



SIDE EVENT

Symposium on International Solidarity with the Cuban Five

THE CASE OF THE CUBAN FIVE

by

Leonard Weinglass

Counsel for the Cuban Five

Five Cuban men, later to become known as the Cuban Five, were arrested in Miami, Florida in September, 1998 and charged with 26 counts of violating the federal laws of the United States. 24 of those charges, being relatively minor and technical offenses, alleged the use of false names and failure to register as foreign agents. None of the charges claimed they used weapons, engaged in violence or destroyed property.

Twelve years later they still remain locked away in five separate prisons in the United States, with family visits restricted and two of them being denied visits from their spouses. The injustice of their case has led to over 200 support committees being formed in the U.S. and throughout the world. In 2009 when they sought review of their convictions and sentences before the Supreme Court of the United States 10 Nobel Prize winners, two former presidents of the European Union, the entire Senate of Mexico, bar associations of various countries, the Ibero-American Federation of Ombudsmen, the International Federation of Human Rights, the International Association of Democratic Lawyers and others, too numerous to mention, filed briefs in their support in an unprecedented outpouring of domestic and international support.

The case arises out of a particular moment in history. Following the success of the Cuban revolution nearly a half million former residents of Cuba fled to the United States, most settling in and around Miami, Florida, a mere 100 miles away. Encouraged and aided by intelligence and military agencies of the U.S. some formed groups of mercenaries who were trained and, in some cases, supplied with weapons and explosive materials to be used against Cuba in an effort to bring down the revolution, particularly after the failed invasion attempt at the Bay of Pigs in 1963. Cuba suffered significant casualties, property damage and even attacks from biological weapons.

Due, in part to the U.S. trade embargo, the Cuban economy, cut off from its regional trading partners, turned to the socialist bloc in Eastern Europe, particularly the Soviet Union, with whom it had ideological ties as well. With the demise of those state economies after 1990 the Cuban economy fell into a deep crisis. In an effort to quickly gain much needed hard



currency Cuba turned to tourism and began constructing hotels and a tourist infrastructure in partnership with private enterprises from Canada, Spain, Italy and other friendly countries. That's when their adversaries in the exile community in Miami escalated their tactics by launching a bombing and sabotage campaign against tourist sites, hoping to destroy the very fragile tourism industry and bring the revolution to its knees. Foreigners were dissuaded from visiting after a bomb was found in the new airport terminal in Havana, in tourist buses and hotels (an Italian tourist was killed when one exploded in a hotel lobby). Boats from Miami traveled to Cuba and shelled hotels and tourist facilities from offshore.

Cuba's protests to the US government to control these terrorist activities fell on deaf ears. The United Nations stood silent. Having exhausted all other means, Cuba sent the Five to the United States to infiltrate these mercenary groups and warn Cuba of their plans to attack. The mission of the Five was not to harm the national security of the United States nor launch attacks in the US. They came without arms or explosives, never sought security clearances, did not seek to obtain classified documents and inflicted no injuries or property damage.

Yet, they were charged with serious offenses: conspiracies to commit espionage and, in one case, murder, both carrying life sentences. A conspiracy is often used by the US in political trials where the government cannot prove a crime occurred. All they need prove is that there was an *agreement* to commit a crime. In such a situation the jury, composed of twelve people drawn from the voting rolls in the community, are simply asked to infer that there must have been an agreement, frequently relying on the juror's prejudices based on the nationality, political loyalty, or race of the accused.

In this instance the government's task was greatly facilitated by bringing the charges in Miami, Florida, the one venue in the United in which they could not receive a fair trial due to the overwhelming hostility of the exile community toward anyone connected to the government of Cuba. As one expert witness put it: the mentality of Miami is one of being in a perpetual state of war with Cuba. Another expert calculated their chances of receiving a fair trial in Miami at "virtually zero." Even that advantage was insufficient for the prosecutors who used baseless and inflammatory rhetoric in addressing the jury with comments such as, "the five came here to destroy the United States," No evidence in the record justified such an argument.

Their trial, which began in the late Fall of 2000, lasted for nearly seven months, being the longest trial in the United States that year. The trial record was over 119 volumes in length with more than 800 exhibits. Unlike any other espionage trial in the US history two generals, an admiral and the presidential advisor to the White House all testified *in support of the defense*. But to no avail. The Miami jury convicted all five on all 26 counts. Three received life sentences (one got a double life sentence) and two were sentenced to 19 and 15 years respectively.

An appeal followed. Three distinguished judges of the appellate court, with more than



80 years of judicial experience between them, concluded in a 93 page scholarly opinion that the Five were denied their fundamental right to a fair process by being forced to defend themselves before a Miami jury and ordered their release or a new trial. Before either could happen the Bush Administration took the unusual step of asking all twelve judges of that appellate court to review the unanimous decision of the three judge panel. One year later, to the day, that favorable decision was reversed. Today all Five remain in prison. However, the life sentences for the alleged conspiracy to commit espionage were found to be too harsh and two of the Five had their sentences reduced to 30 and 21 years respectively.

At one point in this tragic saga of injustice a subcommittee of the United Nations, the UN Working Group on Arbitrary Detention, examined the record of the case; and, in May, 2005, concluded that the United States had failed to guarantee the Five a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), a treaty the US has ratified. The US ignored their mandate.

As of this writing we are preparing the final papers for a federal habeas corpus petition on behalf of Gerardo Hernandez, the one who is serving the most dire sentence of all: two life sentences plus 15 years for having been convicted of both conspiracy to commit espionage and conspiracy to murder. His petition is limited to issues of a fundamental constitutional nature. However, in the interest of justice we are calling for a re-examination of the murder charge and the failure of his attorney to adequately defend it. The essential facts on the conspiracy to commit murder are largely undisputed:

On February 24, 1996, in what was by then a familiar pattern, members of a Cuban exile group in Miami, known as The Brothers To The Rescue, took off from Florida in 3 planes and, once airborne, veered off their flight plans and headed straight for Havana, Cuba, the national capital. In the previous 20 months they had overflowed Cuba 25 times, endangering civilians as they dropped objects from their aircraft, and calling on residents to rise up against their government. After being warned by Cuban air control that they were entering a prohibited area, they were intercepted over or near to Cuban territorial waters by the Cuban airforce and two were shot down, killing the four occupants.

In an unprecedented use of the criminal laws of conspiracy Gerardo Hernandez was charged with conspiring with the Cuban pilots to cause the four deaths. Hernandez, who was in Florida at the time, had successfully overseen the infiltration of the group that sent the aircraft. He was not charged with tipping off the Cubans about the planned flight, its route or mission, but rather with being part of the conspiracy because he had allegedly warned his fellow Cuban agents beforehand not to fly on the day in question. Even that allegation, as weak as it was, was sharply in dispute. One of the senior judges in reviewing the case sharply criticized her fellow jurists for finding the evidence adequate to support Gerardo's conviction. Even the prosecutors conceded they faced an "insurmountable obstacle" in their attempt to gain a



conviction. Moreover, a conspiracy requires that there be an unlawful objective to the alleged conspiratorial agreement. There was nothing unlawful about Cuba defending its airspace from intruders, so the whole thrust of the conspiracy charge had no basis in law. The very last federal judge to address the issue unambiguously wrote that Cuba had the right to defend itself. Unfortunately, her more conservative brethren, who never disputed that finding, upheld the conviction nonetheless.

This case is so much more than a simple matter of judicial error and injustice. The Five were prosecuted not because they violated the laws of the United States but because they interfered with those who were and prevented them from inflicting further violence on Cuba, a neighbor with whom the US is at peace. Moreover, by infiltrating a terror network that's encouraged and allowed to exist in the US they exposed the hypocrisy of America's claim to oppose terrorism everywhere. The issues of this case addresses the conscience of the international community and calls out for the immediate release of the Five and the restoration of normal relations between the US and Cuba.

Leonard Weinglass is a defense lawyer and civil rights activist. A 1958 graduate of Yale Law School, he is a former Co-Chair of the National Lawyers Guild's International Committee. He also has taught criminal trial advocacy at the University of Southern California Law School and at the People's College of Law in Los Angeles.