

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5526  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE MARIO HERNANDEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-91-CR-175)

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(February 15, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Jose Mario Hernandez appeals his conviction, challenging only the denial of his motion for a new trial. We **AFFIRM**.

I.

On April 30, 1991, United States Immigration Service agents executed a search warrant in San Antonio, Texas, on property in Hernandez's custody. Upon entering the tract, the agents first

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<sup>1</sup> Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

approached a large metal building known as "the shop". One agent testified that he looked in the window of the shop and saw three people sleeping. The agents entered, spoke to the three people, and learned that they were Mexican citizens who were illegally in the United States. The three were later identified as Alberto Ceciliano-Rodriguez, his son, Jose Luis Ceciliano-Hernandez, and David Piña-Aguilar<sup>2</sup>.

It was clear from the agents' search that the three men were living in the shop. The building contained three beds (where the men were sleeping), a refrigerator, a table and a stove. The men's personal belongings were in the room, and the refrigerator was stocked with food. After the three were interviewed, the agents proceeded to Hernandez's home. He was arrested and convicted on three counts of harboring an illegal alien in violation of 8 U.S.C. § 1324(a)(1)(C).<sup>3</sup>

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<sup>2</sup> In some portions of the Record, he is referred to as David Peña-Aguilar.

<sup>3</sup> Section 1324 provides in part:

**(a) Criminal Penalties**

(1) Any person who --

. . . .

(C) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation

. . . .

At trial, all three aliens testified that Hernandez knew they were in the United States illegally. Rodriguez's sister testified that he told Hernandez that he "had papers". But, Rodriguez testified that he did not recall making such a statement and, in fact, was unsure whether he even spoke to Hernandez at the event where Rodriguez's sister said the statement was made. Rodriguez also testified that, prior to the date of his arrest, he never had "any papers that would legally allow [him] to enter or reside in the United States".

Seven days after his conviction, Hernandez moved, *pro se*, for a new trial on several bases, including the discovery of evidence that Rodriguez "had a prior Social Security Number". The motion was denied without reasons.

## II.

On appeal, Hernandez asserts that the district court erred in denying his motion for a new trial, both because of the newly discovered evidence, and because the first trial was tainted by the government's failure to disclose that evidence as **Brady** material. He also bases error on the district court's failure to appoint counsel for, or to conduct an evidentiary hearing on, the new trial motion.

Motions for new trial on the basis of newly discovered evidence are disfavored, and denial of such a motion will be

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shall be fined ... or imprisoned ..., or both, for each alien in respect to whom any violation of this paragraph occurs.

reversed only "when there is a clear abuse of discretion". **United States v. Peña**, 949 F.2d 751, 758 (5th Cir. 1991). A defendant seeking a new trial because of newly-discovered evidence must show that:

- 1) The evidence is newly discovered and was unknown to the defendant at the time of trial;
- 2) Failure to detect the evidence was not due to lack of due diligence by defendant;
- 3) The evidence is material, not merely cumulative or impeaching; and
- 4) The evidence will probably produce an acquittal.

**Id.** All four elements must be shown, **id.**; Hernandez has failed to establish even one.

A.

Hernandez contends that the existence of a social security card in Rodriguez's name is critical evidence, because it proves that he committed perjury and thus, lowers the standard for establishing materiality. We disagree. This documentation alone cannot possibly prove perjury. Hernandez has never even attempted to show that the card is valid. Rodriguez's allegedly false testimony was that he had no documents which would **legally** allow him to enter the United States. Possession of false identification would not allow him to **legally** enter or reside in this country. It cannot, therefore, prove perjury. At best, it might have been used to impeach Rodriguez's testimony. As this court has held, this is insufficient to establish materiality. **Id.**

Furthermore, we doubt that the evidence can be characterized as "newly discovered", and are confident that, if Hernandez knew nothing of it prior to trial, the lack of knowledge is wholly attributable to his own lack of due diligence. He contends that his innocence is supported by the testimony of Rodriguez's sister that Rodriguez told Hernandez that he "had papers". If, in fact, Hernandez believed that Rodriguez had papers, Hernandez might well have had copies of them. In any event, before trial, he certainly could have obtained them, or attempted to obtain them, through the exercise of due diligence. The Record evidences no attempt to do so.

Accordingly, we find no error in the denial of Hernandez's motion for a new trial, much less the requisite "clear abuse of discretion".

B.

**Brady v. Maryland**, 373 U.S. 83 (1963), compels the government to disclose exculpatory evidence to the defendant. In order to establish a **Brady** violation, the defendant must show that 1) evidence was suppressed; 2) the evidence was favorable to the accused; and 3) the evidence was material to the issues of guilt or punishment. **United States v. Ellender**, 947 F.2d 748, 756 (5th Cir. 1991). However, where the "defendant's own lack of reasonable diligence is the sole reason for not obtaining the pertinent material, there can be no **Brady** claim". **Id.** at 757. We have already noted that Hernandez could easily have obtained the social

security card through an exercise of due diligence. Therefore, he cannot establish a **Brady** violation.

C.

Finally, Hernandez asserts his rights to have counsel represent him on the new trial motion and to an evidentiary hearing on it.

The district court relieved court appointed trial counsel of his responsibility on February 7, 1992, almost two months after Hernandez filed his *pro se* motion for a new trial. His choice to proceed in that matter without consulting his attorney is certainly not the court's error.

It is well settled that " a trial judge has discretion to deny motions for a new trial without an evidentiary hearing". ***United States v. MMR Corporation***, 954 F.2d 1040, 1046 (5th Cir. 1992). In this case, it is difficult to imagine what matters might have been explored at such a hearing. The judge who ruled on the motion had presided at trial. Although he did not state his reasons for denying the motion, he might easily have concluded from the evidence adduced at trial and from the motion itself that the evidence was not material, not newly discovered, or that Hernandez failed to exercise due diligence. We find no abuse of discretion.

III.

Accordingly, the judgment is

**AFFIRMED.**