08-6096-pr

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-6096-pr

UNITED STATES OF AMERICA,
Appellee,

-vs-

LUIS DEJESUS, SIXT POLANCO, also known as Manny, also known as Luis Acevedo,
Defendants,

JOSE RAFAEL RODRIGUEZ, also known as Old Man, also known as Angel Ramirez-Pellot,
Defendant-Appellant.

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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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut (Robert N. Chatigny, J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On June 12, 2008, a jury found the defendant guilty of Count One of the Indictment, which charged him with conspiracy to possess with the intent to distribute and to distribute heroin. A1, A18.[1] On December 8, 2008, the district court sentenced the defendant to 51 months of incarceration and three years of supervised release. A6, A21. Judgment entered on December 9, 2008. A6. The defendant filed a timely notice of appeal on December 9, 2008, A5, and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

[1] The defendant's Appendix will be cited as "A" followed by the page number.

Statement of the Issues Presented

I. Did the district court abuse its discretion in admitting testimony by a co-defendant that he and the defendant had cut and packaged heroin together in late June and early July, 2006, for the limited purpose of establishing that the defendant had knowingly participated in the charged heroin conspiracy in July, 2006?

II. Did the district court commit plain error in permitting the government to rely on evidence that a cooperating witness, who was identified, but was not called as a witness, participated in a controlled heroin transaction which involved the defendant?

III. Was there sufficient evidence to allow any rational trier of fact to conclude that the defendant's guilt on Count One had been established beyond a reasonable doubt?

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Preliminary Statement

On July 19, 2006, the defendant knowingly helped his friend and co-defendant Sixto Polanco sell 80 grams of heroin to an individual who was cooperating with the

government. After negotiating the sale earlier in the day, Polanco had the defendant drive him to meet with his heroin source and retrieve 80 grams of heroin. The defendant then drove Polanco to meet with the cooperating witness at an AT&T parking lot on Brainard Road in Hartford, Connecticut. When they arrived at the meeting location, Polanco got out of his vehicle, and got into the cooperating witness's vehicle. Polanco then called the defendant via cell phone and directed him to drive over to the cooperating witness's vehicle with the heroin. When the defendant arrived, he got out of his vehicle, walked over to Polanco, and handed him the 80 grams of heroin, which was clearly visible inside a clear plastic bag. The cooperating witness provided Polanco with $5,000 in exchange for the heroin. Polanco had negotiated a price of $70 per gram, so that the cooperating witness still owed him $600. On July 26, 2006, after advising the cooperating witness that Polanco was unavailable, the defendant met him in front of the defendant's residence at 12 Arnold Street in Hartford and collected the remaining $600 owed from the July 19th transaction. In June, 2008, a jury convicted the defendant of conspiring with Polanco to distribute heroin.

In this appeal, the defendant makes three claims. First, he argues that the district court abused its discretion in admitting, over the defendant's objection, testimony by co-defendant Dejesus that, in late June, and early July of 2006, he and the defendant sometimes cut and packaged heroin together in their apartments at 12 Arnold Street. Second, despite the fact that the cooperating witness did not testify for either party, the defendant now argues for

the first time on appeal that government somehow "prejudiced" the jury by using an alleged "unreliable" cooperating witness during its investigation. Third, the defendant argues that the government's evidence at trial was insufficient to allow any rational jury to conclude that the defendant's guilt had been established beyond a reasonable doubt.

For the reasons that follow, these claims have no merit, and the defendant's conviction should be affirmed.

Statement of the Case

On November 30, 2006, a federal grand jury sitting in Hartford returned a four-count Indictment against the defendant, Polanco and Dejesus. A1-A4, A11. The Indictment charged Polanco and the defendant in Count One with conspiracy to possess with the intent to distribute, and to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846, and in Count Two with distribution of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and 18 U.S.C. § 2. A1-A2. The Indictment also charged Dejesus in Count Three, and Polanco in Count Four, with distribution of fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). A2. On December 17, 2007, Dejesus pleaded guilty to Count Three of the Indictment, and, on March 24, 2008, Polanco pleaded guilty to Count One of the Indictment. GA319, GA321. On May 21, 2008, the Government moved to dismiss Count Two of the Indictment, stating in the motion that "[t]he charge in Count Two is based on the same facts underlying the charge in Count One and carries the same

potential statutory and guideline penalties." GA335. On May 28, 2008, the district court granted that motion. A16. On March 19, 2009, the Government moved to dismiss Count Four of the Indictment, and the district court granted the motion that same day. GA333.

Trial commenced immediately after jury selection on June 10, 2008. On June 11, 2008, at the conclusion of the Government's case, the defendant moved orally both to strike a portion of Luis Dejesus's testimony and for a judgment of acquittal under Fed. R. Crim. P. 29. A17. The district court denied both motions. A17-A18. On June 12, 2008, the jury returned a guilty verdict as to the defendant on Count One. A17-A18. The defendant did not renew his motion for judgment of acquittal after the jury's verdict and did not submit a motion for a new trial.

On December 8, 2008, based on undisputed evidence in the Pre-Sentence Report that the defendant's true name was "Jose Rafael Rodriguez" and that the name under which the defendant was indicted ("Angel Ramirez-Pellot") was an alias, the government moved, without objection, to amend the caption of the case to reflect the defendant's true identity. A21. The court granted that motion. A21. On that same date, the court (Robert N. Chatigny, J.) sentenced the defendant to a term of 51 months' incarceration and 3 years' supervised release on his conviction of Counts One of the Indictment. A6-A8, A21. Judgment entered on December 9, 2008, and the defendant filed a timely notice of appeal on December 9, 2008. A5-A8. The defendant has been in custody since his federal arrest on January 31, 2007 and is currently

serving his sentence.

On appeal, the defendant continued to be represented by his CJA appointed trial attorney, Jonathan Einhorn, who had taken over after the defendant had sought to replace his first appointed attorney. A13, A15. Attorney Einhorn submitted the brief to which the Government now responds. After the submission of this brief, the defendant sought again to terminate his attorney's representation and made a number of claims against his attorney in *pro se* filings with this Court. He also filed a *pro se* motion to withdraw Attorney Einhorn's brief and proceed without the benefit of counsel. The Court resolved this motion by permitting the defendant to file a supplemental *pro se* brief, but prohibiting him from withdrawing Attorney Einhorn's brief. The Court further provided the defendant with a continuance to December 15, 2009 to submit his supplemental brief and ordered the Government to file its opposition brief by January 14, 2009. The defendant did not submit another brief, but did submit a motion for a continuance on December 22, 2009. On January 8, 2010, the Court granted the motion and gave him until February 16, 2010 to file any supplemental brief. At the same time, the Clerk of the Court directed the government to file its brief on or before January 14, 2010. The claims to which the government responds herein are those raised in Attorney Einhorn's initial brief.

Statement of Facts

Based on the evidence presented by the government at trial, the jury reasonably could have found the following

facts:[2]

On July 19, 2006, the FBI, using a cooperating witness, attempted to set up a controlled purchase with an individual who was known to them at the time as Manny and who was subsequently identified as Sixto Polanco. GA24.[3] A cooperating witness, identified at trial by his full name and referred to at trial and herein as "Jeffrey," had provided information about Polanco to FBI Special Agent Robert Bornstein and had stated that Polanco was acquiring and distributing large quantities of heroin in the Hartford area. GA18. Jeffrey, a felon with multiple convictions, cooperated in exchange for money and was paid a total of $750 in this case. GA20. He had previously cooperated with the FBI in another, unrelated investigation which had resulted in federal charges against

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[2] At trial, during its case-in-chief, the government offered the testimony of Sixto Polanco, Luis Dejesus, FBI Special Agent Robert Bornstein, and Hartford Police Detective Nestor Caraballo. The government also offered as exhibits the audio recordings and corresponding transcripts for several recorded telephone calls and meetings, the 80.2 grams of heroin purchased from Polanco and the defendant on July 19, 2006 and photographs depicting the various locations where Polanco and the defendant met with the cooperating witness who negotiated the heroin purchase. Because the recordings were all in Spanish, transcripts containing English-language translations of the recordings were admitted, by agreement, as full exhibits.

[3] The government's appendix will be cited as "GA," along with the page number.

nearly 80 individuals, as well as the seizure of several kilograms of cocaine and cocaine base, and several firearms. GA108. The FBI paid him over $32,000 for his cooperation in that case. GA106.

To corroborate the information that Jeffrey provided, Special Agent Bornstein directed him to attempt to engage in a controlled purchase of heroin from Polanco. GA22. The FBI was able to obtain $5,000 in government funds for the controlled purchase, and Jeffrey was advised to try to negotiate a purchase of 100 grams of heroin from Polanco. GA23-GA24.

At approximately 11:25 a.m. on July 19, 2006, Special Agent Bornstein and other members of his FBI task force met Jeffrey at a secure location, which was near a movie theater on Brainard Road in Hartford. GA24. They searched Jeffrey and his vehicle for contraband or excess monetary funds, with negative results, and then had him place a consensually recorded telephone call to a cellular telephone used by Polanco. GA25. At approximately 11:33 a.m., Jeffrey called Polanco and said, "Trying to see if for the five, you can get me 100, daddy, if you can." GA293 (Ex. 4a - transcript of call). Polanco advised that they would talk when they met. GA293. At approximately 12:25 p.m., the two spoke again and made arrangements to meet around Park and Zion Streets in Hartford. Ex. 4c (transcript of call); GA33. At that point, the FBI provided Jeffrey with a transmitting device, a digital recorder and $5,000 in United States currency. GA33. The agents then followed him from the secure location to the area around Park and Zion Streets. GA33.

During the drive, Jeffrey received a call from Polanco directing him to a different meeting location in the vicinity of 12 Arnold Street. GA33.

Soon after, Special Agent Bornstein observed Jeffrey pull up in the vicinity of 12 Arnold Street and saw Polanco get into Jeffrey's vehicle. GA35. The FBI followed the vehicle to several different locations, including a beauty salon owned by Polanco. GA36-GA37. The vehicle finally parked in the lot for a vacant business adjacent to a business called "Sunset Leather" and, moments later, a gray Honda Civic, driven by an unidentified female, arrived at the location. GA37-GA38.

The defendant got out of the Honda, approached the passenger side of Jeffrey's vehicle, and engaged in some conversation. GA38-GA39. Polanco then got out of Jeffrey's car and got into the gray Honda Civic with the defendant. GA38-GA39. No narcotics transaction took place at this point. GA39.

Polanco only had fifty grams of heroin available to him at that time, not the hundred grams requested. GA41; GA294 (Ex. 5a - transcript of the body wire recording). He asked Jeffrey whether he wanted to purchase the fifty grams or wait until later that same day to purchase a larger quantity. GA294. Jeffrey pretended that he was purchasing the heroin for a brother-in-law and placed a telephone call to this brother-in-law, who was, in fact, an FBI agent; he was calling to find out whether he should purchase the fifty grams at that time or wait until later in the day to purchase the larger quantity. GA41-GA42,

GA294. The FBI advised him to wait and purchase the larger quantity of heroin later that same day. GA42.

During the recorded conversation in Jeffrey's vehicle, Jeffrey asked to see a sample of the heroin that Polanco was planning to sell him. GA298. Polanco said that the defendant could go and get a sample. GA298. Specifically, he stated, "You have to wait cause it's a little far from here. I'll send the old man. . . . Old man. . . bring yourself over here for a second . . . come out here for a second . . . so you can go . . . that's fine we'll talk . . . that little thing over there . . . roll down the window . . . old man!" GA298. That is when the FBI observed the defendant walk over to Jeffrey's vehicle. Polanco then told the defendant, "Go and get half a gram . . . listen we are going to wait until the Colombian comes later. Because his friend, his brother in law wants to take the works when complete. It's best if you go over there with your money and come when I call you. . . . half a gram. Listen stay up there, go. And bring me down something from there . . . I will take you later when the old man comes back." GA298. Polanco confirmed that Jeffrey was not going to back out or change his mind later, and also told him, "[W]hen I can't I'll send the old man." GA298. The Honda departed, and the FBI agents followed Jeffrey's vehicle to a secure location and retrieved from the $5,000 in buy money and the surveillance equipment. GA42-GA43.

The FBI agents met up with Jeffrey again at approximately 6:00 p.m. that same day. GA43. They searched him and his vehicle for contraband and excess

monetary funds, and provided him with $5,000, a transmitter and a digital recording device. GA43. Jeffrey then called Polanco and was instructed to meet him in the parking lot of a Burger King restaurant located on Airport Road in Hartford. GA44. Special Agent Bornstein told one member of the surveillance team, Hartford Police Detective Nestor Caraballo, to arrive in the vicinity of the meet location early so that he could observe Polanco when he arrived there. GA44. Detective Caraballo was in plain clothes and was driving a blue Honda Accord with tinted windows. GA44, GA195. When he arrived near the location, he immediately observed an individual later identified as Polanco walking in the parking lot of a gas station adjacent to the Burger King. GA45. Polanco crossed the street on foot and slowly approached Caraballo's vehicle, trying to look inside the car. GA46, GA198. At that point, Caraballo moved his car to a different surveillance spot about 100 hundred feet away from the original spot to avoid any contact with Polanco. GA198. He was concerned that Polanco would recognize him as a police officer. GA198.

After Detective Caraballo moved his vehicle, Polanco approached him on foot a second time. GA199. This time, Detective Caraballo rolled down his window and told Polanco that he was "all set" and was waiting for someone to come out of the adjacent garage. GA199. Polanco quickly turned around and walked away. GA199. Detective Caraballo then drove away from the area, wanting to avoid any additional contact with Polanco. GA199. He repositioned himself in a parking lot on the other side of the maintenance building where Jeffrey and

Polanco later parked. GA201.

Polanco subsequently walked back across Airport Road, into the Burger King parking lot, and entered Jeffrey's vehicle. GA47. Jeffrey drove out of the parking lot, down Airport Road, and pulled into a parking lot for a maintenance building owned by AT&T. GA48-GA49. Moments later, Special Agent Bornstein observed the same gray Honda Civic that he had observed earlier in the day pull into the AT&T parking lot and park alongside Jeffrey's vehicle. GA50-GA51. Polanco was recorded telling Jeffrey, "Here I gave you eighty grams out of those eighty grams, you will take five because they are seventy-five, and I took three more grams . . . you're gonna have eight grams." GA303 (Ex. 7a - transcript of body wire). Special Agent Bornstein observed the defendant get out of the driver's side door and approach the passenger side window of Jeffrey's vehicle, where Polanco was sitting. GA51. Polanco then stated, "Listen to me, I couldn't. Here I am giving you . . . I am giving you ten grams, . . . Give him that, there." GA303. The defendant then handed Polanco a clear plastic bag containing heroin. GA62, GA150, GA187. Because the heroin was stored inside a clear plastic bag, it was visible to anyone looking at the bag. Ex. 1 (heroin). Based on what Special Agent Bornstein observed and overheard through the transmitter, the heroin transaction was not consummated until shortly after the defendant approached Jeffrey's vehicle. GA114.

Polanco then got out of Jeffrey's vehicle, got into the rear passenger seat of the Honda Civic and left. GA52. Jeffrey used his cell phone to call the FBI and advise that

Polanco had been very suspicious of Detective Caraballo's vehicle, thought that there might be individuals inside the vehicle who planned to rob him, and was going to confront the individuals in the vehicle. GA52. Jeffrey also warned that Polanco was armed. GA52. By the time the FBI received this information, Polanco's Honda Civic had already pulled up to Detective Caraballo's vehicle. GA53. The occupants of the Honda asked Detective Caraballo what he was doing in the parking lot, and he responded that he was just waiting for his wife. GA203. Detective Caraballo could not remember which occupant of the vehicle had asked him the question. He recalled that the defendant was driving, that there was an unidentified female in the front passenger seat, and that Polanco and a female child were in the rear seat. GA204. He thought that he had spoken either to the defendant or the front female passenger, but could not recall which one of these individuals it had been. GA204.

Special Agents Bornstein and Medina then followed Jeffrey to a secure location, retrieved the transmitter, recording device and heroin purchased from Polanco, and searched Jeffrey for contraband and excess monies, with negative results. GA56. Special Agent Bornstein sent the heroin to the DEA laboratory for testing, and the results confirmed that it contained heroin hydrochloride and weighed approximately 80.2 grams. GA58-GA59; Ex. 1. According to Special Agent Bornstein, Polanco charged Jeffrey $70 per gram for the heroin and, therefore, was not willing to provide him with 100 grams of heroin in exchange for $5,000. GA62. Polanco himself explained that he was charging between $65 and $75 per gram for

heroin and would not have given Jeffrey 100 grams of heroin for $5,000. GA137.

Special Agent Bornstein wanted to confirm whether Polanco suspected that Jeffrey was working with law enforcement officers, so, after the transaction, at approximately 7:08 p.m., he directed Jeffrey to make another recorded telephone call to Polanco. GA59-GA60. Jeffrey stated, "Listen crazy, let me ask you a question. Who do you think that guy was in the Honda?" GA299 (Ex. 6a - transcript of telephone call). Polanco said he did not know who was in the vehicle, but stated that the vehicle looked like one belonging to a rival drug dealer. GA299.

Next, Special Agent Bornstein directed Jeffrey to set up a meeting with Polanco to pay him the remaining monies owed for the 80 grams of heroin. GA64. At a price of $70 per gram, Jeffrey still owed Polanco $600 for the heroin purchased on July 19, 2006. The FBI had an interest in paying off the debt because the investigation was ongoing, and they wanted to continue to use Jeffrey as a cooperating witness. GA64.

Jeffrey was advised that Polanco was not available and was out of town, so he called a cellular telephone used by the defendant. GA64-GA65. The phone records for that cellular telephone revealed that it was subscribed to an "Angel Ramirez-Pellot" (the defendant's alias) at an address of 12 Arnold Street. GA81; Ex. 11 (phone records). The subscriber information for the cell phone also contained a Connecticut Department of Motor

Vehicles ("DMV") identification number. GA82. The DMV identification card for that number contained a photograph of the defendant and listed a name of "Angel Ramirez-Pellot" and an address of "12 Arnold Street, Hartford, Connecticut." GA86-GA87.

Phone records for both the defendant's cell phone and Polanco's cell phone revealed that, from July 19, 2006 to July 26, 2006, there were 26 calls between the two phones. GA84. In addition, phone records showed a total of six calls between Polanco's cell phone and Jeffrey's cell phone on July 19 and July 20, 2006, and a total of fourteen calls between the defendant's cell phone and Jeffrey's cell phone from July 22, 2006 and July 26, 2006. GA84-GA85.

On July 26, 2006, at approximately 6:14 p.m., Jeffrey made a recorded call to the defendant and advised that he was by the Burger King on Airport Road. GA304 (Ex. 8a - transcript of the call). The defendant replied that it was "ugly" near the Burger King and asked Jeffrey to meet him on Arnold Street, where he and Polanco had previously met on July 19, 2006. GA304. Jeffrey said he wanted to meet the defendant "[t]o square up with the money." GA305. The defendant asked, "What did you say. To square up what?" GA305. Jeffrey replied, "To square up. . . I'll talk to you when I get there." GA305. At approximately 6:15 p.m., the defendant called back Jeffrey and said, "Tell me exactly because I have to leave here. . . . It's that I don't know. Talk to me straight up so I can give you an answer." GA306 (Ex. 9a - transcript of call). Jeffrey replied, "I wanted to talk to you about the, to see if you can get me the rocks." GA306. The defendant

said, "Oh, that, not yet. Not yet I think tomorrow or so for that." GA306.

The FBI searched Jeffrey for contraband and excess monies, with negative results, provided him with a transmitter, recording device and $600 and followed him to the meeting location at 12 Arnold Street. GA62, GA68. Although the meeting was recorded and occurred inside Jeffrey's vehicle, due to the fact that the meeting lasted only moments, the surveillance units did not observe Jeffrey meet with the defendant. GA69. Special Agent Bornstein, Polanco and Dejesus all identified the defendant's voice from the July 26, 2006 recorded telephone calls and recorded meeting. GA70, GA155, GA228-GA229. A review of the audio recording of the July 26th meeting revealed that the defendant met with Jeffrey and spoke with him about a potential future narcotics transaction. GA307-GA308 (Ex. 10a - transcript of audio recording). After the meeting, the FBI followed Jeffrey to a secure location, confirmed that he was no longer in possession of the $600 and retrieved the transmitter and recording device. GA69.

The FBI arrested Polanco on January 24, 2007. GA89. The arrests in this case had been delayed in deference to an unrelated, ongoing DEA investigation in which Polanco was also charged, along with his source, Andres Bolanos. GA88-GA89. The FBI arrested the defendant and Dejesus on July 31, 2007 at 12 Arnold Street, where they resided in separate apartments. GA89. At the time of the defendant's arrest, the FBI seized from him the DMV identification card with his picture and identifying

information, and a social security card in the name of "Angel Ramirez-Pellot." GA89-GA90; Exs. 14 and 15.

At trial, both Polanco and Dejesus testified as Government witnesses. Polanco confirmed that he was a convicted felon, that he was not a United States citizen, that he was subject to an existing deportation order, and that he used multiple aliases, in part to avoid deportation. GA118, GA156-GA160. He also reviewed his plea and cooperation agreements in this case and the unrelated DEA case, and the penalties that he faced as a result of his convictions in both cases. GA156-GA157.

Polanco identified the defendant in court as his "friend" and referred to him as "the old man," which was the name that Polanco used to call him. GA120. Polanco had met the defendant in 2005, when Polanco had been trying to start up a transportation business. GA121. Polanco started selling heroin in approximately May, 2006, at which time he involved the defendant by asking him to drive a car for Polanco and by agreeing to pay him for his services. GA122-GA123. Polanco did not have a driver's license and did not own a car. GA122.

Polanco explained, "He would drive the car and I would do my deals." GA123. He testified that the defendant was sometimes in the car with Polanco when Polanco would meet with his supplier, known to him as "the Colombian" and later identified as Bolanos. GA123-GA125. Polanco said that he trusted the defendant and had considered him to be a good friend. GA125.

Polanco also testified that he knew Dejesus and had sold cocaine to him on two occasions before July, 2006. GA126. Polanco did not know Dejesus well and did not trust him. GA126. At one point, he had asked Dejesus whether there was a room for the defendant at 12 Arnold Street; Dejesus resided there in the second floor apartment. GA127-GA128. Dejesus had stated that there was room, and, for some time, Polanco paid the defendant's rent for the third floor apartment there. GA127-GA128. Polanco explained that, on occasion, in July, 2006, he would store quantities of heroin in this third floor apartment, which was comprised of one room. GA135. The defendant was not present when Polanco dropped off the heroin, but Polanco, who had a key to the apartment, had told him he would be storing "something there." GA135. On these occasions, according to Polanco, he kept the heroin in the apartment for only a few hours at a time and removed it before the defendant returned home. GA136.

Polanco also stated that, in July, 2006, he sold heroin in multi-gram quantities at a price that ranged between $70 and $75 per gram. GA129. He acknowledged having sold heroin to Jeffrey on multiple occasions, beginning in June, 2006, and said that he stopped trusting him and felt he was working with the police after the July 19, 2006 transaction. GA130.

Polanco listened to the various recorded telephone calls and recorded meetings involving Jeffrey and explained what was happening at the time of the recordings. For example, while listening to the recording of the first meeting with Jeffrey on July 19, 2006 (Ex. 5), he testified

that he had brought fifty grams of heroin with him inside of Jeffrey's vehicle and had called his source to see if he could obtain eighty grams of heroin to sell to Jeffrey. GA138-GA139. He explained that he had not been willing to sell Jeffrey 100 grams of heroin for $5,000 and that this quantity would cost $6,500. GA138. He also explained that, at some point during the recording, he had called the defendant over to Jeffrey's vehicle and directed him to retrieve a half gram of heroin from the defendant's apartment to give to Jeffrey as a sample so that Jeffrey could test it out and verify its quality.[4] GA141-GA144.

Polanco testified that he then drove with the defendant in the gray Honda Civic to meet with Bolanos, his heroin source. GA146-GA147. The defendant drove Polanco to a location on Wethersfield Avenue, where Polanco got out of the car alone, met with Bolanos and received from him approximately 80 grams of heroin in a clear plastic bag. GA146-GA147, GA187. Polanco brought the heroin back into the car with him, and the defendant drove them to meet with Jeffrey on Airport Road. GA147.

When they arrived at the meeting location on Airport Road, Polanco became suspicious of a blue car that was similar to a car driven by one of his heroin customers. GA147-GA148. Polanco approached the suspicious car on foot, but it drove away before he got there. GA148. Polanco claimed he was not armed, but had said that he

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[4] Polanco could not remember whether he had talked to the defendant in person or over the telephone regarding obtaining the sample of heroin. GA144.

was armed to intimidate Jeffrey; he did not suspect any police surveillance, but was concerned that he was being set up for a robbery. GA148-GA149.

Polanco also explained exactly how the defendant had brought the heroin to Jeffrey's vehicle after Polanco had met Jeffrey and gotten into his vehicle. GA150. Polanco, while in Jeffrey's vehicle, had called the defendant and asked him to drive over to where they were parked in the AT&T parking lot. GA150. The defendant drove the Honda Civic to where Polanco and Jeffrey were parked, got out of his vehicle, walked over to Jeffrey's vehicle and handed Polanco the heroin. GA150-GA151. Polanco identified the moment in the recording (Ex. 7a) when he had directed the defendant to hand him the heroin. GA150. Jeffrey then provided Polanco with a $5,000 in cash, which Polanco did not count until after he had left the area in the defendant's vehicle. GA151-GA152.

After completing the transaction, Polanco and the defendant returned to meet with Bolanos and pay him for the heroin. GA151-GA152. Polanco also confronted the drug customer whom he had suspected of being in the blue car during the transaction. GA154. The customer not only denied having been there, but also speculated that the car must have belonged to Detective Caraballo. GA154.

According to Polanco, after the transaction, Jeffrey called him and told him that he would send the remaining monies to him through the defendant. GA153. By this time, Polanco had suspected that Jeffrey had been working with the police. GA153. Feeling "desperate," he decided

to go to New York for a while. GA153. Polanco could not remember if the defendant had ever given him the remaining $600 that Jeffrey had owed from the July 19th transaction. GA153.

Dejesus, who was not present during the July 19, 2006 transaction, testified about the defendant's role in Polanco's heroin trafficking operation in July, 2006.[5] He said that he had met Polanco and the defendant in 2005, after Polanco had hired Dejesus as an electrician, to do work on Polanco's beauty salon. GA217-GA218. Dejesus performed electrical work for Polanco for approximately four to five months and saw the defendant at the salon almost every day. GA218-GA219. Dejesus said that, at some point, Polanco started providing him with quantities of crack cocaine, which contradicted Polanco's testimony that he did not sell crack cocaine. GA231. Approximately one month after Dejesus had started working at the salon, Polanco asked him if there was a room available in Dejesus's building at 12 Arnold Street. GA219-GA220. Dejesus spoke to the landlord and convinced him to rent

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[5] Dejesus confirmed that he had pleaded guilty in this case, and reviewed his plea and cooperation agreements, and the penalties that he faced as a result of his conviction. GA213-GA216. He also acknowledged that, although he had initially been released on bond in this case, he had been remanded into custody after having been arrested on state charges for having forged his mother's checks to support his crack cocaine habit. GA216. Finally, he admitted that, in 1997, he had been convicted of criminal impersonation. GA217.

the third floor apartment to the defendant. GA220. According to Dejesus, he saw Polanco pay the landlord the first month's rent for the apartment. GA221.

After the defendant moved into Dejesus's building, the two began to see each other on a daily basis. GA221. In July, 2006, the defendant began to complain to Dejesus about the way that Polanco was treating him and felt that Polanco was not paying him enough money for his work. GA222. The defendant told Dejesus that he was taking trips to New York for Polanco, dropping off and picking up items at an "import export place," and "picking up packages and stuff." GA222. He told Dejesus that the packages contained heroin. GA223. The defendant felt he was assuming too much of the risk and was not being fairly compensated. GA223. The defendant also complained that, on his days off, Polanco was calling him and asking him to meet customers of his. GA225. In addition, Dejesus observed a high volume of people coming in and out of the defendant's apartment. GA225.

Dejesus also testified that, in July, 2006, the defendant would obtain heroin that he and the defendant would cut and package for resale in both the defendant's apartment, and Dejesus's apartment. GA225-GA226. According to Dejesus, he and the defendant had been trying to establish their own heroin distribution business. GA226.

Dejesus met Jeffrey through the defendant and Polanco. GA226. In July, 2006, Jeffrey came to 12 Arnold Street three or four times looking for Polanco. GA226. According to Dejesus, when Polanco was not

around, and the defendant was there, Jeffrey would meet with the defendant. GA226. The defendant had told Dejesus that Jeffrey had been there looking to buy grams of heroin. GA227. Dejesus had been under the impression that Polanco had not wanted to deal with Jeffrey anymore because he had suspected that Jeffrey was working with the police. GA227. The defendant disagreed and thought that Polanco was being paranoid. GA227.

After Dejesus completed his testimony, the Government recalled Special Agent Bornstein as its last witness, this time offering him as a narcotics expert. GA240.[6] First, Special Agent Bornstein explained the typical quantities in which heroin was sold on the street and the prices charged for these quantities. GA247-GA248. Next, he discussed the typical purity levels for different quantities and forms of heroin. GA252. Finally, he reviewed the various roles individuals could play in a typical drug trafficking operation. GA252.

Summary of Argument

I. The district court properly exercised its discretion in admitting testimony that, in late June and early July, 2006, the defendant and Dejesus had cut and packaged heroin for resale together in both of their apartments at 12 Arnold Street. This testimony was

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[6] The district court provided the jury with an agreed upon limiting instruction regarding how the jury should evaluate Special Agent Bornstein's expert testimony. GA240-GA241.

relevant as evidence that the defendant had knowingly participated in Polanco's heroin trafficking enterprise, and, more specifically, as evidence that the defendant knew what heroin was and knew that he was delivering heroin to Polanco during the July 19, 2006 controlled transaction. The district court dealt with any potential for unfair prejudice by providing the jury with an agreed upon limiting instruction which explained the proper consideration of the testimony.

II. The district court did not commit plain error in allowing the government to rely on testimony about a controlled purchase engaged in by a cooperating witness. Neither the government, nor the defendant called the cooperating witness to the stand, and the defendant was able to challenge the reliability of the cooperating witness and the thoroughness of the government's physical and electronic surveillance through cross examination of the government's law enforcement witnesses.

III. When viewed in the light most favorable to the government, the evidence introduced at trial was sufficient to allow any rational trier of fact to find the defendant guilty beyond a reasonable doubt. The evidence at trial established that the defendant knowingly participated in the conspiracy by helping Polanco sell 80 grams of heroin on July 19, 2006 to a cooperating witness and collecting a remaining $600 in cash owed on that transaction one week later. Specifically, with knowledge that he was helping Polanco to sell heroin, the defendant drove Polanco to meet with his supplier to obtain 80 grams of heroin, drove Polanco to meet with the cooperating witness to sell the

heroin to him, delivered the heroin in a clear plastic bag to the cooperating witness's vehicle so that Polanco could sell it to him, and subsequently collected monies owed by the cooperating witness from the heroin transaction.

Argument

I. The district court did not abuse its discretion in admitting evidence that, during the time period of the charged conspiracy, the defendant and a testifying co-defendant cut and packaged heroin together in their apartments.

The defendant claims that the trial court erred in denying his motion to strike Dejesus's testimony that, in late June and early July of 2006, he and the defendant sometimes cut and packaged heroin for resale in their apartments at 12 Arnold Street. This claim has no merit. The trial court properly denied the motion to strike, which was made after defense counsel's extensive cross examination of the witness on the issue, and in the absence of a timely objection during the challenged portion of the testimony. As the trial court concluded, the testimony was relevant to the disputed issue of whether the defendant had knowingly participated in the July 19, 2006 heroin transaction. More specifically, the testimony was relevant to the issue of whether the defendant knew that the material in the clear plastic bag he delivered to Polanco was heroin, given that the contents of the bag were visible to the naked eye. The trial court negated any potential for unfair prejudice by providing the jury with an agreed-upon

limiting instruction as to the specific purpose of the evidence.

A. Relevant facts

A portion of Dejesus's testimony included the statement that, in July, 2006, he and the defendant "[c]ut and packaged [heroin] for sale." GA225. When asked what he meant by that, Dejesus stated, "We were trying to start our own heroin gate, what they call, we were trying to get up and running." GA226. When asked where he and the defendant had cut and packaged the heroin, he answered, "Couple times in his apartment and once in my apartment." GA226. Finally, as to this line of questioning, Dejesus was asked, "Who got the heroin?" and he responded, "The defendant did." GA226. The defendant did not object to any of this testimony. GA225-GA226.

On cross examination, defense counsel stated, "You were asked a few moments ago about an incident or incidents you say in July of '06 when you were present with my client with regard to packaging or cutting heroin, you remember that?" GA233. Dejesus replied, "Yes, sir." Defense counsel asked, "And is it possible that happened in May or June of '06?" GA233. Dejesus said, "It's possible." GA233. Defense counsel then asked, "Sure. It's possible that it could have been sometime around then. You don't have a calendar that says July 4th I cut and packaged heroin with the defendant, right?" GA233. Dejesus responded, "No. The only reason why I say yes to July was because of the heat." GA233. Defense counsel

asked, "Because of the heat. So it was sometime when it was warm?" GA233. Dejesus said, "No. Hot." GA233. Defense counsel asked, "And it could have been August then, right?" GA234. Dejesus answered, "No, not that far in." GA234. Defense counsel asked, "Could it have been June?" GA234. Dejesus replied, "Yeah. Could have been the end of June, beginning of July." GA234. Defense counsel asked, "You're just not sure of the exact time period, that's what you're telling us, right?" GA234. Dejesus replied, "Exactly." GA234. Defense counsel clarified, "So when the prosecution said July of '06, you were just agreeing because the prosecutor happened to say it?" GA234. Dejesus said, "Yes." GA234.

At the conclusion of cross examination, defense counsel asked for a sidebar and stated, "[B]ased upon his testimony that he's not sure when the transaction occurred, I would ask that that portion of his testimony involving the cutting and packaging incidents be stricken. It's only – this is a short term conspiracy. It seems to me it would have to be some certainty that it's in July. And the witness isn't certain of that." GA237. The government replied, "He testified that it could have been late June or early July. I believe that falls within the scope." GA237. The district court ruled, "I deny the request." GA237.

On redirect examination, the government did not ask Dejesus any additional questions about the cutting and packaging of heroin with the defendant. GA238-GA239.

After the government rested, defense counsel again moved to strike Dejesus's testimony "about my client

packaging or cutting heroin for sale." GA254. Defense counsel argued:

> Assuming that he's telling the truth that there was a packaging and cutting going on between he and my client, there's no evidence that it's part of this conspiracy whatsoever.
>
> Agent Bornstein just testified that there was more than one source of heroin available at that time in the Hartford area. Mr. Dejesus, who's the only testimony at all as to this packaging, repackaging and cutting, testified that they were hoping to go into business for themselves.
>
> So the fact that they were doing this packaging and cutting – I don't know whatever became of it – it doesn't lead one to the conclusion that it's part of this conspiracy. And I cite, your Honor – I know the Hawkins case your Honor is familiar with, but it's the same issue that Judge Underhill talks about. Just because someone is selling drugs doesn't mean that it's part of the conspiracy. And more so than the Hawkins case. There's no testimony that the drugs that were allegedly being repackaged or cut even came from Mr. Sixto Polanco. For all we know they came from somewhere else. For all we know they came from one of the other sources that Agent Bornstein talked about.
>
> But there's a lack of evidence in this case that would connect that repackaging and cutting to this

particular conspiracy. And so on that ground, I would ask that it be stricken.

GA254-GA255.

The government responded with two arguments:

The first is that the purpose of the evidence . . . is misunderstood slightly. The government's primary proof here is that . . . the defendant participated in a delivery of 80 grams of heroin, part of that is going to require us to prove beyond a reasonable doubt that he knew it was heroin. In other words, he's holding a plastic bag. We have to prove he knew it was heroin.

. . . I think the court's instruction is going to say his mere presence at the scene, even his mere association with knowledge might not be enough. So we really need to prove that when he delivered that 80 grams, he knew it was heroin. And so it goes to that issue.

If the jury credits the testimony that towards the end of June, beginning in July, he himself was handling heroin by packaging it, it's relevant to prove that when he delivered the 80 grams in July he knew it was heroin. That's the primary claim of relevance.

GA255-GA256.

The government also argued that the defendant was reading the charge in the Indictment too narrowly. GA256. "The charge is [that] in or about July of 2006, the defendant, Mr. Polanco, and others known and unknown, participated in the heroin conspiracy." GA256. The government pointed out that, because it did not know until Dejesus's first proffer on May 22, 2008 that he had participated in the heroin trade with the defendant, Dejesus himself could be considered as one of the unknown co-conspirators mentioned in Count One. GA256. The government stated, "So my claim is it's not only relevant to prove the defendant knew he was delivering the 80 grams of heroin . . . , but also that it's relevant to show that he was participating in a conspiracy to sell heroin from his residence with Mr. Polanco, with Mr. Dejesus. So there's sort of two alternate theories of relevance." GA257.

The "primary theory" for the admission of the evidence, in the government's view "is because we're going to need to show that what [the defendant] was doing for Mr. Polanco, he did knowing that it was involving heroin and not just something that may or [may] not have been drugs or may or may not have been contraband, but that he knew it was heroin." GA257.

In response, defense counsel argued, "[T]he first argument fails, because if in fact your Honor buys that, then we'd be entitled to a limiting instruction with regard to the packaging and cutting, instructing the jury at the very least that that should not be considered as evidence of participation in a conspiracy to package and resell heroin." GA257. Defense counsel felt, however, that "[t]he

prejudice is overwhelming that a jury hearing that my client was packaging or cutting heroin then will think, well, gosh, the guy's packaging and cutting heroin, the government says, sure it's only to show you ladies and gentleman that he knew what heroin was." GA257-GA258. Defense counsel thought that the jury would conclude, "[i]f he's packaging it and cutting it, he must be dealing it, he must be a seller, he must be part of the conspiracy to package and cut." GA258. In addition, he argued, "Just because Mr. Luis Dejesus was a party to that, doesn't mean he was a party to the conspiracy. . . . [M]y recollection is that the import of Mr. Dejesus's testimony is that he and [the defendant] were attempting to go into business for themselves and do something by themselves," and without Polanco. GA258.

The trial court replied:

> Let's suppose that a tim[ely] objection had been made on the ground that this was beyond the scope of the alleged conspiracy and the government responded as [government's counsel,] Mr. Spector just did. We're offering this to prove that the defendant knew what heroin was and what it looked like, and we're offering this for that purpose, not to prove that the packaging that was described by Mr. Dejesus was necessarily part of the conspiracy charged in the count, although I understand the government reserves that argument. But instead assuming it was a different conspiracy, we're offering it to prove knowledge and intent, absence of mistake, and on that basis, it should

come in. What do you say to that?

GA259.

Defense counsel replied, "That would require a limiting instruction from the court. My concern about that is I just don't think there's any limiting instruction that could serve that purpose. It's such strong evidence." GA259.

The trial court ruled, "I don't think that a rational system would preclude the trier of fact from considering the evidence in this case. And on that basis, I'll deny your motion." GA260. The court also held:

> I'll be willing to reconsider if you can come up with some persuasive authority that shows me that I'm wrong; that my intuition is unsound. It might be. But on the face of it, it seems to me the government has a very heavy burden of proof in the case, and given the evidence that we've heard of the surveillance, it's to my mind reasonable for the government to be able to show that it this period of time, more or less simultaneously, if you credit the testimony of the witness, this defendant was cutting and packaging heroin independently of Mr. Polanco perhaps, perhaps not. But in any case, sitting, cutting and packaging heroin, which he was allegedly delivering as part of the conspiracy at about the very same time.

GA260.

In response, defense counsel asked, "Would your Honor at the very least give the limiting instruction that I've requested?" GA261. The court replied, "Sure. I'm open to any instruction you might have." GA261. At that point, the government suggested that no limiting instruction was warranted because the evidence at issue was not traditional 404(b) evidence, but instead was inextricably intertwined with the charged conspiracy. GA261. Defense counsel argued that a limiting instruction was appropriate to direct the jury only to consider the evidence "for the purpose of determining whether or not [the defendant] knew what heroin was but not to consider the repackaging and cutting as part of the conspiracy in this case and therefore cannot be used against him as evidence." GA262. The trial court expressed some skepticism of the defendant's position, but advised that it would keep an open mind and that the defendant should present a request with supporting authority for the charge conference the next day. GA262-GA263.

The defendant then renewed his objection and explained that, in the first instance, he wanted the testimony stricken. GA264. The court repeated its view that the testimony was relevant and that it should not be stricken. GA264. The court asked defense counsel: "So a person charged with conspiracy to possess with intent to distribute and to distribute heroin in late June, July of any given year is protected against a jury's consideration of evidence that he was cutting and packaging heroin at that very time in the absence of evidence linking it to the charged conspiracy." GA265. Defense counsel replied, "Exactly, exactly. His conduct, as I said by way of

example, similarly with regard to a buyer who might come into court and testify he bought something from my client, there must be a connection to the conspiracy." GA265. He argued, "[T]heres' just no evidence that this subsequent packaging and rebagging had anything to do with the conspiracy." GA266-GA267.

In response, the government argued:

> What we're talking about here is did he participate in a conspiracy to sell heroin by delivering heroin on the 19th, most directly, and then accepting a 600-dollar payment on the 26th most directly. And I would assume one of the big claims is going to be he was a driver. He didn't really know what was going on. And so I think the jury would want to know that during that exact same time period in the residence where Mr. Polanco says he stored heroin, where Mr. Polanco paid for the rent for the first time, using Mr. Dejesus to find the apartment, in that very apartment he's packaging heroin. We're not going to get into did he sell it, we're not going to get into where it went or where it came from. Because in our view the value of the evidence is simply to show that when he did what he did on the 19th, he knew it was heroin. He knew exactly what he was doing.

GA267-GA268.

The trial court stated, "That sounds right to me. . . . On the face of it you seem to have the better argument. But

I'm willing to reconsider if I'm provided with citations and authority along the lines that I described." GA269.

During the charge conference on June 12, 2008, the court addressed the issue again. Defense counsel argued,

> [A]ssuming that there is a chain that goes all the way down from Bolanos to Sixto to my guy to street dealers was to say – let's say my guy one day says, I'm not getting enough money, I'm going to strike out on my own. I'll get the drugs from Charlie Smith down the street and I'll sell it. Well, his sale of drugs to other people with the drugs from Charlie Smith doesn't make him a part of the conspiracy. And in this case there's no evidence whatsoever that the drugs they were cutting and bagging came from Ramirez's drugs.

GA285-GA286. The court summarized the government's response: "[L]et's assume you're right, that this activity is separate and independent from the charged conspiracy, nevertheless the testimony about Dejesus should not be stricken in whole or in part because it is inextricably intertwined with the facts and circumstances of the case and, more specifically, proves beyond a reasonable doubt that when he delivered the heroin, . . . he knew what he was doing." GA286.

Defense counsel both argued that a limiting instruction was necessary and stated that no limiting instruction could blunt the prejudice of the testimony. GA286-GA287. He clarified that he would prefer that the testimony was

stricken, but wanted a limiting instruction if it was not stricken. GA288-GA289. When the court asked whether the government would object to a limiting instruction, it stated that it would not object. GA289. The court then stated:

> My understanding is that the defendant's principle objection is that the cutting and bagging is not part of the charged conspiracy. And I think that's a reasonable position for the defendant to take, and I'm willing to instruct the jury, with your concurrence, that they are not to consider the bagging and cutting as activity undertaken pursuant to the charged conspiracy. The government is not asking you to find beyond a reasonable doubt that the cutting and bagging described by Dejesus was part of the conspiracy between the defendant and Polanco. Why then is it part of the case? Well, you can consider it on the question whether the defendant's alleged participation in the Polanco conspiracy was knowing.

GA290-291. In response, the government stated, "That's great your Honor, that would be fine. Just like that would be great." GA291. Defense counsel stated, "I think that's an accurate rendition, at least of my position." GA291.

The court did not strike any of Dejesus's testimony, but during the final instructions, it advised the jury:

> There was testimony in the case by Mr. Dejesus that he and the defendant jointly participated in

> cutting and bagging heroin at 12 Arnold Street. Whether or not you should believe this testimony by Mr. Dejesus is entirely up to you. Please note that the government does not claim that the bagging and cutting described by Mr. Dejesus was undertaken pursuant to the conspiracy between Polanco and the defendant and others charged in Count One of the indictment here.
>
> Why then is this part of the case? The government offers this testimony for you to consider in deciding whether the defendant knowingly participated in the alleged conspiracy with Polanco to sell heroin to the man named Jeffrey.
>
> I instruct you that you can use Mr. Dejesus's testimony concerning the bagging and cutting activity for this purpose but not for any other, and I remind you that the defendant is not on trial for any conduct that is not charged in the indictment.

A61-A62. At the conclusion of the charge, neither side voiced any objection as to this limiting instruction. A78.

B. Governing law and standard of review

Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,

> such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

See United States v. Pipola, 83 F.3d 556, 565 (2d Cir. 1996). This Court follows the "inclusionary" approach to the admission of other act evidence: evidence of prior crimes, wrongs or acts, is admissible for any purpose other than to show a defendant's criminal propensity so long as the court determines that the evidence's probative value is not substantially outweighed by its potential for unfair prejudice. *See United States v. Diaz*, 176 F.3d 52, 79 (2d Cir. 1999); *United States v. Stevens*, 83 F.3d 60, 67 (2d Cir. 1996); *Pipola*, 83 F.3d at 565; *United States v. Muniz*, 60 F.3d 65, 69 (2d Cir. 1995); *United States v. DeVillio*, 983 F.2d 1185, 1194 (2d Cir. 1993).

In *Huddleston v. United States*, 485 U.S. 681, 691 (1988), the Supreme Court outlined the test for admissibility of other act evidence under Rule 404(b). *First*, to be admissible the evidence must be offered for a proper purpose -- such as proof of knowledge, intent or absence of mistake or accident. *Second*, the offered evidence must be relevant to an issue in the case. *Third*, the probative value of the similar act evidence must not be substantially outweighed by the potential for unfair prejudice. *Fourth*, if requested to do so, the court must give an appropriate limiting instruction to the jury. *See id.*; *see also United States v. Edwards*, 342 F.3d 168, 176 (2d Cir. 2003).

Not all evidence of a defendant's uncharged wrongful

conduct is subject to the limitations governing Fed. R. Evid. 404(b). Rather, "'evidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.'" *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997) (as altered in *Carboni*)). "[E]vidence that does not directly establish an element of the offense charged [is admissible] in order to provide background for the events involved in the case. In particular, evidence of other bad acts may be admitted to provide the jury with the complete story of the crimes charged by demonstrating the context of certain events relevant to the charged offense." *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994) (internal citation and quotation marks omitted).

Once evidence is found to be relevant to a material issue in dispute, the court must determine whether the risk of *unfair* prejudice substantially outweighs the probative value of the evidence. *See* Fed. R. Evid. 403; *Huddleston*, 485 U.S. at 691. The Advisory Committee defines "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee Note to Fed. R. Evid. 403. Thus, as this Court has stated, "Evidence is prejudicial [within the meaning of Rule 403] only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its

admission into evidence." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980).

If other crimes evidence is admitted, and if requested to do so, the district court must give a limiting instruction to the jury explaining the purpose for which the evidence may be considered. *See Huddleston*, 485 U.S. at 691-92; *United States v. Thomas*, 54 F.3d 73, 81 (2d Cir. 1995).

A district court has "wide discretion in determining the admissibility of evidence under the Federal Rules," and this Court reviews the admission of evidence for abuse of that discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005). A district court abuses its discretion when it "act[s] arbitrarily and irrationally," *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992), or its rulings are "manifestly erroneous," *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (internal quotation marks omitted). Indeed, "[t]he appellate court must look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect. To find abuse, the appellate court must find that the trial court acted arbitrarily or irrationally." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (citation and internal quotation marks omitted).

C. Discussion

The defendant claims that the trial court erred in refusing to strike the testimony of Dejesus that, in late June and early July of 2006, he and the defendant had cut

and packaged heroin for resale in both of their apartments at 12 Arnold Street. He is incorrect. This testimony was relevant to prove that the defendant knew what heroin had looked like and that he had handled it prior to the July 19, 2006 heroin transaction. The testimony and evidence at trial established that, on July 19, 2006, the defendant had helped Polanco sell 80 grams of heroin by driving him to meet with his heroin supplier before the transaction, driving him to the transaction itself, delivering the heroin in a clear plastic bag to Polanco while Polanco was inside Jeffrey's car, and meeting with Jeffrey one week later to receive the remaining $600 owed for the heroin. GA62, GA68, GA70, GA146-GA147, GA150-GA152, GA187, GA293-GA308. The Government had to prove beyond a reasonable doubt that the defendant was a knowing and voluntary participant in the conspiracy to sell heroin, and not just that he was merely present with Polanco at the time of the transaction, or that he had some knowledge of Polanco's heroin trafficking activities. Testimony that, during the same time period, he had cut and packaged heroin in his and a cohort's apartment was relevant to the issue of whether the defendant knew that he was helping Polanco to sell heroin in July, 2006.

The issue of the defendants' knowing participation in the heroin transaction was certainly in dispute during the trial. In fact, the defendant conceded that he was Polanco's driver, but claimed that he only drove him around for innocent purposes and had no idea that Polanco was selling heroin. Indeed, the defendant, through cross examination of the government witnesses and during closing argument, suggested that Polanco had hired him as

a driver because Polanco had no driver's license and needed the defendant to bring him and his family members to various places in Connecticut and New York for legitimate reasons. GA122, GA175-GA176; Tr. at 325, 327, 332, 334. He pointed out that Polanco did not consider the defendant to be a narcotics associate or co-conspirator and, instead, viewed him as a friend and employee who had no involvement in Polanco's drug business. GA183-GA185; Tr. at 327.

The government's strongest evidence of the defendant's guilt on the conspiracy charge was that he drove Polanco to meet with Bolanos on July 19th and obtain the 80 grams of heroin, which was packaged in a clear plastic bag, and then, after Polanco got out of the vehicle to meet Jeffrey (leaving the heroin with the defendant), the defendant brought this same bag of heroin to Polanco while he sat in Jeffrey's vehicle. GA62, GA68, GA70, GA146-GA147, GA150-GA152, GA187, GA293-GA308. Any suggestion that the defendant did not know that he was providing heroin to Polanco, or that he was merely present during the heroin transaction, but was not a knowing participant in the transaction, could have been rebutted by evidence that, during the same time period, the defendant had obtained heroin and, along with Dejesus, was cutting and packaging it for resale. *See United States v. Aminy*, 15 F.3d 258 (2d Cir. 1994) (holding that, where defendant placed his knowledge in issue by claiming he did not know briefcase in his possession contained heroin, evidence of uncharged act of possession of small quantity of heroin consistent with drug dealer's sample was admissible to prove knowledge and intent). "Where. . . the

defendant does not deny that he was present during a narcotics transaction, but simply denies wrongdoing, evidence of other arguably similar narcotics involvement may, in appropriate circumstances, be admitted to show knowledge or intent." *Id.* at 260. The testimony by Dejesus showed that the defendant was intimately familiar with the form and substance of heroin and that he knew what he was delivering to Polanco on July 19, 2006.

In addition, the probative value of the evidence at issue was not substantially outweighed by the potential for unfair prejudice. *See Edwards*, 342 F.3d at 176. First, the trial court provided the jury with an agreed-upon limiting instruction to prevent the jury from misusing the evidence. In this instruction, the court explained the purpose for the evidence and instructed that there was no claim that "the bagging and cutting . . . was undertaken pursuant to the conspiracy between Polanco and the defendant and others charged in Count One of the indictment here." A61. The court advised that the evidence was only relevant to the determination of "whether the defendant knowingly participated in the alleged conspiracy with Polanco to sell heroin to the man named Jeffrey." A61. The court further warned that the "testimony concerning the bagging and cutting" could be used for no other purpose and that "the defendant is not on trial for any conduct that is not charged in the indictment." A62. Thus, there was no danger that the jury could have used the evidence for an improper purpose.

Second, the evidence at issue constituted a very small portion of the Government's case-in-chief, which

consisted primarily of evidence that, on July 19, 2006, the defendant had driven Polanco to meet his source of supply for heroin and then had driven him to the heroin transaction, that the defendant had delivered the 80 grams of heroin in a clear plastic bag to Polanco while he waited in Jeffrey's vehicle, and that the defendant had met with Jeffrey on July 26, 2006 for the sole purpose of collecting the remaining $600 owed from the July 19th heroin transaction. GA62, GA68, GA70, GA146-GA147, GA150-GA152, GA187, GA293-GA308. Physical and electronic surveillance, along with Polanco's own testimony, confirmed that, earlier in the day on July 19th, Polanco had directed the defendant to retrieve a small quantity of heroin for Jeffrey to test, and, at the time of the actual heroin transaction, the defendant had driven to Jeffrey's vehicle and dropped off 80 grams of heroin for Polanco to sell to Jeffrey. GA38-GA39, GA62, GA114, GA141-GA144, GA150-GA151, GA298, GA303. Moreover, Dejesus testified that the defendant had admitted to him that he had been driving Polanco to New York to pick up packages of heroin and complained that Polanco was not paying him enough money for such a risky job. GA222-GA223. Dejesus also testified that, on occasion, during the time period of the conspiracy, Jeffrey would come to 12 Arnold Street looking to purchase heroin and would meet with the defendant when Polanco was not available. GA226-GA227. Given the overwhelming evidence of the defendant's knowing involvement in the heroin conspiracy, Dejesus's testimony that he and the defendant had cut and packaged heroin in their apartments during the same time period could not have resulted in unfair prejudice to the defendant. *See*

United States v. Rigas, 490 F.3d 208, 238-39 (2d Cir. 2007).

For the same reason, any error by the district court was harmless. "An error in admitting evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *Edwards*, 342 F.3d at 178 (internal quotation marks omitted). The proof in support of the defendant's conviction was overwhelming. FBI surveillance units observed the defendant deliver the 80 grams of heroin to Polanco just before Polanco exchanged the heroin with Jeffrey for $5,000. GA62-GA63. The recording of the incident revealed that Polanco turned to the defendant, who had just pulled up in a separate vehicle, and retrieved the 80 grams of heroin, which he then provided to Jeffrey. GA303. Polanco testified that, on July 19, 2006, the defendant drove him to meet with Bolanos to obtain the heroin for Jeffrey, drove him to meet Jeffrey on Airport Road, and brought the heroin to Polanco, in a clear plastic bag, as he sat in Jeffrey's vehicle finalizing the negotiations for the transaction. GA146-GA151, GA187. Recorded telephone calls, surveillance and the recording from a body wire established that the defendant and Jeffrey met on July 26, 2006 so that Jeffrey could pay the defendant $600 owed from the 80 gram heroin sale on July 19, 2006. GA304-GA308. Finally, other testimony from Dejesus established that, in July, 2006, the defendant had been upset with Polanco because he thought he was not getting paid enough to transport heroin for Polanco from New York to Connecticut. GA222-GA223. In the context of this overwhelming evidence of the defendant's knowing

participation in Polanco's heroin distribution enterprise, any error in admitting, for a limited purpose, Dejesus's testimony that he and the defendant had cut and packaged heroin together in their apartments during the same time period was harmless.

II. The district court did not commit plain error by allowing the government to present evidence of a controlled purchase involving a non-testifying cooperating witness.

In his second claim, the defendant states that he was "unfairly prejudiced by an unreliable cooperating witness." Def.'s Brief at 14. He raises this claim for the first time on appeal, but does not elaborate at all regarding what rights of his the government allegedly violated, and the manner in which the government allegedly violated those rights. He argues that the government should not have been able to rely on Jeffrey's testimony, and he seems to fault the government for allegedly failing to document Jeffrey's dealings with Polanco and the defendant through the use of additional audio and video surveillance equipment. This claim has no merit. The government did not call Jeffrey as a witness and, to the extent that the defendant viewed Jeffrey as an unreliable source of information, he was able to present this argument through cross examination of the government's other witnesses.

A. Relevant facts

As stated above, the government relied on a cooperating witness in this case, identified herein as

Jeffrey, to engage in recorded telephone calls and recorded meetings with the defendant and Polanco. Neither the government, nor the defendant called Jeffrey as a witness, and, because he was identified and known to both parties, the trial court instructed the jury as follows:

> There are several persons whose names you heard during the trial who did not appear to testify. I instruct you that each party had an equal opportunity or lack of opportunity to call any such witness. Therefore, you should not draw any inference or reach any conclusion as to what the witnesses would have testified to had they been called and their absence should not affect you in any way. Please remember my instruction that the law does not impose on a defendant the burden or duty of calling any witness or producing any evidence or testifying himself.

A70.

Although the government did not call Jeffrey as a witness, it did elicit impeachment information as to him. For example, Special Agent Bornstein testified that the FBI had paid Jeffrey a total of $750 for his cooperation in this case and approximately $32,000 for his cooperation in a separate, unrelated investigation. GA20, GA106. He also testified that Jeffrey was a convicted felon. GA20. In addition, through cross examination of Special Agent Bornstein, the defendant noted the absence of any video surveillance of Jeffrey's meetings with Polanco and the defendant, and the various limitations of the physical and

audio surveillance that was used on July 19, 2006 and July 26, 2006. GA102-GA103.

The defendant never claimed to the trial court that the government should not have been able to present evidence of Jeffrey's dealings with Polanco and the defendant. The defendant also never called Jeffrey as a witness, despite the fact that Jeffrey and all of his impeaching information was disclosed to him. Instead, the defendant argued to the jury that Jeffrey was unreliable and could not be the basis for a conviction of the defendant. Tr. at 340.[7] The defendant also attacked the FBI both for its alleged failings in conducting physical and electronic surveillance in the investigation, *see, e.g.,* Tr. at 332-333, and for its willingness to believe a well-paid, convicted felon who was "only in it for the money." Tr. at 340.

B. Governing law and standard of review

If a defendant fails to object to an evidentiary ruling at trial, the defendant must demonstrate that the trial court's abuse of discretion was plain error. *See United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003). Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v.*

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[7] The transcript is contained in three, sequentially paginated volumes and will be referred to as "Tr." and the page number.

Williams, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "the error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

It is difficult to determine the precise error alleged in the defendant's second claim. He only dedicates one page of his brief to the argument, he does not cite any case law, and he does not articulate what rights were allegedly violated. On its face, this claim appears to allege that the jury was unfairly prejudiced by Jeffrey's testimony and by

the government's failure to corroborate his information through audio, video and physical surveillance.

In the first instance, the defendant's claim lacks merit because Jeffrey did not testify as a government witness, and the defendant chose not to call him as a witness. During the testimony of Special Agent Bornstein, the defendant was able to elicit impeaching information about Jeffrey, including information about his criminal record and the amount of money he was paid for cooperating with the government. Moreover, during cross examination of the government witnesses and through closing argument, the defendant was able to present the jury with his claim that the FBI did not engage in sufficient electronic and physical surveillance to corroborate Jeffrey's information and establish that the defendant had been a knowing participant in the heroin transaction with Polanco. The trial court did not commit any error, let alone error which would be considered plain, would affect substantial rights and would affect the integrity of judicial proceedings.

III. The evidence was sufficient to support the defendant's conviction.

Finally, the defendant claims that there was insufficient evidence to support his conviction on Count One of the Indictment. This claim lacks merit.

A. Governing law and standard of review

"A defendant challenging the sufficiency of trial evidence 'bears a heavy burden,' *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003), and the reviewing court must 'view the evidence presented in the light most favorable to the government, and draw all reasonable inferences in its favor,' *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000)." *United States v. Giovanelli*, 464 F.3d 346, 349 (2d Cir. 2006) (internal ellipses omitted). "Accordingly, [this Court] will affirm the jury verdict unless 'no rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt.' *United States v. Schwarz*, 283 F.3d 76, 105 (2d Cir. 2002)." *Giovanelli*, 464 F.3d at 349. In its review, this Court is "constrained to consider the evidence in a light most favorable to the government, to draw all permissible inferences in the government's favor and to favor the jury's verdict in resolving issues of credibility." *United States v. Singh*, 390 F.3d 168, 187 (2d Cir. 2004). "The assessment of witness credibility lies solely within the province of the jury, and the jury is free to believe part and disbelieve part of any witness's testimony." *United States v. Josephberg*, 562 F.3d 478, 487 (2d Cir.), *cert. denied*, 130 S. Ct. 397 (2009). "[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *Id.* (internal quotation marks omitted). "The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." *Id.* at 488 (internal quotation marks omitted).

B. Discussion

The charge against the defendant in Count One of the Indictment is that, in July, 2006, he knowingly and voluntarily participated in a conspiracy to distribute heroin. The evidence at trial established that the defendant knowingly participated in the conspiracy by helping Polanco sell 80 grams of heroin on July 19, 2006 to Jeffrey and then collecting a remaining $600 in cash owed from that transaction from Jeffrey on July 26, 2006. In short, the evidence established that the defendant worked for Polanco as his driver and, in that role, knowingly helped him purchase and redistribute heroin.

Physical surveillance and the recording from the body wire worn by Jeffrey on July 19, 2006 established that, when Polanco and Jeffrey met early in the day on the 19th, Polanco only had fifty grams of heroin, not the 100 grams which Jeffrey had requested. GA38-GA39, GA41, GA294. When Jeffrey decided to give Polanco more time to obtain additional heroin from his supplier, he asked Polanco for a sample of heroin to test its quality, and Polanco directed the defendant to retrieve the sample. GA298.

Polanco testified that, after he and Jeffrey met early in the day on July 19th, the defendant drove Polanco to meet with his heroin supplier, and Polanco obtained 80 grams of heroin in a clear plastic bag and brought it into the car with the defendant. GA146-GA147. The defendant then drove Polanco to meet with Jeffrey and, after Polanco had gotten into Jeffrey's vehicle and driven to the nearby AT&T

parking lot, the defendant pulled up next to Jeffrey's vehicle and handed the bag containing the 80 grams of heroin to Polanco to sell to Jeffrey. GA150-GA151. The audio recording of the transaction, along with the physical surveillance conducted by Special Agent Bornstein, corroborated Polanco's testimony and confirmed that the defendant had, indeed, brought the heroin to Jeffrey's vehicle just prior to when Jeffrey provided the $5,000 to Polanco in exchange for the 80 grams of heroin. GA62-GA63, GA303.

When Jeffrey called Polanco to arrange to pay him the remaining $600 owed on the 80 gram transaction, he was directed to call the defendant. GA64-GA65. Phone records for both the defendant's and Polanco's cell phones revealed that, from July 19, 2006 to July 26, 2006, there were 26 calls between the two phones, six calls between Polanco's cell phone and Jeffrey's cell phone on July 19 and July 20, 2006, and fourteen calls between the defendant's cell phone and Jeffrey's cell phone from July 22, 2006 and July 26, 2006. GA84-GA85. Two recorded telephone calls between the defendant and Jeffrey on July 26, 2006 established that Jeffrey made arrangements to meet the defendant and pay him the remaining $600 owed from the July 19th transaction. GA304-GA306. Physical surveillance, along with the recording from the body wire worn by Jeffrey, established that he met with the defendant in front of the defendant's residence at 12 Arnold Street and paid him the remaining $600. GA68-GA69, GA307-GA308

Polanco testified that the defendant was his driver and,

during the time period of the charged conspiracy, the defendant would transport him to and from heroin transactions. GA122-GA125. Also, according to Polanco, he helped pay the defendant's rent for his third floor apartment in the 12 Arnold Street building and, for brief periods of time, with the defendant's knowledge, stored heroin there. GA127-GA128, GA135-GA136.

Dejesus testified that the defendant transported heroin for Polanco and complained that Polanco did not compensate him enough for the risk he bore in helping to transport heroin back from New York. GA222-GA223. Dejesus also testified that, when Jeffrey came to 12 Arnold Street looking to purchase heroin and Polanco was unavailable, he would meet with the defendant. GA226-GA227. In addition, Dejesus stated that, in late June, and early July, 2006, the defendant would sometimes obtain heroin, and he and the defendant would then cut and package it for resale in one of their apartments. GA225-GA226.

Viewing this evidence "in the light most favorable to the government, and draw[ing] all reasonable inferences in its favor," *Giovanelli*, 464 F.3d at 349, this Court should conclude that there was sufficient evidence to support the defendant's conviction on Count One.

The defendant claims that he was merely a "go between" who did not "intend to further the goals of the conspiracy." Def.'s Brief at 18. He maintains that there was "none of the indicia of a drug conspiracy," "i.e., no evidence that credit was extended to [the defendant], no

repeated drug transactions, no position of trust in the organization, no discussion of payment to [the defendant], no repeated cell phone calls, no proof of his intent to contribute to the success of the conspiracy, and no 'tools of the trade,' such as firearms, packaging materials, cell phones, scales or plastic bags." Def.'s Brief at 17.

The defendant's argument is flawed by his misunderstanding of the scope of the charged conspiracy. Count One charges that Polanco, the defendant and others known and unknown conspired to distribute heroin in July, 2006. Count One does not charge a complex narcotics conspiracy involving a sophisticated distribution network; it charges a simple heroin distribution conspiracy based primarily on evidence of a single distribution of 80 grams of heroin on July 19, 2006. The defendant's conviction of this charge is based on evidence that he knowingly engaged in acts with the intent to further the goals of the charged conspiracy. Specifically, with knowledge that he was helping Polanco sell heroin to Jeffrey, the defendant drove Polanco to meet Bolanos to obtain heroin from him, drove Polanco to meet Jeffrey to sell heroin to him, delivered 80 grams of heroin to Jeffrey's vehicle so that Polanco could sell it to him, and subsequently collected monies owed on the heroin transaction from Jeffrey. In other words, the evidence shows that the defendant was an active participant in the short-term heroin conspiracy alleged in Count One.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 14, 2010

Respectfully submitted,

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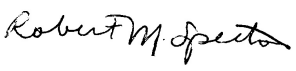

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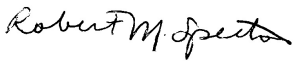
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 approximately13,998 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

Fed. R. Evid. 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused.--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim.--Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness.--Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Rodriguez

Docket Number: 08-6096-pr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **prisonercases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 1/14/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: January 14, 2010

CERTIFICATE OF SERVICE

08-6096-pr USA v. Rodriguez

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January 14, 2010

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