

**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 MOTION FOR LEAVE TO REFILE DE53 AND ATTACHMENTS TO
EXPAND THE RECORD PURSUANT TO RULE 7, RULES GOVERNING SECTION
2255 PROCEEDINGS AND MEMORANDUM IN SUPPORT**

The affidavit of Martin Garbus and attachments, previously filed as DE53, show that extensive inquiry has been conducted to discover facts that relate to Movant's claim in ground five of his motion to vacate pursuant to 28 U.S.C. § 2255. The affidavit presents the results of that inquiry, including efforts that have been blocked either by refusal of some persons to discuss the matter 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.

In the event the court grants the government's objection to this filing (DE56), Movant, by counsel, moves for leave to refile DE53 and attachments to expand the record pursuant to Rule 7 of the Rules Governing Section 2255 Proceedings.

Rule 7 recognizes that supplementation of the record may be an appropriate vehicle to advance the court's decision-making process. Rule 7(a) authorizes the court to "direct the parties

to expand the record by submitting additional materials relating to the motion,” and Rule 7(b) permits affidavits, as appropriate, to accomplish this.

The Advisory Committee Notes to the analogous provision in Rules Governing Section 2254 Proceedings 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 on motion 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 (“or upon cause shown by the petitioner”).

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 procedurally

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.

DATED: November 16, 2012

Martin Garbus

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing motion for leave to refile was filed electronically this 16th day of November, 2012, and served by that means on all counsel of record.

Richard C. Klugh

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