

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

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

GERARDO HERNANDEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

**REQUEST FOR ORAL ARGUMENT AND DISCOVERY  
REGARDING MOVANT GERARDO HERNANDEZ'S  
MOTION TO VACATE, SET ASIDE, OR CORRECT  
JUDGMENT AND SENTENCE UNDER 28 U.S.C. § 2255**

Gerardo Hernandez respectfully requests for this honorable Court to grant oral argument on his Motion to Vacate, Set Aside, or Correct Judgment and Sentence Under 28 U.S.C. § 2255 (DE#1), and discovery relating to the due process claim set forth therein. In support, Movant states as follows:

**I. Background.**

The facts of the underlying criminal case are well known to the Court and also described in detail in prior filings in this collateral action, so Movant offers only a brief summary. In 2001, after a jury trial, Movant was convicted of acting as an unregistered foreign agent, conspiracy to commit espionage, possessing and using fraudulent identification, and conspiracy to commit murder, all in connection with his activities as an agent of the Cuban government. Five

defendants were tried together, but Movant was the only one charged with conspiracy to commit murder.

During the trial, defendants sought a change of venue on the ground that the South Florida community—generally known to be vociferous in its opposition to the Castro regime, for whom Movant and his co-defendants were accused of spying—constituted an unfair venue in which to conduct the proceedings. Defendants also argued, among other things, that news coverage about the trial tainted the atmosphere, a fact corroborated by concerns expressed by this Court and by the prosecution during the course of the trial. Nevertheless, the Court denied the motion to change venue, and the trial was conducted in the Southern District of Florida.

All of the defendants were convicted, and all appealed. The defendant-appellants initially obtained a new trial on the ground that the Southern District of Florida, and Miami in particular, was an unfair venue—the Eleventh Circuit panel described the situation as a “perfect storm” of prejudice, in which a “surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with” prosecutorial misconduct. *United States v. Campa*, 419 F.3d 1219, 1263 (11th Cir. 2005), *vacated by* 429 F.3d 1011 (11th Cir. 2005). However, the court of appeals, sitting en banc, vacated the panel opinion and affirmed Movant’s conviction. *United States v. Campa*, 459 F.3d 1121, 1154-55 (11th Cir. 2006). The Supreme Court denied certiorari.

On June 14, 2010, Movant timely filed his Motion to Vacate, Set Aside, or Correct Judgment and Sentence Under 28 U.S.C. § 2255. After this Court directed the Government to respond, Movant filed a Memorandum of Law (DE#12) in support of his Motion. The Motion and Memorandum set forth several grounds for relief from Movant’s conviction and sentence, including: ineffective assistance of trial and appellate counsel; the denial of due process resulting

from the trial venue; a separate denial of due process resulting from the Government's payments to journalists who published false, hostile, and inculpatory articles before and during the trial; the Government's failure to disclose material exculpatory evidence; and prosecutorial misconduct.<sup>1</sup> These claims, individually and together, require that Movant's conviction be set aside. Movant's codefendants have filed motions in their own respective cases, which claims overlap, in part, with Movant's.

One key fact, which emerged during the course of appeals, is that the U.S. Government, and specifically the U.S. State Department, has paid significant sums of money to journalists who published articles that either made prejudicial statements about Movant and his codefendants, or made encouraging statements about the prosecution, in the trial venue itself. The media's statements, which were funded by the Government, and which specifically allege the guilt of Movant and his co-defendants, created an environment of prejudice that critically undermines confidence in the verdict. Moreover, when these facts were initially discovered, they caused an uproar in the journalistic community, which regarded the reporters' actions as utterly inconsistent with their commitment to objectivity. Prosecutors are held to even more stringent ethical standards, and the prosecution's decision to proceed with this case even as Government-funded propaganda saturated the airwaves and the print media in the trial venue has precipitated worldwide criticism. The resulting prejudice—both from the perceived effect of the tainted media coverage on the trial venue, and the appearance of impropriety that results from the Government's involvement in the creation of that coverage—violates Movant's constitutional rights and requires that his conviction be set aside.

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<sup>1</sup> The present request for discovery relates only to Movant's due process claim. Movant intends, in the near future, to submit discovery requests relating to his other claims.

**II. Movant Requests Oral Argument On His § 2255 Motion.**

Movant respectfully requests oral argument regarding the legal issues raised in his Motion to Vacate, Set Aside, or Correct Judgment and Sentence Under 28 U.S.C. § 2255. This Court has discretion to order oral argument if it believes that such argument would be helpful. It is clear from the Government's response to the Motion that Movant and the Government read the controlling law and relevant facts differently, and oral argument may assist the Court in resolving the relevant legal contentions and also focus the issues in advance of an evidentiary hearing.

**III. This Court Should Grant Discovery on the Due Process Claim Prior to an Evidentiary Hearing.**

This Court should grant Movant an opportunity for discovery prior to an evidentiary hearing because Movant has set forth a viable claim for relief, because the record does not fully address the substance of Movant's claim, and because diligent efforts—by Movant and others—to obtain the information sought in discovery through other means have not succeeded. In this Request, Movant asks only for discovery relating to his due process claim, *i.e.*, the claim relating to paid journalists. Movant intends to file separate discovery requests relating to his other claims.

**A. This Court Must Grant Discovery If Movant States a Viable Claim for Relief.**

This Court has the power, for “good cause,” to authorize discovery in a § 2255 case. *See* Rules Governing Section 2255 Cases in the U.S. District Courts 6(a); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *see also Nieblas v. Smith*, 204 F.3d 29, 31 (2d Cir. 1999) (“A district court has broad discretion to hear further evidence in habeas cases.”).<sup>2</sup> As the Supreme Court has

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<sup>2</sup> The Rules Governing Section 2255 cases are virtually identical to the Rules Governing Section 2254 cases, except that the Rules Governing Section 2255 Cases authorize discovery using either

explained, the “good cause” requirement is met ““where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.”” *Bracy*, 520 U.S. at 908-09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). In those circumstances, “it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.” *Id.*; *see also Borden v. Allen*, 646 F.3d 785, 830 (11th Cir. 2011) (Wilson, J. concurring in part) (noting that certainty is not required, but rather, “[s]o long as a petitioner has raised such a possibility—that, if the facts are fully developed, there is ‘reason to believe’ that he or she ‘may’ be able to demonstrate a constitutional violation,” discovery is required).

In addition to using discovery to determine whether petitioner is entitled to relief, “the Advisory Committee Notes to Rule 6 approve the use of discovery in appropriate cases *before* an evidentiary hearing has been granted.” *See* 1-19 Federal Habeas Corpus Practice & Procedure § 19.4; *see also* Rules Governing Section 2254 Cases advisory committee note (“Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing . . .”); *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1963) (granting discovery to determine whether hearing was necessary in § 2255 action). Discovery is required because the trial record did not and could not address many of Movant’s claims, and Movant’s diligent efforts to secure the relevant evidence have met with resistance from the Government.

#### **B. Movant’s Due Process Claim Warrants Discovery.**

The “good cause” standard is met in this case because Movant has set forth cognizable claims and made specific factual allegations that, if true, would entitle him to relief. Movant has

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civil or criminal procedures. *See* Rules Governing Section 2255 Cases 6 advisory committee note.

alleged that the prosecution knew or should have known what the State Department was doing. Movant has alleged that the Government hired journalists and amplified the voices of other journalists who published, in an organized manner, specific prejudicial accounts of the events of this case. These same journalists called for Movant's conviction and described him as an instrument of the Castro regime, all in an effort to rouse public sentiment in the trial venue against Movant and in favor of the prosecution. These allegations, if true, undermine the verdict and raise serious due process concerns about the entire trial, and especially about the Government's decision to fight to keep the trial in this venue.

Movant's argument is concrete, not speculative. He has already produced evidence of inflammatory and irresponsible journalism and commentary—published both before and during the trial, in the trial venue, by authors who were being paid by the Government. The journalists' Government ties were not known during the trial, and produced an uproar when they were discovered many years later. Moreover, the prejudicial effect of the tainted media statements is beyond serious dispute: Congress itself has made the dissemination of government propaganda about Cuba illegal in the United States, for the precise reason that it has the power to distort public opinion and taint the marketplace of ideas. *See* 22 U.S.C. § 1461. The Government does not deny these facts. Instead, it asserts, before any discovery has been conducted, that the facts currently in evidence are insufficient to warrant relief. Movant disagrees with that argument, but it does not matter in any event because the facts in evidence at least require further inquiry into the nature of the media coverage before and during the trial, the nature of the connection between the Government and the journalists, and the prosecution team's connection with the tainted media coverage.

Movant believes that if granted discovery, the facts at the hearing will show that the prosecution had knowledge of the media campaign, knew that its false, hostile, and prejudicial message had a significant impact in the trial venue, and nevertheless fought to keep the trial in Miami. If the prosecution and the propagandists collaborated, that fact would require that Movant's conviction be set aside. Thus, Movant should have discovery regarding whether individuals in the Department of Justice consulted the U.S. State Department before initiating the prosecution or during the course of the case. Movant should also have discovery of State Department records relating to whether anybody in the State Department gave improper input to the Justice Department before or during the case.

The Government has conceded that a number of journalists received significant payments for their participation in programming on Radio and TV Martí, so that they became, in effect, hired flacks in a propaganda machine that directly targeted Movant and his co-defendants. So far, Movant has substantiated these claims using documents obtained in Freedom of Information Act (FOIA) requests, which show contracts between the U.S. Government and journalists who published articles about Movant's trial. *See* DE#33, App. C (providing examples of the paid journalists' work). But the Government has resisted revealing the full extent of its involvement. The responses to these FOIA requests have not been full and complete. Instead, the FOIA requesters have been delayed for years, and have faced heavy resistance of every conceivable kind, and have had to resort to litigation to obtain even the partial disclosures that they have received. Given the Government's determined, rigid refusal to release the pertinent records, which was set forth in detail in Movant's Reply Brief as well as the affidavit of Mara Verheyden-Hilliard, enclosed with that brief (DE#33, App. B), and that the pertinent materials regarding the Government's attempt to corrupt and pervert the jury by improper influence

through its ties to journalists. Movant must receive additional discovery regarding the scope and nature of payments from the Government to the journalists to ensure that the record on this matter accurately describes the connection. *Cf. Reed v. Quarterman*, 504 F.3d 465, 471-72 (5th Cir. 2007) (granting discovery to petitioner who requested files relating to communications between the government and informants). Movant is, of course, entitled to discovery about whether any of the paid journalists had contact with any member of the prosecution team.

In connection with the allegations relating to journalism, Movant has argued that the inflammatory journalism perverted the course of justice, influenced the jury, and infected the trial venue with prejudice, thus denying him a fair trial. In *Coleman v. Zant*, 708 F.2d 541, 547 (11th Cir. 2011), the court authorized discovery of “transcripts of television and radio broadcasts which referred to the case,” as well as depositions of “news directors of television stations, radio stations, and newspapers in and around Seminole County,” and “other persons whom [petitioner] claimed had knowledge of the prejudice against petitioner existent in Seminole County during his trial.” The court granted constitutionally required discovery because “[a]t the most basic level, the facts that could be derived from these sources are unquestionably material to petitioner's claim on the change of venue issue.” *Id.*

In this case, Movant must likewise receive discovery of the relevant publications, and should also have access to the journalists and their employers, who can shed light on the degree to which the Government was responsible for the inflammatory statements about him in the press. To put the matter succinctly, Movant has a right to know whether the Government was funding a negative publicity campaign about him during his own trial whose purpose was to ensure his conviction. It is totally obvious. If it was, then his conviction simply cannot stand.

### **C. A Roadmap for Discovery.**

The attached proposed discovery requests are tailored to prove the elements of Movant's claim. The purpose of discovery with regard to the due process issue is to establish: (1) the full scope of the issue by identifying all journalists and media organizations that received funds from the United States and then published false, hostile, inflammatory and prejudicial statements about Movant and his co-defendants (or laudatory statements about the prosecution), as well as the specific articles, interviews, and television and radio segments in which those statements appeared; (2) the precise degree of the Government's influence and control over these journalists and media organizations; (3) the degree of knowledge held not only by the U.S. State Department, which actually paid the journalists, but also by other branches of the Government, including the U.S. Department of Justice; (4) the prejudicial impact of the Government's propaganda campaign on Movant's trial. To prove these elements, Movant proposes that discovery proceed as described below.

Movant first requests the ability to issue requests for admission, as well as interrogatories and document requests, to the United States. These requests will focus on the financial arrangements between the Government and the journalists, the degree to which the Government exercised control or set expectations for journalistic and editorial content, and the degree of interaction between the U.S. State Department and the Department of Justice, including the prosecution team.

Movant also requests transcripts and/or recordings of relevant broadcasts from Radio and TV Martí—*i.e.*, broadcasts involving journalists who also published prejudicial materials about Movant in other forums, as well as other broadcasts that directly discussed the events of this case. Movant must have information about Radio and TV Martí's influence in the trial venue,

including data about the stations' listeners. Some, but not all, of these requests will relate to materials that have previously been requested by the National Committee to Free the Cuban Five and by the *Liberation* newspaper under FOIA. Discovery requests relating to these materials are necessary because the materials are important, but the Government has heretofore resisted a full and complete disclosure in the FOIA process.

Simultaneously, because the FOIA process has revealed the identifies of some journalists who received payments from the Government while publishing materials about Movant, Movant requests depositions of some or all of those journalists to establish that they were, in fact, part of a Government's efforts to secure his conviction, and that their publications outside of Radio and TV Martí were of a piece with that broader purpose.

Movant requests that subpoenas be issued to the publishers of El Nuevo Herald and Diario Las Americas, the two publications that printed the most substantial volume of false and untrue coverage about Movant's trial. These subpoenas would seek to show that the Government influenced the editorial process at these papers, whether and to what degree the papers were aware that their reporters and commentators were taking Government money, and how the papers responded to the discovery that the reporters were, in fact, being so paid.<sup>3</sup>

To fully establish the scope of the issue, Movant also requests that subpoenas be issued to a number of Miami media outlets that covered the events of this case. The subpoenas would request the production of documents, specifically recordings or transcripts of the relevant

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<sup>3</sup> Included in the subpoena to the Miami Herald, Movant requests the production of the materials obtained by the Herald in its own FOIA investigation of the ties between the Government and journalists on the staff of El Nuevo Herald. The Herald was the first to discover the conflict of interest that arises when reporters take money from the U.S. Government, and its knowledge of this issue is likely to shed considerable light on the matters before the Court.

programming. Movant also requests discovery regarding the viewership/listenership of these media outlets, so that he can illustrate how broadly any prejudicial messages were disseminated.

The above steps constitute a reasonable start to the discovery process. If the interrogatories and document requests reveal that currently unnamed individuals or organizations—whether in the Government’s employ or in the private sector—have information about the Government’s propaganda operation, Movant may wish to seek additional discovery regarding those individuals.

Rule 6(b) of the Rules Governing Section 2255 Cases in the U.S. District Courts provides that any request for discovery must be accompanied by proposed requests for admissions, interrogatories, and requests for specific documents. Proposed requests are appended to this Motion. Movant has endeavored to be comprehensive, but he anticipates that as discovery progresses, the information he discovers may justify further discovery requests.

**IV. Conclusion**

This Court should order oral argument on the Motion to Vacate, Set Aside, or Correct Judgment and Sentence Under 28 U.S.C. § 2255, and discovery on the due process claim set forth therein.

Respectfully submitted,

/s/ Thomas C. Goldstein  
THOMAS C. GOLDSTEIN, ESQ.  
Attorney for Movant  
Goldstein & Russell, P.C.  
5225 Wisconsin Ave. NW, Suite 404  
Washington, DC 20015  
Telephone No. (202) 362-0636  
Facsimile No. (855) 452-4847

/s/ Richard C. Klugh  
RICHARD C. KLUGH, ESQ.  
Attorney for Movant  
Ingraham Building  
25 Southeast 2nd Avenue, Suite 1105  
Miami, Florida 33131-1605  
Telephone No. (305) 536-1191  
Facsimile No. (305) 536-2170

/s/ Martin Garbus  
MARTIN GARBUS  
Attorney for Movant  
Eaton & Van Winkle LLP  
3 Park Ave.  
16th Floor  
New York, NY 10016  
Telephone No. (212) 561-3625  
Facsimile No. (212) 779-

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2012, I electronically filed the foregoing document with the Clerk of Court, using CM/ECF.

/s/ Richard C. Klugh  
RICHARD C. KLUGH