

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:11-CV-22854
(Criminal Case No. 98-CR-721-LENARD)

LUIS MEDINA,
[RAMÓN LABAÑINO],

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

MOVANT RAMÓN LABAÑINO'S SUPPLEMENTAL MEMORANDUM ADDRESSING
THE THREAT OF GOVERNMENT-PAID JOURNALISTS TO THE INTEGRITY OF THE
JURY PROCESS

There is a thread in the trial of this case that is extremely relevant to, but has not been discussed by the parties in the context of, pending claims for post-conviction relief. This thread is this court's concern for the integrity of the jury process in the face of media reports of the statements and actions of potential witnesses, and the decisive response by this court in its Opinion and Memorandum of Law (CRDE#978)¹, entered on February 16, 2001, and its Order Granting in Part and Denying In Part Motion for Clarification And/or Modification (CRDE#999), entered on February 22, 2001.

In his Motion to Vacate Sentence (DE#1)² and Memorandum in Support (DE#5), Ramon

¹ This form of citation, "CRDE#___," references docket entries in the underlying criminal case, No. 98-CR-721-LENARD.

² This form of citation, "DE#___," references docket entries in this case.

Labañino presented a claim of denial of due process, in the government's failure to disclose its payments to community news reporters publishing inflammatory articles, which resulted in a waiver of valid arguments and defenses at the pretrial and trial proceedings, rendering counsel ineffective as a matter of law. The government responded (DE#15), correctly noting that a portion of the empirical support for this motion had been omitted from a footnote, and claiming that Mr. Labañino's "claim is factually unsound and [his] conjecture baseless, illogical, and contradicted by [his] own referenced materials." (Id.:6). The government raised numerous procedural objections, but the heart of their opposition was that Mr. Labañino had not demonstrated prejudice. Mr. Labañino replied, correcting his footnote (DE#20:10,n.5) and documenting the court's concern about specific instances of media intrusion into the jury box during trial (Id.:10).

This memorandum is submitted to review the court's prior expressions of the corrosive impact of media coverage on the integrity of the trial process and the limited ability of the court to protect the jury from that impact, both of which are relevant to Mr. Labañino's claim now before the court. In short, it is submitted to show that the court has already recognized the very prejudice which the government denies.

On November 27, 2000, the date jury selection began, this court expanded on the court's initial Gag Order (CRDE#122), issued on October 22, 1998. The initial order was based on Southern District of Florida Local Rule 77.2 and applied to parties and counsel. The expanded order precluded witnesses from speaking to the press, in response to an incident in which family members of victims of the Brothers to the Rescue shutdown engaged with the press in front of the courthouse.

Enforcement of the expanded gag order came before the court on the government's

complaint that defense witness Richard Nuccio had spoken to the Miami Herald about the FBI's knowledge of the shutdown (CRDE#818) and defense objection that subpoenaed witness Jose Basulto held a press conference to announce plans to fly to "Martyr's Point," the supposed location of the shutdown (CRDE#938). The Opinion and Memorandum of Law (CRDE#978) followed. Thereafter, Basulto filed papers which led to the Order Granting In Part and Denying In Part Motion for Clarification And/or Modification (CRDE#999)³.

Both the initial Opinion and the clarifying Order applied to "trial participants," who were precluded "from making extrajudicial statements or taking actions that would have a meaningful likelihood of materially impairing the court's ability to conduct a fair trial" and applied to "extrajudicial statements and conduct intended to influence public opinion or the jury regarding the merits of the case" (Opinion:18; Order:2-3).

This court fully appreciated the constitutional conflict posed. Indeed, the first sentence of the "analysis" section of the Opinion stated: "The imposition of a gag order demands that the Court balance two competing constitutional rights, specifically a trial participant's right to free speech under the First Amendment and a criminal defendant's right to a fair trial under the Sixth Amendment" (CRDE#978:7).

As this court noted, the Sixth Amendment right to a fair trial is "the most fundamental of all freedoms," and "when First Amendment claims impinge upon the Sixth Amendment right to a trial by an impartial jury, asserted First Amendment interests must yield to the 'most fundamental of all freedoms,' the right to a fair trial for the accused." *News-Journal Corp. v. Foxman*, 939

³ Page 5 of this seven page order, containing much of the court's analysis, is not included in the record.

F.2d 1499, 1512 (11th Cir.1991) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)) (Order:7).

The court's Opinion and Order were gag orders on trial participants, not on the press, and are evaluated under "a less stringent standard," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991), but nevertheless require that the court find a substantial likelihood that extrajudicial comments by trial participants would prejudice the court's ability to conduct a fair trial.

This court made the findings under the more rigorous standard of "substantial likelihood," rather than the lesser standard of "reasonable likelihood" adopted by some circuits. See, Opinion:10-11). The court recited its findings and reached a conclusion (Id.:15):

Based on these findings ["that local and national media coverage ... has been significant" and "has only intensified as the trial has progressed," "that unrestricted statements by trial participants would only serve to increase ... publicity," and "that publication of extrajudicial statements and actions by the trial participants may very well taint the unsequestered jury"], the Court concludes that there is a substantial likelihood that the extrajudicial comments and conduct by the trial participants in this case would prejudice the Court's ability to conduct a fair trial.

After reciting the careful consideration given to the change of venue issue, the extensive voir dire, and the daily admonishment to the jury not to read or listen to anything regarding the trial, the court make a striking, and relevant, finding. "The Court finds, however, that not even the most emphatic instruction or the most searching voir dire question can shield the jurors from banner headlines or ex parte statements and conduct by witnesses or counsel that would undoubtedly receive extensive coverage." (Id.:17)

Basulto moved for a stay pending appeal from these orders, which was denied by Order entered on April 16, 2001 (CRDE#1163). In contrast with the finding that Basulto would suffer no irreparable harm, the court found that:

Defendants will suffer substantial harm from the stay of these Orders. The local press and broadcast media's daily coverage of this trial has been extensive, since the trial commenced on November 27, 2000. Allowing Witness Basulto to comment about his testimony or his version of the facts in this case is certain to draw further press and media attention. Regardless of the Court's daily instruction to the jury not to read or listen to anything in the media regarding this case, the jurors' best efforts to adhere to these daily instructions would be powerless against a banner headline, placed above the fold of a local newspaper, or an advertisement for a local news segment on the television or radio. The Court simply cannot run the risk of prejudicing Defendants by having the jury exposed to statements about the facts of this case, from outside the courtroom. Such exposure would be a veritable sacrifice of Defendants' Sixth Amendment rights to a fair trial.

(Id.:4-5).

The question now before the court is whether journalists paid by the government to participate in foreign propaganda to further regime change in Cuba created the same likelihood of prejudice to Mr. Labañino's rights. This question was not before the court because Defendants did not learn that this was the fact until long after trial concluded. As more and more information is wrested from the government in Freedom of Information Act litigation,⁴ it has become obvious that many journalists were paid by the government to participate in its propaganda campaign and wrote incendiary articles published in the Miami media market that commented on facts in issue, including outright fabrication, and on Defendants' guilt of the charges on which they were being tried.

If the tools available to the court were inadequate to protect the jury, and in turn the Defendants, from the prejudicial effect of this media coverage when generated by the words or conduct of "trial participants," defined to include everyone on the extensive witness lists

⁴ Much of this information has been filed in *Gerardo Hernandez v. United States*, Case No. 10-21957-Civ-LENARD and Mr. Labañino will file a motion to adopt the pertinent pleadings.

provided by the parties, there is no rational basis to conclude that the jury would not have been tainted by the media avalanche precipitated by the government-paid journalists.

Mr. Labañino submits that if the court were to add to the findings recited in its prior orders, the finding that the government paid journalists in the Miami media market to participate in its propaganda effort, never denied by the government in this proceeding, it would be clear that he is entitled to the relief he seeks.

Respectfully submitted,

S William M. Norris

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Supplemental Memorandum was filed via the ECF system this 22nd day of October, 2013, and served on all counsel of record by that means.

S William M. Norris

William M. Norris