

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against-

JUAN ORLANDO HERNANDEZ,

Defendant.

15 Cr. 379 (PKC)

NOTICE OF MOTION

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PLEASE TAKE NOTICE THAT, upon the accompanying Memorandum of Law, dated March 22, 2024, Defendant Juan Orlando Hernandez will move this Court, before the Honorable P. Kevin Castel, on a date and time convenient for the Court, at the United States Courthouse for the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, for an Order granting Mr. Hernandez's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

Dated: March 22, 2024
New York, New York

Respectfully submitted,

/s/

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MEMORANDUM OF LAW IN SUPPORT OF JUAN ORLANDO HERNANDEZ'S
MOTION FOR A NEW TRIAL UNDER RULE 33 OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

We respectfully Submit this memorandum of law in support of Juan Orlando Hernandez's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

PRELIMINARY STATEMENT

Juan Orlando Hernandez seeks a new trial under Rule 33 of the Federal Rules of Criminal Procedure for two reasons. *First*, the government's expert witness, DEA Analyst Jennifer Taul, misled the jury by testifying that cocaine trafficking through Honduras went **up** during the Presidency of Juan Orlando Hernandez, when, in fact, it went **down**. Instead of correcting that testimony, the government emphasized it during its rebuttal summation. *Second*, Mr. Hernandez's trial was improperly held in the Southern District of New York, even though under 18 U.S.C. § 3238, it should have been held in the Southern District of Florida, the district to which he was first brought, upon being extradited from Honduras.

ARGUMENT

Upon a defendant’s motion, a court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. The test on a Rule 33 motion “is whether it would be a manifest injustice to let the guilty verdict stand.” *United States v. Bell*, 584 F.3d 478, 483 (2d Cir. 2009) (quotations omitted). In applying this test, the district court must examine the totality of the circumstances. *Id.* As the Second Circuit has explained, on a motion for a new trial, “[a]n objective evaluation is required. There must be a real concern that an innocent person may have been convicted. It is only when it appears that an injustice has been done that there is a need for a new trial ‘in the interest of justice.’” *Id.* (citation omitted).

I. The Government’s Expert Witness, DEA Analyst Jennifer Taul, Misled the Jury as to Issues Material to Mr. Hernandez’s Guilt and then Government Emphasized that Testimony in its Rebuttal Summation

As detailed in the March 8, 2024 letter submitted by Mr. Hernandez, the government argued in its rebuttal summation: “And you heard from the government’s expert witness how the volume of cocaine through Honduras went up during the defendant’s presidency, from 2014 through 2022.” Tr. 1756:19-21.

The government was referencing trial testimony by DEA Analyst Jennifer Taul, who the Court qualified as an expert in cocaine manufacturing processes, as well as drug trafficking routes and pricing. Ms. Taul testified as follows:

Q: Well, just putting COVID aside because that was – so let’s do between – because you raise a good point. Between 2014 and let’s say 2019, did cocaine trafficking through Honduras go up or down?

A: Up.

Q: You say it went up between 2014 and 2019?

A: I believe so.

Q: What's your basis for saying that?

A: There are statistics reported by a number of different bodies, both private and government, DEA reporting mostly.

Tr. 614:12-21.

We believe that the testimony offered by DEA Analyst Jennifer Taul was false or at least severely misleading, that the government had reason to know it was not accurate, and should have corrected it, not emphasized it during summations.

In *United States v. Geovanny Fuentes Ramirez*, 15-CR-379 (PKC), which was tried by one of the prosecutors in this case and presided over by this Court, the government called Dr. Dario Euraque, who was qualified by the Court as an expert in Honduran history and its social and political systems. On both cross-examination and redirect examination, Dr. Euraque testified in a manner that contradicts Ms. Taul's testimony and the argument made in the government's rebuttal summation in this case. On cross-examination in *Ramirez*, Dr. Euraque testified as follows:

Q: Over the past eight years or seven years that President Hernandez has been in power, there's been a substantial reduction in the amount of narco-trafficking through Honduras, isn't that right.

A: Correct.

Ramirez Tr. 628:17-22. Dr. Euraque then testified that:

Q: The number went from 87 percent of cocaine travelling from South America up to the United States, stopping in Honduras, to now, more or less, let's call it, being 5 percent?

A: About.

Q: An 82 percent reduction, at least.

A: Pretty much.

Ramirez Tr. 629:10-15.

On redirect examination of Dr. Euraque in *Ramirez*, the government did not dispute the reduction, but tried to attribute some of it to other causes, such as the efforts of the DEA:

Q: Professor Euraque, you just testified about the reduction in narcotics trafficking from Honduras, is that correct?

A: Yes, I did.

Q: Can you say whether that's attributable to the efforts of Juan Orlando Hernandez or the efforts of the DEA?

A: Can you repeat the question?

Q: Sure. Can you say whether that reduction is attributable only to Juan Orlando Hernandez?

A: Oh, I don't think it's attributable only to Juan Orlando Hernandez.

Q: Could it also be attributable to efforts by the DEA?

A: Yes.

Q: Other organizations?

A: Yes.

Ramirez Tr. 636:6-20.

The government declined to call Dr. Euraque at this trial to avoid him repeating this damaging testimony. While that was the government's prerogative, it was improper to rely on contradictory and irreconcilable testimony from Ms. Taul and argue it to the jury.

As we previously noted to the Court, there are several International Narcotics Control Strategy Reports (INCSR) that document the reduction in the flow of cocaine through Honduras during Mr. Hernandez's presidency. Pursuant to Section 489 of the Foreign Assistance Act of 1961, those reports are required to be submitted by the President to Congress on March 1 of every year and must include, inter alia, "information from the Drug Enforcement

Administration.” Several of the published INCSR reports on Honduras contradict Ms. Taul’s trial testimony, as follows:

INCSR 2016 Report on Honduras: “According to U.S. estimates, the volume of cocaine that transited Honduras to the United States over this period decreased by 40 percent from 2014.”¹

INCSR 2017 Report on Honduras: “In 2016, the U.S. government estimated that the number of aircraft suspected of smuggling cocaine into Honduras decreased by approximately 30 percent from the previous year, to 35 in total.”²

INCSR 2020 Report on Honduras: “The United States estimates approximately 4 percent, or 120 metric tons (MT), of cocaine shipments from South America made a first stop by air or by sea in Honduras in 2019.”³

INCSR 2022 Report on Honduras: “During the first nine months of 2021, the Government of Honduras reported seizing 14.2 metric tons (MT) of cocaine – four times more than all seizures in 2020.”⁴

Mr. Hernandez requested that the Court reopen the record and instruct the jury as follows: “The volume of cocaine through Honduras went down during the defendant’s Presidency, from 2014 through 2022.” The Court denied the motion.

In addition to the four INCSR reports cited in Mr. Hernandez’s March 8 letter, further research supports the fact that cocaine trafficking through Honduras went down during Mr. Hernandez’s Presidency. For example:

INCSR 2015 Report on Honduras: “In 2014, the U.S. government estimated that sixty percent of cocaine smuggling flights that departed from South America first landed in Honduras – a decline from 75 percent of such flights in 2013.”⁵

¹ <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2016/vol1/253271.htm>

² www.state.gov/wp-content/uploads/2019/04/2017-INCSR-Vol.-I.pdf

³ www.state.gov/wp-content/uploads/2020/06/Tab-1-INCSR-Vol.-I-Final-for-Printing-1-29-20-508-4.pdf

⁴ www.state.gov/wp-content/uploads/2022/03/22-00767-INCSR-2022-Vol-1.pdf

⁵ <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2015/vol1/238978.htm>

Update on Drug Situation in Central America for Central Dublin Group Meeting (11/7/2018): “According to U.S. government estimates, the volume of cocaine transiting Honduras in 2017 was lower than in 2016, and the number of aircraft suspected of smuggling cocaine into Honduras from South America decreased for the second-consecutive year.”⁶

Remarks by President Trump at the Israeli American Council National Summit 2019 (12/8/2019): “And we’re delighted to have with us President Juan Orlando Hernandez of Honduras and the First Lady of Honduras. And I have to tell you – thank you, sir – that President Hernandez is working with the United States very closely. You know what’s going on on our southern border. And we’re winning after years and years of losing. We’re stopping drugs at a level that has never happened.”⁷

Bureau of International Narcotics and Law Enforcement Affairs: Honduras Summary: “Since 2010, Honduras has had one of the highest murder rates in the world. However, official statistics from the Honduran Observatory on National Violence show Honduras’s homicide rate decreased to 42.8 per 100,000 in 2017, a 50 percent reduction from its peak of 86.5 per 100,000 in 2011. This represents a further 25 percent decrease from 2016.”

* * *

“As part of this effort, the Honduran government is implementing a well-defined road map to overhaul and professionalize the Honduras National Police (HNP). Since April 2016, the Special Commission for the Purging and Restructuring of the Honduran National Police (Purge Commission) has recommended the dismissal or provisional suspension of just over 6,000 corrupt, criminal, or otherwise ineffective police officers.”⁸

⁶ <https://data.consilium.europa.eu/doc/document/ST-13783-2018-INIT/en/pdf>

⁷ <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-israeli-american-council-national-summit-2019/>

⁸ <https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/honduras-summary/>

In addition to these reports documenting the decrease in cocaine trafficking through Honduras under President Hernandez, the DEA directly praised Mr. Hernandez in multiple tweets:





The available evidence suggests that Ms. Taul’s testimony that between 2014 - 2019, cocaine trafficking through Honduras went “up” was false. If the prosecution knew or should have known of this false testimony prior to the conclusion of the trial and did not correct it, the conviction must be set aside where there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” The knowing introduction of false testimony will lead to “virtually automatic” reversal. The standard applicable to the knowing introduction of false testimony serves the dual purposes of discouraging prosecutorial misconduct and providing relief from an unfair conviction. *See United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *United States v. Stewart*, 433 F.3d 273, 297 (2d Cir. 2006) (internal citations omitted).

The use of false or perjured evidence is improper whether the government affirmatively elicits the false evidence or whether it merely “allows it to go uncorrected.” *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (reversing conviction where prosecution failed to correct witness’s false testimony that he had no agreement with the prosecution). Here, the government doubled down on Ms. Taul’s misleading testimony when it argued it to the jury, which magnified the issue. *See United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977) (reversing conviction where government “not only permitted false testimony of one of its witnesses to go to the jury, but argued it [the false testimony] as a relevant matter for the jury to consider.”).

The government could not have believed that Mr. Taul’s testimony on this issue was accurate and should have (a) corrected it on redirect examination and (b) refrained from arguing it to the jury during its rebuttal summation.

If the government has any evidence at all – including the supposed “DEA reporting” relied on by Ms. Taul, the government should now present that material to the Court. Alternatively, the government should submit an affidavit from Ms. Taul indicating exactly what “statistics reported by a number of different bodies, both private and government, DEA reporting mostly” she was relying on during her trial testimony or the government should present that material to the Court. We have been unable to locate any such statistics or reports and do not believe any exist, but the government may have access to additional, non-public information. The government should also explain why Ms. Taul’s testimony contradicts the testimony of the government’s prior expert witness, Dr. Dario Euraque.

II. Mr. Hernandez’s Trial Was Improperly Held in the Southern District of New York, Even Though Under 18 U.S.C. § 3238, It Should Have Been Held in the Southern District of Florida, the District to Which He Was First Brought, Upon Being Extradited from Honduras

During trial, the government asked the defense to sign a stipulation, entered into evidence as GX 1010, that “on April 21, 0222, Juan Orlando Hernandez, the defendant, was flown from Tegucigalpa, Honduras, to Westchester County Airport, where he was first brought into the United States.” I signed the stipulation, not having any reason to question that factual assertion.

It has now come to my attention that the stipulation was inaccurate, because the plane carrying Mr. Hernandez first landed in Ft. Lauderdale, Florida, where Mr. Hernandez was removed from the plane. He was then reboarded onto the plane, which then carried him to Westchester. The source of my information is Mr. Hernandez and a news article that was provided to me by others:



La aeronave, una Beechcraft Super King Air 350, con registro N430JT, despegó desde Fort Lauderdale, Florida, Estados Unidos. Está previsto que arribe a Fort Lauderdale, en su vuelo de regreso, a alrededor de las 6:21 p.m.

Hernández será trasladado esta misma noche hacia Nueva York, adonde permanecerá recluso antes de presentarse ante un juez en el primer paso de su caso judicial en aquel país, mañana viernes.

I understand that the news article states:

“Aircraft, a Beechcraft Super King Air 350, with N430JT registration, took off from Fort Lauderdale, Florida, United States. He is scheduled to arrive in Fort Lauderdale, on his return flight, at around 6:21 p.m. Hernández will be transferred tonight to New York, where he will remain detained before appearing before a judge in the first step of his judicial case in that country, tomorrow, Friday.”

Under 18 U.S.C. § 3238, “The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.”

Based on information and belief, Mr. Hernandez was first brought to the Southern District of Florida. The Superseding Indictment does not contain any allegation that any part of the offenses were committed in the United States. Accordingly, venue in the Southern District of New York was improper and the indictment should be dismissed for that reason. *See United States v. Holmes*, 670 F.3d 586 (4th Cir. 2012) (collecting cases analyzing § 3238).

Conclusion

For the reasons set forth herein, the Court should grant Mr. Hernandez a new trial.

Dated: March 22, 2024

Respectfully submitted,

/s/

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