

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

Case No. 1:10-CV-21957-JAL

[Criminal Case No. 98-721-Cr-LENARD]

GERARDO HERNANDEZ,

Movant,

v.

UNITED STATES,

Respondent.

**REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO SET ASIDE THE
CONVICTION AND, IN THE ALTERNATIVE, IN SUPPORT OF MOVANT'S MOTION
FOR DISCOVERY AND ORAL ARGUMENT.**

Movant Gerardo Hernandez, by counsel, submits the following reply memorandum in support of his motion to set aside his conviction and, in the alternative, in support of his motion for discovery and oral argument. The affidavit of Martin Garbus, together with exhibits attached thereto, is incorporated in this reply.

I. Reply to the Government's Response:

1. The Government's Response argues that this Court's previous opinion and the venue decision of the En Banc Eleventh Circuit Court of Appeals opinion on August 9, 2006 are dispositive. The facts about the covert and secret propagandists were not known by any Court or defense counsel until September 8, 2006, when those facts started to surface as a result of an investigation started by *The Miami Herald*. As the *The Miami Herald*, *The New York Times*, and *Associated Press* investigations confirm, the facts of this propaganda campaign set forth in the

affidavit Martin Garbus were not known until after the August 9, 2006 En Banc decision of the Eleventh Circuit. The Government's agents, when confronted with the facts unearthed by the media investigations lied, evaded answers, and resisted any attempts to find out the facts. The legal and factual issues before the courts prior to September 8th, 2006 were of a totally different nature.

2. The Government also argues that the Courts have already decided the discovery issues by virtue of the Court decisions in the FOIA applications. But, of course, the criteria for discovery in a FOIA cases is different than in an application to set aside an unconstitutional conviction.

3. Nonetheless, the Government's Response makes it clear that parties agree on certain issues, and disagree on others. The controverted facts thus far are few.

4. The Government's Response agrees that "some" individuals described as journalists were secretly paid with funds through various governmental agencies and conduits, and that were being employed by the Government during the period of 1996 to 2001. **That agreement, along with the additional facts that have been developed, as shown in the affidavit of Martin Garbus, requires the convictions be immediately vacated. This case can be instantly resolved by placing a request to the Government to admit who those journalists were, for what period of time they were paid, and what did they do for those payments. No further discovery or hearing of any kind is required. That entire process need not take longer than one hour.**

5. The Government's Response does not deny that covert paid journalists had contracts with the government. It is clear that those Government agents who pursued the background checks were committed to do all they could to secure convictions. The Government's Response refuses to tell us of all the various duties the "covert paid journalists" had; the Government argues we should be more specific. The Government refuses to be transparent. The Government has the full files on each of

these journalists by virtue of having made background checks on each of them. The Government also has access that Movant does not have, to witnesses, to Government background files, and to radio and TV transcripts successfully withheld for over a decade.

6. The Government's Response does not claim that the covert propagandists were not intending to help seek a conviction, were not propagandizing, and did not succeed in influencing the jury. Nor could the Government's response honestly do so. The Government cannot be allowed to try and prove that their illegal actions did not lead to a wrongful conviction. The Government spent millions of dollars relentlessly attacking the integrity of the trial and trying to influence the jury to convict. The Government believed that its paid journalists were persuading the sitting jury. Otherwise, why would the Government have continued to spend millions, week after week, month after month, year after year, to influence the jury if the Government believed it had no effect?

7. The Trial Court's gag order¹, extending to "all [trial] participants, lawyers, witnesses, family members of the victims," covered all "statements or information which is intended to influence public opinion or the jury regarding the merits of the case." The facts prove that on a regular, continuous, and overwhelming basis, the Government was deliberately violating that Order.

8. The Government's Response claims that these issues cannot now be considered. The Response is wrong. First, it is now clear that the newly discovered past and present conduct of the Government violates the existing and present statutory law² as well as the Constitutional rights of the defendants. Secondly, the Government violated the integrity of the trial in a covert fashion, then

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Also see *United States v. Hernandez et. al*, No. 98-721-Cr-LENARD/DUBE, Filed Document 818 (So. Fl. 2000) (United States' Motion to Enforce Court's Directive Concerning Witness Comments to News Media) **Exhibit A**.

²

The publicity or propaganda prohibition is included in the yearly Congressional Consolidated Appropriations Act

lied about it, and then tried to cover it up, and then resisted all attempts to expose the payments. Thirdly, the Government, although it knew of the secret cover-up, never advised the Trial Court of that. Fourthly, it was obligated to do so and never at any time advised the Movant of the wrongful attempts to convict Movant. Fifthly, the prosecution does not deny that it did nothing, long after it knew the facts, and long after the story of the events surfaced six years ago and was widely reported throughout the United States. The Government withheld information for all these years because it knew its disclosure would require the convictions be set aside.

9. The proof Movant has at this point, as presented in the affidavit of Martin Garbus, is that, according to Government records, certain sums were paid by governmental agencies to selected propagandists to carry out an illegal Government plan to convict. The Government, prohibited by law from domestic propagandizing, decided to use its international propaganda machine and undercover agents to get its prohibited “conviction” message to the Miami community. We do not know the totality of facts about these journalists. But because of the Government’s ongoing cover-up we do not know the total number of “journalists” and other people paid by the Government to secure a conviction. We do not know how much the journalists were paid in most instances and through which entities, what they did under cover, for what, and over what length of time.³ But what we now know is more than enough.

10. Movant submits that the Government, even as it argues that the “venue” issues have been definitively and forever decided, must now agree that this is the first time these propaganda issues have been raised in this criminal case. For the first time this Court has been offered proof as to the

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This affidavit is far too long. It could be many times as long because the Government’s July 6, 2012 response, like their previous responses, claims we must prove detailed facts about events occurring over a five-year period that first began 16 years ago.

consistent, many times daily, brutal propaganda aimed at the jurors and the community in which they lived. These facts set in the affidavit of Martin Garbus were not raised at the trial, they were not raised before the Eleventh Circuit, and they were not raised in the United States Supreme Court.

II. While the Government has resisted exposure for many years, it is now constitutionally required to submit to Court-ordered discovery:

11. The shoot-down, arrests, and convictions were international matters. The Government saw vital international interests at stake in this case. The Government's interests were also seen from a domestic view. The government, realizing it had two separate issues that were in one ball of tar, wrongfully used all the resources it had at its disposal to oppose foreign and domestic enemies. State and local agencies were involved. Every appropriate Federal and State resource was used. In so doing, the Constitutional rights of these defendants were disregarded and violated.

12. Movant believes no further discovery is needed because of the Government's present and required future admissions. Because the Court may feel otherwise, we discuss the discovery issues.

13. The Government's discovery obligation on this matter has been recently clarified in the three Department of Justice Memoranda Addressing Discovery Obligations of the Prosecution in Criminal Cases.⁴ The memoranda were issued after the Government, in a number of highly publicized cases, was found to have wrongfully withheld information from the defendant. Those memoranda, as we can see from the opinion of District Judge Wolf in *United States v. Jones*, 686 F.Supp.2d 147 (D.Mass.,2010), where the District Court describes the history and intent of the new guidelines, seems to have been promulgated with Movant's case in mind.⁵

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Memorandum from David Ogden, Deputy Attorney General, to Department Prosecutors, January 4, 2010. **Exhibit FF.**

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Jones, supra, 686 F.Supp.2d at 148-49: "The United States Attorney's office has made intensive efforts to better prepare its prosecutors to perform their duties to provide discovery. While the Court remains skeptical that training involving

14. The Government's July 6th, 2012 Response contradicts and ignores the purpose and spirit of new Holder directive.⁶

15. These directives inform this motion. On January 4, 2010, the Department of Justice issued the memoranda that "address discovery practices in criminal cases and outline specific steps intended to help ensure that federal prosecutors comply with their discovery obligations."⁷

16. After the 2009 dismissal of former Senator Ted Stevens' conviction, Attorney General Eric Holder instituted additional training for prosecutors regarding discovery obligations, and also created a working group of senior prosecutors and attorneys from the Department of Justice and the United States Attorney's office, representatives from law enforcement, and IT professionals. This United States Attorney's office may have been involved and may have promulgated further guidelines for this district. The purpose of this group was to explore the department's training and practices related to discovery in criminal cases. The result of this group's work was the issuing of the three memoranda by Deputy Attorney General David Ogden.

17. The first memorandum to all Department of Justice prosecutors urged prosecutors to realize that their duty is to "seek justice." In this section, Ogden explains that even a minor lapse in

prosecutors alone will suffice, representatives of the United States Attorney participated in planning the educational programs prompted by this case, which was organized by the court and involved prosecutors, defense lawyers, judges, and a law professor. That program was voluntarily attended by the vast majority of Assistant United States Attorneys in this district and by an official of the Department of Justice responsible for the training of Federal Prosecutors. The new United States Attorney, Cameron Ortiz, participated in the program, welcomed the "unique opportunity" that the program offered, judged it to have "considerable" value and pledged her best efforts to assure that her prosecutors always "do the right thing." In addition, in January 2010, Attorney general Holder instituted a series of initiatives to assure that prosecutors understand their duties concerning discovery and discharge them in a way that is faithful to the Department of Justice's highest aspirations and finest traditions." Judge Wolf found the United States attorney's conduct was unintentional in her failure to comply with this directive.

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This Court should note that Government resists nearly all discovery aimed at finding out what Radio Marti does.

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Department of Justice Memoranda Summation from Morrison and Foerster: <http://www.mofo.com/departement-of-justice-issues-memoranda-addressing-discovery-obligations-of-prosecutors-in-criminal-cases-01-05-2010/>

discovery procedure can have disastrous effects. He tells prosecutors that providing all discovery in a speedy and efficient manner, even discovery which could disclose “exculpatory and impeaching evidence,” is in the best interest of the state in order to avoid a widespread lack of faith in the criminal justice system. The prosecutor has done exactly the opposite in this case.

18. The second memorandum, sent to United States Attorneys and the heads of the Department of Justice directing them to develop a policy for each office regarding discovery in criminal cases. The policy was instructed to include the timing of discovery and the assurance that all prosecutors in criminal cases will turn over any interviews with any witness, testifying or not. The policy that each office was to implement was to be based off of district and circuit court precedents and be completed by March 31, 2010.

19. The third memorandum issued by the Justice Department titled “Guidance for Prosecutors Regarding Criminal Discovery”, referred to as “Guidance”, specifically outlines a prosecutor’s responsibility when it comes to discovery in a criminal case, including step by step instructions and factors to consider. These recent guidelines seemed to anticipate this case.

20. As a first step, the Guidance directs prosecutors... “to err on the side of inclusiveness when identifying members of the prosecution team for discovery purposes.”

21. The guidelines tell us the Government must look for discovery information in all agencies, whether it is to look at the Federal Bureau of Investigation, or the Broadcasting Board of Governors, or the Office of Cuba Broadcasting. Prosecutors are told they must consider eight factors, which can be summarized as follows:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;

- Whether the agency, for example (OCB and BBG), played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

- Whether the prosecutor knows of and has access to discoverable information held by the agency;

- Whether the prosecutor has obtained other information and/or evidence from the agency

The degree to which information gathered by the prosecutor has been shared with the agency;

- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges;

- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

22. Applied to this matter, the elements of this directive demand consideration of the following questions to define the Government's discovery obligation: What were the September 2006 events surrounding the *Miami Herald's* investigation and the follow up investigations, such as the Columbia University investigation where participants in the *Miami Herald* story were interviewed at length?⁸ What did the Government do and say when it learned of the *Miami Herald's* investigation? What did they do to try to stop the story and to continue and expand the concealment? What did the Government say when it put so many journalists on so many payrolls? How did they

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Mr. Garbus contacted Columbia University to get copies of the interviews of Fiedler, Corral, the paid journalists, and others to see, amongst other things, what other information Corral had obtained about other journalists and the Government. Corral told Columbia University his original article was cut (*When the Story is us: Miami Herald, Nuevo Herald, and Radio Marti*, Columbia University Case Study, CSJ-10-0026.0, p14). Columbia University refused to make those interviews available, claiming they were confidential. The University said they would honor a subpoena.

decide their success in influencing the community in order to get millions and millions of dollars in funding? What else did Radio/TV Marti justify for its Miami operation? Why was one journalist or one Media Company chosen over all others?

23. The Government, in FOIA applications, and in response to Congress and scholars, resists discovery.⁹ It is inconceivable that the Movant has no discovery right in a case where he faces life imprisonment, when the GAO, where there was a “smaller” similar violation of federal law had total unhampered discovery.

24. The competition among the FBI with other Government agencies, as well as between state and local law enforcement and federal agencies, and their separate involvement with both the paid journalists and those paid journalist’s goals, is of great significance. What is the illegal “masterpiece” created in this case? Did any State or local law enforcement official knowing of federal violations try to cover up? The close ties between state and local law enforcement agencies and anti-Castro forces in Miami have previously been extensively documented in many books and articles. The spirit of the new memoranda should be followed to see what those agents did in this case with relation to the paid journalists. When prosecutors are to determine when to look for discoverable information from state and city law enforcement agencies (like Florida and Miami), they are, the guidelines tell us, directed to consider three factors:

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For example, Professor John S. Nichols, a Professor of Communications and International Affairs at Pennsylvania State University gave his testimony before Congress on Radio and TV Marti on June 17th, 2009. He said: “Furthermore, it is at least ironic that, while TV Marti is supposedly about freedom of information for the Cuban people, the U.S. government has not been forthcoming in releasing information to the U.S. public about its operation of the station. I have filed numerous Freedom of Information Act requests for relevant unclassified documents, but almost all of those requests have been ignored or inappropriately denied. It is equally ironic that most of the three-way correspondence among the United States, Cuba and the International Telecommunication Union was supplied to me by Cuban officials.” (John S. Nichols, *TV Marti has Virtually No Audience, Violates International Law, and Should be Closed, Before the Subcommittee on International Organizations, Human Rights and Oversight, Committee on Foreign Affairs, U.S. House of Representatives, June 17th, 2009.*)

- a) Whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control;
- b) The extent to which the state and federal government are part of a team, participating in a joint investigation, or sharing resources;
- c) Whether the prosecutor has ready access to the evidence.

25. Because of the Government's admission and the facts developed in this matter, Movant's case does not need further discovery to succeed. The Government has resisted every attempt to uncover the facts. The Government has failed to fulfill its constitutionally mandated discovery obligations. The Government's objection to exposure of the Government's secret program contradicts the purpose and intent of the new 2010 discovery requirements set forth by Attorney General Eric Holder Jr.

III. Conclusion:

26. Gerardo Hernandez, facing two life sentences, has now been imprisoned for 13 years and 11 months. The Government's successful secret subversion of the Miami print, radio, and television media to pursue a conviction is nearly incomprehensible. It is unprecedented. There should now be an immediate dismissal of the indictment; otherwise, this case will be permanently memorialized in American legal history as a landmark of ghastly and secretive injustice.

27. The Government's Response to this motion, factually barren and legally incorrect, shows that no further hearing is required and the conviction must be now vacated. The Courts cannot permit the integrity of American criminal trials to be made vulnerable to prosecutorial manipulation directed specifically to the trial's outcome that is then shielded from examination by assertions of classification and national security privilege.

28. Gerardo Hernandez requests that his conviction and sentence be vacated, or, in the alternative, that discovery proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on September 1, 2012 , I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Richard C. Klugh
RICHARD C. KLUGH