

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:10-21957-cv-JAL  
(98-721-cr-JAL)

GERARDO HERNANDEZ,

Movant,

v.

UNITED STATES,

Respondent.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION, IN THE ALTERNATIVE, FOR  
LEAVE TO AMEND GROUND FIVE OF MOTION TO VACATE JUDGMENT**

In the event the court grants the government's motion to strike DE53, and denies Movant's motion, in the alternative, for leave to expand the record by refileing DE53, Movant has filed a motion, in the alternative, for leave to amend ground five of his motion to vacate. This memorandum is submitted in support of that motion.

The proposed Ground Five amendment has not been the subject of any previous appeal. It arises out of the same set of facts on which the original Ground Five was based.

Eleventh Circuit precedent allows this amendment. In *Davenport v. United States*, 217 F3d 1341 (11<sup>th</sup> Cir.2000), the court considered for the first time amendment of pleadings under Rule 15(c), Fed.R.Civ.P., in the context if a § 2255 motion. That court noted that three other circuits had already addressed the issue (*Id.*, at 1344):

All three circuits held that for an untimely § 2255 claim to “relate back” under Rule 15(c), the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings. See *United States v. Pittman*, 209 F.3d 314 (4th Cir.2000); *United States v. Duffus*, 174 F.3d 333 (3d Cir.), cert. denied, 528 U.S. 866, 120 S.Ct. 163, 145 L.Ed.2d 138 (1999); *United States v. Craycraft*, 167 F.3d 451 (8th Cir.1999). Instead, in order to relate back, the untimely claim must have arisen from the “same set of facts” as the timely filed claim, not from separate conduct or a separate occurrence in “both time and type.” *Pittman*, 209 F.3d at 318 (“both time and type”); *Duffus*, 174 F.3d at 337 (“same set of facts”); *Craycraft*, 167 F.3d at 457 (“same set of facts” and “both time and type”).

*Davenport* adopted this line of cases, 217 F.3d at 1347. It is clear, notwithstanding the Government’s suggestion that Movant raises matters that should be addressed in a second and successive petition, that DE56 does not raise new claims. The precedent is also relevant to the Government’s claim that they have somehow been “sandbagged.” *Davenport* cites with approval, *Id.*, at 1345, the Eighth Circuit’s observation in *United States v. Craycraft*, 167 F.3d at 457, that “[t]he rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide.”

WHEREFORE Movant requests leave of court to file his amendment to Ground Five of his Motion to Vacate Judgment.

DATED: November 16, 2012

Martin Garbus

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing motion for leave to amend was filed electronically this 16th day of November, 2012, and served by that means on all counsel of record.

Richard C. Klugh

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Richard C. Klugh