circuit, voting 10 to 2, so the issue of venue is no longer available to us. But the rest of the case—aside from the issue of fair trial and venue—has been returned to the original court, now composed of two judges with the possible addition of a third, for consideration of all the remaining issues. The third judge retired from the bench approximately two years ago. Now we have a two-judge panel. It is possible that a third judge will be appointed to hear this case but we will not know that until a week before the arguments.

GLR: What are the issues on appeal?

LW: There are a number of remaining issues, but I will highlight the three most important ones most likely be addressed in the argument.

First is the issue of whether or not Count 3, alleging a conspiracy to commit murder against Gerardo Hernandez—arising out of the shoot-down by Cuba of two aircraft in 1996—can be sustained on appeal.

The defense is arguing that the evidence on that alleged conspiracy is insufficient as a matter of law. The argument is strong because the government at one point in the litigation acknowledged that their evidence was very weak and that they in fact could not prove that count. It is also impacted by the fact that the appeals court, when we originally argued the case in March of 2004 [first oral argument before the three-judge panel], also expressed its opinion that the evidence on that count was weak. So our initial focus is to remove Count 3.

I should also point out that this is the first time in history that an individual is being held liable for the action of a sovereign state in defending its airspace. Count 3 should never have been indicted in the first place because Cuba had the right to defend its airspace in shooting down these aircraft. But even assuming that it is legally viable, it was never proven.

The second argument that will take a considerable amount of the court's attention, is the question of prosecutorial misconduct, particularly the misconduct of the prosecutor [U.S. Attorney John Kastrenakes] in his final argument to the jury.

Closing argument is constrained by very precise rules of law that prohibit counsel from arguing outside the scope of the evidence. In other words, a prosecutor cannot make claims in the final argument that are without any evidence or proof in the case. In this particular instance the prosecutor went far beyond the bounds of proper argument.

For example he claimed at one point that the Five came to the United States, not to monitor the activities of the terror network that had been assaulting the Cuban people, but instead he argued that their purpose in coming was to destroy the United States. That was mentioned not once but three times in the course of his argument. The Five were unarmed, they carried no explosives, they committed no acts of sabotage or arson, they threatened no one, and yet the prosecutor made that claim.

We contend that that is outrageous prosecutorial misconduct and because of that, both the count alleging conspiracy to commit murder and the count alleging conspiracy to commit espionage, which were closely-argued counts, must be set aside and a new trial ordered on those counts.

The third argument that will have prominence is the question of the sentencing of the three of the Five who were accused of conspiracy to commit espionage [Gerardo Hernández, Antonio Guerrero, Ramón Labañino]. Each of the three who were so accused received a life sentence. A life sentence now means that you actually serve your entire life without getting out of prison prior to your death. This case was the first case in the history of the United States where there were no classified documents involved. That is, there was nothing in the nature of a national-security-published matter that was in this case.

The notorious cases related to espionage historically are cases involving individuals who turned over to a foreign country, scores, sometimes hundreds and thousands of state secrets. In those cases these individuals—the most notorious of whom are people like Robert Hansen, of the FBI, Aldrich Ames of the CIA, Robert Walker of the Navy, who gave hundreds if not thousands of documents—each received life.

But in the case of the Five there were no such documents. Nonetheless the three are serving the same life sentences as these most notorious spies. So we are arguing that this sentence, given the facts of this case, is oppressive, irrational and outside the bounds of the statutory scheme. It was a sentence that obviously was reserved for Cuban patriots who took up the responsibility of exposing and trying to prevent the terror that emanates from the United States directed against Cuba.

Those are the two main charges of the 26 counts, and third, the prosecutorial misconduct of the prosecutor.

If we prevail on those issues, that will go a long way toward bringing the three who are serving life sentences, and all five men, back home to their families and compatriots in Cuba.

GLR: You mentioned that the prosecution did not present evidence to prove their charge of murder conspiracy against Gerardo Hernández. This is an extremely unusual and irregular charge given that even the prosecution during the trial went to the 11th Circuit to appeal, with a “writ of prohibition” on the judge’s instructions, because the prosecution said they didn’t have the evidence to convict. Specifically what was required for a conviction which the prosecution failed to prove?

LW: What was required for a conviction under U.S. law was proof beyond a reasonable doubt that Gerardo Hernández had entered into an agreement whose objective was to bring about the deaths of four individuals who died when their planes were shot down. There is no evidence whatsoever that Hernández had any knowledge the shoot-down was to occur. And therefore the case failed in terms of its evidence.

Beyond that, there should not even have been a charge of that nature. That charge was unprecedented because Cuba, a sovereign state, was seeking to protect its own airspace, and in so doing, its military aircraft brought down intruding aircraft. That activity has never before resulted in an indictment against an individual who was in no way involved in the military action.

GLR: Didn’t the prosecution also claim that Gerardo Hernández knew the planes would be shot down in international waters? Yet, Gerardo was not part of any plan for the shoot-down, although it was a justified and legal act by Cuba.

LW: That is correct. There is no evidence that he knew that there was going to be a shoot-down. The only evidence at trial was that he received a message from Cuba that his compatriots were not to fly in the Brothers to the Rescue aircraft during that period of time.

[Note: BTTR had invaded Cuban airspace numerous times in 1995 and 1996 despite repeated warnings from Cuba. BTTR’s leader, convicted terrorist José Basulto, had boasted publicly to the Miami press that on Feb. 24, 1996, his organization would fly planes over Cuba, and he persisted in ignoring the warnings from various U.S. and Cuban authorities. The Cuban government, the U.S. State Department and the U.S. Federal Aviation Administration all notified Basulto that Cuba was prepared to take direct action to stop further unauthorized incursions into Cuban airspace.]

Where the planes were shot down was not directly relevant, although the prosecution’s argument was that Hernández was allegedly a part of an agreement to shoot down the planes in international waters.

Hernández was not told why his compatriots who infiltrated BTTR were not to fly, and he was not informed of what was to happen. He was simply told that his compatriots who were there with him were not to fly. That was far from saying that he had knowledge that there was going to be a shoot-down.

GLR: With regard to the life sentences, you have explained that there is no possibility in federal prison for parole or early release except when the prisoner dies. Has this doctrine of life without parole always existed, and if not, when did it change?

LW: Parole has been abolished in the federal system in the United States and I believe that change occurred in approximately 1994. The case of the Five arose in 1998, it arose after the change, therefore the Five were sentenced under the new rule which abolished parole.

GLR: Prisoners who were sentenced to life before 1994, are they eligible for parole?

LW: Yes. I believe they begin to be eligible when they have served approximately 32 or 34 years.

GLR: How does this case affect the guarantees to legal justice that most people have come to expect in the courts? And what more can be done for the Five in court with regard to the venue?

LW: The ruling on venue—which we could appeal at a subsequent time to the U.S. Supreme Court—affects everyone who is brought before the bar of justice in America. The venue rules prior to this decision are rules designed to protect a defendant against being brought to trial before a community that is impassioned as a result of prejudice against the accused. This fundamental and hallmark part of the criminal justice system was undermined by the decision of the 11th Circuit sitting en banc in August of 2006.

If we lose before this panel, we will then have the right to raise the venue issue before the United States Supreme Court. So it affects everyone who is forced to trial in America.

The question of sentencing will also affect everyone who is charged with conspiracies to commit espionage, because of the draconian nature of the Five's sentence.

The murder conspiracy charge against Gerardo Hernández will be a first-time precedent, charging a person within the United States with a conspiracy to commit murder for an outside sovereign's right to protect its own airspace. So this case in many ways will have impacts on the state of the law in the United States.

GLR: Despite the obstacles imposed by the trial judge, the attorneys for the Five tried to show the long history of terrorism in Miami and the sole reason for the Five's mission in Miami, to stop that terrorism. Since their convictions there have been discoveries, revelations of continued plots against the Cuban people by the Miami-based terrorists. And of course, in May, one of the most notorious, Luis Posada Carriles, was freed to join his accomplices in Miami.

What role could these developments play in the struggle for the Five's freedom?

LW: Of the nine issues that will be argued before the two-judge panel, I only mentioned the three main issues that we will be arguing. There are six additional issues. One of them is the issue of justification. Under American law, a person who is accused of a crime could acknowledge committing that crime, and then argue that committing the crime was justified out of necessity to avoid a greater harm. It is a form of self-defense, extended to acts which will protect other parties. This was argued in the original trial. But the trial judge [Joan Lenard] took that issue away from the jury, so it was never considered by the jury. We claim that that was error. We will be arguing that the "defense of necessity" claim should have been submitted to the jury, because the Five came to the United States in order to prevent additional violence, injury and harm to others.

The reason why I didn't mention it initially is that the courts in the United States have a tendency to discredit that defense, particularly in the political context in which it was raised in this case. However, look at the revelations involving Posada Carriles and Orlando Bosch and others, whom the government has conceded were involved in acts of terrorism.

The Five came here to curb their activities. This case presents a stronger record, than any case I am aware of, for the argument that the Five's activities were justified and necessary in order to save lives.

GLR: Do you have an example of how the defense of necessity has been used?

LW: I used it successfully in the defense of President Carter's daughter, Amy. She occupied a building, with other students, at the University of Massachusetts, in opposition to the CIA agents who came to the campus to recruit students into the CIA. She acknowledged that her occupation of the building was a crime but she argued that that was justified by the doctrine of necessity because the CIA was then engaged in an illegal war in Nicaragua.

It was argued to the jury and Amy Carter and her sixteen other student defendants were all acquitted.

GLR: If sufficient relief for the Five is not won in this appeal, is there any possibility of an appeal, on the basis of the original argument of their anti-terrorist mission?

LW: Well, the trial lawyers did a very good job in bringing before the court and jury 35 exhibits demonstrating a long history of terrorist violence directed against Cuba from the southern Florida area. They also produced live witnesses who were involved in those actions, for the jury to see and hear. In fact, our original panel of three judges, when they wrote a 93-page opinion reversing the case because of the prejudice in Miami, cite in footnotes the evidence that was produced in court, and refer to Posada Carriles as a terrorist. I think it is the first judicial

finding that those activities directed against Cuba were in fact terrorist activities. *[The Aug. 9, 2005 93-page opinion is accessible on our website.]*

That was all before the judge in the original trial, but the judge took that issue away from the jury. Now, if we lose this appeal, can we file a new appeal under habeas corpus, incorporating some this new information which has come to light since the end of the trial? The answer is probably yes, and it is something that we will definitely look into because we are keeping records of all the new information, once this argument is concluded and once we have a decision.

GLR: The defense is focusing on three main issues in the oral argument. Is that because of the defense team's time limit of 30 minutes or the limits you have overall in the appeal?

LW: The appeal comprises a trial record of 119 volumes of transcripts, 20,000 pages of exhibits. We have been given a total of 30 minutes to argue all nine issues. If you spread that out, it gives us three minutes per issue. As happens with respect to all appeals, the lawyers have to make a judgment as to which issues they will be arguing. After meeting with all counsel, we have focused on three issues that we will feel will bring about a reversal of the major charges, and set the path for the release of the Five.

But it still only gives us 5 or 6 minutes for issues that we are trying to argue. The 30 minute limit does dictate the issues we will be able to argue and how much time we can spend on each issue.

GLR: Are you able to address all issues in the written briefs?

LW: They are all addressed comprehensively. There is also a limitation on the number of words you can put in a written brief, and we have used all the space that has been allocated to us in arguing all nine issues.

GLR: Have you been in recent communication with any of the Cuban Five?

LW: I am in most frequent communication with Antonio Guerrero. And I just received a letter from him dated July 19. His spirits as usual are very high. He is fully aware of what is happening in court, and the arguments we are about to make. He remains strong and optimistic.

GLR: You have a long history of defending political activists since the 1960s. In this case, with the worldwide and U.S. movement of support for the Five's freedom, how do you see the importance of the political support in regards to this case?

LW: This case is the first case in our memory that it will be argued a third time on appeal. To all of our collective memories, this has never happened before. Why is it happening in this case? We believe it is because of the international and domestic attention that this case has received. As lawyers we know we have the right to argument and we have the right to written appeals. But we also know from experience that whether or not the arguments are heard or the appeals are taken seriously frequently depends upon how extensive the support is, and how broad the interest is in the case.

It is a tribute to all those supporters who have worked diligently to bring the case of the Cuban Five to the public's attention, that we have the opportunity to present oral argument a third time. We cannot rest until Gerardo Hernández, Antonio Guerrero, Ramón Labañino, René González and Fernando González are home in Cuba with their families.

Thank you very much.

For more information about the case, including copies of relevant legal documents and decisions, visit the website of the National Committee to Free the Cuban Five at www.freethefive.org