

Interview with Leonard Weinglass on the appeal of Gerardo Hernández

by Gloria La Riva, coordinator
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It was announced on June 14, 2010 that a habeas corpus petition was filed on behalf of Gerardo Hernández. What is a habeas corpus petition and why it is also referred to as collateral?

Following his conviction Gerardo had a right to appeal it to the circuit court of appeals in Atlanta, which he did and then seek a review in the U.S. Supreme Court, which he also did. That process is the direct appeal. When that process is completed, which it is in Gerardo's case, then one has the right to launch a collateral appeal or a collateral attack on the conviction, which is a very limited form of appeal (only constitutional issues not previously litigated, plus a claim of actual innocence), in what was previously known as "federal habeas corpus." Now it is called a "Section 2255," motion. That is where we are now.

We filed the section 2255 motion on June 14, with our brief to follow within 30 days, indicating those constitutional violations which had not been part of the previous appeal, and a claim of actual innocence.

Why is this a final appeal for Gerardo? Isn't a habeas corpus without time limit or restrictions?

There is definitely a time limit on habeas corpus (Section 2255). You must file within one year of the last litigation event. In Gerardo's case, that was when the U.S. Supreme Court rejected our petition for review on June 15, 2009. That gave us one year to June 14, 2010. However, if it should come to pass, that even after this deadline is over, new evidence that was not previously available should arise, you can still go back to court, with a very narrow band of opportunity and argue actual innocence, which is what we are also arguing in these papers we have filed.

Any evidence of actual innocence or grievous government misconduct could possibly be a basis for going back to court even though we have a one-year statute of limitation.

What is the reason for a one-year limit?

It was set by Congress in 1996, and signed by President Clinton. There used to be no limitations on federal habeas but in the 1996 reform they set a one-year limit for filing. Many people feel it is unfair because what happens in a num-



ber of cases is that evidence surfaces after the one year deadline. Now a defendant is presumptively barred — unless he or she can convince the court of the right to accept a late filing, not easily done.

What court was Gerardo's filed in and what are the next steps if it is denied?

The case is filed in the federal district court in Miami, which is the southern district court of Florida. That is the same district that had the trial. And ordinarily it goes back to the same judge. However, in the Miami practice — as well as in a number of other federal districts — the sitting judge frequently refers the motion to a magistrate and the magistrate examines the papers preliminarily and holds a hearing if necessary.

In certain cases which are complex, the trial judge could keep the case and have a hearing before herself or himself. We don't know yet whether Judge Lenard, who was the trial judge, will keep this case for herself or whether she will refer it to a magistrate.

If the magistrate or judge believes it has merit what will happen?

If either one believes it has merit, an opinion is written. And in that opinion the court will set forth the remedy. The remedy we're seeking of course is a new trial for Gerardo. Then you have the regular course of appeals should we lose. You can go back to the 11th Circuit Court of Appeals and they will review the case if the trial court or the appellate court certifies issues for review. And if you lose there, you can once

THE CUBAN FIVE ARE POLITICAL PRISONERS serving two life sentences and 98 years collectively

Gerardo Hernández, Ramón Labañino, Antonio Guerrero, Fernando González and René González were arrested on September 12th, 1998 by the FBI and locked for the next 17 months in solitary confinement. They were falsely charged with espionage conspiracy. However, their actions were never directed at the U.S. government, they never harmed anyone nor possessed any weapons. Their mission was preventing Miami terrorists from attacking Cuba.

For more than 50 years, the U.S. government has carried out aggressive policies against Cuba, using economic blockade and promoting terrorist organizations—based in Miami—to attack Cuba. Since 1959, more than 3,400 Cubans have died from the terrorists' attacks.

The trial began November 2000 in Miami, where a virtual witchhunt atmosphere existed because of anti-Cuba prejudice. An unprecedented media campaign was unleashed against the Cuban Five. Their attorneys tried to move the trial to a venue away from Miami, but the judge refused.

Now, newly-discovered evidence has revealed that while the U.S. government was prosecuting the Cuban Five, it was secretly paying prominent journalists in Miami to engage in propaganda against Cuba and the five Cubans—through Radio and TV Martí—creating a climate that would guarantee convictions.

The cause of the Cuban Five, who were peacefully defending their homeland from violent attack, has given birth to a worldwide movement to demand their freedom.

again petition the U.S. Supreme Court to take the case.

One of the issues of the appeal, is that of the journalists who were being paid without the defense knowing, journalists who were supposedly independent but were receiving money from Radio and TV Martí.

This is a classic case of newly-discovered evidence of a constitutional dimension. The trial occurred in the period of 2000 and 2001. No one knew that these journalists were being paid by the government at that time. But in 2006 it was revealed that in fact some of the regular reporting journalists were also on the payroll of the federal government in connection with Radio and TV Martí. Since that was not revealed until 2006, it is newly-discovered evidence. Since it is evidence of the government's manipulations of attitudes within the community, it is of a constitutional dimension since it violated Gerardo's constitutional right to a fair trial.

So in our papers we are citing the 2006 revelation, and all the excellent work that has been done by the National Committee to give substance to these revelations and to also seek under the Freedom of Information Act, further information which is still forthcoming to buttress the claim.

There is still additional information, as the litigation under the Freedom of Information Act proceeds, to develop more and more information on these journalists, their agreements with the government, what they did, and under whose auspices. We expect the case will be in the district court for at least six months, probably longer. So as we get new information it can be added to the papers we'll be filing this and next month.

You have a long history defending people who were prosecuted for being involved in social justice issues. How do you see the case of the Cuban Five in the context of your history defending political prisoners?

This case is very similar to those cases. Once you have a prosecution where the government has a political interest in the outcome, there's always a strong likelihood that steps were taken that were improper in initiating and prosecuting the case. And steps were taken here that were not known at the time of the trial but became known later.

We are going to be finding additional information that the government withheld, that they didn't provide, that they used to manipulate this process in order to gain a conviction. As has happened in past cases, this is going to be a revelatory process where we're going to find out things that were not previously known and which only became known only through additional prodding and pressure.

What attorneys are involved in the appeals?

Most of the attorneys have remained in the case, going on now for twelve years. Others have joined during the appeal.

That is a typical process. Frequently, as in the case of Tom Goldstein, you need the special expertise of an attorney who practices before a particular court. Goldstein of course is an expert in U.S. Supreme Court litigation. He teaches seminars at both Harvard and Stanford on Supreme Court litigation. When we got to the level of the Supreme Court we turned to Tom Goldstein.

I came into the case in 2003, seven years ago, as the case was about to be heard on appeal. Antonio's attorney had fallen ill and I was asked to replace him.

Some people have asked if there is any relief after the final appeal, any courts in the international arena available to the Five?

In May of 2005 a subcommittee of the Human Rights Committee of the UN (the Working Group on Arbitrary Detention) did issue an opinion by five judges that the venue violated international norms of due process, and they urged the US to move the case to another venue. The U.S. of course did not respond. There are other international venues we may turn to, but that will have to wait until all of our domestic appeals have been exhausted.

We are talking about law and legal issues. What other means do you think there is to win justice for the Cuban Five?

The filing on June 14 was on behalf of Gerardo Hernández. Gerardo's case is exemplary because he is serving two life sentences plus 15 years, in a situation in which he is demonstrably innocent of the charges. He is the first person in U.S. history to be charged for the shutdown of an aircraft by the armed forces of another country acting in defense of their airspace.

Also, as a simple matter of the failure of the evidence used against him, the United States prosecutors acknowledged at the end of the trial in an emergency appeal to the appellate courts that they did not have sufficient evidence to convict him, referring to it as "insurmountable obstacle" toward gaining a conviction if the trial judge gave her intended instructions to the jury. The appeal was rejected, the instructions were given, and the jury convicted nonetheless. Only in Miami.

Gerardo's case is really one that calls for interventions by non-judicial, non-legal bodies and people worldwide interested in human rights and justice.

What message do you have for Gerardo and for the movement?

I spoke to Gerardo two days ago, he called me from his maximum security prison in California. He wanted an update on where the case stood right now. He is a very strong, firm person who believes in his own innocence and his country.

He served honorably as a volunteer in Africa in the struggle against apartheid. He has been an exemplary prisoner, not a single violation in his 12 years living under the rigors of maximum-security confinement. He looks to the worldwide community of people concerned with issues of justice to make known their concern. He also feels confident that he will ultimately be vindicated.



Artwork by
Gerardo Hernández
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Join the Campaign to Free the Cuban Five! Contact us to see how you can help:

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