

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO.: 98-721-CR-LENARD(s)(s)

RENE GONZALEZ,

Magistrate Judge Dube

Defendant.

**DEFENDANT’S REPLY TO THE GOVERNMENT’S RESPONSE
IN OPPOSITION TO THE
MOTION TO MODIFY CONDITIONS
OF SUPERVISED RELEASE**

COMES NOW the Defendant RENE GONZALEZ by and through his undersigned counsel and for his reply to the government response in opposition (DE #1814) to his motion for the entry of an order modifying his conditions of his impending supervised release to allow him to return to Cuba upon completion of his sentence (DE #1808) and in support thereof would state as follows:

Factual and Procedural Background

In their section labeled “factual and procedural background” the government’s response in opposition to the motion does not contain facts but merely opinion that the defendant was “resolutely and expressly unrepentant” during and following the trial. As this court and the government is surely aware, each and every defendant who is charged with a crime has a right to trial. Mr. Gonzalez exercised his right to trial and did not testify in his own behalf nor obstructed justice in any way during the trial. The government’s zeal to continue to punish Rene Gonzalez by separating him from his family has no connection with his exercise of his right to trial.

During the course of the sentencing which occurred more than ten years ago, the defendant was permitted to allocute as permitted. The government may not have liked or agreed with what Mr. Gonzalez had to say but it then became the court's obligation to impose what the court felt to be a reasonable sentence upon him. The court imposed a consecutive sentence at the statutory maximum for each of the two counts of conviction for a total of fifteen years incarceration. Whether he was remorseful or not, this court imposed the absolute highest sentence permitted by the law. However, from what appears to be much chagrin from the government, that sentence is about to end. The defendant is not seeking to rehash his allocution but be permitted to return to Cuba as outlined within the motion.

The government mistakenly believes that the purpose of this motion is to terminate or eliminate supervised release. (Response at Page 5) This absurd conclusion is negated by the fact that Rene Gonzalez is seeking to have the exact conditions of supervised imposed that are imposed by this court on an almost daily basis on those whose supervised release is non-reporting due to the immigration consequences of their felony adjudication. These conditions mirror the conditions of supervised release upon those defendants that this court finds that are subject to deportation.

What the government fails to inform this court is that the defendant will be on supervised release for three years. That was this court's judgment and sentence imposed in 2001 and modification of the length of that term is not being sought. What is being sought is the humanitarian resolution for the reasons stated in the motion that the defendant be permitted to return to Cuba while remaining on supervised release

as would be any defendant deported to his home country. The circumstances outlined in the motion were not foreseen at the December 2001 sentencing.

Jurisdiction to Grant the Motion

In their response, the government suggests that the court should not grant the motion (without citing authority to support their position) because the court “*may* well be without authority to modify conditions of supervised release which has not yet even begun.” The government ignores the plain language of the statute (which they themselves cite), to wit 18 U.S.C. §3583(e) and Fed. R. Crim. P. 32.1(c) which permits the court to modify the terms and conditions of supervised release at any time. The statute’s only condition on the modification or the relief sought in this case is that it must be done prior to the expiration or termination of the term of supervised release.

Therefore, if this court was to adopt the misguided reading of the statute suggested by the government it would require a defendant to sit on his hands and wait until his sentence expired rather than bringing relevant matters to the court’s attention. This would result in a resolution based on form over substance. Where a defendant has been incarcerated for a lengthy period of time, just as Rene Gonzalez who has been in custody since 1998, has a substantial change in circumstances which has occurred over the passage of time, he should be permitted to bring that promptly to the court’s attention for ruling rather than later.

The government’s reliance on United States vs. Nonahal, 338 F.3d 668 (7th Cir 2003) as being instructive to this court is misplaced. In Nonahal, the defendant was a dental student at Marquette University who had been dismissed for academic

reasons before a counterfeiting scheme had landed him in trouble. Therefore, because the dismissal prevented him from gaining entry to another dental school in the United States, he sought admission to an overseas program. In his petition, Mr. Nonahal alleged that he has been admitted to a dental school in Karachi, Pakistan. With a little more than a year left on his supervised release, the government argued that he could wait to finish school when his supervised release was completed. Nonahal's position was that he wanted to practice dentistry in California as soon as possible and sit for the next available California dental licencing exam. There was no forced family separation as shown by this defendant or prejudice by forcing him to remain in the United States and away from his family. To the contrary, Mr. Nonahal would have likely been able to enter dental school upon the expiration of his supervised release and his reasons for requesting the modification were economic and not humanitarian.

In affirming the district court's denial of the *pro se* motion¹, the appellate court did not find the urgency suggested by Nonahal in completing his education. However, in the instant motion the sense of urgency to be reunited with his family after more than a decade is clearly present. Keeping Rene Gonzalez in the United States would be clearly putative in nature designed to punish him despite adequate remedies to the contrary.

Substantive Merit

Throughout the response, the government states that in his allocution, the defendant sought to promote Cuban interests through covert activity. (Response at page 3) This fragmented portion of the defendant's allocution bears no resemblance

¹Nonahal proceeded *pro se* both at the district court level and on appeal.

of the defendant today. Clearly, through this media intensive and high profile trial, any chance of the defendant engaging in covert activity is nonexistent. The press coverage world wide has made the defendant rather well known and impossible to ever act in a covert fashion alleged by the government. In this age of the information superhighway, those chances are nil.

At the time of his arrest, Rene Gonzalez's employment was primarily as a licensed pilot and a flight instructor. Rene Gonzalez has not flown since 1998 and his pilot's license has lapsed. If he is permitted to return to Cuba, he cannot use his status as a pilot to penetrate or report on activities of Miami organizations who are known to be against the Cuban government, he could not implement "active measures" in Miami, take taskings from Miami-based Cuban intelligence officers, or manipulate the FBI as alleged by the government. Therefore, the government's "fears" about the defendant returning to his former activity are totally impossible if he is in Cuba.

The government clearly misses the point that the best place for the defendant not to engage in criminal conduct and protect the public in Miami is if the defendant is permitted to return to his family in Cuba. Clearly none of the conduct that the government cites in their motion occurred while the defendant was in Cuba but only when he was here in Miami. To adopt the government's non-humanitarian stance would be to have the defendant reside once again in Miami itself.

At page ten of their response, the government voices concern that the defendant is and remains a United States citizen as well as a Cuban citizen. Obviously, the government cannot force the defendant to give up his United States citizenship which he acquired by being born in the United States in 1956. However, the defendant if

permitted to leave for Cuba as requested he would be able to come into the United States. The government misses the point, as outlined within the motion, that if he should re-enter the United States during the term of supervised release he must immediately report to the United States Probation office and he will be supervised as ordered by this court. However, just as with all deportees, if he is residing outside the United States, the term of supervised release would be non-reporting.

In the middle of page ten the government patently contradicts itself wherein it is stated that Rene Gonzalez, with his ability to live in, travel to and visit the United States by virtue of his citizenship, amplifies the threat from him. In his motion for modification, Rene Gonzalez has proposed the best way not to “amplify” the threat of his presence, to wit, allow his to return to Cuba. If it satisfies the prosecution and this court, the defendant would agree not to return to the United States during the term of his supervised release. This could be accomplished quite easily as outlined below.

Any United States travel documents (i.e. passport) that were possessed by the defendant at the time of his arrest have been seized by the FBI at the time of the defendant’s arrest in September 1998. Those travel documents, specifically the defendant’s United States Passport has long since expired². One could imagine the amount of red flags that would be raised at the United States State Department if Rene Gonzalez was to apply for a United States passport upon release. In order to ease the government’s mind, the defendant would agree not to apply for a renewal of his United States passport during the three-year period of his supervised release.

Other than his being permitted to return to Cuba after thirteen (13) years of

²A United States passport must be renewed every ten (10) years.

incarceration, the defendant is not seeking to modify any condition of his release. The government derides the advantages of the defendant's United States citizenship but he can neither be stripped of it nor be forced to give his citizenship up as a condition of his supervised release.

It is respectfully submitted that the modifications of the conditions requested in the motion are not prohibited by statute (18 U.S.C. §3583) or the sentencing guidelines (U.S.S.G. §5D1.2 and §5D1.3) as the modification requested does not involve mandatory conditions of supervised release. Further, the requested modification is consistent with 18 U.S.C. §3553(a) in that it is based on "the nature and circumstances of the offense and the history and characteristics of the defendant" they are also consistent with the remaining sentencing factors in §3553(a).

Visitation

Whether in a jail, half way house or apartment, his daughters have had an opportunity to visit their father and they have on an annual basis which is insufficient in having their father be a part of their lives. However, Rene Gonzalez has not been able to be a father to his youngest daughter who was just an infant when he was arrested. The government seeks to enforce a Cold War type family separation of Rene and his family. This court imposed a fifteen-year jail sentence which the defendant is a precious few months from completing. There is no justification from the continued separation of the defendant from his parents, wife and children.

In footnote seven of their response the government states that an "accommodation" has been made to allow Rene's wife, Olga, to visit her husband. Without going into detail, Olga and Rene had not seen each other for more than ten

(10) years. Though their marriage remains strong and intact, this one time visit took a decade of humanitarian and diplomatic efforts and its chances of being repeated in the future are minimal at best.

Precedent in this District

Based on conversations with former United States Probation officers in this district, there is precedent for the relief sought for allowing defendants who are American citizens, to serve their supervised release in a foreign country. There is also precedent for allowing non-citizens who do not face removal from the United States to return to their native countries to live and work under modified conditions of supervised release. These modifications have been sought either at the time of the original sentence, just prior to the commencement of supervision or sometime during supervision.

Modifications were sought due to family considerations and employment opportunities. For example, after his release from BOP custody, the defendant in United States vs. Joseph Conti, 99-6195-CR-RYSKAMP who was convicted of a money laundering conspiracy, was allowed to live in Italy and Costa Rica as soon as this three-year term of supervised release began. (See DE #985) Mr. Conti was a United States citizen and his supervised release remained non-reporting as long as he was outside the United States but he remained on supervised release. Unlike Conti, the defendant in addition to being an American citizen is a Cuban citizen.

According to retired Supervising United States Probation Officer Michael Berg another example is the case of Anthony Bucci who was convicted in the Northern District of Ohio in Case No.: 98-CR-405 and his supervised release was assumed by

the Southern District of Florida. During his term of supervised release Mr. Bucci's term of supervision was modified to allow him to take a position of a building project superintendent in Nicaragua.

While the defendant is not seeking permission to reside out of the country for economic reasons but for family reasons, his status as a dual citizen of Cuba and the United States together with the BOP (with the acquiescence of the government) permitted the defendant to receive consular and diplomatic visitation from Cuban government officials clearly justifies the relief being sought.

WHEREFORE, the Defendant RENE GONZALEZ respectfully requests that this Court grant this motion and permit his impending supervised release be modified to allow him to travel back to Cuba and reside in Cuba with his family as opposed to serving his term of supervised release in the United States. In addition, it is requested that the term of supervised release be non-reporting while he resides outside of the United States, however, should he re-enter the United States within the three (3) year period that he report to the United States Probation Office immediately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record this 25th day of March 2011.

Respectfully submitted,

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