

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:10-21957-cv-JAL
(98-721-cr-JAL)

GERARDO HERNANDEZ,
Movant,

v.

UNITED STATES,
Respondent.

**MOVANT'S MEMORANDUM IN OPPOSITION TO THE GOVERNMENT'S MOTION
TO STRIKE AND NOTICE OF OBJECTION (DE56) TO MOVANT'S AFFIDAVIT OF
MARTIN GARBUS (DE53)**

Introduction

The Government's motion (DE56) offers nothing factual regarding Movant's claims. Instead, it raises procedural objections to the filing of the Affidavit of Martin Garbus (DE53). As with prior Government pleadings, it does not offer any factual evidence to contradict Movant's claim that the Government has suppressed evidence showing that the Government illegally spent many hundreds of thousands of dollars, from 1996 to 2001, to influence the criminal process and to persuade the jury, through propaganda and intimidation, to wrongfully convict Movant. The Government's conduct, both in the use of an arm of foreign propaganda to influence a domestic criminal proceeding and the avoidance of that issue when properly raised in a constitutional challenge to the resulting conviction, is seemingly incomprehensible and is unprecedented.

The Government's claim of prejudice, after more than 15 years of misconduct, is silly. At the very beginning of their motion to strike, the Government claims it has been "sandbagged" (DE56:2), and this is the theme throughout their motion. This is a curious choice of word.¹

It is an ironic choice of word because Movant has never concealed his position; the challenge to the Government's use of paid journalists was raised in his Motion for Relief (DE1), explained in his Memorandum (DE12), and is the focus of the Affidavit of Martin Garbus. The Government, in contrast, has never addressed the matter substantively, but has challenged the adequacy of Movant's facts in support of the issue. Now, when confronted with DE53, the Government moves to strike. It would appear that it is the government who wishes "to hide the truth about [it's] self so as to gain an advantage" over Movant.

Movant's trial, from November 27, 2000 to June 8, 2001, was conducted in a flood of this Government-funded propaganda. The issue, the denial of Movant's due process rights, are simply too important to be ignored as the Government wishes.

In the event the Court grants the government's motion to strike, Movant files, in the first alternative, his motion for leave to expand the record pursuant to Rule 7, Rules Governing Section 2255 Proceeding by refiling DE56 and attachment, and, in the second alternative, his motion for leave to amend ground five of the 2255 petition, and memorandum in support.

¹As a transitive verb, "sandbag" is defined at "to hit or stun with or as if with a sandbag" or "to conceal or misrepresent one's true position, potential, or intent especially in order to take advantage of." As an intransitive verb, it is defined as "to hide the truth about oneself so as to gain an advantage over another." See, www.merriam-webster.com/dictionary/sandbag.

POINT I

THE GOVERNMENT DOES NOT DENY THE ESSENTIAL FACTS THAT REQUIRE THE CONVICTION BE VACATED, OR IN THE ALTERNATIVE, THAT THE MOTION FOR DISCOVERY BE GRANTED.

The Government, now more than two years after first receiving Movant's 2255 application, claiming it was "sandbagged", still does not specifically address or factually deny the following:

a. That an unknown number of journalists and media outlets were paid from 1996 to 2001 to secretly write, speak, and propagandize, against these defendants without identifying the government payments;

b. That many, if not all, of these journalists who were handpicked by the Government were either Bay of Pigs combatants, jailed in Cuba or by the American Government for anti-Castro activities;

c. That the Government did not hire or pay anyone who did not have a commitment to the conviction of the Cuban Five;

d. That the paid journalists all passed background checks administered by the Government to make sure they had the necessary commitment to aid the prosecution;

e. That the amount of money paid to the journalists and the media outlets exceeded hundreds of thousands of dollars;

f. That the journalists were rewarded for their success, both with payments of more and more money and more and more government information;

g. That Jose Basulto, through his colleagues and associates in the Government (including Jorge Mas Canosa) who influenced and controlled Radio Marti and other substantial Government

funds, received governmental funds and that Radio Marti, after the shoot-down made the conviction a priority;

h. That the five years of Radio Marti broadcast, along with other media outlets (some of which were clandestine), were meant to, and did, influence and intimidate the Cuban Five trial jury;

i. That control and influence of Radio Marti passed to Jose Basulto, Brothers to the Rescue, and colleagues after 1996 and that Radio Marti moved to Miami in 1996;

j. That the heretofore undisclosed Radio Marti files, tapes, and broadcasts into Miami will conclusively show the Government meant to, and did, intimidate and influence the jurors and the community they were part of;

k. That the prosecution knew all of the foregoing, or now knows, all the foregoing.

POINT II

THE GOVERNMENT'S MOTION TO STRIKE THE AFFIDAVIT AND ATTACHMENTS OF DE53 MUST BE DENIED. DE53 IS DIRECTLY RESPONSIVE TO THE GOVERNMENT'S RESPONSE TO THE DISCOVERY MOTION AND TO THE GOVERNMENT'S OPPOSITION TO MOVANT'S 28 USC §2255 APPLICATION. DE53 IS WITHIN THE SCOPE OF THE 28 USC §2255 APPLICATION.

The government's Motion to Strike is predicated on claims that, first, Movant's filing is somehow untimely as raising new grounds, "Movant in effect asks the court to note and grant relief based on a vast and disparate array of supposedly factual claims that are new to this litigation" (DE56:7), which should be treated as a second and successive 2255 motion (*Id.*:4-5), and, second, there are a variety of claimed procedural defects in Movant's filing. These grounds should be rejected.

A. DE53 is relevant to and advances a claim made in Movant's Motion to Vacate

The government's Motion to Strike contains a section headed "Procedural History" (DE56:2), but this section does little other than count the number of pages in Movant's various pleadings. The government's contention that they have been somehow "sandbagged" and the matters raised in DE53 are neither relevant to nor present evidence in support of pending claims, including outstanding issues regarding discovery, simply does not withstand analysis.

Ground Four of Movant's Motion to Vacate stated (DE1:8): "The government violated petitioner Hernandez's rights of due process and to a fair trial, and furthermore undermined the constitutional effective assistance of petitioner's counsel, when it failed to disclose material exculpatory evidence. [Please see attached addendum for further specification of claim.]" The referenced Addendum stated (DE1-2:14): "VIII: The petitioner was denied due process of law because before, during and after the indictment and trial, the government surreptitiously funded a highly inculpatory, anti Cuba propaganda campaign in the community in which the defendants were tried." This section contained six specific subsections of the claim.

Thereafter, Movant filed his Memorandum in Support of Motion to Vacate, Set Aside or Correct Judgment and Sentence Under 28 U.S.C. § 2255 (DE12). This Memorandum included "VII: The movant was denied due process of law because the government surreptitiously funded a highly inculpatory, anti-Cuba propaganda campaign in the community in which the defendants were tried" which set for the Constitutional basis for the claim, recounted efforts Movant made to discover facts that were blocked by the government and presented the facts then known to Movant (*Id.*:61-78).

Every fact and legal argument referred to in the DE53 affidavit, brief, and attachment comes within the factual and legal arguments made in Movant's 2255 application.² For example, Movant's October 12, 2010 Memorandum of Law in Support of Section 2255 Motion (DE12) states the journalists were paid by the Government (*Id.*:58) and other Government sources and that Radio Marti's budget each year between 1966 and 2001 was \$37,000,000, and that in fact the amount of yearly money available for use to convict the Movant may have been far more because of the other activities of the government (*Id.*:58). Material aimed at persuading and intimidating was in various newspapers and illegally broadcast by Radio Marti into Miami by the Government in violation of law (*Id.*:55) by individuals and government stations that did not disclose the true identity of the journalists (*Id.*:58) and because this is the same propaganda practice that existed in the Armstrong Williams case,³ the conviction must be set aside. The October 12, 2010 brief admits much remains unknown (*Id.*:59), for the information is in the Government's files, and what is available, even after

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DE53 presented to the Court in support of the 2255 application and discovery motion materials gathered by or at the direction of counsel and cited to available sources. Nothing obscure, nothing remote. There are no dramatic, controverted new affidavits of newly discovered witnesses or newly discovered fingerprint or satellite photos. There is no possible claim of prejudice. The Government is putting its head in the sand and hoping the Court will follow. Once we have the names and dates of all payments to the journalists we can then attempt to locate all the Government paid for speeches, performances, and writings on Radio Marti and elsewhere. It is simple. Is that really so much to ask this prosecutor to produce when all the facts relevant to this claim, are within the sole knowledge of the Government and were suppressed by the Government for over 15 years. Men are in jail now over fourteen years. And does it not make perfectly obvious the reason why the Government continues two years after Movant's application was filed, to refuse to produce the relevant information.

DE53 and the November 1, 2012 Affidavit are required to set forth to the Court the sixteen year time period, from the shoot down to the present, from the trial to Movant's last attempts to discover new facts. This summation of previous briefs and affidavits from Movant and the Government should aid the Court by combining the previously set forth facts, and mixed facts in law in context in one coherent narrative.

³ United States Government Accountability Office, opinion B229069 66 comp 707.

all of Movants effort, is sparse. Thereafter, the memorandum goes into details pointing out the cover-up, BBG responses and the Movant's refusal to answer questions and the need for Movant's subsequent discovery motion to further answer the Government's demand for more facts.⁴

DE53 restates the language in Movant's 2255 Memorandum filed October 12, 2010, which begins the journalists issue, (DE12:57), and points out (*Id.*:58), that the *Miami Herald* September 2006 article talked of "At least 10 journalists." Nearly all of these journalists are discussed in DE53 and the backgrounds of some are specifically mentioned in Movant's previous papers.

The factual and legal arguments in DE53 also come separately within the Movant's Reply Memorandum of August 16, 2011, (DE33:44) (replying to the Government's claim that Movant must show more and has not shown enough to get to a hearing). It specifically states the journalists, the articles, and speeches they gave, and states "But the cited pieces represent a sampling of the journalists paid by the government before and during the trial (*Id.*:44). These articles represent only a small sampling of materials written before and during the trial. Movant is prepared to present additional examples at a hearing" (*Id.*:45) (underling added). The Movant Brief refers to the Smith Mundt Act, see 22 U.S.C. 1461 and the improper use of Radio Marti and the Governments vast

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The previous motion for a change of venue litigation is not related to the paid journalism claim, which is based on Government wrongdoing where each speech and article is a separate violation of law and each legal violation "conclusively" prejudices the jury. Furthermore the Movant could not have made this application previously in the litigation because the Miami Herald article of September 2006 did not appear until after the final decision of the Eleventh Circuit and the government has, even as of now, resisted every attempt to place the facts before the Court. The Government knew in 1996; no one else did.

Appendix H-1 to the October 12, 2010 contains, among others, the first response from the BBG to National Committee's FOIA REQUEST, and it checks off 17 positive individuals of the 33 names, including Humberto Cortina, Ivette Leyva, Juan Manuel Cao.

Armando Perez Roura is identified in the FOIA. Research that was not available on the Federal Website – (since there is no record of payment) when supplemented is that he has a long-time link through his Radio WAQI, "Radio Mambí", including his re-broadcasting of his Miami programs on Radio Marti, in addition to his other links. The fact that the government reveals no ties of Perez Roura and Radio Marti, is one more example of Defense being denied information. In fact, the BBG response to the first FOIA is deliberately misleading.

funds (DE33:39-42) in an unconstitutional propaganda machine (*Id.*:39) designed to persuade the jury to convict (*Id.*:40) and that Movant does not have to actually demonstrate jury bias (*Id.*:46).

This is the factual and legal argument of DE53.

The Government cannot deny that the nearly all the journalists are mentioned in the 2255 filings, the FOIA suits, the responses to the FOIA suits, in the appendix to the Memorandum, in the Columbia Study, the public record, and in the newspaper writings about the events and the exhibit.⁵

⁵ The following are some of the journalists listed in DE53 and the November 1, 1012 Affidavit who are referred to in Movant's previous papers:

1. Alberto Muller, who received \$39,871.00 from 2004-2010 is mentioned in Movant's previous documents.
2. Humberto Cortina, originally mentioned in the BBG Response, and Movant's 2255, Appendix H-1.
3. Julio Estorino, originally mentioned in Liberation FOIA response, first mentioned in Movant's Reply.
4. Carlos Alberto Montaner, is listed originally in Movant's Memorandum.
5. Olance Nogueras, was previously mentioned in Movant's Memorandum to the Government's response.
6. Enrique Encinosa, detailed in Movant's Memorandum.
7. Ariel Remos, one of the original paid journalists, mentioned in Miami Herald article was detailed in Movant's 2253 memorandum.
8. Luis Aguilare Leon, is first mentioned in DE53, because all the Government Documents, the FOIA's response and Federal Website, do not mention him at all. The fact that he worked for Radio Marti since 1985 was first revealed publicly when he died in 2008 in his obituary. Government records we have seen have no information on him.
9. Wilfredo Cancio Isla, one of the original paid journalists mentioned in Miami Herald 2006 article was in Movant's 2255 Memorandum.
10. Helen Ferre, one of the original paid journalists mentioned in The Miami Herald 2006 article was in the 2255 Memorandum.
11. Caridad Roque, name is first mentioned in DE53. Her name was withheld by the Government in the FOIA lawsuit and subsequently found.
12. Enrique Patterson. The Liberation FOIA produced his contracts and information.
13. Ernesto Betancourt. A Director of Radio Marti, not disclosed in previous FOIA proceedings, was found through the Federal Website.
14. WJAN, AMERICA TEVE STATION. These names did not come up in the FOIA requests, because they were under ad different name of Sherjan Broadcasting. Since 1960 with allegedly independent media in the Miami area received Government money from a variety of sources. For example, Channel 41 WJAN, America TeVe, was functioning in Miami at the time of the trial. America TeVe's Network Director is Omar A. Saul Romay, the Chairman is Marcelo Soldano. We only know Sherjan Broadcasting Co. Inc. received \$111,600 from the Government from October 19th, 2004 to September 17th, 2005. We do not know how much, if any, that it received at any other time. The President and Chief Executive Officer of Sherjan is Omar A. Saul Romay and the CFO is Marcelo Soldano, according to Dunn & Bradstreet and the Florida Department of State. WJAN features, among other things, "A Mano Limpia", a highly political show hosted by an alleged independent journalist who was not independent. Oscar Haza, who had previously received federal payments, is a very small example of the interrelationship between a small group of paid journalists, some of whom were previously imprisoned in Cuba, American agents, activists who go beyond journalism, and, who we believe are "dirty trick practitioners".
15. Juan Manuel Cao, is in the BBG National Committee FOIA response as receiving monies, in Affidavit H-1.

The best argument against the Motion to Strike, as to the scope of Movant's claim, is the Government's own July 6, 2012 response, along with their previous responses. DE53 and the Movant's discovery motion were specifically in response to the Government's demand for more information. The Government's response to this discovery request, opposing a hearing on either the 2255 application or the discovery motion is part of the cover-up. The Government's Response to the Discovery Motion (at page 3 and 4) accurately describes the paid journalism claim of Movant and the co-defendants. The Government claimed (DE43:5), that there is no argument or facts that support the claim of the use of the media to intimidate the jury. DE53 replies to that as it sets forth the facts, law, and cites sources. The Government claimed (DE43:8) there was no reason to believe the Government hired partisan writers to write partisan articles about the trial and intimidate and persuade jurors. DE53 replies to that as it sets forth fact, law, and cites sources.⁶

The government's argument that Movant is out of time is not only factually incorrect, it ignores Eleventh Circuit precedent. In *Davenport v. United States*, 217 F3d 1341 (11th Cir.2000), the court considered for the first time amendment of pleadings under Rule 15(c), Fed.R.Civ.P., in the context of a § 2255 motion. That court noted that three other circuits had already addressed the issue (*Id.*, at 1344):

All three circuits held that for an untimely § 2255 claim to "relate back" under Rule 15(c), the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings. *See*

⁶ Not one of the 25 citations the government in support of the motion to strike is remotely relevant to this motion. Not one is a habeas corpus application. The two criminal cases referred to have no substantive or procedural relevance. The civil cases do not remotely relate to the case at bar. This is not a case with newly discovered or a new forensic test that discloses new information that no one knew about. All of the information cited in Movant's motion and DE53 is within the Government's knowledge. Not Movant's or anyone else's knowledge. The Government's Motion to Strike and Object seeks the creation of new law to hide the facts, avoid a hearing, and uphold a wrongful conviction secured by massive government misconduct, while Movant presently sits in prison facing a double life sentence.

United States v. Pittman, 209 F.3d 314 (4th Cir.2000); *United States v. Duffus*, 174 F.3d 333 (3d Cir.), *cert. denied*, 528 U.S. 866, 120 S.Ct. 163, 145 L.Ed.2d 138 (1999); *United States v. Craycraft*, 167 F.3d 451 (8th Cir.1999). Instead, in order to relate back, the untimely claim must have arisen from the “same set of facts” as the timely filed claim, not from separate conduct or a separate occurrence in “both time and type.” *Pittman*, 209 F.3d at 318 (“both time and type”); *Duffus*, 174 F.3d at 337 (“same set of facts”); *Craycraft*, 167 F.3d at 457 (“same set of facts” and “both time and type”).

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

B. DE53 responds to the government’s objection to discovery

On June 6, 2012, Movant requested leave of the court to conduct discovery. DE38-1. See, Rule 6, Rules Governing Section 2255 Proceedings for the United States District Court, and authority cited in DE38-1:4-5. The government’s July 6, 2012 Response in Opposition to Movant’s Request for Discovery and for Oral Argument (DE43:1), took the position, consistent with their previous responses, that “Movant fails to show good cause for discovery in that he has not made a sufficient factual showing of specific allegations, but rather asserts generalized speculation and bare conclusions.” DE53 responded to the Government’s demand for more information.

As noted above, the Government claimed (DE43:5), that there is no argument or facts that support the claim of the use of the media to intimidate the jury. DE53 replies to that as it sets forth

the facts, pertinent principles and historical experience regarding domestic dissemination of foreign propaganda, and cites sources. The Government claimed (DE43:8), that there was no reason to believe the Government hired partisan writers to write partisan articles about the trial and intimidate and persuade jurors. DE53 replies to that as it sets forth fact, pertinent principles and experience regarding domestic dissemination of foreign propaganda, and cites sources.

C. DE53 expands the record regarding Movant's claim of denial of due process

The affidavit of Martin Garbus shows that extensive inquiry has been conducted to discover facts that relate to Movant's claim. The affidavit presents the results of that inquiry, including efforts that have been blocked either by refusal of some persons to discuss the matter absent court process or by denials of Freedom of Information Act requests. The affidavit supplements prior pleadings, offering additional support for Movant's Petition and for his request for discovery.

Rule 7 of the Rules Governing Section 2255 Proceedings recognizes that supplementation of the record may be appropriate. This rule does not require a litigant to secure a court order before submitting supplemental materials for the court to consider. *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.1989)(noting contrast with requirement of Rule 6); *Turk v. White*, 106 F.3d 409, *1 (9th Cir.1997). Movant did not seek a court order prior to submitting the affidavit, but, by separate filing, now moves the court for leave to refile DE53 and attachments, in the event the court grants the government's motion to strike.

Rule 7(a) authorizes the court to "direct the parties to expand the record by submitting additional materials relating to the motion." Rule 7(b) permits affidavits, as appropriate, to accomplish this. The government seeks to strike the affidavit without any discussion of this concept of expanding the record or the court's authority in this regard.

The Advisory Committee Notes to the analogous provision in Rules Governing Section 2254 recognizes the value of expanding the record, citing *Raines v. United States*, 423 F.2d 536,529-530 (4th Cir.1970):

Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in a appropriate case, even affidavits.

The Note also cites *Harris v. Nelson*, 394 U.S. 286, 300 (1969):

At any time in the proceedings * * * either on [the court's] own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * before or in conjunction with the hearing of the facts * * * [emphasis of Committee deleted]

While Rule 7 does not expressly address expansion of the record by the parties, Movant submits that the interests of justice served by court-directed expansion of the record are equally served by relevant supplements by the parties, *see, e.g. Clemons v. United States*, 2004 WL 2212017 (D.Del.,2004) (granting government Motion to Expand the Record Pursuant to Rule 7), and *Harris* expressly acknowledges that the petitioner may seek to expand the record.

Rule 7 does not expressly address the question of how a petitioner may seek to expand the record. Movant had done so by filing the Affidavit of Martin Garbus. If this is procedural incorrect, and the court strikes this document and its attachments, Movant moves, as first alternative relief, for leave to refile the Affidavit and attachments to expand the record.

D. The government's various procedural arguments do not justify the relief it seeks

Rather than discuss DE53 for what it is, a response regarding facts supporting discovery and a supplement to the record before the court, the government characterizes the document as raising new claims and presents procedural arguments for striking.

1. Page limitation:

The government is clearly troubled by the number of pages in Movant's pleadings, as if there is some finite number of pages which a person wrongfully sentenced to life in prison must observe. The ten page limitation of Local Rule 7.1(c)(2) applies only to reply memorandum. This page limit was observed. Local Rule 71(c) permits the filing of material in support, "including affidavits and declarations." There is no limitation in the Rules on the size of the affidavit.

2. The nature of the Martin Garbus Affidavit

DE53 presented to the Court available materials and provided citations to those sources. The materials were gathered by or at the direction of Martin Garbus, who reviewed and analyzed them, and presented the historical facts which he knew or had learned that relate to Movant's claims. He believes that the materials he has presented are relevant, material and admissible evidence. These are evidentiary issues ultimately for resolution by the court, but there is nothing about the presentation of these materials in affidavit form at this point in the proceeding which is improper.

E. The threat of CIPA reveals that the Government's real objection is not procedural

The propaganda that is the subject of Movant's was, for several reasons, far worse for the empaneled twelve jurors than before they were selected. Once the trial began the entire community knew of the twelve who were to decide guilt or innocence. The propaganda intensified greatly once the trial began. It was a 194 days of media coverage. It was totally different in daily volume and specificity than before opening statements. There was a daily barrage of what was

passed off as “news” stories (or even at times as opinion pieces) that, in reality were a combination of opinion, fiction, speculation, improper “sourcing”, and a biased view of history with false content, that said there must be a conviction. More than guilt or innocence was at stake, the jurors were told. Neither Court nor Defense Counsel explored this issue at trial because neither the Court nor Counsel knew, prior to September 2006, that the Government spent secret monies and assets to interfere with the trial and influence the jury.

To defect inquiry, in a last attempt to keep secret what they must disclose about Muller, Alfonso, Cortina, and the others, the Government states in Response in Opposition to Movant’s Request for Discovery (DE43:27): “There is a fair prospect that the Government would have to assert privileges or resort to the Classified Information Procedures Act as to certain materials and proposed inquiries Movant requests.” CIPA has a valid, important rule to play in litigation. However, hiding illegal secret Government conduct as the Government seeks to sustain an unconstitutional conviction is not one of them. In light of Movant’s life sentence and 14 years in jail and the violation of law by the Government, this threat of invocation of CIPA is a striking statement, not a routine governmental assertion. But it is consistent with the Government’s responses over the years in the FOIA suits and to request from Congress, Government agencies, and scholars who try to find out about what the Government’s Miami expenditures were for. This invocation of CIPA in the Response tells us what the Government’s true concerns are on this motion. It is not about the mere words in the print media and on radio and television. It is the exposure of characteristics of the journalists, and the Government’s involvement in this case with them, which jeopardizes more than Movant’s convictions.

CONCLUSION

THE GOVERNMENT’S MOTION TO STRIKE OR OBJECT SHOULD BE DENIED.

Movant did not “sandbag” the Government. The Government is trying to “sandbag” this Court, this judicial process, and the American system of justice, in the same way they sandbagged the jury and the community it represents. The Government claims that documents, bills, checks, and vouchers, relating to dates and times of payments to journalists, implicate national security. They have no more national security implications than any laundry list. This is sandbagging.

In the event the Court grants the government’s motion to strike, Movant in separate filings moves, in the first alternative, for leave to expand the record pursuant to Rule 7, Rules Governing Section 2255 Proceeding by refiling DE56 and attachment, or, in the second alternative, for leave to amend the 2255 petition.

DATED: November 16, 2012

Martin Garbus

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Memorandum was filed this 16th day of November, 2012 via electronic case filing and a copy was served on counsel of record by that means.

Richard C. Klugh

Richard C. Klugh