

From the Courts: Justice Watch

In Cuban spies case, government turns snippy

January 03, 2006 By: Julie Kay

South Florida lawyers are expressing astonishment and dismay over the unusual effort by the U.S. attorney's office to block national legal groups from filing amicus briefs in the government's appeal of the reversal of the Cuban spies' convictions in Miami.

With oral arguments scheduled for next month in the second round of appeals before the 11th U.S. Circuit Court of Appeals, the federal government's effort to reinstate the convictions of five Cuban agents and force a retrial is heating up and turning somewhat ugly.

The full 11th Circuit in Atlanta will hear arguments in the government's appeal of an August ruling by a three-judge panel that overturned the 2001 spying convictions of the five agents.

The latest twist in the high-profile case came last week when the U.S. attorney's office in Miami filed a motion seeking to block the 11th Circuit's acceptance of two amicus briefs filed by state and national legal organizations that oppose the government's position. The motion sharply urged the 11th Circuit not to accept the briefs.

Two days later, Ricardo Bascuas, a University of Miami law professor who authored one of the amicus briefs, filed a strongly worded reply opposing the government's position and reiterating why amicus briefs should be allowed.

"The important civil rights precedents discussed by amici curiae hold that the Sixth Amendment protects us all from convictions tainted by racial, ideological, religious, ethnic, or other irrational prejudice," states the brief. "As distinguished criminal defense organizations, amici offer to assist the court by presenting the cases most pertinent to the fair treatment of unpopular defendants."

The amicus briefs were filed by the National Lawyers Guild, the National Association of Criminal Defense Lawyers, the National Association of Federal Public Defenders and the Florida Association of Criminal Defense Lawyers. One was co-authored by Miami criminal defense lawyers David O. Markus and Brian L. Tannebaum, with Henry J. Bemporad of San Antonio.

Assistant U.S. Attorney David Buckner, who co-authored the government's brief, declined comment.

"Everyone plays to win, I guess," Federal Assistant Public Defender Richard Klugh, who likely will be arguing the case before the 11th Circuit, said in an interview. "But to not allow anyone except the Cuban defendants to argue is not right. These are respected American legal organizations and they should be allowed to participate in the process."

Markus angrily called the prosecutors "crybabies."

"Only insecure bullies cry and complain like this," he said. "I'm really surprised that the [U.S. attorney's office] would take this position."

The battle over the amicus briefs underscores the political volatility of the case and the intensity of the legal fight.

In 2001, after six months, a jury convicted five men of plotting to spy for the Cuban government.

But last August, an 11th Circuit panel overturned the convictions, ruling that U.S. District Judge Joan Lenard was wrong to deny a defense request for a change of venue because passionate anti-Castro sentiment in Miami made it impossible for the defendants to get a fair trial.

The 93-page ruling was widely criticized in the Cuban-American community. Some expressed offense over the panel's message, addressed to the Cuban-American community, that the U.S. Constitution requires that "every defendant, no matter how unpopular, must be treated fairly."

U.S. Attorney Alex Acosta appealed the panel ruling and asked the full court to reconsider the matter. In an unexpected decision, the full 11th Circuit in October agreed to rehear the case.

Some South Florida lawyers were stunned when the government filed its motion late last month urging the court not to accept the amicus briefs.

In the motion, Buckner and Assistant U.S. Attorney Anne R. Schultz argue that the briefs are partisan filings that "bring no policy perspective different or distinct from the appellants' interest and which argues detailed factual contentions, inappropriate for an amicus

filing.”

The prosecution also argued that if forced to respond to the amici, it would have to spend a “significant portion” of its limited briefing allotment refuting “baseless claims,” because “record citations are selective and incomplete, and the characterizations misleading and wrong.”

Ouch.

Klugh said the part that most offended him is the government’s assertion that the federal public defender’s office may have solicited the outside legal groups to write their amicus briefs and may even have had a hand in the writing. The brief by Assistant U.S. Attorney Caroline Heck Miller calls the amici “surrogates for appellants.” The purpose of such a move, she suggests, would be to allow the defense to circumvent page limitations in their own briefs.

Klugh angrily denies the allegation. He and other defense lawyers argue that they see no reason why the court shouldn’t allow the two amicus briefs. All parties should be allowed to express their views in the case, Klugh said.

“I have never seen the government argue this before,” Klugh said. “I can see if there were 10 briefs filed, but there were just two, from respected legal organizations.”

One of the amicus authors, C. Peter Erlinder, a professor of law at the William Mitchell College of Law in St. Paul, Minn., felt so strongly about the case that he took time out during a trip to Tanzania as part of a United Nations group addressing local government issues to write his brief, Klugh said.

Richard B. Rosenthal, a Miami appellate lawyer, said the South Florida legal community was flabbergasted by the government’s move.

“We were all surprised,” he said. “Those briefs are routinely allowed and the government’s decision to challenge the amicus brief smacks either of desperation or of sheer pettiness.”

But Robert Jarvis, a law professor at Nova Southeastern University, said the government’s move may be justified. Amicus briefs are sometimes used by legal groups to bolster fundraising efforts.

“The court does not want be burdened down with amicus briefs,” he said. U.S. Supreme Court Justices Ruth Bader Ginsberg and Sandra Day O’Connor have remarked publicly that they don’t read amicus briefs.

“There’s always the question of what do you have to say that’s new and different,” Jarvis said. “I’m not unsympathetic to the government’s position.”

The legal community is watching to see if any amicus briefs supporting the government’s position will be filed, perhaps by Cuban-American groups. All such briefs are due Jan. 13.