07-2912-cr(L)

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-2912-cr(L)
08-6210-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALEX LUNA,
Defendant,

ARCADIO RAMIREZ, JOSE LUIS RODRIGUEZ,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
United States Attorney
District of Connecticut

HAROLD H. CHEN
WILLIAM J. NARDINI *(of counsel)*
Assistant United States Attorneys

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231.

On May 25, 2006, following a two-and-a-half-week trial, the jury found Arcadio Ramirez ("Ramirez") and Jose Luis Rodriguez ("Rodriguez") guilty of conspiracy to possess with intent to distribute cocaine. GA 2-3.

On June 26, 2007, Judge Underhill sentenced Ramirez to 204 months of imprisonment. Arcadio Ramirez Appendix ("AA") 15. On that same day, judgment was entered. *Id*. On July 3, 2007, Ramirez filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *Id*.

On December 19, 2008, Judge Underhill sentenced Rodriguez to 120 months of imprisonment. Jose Luis Rodriguez Appendix ("RA") 14. On that same day, judgment was entered. *Id*. On December 22, 2008, Rodriguez filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *Id*.

This Court has jurisdiction over the defendants' appeals pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Arcadio Ramirez

1. Whether the district court clearly erred in finding that Ramirez was responsible for conspiring to distribute at least 15 kilograms of cocaine when the evidence supported each of the drug quantities attributed to the defendant by the district court.

II. Jose Luis Rodriguez

1. Whether the district court abused its discretion in permitting the government to call rebuttal witnesses to contradict Rodriguez's testimony on direct examination that he had "never see[n] no drugs" and "never got in trouble before."

2. Whether the district court abused its discretion in ruling that the government's 62-page bill of particulars was sufficiently detailed to provide the defendant with notice of the charge he faced.

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Preliminary Statement

From 1998 through March 2005, Arcadio Ramirez was a major supplier to a large-scale cocaine and crack-cocaine distribution organization based in Danbury, Connecticut, led by Alex Luna. Beginning in 2002 through March 2005, Jose Adames and Jose Luis Rodriguez joined the conspiracy as suppliers to Luna as well. The government's

trial evidence, which included testimony from law enforcement officers and several cooperating co-defendants, demonstrated that Adames, Ramirez, and Rodriguez were engaged in regularly supplying Luna and his associates with kilogram-sized quantities of cocaine. Upon receiving the cocaine, Luna and his associates went to various hotels in the Danbury area to process and package the cocaine for street sale.

One day before the government commenced its case-in-chief, the district court ordered the government to provide Rodriguez and his co-defendants with a bill of particulars. Pursuant to the court's order, the government filed a 62-page bill of particulars.

Rodriguez testified on direct examination that he had never been involved in trafficking cocaine with Adames and denied having ever seen drugs, and claimed that he had never even been in trouble before, aside from "one little problem." Consequently, because Rodriguez put his credibility at issue, the district court permitted the government to call two witnesses on rebuttal who testified that, among other things, Rodriguez not only was involved in distributing cocaine with Adames and Luna, but also had a prior arrest in which he was holding cocaine.

The jury convicted both Ramirez and Rodriguez of conspiracy to possess with intent to distribute, and to distribute, cocaine. On a special verdict form, the jury attributed 5 kilograms of cocaine and/or 50 grams of cocaine base to Rodriguez in violation of 21 U.S.C.

§ 841(b)(1)(A); and 500 grams of cocaine and/or 5 grams of cocaine base to Ramirez in violation of 21 U.S.C. § 841(b)(1)(B). GA 2-3.

The district court sentenced Ramirez to 204 months of imprisonment based on the court's finding that more than 15 kilograms of cocaine were attributable to him. In making this finding, the court considered, among other things, Ramirez's involvement in supplying Luna with cocaine from 1998 to March 2005 as well as evidence that Ramirez was arrested in 2000 at John F. Kennedy Airport in New York with approximately $317,406 in drug proceeds secreted in his luggage and on his person.

Ramirez now challenges his sentence, claiming that the district court's findings on drug quantity were flawed. This Court should affirm Ramirez's sentence because the district court made findings based on evidence presented at both trial and sentencing to support that more than 15 kilograms of cocaine were attributable to him.

Rodriguez challenges his conviction, contending that the district court abused its discretion in permitting the testimony of the government's rebuttal witnesses and in accepting the government's bill of particulars. This Court should affirm Rodriguez's conviction because the district court properly permitted rebuttal witnesses who impeached Rodriguez by contradicting his denial on direct examination that he had ever seen any drugs. In addition, the government's 62-page bill of particulars provided Rodriguez with sufficient notice of the charges brought in the Superseding Indictment.

Statement of the Case

On September 21, 2005, a federal grand jury in the District of Connecticut returned a Superseding Indictment charging Ramirez and Rodriguez, among others, with various narcotics-trafficking offenses. AA 17. In Count One, Ramirez and Rodriguez were charged with conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. AA 18, 19.

A trial was held before the Hon. Stefan R. Underhill. On May 25, 2006, the jury convicted Ramirez of conspiracy to possess with intent to distribute and to distribute 500 grams or more of cocaine and/or 5 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846; and convicted Rodriguez of conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine and/or 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846. GA 2-3.

On June 26, 2007, the district court sentenced Ramirez to 204 months in prison and entered judgment. AA 15. On July 3, 2007, Ramirez filed a timely notice of appeal. *Id*.

On December 19, 2008, the district court sentenced Rodriguez to 120 months in prison and entered judgment. RA 14, 15. On December 22, 2008, Rodriguez filed a timely notice of appeal. *Id*.

Statement of Facts

I. The offense conduct: trial evidence and the presentence report

A. The cocaine distributed by Adames, Ramirez, and Rodriguez

Ramirez, also known as "Peti," was a long-standing, high-volume narcotics trafficker based primarily in Brooklyn, New York. PSR ¶ 22. Along with his brothers Jose Ramirez (a.k.a. "Pollo"), Miguel Ramirez (a.k.a. "Nemo"), and Renee Ramirez, Ramirez controlled, during the 1990s, a city block in Brooklyn on Cornelia Street between Evergreen and Central Avenues. This city block was used by the four Ramirez brothers to distribute large amounts of cocaine. *Id.* Although neither Ramirez nor his brothers lived at this location, they controlled and directed a network of street-level managers and sellers, and supplied them with large amounts of cocaine, among other drugs. *Id.* One of the drug managers who reported to Ramirez and his brothers during this time was Nicky Carrasquillo, who was a cooperating defendant in this case. *Id.*

According to Carrasquillo, Arcadio and the Ramirez brothers would collect the drug proceeds from their sellers, generally on a daily basis, and send these funds back to the Dominican Republic. PSR ¶ 23. In fact, on September 20, 2000, Ramirez was arrested at John F. Kennedy ("JFK") Airport after U.S. Customs found approximately $308,000, consisting primarily of $20 bills, concealed in bed sheets

in his checked luggage. *Id.* Ramirez also had approximately $8,000 on his person. *Id.*

Apparently unaware of Ramirez's drug-trafficking activities, the U.S. Attorney's Office for the Eastern District of New York charged Ramirez with failing to report $317,406 in U.S. currency in violation of 31 U.S.C. § 5316. PSR ¶ 24. As part of his plea agreement, Arcadio forfeited all of the $317,406. *Id.*

Ramirez and his brothers supplied Alex Luna with cocaine for distribution in Danbury, Connecticut, since 1998. AA 72, 75. Alexander Adames ("Alexander"), a cousin of both Luna and Ramirez, initially served as the middleman for these cocaine deliveries in 1998 and 1999. AA 74-75. As a result of these illegal activities, Alexander was arrested and deported twice. *Id.*

By 2002, Luna led an active drug organization that was distributing kilogram-sized quantities of cocaine on a weekly basis in the greater Danbury area. The trial testimony of cooperating witnesses Carrasquillo, Nelson Rosa, Jose Pena, and Maria Robles, among others, disclosed that Adames, also known as "Ponpa," who was Luna's cousin and one of Ramirez's former block managers in Brooklyn, served as the principal supplier of cocaine; and that Ramirez and Rodriguez were also cocaine suppliers who would travel, usually with Adames, from New York to deliver drugs to Luna in Danbury. Luna would also travel to New York to meet Adames, Ramirez, and Rodriguez to pick up cocaine and exchange money for drugs.

Rosa and Pena testified that Adames, Ramirez, and Rodriguez would regularly deliver drugs to Luna in Danbury. GA 11, 13, 14, 18, 21, 27, 32, 39, 40, 47, 48, 52, 53, 57, 58, 64, 65. Similarly, Carrasquillo testified that Adames, Ramirez, and Rodriguez together made drug deliveries to Luna on multiple occasions and supplied Carrasquillo with cocaine. AA 79, 90, 96, 98-99, 104, 106-07. Robles also testified that Rodriguez met with another supplier named "Rubio," and that Rodriguez and Adames once ran Luna's drug-trafficking business while he was on vacation. GA 81, 85, 86, 87, 104.

From 2002 onward, Adames, Ramirez, and Rodriguez regularly supplied Luna with 500-gram to kilogram-sized quantities of cocaine. Rosa testified that at one location in Danbury, Ramirez delivered cocaine three or four times to Luna. GA 40. Pena further testified that Luna once told him to enter a green Ford Taurus, driven by Ramirez, in which Adames and Jose Luis were passengers. There, Ramirez opened a secret compartment in the Taurus and removed a black bag, which Adames handed over to Pena. Pena brought Luna this black bag, which contained one kilogram of cocaine broken down into ten 100-gram packages. GA 62-67.[1]

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[1] Ramirez and Rodriguez were tried with defendant Warren Hawkins, who was convicted by the jury on May 25, 2006, of conspiracy to possess with intent to distribute, and to distribute, less than 500 grams of cocaine and/or 5 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. On June 15, 2007, the district court (continued...)

Shortly before his arrest, law enforcement officers observed Ramirez trying to manipulate components of a silver Jeep Grand Cherokee, registered in the name of his sister, Vianny Ramirez. PSR ¶ 27. After this automobile was seized and searched, the officers determined that this car contained a high-quality secret compartment with hydraulic pistons used to hide drugs and contraband. *Id.*

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[1] (...continued)
issued a ruling and order acquitting Hawkins. The government appealed. On October 16, 2008, this Court reversed the district court's acquittal order and remanded the case for further proceedings consistent with its opinion. *See United States v. Hawkins*, 547 F.3d 66, 78 (2d Cir. 2008).

B. The bill of particulars with respect to Rodriguez

On May 8, 2006, two days before the start of evidence, Rodriguez filed a motion for a bill of particulars. RA 6. On May 9, 2006, the district court granted the motion in part and ordered the government to produce a bill of particulars with respect to two items: (1) "the names of individuals the government claims are coconspirators with respect to each defendant, including those referred to as 'others known . . . to the Grand Jury' in the Superseding Indictment, and (2) a list of the drug transactions in which the individual defendant was allegedly involved, including the names of the other parties involved, the nature of and the amount of the drug, and the approximate date and location of such transactions." GA 5-6.

On May 10, 2006, the government notified the district court that it would file a motion for reconsideration of the court's ruling. GA 7. On May 11, 2006, the district court informed the government that it should file a bill of particulars on May 15, 2006, regardless of the filing of the motion for reconsideration. GA 44.

On May 15, 2006, the government filed a motion for reconsideration and attached a 62-page bill of particulars. This document specified (1) a complete list of Rodriguez's co-conspirators; and (2) Rodriguez's involvement in trafficking narcotics with the Luna organization, including the names of Rodriguez's co-conspirators, the amounts and types of narcotics, and the approximate dates of the specified transactions. AA 37-98. In the motion for reconsideration, the government renewed its objection to

the court's order with respect to the bill of particulars. AA 21-36. On May 18, 2009, the district court denied the government's motion for reconsideration. AA 99-103.

Due to the court's order that a bill of particulars be filed after the commencement of the case-in-chief, the government stated on the record that it would make its witnesses available for recall should Rodriguez or his co-defendants require additional testimony from those witnesses. GA 7.

C. Rodriguez's trial testimony and the government's rebuttal witnesses

1. Rodriguez's testimony

At trial, Rodriguez testified in his own defense and contradicted the testimony of, among others, Carrasquillo, Rosa, and Pena. In essence, Rodriguez disclaimed any knowledge of drug trafficking and contended that he had merely driven Adames and Ramirez to meet with Luna. When asked on direct examination whether he saw "any drug deliveries of any kind" between 2001 and 2004, Rodriguez answered, "No, I never see no drugs." GA 119. He further disclaimed any knowledge of the secret compartments, or "traps," used to hide and transport drugs in vehicles. GA 126. Moreover, except for "a little problem," Rodriguez testified that he "never got in trouble before." GA 127. On cross-examination, Rodriguez stated that between 1998 and 2005, he had never seen any illegal drugs except for marijuana. GA 134.

2. Maria Robles' testimony

On May 23, 2006, after Rodriguez ended his defense case, the government recalled Maria Robles as a rebuttal witness. She testified that she saw Rodriguez deliver drugs with Adames to Luna in Danbury on a weekly basis, RA 114; that she had a conversation with Rodriguez in which he described swallowing "balloons" full of cocaine to smuggle them from the Dominican Republic to the United States, RA 115; and that Luna had told Rodriguez to find other persons who were willing to smuggle cocaine in the same way, RA 116. She further testified that on two or three occasions, Rodriguez drove from New York alone to bring cocaine to Luna in exchange for cash. RA 117.

3. Officer Cuba's testimony

After Robles concluded her testimony, the government called Officer Waldo Cuba of the New York Police Department to testify as a second rebuttal witness. When Rodriguez objected that Officer Cuba was being called on a collateral matter, the government argued that "the defendant [had taken] the stand and, by doing so, put his credibility at issue." RA 107. The court overruled the objection and permitted Officer Cuba to testify under Fed. R. Evid. 608(b). RA 136.

Officer Cuba testified that while on duty in Queens, New York, on March 30, 2005, he observed Rodriguez standing outside a vehicle placing what appeared to be plastic bags of cocaine into a small magnetic box. RA 140-42. Officer Cuba further testified that after he stopped the

vehicle and arrested Rodriguez, he inspected the box. Officer Cuba determined that the box contained cocaine and what appeared to be heroin. RA 142.

Before Officer Cuba was cross-examined, the district court instructed the jury that his testimony was introduced not to prove prior conduct, but strictly to impeach Rodriguez's credibility:

> Mr. Cuba is here for the purposes of providing testimony intended to impeach or contradict the testimony given by Mr. Rodriguez. The activities that were just testified to are outside the scope, that is, the time frame of the allegations of the indictment and, therefore, may not be considered by you for purposes of deciding the substance of the charges in the indictment but rather, can be considered only for purposes of impeaching Mr. Rodriguez.

Id.

On May 25, 2006, the jury convicted Ramirez of conspiracy to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). The jury also convicted Rodriguez of conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). GA 2-3.

4. Rodriguez's post-conviction motions

On June 1, 2006, Rodriguez moved for dismissal, acquittal, or a new trial, arguing in part that "the document filed by the government was not a bill of particulars." AA 152. On June 8, 2006, Rodriguez filed a supplemental motion further contending that the bill of particulars was inadequate as a matter of law. AA 157.

On March 26, 2008, the district court denied all of Rodriguez's various motions for post-conviction relief. With respect to the bill of particulars, the district court held:

> [T]he summary of evidence the government produced was sufficient to satisfy the purpose of my order. In addition, although the government's evidence against the defendants, including Rodriguez, was at times far-reaching, review of the trial transcript demonstrates a lack of the sort of unfair surprise that a bill of particulars guards against. In other words, Rodriguez may have had a difficult time defending himself, but the vast discovery the government provided, along with the somewhat narrower summary of criminal activity, satisfied any concerns about unfair surprise and a lack of notice of evidence against him.

RA 185.

II. The sentencing hearings

A. Arcadio Ramirez

At the sentencing hearing on June 26, 2007, the district court made findings about Ramirez's attributable drug quantity under U.S.S.G. 1B1.3.[2] As a threshold matter, the court found that Ramirez was directly involved in distributing 3.5 kilograms of cocaine. AA 264. The court further found that Carasquillo's testimony at trial and sentencing was credible, AA 263, including his testimony that Ramirez was supplying Luna with cocaine as far back as 1997 or 1998, AA-215; that the cocaine deliveries to Luna occurred at least once a week, in quantities of approximately 125 grams, AA 216-17; and that in late 2004 and early 2005, Ramirez supplied Luna with 80 grams to 250 grams of cocaine at least twice a week. AA 221-22.

Based on the above findings, the court calculated Ramirez's total drug quantity to be between 15-50 kilograms of cocaine based on the following quantities: (1) 3.5 kilograms were directly attributable to Ramirez at trial, AA 264; (2) two kilograms were "conservatively" attributed from transactions between Ramirez and Carrasquillo from late 2004 to early 2005, *id.;* (3) four to seven kilograms of cocaine were extrapolated from approximately one-third to one-half of the $317,406 in

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[2] The government initially argued, per the PSR, that attributable drug quantity should be 50 to 150 kilograms of cocaine. AA 251-52, 259.

drug proceeds seized from Ramirez at JFK Airport, AA 265; and (4) the court's finding that the cocaine supplied by Alexander, Adames, and Rodriguez to Luna between 1998 and 2005, which originated from Ramirez and his brothers, put Ramirez's attributable quantity "easily over the 15-kilogram minimum." *Id.* In arriving at this quantity, the court concluded that "Ramirez was directly or indirectly involved in supplying the Luna organization with, a bare minimum, some 20 or 25 kilograms of cocaine as relevant conduct." *Id.* The court further found that it did not have to make a specific quantity finding on Ramirez's pre-1998 relevant conduct because its quantity finding for the 1998-2005 conspiracy was "sufficient to get over the 15 [kilogram] minimum." AA 266.

Accordingly, the district court sentenced Ramirez to a term of imprisonment of 204 months, which was within the advisory Guideline range of 188-235 months based on an adjusted offense level of 34 and a criminal history category of III. AA 269, 275.

B. Jose Luis Rodriguez

At the sentencing hearing on December 19, 2008, the district court sentenced Rodriguez to a term of imprisonment of 120 months, which was the mandatory minimum sentence as well as a one-month departure from the advisory Guideline range of 121-151 months based on an adjusted offense level of 32 and a criminal history category of I. AA 218, 228.

SUMMARY OF ARGUMENT

I. The district court did not clearly err in finding by a preponderance of the evidence at sentencing that Ramirez was responsible for conspiring to distribute at least 15 kilograms of cocaine. The evidence presented at trial and during Ramirez's sentencing hearing demonstrated his consistent involvement in providing the Luna organization with large amounts of cocaine over several years. As the district court explicitly found, 15 kilograms was a conservative estimate of the cocaine attributable to Ramirez based on the evidence presented at trial and at sentencing, and in the Presentence Report.

II. The district court did not abuse its discretion in permitting the government to call rebuttal witnesses Maria Robles and Waldo Cuba to impeach Rodriguez's testimony on direct examination that he had "never see[n] no drugs" and "never got in trouble before" aside from "one little problem." As an initial matter, Robles' rebuttal testimony was admissible under Fed. R. Evid. 401 because it went to the heart of Rodriguez's involvement in the Luna drug-trafficking conspiracy. Moreover, by choosing to testify about these issues, Rodriguez exposed himself to being impeached through extrinsic evidence that contradicted his direct testimony. Consequently, the district court was within its discretion to permit rebuttal witnesses who contradicted his claim that he had no prior experience in the illegal drug trade.

III. The district court did not abuse its discretion in finding that the government's 62-page bill of particulars

provided Rodriguez with sufficient notice of the charge in the Superseding Indictment. This bill of particulars, which provided Rodriguez with a comprehensive summary of the government's evidence against him, also served to protect him from any unfair surprise at trial.

ARGUMENT

I. The district court did not clearly err in finding that Ramirez was responsible for conspiring to distribute at least 15 kilograms of cocaine when the evidence presented at trial and sentencing supported those findings

A. Governing law and standard of review

"The quantity of drugs attributable to a defendant at the time of sentencing is a question of fact for the district court, subject to a clearly erroneous standard of review." *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998). There is "clear error" only if the Court is "'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also United States v. Sash*, 396 F.3d 515, 521 (2d Cir. 2005). As long as the "district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

In determining the quantity of drugs attributable to a defendant for sentencing purposes, the sentencing court must "approximate the relevant drug quantity" if "the quantity seized does not reflect the true scale of the offense." *United States v. Jones*, 531 F.3d 163, 175 (2d Cir. 2008) (internal quotation marks omitted) (citing U.S.S.G. § 2D1.1, app. note 12). This Court will sustain such a finding as long as "the evidence – direct or circumstantial – supports a district court's preponderance determination as to drug quantity." *Id*. "[A] sentencing court may rely on any information it knows about, including evidence that would not be admissible at trial, as long as it is relying on specific evidence – *e.g.*, drug records, admissions or live testimony." *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (internal citations and quotation marks omitted) (citing, *inter alia*, U.S.S.G. § 6A1.3); 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). "[T]he district court's estimation need be established only by a preponderance of the evidence." *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (finding district court did not err in attributing to defendant the estimated weight of marijuana in boxes that were not seized). In making a determination as to drug quantity, the district court must "state in open court" its findings. *United States v. Carter*, 489 F.3d 528, 537 (2d Cir. 2007), *cert. denied sub nom. Bearam v. United States*, 128 S. Ct. 1066 (2008).

Moreover, "the quantity of drugs attributed to a defendant need not be foreseeable to him when he personally participates, in a direct way, in a jointly undertaken drug transaction." *United States v. Chalarca*, 95 F.3d 239, 243 (2d Cir. 1996) (finding that defendant should be responsible for entire drug quantity when she participated directly in drug conspiracy); *see United States v. Diaz*, 176 F.3d 52, 119-20 (2d Cir. 1999) (holding defendant responsible for drug quantity due to direct participation in running drug block even after he was incarcerated).

Even in the absence of evidence demonstrating that a defendant directly participates in jointly undertaken illegal conduct, "[i]t is well established that a district court may consider the relevant conduct of co-conspirators when sentencing a defendant." *United States v. Johnson*, 378 F.3d. 230, 238 (2d Cir. 2004). "A defendant convicted for a 'jointly undertaken criminal activity' such as . . . [a] drug trafficking conspiracy, may be held responsible for 'all reasonably foreseeable acts' of others in furtherance of the conspiracy," *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quoting U.S.S.G. § 1B1.3(a)(1)(B)), *cert. denied*, 127 S.Ct. 1022 (2007), provided that the court makes particularized findings that the acts committed are within the scope of the defendant's agreement with his co-conspirators and that the acts of the co-conspirators are reasonably foreseeable to the defendant, *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). *See also Snow*, 462 F.3d at 72 ("The defendant need not have actual knowledge of the exact quantity of narcotics involved in the entire conspiracy; rather, it is sufficient if he could

reasonably have foreseen the quantity involved."). The ultimate question is "whether the conspiracy-wide quantity was within the scope of the criminal activity" to which the defendant agreed. *Id.*

B. Discussion

Ramirez contends that the district court erred in attributing at least 15 kilograms of cocaine to him without making the requisite factual findings. This claim is without merit.

1. The district court's findings were factually supported by evidence introduced at trial and sentencing, and contained in the PSR

The district court made clear, factually supported findings that Ramirez was responsible for weekly deliveries of cocaine to the Luna organization between the time period of the charged conspiracy from 1998 to March 2005. AA 265-66. Due to the recurring nature of the drug deliveries, the court found, "Ramirez was directly or indirectly involved in supplying the Luna organization with, a bare minimum, some 20 to 25 kilograms of cocaine as relevant conduct." AA 265. This finding, as explained by the court, was derived from the drug quantity found at trial to be directly attributed to Ramirez; his prior arrest for attempting to smuggle out $317,406 in drug proceeds at JFK Airport; Carrasquillo's testimony at sentencing; and the quantities indirectly attributable to Ramirez by virtue of his and brothers' supplying cocaine to Luna through Adames, Rodriguez, and Alexander Adames. AA 264-65.

In making this finding, the court found by a preponderance of the evidence that Carrasquillo's testimony was "generally credible." AA 263.

In addition, the trial testimony of Rosa, Pena, and Robles demonstrates that Adames, Ramirez, and Rodriguez would regularly deliver drugs to Luna in Danbury. GA 11, 13, 14, 18, 21, 27, 32, 39, 40, 47, 48, 52, 53, 57, 58, 64, 65, 81, 85, 86, 87, 104. A sentencing court may properly consider the sworn statements of co-conspirators in a drug organization when determining aggregate quantity attributable to a fellow co-conspirator. *See, e.g., United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003) (finding the sentencing court reasonably attributed drug quantity to co-conspirator the "quantity of drugs that . . . the ringleader of the conspiracy[] admitted to trafficking in his own plea agreement"); *United States v. Hernandez*, 227 F.3d 686, 698 (6th Cir. 2000) (affirming sentence of drug gang's leader that was based, in part, on the district court's finding that co-conspirators' drug quantity also applied to the leader). *Cf. United States v. Florez*, 447 F.3d 145, 155 (2d Cir. 1990) (holding that testimony of a single accomplice is sufficient to sustain a conviction so long as the "testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt"). Here, the court appropriately considered the testimony of the cooperating witnesses, which included Carrasquillo's sentencing testimony and the trial testimony of Rosa, Pena, and Robles, when finding that Ramirez and his brothers were involved in supplying the Luna organization through Alexander, Adames, and Rodriguez between 1998 and 2005. AA 265.

Moreover, the methodology employed by the district court to arrive at the 15-50 kilogram figure, reduced from the PSR's initial estimate of 50-150 kilograms, AA 251, was reasonable. The court explained that its calculation was "very easily over the 15-kilogram minimum," AA 265-266. First, the court found that 3.5 kilograms of cocaine were directly attributable to Ramirez based on the trial evidence. AA 264. Second, two more kilograms were attributed from drug transactions between Ramirez and Carrasquillo from late 2004 to early 2005 that "occurred over a period of three-and-a-half months, two times a week and between 80 and 250 grams per delivery." *Id.* Third, the court extrapolated four to seven kilograms of cocaine based on one-third to one-half of the $317,406 in drug proceeds seized from Ramirez at JFK Airport. AA 265. Here, the district court implicitly adopted the government's argument that the $317,406 seized from Ramirez in 2000 was equivalent to approximately 15 kilograms of cocaine. AA 202. The government's position was tacitly premised on a price of roughly $21,000 per kilogram (i.e., $317,406 ÷ $21,000 = roughly 15 kilograms), which was "a conservative estimate of the price of [a] kilo . . . of cocaine back in 2000." *Id*. Thus, based on these three sources of evidence, the court had already established an attributable drug quantity between 9.5 and 12 kilograms of cocaine.

Fourth and most significant, the court found that the cocaine supplied to Luna by Alexander from 1998 to 1999, and by Adames and Rodriguez from 2002 and 2005, originated from Ramirez and his brothers in Brooklyn. AA 265. The court conservatively found that weekly shipments

of 80 grams of cocaine per week, which represented the "deliveries . . . on the very lowest end" during this period, put the attributable drug quantity "very easily over the 15-kilogram minimum" when combined with the finding of 9.5 to 12 kilograms. *Id.* Thus, the court concluded that "Ramirez was directly or indirectly involved in supplying the Luna organization with, a bare minimum, some 20 or 25 kilograms of cocaine as relevant conduct." *Id.* The court further found that it did not have to make a specific finding on Ramirez's drug-trafficking activities before 1998 because his attributable quantity during the charged 1998-2005 conspiracy was "sufficient to get over the 15 [kilogram] minimum." AA 266. Notably, Ramirez offered no evidence or testimony to dispute the government's evidence on drug quantity. Thus, the court's drug-quantity finding was both conservative and factually supported. *See Prince*, 110 F.3d at 925 (affirming district court's "conservative" estimate of drug quantity).

2. Ramirez's challenges on appeal to the drug-quantity finding are without merit

Ramirez alleges three errors in the district court's drug quantity finding. First, he contends that because he was acquitted of distributing more than 5 kilograms of cocaine under 21 U.S.C. § 841(b)(1)(A), and instead was convicted of distributing between 500 grams and 5 kilograms of cocaine under 21 U.S.C. § 841(b)(1)(B), the court was not permitted to attribute a greater drug quantity to him at sentencing. It is settled law, however, that a sentencing court may make factual findings by a preponderance of the evidence, even if a jury did not make such findings beyond

a reasonable doubt at trial. In *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), this Court held that, after *United States v. Booker*, 543 U.S. 220 (2005), a district court's "authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment." *Id.* at 525. Similarly, this Court held in *Vaughn* that the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), survived *Booker*, so that a district court may base its sentence even on acquitted conduct. *Vaughn*, 430 F.3d at 525. As this Court further explained, "district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct, as long as the judge does not impose (1) a sentence in the belief that the Guidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence under § 841(b) not authorized by the verdict." *Id.* at 527.

Here, the district court's actions were fully consistent with the dictates of *Vaughn*. It stated on the record that the guidelines were advisory, rather than mandatory, and discussed the factors set forth in 18 U.S.C. § 3553(a). AA 272-75. Nor did the court's sentence deviate from the statutory maximum or the mandatory minimum. Thus, the district court's findings that Ramirez's relevant conduct included acquitted conduct is wholly consistent with *Vaughn*.

Second, the defendant argues that the district court improperly considered his prior arrest at JFK Airport for

attempting to smuggle $317,406 out of the United States as relevant conduct. This Court has ruled in *United States v. Jones,* 531 F.3d 163, 177-78 (2d Cir. 2008), "that where, as in this case, seized currency appears by a preponderance of the evidence to be the proceeds of narcotics trafficking, a district court may consider the market price for the drugs in which the defendant trafficked in determining the drug quantity represented by that currency." *Id.* at 175. *Jones* further acknowledges that the "eight sister circuits that have addressed the issue have uniformly concluded that a sentencing court may derive drug quantity from seized currency that appears to be the proceeds of illegal trafficking." *Id.* As a result, this Court reached "the same conclusion and h[e]ld that a district court may use money attributable to drug transactions to determine the quantity of drugs relevant to sentencing." *Id.* at 176.

Here, in conformity with *Jones*, the district court found "that between a third and half of that $317,000 is attributable to the Danbury [drug] deliveries." AA 265. The district court could have made a supportable factual finding that the entire $317,406 could be extrapolated into a quantity of cocaine as relevant conduct because, as the government argued, Ramirez's Brooklyn street sales could have been viewed as relevant conduct. *See* U.S.S.G. § 1B1.3(a)(1)(B) (relevant conduct includes "in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly

undertaken criminal activity"). Instead, the court took a conservative approach and attributed only the portion of Ramirez's drug transactions – that is, his deliveries to the Luna organization in Danbury – as relevant conduct. AA264-65. The court's conservative finding accurately reflects the trial record, the PSR, and Carrasquillo's sentencing testimony, and is not clearly erroneous. AA 265. *See United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995) (affirming drug quantity attribution that "was carefully considered, conservative, and based on the evidence presented, primarily [two cooperators'] testimony").

Ramirez's reliance on *United States v. Fermin*, 32 F.3d 674 (2d Cir. 1994), is misplaced. There, the defendant's underlying offense conduct involved 33.2 kilograms of cocaine for a 1990-91 conspiracy offense, but the district court added 58 more kilograms as relevant conduct based on the defendant's seized drug records from 1983-85. *Id*. at 681. This Court remanded for resentencing, finding that there was "no clear evidence that the type of conduct reflected in the drug records for the 1983-85 period is even related to the [1990-91] conduct for which he has been convicted." *Id*. Here, the 2000 cash seizure at JFK Airport occurs during the charged 1998-2005 conspiracy. Thus, *Fermin* is of no moment to Ramirez.

Finally, even if this Court were to exclude the district court's finding that four to seven kilograms are attributable from the $317,406 cash seizure, Ramirez's drug quantity would still exceed the 15-kilogram threshold. As discussed *supra*, the district court found that

5.5 kilograms of cocaine were derived from 3.5 kilograms directly attributable to Ramirez at trial, AA 264, and two kilograms attributed from transactions between Ramirez and Carrasquillo from late 2004 to early 2005, *id.* The court further found that the minimum amount of cocaine distributed on a weekly basis by Ramirez and his brothers with Adames, Rodriguez, and Luna was 80 grams per week, which is equivalent to approximately 4 kilograms per year. AA 266. Thus, even if this Court were to consider this minimum drug quantity of 80 grams per week for 1998, 1999, and 2003, these three years alone would yield 12 kilograms of cocaine. When combined with the court's 5.5 kilogram finding, that would exceed the 15-kilogram threshold.[3] Accordingly, the district court's quantity finding on the drug proceeds is not essential to affirming Ramirez's sentence.

In sum, the district court did not clearly err in finding that Ramirez was responsible for conspiring to distribute at least 15 kilograms of cocaine.

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[3] If the district court had assumed the higher quantity of 250 grams per week set forth in Carrasquillo's testimony, that would have yielded 13 kilograms per year. AA 264. Thus, just one year of the relevant conduct from the 1998-2005 conspiracy, plus the court's 5.5 kilogram finding, would have been sufficient to exceed the 15-kilogram threshold.

II. The district court did not abuse its discretion in permitting the government to call rebuttal witnesses to contradict Rodriguez's testimony that he had no involvement in or knowledge of the illegal drug trade

A. Governing law and standard of review

"Central to the proper operation of the adversary system is the notion that 'when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.'" *United States v. Garcia,* 936 F.2d 648, 653 (2d Cir. 1991) (quoting *United States v. Havens*, 446 U.S. 620, 626-27 (1980)). Where a defendant testifies at trial and makes a false or misleading statement, the government may refute the testimony on cross-examination, or in its rebuttal case, by introducing evidence of the defendant's involvement in other crimes and bad acts. Under the "impeachment by contradiction" doctrine, the government is entitled to introduce extrinsic evidence that proves the testimony is false. *See United States v. Castillo*, 181 F.3d 1129, 1132-33 (9th Cir. 1999); *United States v. Beverly*, 5 F.3d 633, 639-40 (2d Cir. 1993); *United States v. Garcia*, 900 F.2d 571, 575-76 (2d Cir. 1990). "Although Rule 608(b) generally prohibits extrinsic evidence of specific instances of conduct, an exception to that rule exists when evidence contradicts a witness's testimony." *United States v. Rodriguez*, 539 F. Supp. 2d 592, 595 (D. Conn. 2008); *see also Castillo*, 181 F.3d at 1132-33. "'This approach has been justified on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact,

and then shield himself from impeachment by asserting the collateral-fact doctrine.'" *Id.* at 1133 (quoting 2A Wright & Gold, Federal Practice and Procedure, § 6119 at 116-17 (1993)).

Moreover, where a defendant testifies and "offers an innocent explanation [of events] he 'opens the door' to questioning into the truth of his testimony, and the government is entitled to attack his credibility on cross-examination." *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998). "Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied." *Beverly*, 5 F.3d at 639. In doing so, the government may use in its cross-examination or rebuttal case evidence that would otherwise be barred from use. *See id*. at 640; *United States v. Atherton*, 936 F.2d 728, 734 (2d Cir. 1991); *Walder v. United States*, 347 U.S. 62, 65-66 (1954). While the government cannot manipulate its questions on cross-examination to entice a defendant into opening the door to extrinsic evidence, a defendant may open such a door when testifying on direct and cross-examination alike. *See Castillo*, 181 F.3d at 1133-34; *Atherton*, 936 F.2d at 734; *Havens*, 446 U.S. at 627.

In applying this doctrine, this Court has permitted the admission of otherwise objectionable evidence in the following circumstances: evidence of the defendant's involvement in prior shootings, after the defendant falsely testified that he was a law-abiding citizen who had no familiarity with guns and never possessed one, *Beverly*, 5

F.3d at 639-40; evidence of the defendant's involvement with organized crime members and drug traffickers, after he claimed that he believed he was involved in a phony drug sale, *United States v. Gambino*, 951 F.2d 498, 503-04 (2d Cir. 1991); evidence of the defendant's association with organized crime and involvement in a prior extortion threat, after he testified that his association with crime figures was by chance, *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982); and evidence of the defendant's involvement in uncharged bribes, after he denied ever taking bribes from anyone, *United States v. Benedetto*, 571 F.2d 1246, 1250 (2d Cir. 1978).

"The rationale behind this rule is not difficult to perceive, for even if the issue injected is irrelevant or collateral, a defendant should not be allowed to profit by a gratuitously offered misstatement." *United States v. Beno*, 324 F.2d 582, 588 (2d Cir. 1963). If a defendant testifies falsely on his own behalf, this Court has found that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Walder*, 347 U.S. at 65.

"A district court has wide discretion in determining whether to permit evidence on rebuttal." *United States v. Tejada*, 956 F.2d 1256, 1266 (2d Cir. 1992). More generally, a district court has broad discretion in its decisions to admit or exclude evidence and testimony. Its rulings in this regard are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003)

(manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

B. Discussion

Rodriguez contends that the district court should have excluded the rebuttal testimony of Cuba and Robles under Fed. R. Evid. 608(b) after Rodriguez testified on direct examination that he had "never see[n] no drugs" and "never got in trouble before" except for "one little problem." GA 119, 127. This argument misreads Fed. R. Evid. 608(b) and ignores this Court's established authorities permitting the government to impeach a defendant by contradicting his direct testimony with extrinsic evidence.

As an initial matter, Robles' rebuttal testimony was admissible under Fed. R. Evid. 401 because it went to the heart of Rodriguez's involvement in the Luna drug-trafficking conspiracy. For example, she testified that she saw Rodriguez deliver cocaine with Adames to Luna in Danbury on a weekly basis, RA 114, and that Rodriguez drove by himself two or three times from New York to bring cocaine to Luna in exchange for cash, RA 117. She further testified that Rodriguez admitted to swallowing "balloons" full of cocaine to smuggle them from the Dominican Republic to the United States, RA 115, and that Luna had told him to find other persons who were willing to do the same, RA 116. Thus, because her rebuttal testimony concerned matters regarding the distribution of cocaine by Rodriguez with Luna, her testimony was admissible under Fed. R. Evid. 401.

In any event, both Robles's and Cuba's testimony was admissible to impeach Rodriguez by contradicting his volunteered testimony on direct examination. Although Fed. R. Evid. 608(b) generally prohibits extrinsic evidence of specific instances of conduct, this Court has long recognized that the admission of extrinsic evidence is permissible to contradict a witness's volunteered testimony on direct examination and, in some circumstances, on cross-examination as well. *See Garcia*, 900 F.2d at 575 (discussing inapplicability of Rule 608(b) to "impeachment by contradiction" evidence); *Benedetto*, 571 F.2d at 1250 (same); *see also United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (finding that "[i]mpeachment by contradiction is a recognized mode of impeachment" and that "extrinsic evidence to impeach is only admissible for contradiction where the prior testimony being contradicted was itself material to the case at hand").

In *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), the Court rejected a challenge to evidence offered by the government in its rebuttal case when the defendant Mazzurco claimed in his defense case that he had lawful employment as a broker of imported gems and "[i]mplicitly . . . denied that he had any connection to narcotics trafficking." *Id*. at 1172. There, the government offered a customs document seized from the defendant's home showing that one of his customers, Guido Cocilovo, had shipped certain goods from Italy to Miami, as well as evidence substantiating Cocilovo's arrest while possessing six kilograms of cocaine and a paper note bearing the defendant's telephone number. This Court held that "[t]he

evidence relating to Cocilovo served to rebut Mazzurco's claim that he was an importer of legitimate goods" and that "[b]y linking Mazzurco to Cocilovo, who clearly was involved both in importing activities and drug trafficking, the evidence cast doubt on Mazzurco's claim of innocence." *Id*.

Here, in the same manner as the *Casamento* court, the district court properly permitted Waldo and Cuba to testify on rebuttal because their testimony directly contradicted Rodriguez's testimony that during the period of the alleged conspiracy, he had never seen illegal drugs except for marijuana; had never seen or participated in drug deliveries; and had never observed a secret compartment in a vehicle designed to hide illegal drugs. Unlike the *Casamento* defendant who *implicitly* denied involvement in narcotics trafficking, *id*. at 1141-42, Rodriguez *explicitly* denied being involved in distributing cocaine, particularly with Adames, when questioned by his own attorney on direct examination:

> Q You've been in here in court for the whole trial?
>
> A Yes.
>
> Q You've heard it said that [Adames] was delivering drugs?
>
> A Yes.
>
> Q During the time that you were just describing, did you see *any deliveries of drugs of any kind*?

A *No, I never see no drugs. . . .*

GA 119 (emphasis added). Rodriguez later disavowed on direct examination any knowledge of the secret compartments, or "traps," in vehicles used by Adames and others to transport drugs to Luna:

Q [Y]ou've seen in this courtroom and heard testimony about traps in vehicles; you hear that?

A Yes.

Q Did you see any traps in any of the vehicles that you were in?

A No, never.

Q Did you see anybody reach into any traps and hand packages over?

A Nope.

GA 125-26. Rodriguez further testified on direct that with the exception of a "little problem," he had "never got[ten] in trouble before." GA 127.

On cross-examination, Rodriguez's denial that he had ever seen cocaine became even more emphatic:

Q And, Mr. Rodriguez, you're claiming you never say any drugs in this whole time period, correct?

A No, never.

Q Except for marijuana. You saw marijuana, right?

A Yes.

Q Okay, but you never saw cocaine?

A No.

GA 134.

Thus, just as the prosecution properly did in *Casamento*, the government elicited testimony from Waldo and Cuba to rebut Rodriguez's unequivocal denial. For instance, Maria Robles testified about, among other things, that she saw Rodriguez deliver drugs with Adames to Luna in Danbury on a weekly basis, RA 114; that she had a conversation with Rodriguez in which he described swallowing "balloons" full of cocaine to smuggle them from the Dominican Republic to the United States, RA 115; and that on two or three occasions, Rodriguez drove from New York alone to bring cocaine to Luna in exchange for cash. RA 117. Similarly, Officer Cuba testified that he had previously arrested Rodriguez in possession of a box containing cocaine and what appeared to be heroin. RA 140-42. The district court instructed the jury that Officer Cuba's testimony was relevant only with respect to Rodriguez's truthfulness for impeachment. RA 142.

Rodriguez further contends that the testimony of Robles and Cuba was improper because Rodriguez never testified about the facts raised in their rebuttal testimony. Rodriguez, however, chose to testify on his behalf and denied knowledge of illegal drugs and any involvement in the Luna conspiracy. This denial made him subject to impeachment. As this Court has consistently held, a defendant who testifies on his own behalf cannot manipulate Rule 608(b)'s prohibition on extrinsic evidence to shield false testimony from impeachment. *See Walder*, 347 U.S. at 65 (finding that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility"). Furthermore, this Court has affirmed such rebuttal testimony when the defendant has denied engaging in illegal conduct. *See Beverly*, 5 F.3d at 639-40 (defendant's involvement in prior shootings after claiming to be a law-abiding citizen with no familiarity with guns); *Gambino*, 951 F.2d at 503-04 (defendant's involvement with drug traffickers after claiming that he was involved in a phony drug sale); *Benedetto*, 571 F.2d at 1250 (defendant's involvement in uncharged bribes after denying ever taking bribes). Thus, the district court properly exercised its discretion to permit Cuba's and Robles's testimony to contradict Rodriguez's denial that he was ever involved with illegal drugs or in the Luna conspiracy.

Moreover, even indulging the unwarranted assumption that the district court abused its discretion by permitting Cuba and Robles to testify on rebuttal, such error would have been harmless in light of the overwhelming evidence

of Rodriguez's knowing participation in the Luna drug conspiracy. *See United States v. Meserve*, 271 F.3d 314, 329-31 (1st Cir. 2001) (applying harmless error review to wrongful admission of extrinsic evidence in violation of Rule 608(b)). Here, the evidence in the government's case-in-chief included, among other things, video surveillance of Rodriguez and Adames meeting at Luna's apartment, GA 68-79; a post-arrest statement in which Rodriguez admitted driving with Adames from New York to Connecticut to sell large quantities of cocaine to Luna, GA 106-16; and the testimony of several co-defendants, including Rosa, Pena, and Carrasquillo, who testified that Rodriguez was involved in regular cocaine transactions with Luna, Adames, and Ramirez, GA 11, 13, 14, 18, 21, 27, 32, 39, 40, 47, 48, 52, 53, 57, 58, 64, 65.

In sum, because Robles's and Cuba's rebuttal testimony was offered to directly contradict statements that Rodriguez made during his direct examination rather than to prove specific instances of untruthfulness, the district court did not abuse its discretion in permitting their rebuttal testimony.

III. The district court did not abuse its discretion in ruling that the government's 62-page bill of particulars was sufficient

A. Governing law and standard of review

A request for a bill of particulars is granted only when necessary to inform defendants of the charges against them with sufficient precision to enable them to prepare their

defense; to avoid or minimize the danger of surprise at trial; or to enable them to plead their acquittal or conviction to bar a subsequent prosecution for the same offense when the indictment is too vague for such purposes. *See Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987). The district court "has the discretion to deny a bill of particulars 'if the information sought by defendant is provided in the indictment or in some acceptable alternate form.'" *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998) (citing *Bortnovsky*, 820 F.2d at 574). Moreover, a bill of particulars is "not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means." *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999).

"The test for determining whether a bill of particulars should have been granted is similar to the test for determining the general sufficiency of the indictment . . . that is, 'whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.'" *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003) (quoting *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981) (quotation omitted)). The decision to grant a request for a bill of particulars is reviewed for abuse of discretion. *See id.*; *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984); *see also Rodella v. United States*, 286 F.2d 306, 310 (9th Cir. 1960) ("The determination of the extent to which a motion for a bill of particulars should be granted has been frequently and consistently held to be a

matter addressed to the sole judicial discretion of the trial court.").

B. Discussion

The district court did not abuse its discretion in ruling that the government's bill of particulars was sufficient to apprise the defendant of the charges to enable him to prepare for trial. Here, the district court partially granted Rodriguez's motion for a bill of particulars. GA 5-6. In response, the government provided Rodriguez with its 62-page bill of particulars. RA 37-98. The court ultimately found that "[a]lthough the government did not provide a traditional bill or particulars . . . the summary of evidence the government produced was sufficient to satisfy the purpose of the [court's] order." RA 185. The court further found that a "review of the trial transcript demonstrates a lack of the sort of unfair surprise that a bill of particulars guards against," and that "the vast discovery the government provided, along with the somewhat narrower summary of criminal activity, satisfied any concerns about unfair surprise and a lack of notice of evidence against him." *Id*.

Nevertheless, despite the court's ruling, Rodriguez contends that the form of the government's response was "not in compliance with the court's order." In essence, he seemingly argues that the court abused its discretion by not rejecting the government's response and not compelling it to file a second bill of particulars. Rodriguez further contends that due to the court's purported error, he was "unable to nail down with any specificity when it is that he

was alleged to have been involved in the wrongdoing [as part of the Luna conspiracy]." Rodriguez Brief at 23.

A review of the government's bill of particulars demonstrates that Rodriguez was provided with more than sufficient notice of the charges in order to prepare for trial. As an initial matter, the government's bill of particulars identified Rodriguez's co-conspirators. RA 37. It further discussed, among other things, (1) his involvement in a cocaine delivery to Luna on February 16, 2005, at 385 Main Street, Laurel Gardens, RA 41; (2) Rodriguez's inculpatory statements to Carrasquillo after Rodriguez's arrest, RA 42-43; (3) Rodriguez's status as partners with Adames in the illegal drug business, RA 44-45; (4) Rodriguez's deliveries by himself to bring cocaine to Luna in the summer of 2004, RA 46; (5) approximately 15 deliveries of cocaine, observed by Rosa, involving Rodriguez, Adames, and Luna at 24 East Pembroke Road in Danbury, CT, between the fall of 2003 and winter of 2004, RA 75-76; (6) transactions in which Rodriguez and Adames provided Luna and Rosa with cocaine at Adames' home and on a highway exit ramp, RA 78; (7) an occasion in which Rodriguez and Adames brought 300 grams of cocaine to Luna in Danbury and then proceeded to convert 100 grams of that cocaine into crack cocaine; (8) Robles' observations between 2003 and 2005 in which she saw Rodriguez counting money when he and Adames would meet Luna in Danbury, RA 97; and (9) the rental cars used by Rodriguez, RA 97-98. Thus, although "a bill of particulars is not . . . a device to give the defense a road map to the government's case," the government's submission essentially gave Rodriguez such a road map

for its case-in-chief. *See United States v. Macchia*, 35 F.3d 662, 671 n.1 (2d Cir.1994)).

Moreover, the defendant's claim fails because he has not identified with any specificity the manner in which the government's bill of particulars was purportedly inadequate. In *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir. 2008), the defendant claimed that the indictment was "too vague to permit an adequate defense in response," and that the prosecution's bill of particulars"was not sufficient to cure the underlying problem of the Indictment's overarching scope." *Id*. at 150 (quoting defendant's brief and omitting internal quotation marks). There, the district court had granted the defendant's request for a bill of particulars as to a number of points, but denied it as to several others. *Id*. On appeal, this Court rejected the defendant's challenge to the bill of particulars because he failed to identify "(1) any particular charge on which further detail would have been helpful or (2) any specific errors by the District Court." *Id*. at 151; *see also Bortnovsky*, 820 F.2d at 574.

Here, the same reasoning applies. Rodriguez has failed to identify any particular charge on which further detail would have been helpful. This omission is the result of the comprehensive nature of the government's bill of particulars, which provided many relevant facts regarding Rodriguez's involvement in the Luna narcotics conspiracy. Despite claiming that the bill of particulars did "nothing to particularize the charges," Rodriguez Brief at 23, Rodriguez fails to explain why the district court's ruling was deficient. Thus, as in *In re Terrorist Bombings*,

Ramirez's challenge to the bill of particulars fails for want of identifying "(1) any particular charge on which further detail would have been helpful or (2) any specific errors [committed] by the District Court." 552 F.3d at 151; *see also United States v. Williams*, 962 F.2d 1218, 1225 (6th Cir. 1992) (affirming district court's finding in drug-conspiracy case that bill of particulars, which consisted of a four-page letter and a list of receipts from materials provided previously in discovery, was "sufficiently detailed").

As doctrinal support, Rodriguez relies exclusively on *United States v. Armco Steel Corp*., 255 F. Supp. 841 (S.D. Cal. 1966), to support its contention that the government's bill of particulars was inadequate. *Armco* represents an extreme case in which the prosecution filed four factually inconsistent bills of particulars, followed by an internally contradictory bill of particulars, that caused "such contradiction, confusion, and obscurity of fact" to compel the district court to dismiss the case. *Id.* at 846. Here, the government engaged in no such obfuscation of either the charge or the facts underlying the drug-conspiracy charge brought against Rodriguez.[4] Finally,

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[4] Rodriguez contends that the bill of particulars was deficient because it did not mention Officer Cuba's and Robles's testimony that Rodriguez handled cocaine and discussed ingesting cocaine as a human drug courier. Rodriguez Brief at 24. As discussed at length *supra*, their testimony was not part of the government's case-in-chief and was presented solely to impeach Rodriguez's testimony in the defense case.
(continued...)

even assuming the district court committed error by accepting the government's bill of particulars, any such error would have been harmless. *See Barnes*, 158 F.3d at 665-66 (concluding that any error in the denial of a bill of particulars was harmless where the defendant could not demonstrate that he was taken by surprise by the evidence presented at trial and that such surprise prejudiced his defense). In sum, the district court did not abuse its discretion in finding the government's bill of particulars to be sufficient.

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[4] (...continued)
Because a bill of particulars is designed to provide details about the indictment, it has no relevance to evidence introduced for impeachment purposes.

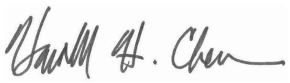
CONCLUSION

For the foregoing reasons, the district court's sentence of Arcadio Ramirez and the conviction of Jose Luis Rodriguez should be affirmed.

Dated: September 11, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

JOHN D. ESTERHAY
Student Law Intern (on the brief)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,322 words, exclusive of the Table of Contents, Table of Authorities, and Addendum of Statutes and Rules.

HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S. C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

18 U.S.C. § 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

U.S.S.G. § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy (2006)

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) . . . .

* * * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
* * * *	
(3) At least 15 KG but less than 50 KG of Cocaine;	Level 34
* * * *	

Application Notes

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12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an

additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.