

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES : 12 Cr. 266 (ABJ)
v. :
DWIGHT KNOWLES :
And :
ORAL GEORGE THOMPSON :
Defendants. :

**DEFENDANTS’ OPPOSITION TO GOVERNMENT’S
MOTION *IN LIMINE* RE WITNESS JOSE HEREDIA PRADO**

INTRODUCTION

The Government has moved to preclude the defense from using a murder conviction to impeach prosecution witness Jose Heredia Prado, arguing that its probative value is outweighed by the risk of “unfair prejudice.” As set forth herein, the prior conviction satisfies all of the requirements for admissibility under Federal Rule of Criminal Procedure 609(a). There would be nothing “unfair” about the jury learning that Heredia Prado is a convicted murderer and using that information (along with his international drug trafficking conviction in the United States District Court for the Eastern District of Virginia) to assess his credibility. The defense has no objection to an appropriate instruction to the jury immediately after the impeachment by prior conviction. In the final analysis, the Government’s effort to present a sanitized version of its witness ought be rejected and the *Motion In Limine* denied.

FACTUAL BACKGROUND

The Government moved this Court on July 1, 2016 for leave to take the deposition of Jose Heredia Prado pursuant to Federal Rule of Criminal Procedure 15. The witness, a Colombian national, was about to complete his federal sentence in the Virginia case and the Government was concerned that he would be deported back to Colombia, South America before the trial of this case would commence. Defendants Thompson and Knowles did not object to the request and the deposition is currently scheduled for August 22, 2016.

The Government provided a basic summary of Heredia Prado's expected testimony, which stated in relevant part that:

in 2011 he spoke to defendant Thompson by phone for the purpose of helping another individual sell ten kilograms of cocaine to Thompson. The Government also expects Prado to testify that in early 2012, Prado met defendant Knowles when Knowles was living at the residence of another drug trafficker known to Prado as "Omero," in Colombia. The Government expects Prado to testify that Omero told Prado that Knowles was living with him (Omero) in order to use Knowles's family connections in the Bahamas to locate aircraft in the Bahamas to be used to traffic cocaine. The Government expects Prado to testify that Omero asked Prado to assist in finding drug traffickers who would be interested in using the plane to transport cocaine, and to find individuals to invest money in the proposed deal. Prado invested some of his own money, as well as money from other individuals, in the proposed arrangement, but received no share of proceeds and withdrew from the transaction.

As part of its disclosure obligations, the Government advised that Jose Heredia Prado had prior convictions in Colombia from 1997 for both Murder and a Firearms charge, for which he served a nine-year sentence. The defendant is also subject to impeachment for his felony conviction for Conspiracy To Distribute Five or More Kilograms Of Cocaine Knowing Or Intending That They Would Be Unlawfully Imported Into the United States in case 12 Cr 0358 in the United States District Court for the

Eastern District of Virginia. The Government also disclosed other “bad acts” for this witness, including: tax and custom fraud in Colombia; and other, uncharged drug trafficking activities in Colombia.

As the following analysis demonstrates, under the facts presented and controlling law, the defense should be allowed to impeach Jose Heredia Prado with his Colombian murder conviction.

LEGAL ANALYSIS

1. The Murder Conviction Is Admissible To Impeach The Witness

Federal Rule of Criminal Procedure 609(a) expressly authorizes impeachment with a prior felony conviction. The Rule states that the conviction for an offense that is punishable by more than one year in jail “**must be admitted**, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant. (emphasis added). Thus, under the Rule, Heredia Prado’s murder conviction “must be admitted” unless it is somehow unfairly prejudicial. See Federal Rule of Criminal Procedure 403.

In support of its argument that the probative value of the impeachment in this case would be outweighed by unfair prejudice, the Government suggests that the following four factors are relevant to the Court’s decision: (1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness’ testimony to the case; (4) the importance of the credibility of the defendant; and (5) generally, the impeachment value of the prior crime. See e.g., United States v. Pettiford, 238 F.R.D. 33, 41 (D.D.C. 2007). Even assuming *arguendo* that these are the relevant factors, the Government has failed to demonstrate that the impeachment would be unfairly prejudicial.

The Government first suggests that somehow the murder conviction is not particularly probative as to the issue of credibility. Neither the cases relied upon by the Government, nor common sense, supports this conclusion. The intentional taking of a human life is one of the most serious offenses in the criminal law, is conduct that is universally condemned, and reflects a total lack of regard for the rules that govern society. To be clear, the defendants do not intend to improperly argue that Heredia Prado is a bad person because he has a prior murder conviction; but we intend to argue vigorously to the members of the jury that he is a person whose criminal history demonstrates that he is unworthy of belief.

The Government also notes that the murder conviction took place “over than ten years before the events and conduct that Prado would testify about.” *Gov. Motion in Limine* DE 158 at p.7. The test for temporal remoteness under the Federal Rules, however, focuses not on the date of conviction, but rather on the date that the witness completed his sentence or period of probation. The Advisory Committee Notes accompanying Rule 609 state that:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his **most recent conviction**, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date (emphasis added).

Heredia Prado served a nine-year sentence for the murder conviction, which would place his release date well within the ten-year window provided for by Rule 609. Moreover, because the witness completed serving a sentence for his “most recent” felony international drug trafficking conviction in the United States on July 7, 2016, the door would be open to using the murder conviction even if the sentence was completed more

than ten years ago. Under the clear intention of the Rule, this Court should reject the Government's argument that the age of the conviction is a reason to preclude its use during impeachment.

The Government concedes in its *Motion In Limine*, that Heredia Prado would be an important witness and that his credibility would be a critical factor for the jury's consideration. Indeed, the Government is likely to argue that Heredia Prado is one of the most important witnesses because he: (1) is not a defendant in the charged case; and (2) because he has completed his sentence, he would have no motive to fabricate. Thus, the defendant's need to impeach his credibility is particularly crucial. The Government has made the decision to use Heredia Prado as a cooperating witness in this case. As with all cooperators, the testimony comes with certain "baggage." The Government wants the benefit of Heredia Prado's testimony, without the burden of his prior criminal record. There is no reason to allow the Government to "sanitize" the witness' criminal history and there is nothing unfairly prejudicial about permitting the impeachment with his prior murder conviction.¹

2. The Defense Should Be Allowed To Inquire Whether A Plane Existed

The Government has disclosed that it believes that Heredia Prado would testify that he did not believe the defendants actually had access to an airplane. The Government's motion noted that it:

expects that Prado may testify that, in light of the fact that he was never paid, and due to his lack of success in prior efforts to use aircraft to traffic cocaine, his

¹ The Court should also reject the Government's suggestion that the impeachment be limited to the date and fact of a prior conviction, without mentioning that it was for murder. The cases relied upon by the Government in support of this procedure are inapposite because they involve the impeachment of a testifying defendant. The standard for the impeachment of a testifying defendant, however, is different under Rule 608. Moreover, the procedure suggested by the Government is likely to confuse the jury and make them wonder what the conviction was for.

opinion is that the proposed aircraft that Omero and Knowles were going to use did not actually exist.

Gov. Motion In Limine at pp. 8-9. The Government would like to keep this testimony from the jury.

The Government analyzes this legal issue as though Heredia Prado were going to be offering a “lay opinion” as to the likelihood or not, that a plane actually existed. It concludes that Heredia Prado would have no basis to form such an opinion. The defense has not had the opportunity to speak with this witness,² but based upon the facts provided by the Government, it does appear that Heredia Prado would have more than a sufficient basis to explain that during the time that he was involved with the defendants, he concluded that they did not actually have access to an airplane and that as a result, he stopped working with them.

The Government has disclosed that from 2010 until the time of his arrest, Heredia Prado was actively involved in “brokering cocaine transactions, and in attempting to locate aircraft to be used to transport cocaine from Colombia.” He has a conviction in the Eastern District of Virginia for similar drug trafficking activities and thus, would seem to have every basis to offer an opinion as to whether a plane actually existed. Moreover, it may well be that this testimony is admissible not merely as lay opinion, but also upon other legal grounds, such as “present sense impression,” or is simply necessary to complete Heredia Prado’s testimony. Under the circumstances, it appears that these facts would be relevant to the jury’s consideration. These matters will not be clear until after the witness testifies on direct examination.

² Defense counsel sent a letter requesting the opportunity to meet with Heredia Prado to his current defense attorney, but as of the filing of this Opposition, no reply has been forthcoming.

The Government's effort to restrict such cross-examination on this issue goes to the very heart of the defendants' ability to create reasonable doubt and defend themselves at trial. It would provide an unfair tactical advantage to prosecution to allow them to attempt to prove the defendants Thompson and Knowles were involved in these drug transactions, without allowing the jury to know that at least one experienced trafficker did not believe that a plane actually existed.

CONCLUSION

For all of the foregoing reasons, the defendants request that the Court deny the Government's *Motion In Limine*.³

Respectfully submitted,

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³ The defendants' do not object to the Government's use of transcripts and tape recordings subject to later connection at trial. The defendants' do, however, reserve the right to promptly file a motion in limine requiring the Government to prove that the hearsay statements offered by Heredia Prado (and others) were made "in furtherance" of the charged conspiracy.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent, via Electronic Case Filing, to Paul Joseph, Brian Sardelli, and Erin Cox, Trial Attorneys, Narcotic and Dangerous Drug Section, via this Court's ECF system, this 10^h day of August 2016.

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