UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-cv-JAL
(98-721-cr-JAL)

GERARDO HERNANDEZ,
Movant,

v.

UNITED STATES,
Respondent
_____/

UNITED STATES' MOTION TO STRIKE, AND NOTICE OF OBJECTION, WITH INCORPORATED MEMORANDUM OF LAW

The United States respectfully moves to strike the August 31, 2012, Affidavit of Martin Garbus, Docket Entry ("DE") 53, and its associated exhibits and attachments, DE 53-1 through DE 53-31, for being immaterial, time-barred and otherwise procedurally barred, and in violation of the Local Rules of the Southern District of Florida. The affidavit also is objectionable for being wholly inadmissible, in that it is conclusory speculation, hearsay, and not based on personal knowledge. In support, the United States states as follows:

Gerardo Hernandez ("Movant") long ago filed a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody, DE 1, 1-1, 1-2, on the eve of the statutory deadline for such claims. The motion, and later-filed supporting memorandum, DE 12, was dominated by claims of ineffective assistance of counsel. A subsidiary claim argued that due process was violated by the government purportedly funding a propaganda campaign against the defendants in the trial community; this issue occupied six of

104 separately enumerated claims, DE 1-2:14, and 18 of 90 pages of legal argument that named three supposedly suspect journalists as having written seven challenged articles about this case, DE 12:61-78.[1] Following the United States' response, DE 28, Movant has been amplifying and expanding this subsidiary claim concerning payments to journalists with an ever-increasing volume of procedurally irregular filings and conclusory speculations, in effect expanding his §2255 claim after the statute of limits expired, and sandbagging the government after it had already filed its response. This unfair and procedurally improper process reached a new peak with the latest affidavit, DE 53, whose 66 pages roam across six decades of political history in a subjective and conclusory declamation that would inject into this record as purported fact a myriad of irrelevant, time-barred partisan and argumentative assertions and spurious issues. The court need not, and should not, permit this usurpation of the proper channels of litigation. We respectfully move the court to strike the affidavit, and its attachments, and to sustain our objection thereto.

Procedural History

[1] The government's response to the §2255 motion described Movant's claim as three supposedly government-paid journalists said to have written *eight* articles about the case. *See* DE 28:95. However, the government there mistakenly counted twice one of the articles referenced by Movant. Movant's §2255 legal memorandum named but three journalists, said to have received government remuneration for Radio or TV Marti, as having written about his case: Remos (four articles, cited at DE 12:63-64, 72-73), Cancio (two articles, cited at DE 12:64, 72-73) and Ferre (one article, cited at DE 12:65, 73). Movant's legal memorandum named two other persons – Encinosa and Montaner, DE 12:65 – as having received government remuneration in connection with Radio or TV Marti, but failed to identify any publications by them about Movant or the trial. Movant's initial §2255 motion, DE 1, 1-2, named no one as to these claims concerning government payments.

Movant's judgments of conviction became final, for purposes of 28 U.S.C. §2255(f), on June 15, 2009, with the Supreme Court's denial of his petition for certiorari following affirmance of his convictions by the Eleventh Circuit Court of Appeals. *See United States v. Campa, et al*, 529 F.3d 980 (11th Cir. 2008) ["*Campa* 3"], *cert. denied*, 129 S.Ct. 2790 (2009) [2] Thus, pursuant to 28 U.S.C. §2255(f), a motion by Movant attacking his sentence and conviction pursuant to 28 U.S.C. §2255 could be timely filed only within one year of June 15, 2009.

On June 14, 2010, Movant timely filed his Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody, DE 1, accompanied by a cover sheet (DE 1-3) and Addendum (DE 1-2) setting forth 104 enumerated claims in outline form. *See* DE 28-1, numbering the claims. Movant sought (DE 7), and was granted (DE 8), leave to file a supporting memorandum of law in excess of the court's ordinary page limit. On October 12, 2010, Movant filed his Memorandum in Support of the § 2255 motion (DE 12), which memorandum was 90 pages in length and was accompanied by 24 attachments totaling more than 225 additional pages (DE 12-1 – DE 12-24). On March 31, 2011, Movant unilaterally filed his own affidavit (DE 24, DE 24-1). On April 25, 2011, the United States filed its Response in Opposition to the § 2255 motion (DE 28), on which the court imposed a length limit that it be no longer than Movant's October 12, 2010 Memorandum, *see* DE 20, 23. On August 16, 2011,

[2] The court is familiar with the underlying criminal case's lengthy appellate history, resulting in affirmance of Movant's judgment and sentence. *See United States v. Campa, et al*, 419 F.3d 1219 (11th Cir.), ["*Campa* 1"], *vacated* 429 F.3d 1011 (11th Cir. 2005) (*en banc)*; *United States v. Campa, et al*, 459 F.3d 1121 (11th Cir. 2006) (*en banc*) ["*Campa* 2"]; *United States v. Campa, et al*, 529 F.3d 980 (11th Cir. 2008) ["*Campa* 3"], *cert. denied*, 129 S.Ct. 2790 (2009).

Movant filed a 52-page Reply (DE 33), accompanied by yet more attachments (DE 33-1 – DE 33-3).

On June 6, 2012, Movant filed a Request for Oral Argument and Discovery regarding his § 2255 motion (DE 38-1), accompanied by a Notice thereof (DE 38); an appendix of discovery requests (DE 38-2); an affidavit by Movant's latest attorney, Martin Garbus[3] (DE 38-3); and seven Exhibits (DE 38-4 – 38-10). The material filed in and attached to the discovery motion (which relates to the claims of payments to journalists) totals more than 500 pages. The United States responded in opposition to the motion on July 6, 2012 (DE 43, 43-1, 43-2).

Movant sought (DE 46/47, 49/50), and was granted (DE 48, 51), extension of time to file a reply, but did not seek leave to exceed the 10-page limit for a reply memorandum, *see* Local Rules of the United States District Court for the Southern District of Florida ("Local Rules"), Rule 7.1(c)(2). On August 31, 2012, Movant filed an 11-page (including signature page, not counted under Local Rule 7.1(c)(2)) reply memorandum (DE 52). Contemporaneously with this Reply, Movant also filed another affidavit of attorney Garbus (DE 53), of 66 pages, and attached materials and exhibits (DE 53-1 – DE 53-31) totaling more than 300 additional pages.

Argument and Memorandum of Law

It is this material – Docket Entries 53, and 53-1 through 53-31 – that the United States respectfully submits should be stricken. The material is procedurally barred on a number of bases, such as being: untimely pursuant to 28 U.S.C. §2255(f); untimely pursuant to Fed.R.Crim.P. 33(b)(1) as to newly discovered evidence; a successive §2255 petition precluded

[3] On May 3, 2012, the court granted attorney Garbus leave to appear on behalf of Movant *pro haec vice*, DE 37, joining Movant's two other attorneys in this matter,

by 28 U.S.C. §2255(h) and in violation of Rule 9 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("§2255 Rules); in violation of Local Rule 7.1(c)'s provision that replies must "be strictly limited to rebuttal of matters raised in the memorandum in opposition;" and in violation of Local Rule 7.1(c)(2)'s length limit. The material is also substantively infirm, immaterial and inadmissible, as attorney Garbus's lengthy affidavit is not based on personal knowledge, is inadmissible hearsay, and is but conclusory argument; the other items are similarly immaterial and objectionable, both as hearsay in themselves and as being mere appendages to the impermissible Garbus affidavit.

Fed. R. Civ. P. 12(f) provides that a court may strike "redundant, immaterial, impertinent, or scandalous" matter from a pleading. That rule addresses *pleadings* as enumerated at Fed.R.Civ.P. 7(a): a complaint, answer and reply. It has been noted (mostly in the context of summary-judgment motions) that an affidavit is not a *pleading* and so not subject to a Rule 12(f) motion to strike, but that in such a circumstance a notice of objection may be used to challenge the affidavit. *See Morgan v. Sears, Roebuck and Company*, 700 F.Supp. 1574, 1576 (N.D. Ga. 1989); *Pinkerton and Laws Company, Inc.*, 650 F.Supp. 1138, 1141 (S.D. Ga. 1986). It also has been noted that the Eleventh Circuit implicitly acknowledges the discretion of the district court to strike an affidavit. *See Corey Airport Services, Inc. v. City of Atlanta*, 632 F.Supp. 2d 1246, 1267 (N.D. Ga. 2008), *Putnal v. Guardian Life Insurance Company of America*, 2006 WL 2850424, *3 (M.D. Ga. 2006) (tracing acknowledgement to *Auto Drive-Away Co. of Hialeah, Inc. v. I.C.C.* 360 F.2d 446, 449 (5th Cir. 1966), while preferring notice of objection for challenge to defective affidavit). *See also Moret v. Green*, 494 F.Supp.2d 329, 336 (D. Md. 2007) (even where affidavits technically do not constitute pleadings, courts have permitted affidavit-

challenge by motion to strike because federal rules provide no other means to contest sufficiency); *McLaughlin v. Copeland*, 434 F.Supp. 513, 519 (D. Md. 1977) (same; hearsay and affidavit portions not based on personal knowledge stricken; exhibits and attachments stricken).

Apart from Rule 12(f), the court also has the inherent power to control its docket, and to strike filings that do not comply with court and local rules. *See Ogle v. BAC Home Loans Servicing, LP*, 2011 WL 3838169, *2 (S.D. Oh. 2011); *Zep Inc., v. Midwest Motor Supply Co.*, 726 F.Supp.2d 818, 822 (S.D. Oh. 2010).

Based on these authorities, the court has ample power to strike these filing. First, they can fairly be construed as "pleadings" pursuant to Fed. R. Civ. P. 7(a)(7), as they are part of Movant's reply. Movant's Reply Memorandum states, DE 52:1, that the Garbus affidavit and its attached exhibits are "incorporated in this reply." Both the Reply Memorandum and the affidavit are styled as being in support of both the recent discovery motion and also the original §2255 motion, *see* DE 52:1, 53:1. Of course, Movant's effort to reply in August, 2012, to the original §2255 motion is wholly irregular; Movant already filed his reply thereto, *see* DE 33, and there is no justification offered or sought for seeking to supplement the reply, more than a year after the time to reply on the §2255 motion expired. But Movant should be held to his word, and by characterizing the affidavit as part of his reply on the original §2255 motion, Movant fairly brings it within the heading of a pleading subject to Fed. R. Civ. P. 12(f). Second, the court has inherent power to control its docket and to strike pleadings filed in violation of its rules. Third, we seek relief both as a motion to strike, and as a notice of objection to the affidavit and its attachments. *See, e.g., Rosen v. Service Corporation International, et al*, 2012 WL 370298 (S.D.

Fl. 2012)(construing motion to strike affidavit as objection thereto, sustained as to statements of affiant's mere "understanding" and not within his personal knowledge).

Motions to strike pleadings, such as portions of a complaint, pursuant to Fed. R. Civ. P. 12(f) are viewed with disfavor and are infrequently granted. *Brown v. Seebach*, 763 F.Supp. 574, 583 (S.D. Fl. 1991). Here, however, we seek to strike material that comes long after Movant, through multiple lawyers, has been able to state his case, at great length and detail. Further, we deal here with certain clear time limits which Movant transgresses with this material, making the filings procedurally barred as well as substantively infirm. Movant's deadline for filing his §2255 motion expired June 15, 2010, pursuant to 28 U.S.C. §2255(f). Movant's deadline for raising a claim of newly discovered evidence expired long before that, pursuant to Fed.R.Crim.P. 33(b)(1).[4] Yet with these materials Movant seeks to advance claims in violation of these deadlines. Although not articulating a rationale of newly discovered evidence (doubtless because such a rationale is so clearly time-barred), 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, such as arguments, affidavit statements, and news stories about, *inter alia*, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), a 1975 post-Watergate investigation into United States intelligence-gathering; the supposed machinations of the late Jorge Mas Canosa (who died in 1997) to bring the Radio Marti and TV Marti operations to Miami; and a 1977 *Rolling Stone*

[4] Movant's verdict of guilty was returned by the jury June 8, 2001; the court adjudicated him guilty that day. *See* DE 1299; DE 1585:14668-14669 (underlying criminal case, No. 98-721-cr-LENARD).

article about CIA use of American news media. Movant's seeking to bootstrap this material into the record of this case amount to an improper effort to expand his §2255 motion, long past the deadline for filing a §2255 motion or asserting newly discovered evidence, and with no effort to comply with the prescriptions for seeking to file a second §2255 motion,[5] or to amend the instant motion. *See Zep v. Midwest Motor, supra*, 726 F.Supp2d at 823 (granting motion to strike reply brief as to matters beyond the scope of the initial motion); *Anderson v. United States*, 468 F. Supp. 2d 780 (D. Md. 2007) (new §2255 claims first asserted in reply brief, and in amended §2255 motion, are time-barred and do not relate back to timely claims).

In addition to being time-barred, and an impermissible second or successive §2255 motion, the filings also violate the court's Local Rules. Local Rule 7.1(c) provides for a reply "strictly limited to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law." Attorney Garbus's filing, by contrast, though styled an affidavit, is actually an advocate's argument which seeks to address a large array of matters which were not raised in the government's response, in violation of Local Rule 7.1(c). It also greatly exceeds Local Rule 7.1(c)(2)'s 10-page limit, which already was entirely used by DE 52. Leave to file excess pages was not sought. *Compare Zep v. Midwest Motor, supra*, 726 F. Supp. 2d at 822 (motion to strike second reply brief denied because the two briefs did not together exceed permitted page limit, and proper permission was requested to file second brief). When a party ignores the page limits established by local rules or court orders, the

[5] 28 U.S.C. §2255(h), and §2255 Rule 9, require court of appeals authorization to bring a second or successive §2255 motion.

court typically strikes the filing or excess pages. *In re Ready-Mixed Concrete Antitrust Litigation*, 261 F.R.D. 154, 161 (S.D. Ind. 2009).

The filings also are immaterial and impertinent, in the sense referenced in Rule 12(f). *See Federal Deposit Insurance Corporation v. Butcher*, 660 F. Supp. 1274, 1277 (E.D. Tenn. 1987) (impertinent as having "no essential or important relationship to the claim for relief"). Because they are procedurally barred, as discussed *supra*, they have no pertinence or materiality to the litigation. In addition, their subject matter is immaterial due to its content: irrelevant hearsay as to matters far removed, in time and subject matter, from Movant's case. *See also United States v. Spellissey*, 2009 WL 2366547, *5 (M.D. Fla. 2009) (affiant in §2255 case "has no personal knowledge of either the Defendants, the charges, the case or the evidence. Simply put, his averments are immaterial to this case" and are nothing but an attack on the prosecution; affidavit stricken on government motion), *aff'd*, 2010 WL 1172422, **2 (11th Cir. 2011) (district court did not abuse discretion; affidavit that contains no admissible evidence may be excluded). The purpose of a motion to strike includes avoiding unnecessary forays into immaterial matters and spurious issues, *see NN&R, Inc. v. One Beacon Insurance Group*, 362 F. Supp. 2d 514, 525 (D. N.J. 2005); *Cordon v. Wachovia Mortg*, 776 F. Supp. 2d 1029, 1041 (N.D. Cal. 2011). Immateriality and spuriousness aptly describe these filings.

The filings also are highly objectionable because the affidavit around which all revolve wholly fails to meet any standards for admissibility or reliability. Attorney Garbus makes no claim of having direct knowledge of the matters he addresses in his 66-page statement; rather, he vouches for them "to the best of my knowledge and belief and based upon my review of documentary and other evidence," DE 53-1. In other words, the entire affidavit is hearsay as to

which the affiant has no personal knowledge, rendering it infirm. *See, e.g., Rosen v. Service Corporation International, supra*, 2012 WL 370298 (affidavit statements of "belief" or "understanding" do not reflect personal knowledge; are irrelevant; and should be disregarded).

The filings are unfair and prejudicial to the government in the context of this litigation. *See Caterpillar, Inc. v. Wilhelm*, 824 F. Supp. 2d 828, 835 (C.D. Ill. 2009) (courts generally do not grant motions to strike unless the defect in the pleading causes some prejudice to the party bringing the motion). Long after the United States filed its response in this matter, Movant is seeking to freight the record with new conclusory assertions, held out as factual, but actually no more than speculation and hearsay. The affidavit is full of advocacy argument, partisan generalizations, and half-truths.[6] The government should not be required to address, nor the court to entertain, an endless stream of such procedurally impermissible, immaterial and inadmissible claims.

In the past, defendants' efforts to inject procedurally barred material into the criminal case record have worked great mischief and taken a heavy toll in undue protraction of litigation, and needless expenditure of judicial resources. In 2002, Movant joined in a Motion for New Trial, DE 1635, 1644 (in the underlying criminal Case No. 98-721-Cr-LENARD) which

[6] For instance, the affidavit references that reporters who received payments from Radio and TV Marti were fired therefor by their newspaper, but fails to note that the firings were rescinded, as even Movant's co-defendants concede. *See* DE 43-1:14. The affidavit also extensively discusses a 2005 incident involving Armstrong Williams said to be analogous to the Marti payments, *see, e.g.*, DE 53:37-38, but omits to mention that the analogy was rejected in the *Miami Herald*'s own subsequent investigation and report on its coverage of the Marti story, in part because the Williams incident, unlike the Marti story, involved government payments for domestic publications. *See* DE 43-1:15, discussing Joe Strupp, *Hoyt's Report on Flawed "Miami Herald" Coverage*, Editor & Publisher (Nov. 17, 2006).

included time-barred claims to which extensive declarations and attachments were appended, DE 1636 (*id.*). The United States objected to the untimeliness, *see* DE 1660 (*id.*), and moved to strike the time-barred materials, *see* DE 1662 (*id.*). Nonetheless, the *Campa 1* panel was misled into focusing on the time-barred material as informing its later-vacated opinion. *See Campa 1*, *supra*, 419 F.3d at 1255-1257. Only after a further year of appellate litigation did *Campa 2* set the matter straight, noting that the district court properly declined to consider these time-barred materials; *see Campa 2*, *supra*, 459 F.3d at 1153-1154. The appeal then was remanded to the panel for further consideration of the other claims, which took nearly two years more.

We respectfully submit that the court need not, and should not, allow this matter to be similarly sidetracked with immaterial, time-barred and otherwise excludable filings.

Conclusion

WHEREFORE the United States respectfully moves the court to strike DE 53, 53-1 through 53-31, or in the alternative to sustain the government's objection to their being considered.

Undersigned counsel has consulted with counsel for Movant, who opposes this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 20, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, for uploading and service by electronic notice to counsel and parties authorized to receive electronically Notices of Electronic Filing.

/s/ Caroline Heck Miller
Caroline Heck Miller
Assistant U.S. Attorney