

The case of the Five: Where we come from, where we go from here.

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The easiest way to understand it would be to make a chronological list of the most important events starting with the appellate proceedings and adding some complementary comments.

When did the appellate proceedings begin?

The first step of the appellate proceedings was taken in the month of December 2001. The Five had been sentenced by Federal Judge Joan A. Lenard, who had presided over the trial at the South Florida District Federal Court, in Miami city.

The Rules of Appeal provide that an appellate process to overturn the conviction of a District federal judge requires filing a Notice of Appeal with the same court where the trial was originally held. Such notice should be filed within ten days following the date when the sentence was passed; it does not require arguing the reasons but simply stating the disagreement of the convicted. Five years and seven months have passed since the appellate proceedings started to overturn the sentences given to the Five.

What court should be decided on this?

Consistent with the United States legal system, it is the Circuit Court that should review the cases tried at the district courts. In this case, given the geographical division of the judicial system, it is the Atlanta Eleventh Circuit Court of Appeals that should review the cases tried at the South Florida District federal court since the cases tried in the federal courts of the states of Georgia, Alabama and Florida fall under its jurisdiction.

Once the corresponding documents were received by the Atlanta Court of Appeals, a three-judge panel was instituted made up by Mr. Stanley Francis Birch, Jr., a federal judge appointed in 1990 to the Eleventh Circuit Court by President George Bush; Judge Phyllis A. Kravitch, a federal judge appointed in 1979 by former President Carter, who is also a judge at the Eleventh Circuit Court; and Judge James L. Oakes, who was invited into this case, although he works as a judge in the Second Circuit Court of Appeals. It is common practice to invite experienced judges from other circuits to join panels in the Eleventh, and such is the case of Mr. Oakes.

These were the three appellate federal judges commissioned with reviewing the alleged breaches of the law occurred during the Miami court trial presided over by South Florida District federal judge Joan A. Lenard.

Reasons for the appeal

Once instituted the panel set forth the deadline for the defense attorneys to submit their bills of complaint and for the government to respond.

At that moment, the U.S. government orchestrated one of its numerous maneuvers aimed at obstructing the defense of the Five. Unjustifiably, and under the pretext of the illegal Iraq invasion, the defendants, who had been sent to different and distant prisons, were placed in solitary confinement cells. The argument was the much touted national security issue,

as if it were possible from those prisons and after five years of detention to cooperate with the Iraqi resistance.

Under a special provision related to national defense, they were taken to punishment cells in solitary confinement, each one in his penitentiary center, and told that this measure would stand for a year that could be indefinitely extended in the following years. They were prevented from communicating with their respective lawyers, with their families and with Cuba's diplomatic officials in the United States; this action was taken at the same time that the lawyers were finalizing their statements and exchanging views with the defendants. The immediate solidarity displayed both inside and outside the United States had an impact on this situation that lasted only a month.

Then the panel learned of the legal reasons for the appeal based on the violations of the law by the government and the court during the Miami trial. Each and every one of the arguments would deserve an extensive analysis but to save space they shall be summed up as follows:

- 1) Wrongful action on the part of the Judge for holding the trial with a Jury selected from the Miami community in violation of the Sixth Amendment of the Constitution of the United States of America. Said amendment provides that every defendant has the right to be tried by an impartial jury. Impartiality is defined as the absence of prejudice among the potential jurors towards the defendant with the additional element that the jury should be spared any external influence. From the very beginning, the defense lawyers requested a change of venue and the selection of the jury in a nearby city other than Miami where strong adverse opinions on Cuba issues prevail, the same as an extremely inflammatory press against the Five, all of which could adversely affect impartiality given its influence on the jurors. Despite all the arguments, the Judge rejected the petition submitted by the defense.
- 2) Prosecutorial misconduct by the government representatives, that is, the Prosecution during the presentation of the case to the jury basically aimed at inflaming with passion the political sentiments of the jurors and rekindling the community prejudices against the defendants. The Prosecution made inconvenient comments while intentionally misrepresenting the facts and evidence introduced during the trial. At the same time, it led the jurors to believe it was their patriotic duty to condemn the defendants regardless of the evidence and the rigor of the sentences imposed.
- 3) Insufficient evidence to declare defendant Gerardo Hernandez Nordelo guilty of the crime of conspiracy to commit first degree murder. This charge is related to the shooting down of two small planes own by the Brothers to the Rescue organization. These had repeatedly violated Cuba's airspace from 1994 until February 1996 thus interfering with communications between the air traffic control towers and the commercial flights entering and leaving Cuba while these aircrafts were landing or taking off. Additionally, during their low-flights on densely populated areas of the Cuban capital, they dropped objects in violation of the aviation rules. After the leader of said organization had announced that they would repeat these illegal actions on February 24, 1996, the Cuban government issued a public statement warning of its decision to put an end to such violations. At the same time, a diplomatic note was presented by the Cuban government to the United States government advising it on said decision. However, the latter failed to comply with its duty to prevent that three small planes took off from its territory with well identified illegal purposes. The Cuban government then exercised its sovereignty

over its territory and shot down the two planes that trespassed into its borders. The plane commanded by Mr. Jose Basulto was not shot down as it remained on the border of the international and Cuban waters taking to the north immediately after the shooting of the other two. Although it is true that monitoring the actions of this terrorist group was among Gerardo Hernandez's duties, it was proven with evidence that he had no relation whatsoever with the Cuban government's decision nor did he conspire with it to bring death on any person in international waters, as the crime requires. In an emergency motion addressed to the Atlanta Court and intended to modify the judge's instructions to the jury on the elements of the crime, the government representatives, according to the law and legal precedents, admitted it when in their document they stated that "...in light of the evidence submitted an insurmountable obstacle arises which could lead to the acquittal of the defendant". As to this charge, we are also appealing the jurisdiction of this court to try this event under the Foreign Sovereign Immunities Act, which prevents putting on trial in this country the actions of the government of a sovereign state, such as the case of the two planes shot down by the Cuban air force in a legitimate act of sovereign defense of its airspace, as proved by the evidence.

- 4) Insufficient evidence to sentence defendants Gerardo Hernandez, Ramon Labañino and Antonio Guerrero for the crime of conspiracy to communicate to Cuba information related to the United States' national defense. The witnesses' depositions introduced in the trial by both the prosecution and the defense attorneys agree that Cuba never requested them to seek information on US national defense. On the other hand, no action led any of the defendants to a position where they could obtain such information, and they were not found in possession of any information thus classified. According to the testimony of intelligence experts all of the information requested and obtained was public
- 5) information which fails to typify the crime of conspiracy to commit espionage. The instructions issued by Judge Lenard to the Jury explain that to commit this crime the following elements should be present:
 - a. The information involved must be related to national defense.
 - b. To be considered national defense information, this must be protected by the government with special efforts to prevent its disclosure to the public.
 - c. That the defendant acted with intent or with the notion that the information might hurt the United States or give another nation an advantage over the United States.
 - d. The government must prove that the information involved was specially protected.
 - e. If the information has been made public, or if it can be found in sources legally available to the general public, it is not related to national defense.
 - f. When the sources of information are legally available to the public and the United States has not made efforts to protect such information, this is not related to national defense.

Still, the jury found them guilty ignoring all the evidence and the provisions of the law.

- 6) Illegal use in this case of a special legislation applicable to trials where national security information is involved. Following a government request, the court approved at an early stage of the proceedings, the application of the Classified Information Procedures Act (CIPA) which placed all the evidence in the hands of the government while limiting the defense lawyers' access to it during the preparation of the trial. Likewise, through a protective order, it prevented the defense lawyers from exchanging views on the evidence that each of them had

access to under government authorization. The attorneys for the defense required permission from the government to be a part of the trial. Ramon Labañino went eight months without a lawyer, since Eric Cohen, the public defender assigned to his case by the court on September 1998, failed to receive the government's permission to have access to the evidence. Therefore, on May 20, 1999 he submitted in writing his resignation, which was accepted by the court. Cohen left the case without ever having as much as seen a piece of evidence linked to the process. A few months later, on November, the government admitted that in the profuse documentation of the case not a shred of evidence had been found in possession of the accused that was linked in any way to national security. The application of this procedure was but a government maneuver to influence the court first and then the jury, in the sense that this was a case related to espionage.

- 7) Undue denial by the court to instruct the jury, --despite a petition to the effect by the defense lawyers-- on the legal doctrine of justification and necessity. This means that in due course the defense lawyers intended to prove to the jury that the Five were in the United States as a consequence of the terrorist actions carried out against Cuba, and the deaths, injuries and material damages caused by them, combined with the inaction on the part of the US authorities to put an end to such crimes as befits the Neutrality Act --a legal provision prohibiting the organization and implementation of actions on another country to which war has not been officially declared and the punishment of the perpetrators. This doctrine provides that the defendant should present evidence to the jury to prove the alleged justification or necessity of his actions. From the beginning of the process, the Judge denied the defense the possibility to present its proofs and later failed to instruct the jury to analyze the case in the light of this legal doctrine.
- 8) Wrongful application of the sentencing guidelines. When the time came to pass sentence, the Judge ignored the federal sentencing guidelines and imposed the maximum sentences even when she was not entitled to do so. For example, in the case of the crime of conspiracy to commit espionage she sentenced to life imprisonment, which is the sentence corresponding to someone who obtains information relative to national defense, passes it unto a foreign government and brings serious damage on the United States. The Judge imposed these disproportionate sentences despite the fact that the evidence accepted in court and the statements by the experts showed that no national defense information was involved in this case.
- 9) The securing of evidence by the government prior to the arrest, in violation of the law and through illegal searches in the defendants' houses. The Judge denied the motions presented by the defense to suppress such evidence.
- 10) During the selection of the jury, the government applied a racial standard to allow it to leave out potential African American jurors. The Judge denied the defense's motions to prevent that the government could proceed with this illegal practice known as Batson Violation, in reference to a legal precedent set in a previous trial.

The panel's decision

After holding an oral hearing on March 10, 2004, where the parties involved responded the questions raised by the judges on the main issues contained in the appeal, and reviewing the evidence and documentation of the trial, the panel issued a ruling that was made public on August 9, 2005. With this decision they only responded to the first of the issues raised by the defense, namely, the one related to the venue of the trial.

They said that the strong prejudices of the Miami community against Fidel Castro, the Cuban government and its agents, the publicity surrounding the trial and other events in the community (the case of Elian Gonzalez) combined giving rise to a situation that made it impossible for the defendants to be accorded a fair and impartial process. Therefore, they decided to revoke the sentences and to return the case for a new trial.

It was the view of these judges that the trial was held under what they defined as a 'perfect storm' made up by the community prejudices against the defendants, the strong publicity before and during the trial, and the manipulations by the government and some of its witnesses who used inconvenient expressions before the jury with a clear intent to rekindle such prejudices. Additionally, they admitted that the defense lawyers had presented enough proofs in their petitions for a change of venue, which should have been granted by the judge.

They added that since they were revoking the sentences and ordering a new trial, they needed not to respond to the other issues raised in the appeal.

To sum up, of all the issues raised by the defense lawyers of the Five, the three-judge panel made a decision only on that related to the venue of the trial, which was the main request for it dealt with a constitutional violation.

An exceptional appeal

As pertaining to the Federal Rules on Criminal Procedure in the United States, the revision of the decision by an appellate panel is not favored, therefore, this should have been accepted by the parties sending the files back to Miami in order to hold a new trial in a venue where hostility against the defendants was not present as in this city. That is, the judges' mandate should have been respected.

However, despite all of this, the US General Attorney's Office addressed the Atlanta Court of Appeals full panel of judges with a request for an exceptional new hearing that would re-examine the panel's decision. The full panel consists of twelve judges.

Exactly one year after the sentences were revoked, on August 9, 2006, the full panel of judges of the Atlanta Court of Appeals, by a majority decision of 10 to 2, declared the annulment of the ruling by the three federal judge panel designed to examine the appeal and decided that the proceedings be returned to these for them to decide on the matters that remained pending from August 9, 2005.

Despite the defendants' disagreement with the decision it is not possible to discuss it now at the United States Supreme Court since the rules of procedure provide that no case can be taken to it while there are pending matters in the Circuit Court of Appeals.

Conclusion: The documents were all returned to Birch, Kravitch and Oakes for them to decide on the pending matters contained in the appeal, that is, everything contained in the original appeal but the change of venue.

Consequences: New statements addressed to the panel by the defense and the government representatives, each defending his position and the indication of a new oral hearing for last August 20, 2007.

On the other hand, time has passed and Judge Oakes is now retired; his appointed replacement is Judge William H. Prior, Jr., a working judge from the Atlanta Appellate Circuit.

What happened on the 20th?

An oral hearing works in the interest of the judges rather than that of the parties involved in the trial. Although the defendants' legal representatives and the government tried to present their basic points, the judges decided which aspects in each point they wanted to listen to in order to clarify their doubts and take position as judges after reading and studying the arguments exposed by the counselors in their respective papers.

In this framework, the judges decided that the discussion that day would focus, first, on everything related to the government willful misconduct during the trial and, later, on those aspects related to the lack of evidence to substantiate the charges of conspiracy to commit murder and espionage. Likewise, they ordered the government to submit to the court, within fifteen days, the documents previously sealed under the CIPA provisions which the defense had no access to from the beginning of the proceedings.

Each party had thirty minutes to present their case.

It was a difficult endeavor for the speakers, as a color-changing clock in front of them indicated the unrelenting passing of time. It was green at the start, then yellow towards the end, and finally red. The judges kept interrupting the lawyers with questions on any of the legal aspects in the appeal or the evidence in the case and their interpretation. On occasions it was like a professor questioning a student, and a minute later it was a reflexive comment ironically made like in passing; at times they played the devil's advocates or showed a marked incisiveness towards either of the parties, which cannot be taken as an indication of their final decision.

There was, however, a significant detail which marked this oral hearing. Over seventy international and American observers, convened by the solidarity campaign with the Five, attended the hearing to listen directly to the arguments of both parties. Representatives of international lawyers associations, Latin American lawmakers, experts from Europe and other geographical areas, and leaders of solidarity organizations witnessed how the assistant U.S. Attorney Mrs. Caroline Keck Miller failed to answer the judges' questions concerning the lack of evidence to sustain the main charges for which the Five were condemned. The absence of evidence to justify the charge of conspiracy to commit murder was clear to all those present. At the same time, there is hardly any action in the whole process pointing to the defendants' intention to obtain information related to the national defense of the United States during their stay in that country.

At the end of the intellectual exercise there were still no decisions. Now, we can only wait, and the federal law sets no limits to the judges for the release of their ruling. Anyone could think that too many years of degrading imprisonment have already passed and justice has not been served. On the other hand, two members of that panel –Birch and Kravitch-- showed with their previous ruling that they are committed to law, for they revoked the sentences upon realization of the constitutional violation committed against the Five by holding the trial in Miami, and later vigorously opposed, as a minority, the unfair decision of the majority in the full panel.

We are torn between the ideas of resistance and hope expressed by two of our brothers in their defense statements during the hearing where they were informed of the harsh sentences we keep appealing.

Rene has said: "...And as these three sordid years go down in history, and a mountain of arguments, motions and technicalities come to bury a story of blackmail, power abuse and the most absolute contempt for such a highly praised justice system, polished to a shine it never had, we will continue to appeal to those values, and to the American people's vocation for truth. And we will do so with all the patience, faith and courage that we draw from the crime of dignity."

And Gerardo has said: "I trust that if not at this level, then at some other level of the system, reason and justice will prevail over political prejudices and the desire for revenge, and it will be understood that we have done no harm to this country that deserves such a punishment. But if this were not the case, I would then take the liberty of quoting one of this nation's greatest patriots, Nathan Hale, when he said: "My only regret is that I have but one life to give for my country."

Again, and for the third time on August 20, 2007, the forceful arguments of the defense were presented to the judges in the Atlanta 11th Circuit Court of Appeals. We hope the values referred to by Rene will prevail and this judges' panel will resolve, once and for all, to put an end to the sacrifice of Five useful men and their valuable lives.