

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
(98-721-Cr-LENARD)

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| GERARDO HERNANDEZ, | : |
| Movant, | : |
| | : |
| v. | : |
| | : |
| | : |
| UNITED STATES, | : |
| Respondent. | : |

MOVANT’S REPLY TO GOVERNMENT’S CONSOLIDATED RESPONSE (DE:73), IN SUPPORT OF MOVANT’S MOTION FOR DISCOVERY AND MOTION TO VACATE CONVICTION AND SET ASIDE THE JUDGMENT, OR IN THE ALTERNATIVE TO EXPAND AND AMEND HABEAS CORPUS APPLICATION, AND FOR DISCOVERY

Preliminary Remarks

Reading the Government’s Response makes clear that Movant’s motion, proving criminal conduct, must be granted by looking at 1) what the Government factually misstates, 2) what the Government legally misstates, 3) what the Government legally ignores, and 4) what the Government factually ignores.

The Government’s Response Brief (DE 73), at page 47 states: “The media did not have the names of the jurors.” Were this true, the Government’s argument, that there was no structural error that effectively prejudiced the jury, would (under the set of assumptions the Government presents) have at least a logical coherence. But the statement in DE 73 is false and misleading.¹

¹ The Government’s denial contradicts this Court’s repeated statements, and the record of the jury selection and the trial itself. It also ignores documented events surrounding the trial that are not in the trial record as it tries to hide government misconduct. It is a critical denial and goes to the heart of the Government’s defense of its contemptuous, illegal, and criminal conduct. Of course, even if the Government were to be correct that the general public did not have the names of the jurors, the conviction must fall. Jurors’ families, friends and co-employees knew who they

As the Affidavit of Martin Garbus, one of the attorneys for the Movants, submitted herewith, shows, the Government's paid journalists deliberately taped, for television, the faces of the jurors and then showed the tapes on Channel 23, the day the jury was in deliberation. The jurors' faces, previously publicly named during the trial, were shown to the Miami community, to jurors' families, their co-employees and others. Attachments A to E of this Brief are selected parts of the trial record that prove the jury's names and faces were known to the public and the media.

This Court and the Eleventh Circuit knew of certain published articles. Neither knew of (1) the government project to intimidate the jurors, (2) the personnel involved in the project, or (3) the media events (such as press conferences and demonstrations and marches) staged to influence the jurors. What the Court (and the Eleventh Circuit) never knew when it was seeking to insulate the jurors (but now knows) is that paid reporters (some from Radio and TV Marti) and the alleged non-Government paid journalists covering the case were not real journalists but part of a "Gang" (hereafter called the "Gang") who publicly advocated and then justified terrorism and violence. The Government-paid "Gang"² consisted of illegal combatants, terrorists, members of terrorists "Gangs", felons, and "criminals", previously jailed in Cuba and America for political or criminal activity (one colleague who wrote in a Government-subsidized paper, was described by former United States Attorney General Richard Thornburgh as an "unrepentant

were, and even if they were unknown, the "Gang" knew who they were and helped put enough pressure on them to make sure that conviction was a certainty.

² A "Gang" is defined in Webster's Dictionary as an organized group of criminals. The affidavit of William Norris (Attachment H), one of the defense attorneys at trial, has a description of some of the "Gangs" colleagues who testified at the trial.

terrorist”³), with several of them being connected to the CIA and other branches of our Government.

I will summarize the trial excerpts that contradict the Government’s denial at page 47 of this brief.

Attachment A are portions of the voir dire. The jurors publicly gave their names when the media was present, where their parents, children and grandchildren live, where members of their families worked, their places of employment, the community in which they lived, and as a result, where they had to drive from to reach the Courthouse. The “Gang” knew where they lived, this contradicts the facts set forth by the Government.

Attachment B is that portion of the trial transcript, from page 14644 line 11 to page 14647, where the Court described its narrative of the jurors’ harassment the day before, on June 4. Some of the jurors said they were filmed all the way from the Courthouse to their cars and they saw their license plates filmed. Cameras from Channel 23 and from Radio/TV Marti filmed them. This directly contradicts the Government.

Attachment C relates to the effect of cameras on the jurors and the effect of a press conference held by the victims’ families. We know the victims were colleagues of Basulto and others who received Government monies. We do not know if Government personnel and monies organized and paid for the press conference or if Government monies went to the families of the victims, or both.⁴ It is more than likely that it did.

³ Alejandro Armengol, another government journalist, left Cuba in 1983. We have, since the previous submission, learned of additional “journalists” who covered the case, were present in the Court during the voir dire and trial and worked for the independent media, not Radio/TV Marti. Alejandro Armengol received Government payments from (at least) 1999 on. He was named on the original FOIA and 2255 application.

⁴ The families of the jurors were trying to recover monies for wrongful death. We believe they were supported, in part, by our government. They spoke freely to the Court and perhaps

The Government said at page 117 “These individuals are not part of the Government’s prosecution effort. We speak to them, we have a cooperative relationship, but I have tried to keep arms-length from these individuals to some extent”. This is most probably a false statement. The Government gave its view that the Gag Order did not apply to the victims’ families (page 117); the Government view of the Gag Order was selective.

Attachment D reflects a Gag Order discussion (page 1546). Attachment E reflects the formidable media presence (page 1817), and photographs of Defendant, taken from “anonymous sources” that appeared in the media on the day of opening statements (page 1824).⁵

It was not an “accident” that the Government, while professing to the Eleventh Circuit, this Court, and the United States Supreme Court, a commitment to honor the Gag Order, and a commitment to seeking an impartial jury, was creating structural error as it was circumventing both the Court, the Constitution and the concept of American justice. And they continue to compound this with a massive fourteen year cover up.⁶

The media sat in on the voir dire as well as the trial when the jurors gave their names. The media physically followed the jurors, who wore juror tags outside the courthouse, from selection to conviction. The media sought to, and succeeded in, interviewing jurors. The

independent media at events partially paid for and organized by the federal government. The “Gang”, the families and the government had the same goal — a conviction. What did the Government exactly mean when it admitted to a “cooperative relationship”?

⁵ We do not intend now to detail every instance in the transcript where the government’s statements on these issues are false or misleading. But with the knowledge we now have, reading the transcript today is totally different than the knowledge we had in reading the transcript prior to today. Both this Court and, we assume, subsequently the Eleventh Circuit (and perhaps the Supreme Court) will see a very different transcript. The difference is astonishing.

⁶ The Government found a way to get around the Gag Order. The jurors, while attempting to live within the Court’s directions, were bombarded with the words and actions the Court did not want them to see or hear.

Government knew jurors should not be shown on television to tell the residents of Miami who the jurors were. The Court's intent could not have been clearer. The Government's alleged attempt to keep an "arms-length relationship" with the families of the victims, the media, and public demonstrators was a fraud. Public events we believe were coordinated with trial events.

On February 17, 2001, on Channel 23 primetime 6 pm news, reporter Mario Vallejo interviewed Maggie Schuss, co-founder of Brothers to the Rescue and wife of government witness William Schuss, who describes a petition drive to "indict Fidel Castro for the murder of the four pilots." Then Channel 23 gives the address where to mail the petitions and informs the public that petitions can be obtained at well-known Cuban restaurants or at supermarkets. The story goes immediately to video of BTTR planes and Cuban MiGs and the voice of the Cuban pilots before and after they shoot down the planes, in a clear attempt to create an emotionally-charged backdrop to the petition appeal. The story cuts immediately to Eva Barba, mother of Pablo Morales, one of the pilots who died in the shoot-down, as she sobs about her son's murder, demanding justice, and then continues with more audio of the plane shoot-down. The story ends with a production credit attributing the coverage to a joint production team of Channel 23. *See* Attachment F (transcript of Channel 23 news story of Feb. 17, 2001). We have learned since the Miami Herald Sept. 8, 2006 Oscar Corral article, that Omar Claro, Channel 23 reporter received monies; from our research we learn that Ronald de Souza of Channel 23 received monies (he also covered the trial), and that Channel 23 News Director Helga Silva – director from 1998 to 2006 -- was employed at Radio Martí from 1985 to 1987. Because of the government's deliberate blocking of information about journalist payments before 2003, we are denied the necessary information to uncover the full extent of Channel 23's obvious protagonist role to convict Movant before the public and the unsequestered jury. The interview with Eva Barba was a deliberate and direct violation of the Court order against interviewing family members of the

victims. A family member is shown in a highly emotional state to draw the public's sympathy, the station informs the public to respond by collecting petitions to indict Fidel Castro for the pilots' murder, and by implication Movant, and gives locations to obtain petitions and an address to mail them. Movant must have unfettered access to Government documents to learn the full extent of payments and relationship of Channel 23 management and employees with the Government.

As the Court noted in the trial record (Attachment A), reporters from Radio/TV Marti, Channel 23, and others, personally followed jurors out to the parking lots when they left the court, saw their license plates and knew not only their names, but also information about their relatives, and places of employment. They were described and identified as jurors on TV, not only on TV/Marti, shown in Miami, but Channel 23 in Miami, as well as other media outlets that used Government personal and received Government funds.

The Government claims the information proving "structural error"; the payments and the outside media events, have always been available to Defense Counsel notwithstanding the cover up. We want to put that to rest. Annexed here as Attachment G is an email dated January 9, 2013 from FPDS, the Government database, pointing out that Government agencies are not required to report their procurement spending before 2003. The FPDS website was established in 2004. Since everyone involved in these payments must have known they were illegal, it is not surprising that it was not in the database and is not easily found.

There is little reason to believe anything the Government says at this point in this case. That is why the Government is attempting to say so little. It may be that the particular Government trial prosecutor did not know of the particular taping, or much of the other governmental wrongful conduct. While that may be argued as a defense by the prosecutor, it is not justifiable that the Government trial prosecutor has seemingly made no inquiry within (or

outside) the government to learn what transpired. That is not only legally and morally contemptuous, it shows that the structural error the Government created cannot be overlooked in order to sustain Movant's conviction.

Never before in American history has the Federal Government put together such a secret, well-paid and directed "Gang" like this with access to an unsequestered jury that sat for more than seven months in order to secure a federal conviction. For men who previously randomly killed, intimidating jurors and the community in which they lived was the very least they would or could do to get a conviction.

The "Gang", media personnel paid by the Government, were not "accidentally" taking the jurors' pictures and following them to their cars. The public was not interested in the jurors' license plates or places of employment nor is it a news story that stands on its own. Much of the "media" was doing it to help Movant's prosecution. The media had several goals. First, to obtain the information, second, to use the information, thirdly, to let the jurors and their families know they were vulnerable to the pressure of those who wanted to convict, and fourthly, to communicate throughout Miami who the jurors were.

The jurors knew every aspect of their lives was, or easily would be, public knowledge. They knew whether thousands of their fellow citizens knew them, would know them, or despised them, was not in their control.

There was, as we now know, a constant dissonance in the Court. The Court, not knowing the facts, saw "Gangs" following the jurors and taking down license plates as Radio TV/Marti personnel and independent journalists. But it is not clear there were any untainted independent journalists in the "Gang", at the voir dire, or at the trial. It may have been all a charade. The daily reporters may all have been Government paid. The Court looked at the selection of the jurors and the trial and saw an independent media and made its ruling. But the Court did not

know 1) many of the “independent” journalists were on the Government payroll with the independent media (even if they were not known to be part of the Radio Marti staff), 2) the composition of these different and interrelated “Gangs”, 3) the relationship between the government and “independent media”, 4) the goals of the “Gang”.

Specifically, the Court did not know of the relationship between the independent media such as Channel 23, the Government, and the Radio Marti “Gang” and other similar unknown “Gangs”. For example, Enrique Encinosa, who commented publicly on the defendants and the trial, ostensibly as an independent journalist, was involved with both Radio Marti, and allegedly independent radio stations and talk shows that received government funds. There was no “wall” between Government and private media entities. The money flowed through a non existing fence. “Independent” media stations and programs received, as did Radio/TV Marti, Government funds. The private media and Radio/TV Marti fed off each other; gave information and programs to each other.

Attempting to intimidate a jury so that it would not come to the attention of the Court and creating outside media related events was not difficult for the Government, the “Gang” members and Enrique Encinosa. Encinosa (cited as an “intelligence expert” by other members of the “Gang” in articles they wrote) advocated bombings and killing in Havana and had “independent” programs on WQBA as well as WAQI that he used federal money for.

Encinosa, just one of many “Gang” members, also co-hosted clandestine radio programs into Havana (rebroadcast in Miami) openly advocating terrorist acts (DE 53, paragraph 47, 48, 49, 50). The members of the “Gang” appeared in multiple venues. The number of people and media outlets affected by the Government’s conduct is presently unknown.⁷ Encinosa’s work

⁷ We still only now know a very small part of what the “Gang” did, who it was composed of, and how much money was involved.

alone shows the powerful effect of even minimal amounts of the Government monies to interfere with the trial. The value of the money, invested in the corrupt criminal project, was greatly multiplied because of the relationship between the independent media and because the supposed independent media used the propaganda created by the Government for its own publications.

There is no question, on the proof before this Court, that the Court must vacate the sentences. The 51 page, totally transparent, Governments Consolidated Response (DE 73) says nothing, never once defends the repeated uncontradicted violation of the United States Constitution, of the Smith Mundt Act, or of the statutory prohibitions against domestic propaganda,⁸ and the prohibition against the Government covertly paying private persons to act as its spokespersons, who were in the Courtroom, day after day, to prejudice a publicly identified, sitting unsequestered federal criminal jury.⁹

The Government never once cites or discusses a case (there is none) in the history of this country where a federal conviction was upheld and where there were so many separate legal violations (each article of the thousands of articles, each speech of the thousands of speeches, and each act of the thousands of radio and TV acts were separate violations) and so much massive criminal wrongdoing with a “Gang” of paid “killers”, illegal “unrepentant terrorists” and felons working to intimidate the jury pool.

⁸ The Government never mentions the rulings of the General Accountability Office.

⁹ How many Miami Courthouse demonstrations calling for convictions were organized by and paid for by Government funds? How many of the demonstrations and meetings throughout the city were put together by the “Gang” and its colleagues? The jurors may have felt they were truthful when they heard the Court’s instructions not to read or listen to aspects of the media, but they were affected by the results of courthouse demonstrators and press conferences that they could not avoid and were not directed to avoid. How many members of the BBG and Government agencies, other than the BBG, were involved in the obtaining, spending, and using of the millions of dollars to intimidate the jury?

The Government is not entitled to a hearing on the motion to vacate because the Government does not deny (and presents not one fact to contest any aspect of Movant's claim)¹⁰ that monies were used and illegal acts were performed to violate the civil and criminal contempt laws and substantive criminal laws by paying rogue journalists to get a conviction by any and all means necessary.

Seemingly-protected activities, some of which were observed by the Court, such as specific demonstrators in and around the Courthouse, are of a different legal consequence when they are created by the Government, paid for by the Government, and organized by the Government to obtain a conviction (DE53, paragraph 117). The Court did not and could not, at the trial, see these activities as an essential planned part of the conviction process. When a defense lawyer, Joaquin Mendez, and his family had to change residences from where they lived because of marches and demonstrations aimed at him and his family, no one knew the Government's role in the creation of those marches and fears to create a community bias that pressured the jurors as well as put direct pressure on jurors and their families.¹¹

As Exhibit C, at pages 111-113 shows, the Government was asked about a press conference held as the jurors walked out when the jurors wearing tags were identified. The United States Attorney said she did not know "what really happened". But if the Court knew many in the media were Government employees and if the Court knew monies and personnel were being used to stage events outside the Courthouse, throughout the City, and in the media meant to wrongfully communicate to the jury, the Court would have ruled differently on the

¹⁰ Except the one dispute, discussed at page 1 of this Brief.

¹¹ When the Court learned of an activity that could prejudice the jurors (e.g., the Miami Herald's reporting of remarks made by Richard Nuccio), the Court expressed its concern and addressed it. The Court did not know of many other events, far more significant, that were created for a purpose far more harmful than merely creating publicity.

issues presented to it. If the Court knew that families of the victims were getting federal funds (as a “cooperative relationship” with the Government) and were in communication with the jury, in violation of the Gag Order, the Court would have ruled differently.

The United States Attorney said, as the transcript shows, that the events “were not planned” and were not planned to influence the jurors. The United States Attorney either did not know many in those crowds were being paid by the Government to do what they could to persuade and intimidate the jurors, or the Government deliberately misstated. The Government created public events to portray community anger, and then wrote about them to create larger events to show a harshly motivated community. All to ensure the jury knew how the “community” wanted them to vote. And then, throughout a seven month trial, on a daily basis the Government performed acts, withheld information and abused on a daily basis Gerardo Hernandez, his colleagues, the Court and defense counsel. It also abused the families of the victims, who will now be frustrated by looking at empty convictions.

Government employees were not permitted to talk to the jurors, but the Government found ways around that restriction. It is also likely that even the members of the media that the Government did not pay were aware of the illegal payments and saw that as a testimony to the power of those who secretly wanted the conviction. It may have been an inducement for some to try to get on the Government payroll by writing biased pieces.¹²

¹² Clearly individuals in the Government close to the case knew exactly what was going on, for many of the Governments witnesses knew. Joaquin Mendez pointed out the jurors were in dialogue with the press (Attachment C -- page 119), a “Gang” that we now know was stocked with covert Government employees.

Attachment E (pages 1820, 1821, 1824), a tiny sample of the trial transcript, points out the Court’s acknowledgement of the daily coverage and pursuit of information about jurors by the Spanish media and the Miami Herald by the exact same people who received illegal Government funds. This confirms both Joaquin Mendez’s court statements and William Norris’ affidavit.

Introduction

The government did not spend the money and time on jury intimidation for no reason. It was aimed at creating structural error to get a conviction. Present knowledge of how jurors react makes it clear that notwithstanding the Court's attempts, this jury was wrongfully pressured to convict. The best proof of that will be found in the Government files.

The Government still does not understand or refuses to understand Movant's case. This case is not only about Radio/TV Marti's Cuban broadcasts and it is not only about the misuse of Radio Marti. It is not only about the creation of the Government's illegal secret propaganda "Gang" in the radio, television and print media, attempting to create fear and hostility to prejudice jurors, the entire Miami population, the entire community from which the jury was drawn, not just Cubans and Cuban Americans. It is also about "dirty tricks" such as the Channel 23 taping, the spying on jurors and instilling them with fear.

While the Government takes great pride in claiming it need not controvert Movant's facts, there is only one place in the Government's 51 page brief where the Government does take a factual position that differs from Movant.¹³ The Government does so because they believe they have an "impenetrable" argument for conviction even if the allegations of wrongdoing are correct. The Government argues because the jurors were unknown they were insulated from community pressure, and thus the Government believes it need not even deny the allegations of massive funds and personnel aimed at the jurors.

¹³ The Consolidated Response states "The media did not have the names of the jurors and toward the end of the trial requested, but were not given, those names" (DE 13:41). Because the Government's Consolidated Brief writer and Trial counsel was at the trial every day, she is the best witness to refute this sentence that combines both a partially true and partially false part of a sentence, and a false statement in an attempt to pass off the entire sentence as true. The first half of the sentence is contradicted, not only by the record, but by any awareness of how criminal trials operate and by any acknowledgement of what exactly did happen.

The Government also claims in its Consolidated Response that the sitting jurors had no fear that the community would learn who they were after the verdict was given and announced. This claim is false. It is directly contrary to common sense. It is not a “wall” that the Government can use to shield itself against the claims of structural error and constitutional violation.

Annexed as Attachment H, is the affidavit of William Norris, a former Assistant United States Attorney for the Southern District of Florida, Chief of the Narcotics Division, one of the trial counsel in this case and presently Ramon Labañino’s counsel on his 2255 application. His affidavit, based on the trial record and events that occurred during and after the trial, contradict the Government’s Consolidated Response Brief and again makes clear the significance and reason behind the meaning and importance of the Government’s very important misstatements.¹⁴

The Court itself raised the issue of the jurors being filmed and followed by, amongst others, Radio/TV Marti (Attachment B -- page 14644). The film of the jurors at first was shown on Channel 23. Channel 23 and Radio/TV Marti and the rest of the Miami media are totally intertwined. Rogue journalists were a “Gang” that went station to station. To state that the community did not know who the jurors were when at least tens of thousands saw their faces and many heard their names is preposterous.

¹⁴ The Government was either at a different trial than the one the record reflects and the one William Norris was at, or the Government has recognized the fatal defect in its legal position, and has decided to try to change an unchangeable record, to avoid vacatur. The Government’s refusal to furnish any information tells us the Government is hiding the details of a massive project aimed at circumventing the legal system, the governing law, and the Court’s repeated orders that neither side shall communicate with the media or the Miami community. The Court believed the Government was complying with its Gag Orders and other directions to get a fair trial. This belief was misplaced. All it apparently did was lead to the Government’s creation of a shadow structure to achieve what the Court prohibited.

The jurors knew, after their earliest identifications in Court and out, that they would be held responsible for their verdicts. How could they not? We do not know how many juror tapings there were or to what use they were put. If one station played the tapes, how many others had tapes that they did not publicly play. The jurors were publicly and probably privately spied upon by the Government. They were faced with the threats of marches and demonstrations aimed at them.¹⁵ If sophisticated defense lawyers and journalists who were more removed from the turmoil of having to decide a case (and had access to protection), but nonetheless felt threatened and scared, it was far worse for the jurors who had to render a public verdict.

The Government never once saw fit to identify to the Court any of the hourly barrage in Miami of the radio, television and print that it was paying for.¹⁶ If the Court and the Eleventh Circuit knew of the composition of the Government's "Gang" and the shadow structure they created, it would have clearly understood and explored the fears of the jurors, real and imagined, and the dangers facing the jurors if they voted for acquittal.¹⁷ Giving Government funds to inculcate fear and hostility in the jury, presenting the Government's view of the case outside the

¹⁵ The Government does not deny this.

¹⁶ The Government in DE 73 still argues we do not have "enough facts" to bring this claim to Court. The Government claims that notwithstanding their present "delay claims" and "statute of limitation defenses" we should wait longer to get more facts, while at the same time they justify refusing to give us "facts".

¹⁷ The Government must concede the Eleventh Circuit Court of Appeals was never told of any of the illegal, criminal conduct sponsored by the Government, or about the Government filming of jurors for the purpose of putting their faces on Miami television. The Government must concede that the Appeals Court's opinions are based only on what was before it. The Eleventh Circuit Court knew nothing about the Government's secret payments, never knew anything about the composition of the "Gang" assembled by the Government to intimidate the jurors, never knew anything about what they did, and never knew anything about the shadow structure that had been built up for years by the Government and was in place at the time of trial and that the Government never told the Eleventh Circuit.

courtroom, to effect the administration of justice in the courtroom, while withholding information from this Court, is unprecedented.¹⁸

The Court's concern for the jurors was expressed but the jurors knew the limits of the Court's power. The jurors experienced it on a daily basis. The jurors saw and heard what the Court was doing. But the jurors also saw the daily reality. The Court could not even stop their faces from being on TV at the most critical time of the trial and the most critical time of the jurors' lives. The Court could not stop press events and demonstrations before they occurred. The Court could only stop certain events from repeating and only if the Court knew about it. The Court did not know about the demonstrations that drove Mendez from his home. The jurors knew that. It was their children, their families, their lives, at stake. The "outside forces" were more powerful than the Court. The Court and jury, and the constitutional protections Movant was entitled to, were seen by the Government as just another set of hindrances to conviction that had to be overcome.¹⁹

It is amazing that during the voir dire process, when these suppressed facts were singularly relevant, the Government succeeded in keeping them hidden. When journalists' articles and broadcasts were introduced to show venue prejudice, the Government did not tell the

¹⁸ The jurors, living in the community, were certainly more aware of these dangers than the Court. However, they may have responded in Court; they knew as did Defense Counsel that when they went home to their children and spouses their lives were endangered.

¹⁹ And we still only know a very small part of the story. The "Gang" had tens of millions of dollars at their disposal to do what they wanted to achieve criminal result. Hand in hand, not at arms length, these "journalists" were not hired for their writing niceties. Some probably never wrote before and probably did not write the final articles that had their names on it. They spent their lives with guns and bombs -- not paper and pencils, with tanks and planes -- not computers or television cameras. The Court had certain protections, the jurors did not. How could the jurors, with spouses and children, not be concerned or even terrified? They knew what Basulto's colleagues could or would do to those that stood in their way. As Attachment H, the William Norris affidavit makes clear, they heard it in court even if they did not read it in newspapers.

Court or counsel that the individuals who wrote the articles, spied on the jurors, got their license plate numbers, and spoke to the media were Government employees who were violating the law.²⁰ After the Miami Herald, New York Times, and Los Angeles Times investigations, the Government never came forth.²¹

POINT I

ALL THE PROCEDURAL BARS ASSERTED BY THE GOVERNMENT (INCLUDING “WAIVER”, “UNDUE DELAY”, “CAUSE”, “FAILURE TO SHOW PREJUDICE”, AND THE STATUTE OF LIMITATIONS) FAIL BECAUSE OF THE GOVERNMENT’S CONDUCT IN CREATING AND EMPLOYING THE “GANG” AND THEN TRYING TO HIDE FROM THE COURT WHO THE “GANG” WAS AND WHAT THEY DID. THE ADMINISTRATION OF JUSTICE DOES NOT PERMIT THE GOVERNMENT TO CREATE DELAYS AND THEN BENEFIT FROM THOSE DELAYS AFTER CREATING AN ILLEGAL SHADOW STRUCTURE TO AVOID OBSERVATION.

The Government concedes that “Government interference” can negate all “procedural defaults” such as waiver, or statutes of limitations defenses, undue delay claims or claims that the Government was prejudiced (Consolidated Response DE 73: 24). To characterize the Government’s conduct only as “government interference” is very charitable but even if it were only that, the procedural bars fail.

It was not until the Miami Herald September 2006 story that any specific fact-based allegations were made, and the Government (who knew all the facts we have alleged as well as facts we are seeking to uncover) continued the policy of denial and suppression. The Government should not be rewarded for its success in lying and evasion by then being permitted to claim that Movant should be prejudiced by these delays as he seeks to vacate the conviction.

²⁰ Given the “Gang’s” federal and state governmental connections and false façade of the independent media, they had unique access to juror information.

²¹ In fact, when Oscar Corral was trying to investigate and get the facts, the Government resisted him and the Miami Herald investigative staff and tried to stop the story from ever surfacing.

If neither the Senate nor the House of Representatives nor the Government's Accountability Office nor the Trial Court nor the Eleventh Circuit knew what the Government was doing, how can the Movant and his colleagues be kept in jail for life because they did not know?

The Government cites cases with "procedural bars" in DE 73. They are inopposite. The Government's two linchpin United States Supreme Court cases are not supportive of any legal position the Government takes. In the first of the two cases, United States v. Frady, 456 U.S. 153 (1982), the Supreme Court deals with the defense failure to make timely challenges to a jury instruction. Frady and its progeny has nothing to do with the Government's assertion in this case that Movant failed in his obligation to object to facts about massive secret Government wrongdoing that neither Movant, his colleagues, the Trial Court, nor any members of the Executive or Legislative branches of Government knew anything about, although the Government was obligated to so advise those branches of Government.

The second Supreme Court case relied on by the Government, Mayle v. Felix, 545 U.S. 661 (2005), directly supports Movant's position. The original Habeas application mentioned a dozen journalists who received secret payments from the Government in a Government sponsored propaganda effort. Movant is not arguing, as did the movant in Mayle, that the pleading must be permitted solely because it relates back to the same Mayle state trial. This case is on all four with both the Mayle majority and the minority view. All of the cases the Government cites based on Mayle show they all support Movant's legal argument.²²

²² None of the Government's procedural cases had nearly as much substantial proof of Government criminal misconduct. Nor the very strong possibility that the true extent of criminal activity and constitutional violations far exceeds what has thus far been uncovered.

The government's arguments essentially ignore the force of law of Rule 7 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a rule that expressly allows for introduction of supplemental materials prior to a hearing on the motion. *See United States v. Hill*, 336 Fed.Appx. 832, 833 (11th Cir. 2009) ("Rule 7(c) of the Rules Governing Section 2255 Proceedings *requires* a court to allow a party to respond to the introduction of additional materials. The rule provides that '[t]he judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.' Rule 7(c), Rules Governing Section 2255 Proceedings for the United States District Courts.").

The Government tries to bury Movant's claim in a welter of pages and words and totally ignores the factual details of this habeas corpus application. The application for this amendment and expansion arrived out of the same "conduct, transaction, or occurrence", and thus, Mayle tells us, it must be granted. There is "no new ground alleged that differs in both time and type from those of the original pleadings set forth" and thus, as Mayle tells us, the expansion and amendment must be granted and the federal Courts must now consider Movant's claim.

POINT II

A COMMITMENT TO JUSTICE AND A FAIR TRIAL, WITH THE PROPERLY ALLEGED UNDISPUTED AND UNDENIED FACTS IN THE HABEAS CORPUS APPLICATION, REQUIRE THAT MOVANT NOW BE GRANTED VACATUR.

The Government claims that because Movant's habeas corpus application is not "fact based," has no "factually specific allegations," is "conclusive" and based on "speculation" (DE 73; 78:29, 31), the Government has no obligation to respond factually, and Movant's application must be denied.

The Government does not take the burden of denying the facts, for they cannot. Their claim is that not only do they not have to controvert the facts but that they need not even deny them. It is a necessary argument for the Government because the facts alleged by Movant are

true and to deny it would be perjurious. Under such circumstances a hearing to resolve disputed facts is not proper. The state of this record is similar to an uncontested motion for summary judgment.

Movant's papers are replete with "specific facts". The Government's 51 page brief never denies that millions of dollars of Government funds were secretly and wrongfully spent to pay criminals and militants to persuade and intimidate the community of the jury and the jury itself. The Government does not deny who the "journalists" are, how and why they were selected, and that they and the Government agencies were part of a project to wrongfully convict Movant.

Finally (and always), the Government raises the Classified Information Procedures Act (DE 73:48). There is no reason to believe that the act is implicated if the Government gives the names and the amounts secretly paid to the "Gang", and if the Government is forced to produce the Radio/TV Marti Broadcasts that blanketed Miami, and if the Government produces the "results" of its payments. The Court can adequately supervise discovery without bringing the Government down. We do not want to "rummage" in the Government's files as the Government claims (DE 73:48).

We believe the Court and Government, now faced with the undenied and uncontroverted facts, has an obligation to see how those dollars and personal were criminally used. The Executive and Legislative branches of our Government have been lied to. It is time for the Judicial branch to play its honored constitutional role, to administer justice. This matter should be referred to the United States Attorney General, Eric Holder, and the Department of Justice for an investigation to determine whether crimes were committed, in both the actions taken and then hidden, and by whom. The Government's inadequate Response at this late date is shocking.²³

²³ Attorney General Eric Holder has been particularly responsive to claims of prosecutorial misconduct when the Government withholds necessary information from defendants in securing

The Government puts together dozens of snippets of the trial record and irrelevant exhibits (Attachments A, B, and C to the Consolidated Response)²⁴ and argues that everyone, including the trial court and the Eleventh Circuit Court of Appeals, knew exactly what the Government was doing. This needs no rebuttal. It is false on its face.

CONCLUSION

The Movant's conviction should be immediately vacated, or in the alternative, movant's application to expand the record and amend the pleadings should be granted and discovery should immediately proceed.

convictions. He has insisted on the Government's responding to broader discovery requests than were common in the past. Discovery materials, withheld by the prosecution in the case against Senator Ted Stevens resulted in a dismissal. (See DE 53, paragraph 75). The Government suggests they be given a further opportunity to respond. We oppose that request. The Government has had every opportunity to answer, to defend, to attack, and to argue every point. The matter had been fully submitted on August 31, 2012. The last six months of frivolous motion practice caused by the Government has already wrongfully delayed adjudication. Gerardo Hernandez has been in jail for more than fourteen years because of the Government's misconduct. This motion is ready for disposition.

²⁴ See Attachment H, the affidavit of William Norris.

DATED: January 28, 2013

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CERTIFICATE OF SERVICE

I HEREBY certify that on January 28, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

LIST OF ATTACHMENTS

Attachment A: Excerpts from the jury voir dire portion of the trial transcript.

Attachment B: Excerpt from the trial transcript – pages 14643-47.

Attachment C: Excerpt from the trial transcript – pages 111-21.

Attachment D: Excerpt from the trial transcript – pages 1544-46.

Attachment E: Excerpt from the trial transcript – pages 1817-27.

Attachment F: Transcript of Channel 23, WLTV, news story of February 17, 2001.

Attachment G: Email exchange between Gloria La Riva and the Federal Procurement Data System, dated January 9, 2013.

Attachment H: Affidavit of William M. Norris, Esq., sworn to January 7th, 2013.