**No.**

**In the**
**SUPREME COURT of the UNITED STATES**
**October Term, 2023**

**JUAN ANTONIO HERNANDEZ ALVARADO, AKA Tony Hernandez,**

***Petitioner*,**

***against***

**UNITED STATES OF AMERICA, GEOVANNY FUENTES RAMIREZ, AKA SEALED DEFENDANT 1,**

***Respondents.***

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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# PETITION FOR A WRIT OF CERTIORARI

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Dated: New York, New York
June 10, 2024

## QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of federal law, New York's "no-contact" rule, which prohibits an attorney in a case from communicating with a party he or she knows to be represented by counsel, is violated when the attorney *should know* the party is represented by counsel.

2. Whether a defendant waives his right to counsel when, after saying he wants to cooperate with law enforcement but first wants to speak with his lawyer, he is told he will be taken to jail without being interviewed because agents have been unable to reach the attorney, and replies by saying he wants to begin cooperating immediately, and is then interviewed without counsel present.

3. Whether a trial court ensures a defendant receives a trial by an impartial jury and due process when it fails to investigate information that a sitting juror noticed he was photographed outside court under circumstances that raised safety concerns, and discussed this with another juror.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the following individuals were parties to the original proceeding before the district court that issued the judgment we petition the Court to review: Victor Hugo Diaz Morales, AKA Victor Hugo Villegas Castillo, AKA Rojo; Mario Jose Calix Hernandez; Mauricio Hernandez Pineda; Amado Beltran Beltran, AKA Don Amado; Otto Rene Salguero Morales, AKA Otto Salguero; Ronald Enrique Salguero Portillo, AKA Ronald Salguero; and Fernando Felix Rodriguez, AKA Don Fernando.

## DIRECTLY RELATED CASES

1. United States District Court for the Southern District of New York

   *United States v. Juan Antonio Hernandez Alvarado*, S2 15 Cr. 379 (PKC)

   Judgment entered March 31, 2021

2. United States Court of Appeals for the Second Circuit

   *United States v. Juan Antonio Hernandez Alvarado,* No. 21-885, Summary Order entered January 22, 2024, Petition for Panel Rehearing, denied March 12, 2024

   *United States v. Diaz Morales (Ramirez)*, No. 22-334, Summary Order entered January 22, 2024

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## TABLE OF AUTHORITIES

Petitioner Juan Antonio Hernandez Alvarado respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 22, 2024.

## OPINIONS BELOW

The opinion of the Second Circuit dated January 22, 2024, attached hereto as Appendix A, pages 1a – 28a, is reported at *United States v. Morales*, 2024 WL 220402 (2d Cir. 2024). The order of the Court of Appeals of March 12, 2024, denying Panel rehearing, attached hereto as Appendix B, page 56a, is unreported.

## JURISDICTION

This petition for certiorari is being filed within 90 calendar days of the order denying rehearing, March 12, 2024. (The Summary Order affirming the judgment was dated January 22, 2024.) This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28, United States Code, section 530(B) provides:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
>
> (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

New York Rule of Professional Conduct 4.2(a), 22 N.Y.C.R.R. § 1200, provides:

> Communication With Person Represented By Counsel
>
> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

## STATEMENT OF THE CASE

### A. The District Court Proceedings - Conviction and Sentence

Petitioner Juan Antonio Hernandez Alvarado ("Mr. Hernandez"), a former member of the Honduran Congress and brother of the former President of Honduras, was convicted after trial of conspiring to import cocaine into the United States, in violation of 21 U.S.C. § 963; using and conspiring to use machineguns in furtherance of that conspiracy, in violation of 18 U.S.C. § 924(c) and (o); and making false statements to law enforcement, in violation of 18 U.S.C. § 1001. He was sentenced principally to a life term of imprisonment followed by a mandatory consecutive 30-year term of imprisonment.

This petition concerns three decisions by the United States Court of Appeals for the Second Circuit. First, the Second Circuit affirmed the district court's failure to suppress a statement made by Mr. Hernandez after being arrested, that the government subsequently introduced and relied upon at trial, despite the fact that it was obtained in violation of the "no-contact" rule, which bars an attorney (including a prosecutor) from speaking with a party he knows to be represented by counsel.

Second, the Court affirmed the district court's decision that the statement was not obtained in violation of Mr. Hernandez's right to counsel, as guaranteed by the Fifth and Sixth Amendments.

Third, the Second Circuit found the district court did not violate Mr. Hernandez's rights to trial by an impartial jury and due process, guaranteed by the Sixth and Fifth Amendments, respectively, when it failed to investigate information that two jurors improperly experienced and communicated about an out-of-court incident. The court dismissed one of them, an alternate juror, with the consent of the parties. But it completely failed to investigate whether the impartiality of the second, a sitting juror, was affected by the incident and conversation with the alternate juror.

**1. The post-arrest statement**

**a. Factual background**

In October 2016, Attorney Manuel Retureta represented Mr. Hernandez at a proffer with prosecutors (including AUSA Matthew Laroche) and law enforcement personnel. At the conclusion of the meeting, the prosecution team said they did not believe Mr. Hernandez had been honest during the session.

On May 19, 2017, Retureta sent AUSA Laroche an email requesting a telephone call "regarding Tony Hernandez," and Laroche replied and suggested a convenient time. In October 2017, Special Agent Fraga, who attended the proffer, exchanged text messages with Retureta about meeting for lunch to discuss Mr. Hernandez, among other issues.

On November 23, 2018, DEA agents, including one who had attended the proffer, arrested Mr. Hernandez at Miami International Airport, where he was changing planes to return to Honduras. Mr. Hernandez was already indicted.

At approximately 11:10 a.m., agents transferred Mr. Hernandez to a private room. DEA Special Agent Sandalio Gonzalez asked Mr. Hernandez for the code to unlock his iPhone, which he provided. Gonzalez explained that Mr. Hernandez was under arrest for drug trafficking and making false statements to federal officials, and could cooperate with law enforcement or not, or plead guilty to the charges or not.

The defendant responded, in substance, that he wanted to cooperate with the agents, "and specified that he told *his lawyer* over a year ago, that he wanted to cooperate and he (lawyer) told him that he would speak with prosecutors, but never notified HERNANDEZ-Alvarado." (Emphasis added). SA Gonzalez "asked HERNANDEZ-Alvarado if he presently had a lawyer and HERNANDEZ-Alvarado stated that he had not spoken to 'Manny' in over a year *but would like to call him first*." (Emphasis added)[1].

Agent Gonzalez contacted AUSAs Emil Bove and Laroche who gave him permission to call Retureta. Gonzalez placed calls to Retureta at a number in Washington D.C., at 11:36 a.m. and 11:38, with no answer. He did not leave messages.

Gonzalez consulted AUSAs Bove and Laroche again after these unanswered calls. They told him to stop any communications. Gonzalez informed Mr. Hernandez that he was to be processed and taken to jail without an interview, and Mr. Hernandez responded that he wanted to begin cooperating. Gonzalez placed

[1] At trial, SA Gonzalez testified that "Mr. Retureta" was "an attorney that the defendant asked that I call prior to him cooperating." (A-751-52.)

another call to Retureta at 11:54, with no answer. Gonzalez asked Hernandez again, with input from the AUSAs, if he "presently had legal representation," to which Hernandez replied that he "did not know."

Gonzalez informed Mr. Hernandez that if he had an attorney, he would be entitled to consult that attorney prior to cooperating, but that if he wanted to speak with agents he would have to agree to this "voluntary participation" in a recorded interview. He also said that Mr. Hernandez was not being tricked or pressured, and agreeing to this interview would not result in his release or "avoid him going to jail later that day."

At about 12:20 pm, Mr. Hernandez was taken to the DEA office, processed, and, at 12:37 p.m., given *Miranda* warnings in Spanish. He signed the advice of rights forms and agreed to speak to the agents. Special Agent Gonzalez told the defendant, "[A]s I told you, you can add a lawyer to the process at any time."

The agent began by saying he wanted to repeat what Mr. Hernandez had told him earlier, to wit: "That you wish to proceed and make a statement and talk with us. You do not have legal representation today … now. Huh … You will be talking to a lawyer in the future, but you wish to start this process now." Mr. Hernandez replied, "That's right. I want to start." Gonzalez noted, "And we called Mr. Retureta several times but he did not answer. But you still wish to go ahead." Mr. Hernandez answered, "I do."

Several times during the interrogation, Mr. Hernandez described conversations he had with Retureta ("Manny") after the proffer in October 2016. He

said that, "what I was discussing with Retureta was that I was prepared to come over here in case you all wanted to continue having some clarifications or for me to continue answering questions from you all. And at that time, why, the lawyer told me: 'Let's wait; *they will let us know*.'" (emphasis added.) Mr. Hernandez said he had last talked to Retureta about one year earlier, to which Gonzalez replied, "Then he is not your lawyer today … until you talk to him again." Noting he had "lost touch with him," Mr. Hernandez said, "Let's hope that he …that he will join the process."

Gonzalez warned him that he could not expect to "walk free today" by minimizing his relationships with drug traffickers. Mr. Hernandez replied, "Yes, that's what I would tell Manny. 'Manny,' I says to him, 'how did I participate in those comings and goings, in whatever. I don't know. You tell me…'"

Gonzalez said he understood if Mr. Hernandez was afraid of speaking about certain people. Mr. Hernandez replied that some traffickers who had been extradited to the United States had threatened that someone in his family would pay for what his brother, the Honduran President, "did by sending them over here." He continued, "Yes, that's why when I was telling Manny: 'Manny, people know because they went on the media saying that I had come over.' That they said I never came."

Accused by Gonzalez of not being forthcoming about the traffickers with whom he had worked, Mr. Hernandez said did not want to "invent" the names of people and say he had worked with them. He explained, "That's why, since the last

time, I … 'I want to know,' I says to Manny. 'What can I support? What I am being accused of? To be able to …'"

At approximately 2:41 p.m., after the conclusion of the interrogation, Retureta sent an email to SA Fraga stating, "I understand you and yours are busy with Tony Hernández?" At about 2:53, Retureta sent an email to AUSA Laroche stating, "Please note that I continue to represent [the defendant]. Please make any necessary inquiries through me as he does not wish to speak without defense counsel present." At approximately 3:17, Retureta emailed SA Gonzalez, stating, "I understand Tony Hernandez was arrested in Miami. You involved? Is Hernandez detained in Miami? Please note that I continue to represent him and I ask that there be no questioning outside my presence."

**b. The district court's decision**

The district court denied Mr. Hernandez's motion to suppress the statement. It disregarded the argument alleging violation of the no-contact rule, based on *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), explaining, "New York follows a different rule," and New York Disciplinary "Rule 4.2(a) requires actual knowledge of the fact in question rather than reasonable belief." The court held the government did not have such actual knowledge that Retureta represented Mr. Hernandez.

The court also rejected the Fifth and Sixth Amendment arguments, finding there was "no unambiguous invocation on the right to counsel," and there was a "knowing and voluntary and intelligent waiver of *Miranda*." (*A-216*.)

**2. The out-of-court incident and conversation between jurors**

**a. Factual background**

During the testimony of a witness, the court received a note from an alternate juror, "Juror 14," stating:

> Dear Judge Castel:
>
> Given the uncertain outcome of this trial and the severe consequences of a negative outcome for both the defendant as well as the Honduran government and the country's drug traffickers it occurred to me that it would be in the interests of several parties to interfere with the jury either in the form of persuasion or worse. From what I have seen in the trial thus far, the traffickers have the means, money, and motive to try something nefarious. What, if anything, has been discussed on the government's side to assure the jury's safety?
>
> This in no way affects my impartiality, nor have I mentioned it to the other jury members. I thank you for your consideration.

The note continued on the reverse side of the original note:

> Since writing this note yesterday, myself and *at least one other juror* noticed we were photographed at close range just outside the courthouse by what appeared to be an individual with no media logo or identification. The photo was taken on a cellphone.

(Emphasis added.)

Overnight, the government and defendant conferred. They advised the court that they agreed the juror should be dismissed. However, defense counsel asked the court to enquire regarding the second juror who observed the individual taking cell phone photos, and the discussion between the two jurors regarding their safety

concerns; defense counsel specifically asked the court to question Juror 14 regarding his communications with the other juror.

**b. The district court's denial of the request to investigate**

The court denied the request, saying there was "no indication that he discussed his theories about somebody trying something nefarious with any other juror." The court said it did not wish to conduct an inquiry and create the seeds of concern where none existed. The court dismissed the juror who wrote the note, but did not ask him about the second or any other jurors.

## B. The Appeal and Petition for Rehearing in the Second Circuit

Mr. Hernandez appealed to the Second Circuit and argued that the district court erred when it denied the motion to suppress the statement. The Second Circuit declined to decide whether New York's no-contact rule applied when "attorneys merely *should have known* that a witness was represented by counsel," as there was "insufficient evidence in the record to support even that form of constructive knowledge here." (App[2]. at 9a.) While the prosecutors knew Retureta had represented Mr. Hernandez at the "proffer having to do with events underlying the present indictment," they had not heard from him in roughly a year and a half. Further, Mr. Hernandez said "he had lost touch with Retureta and did not know if he had any legal representation." Thus, The Second Circuit could not conclude the

[2] References to "App." are to the Appendix to this petition.

prosecutors "should have known better than [Mr. Hernandez] himself whether he was represented by Retureta." (*Id.*)

As to the related, right to counsel, issue, the Second Circuit found that, "[a]ssuming for the sake of argument that [Petitioner]'s statement that he would like to call Retureta – in response to the question of whether he had a lawyer – was a clear and unequivocal invocation of his right to counsel, he then voluntarily reinitiated conversation with the DEA agents." (App. at 10a.) The Court found he, and not the agents, initiated the questioning when, "after the agents told him he would be processed without an interview, he told the agents – without being asked any further questions – that he wanted to speak to them 'at th[at] moment and start cooperating.'" (*Id.*) The Panel noted he then signed a waiver of his *Miranda* rights, voluntarily and knowingly waiving his right to counsel. (*Id.*)

Mr. Hernandez also argued[3] that the district court's refusal to further investigate the jurors' communications deprived him of his right to be tried by an impartial jury and due process. The Second Circuit found "the note did not evidence any jury problems beyond the alternate juror's own individual concerns about 'nefarious' traffickers." (App. at 14a.) Further, "Nor does the note's additional mention of 'at least one other juror notic[ing]' being photographed suggest that any discussion took place among the jury or evidence any other improper jury communications." (App. at 15a.) The Second Circuit said "questioning the alternate juror outside the presence of the rest of the jury as to whether he discussed his

[3] Mr. Hernandez also raised a fourth ground not before the Court.

concerns with others, before dismissing him," might have "provided additional assurance that the jury had not been tainted in any way without sowing unnecessary concerns." (*Id.*) However, The Second Circuit concluded it was not an abuse of discretion not to do so, nor outside the "broad flexibility" afforded a district court to deal with such matters. (*Id.*)

Mr. Hernandez sought panel rehearing as to all three issues, but his application was denied. (App. at 56a.)

## REASONS FOR GRANTING THE PETITION

### I. THE SECOND CIRCUIT ERRED WHEN IT HELD THAT PROSECUTORS DID NOT HAVE CONSTRUCTIVE KNOWLEDGE THAT MR. HERNANDEZ WAS REPRESENTED BY COUNSEL AND THEREBY FAILED TO FIND SUCH CONSTRUCTIVE KNOWLEDGE SUFFICIENT TO ESTABLISH A VIOLATION OF THE NO-CONTACT RULE AS A MATTER OF FEDERAL LAW. GRANTING CERTIORARI WILL ALLOW THE COURT TO DECIDE THIS ISSUE OF FIRST IMPRESSION.

Title 28, United States Code, section 530B(a) provides, "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Section 530B(b) states, "The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section."

The "no-contact" rule of New York's Code of Professional Responsibility, promulgated in 2009, states:

> Communication With Person Represented By Counsel
>
> > (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

N.Y. Rules of Prof'l Conduct 4.2(a), 22 N.Y.C. R.R. § 1200 ("Rule 4.2").

As the Second Circuit noted, while the no-contact rule is a New York attorney disciplinary rule, interpretation of the rule "'as it applies to federal criminal law practice should be and is a matter of federal law.'" (App. at 9a) (quoting *Grievance Comm. for S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 645-46 (2d Circuit 1995).

Here, Mr. Hernandez argued the district court applied the wrong standard when it held that prosecutors did not have actual knowledge that he was represented by counsel, as the rule is violated when an attorney knows *or should know* a party is represented by counsel. The Second Circuit declined to resolve the issue – a matter of first impression under federal law - because it found "insufficient evidence in the record to support even that form of constructive knowledge here." (App. at 9a.)

Thus, based on its cramped reading of Rule 4.2, the Second Circuit declined to address an issue with profound consequences for both Mr. Hernandez and others represented by counsel in federal criminal cases, for which there is no federal precedent.

The commentary to Rule 4.2 demonstrates it should be applied broadly:

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

N.Y. R. Prof. Conduct 4.2 cmt. 1.

Comment 3 states the rule applies "even though the represented party initiates or consents to the communication." It also provides, "A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted…" N.Y. R. Prof. Conduct cmt. 3.

Comment 5 describes communications that are permitted, including investigative activities conducted by government lawyers or their agents prior to the commencement of criminal proceedings. However, it notes,

> When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

N.Y. R. Prof. Conduct 4.2 cmt. 5.

Rule 4.2 and the commentary evince a strong intent to prevent exactly what happened here. The government knew Retureta had represented Mr. Hernandez at

the proffer, which concerned the same subject matter as the indictment and intended interrogation, and that he had continued to reach out to them about Mr. Hernandez's desire to cooperate over the following year. They were not told that he no longer represented Mr. Hernandez. One of the first things Mr. Hernandez said to the agent was that, while he wanted to cooperate, he wanted to call his lawyer first. Once the interrogation started, Mr. Hernandez said he hoped his lawyer would join them during it. He described numerous conversations he had had with his lawyer during the interim, including conversations about his willingness and desire to cooperate.

Any ambiguity about Retureta's representation was introduced by the agent. If the government had not spoken with Retureta in a year and a half, and Mr. Hernandez had lost touch with him, that is because the government had decided not to have Mr. Hernandez cooperate, and had not contacted Retureta. Retureta had not had any new information to convey to Mr. Hernandez because the government had not responded to him.

That the prosecutors knew Mr. Hernandez was represented by counsel is most clearly demonstrated by the fact that they initially instructed the agents not to speak to him.

The decision by the Second Circuit renders the no-contact rule unenforceable, at least where an attorney represents a client at a proffer conducted before charges are filed (at which point the attorney can file a notice of appearance). Under the Order, such an attorney would have to constantly advise the government

that the attorney still represents the client, or face the possibility that the government could interrogate the client without counsel present and then claim they no longer "knew," within the meaning of Rule 4.2, that the client was still represented by the attorney.

By granting this petition, the Court would be able to clarify that the no-contact rule in New York state, as applied in a federal prosecution, is violated when a prosecutor questions, or authorizes agents to question, an indicted defendant the prosecutor knows, *or should know*, is represented by counsel.

## II. THE SECOND CIRCUIT ERRED WHEN IT FOUND THAT, EVEN ASSUMING HE UNEQUIVOCALLY INVOKED IT, MR. HERNANDEZ'S RIGHT TO COUNSEL WAS NOT VIOLATED, AS HE WAIVED IT BY REINITIATING CONVERSATION WITH THE AGENT. TO THE CONTRARY, MR. HERNANDEZ RESPONDED TO STATEMENTS BY THE AGENT THAT WERE LIKELY TO ELICIT A RESPONSE FROM HIM.

The record establishes that Mr. Hernandez's statement was elicited within minutes of invoking his right to counsel and in response to a statement by the agent. Yet, the Second Circuit found that, "[a]ssuming for the sake of argument that [Mr. Hernandez]'s statement that he would like to call Retureta – in response to the question of whether he had a lawyer – was a clear and unequivocal invocation of his right to counsel, he then voluntarily reinitiated conversation with the DEA agents." (App. at 10a.) The Second Circuit found he, and not the agents, initiated the questioning when, "after the agents told him he would be processed without an interview, he told the agents – without being asked any further questions – that he

wanted to speak to them 'at th[at] moment and start cooperating.'" (*Id.*) The Second Circuit noted he then signed a waiver of his *Miranda* rights, voluntarily and knowingly waiving his right to counsel. (*Id.*)

Once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Miranda v. Arizona*, 384 U.S. 486, 474 (1966). In *Edwards v. Arizona*, 451 U.S. 477, 485 (1981), the Court found it "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel."

The *Edwards* Court noted, "When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. Further, an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

*Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey,* 494 U.S. 344,

350, (1990); *see also, Minnick v. Mississippi*, 498 U.S. 146, 150-51, 111 S. Ct. 486, 489 (1990).

Mr. Hernandez did not re-initiate the questioning. Rather, he said he wanted to speak to the agents and begin cooperating *after* he had invoked his right to counsel and *in response* to a statement by the agent. This is clear from the context in which the statement was made.

The conversation began with the agent telling Mr. Hernandez what he was charged with, and saying he could cooperate with law enforcement or not, or plead guilty or not (the record does not show the agent said he could fight the charges and go to trial or not). Mr. Hernandez responded that he had told *his lawyer* over a year previously that he wanted to cooperate and would speak with prosecutors. Asked if he presently had an attorney, Mr. Hernandez responded that he had not spoken with "'Manny' in over a year but would like to call him first." (At trial, Gonzalez testified that "Mr. Retureta was "an attorney that the defendant asked that I call prior to him cooperating.")

When his minimal efforts to reach Retureta were unsuccessful, the prosecutors told Gonzalez to cease communications. Gonzalez told Mr. Hernandez that he would be processed and taken to jail without being interviewed, and Mr. Hernandez *responded* by saying that he wanted to begin cooperating.

In the context of the conversation – in which the agent brought up the possibility of cooperation and Mr. Hernandez said he wanted do so after speaking to his attorney- the statement that Mr. Hernandez would be taken to jail without

being interviewed was likely intended to elicit the response it did elicit from Mr. Hernandez; *i.e.*, it was intended to push Mr. Hernandez to revoke his request for counsel. In essence, the agent told Mr. Hernandez: If you want to cooperate, now is the time to do it.

Once Mr. Hernandez invoked his right to counsel (and confirmed that he was represented by counsel), the agents were required to stop speaking to him. Once the right to counsel has attached and been invoked, law enforcement must honor it. This means more than simply that law enforcement cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. *Maine v. Moulton*, 474 U.S. 159, 170-71, 106 S. Ct. 477, 484 (1985). At the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. *Id*.

Instead, they began to muddy the waters by repeatedly asked Hernandez whether he had a lawyer, until, confused by the agents' explanation, and after being prompted by the agent, Mr. Hernandez repeated what the agent said - that he did not have a lawyer *present,* so he did not have a lawyer. Yet, he said, "Let's hope that he …that he will join the process."

The lapse of one year since Mr. Hernandez had spoken to Retureta did not mean that Retureta no longer represented him. Rather, it was due to the fact that

the government had not been in touch with him, and there was nothing to report to Mr. Hernandez.

The agents misled Mr. Hernandez, by saying that because Retureta was not present, he was not Mr. Hernandez's lawyer. The agent repeated this several times, before and during the interview. Gonzalez started the interview saying that because Retureta did not answer his phone, "You do not have legal representation, today ... now." He said that even though Retureta is his lawyer, "he is not your lawyer today … *until you talk to him again*." (Emphasis added.) The agent then elicited a *Miranda* waiver based on these false representations.

Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, which depends in each case, "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Fare v. Michael C.*, 442 U.S. 707, 724-725 (1979).

Because Mr. Hernandez's request for counsel was deliberately ignored, and Hernandez was misled into believing that his lawyer's actual presence had any bearing on his actual representation, any waiver of his right to counsel was not knowing or voluntary.

While a defendant may waive his right to counsel if he reinitiates discussions with law enforcement, the decision must be his and not the product of undue influence. For example, in *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989),

the defendant indicated that he did not want to answer questions and preferred that law enforcement return later. The prosecutor told Campaneria that if he wanted to talk with them, "now was the time to do it."

Under these circumstances, the Second Circuit stated "we cannot say that Campaneria's invocation of his right to remain silent was scrupulously honored." *Id.* While the defendant was clear in this circumstance, "[The prosecutor]'s remark that 'If you want to talk to us, now is the time to do it' was not aimed at resolving any ambiguity in Campaneria's statement, but rather at changing his mind. This is precisely the sort of conduct the prophylactic rule seeks to prevent." *Id.*

This is precisely the case here. The agent did not question Mr. Hernandez to clarify whether Retureta still represented him, but *told* Mr.Hernandez that since his attorney was not present, that he did not have a lawyer. This was clearly intended to change Mr. Hernandez's mind and convince him to waive his *Miranda* rights.

Because Hernandez unambiguously invoked his right to counsel, his subsequent *Miranda* waiver was neither voluntary nor knowing. Granting certiorari will allow the Court to clarify that the right to counsel is violated when government agents do not honor a defendant's invocation of his right to counsel but instead continue to engage him in conversation likely to elicit a response and subsequent waiver.

## III. THE SECOND CIRCUIT ERRED WHEN IT FOUND THE DISTRICT COURT ENSURED MR. HERNANDEZ RECEIVED A TRIAL BY AN IMPARTIAL JURY AND DUE PROCESS WHEN, AFTER DISMISSING AN ALTERNATE JUROR, IT DENIED A REQUEST TO DETERMINE WHETHER ANOTHER JUROR'S IMPARTIALITY HAD BEEN TAINTED IN THE SAME WAY AND WHETHER THE TWO JURORS HAD DISCUSSED THEIR COMMON SAFETY CONCERNS.

During trial, the court received a note from an alternate juror expressing concern for his safety, given the nature of the case, and saying that he and at least one other juror had noticed someone who did not appear to be from the media taking their pictures. The district court granted the request of both parties to dismiss the alternate juror, but denied Mr. Hernandez's request to investigate to determine if the second juror – and perhaps other jurors – had also been impacted.

The Second Circuit found "the note did not evidence any jury problems beyond the alternate juror's own individual concerns about 'nefarious' traffickers." (App. at 14a.) Further, "Nor does the note's additional mention of 'at least one other juror notic[ing]' being photographed suggest that any discussion took place among the jury or evidence any other improper jury communications." (App. at 15a.) The Panel said "questioning the alternate juror outside the presence of the rest of the jury as to whether he discussed his concerns with others, before dismissing him," might have "provided additional assurance that the jury had not been tainted in any way without sowing unnecessary concerns." (*Id.*) However, the Panel concluded it was not an abuse of discretion not to do so, nor outside the "broad flexibility" afforded a district court to deal with such matters. (*Id.*)

A defendant has a constitutional right under the Sixth Amendment to be tried by an impartial jury, "unprejudiced by extraneous influence, and when reasonable grounds exist to believe that the jury may have been exposed to . . . an [improper] influence, the entire picture should be explored. Often, the only way this exploration can be accomplished is by asking the jury about it." *United States v. Moten*, 582 F.2d 654, 664 (2d Cir. 1978) (internal quotation marks and citations omitted) (citing *Remmer v. United States*, 350 U.S. 377, 379 (1956).

Concerns like those here also implicate a defendant's right to due process under the Fifth Amendment. This Court has held, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Thus, a district court has a duty to investigate where there is evidence of juror bias, *United States v. Schwarz*, 283 F.3d 76, 97 (2d Cir. 2002), and upon learning about an unauthorized communication, a trial judge *must* investigate to determine whether a juror's ability to perform her duty impartially has been adversely affected. *United States v. Ruggiero*, 928 F.2d 1289, 1300 (2d Cir. 1991); *see also United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985).

The court's denial of Mr. Hernandez's request to conduct an investigation is hard to understand. The court agreed with the parties and dismissed Juror 14, based on his note indicating he had security concerns because of the nature of the

case, which were heightened when he noticed someone taking his picture who did not appear to be from the media. While the first part of Juror 14's note said he had not communicated his safety concerns to other jurors (prior to being photographed), the second part of the note indicated at least one other juror had also noticed his picture being taken.

Since Juror 14 was aware of this, he must have spoken to "at least one other" juror about it. This was sufficient by itself to require the court to conduct an investigation. It also raised the likelihood that two jurors, sitting in a case like this, and sharing their observations about being photographed by a person who did not appear to be from the media, would have shared their security concerns.

The court was required to determine if the concerns that had justified dismissing Juror 14 made it necessary to also dismiss the other juror. Since Juror 14 said "at least" one other juror had also noticed themselves being photographed, the court should also have tried to determine if there were other jurors similarly affected. But the court conducted no such inquiry.

Further, if the juror or jurors believed the photographer was acting on Mr. Hernandez's behalf, that belief would have tended to compromise the juror's ability to function as a fair and impartial juror. *See United States v. Dutkel*, 192 F. 3d 893, 897 (9th Cir. 1999) ("Where the intrusion is (or is suspected to be) on behalf of the defendant raising the claim of prejudice, the presumption arises automatically because jurors will no doubt resent a defendant they believe has made an improper approach to them.")

Finally, while the court was concerned that an inquiry might have raised "seeds of concern" where none existed, the court could simply have asked Juror 14, who was going to be dismissed anyway, about what discussions he had had with other jurors. While the answer might have raised the need for further questioning, potentially of other jurors, an initial inquiry of Juror 14 would not have had any such potential, negative consequences.

Defense counsel made a clear and timely request for a further investigation that was denied by the court. Consequently, Mr. Hernandez's constitutional rights to be tried by an impartial jury and to due process were violated.

Granting certiorari will allow the Court to clarify that, while a district court is given wide latitude to deal with situations in which a juror's impartiality may be compromised, its discretion is not unlimited, and a court's obligation to ensure a defendant receives a trial by an impartial jury and due process is paramount.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit, and upon such review, the convictions should be vacated, the case should be remanded for further proceedings, and the courts below should be directed to suppress Mr. Hernandez's statement.

Respectfully submitted,

/s/ Jesse M. Siegel
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June 10, 2024

# APPENDIX

## TABLE OF APPENDICES

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21-885-cr (L)
*United States v. Hernandez*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of January, two thousand twenty-four.

**PRESENT:**

**GUIDO CALABRESI,**
**ALISON J. NATHAN,**
*Circuit Judges.*
**SARALA V. NAGALA,**
*District Judge.*

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**United States of America**

*Appellee,*

**v.** **No. 21-885-cr (L),**
**22-334 (Con)**

**Victor Hugo Diaz Morales, AKA Victor Hugo Villegas Castillo, AKA Rojo, Mario Jose Calix Hernandez, Mauricio Hernandez Pineda, Amado Beltran**

**Beltran, AKA Don Amado, Otto Rene Salguero Morales, AKA Otto Salguero, Ronald Enrique Salguero Portillo, AKA Ronald Salguero, Fernando Felix Rodriguez, AKA Don Fernando,**

*Defendants*,

**Juan Antonio Hernandez Alvarado, AKA Tony Hernandez, Geovanny Fuentes Ramirez, AKA Sealed Defendant 1,**

*Defendants-Appellants*.

---

**FOR DEFENDANT-APPELLANT JUAN ANTONIO HERNANDEZ ALVARADO:**

JESSE M. SIEGEL, Law Office of Jesse Siegel, New York, NY.

**FOR DEFENDANT-APPELLANT GEOVANNY FUENTES RAMIREZ:**

JAY S. OVSIOVITCH, Federal Public Defender's Office, Western District of New York, Rochester, NY.

**FOR APPELLEE:**

JACOB H. GUTWILLIG (Jason Richman, Hagan Scotten, *on the briefs*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from judgments of the United States District Court for the Southern District of New York (Castel, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgments of the district court are **AFFIRMED**.

In these consolidated appeals, Defendants-Appellants Juan Antonio Hernandez Alvarado (Hernandez) and Geovanny Fuentes Ramirez (Fuentes Ramirez) appeal from judgments of the United States District Court for the Southern District of New York (Castel, *J.*) convicting them following separate jury trials for their roles in a large-scale conspiracy to traffic cocaine from Honduras into the United States. On March 31, 2021, Hernandez was convicted of conspiring to import cocaine into the United States in violation of 21 U.S.C. § 963, using and conspiring to use machineguns in furtherance of that conspiracy in violation of 18 U.S.C. § 924(c) and (o), and making false statements to law enforcement in violation of 18 U.S.C. § 1001. On February 8, 2022, Fuentes Ramirez was similarly convicted of conspiring to import cocaine into the United States and using and conspiring to use machineguns in furtherance of the

conspiracy, in violation of 21 U.S.C § 963 and 18 U.S.C. § 924(c) and (o). Both were sentenced principally to life imprisonment followed by a mandatory consecutive term of 30 years' imprisonment.

Hernandez and Fuentes Ramirez raise a variety of claims arising from their separate trials. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

## I. Hernandez's Trial

Hernandez advances three claims on appeal that he argues warrant vacating his conviction. First, he argues that statements he made without counsel during a post-arrest interview were wrongly admitted at trial because the interview violated professional ethical rules applying to government attorneys, the Fifth Amendment, and the Sixth Amendment. Second, he argues that improper prosecutorial comments during summation deprived him of a fair trial in violation of due process. And third, he argues that the district court failed to adequately investigate potential juror misconduct or bias after an alternate juror raised concerns about his safety in a note to the court. We consider each argument in turn.

### A. The Post-Arrest Statement

Hernandez was arrested by Customs and Border Patrol agents in 2018 at the Miami International Airport, having already been indicted. Shortly thereafter, he gave a recorded interview without counsel to agents from the Drug Enforcement Administration (DEA), in which he admitted to knowing various drug traffickers in Honduras and receiving offers to work with them but denied involvement in any drug trafficking with them. Hernandez unsuccessfully moved to suppress the interview.

On appeal, Hernandez advances the same arguments for suppression that the district court rejected. He argues that government attorneys directed the DEA agents to interview him without counsel present despite knowing he was represented by counsel, in violation of applicable ethics rules for attorneys, and that the agents interviewed him without counsel despite his invocation of his right to counsel under the Fifth and Sixth Amendments. In an appeal challenging the denial of a suppression motion, we review the district court's factual findings for clear error and its legal holdings *de novo*. *United States v. Stewart*, 551 F.3d 187, 190-91 (2d Cir. 2009).

The no-contact rule generally prohibits an attorney from directly contacting

a party regarding a matter when the attorney knows the party is represented by a lawyer in that matter. *See United States v. Hammad*, 858 F.2d 834, 837 (2d Cir. 1988). In *Hammad*, we held that suppression can be warranted for statements obtained by prosecutors in violation of the no-contact rule. *See id.* at 840.

In addition, the Fifth Amendment provides a right to counsel in custodial interrogations and the Sixth Amendment provides a right to counsel in critical proceedings (including interrogations) after criminal proceedings have commenced. *See Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981); *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). An individual can waive the right to counsel under both amendments, if that waiver is knowing, voluntary, and intelligent. *See United States v. Gonzalez*, 764 F.3d 159, 166 (2d Cir. 2014); *Montejo*, 556 U.S. at 786. Moreover, even after invoking the right to counsel under either amendment, an individual may reinitiate interrogation and then validly waive the right. *See Montejo*, 556 U.S. at 798; *Gonzalez*, 764 F.3d at 166 (citing *Edwards*, 451 U.S. at 485).

Here, after Hernandez told the DEA agents who arrested him that he wished to cooperate, the agents asked him, in Spanish, if he currently had a lawyer. Hernandez replied that he had not spoken in over a year to Manuel Retureta, an attorney who represented him in connection with a proffer to the government that

occurred approximately two years prior, but that he "would like to call him first." Hernandez App'x at 116. After getting permission from two Assistant United States Attorneys (AUSAs), the agents then attempted to call Retureta but were unable to reach him. The agents consulted with the AUSAs again, who advised them not to interview Hernandez at that time. In addition to knowing of Retureta's representation of Hernandez at the earlier proffer, one of the AUSAs had also received an email from Retureta about Hernandez roughly a year and a half before the arrest.

However, after the agents informed Hernandez that they were going to process him and take him to jail without an interview, Hernandez "stated that he wanted to speak with Agents at this moment and start cooperating." *Id.* At that point, the agents again tried unsuccessfully to reach Retureta. They again asked if Hernandez currently had a lawyer, to which he responded that he did not know. With this information, the AUSAs then told the agents to proceed with an interview. The agents advised Hernandez of his rights, Hernandez stated that he understood his rights, and Hernandez read and signed a form waiving his *Miranda* rights before proceeding with the interview.

When the videotaped interview began, the agents confirmed, on the record,

the bottom line of their earlier exchange with Hernandez. One stated, "I just want . . . to repeat here what you told me earlier. That you wish to proceed and make a statement and talk with us." Hernandez App'x at 55. The agent continued: "You do not have legal representation today . . . now. . . . You will be talking to a lawyer in the future, but you wish to start this process now." *Id.* Hernandez then replied: "That's right. I want to start." *Id.* On this record, we agree with the district court that the post-arrest interview should not have been suppressed.

First, admitting statements from the interview did not run afoul of *Hammad*. The relevant rule governing the AUSAs' conduct prohibits a lawyer from communicating about a matter "with a party the lawyer knows to be represented by another lawyer in the matter." N.Y. R. Prof'l Conduct 4.2(a). A comment to the rule clarifies that "know" here means actual knowledge: "This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances." *Id.* cmt. 8; *see also* N.Y. R. Prof'l Conduct 1.0(k) ("'Knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question."). Based on the record of the interactions between the AUSAs, the DEA agents, and Hernandez, as well as statements made by the AUSAs on the record in the suppression hearing, the district court

concluded that the attorneys did not have actual knowledge that Hernandez had legal counsel at the time—a finding with which we see no clear error.

Hernandez cites one case from an intermediate New York appellate court suggesting that, notwithstanding the text of the rule, it can be violated when attorneys merely *should have known* that a witness was represented by counsel. *See In Re Izzo*, 155 A.D.3d 109, 111-12 (N.Y. App. Div. 2017); *but see Grievance Comm. for S. Dist. Of N.Y. v. Simels*, 48 F.3d 640, 645-46 (2d Cir. 1995) (concluding that the interpretation of New York's no-contact rule "as it applies to federal criminal law practice should be and is a matter of federal law"). We do not need to resolve this issue, because there is insufficient evidence in the record to support even that form of constructive knowledge here. The government attorneys knew that Retureta had represented Hernandez in a proffer having to do with events underlying the present indictment, but they had not heard from Retureta regarding Hernandez in roughly a year and a half. And according to Hernandez, he had lost touch with Retureta and did not know if he had any legal representation. Based on these facts, we cannot conclude that the AUSAs should have known better than Hernandez himself whether he was represented by Retureta.

Second, the interview did not violate Hernandez's right to counsel under

the Fifth and Sixth Amendments. Assuming for the sake of argument that Hernandez's statement that he would like to call Retureta—in response to the question of whether he had a lawyer—was a clear and unequivocal invocation of his right to counsel, he then voluntarily reinitiated conversation with the DEA agents. As the district court found, after the agents told him he would be processed without an interview, he told the agents—without being asked any further questions—that he wanted to speak to them "at th[at] moment and start cooperating." Hernandez App'x at 116. It was thus Hernandez, not the DEA agents, who initiated the questioning. The record shows that Hernandez then voluntarily and knowingly waived his right to counsel when he signed a waiver of his *Miranda* rights. *See Montejo*, 556 U.S. at 786-87 (noting that waiver of *Miranda* rights is typically sufficient to waive Sixth Amendment right to counsel). Statements from the interview were therefore properly admitted at trial. *Cf. United States v. Gonzalez*, 764 F.3d at 166-67 (finding that previously invoked right to counsel was subsequently waived when defendant reinitiated conversation with law enforcement).

**B. Prosecutorial Misconduct**

Hernandez takes issue with some of the remarks made by the prosecution

during summation, claiming that the prosecution improperly attacked the integrity and motives of defense counsel before the jury. In seeking a new trial on this alleged prosecutorial misconduct, Hernandez faces a "heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of his right to a fair trial." *United States v. Banki*, 685 F.3d 99, 120 (2d Cir. 2012) (cleaned up). He fails to carry that burden in this case.

"The prosecution and the defense are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence." *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998). Even if the prosecution makes improper comments, we will reverse only when the comments resulted in substantial prejudice, which we evaluate based on "the severity of the alleged misconduct, the measures adopted to cure it, and the certainty of conviction absent the misconduct." *Id.* "[R]arely will an improper summation meet the requisite level of prejudice." *United States v. Daugerdas*, 837 F.3d 212, 227 (2d Cir. 2016) (quotation marks omitted). Finally, where, as here, a party fails to object to the remarks, we review for plain error—which in this context means that we will reverse only if we find "flagrant abuse" that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Carr*, 424

F.3d 213, 227 (2d Cir. 2005) (quotation marks omitted).

On this standard, the prosecution's comments identified by Hernandez do not warrant reversal. The prosecution's comments to the jury that certain arguments advanced by defense counsel were "[w]rong," "just wrong," and "[a]bsolutely false," as well as its comment that "[n]othing that the defense counsel argues now can change the facts that are in evidence," reflect permissible advocacy and argument. Nor did the prosecution overstep by characterizing the defense's attacks on witness credibility and chains of custody for physical evidence as distractions. *See United States v. Williams*, 690 F.3d 70, 75 (2d Cir. 2012) ("[W]e do not think it improper or excessive, without more, for a prosecutor to criticize defense arguments as merely being attempts to 'grasp at straws' or 'focus on distractions.'"); *Carr*, 424 F.3d at 227 ("[T]he government is allowed to respond to an argument that impugns its integrity or the integrity of the case . . . ."); *United States v. Rivera*, 971 F.2d 876, 883 (2d Cir. 1992) (allowing remarks in prosecution's initial and rebuttal summations that defense arguments were "'smoke screens,' game-playing, distractions, and distortions").

This was certainly not "flagrant abuse." *Carr*, 424 F.3d at 227. We thus find no violation of Hernandez's right to a fair trial based on the prosecution's

remarks.

### C. Investigation of Juror Note

During the trial, an alternate juror transmitted a note to Judge Castel in which he expressed concerns about the safety of the jury and whether "it would be in the interests of several parties to interfere with the jury either in the form of persuasion or worse," since "the traffickers have the means, money, and motive to try something nefarious." Hernandez App'x at 768. The note added, "This in no way affects my impartiality, nor have I mentioned it to the other jury members." *Id.* Finally, it contained an additional message on the reverse side apparently added a day later: "Since writing this note yesterday, myself and at least one other juror noticed we were photographed at close range just outside the courthouse by what appeared to be an individual with no media logo or identification. The photo was taken on a cellphone." *Id.* The district court dismissed the alternate juror with the parties' agreement, but, reasoning that the juror had not communicated these concerns to any others and "loathe [sic] to conduct an inquiry which plants the seeds of concern where they may not exist," the court did not pursue further investigation into potential jury intimidation or bias as requested by defense counsel. *Id.* at 775-78.

On appeal, Hernandez argues that failure to investigate this matter further deprived him of his rights to due process and a trial by an impartial jury. "A district court's investigation of juror misconduct or bias is a delicate and complex task." *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003) (internal quotation marks omitted). We review the court's handling of such matters for abuse of discretion, aware that the district court "has broad flexibility in such matters . . . ." *Id.* (quotation marks omitted). In particular, the court must balance its obligation to "investigate and, if necessary, correct a problem" with the need to "avoid tainting a jury unnecessarily." *Id.* at 88. Accordingly, "[i]n this endeavor, sometimes less is more." *Id.* We hold that the district court did not abuse its discretion in handling this matter.

Here, the note did not evidence any jury problems beyond the alternate juror's own individual concerns about "nefarious" traffickers. The alternate juror adhered to the instructions of the court, which informed jurors at the outset as follows: "[I]f it becomes necessary to send the Court a note about something you saw or heard or about any other matter, do not share the content of the note with your fellow jurors." Hernandez App'x at 233. The alternate juror's note explicitly stated that he had not discussed his safety concerns with anyone else.

Nor does the note's additional mention of "at least one other juror notic[ing]" being photographed suggest that any discussion took place among the jury or evidence any other improper jury communications. Hernandez App'x at 768. And questioning jurors about the incident could have unnecessarily magnified the event, causing more harm than good.

Hernandez suggests that the court should have questioned the alternate juror outside the presence of the rest of the jury as to whether he discussed his concerns with others, before dismissing him. This approach could have provided additional assurance that the jury had not been tainted in any way without sowing unnecessary concerns. But it was not an abuse of discretion to decline to adopt that approach, and instead to accept the juror's representation that he had not spoken with anyone about his safety concerns—which the note's mention of the photography incident does not contradict. *See Cox*, 324 F.3d at 87 ("[A] court should generally presume that jurors are being honest."). In dismissing the alternate juror without conducting a further investigation into the rest of the jury, the district court did not exceed the bounds of the "broad flexibility" it is afforded in managing such matters. *Id.* at 86 (quotation marks omitted); *cf. United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (finding no abuse of discretion when

district court declined further investigation of juror note that "did not explain the nature of any discussions [among jurors] or even indicate whether such discussions had taken place"). We therefore reject Hernandez's argument and, having rejected all of his arguments on appeal, will affirm his conviction.

## II. Fuentes Ramirez's Trial and Sentence

Fuentes Ramirez also advances three claims on appeal, broadly speaking. First, he makes several related arguments about the statute of limitations for his charges. He claims that the charges against him were time-barred, that the district court should have instructed the jury on the statute of limitations, and that his trial counsel was constitutionally ineffective for not requesting a specific jury instruction on the issue. Second, Fuentes Ramirez argues that the district court abused its discretion in admitting various pieces of evidence and portions of testimony. And third, he argues that his sentence of life imprisonment is substantively unreasonable. As with Hernandez, we consider each of Fuentes Ramirez's arguments but conclude that none is availing.

### A. Statute of Limitations Arguments

Fuentes Ramirez makes several related arguments concerning the statute of limitations for the charges against him. First, he raises a sufficiency challenge,

claiming that there was not enough evidence at trial for a reasonable jury to conclude that the cocaine trafficking conspiracy he was accused of participating in continued into the limitations period. He argues that the government presented no evidence of acts in furtherance of the conspiracy after 2015, five years before he was indicted. *See* 18 U.S.C. § 3282(a) (providing five-year statute of limitations). He further argues that the conspiracy was abandoned in 2013 after he and co-conspirator Leonel Rivera ceased working together and Rivera began cooperating with the DEA. We review *de novo* a challenge to the sufficiency of evidence and "affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt." *United States v. Yanotti*, 541 F.3d 112, 120 (2d Cir. 2008) (quotation marks omitted). We conclude that is the case here.

As Fuentes Ramirez acknowledges, conspiracy is a continuing offense, for which the statute of limitations does not begin to run until the conspiracy is completed or abandoned. *See United States v. Eppolito*, 543 F.3d 25, 46-47 (2d Cir. 2008). Moreover, Fuentes Ramirez concedes that the government did not need to prove any overt acts for the specific drug conspiracy offense under which he was charged, let alone overt acts within the limitations period. *See United States v.*

*Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980); *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) ("In such cases, once the government proves the conspiracy's existence, the scheme's continued operation into the limitations period is presumed . . . ."). Thus, whether or not the government proved overt acts in furtherance of the conspiracy after 2015 is of no moment.

As for Fuentes Ramirez's abandonment argument, the conspiracy the government charged and presented evidence to prove was far broader than a simple partnership between Fuentes Ramirez and Rivera. There was ample evidence, such as testimony from cooperating witnesses regarding Fuentes Ramirez's activities with an array of traffickers, politicians, and Honduran officials, from which the jury could reasonably conclude that he was a part of a broader cocaine trafficking conspiracy, which would not end simply because Rivera and Fuentes Ramirez ceased working together.

Fuentes Ramirez also argues that the district court erred by failing to instruct the jury on the statute of limitations, as he requested. "A conviction will not be overturned for refusal to give a requested charge unless that requested instruction is legally correct, represents a theory of [the] defense with [a] basis in the record that would lead to acquittal, and the theory is not effectively presented

elsewhere in the charge." *United States v. Holland*, 381 F.3d 80, 84 (2d Cir. 2004) (cleaned up). The defendant must also carry the "heavy burden of showing that the charge given was prejudicial." *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) (internal quotation marks omitted).

After the close of evidence, Fuentes Ramirez's counsel moved for a judgment of acquittal, arguing that no evidence demonstrated "any illegal activity by Mr. Fuentes in the statute of limitations period." Fuentes Ramirez App'x at 280. After the district court denied the motion, Fuentes Ramirez's counsel requested that the court instruct the jury on the statute of limitations based on this earlier argument. Counsel suggested that there was an appropriate instruction in Sand's Modern Federal Jury Instructions but never provided more detail on a specific instruction. In fact, as the district court discovered, the only instructions in Sand were for a different conspiracy offense, which requires proof of an overt act, and for the affirmative defense of withdrawal. *See* Leonard B. Sand et al., 1 Modern Federal Jury Instructions: Criminal § 19.01. As mentioned earlier, however, the drug conspiracy with which Fuentes Ramirez was charged does not require proof of an overt act during the limitations period. And he had not requested any withdrawal or abandonment instruction. Fuentes Ramirez thus

failed to request a legally correct instruction regarding the statute of limitations in this case.

To the extent that Fuentes Ramirez now argues that the district court erred by failing to instruct the jury on a *different* theory of the defense—that Fuentes Ramirez conspired only with Rivera and that the conspiracy was abandoned before the limitations period when Rivera began cooperating with the DEA—he did not request any such instruction. In his brief request he did not mention Rivera or abandonment at all and only referred to his earlier argument regarding a lack of acts in furtherance of the conspiracy during the limitations period.

Importantly, when the court instructed the jury, Fuentes Ramirez did not object. We therefore review any challenge to the instructions given for plain error. *See United States v. Crowley*, 318 F.3d 401, 412-414 (2d Cir. 2003). And it was not plain error for the district court to decline to provide, sua sponte, a jury instruction regarding an unpresented defense theory. *See United States v. Newton*, 677 F.2d 16, 17 (2d Cir. 1982) (holding that where defendant made only "a passing reference to the possibility of [a defense instruction] . . . the trial court was not under an obligation sua sponte to instruct the jury about the availability of such an affirmative defense"); *United States v. Brettholz*, 485 F.2d 483, 490 (2d Cir. 1973)

(concluding "it was not error, and certainly not 'plain error'" for court not to give unrequested instruction concerning an affirmative defense theory).

Lastly, Fuentes Ramirez argues that his trial counsel was constitutionally ineffective for failing to request a more specific instruction regarding the statute of limitations based on an abandonment argument. Lacking an appropriate record to evaluate counsel's strategic decisions, we deny this claim without prejudice to its being raised in a 28 U.S.C. § 2255 proceeding—the preferable avenue for raising this claim in the first instance. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003); *United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003).

**B. Evidentiary Challenges**

Fuentes-Ramirez also raises a variety of evidentiary challenges on appeal. "We review evidentiary rulings for abuse of the district court's broad discretion, reversing only when the court has acted arbitrarily or irrationally." *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006) (internal quotation marks omitted). Our "highly deferential" review is particularly sensitive to "the district court's superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." *United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016) (internal quotation marks omitted). As explained below,

we conclude that the district court did not abuse its discretion in admitting any of the evidence in dispute.

The district court did not abuse its discretion when it admitted evidence from the Instagram and iCloud accounts of Fuentes Ramirez's son, Geovanny Daniel Fuentes Gutierrez. Specifically, the court admitted photographs of large amounts of cash and of ammunition and various weapons, some of which were overlaid with text or a symbol referencing a slang word for "snitch." In addition to the statements in some of the photographs, the court also admitted statements from two online chats. The court held that all of the statements were admissible pursuant to the hearsay exclusion for statements of coconspirators. *See* Fed. R. Evid. 801(d)(2)(E). On appeal, Fuentes Ramirez claims in a single conclusory sentence that the photographs were substantially more prejudicial than probative. But he provides no reason to second-guess the district court's decision to admit the photographs, which together served as evidence probative of an ongoing conspiracy.

As for the statements, the court reasonably concluded that a preponderance of the evidence could show that Gutierrez was a coconspirator with Fuentes Ramirez and that the statements were made in furtherance of the conspiracy. *See*

*id*. The photographs support the conclusion that Gutierrez conspired with Fuentes Ramirez, as do emails between Fuentes Ramirez and Gutierrez discussing Fuentes Ramirez's cocaine laboratory. The disputed statements themselves also support the finding that the two conspired together. *See United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999) (noting that the challenged hearsay statement itself can be considered, alongside other evidence, in establishing the existence of a conspiracy for the purpose of the hearsay exclusion). In them, Gutierrez discusses looking into the murder of Fuentes Ramirez's bodyguards and the identity of coconspirators discovered by the government investigation that would eventually lead to Fuentes Ramirez's trial and conviction. And there is no clear error in the district court's determination that these statements concerning events related to the conspiracy were made in furtherance of it. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 958-59 (2d Cir. 1990) (noting the applicable clear error standard of review and that "statements between coconspirators that may be found to be in furtherance of the conspiracy include statements that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy").

Fuentes Ramirez principally argues that there was nothing dating this evidence to after 2013, when he argues the conspiracy terminated. But as summarized above, there was ample evidence from which to find a conspiracy continuing past that date—and so to find by a preponderance of the evidence that Gutierrez's statements were made in furtherance of an existing conspiracy including Fuentes Ramirez.

Fuentes Ramirez's second evidentiary claim regards the testimony of Leonel Rivera about statements that Fuentes Ramirez made to him while they were both in prison. Fuentes Ramirez argues that because Rivera was cooperating with the government, these statements should have been suppressed under *Massiah v. United States*, 377 U.S. 201, 204-06 (1964), which prohibits the government from circumventing the right to counsel by directing an agent to interrogate a defendant without counsel present. But, as the district court held, there was simply no evidence that the government ever instructed Rivera to approach Fuentes Ramirez in prison. Fuentes Ramirez devotes his efforts on appeal to arguing that the prison encounter was deliberate on the part of Rivera, but he never contests, let alone refutes, the district court's reasoning. Because there was no evidence that the government directed Rivera to approach and elicit information from Fuentes

Ramirez, the motion to suppress was properly denied. *See United States v. Whitten*, 610 F.3d 168, 193 (2d Cir. 2010).

Lastly, Fuentes Ramirez argues that testimony from Jorge Medina, an agricultural engineer who had business dealings with Fuentes Ramirez, was irrelevant and that the probative value of the testimony was substantially outweighed by its unfair prejudice and tendency to mislead the jury. *See* Fed. R. Evid. 403. We disagree. Medina testified that Fuentes Ramirez had police seize a shipment of agricultural cargo from one of his trucks after a dispute. The government presented this testimony to show Fuentes Ramirez's ability to exercise control over Honduran police for his own ends, which it alleged he did in other circumstances in furtherance of his drug trafficking activities. This tendency to make the government's case more likely to be true is sufficient to clear the "very low standard for relevance." *United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir. 2008).

As for unfair prejudice and the risk of misleading the jury (*i.e.* to think that the events Medina testified to could themselves prove the charged cocaine trafficking conspiracy), the district court gave the jury a limiting instruction. It told the jury that Medina's testimony did not "relate to activities of the defendant

that are charged in the indictment as part of a crime" and was instead "being offered to show the relationships between the defendant and other groups, other people." Fuentes Ramirez App'x at 230. It further instructed that it was "the government's position, which the defendant vigorously disagrees with, that this will show, or help shed some light, on those relationships," and again emphasized that Medina's testimony was "not evidence of the crime charged in this case." *Id.* In light of that limiting instruction and given the seriousness of the charges against Fuentes Ramirez compared to the conduct Medina testified to, we cannot say that any unfair prejudice or risk of confusing the jury substantially outweighed the probative value of Medina's testimony. *Cf. United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (finding "no undue prejudice" when disputed evidence "did not involve conduct more serious than the charged crime and the district court gave a proper limiting instruction"). The district court did not abuse its discretion in admitting Medina's testimony.

### C. Sentencing Challenge

Fuentes Ramirez's final argument on appeal is that his sentence is substantively unreasonable. "[O]ur review of a sentence for substantive reasonableness is particularly deferential," and we do not "substitut[e] our own

judgment for that of district courts . . . ." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). Sentences are only substantively unreasonable if they are "so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *Id.* (internal quotation marks omitted). Moreover, we note that "[i]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011).

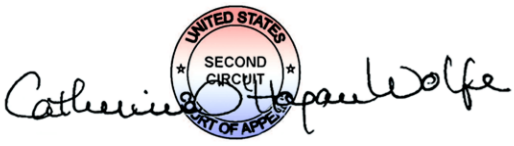
Applying our deferential standard of review, we conclude that Fuentes Ramirez's Guidelines life sentence followed by a mandatory consecutive sentence of thirty years is not so shockingly high or unsupportable as a matter of law as to be substantively unreasonable. As the district court observed, Fuentes Ramirez participated in a massive and violent drug trafficking conspiracy, controlled a cocaine laboratory that he protected with individuals armed with machineguns, and took part in five murders—all over the course of eleven years. As Fuentes Ramirez had committed some of "the most serious types of crimes that one can commit," the court determined that the need for the sentence to provide just punishment, to adequately deter criminal conduct, and to protect the public from

further crimes of Fuentes Ramirez was sufficient to warrant the sentence imposed. Fuentes Ramirez App'x at 366-67; *see* 18 U.S.C. § 3553(a). Those sentencing factors "can bear the weight assigned to [them]" in this case and we will not reweigh the factors ourselves. *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008). We therefore decline to disturb the sentence as substantively unreasonable.

* * *

Having reviewed the records in these trials and the numerous arguments raised on appeal, we find no errors that would warrant vacating the judgments of conviction. Nor do we find that the sentence imposed on Fuentes Ramirez is substantively unreasonable. Accordingly, we **AFFIRM** the judgments of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

# UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
JUAN ANTONIO HERNANDEZ ALVARADO

## JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S2 15 CR 00379-02 (PKC)

USM Number: 17838-104

Peter Brill, Esq. (AUSA Matthew Laroche)
Defendant's Attorney

## THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3, and 4. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 21USC963, 18USC3238 | Conspiracy to Import Cocaine Into the U.S. | 12/31/2016 | 1 |
| 18USC924(c)(1)(A), 924 (c)(1)(B)(ii), 3238, & 2 | Possession of Machineguns and Destructive Devices | 12/31/2016 | 2 |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/30/2021
Date of Imposition of Judgment

Signature of Judge

P. Kevin Castel, U.S.D.J.
Name and Title of Judge

3-30-21
Date

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18USC924(o) & 3238 | Conspiracy to Possess Machineguns and Destructive Devices | 12/31/2016 | 3 |
| 18 U.S.C. 1001 | Making False Statements | 12/31/2016 | 4 |

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Life imprisonment on Counts 1 and 3, and 60 months on Count 4, all to run concurrently, and a mandatory and consecutive 360 months on Count 2.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years on Counts 1 to 3 and 3 years on Count 4, all to run concurrently.

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## SPECIAL CONDITIONS OF SUPERVISION

1. You must obey the immigration laws and comply with the directives of immigration authorities.

2. You must provide the probation officer with access to any requested financial information.

3. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule.

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment** |
|---|---|---|---|---|---|
| TOTALS | $ 400.00 | $ | $ | $ | $ |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss*** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

| | | |
|---|---|---|
| TOTALS | $ 0.00 | $ 0.00 |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JUAN ANTONIO HERNANDEZ ALVARADO
CASE NUMBER: 1:S2 15 CR 00379-02 (PKC)

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

**A** ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

**B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

| Case Number<br>Defendant and Co-Defendant Names<br>*(including defendant number)* | Total Amount | Joint and Several Amount | Corresponding Payee, if appropriate |
|---|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Forfeiture ordered in the amount of $138,500,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States of America v. Juan Antonio Hernandez Alvarado
15 cr 379 (PKC)
Statement of Reasons
Sentencing, March 30, 2021 at 2 p.m.

After hearing the evidence at trial, a twelve-person jury found beyond a reasonable doubt that Juan Antonio Hernandez was a member of a conspiracy to import drugs into the United States from 2004 to 2016. In addition, the jury found him guilty of conspiracy to possess a machine gun in furtherance of drug trafficking and the substantive crime of possession of firearms, including a machine gun. The jury also found him guilty of lying in a 2016 voluntary interview with DEA Agents. Five cooperating witnesses testified at trial in addition to other witnesses and evidence, including photographs and recordings.

As a judge, I am frequently called upon to impose sentence upon individuals in the drug trade. Some have become retail sellers infecting neighborhoods with a substance that destroys families and lives, through addiction, disease and violence, including turf wars and drive by shootings. Some of these retail sellers come from families where the mother was an addict, or the father was imprisoned for drug related crimes. In many of these cases, the defendants are responsible for retail sales measured in grams. Often, they justly receive lengthy prison sentences. I also am required to sentence those buying or selling in kilo quantities. The quantity and type of drug plays an important part in sentencing.

I also see young men from Colombia who are caught in international waters on "go fast" boats loaded with cocaine with an ultimate destination of the United States after transshipment through Central America. These "go fast" drivers typically have little knowledge of the source of the drugs or the distribution network beyond their own role. Many are unskilled,

impoverished and endeavoring to support their families. They receive lengthy sentences for their actions.

And then there is Juan Antonio Hernandez Alvarado, also known as Tony Hernandez. He is 41 years of age, reasonably fit and in good health. He makes an excellent appearance, well-dressed, wearing a warm and engaging smile. He is well educated, went to a military boarding school and received a college degree in law. His family had legitimate businesses, including a hotel and a pharmacy, in which he could have earned a good, honest living. He briefly practiced law. He was elected as a member of the Honduran Congress and could have used his considerable talents for good. But Juan Antonio elected to go in a very different direction.

The trial of Juan Antonio unmasked many details of international narco-trafficking—state sponsored-narco-trafficking. It corrupts every facet of society. Juan Antonio became a major facilitator of the movement of cocaine through Honduras with an eventual destination of the United States. He became a partner in one of the ultimate sources of supply, a cocaine lab in Colombia. He brazenly had his own brand of cocaine imprinted with the initials TH for Tony Hernandez. I recall one cooperator estimating that he purchases 15,000 kilograms from Tony Hernandez.

The defendant is responsible for the murders of Franklin Arita, a trafficker who had interrupted the supply lines of Alex Ardon Soriano. He was murdered utilizing the services of Tigre Bonilla, a police chief. Also Chino, a member of the drug operation who had the misfortune of having been arrested was viewed as posing a threat because he knew too much about the drug operations and could cooperate with law enforcement. Juan Antonio wanted him murdered and when the job was done he expressed happiness.

Juan Antonio rented helicopters to drug traffickers and supplied them with weapons and ammunition, including in one transaction 4,000 to 6,000 pieces of amuntion for assault weapons that were boxed in containers with the markings of the Honduran Military. He acted as middleman in bribes to politicians, including his brother Juan Orlando Hernandez and the National Party. After his second meeting with Joaquin Guzman a/k/a El Chapo leader of the Sinaloa Cartel, he agreed to accept Guzman's offer of $1million in cash for his brother Juan Orlando's presidential campaign in exchange for a pledge of protection for his drug shipments and immunity. Guzman was not the only drug trafficker to whom Tony Hernandez sold protection from prosecution by the government and interdiction by the Honduran Military and National Police. In exchange for payments to him, he alerted drug traffickers to night vision helicopter maneuvers and radar patterns that might have resulted in seizing of shipments. For the radar information, he charged $50,000.

Facts, not speculation, enable the government to reliably estimate that the quantity of cocaine for which Juan Antontio bears responsibility from 2004 through 2015 is 185,000 kilograms. At 8,000 doses per kilogram, this translates to nearly 1.5 billion individual doses of cocaine. The gross income of Juan Antonio from drug trafficking during that same period is reliably estimated at $138,500,000 US dollars.

Defendant and his co-conspirators were indifferent to the consequences of their acts on the lives of people in their own country and in this country. A long sentence will promote respect for law and will serve as a deterrent to others who might engage in similar conduct. It will protect the public from further crimes of this defendant while he is incarcerated. I have considered the need to avoid unwarranted sentence disparities. The highest drug quantity for cocaine recognized by the Sentencing Guidelines is more than 450 kilograms. Very few

defendants, about 6.6% of drug trafficking cases in 2019, have a drug quantity in this highest range. Defendant is responsible for the distribution of 185,000 kilos. I have considered the arguments presented by each side on comparative sentence found in the government's submission at pages 51-55 and in the defendant's memorandum at 13-15.

I have considered the guidelines, policy statements and official commentary of the Sentencing Commission. I recognize that the guidelines are advisory and not binding on the Court. I acknowledge that I have variance discretion.

Defendant faces a mandatory minimum of 10 years on Count 1 and a mandatory consecutive 30-year minimum term of imprisonment on Count 2. By law, I am required to sentence him to a minimum of 40 years imprisonment on Counts 1 and 2. Again that is the minimum. The maximum term on each of Counts 1, 2 and 3 is life imprisonment and on Count 4 is 5 years imprisonment.

At total offense level 43 CHC 1, the Guidelines range is life imprisonment plus the mandatory consecutive term on Count 2 of 360 months. The prosecution and the Office of Probation recommend that I impose this sentence.

Based upon his free choice to engage in a life of drug trafficking over a 12-year period which affected the lives of the people in the United States, Honduras and elsewhere, a sentence of life imprisonment on Counts 1 and 3 is richly deserved, together with 5 years concurrent on Count 4. By law I am required to impose the 30-year mandatory minimum as consecutive to that on Count 3. I will impose forfeiture of $138,500,000 and the $400 special assessment. I will not impose a fine in view of the forfeiture amount. The foregoing in my view is sufficient but not greater than necessary to achieve the purposes of section 3553(a).

This Court is under no delusion that the sentence will end narco-trafficking through Honduras. But today's sentence is an important step. It is not the only prosecution in this district of individuals accused of using Honduras as a transit point for drugs. The experience of law enforcement with La Cosa Nostra or the Mafia--is instructive. By repeatedly going after leaders and organizers of these organized crime families, their impact has been weakened. They are a shadow of what they once were.

Ending the movement of cocaine from Columbia through Honduras, Guatemala and Mexico to the United States is the hope of all good people in Honduras, the United States and other countries of the Americas. Looking back in years to come, today may prove to have been an important step in eliminating the corruptive and corrosive influence of narco-trafficking.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 15 CR 379 (PKC)

JUAN ANTONIO HERNANDEZ ALVARADO,

Defendant.

----------x

New York, N.Y.
October 10, 2019
10:00 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York
EMIL J. BOVE, III
AMANDA HOULE
JASON RICHMAN
Assistant United States Attorneys

OMAR MALONE
MICHAEL R. TEIN
Attorneys for Defendant

ALSO PRESENT: HUMBERTO GARCIA, Interpreter (Spanish)
CRISTINA WEISZ, Interpreter (Spanish)
MERCEDES AVALOS, Interpreter (Spanish)
MARCIA GOTLER, Interpreter (Spanish)
BRIAN FAIRBANKS, DEA
MORGAN HURST, Paralegal, USAO

MR. MALONE: So we have no objection to him being dismissed, but we do feel that the Court has to conduct some inquiry as discretely as possible without signaling what the issue is in any respect as to the other jurors, and I don't know how to do it.

THE COURT: I appreciate that. Thank you.

Let me hear from the government.

MS. HOULE: Thank you, your Honor. As to the question that the juror raised about interference, he said that he did not discuss that with any other juror.

As to the photo, which is a separate issue, the Court has already employed substantial protective measures. You have already addressed the entire jury to tell them that they could use the other exit. No other juror expressed any concern. They obviously know that they could have signed a note if they do have a concern. And so we think that it's unnecessary, your Honor, that it would cause disruption to the jury at this point to start questioning them about the photo. And that there's no cause for it, given the juror's note.

THE COURT: Thank you. All right. I've thought about this, and what struck my eye last night when this note came in was the line in here on the first page of Court Exhibit 3 from this juror, which says, "from what I've seen in the trial thus far, the traffickers have the means, money and motive to try something nefarious."

You can give that a benign interpretation in that that's what the direct testimony of the witnesses are and he's stating that obvious, but it goes on to say what, if anything, has been discussed on the government's side to assure this jury's safety. He says this in no way affects my impartiality, nor have I mentioned it to the other jury members.

That statement gives me concern, and so I'm going to strike juror number 37. I will call him juror 14, because he's the second alternate.

I guess yesterday when I first read this I kind of had it in my mind that he would be stricken, the only question I had was whether I would do it this morning or let it ride a bit, but I think it's prudent to strike him because I don't want him talking to other jurors.

Now he says on the reverse side, so the note is complete on the front side of the page, and then it says, "Please see back," and it says, "Since writing this note yesterday, myself and at least one other juror noticed we were photographed at close range just outside the courthouse by what appears to be an individual with no media logo or identification. The photo was taken on a cell phone."

There's no indication that he discussed his theories about somebody trying something nefarious with any other juror. In fact, he says he hasn't. And I am loathe to conduct an inquiry which plants the seeds of concern where they may not

exist. And therefore, what I'm going to do is I'm going to call the juror in and excuse him.

Now there was another matter that somebody wanted to take up with me before the jury came in, or is that it?

MS. HOULE: Yes, your Honor, it relates to the post-arrest statement of the defendant. So we can go back out in open court to discuss that.

THE COURT: All right. Let me do this. Let me have Flo ask Juror 14 to come in, and if you'll give me a little breathing room.

(Juror present)

THE COURT: Good morning.

JUROR: Good morning.

THE COURT: You are juror 14 at present, correct?

JUROR: Well, I was 37.

THE COURT: And you were 37 before.

JUROR: Yes.

THE COURT: I wanted to let you know that I have discussed certain matters with the parties and I have decided that I am going to excuse you. And I want to thank you for your conscientious attendance at court each day. I would ask you to leave your notebooks with Flo, and do you have anything else in the jury room?

JUROR: My jacket.

THE COURT: Why don't you do this, without saying to

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. (S2) 15-cr-379 (PKC)

JUAN ANTONIO HERNANDEZ ALVARADO,

Defendant. Oral Argument

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New York, N.Y.
June 27, 2019
2:15 p.m.

Before:

HON. P. KEVIN CASTEL

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: EMIL J. BOVE III, ESQ.
MATTHEW J. LAROCHE, ESQ.
JASON RICHMAN, ESQ.
Assistant United States Attorneys

THE MALONE LAW FIRM, P.A.
Attorneys for Defendant
BY: OMAR MALONE, ESQ.
-and-
LEWIS TEIN, P.L.
Attorneys for Defendant
BY: MICHAEL R. TEIN, ESQ.

Also Present: Erika de los Rios
Francisco Olivera
Humberto Garcia
Spanish Interpreters

THE COURT: Thank you.

Mr. Hernandez has moved to suppress the November 23, 2018 post-arrest statements that were made. There is no question that, in October 2016, Assistant United States Attorney Matthew Laroche and DEA Agents Papadopoulos and Fragga coordinated and conducted a proffer session with Mr. Hernandez through his lawyer, Manuel Retureta.

In May of 2017, Retureta and Laroche communicated about Hernandez, and in October 2017, Retureta communicated with DEA Agent Fragga, but there is no basis to conclude that either of the assistant United States attorneys were aware of the October 2017 communication.

On November 20, 2018, Hernandez was indicted by a grand jury, and on November 23 was arrested at Miami International airport. After the arrest, Agents Papadopoulos and Gonzalez brought him to an office in the airport, and there was a question about, apparently, Hernandez stated that he wanted to cooperate and that, quote, he told his lawyer over a year ago that he wanted to cooperate, and he, the lawyer, told Hernandez that he would speak with the prosecutors but never notified Hernandez. Gonzalez asked if Hernandez presently had a lawyer, to which Hernandez responded, he, quote, had not spoken to Manny in over a year but would like to call him first.

There were communications between the agents and the

assistant United States attorneys in New York, and they initially gave a red light, a stop, to any communications. At some point in this chronology, Gonzalez called Retureta's cellphone twice with no answer. And after the assistants indicated to the agents that they should not proceed, Gonzalez told Hernandez that he was going to be processed and taken to jail without an interview and without being asked a question, Hernandez stated, quote, that he wanted to speak with agents at this moment and start cooperating. And Gonzalez asked Hernandez, again, the Court assumes, with input from the assistant United States attorneys, whether he presently had legal representation, and Hernandez stated that he did not know. Gonzalez informed Hernandez that if he had an attorney and wanted to consult with this attorney prior to cooperating, that he was entitled to that, and if he wanted to speak to agents and begin cooperating, that he would be advised of his rights and would need to agree to this voluntary participation in a recorded interview.

It was then that Hernandez was taken from what sounds like the Customs and Border Patrol area to a different office in the airport, and a video interview took place. One of the agents said, "I want to repeat here what you told me earlier, that you wish to proceed and make a statement and talk with us. You do not have legal representation today, now, huh? You will be talking to a lawyer in the future, but you wish to start

this process now." Hernandez responded, "That's right. I want to start." And the agent said, "We called Mr. Retureta several times but he did not answer, but do you still wish to go ahead?" He said, "I do." Hernandez was then read his *Miranda* rights and signed a written waiver of those rights. He verbally, orally confirmed that he had not been pressured or threatened and that the conversation was totally voluntary.

The agent, referring back to October 2016, said, "I know you said earlier that you came to talk to us over a year ago." Hernandez responded, "Yes, a year and a half or two ago, I don't know, something like that." The agent said, "I believe that you said something about your wishing to start this cooperation process since some time ago." Hernandez said, "Yes. What I was discussing with attorney Retureta was that I was prepared to come over here in case you all wanted to continue having some clarification or for me to continue answering questions from all of you. And at that time, while the lawyer told me, quote, let's wait, they will let us know, and then time went by, I lost touch with the lawyer, and what happened today happened." The agent inquired, "When was the last time that you spoke with the lawyer?" Hernandez said, "I think it was one year ago." The agent inquired, "One year ago?" Hernandez said, "Yes," and something else that was unintelligible. The agent then asked, "Then he is not your lawyer today until you talk to him again?" And Hernandez

responded, "Until I talk to him again. He is the one who was handling the matter first." The agent said, "Aha." Hernandez said, "But I have lost touch with him. Let's hope that he will join the process." And the agent said, "As I told you, you can add a lawyer to the process at any time." Hernandez said, "Yes."

And at the end of the interview, the agent said, "You confirmed that you didn't have a lawyer. You were thinking of calling a lawyer to consult, to look for a lawyer, but at this time you do not have a lawyer," to which Hernandez responded, "I do not."

Now, the defendant asserts that the post-arrest interviews should be suppressed because they were taken in violation of Rule of professional conduct 4.2(a), the no-contact rule, and the Fifth and Sixth Amendment. They argue that an attorney, Manuel Retureta, during the post-arrest interview, and -- that Hernandez had an attorney during the interview and that the DEA agents knew that he had a lawyer based on the earlier proffer session that was October 2016 or so. And defendants assert that the statements should be suppressed.

Let me begin by addressing *United States v. Hammad*, a 1988 decision written by Circuit Judge Irving Kaufman. It was a decision that applied the Model Code of Professional Responsibility. And the court said that a court could suppress

a statement for a violation of this provision of the model code, but went on to say, We have confidence that district courts will exercise their discretion cautiously and with clear cognizance that suppression imposes a barrier between the finder of fact and the discovery of truth. That's from *Hammad*. Exclusion is not required in every case. And it's also been said that suppression of evidence is an extreme remedy that may impede legitimate investigatory activities.

Well, much has happened since 1988. The ABA no longer follows the model code. They have adopted the Model Rules of Professional Responsibility. The Model Rules of Professional Responsibility are in place and in force in the following number of jurisdictions, in their entirety: Zero. There's no state that has wholesale adopted them. New York adopted the model rules in 2009. And this court adopted them as a basis for professional discipline in Local Civil Rule 1.5(b)(5), quote, absent significant federal interests.

But there is an important point to be made under the rule as it is in existence in New York today. Rule 4.2(a) provides, "In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Well, one might read that and say, well, that

means something like "knew" or "should have known" or "had a reasonable cause to believe," that's what "know" means. But that question is resolved in Rule 1.0(k) of the Rules of Professional Conduct, which I will read. "'Knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." So it's quite intentional that it uses the word "know." In fact, in the definitions, under definition 1.0(r), there is a provision for "reasonable belief," or "reasonably believes," and, when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. It also provides in 1.S that "'reasonably should know,' when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." But 4.2(a) does not speak of "reasonable belief" or "reasonably should know." It speaks of "knowing." And that denotes actual knowledge of the fact in question.

Now, this is not gamesmanship here on the part of the assistant United States attorneys. I accept as the record here that they knew, in the sense of 1.0(k), 23 months before, that Retureta represented Hernandez. It was somewhat more ambiguous, but I accept for these purposes that they knew a year and a half before, although that is disputed by the government in terms of their actual knowledge; it could be a

lawyer fishing around. But the government acted with caution, based on the representations made by the government here in open court, and therefore I conclude there was no violation of 4.2(a) on the record.

Now, in *Edwards v. Arizona*, the Supreme Court said, "When an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. An accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police." That's *Edwards* at 451 U.S. 484-485. And, here, I do not see an express unambiguous invocation of the right to counsel. Here there was a knowing, voluntary, and intelligent waiver of *Miranda*. There was no unambiguous invocation in a *Miranda* sense. And even at that, the defendant indicated that he wanted to speak with the agents. You will recall that, based on the red light from the assistant United States attorneys, he was told that he was going to be processed and taken to jail without an interview, and, without being asked a question, he stated, quote, that he wanted to speak with agents at this moment and start

cooperating.

So I find there is no basis to suppress under the no-contact rule. I find there is no basis to suppress under *Miranda*. And with regard to the Sixth Amendment, the Sixth Amendment right to counsel, which does attach at critical stages of the criminal proceeding, which includes post-indictment interrogations, may be waived. The Sixth Amendment right to counsel may be waived by a defendant, so long as the relinquishment of the right is voluntary, knowing, and intelligent. And the defendant may waive the right whether or not he is already represented by counsel. The decision to waive need not be itself counseled. And that's the *Montejo* case, *Montejo v. Louisiana*, 566 U.S. 778 (2009).

*Montejo* also says that when a defendant is read its *Miranda* rights, which include the right to have counsel present during interrogation, and agrees to waive those rights, that typically -- and those are rights that have their source in the Fifth Amendment, as a general matter -- an accused who is admonished with these warnings under *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights and of the consequence of abandoning those rights, that his waiver on that basis will be considered a knowing and intelligent one.

So the Court concludes on this record that there is no basis to suppress the statements of November 23, 2018 under

Rule 4.2(a), which for the purpose of this discussion I assume applies here, the Fifth Amendment to the Constitution, or the Sixth Amendment to the Constitution.

Let me inquire of the government, have I set a schedule on 3500 material, on 404(b) evidence, on further proceedings in this case?

MR. BOVE: Yes, your Honor.

THE COURT: All right. Is there anything further from the government?

MR. BOVE: No, your Honor. Thank you.

THE COURT: Anything further from the defendant?

MR. MALONE: Judge, I just want to flag one issue, and it may be in accordance with the schedule previously set by the Court. The government, two days ago maybe, before we came up to New York, provided defense counsel with some expert disclosures, as well as some additional evidence of ledgers or related material, not addressing the ledgers part -- I can deal with that -- the expert part, which, the government purports to introduce an expert regarding drug trafficking routes, which we would have an objection to. They want to introduce testimony of an expert as relates to what's referred to as, quote, Honduras and Honduras policies. I'm not trying to argue that motion or that issue today. I haven't seen any of the relative background on that. I wanted to flag the issue so that we address it at the appropriate time before trial and it doesn't

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand twenty-four,

Before: Guido Calabresi,
Alison J. Nathan,
Circuit Judges.
Sarala V. Nagala,
District Judge.

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United States of America,

Appellee,

v.

Victor Hugo Diaz Morales, AKA Victor Hugo Villegas Castillo, AKA Rojo, Mario Jose Calix Hernandez, Mauricio Hernandez Pineda, Amado Beltran Beltran, AKA Don Amado, Otto Rene Salguero Morales, AKA Otto Salguero, Ronald Enrique Salguero Portillo, AKA Ronald Salguero, Fernando Felix Rodriguez, AKA Don Fernando,

Defendants,

Juan Antonio Hernandez Alvarado, AKA Tony Hernandez, Geovanny Fuentes Ramirez, AKA Sealed Defendant 1,

Defendants - Appellants.

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**ORDER**
Docket No. 21-885 (L)
22-334 (Con)

Appellant Juan Antonio Hernandez Alvarado having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court