09-5191-cr

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-5191-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTONIO MIGUEL ARIAS,
also known as Gilberto Miranda, also known as Miguel,
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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Statement of Jurisdiction

The district court (Alvin W. Thompson, J.[1]) had jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court entered a final judgment as to Arias on November 10, 2009. Appendix ("A") 37. On December 15, 2009, Arias filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b).[2] A37. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] Since the matters treated herein, Judge Thompson has assumed the position of Chief U.S. District Judge.

[2] On November 9, 2009, the district court granted Arias's timely motion for extension of time until December 16, 2009 to file the notice of appeal. A37.

Statement of Issues Presented for Review

1. In this drug conspiracy trial, did the district court clearly err in finding that out-of-court statements of a co-defendant, which were offered as statements by a co-conspirator, were made by a co-conspirator during the course of and in furtherance of the conspiracy?

2. Did the district court abuse its discretion in declining to compel the testimony of a defense witness who declined to testify, asserting his Fifth Amendment privilege against self-incrimination?

United States Court of Appeals

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UNITED STATES OF AMERICA,
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ANTONIO MIGUEL ARIAS,
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Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Antonio Miguel Arias, was convicted by a jury on drug conspiracy and attempted drug possession charges. On appeal, he challenges the admission by the district court of out-of-court statements made by a co-defendant, and the failure of the district court to compel the testimony of a defense witness who asserted his Fifth Amendment privilege against self-incrimination.

The district court properly found that the out-of-court statements offered by the government were made by a co-conspirator of Arias in the course and in furtherance of the conspiracy charged in Count One of the Indictment, and accordingly, those statements were properly admitted as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Similarly, far from abusing its discretion, the district court made a sound decision based on the record and on settled, controlling law when it declined to compel the testimony of a defense witness who asserted his Fifth Amendment privilege against self-incrimination. The jury's verdict and the judgment in the case should therefore be affirmed.

Statement of the Case

On December 13, 2007, a federal grand jury in Bridgeport, Connecticut returned an indictment against four individuals, including the defendant, Antonio Miguel Arias, charging Arias with one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(ii), and one count of attempt to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii) and 18 U.S.C. § 2. A7, 41-44.

Arias was tried on the indictment two times. The first trial, which occurred between May 19 and May 27, 2009, ended in a mistrial. A27-29. The second trial began on June 22, 2009, and took place before a jury and the Honorable Alvin W. Thompson, U.S.D.J. A31. On June

25, 2009, following completion of the government's case, Arias made an oral motion for judgment of acquittal, which the district court denied. A32. On June 26, 2009, the jury returned a verdict of guilty as to Arias on counts one and two of the indictment. *Id*.

On November 6, 2009, the district court sentenced Arias to 360 months of imprisonment and 10 years of supervised release on each count, to be served concurrently. A37, 262-63. On December 15, 2009, Arias filed a timely notice of appeal. A37, 264-65.

Arias is in custody serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The initial seizure

On July 30, 2007, a team of federal agents from the FBI, US Immigration and Customs Enforcement, and local agencies searched the cargo ship Napier Star as it lay at anchor in the harbor at Bridgeport, Connecticut. Government Appendix ("GA") 235. The ship was operated by the Turbana Corporation, a Colombian banana importer. GA232-33. According to an FBI informant, hidden in the ship's cargo holds among some 4800 pallets of bananas were 444 kilograms of cocaine. GA146. However, despite a thorough search of the ship, no hidden cocaine was discovered, and the cargo of the Napier Star was released. GA248-49.

A portion of the cargo of the Napier Star was destined for shipment to Mascari Brothers, a New Haven, Connecticut fruit wholesale company. GA246, 264-66. Following the search, William Mascari, a principal at Mascari Brothers, returned to his New Haven warehouse to find his newly-arrived banana pallets marked with tape reading "Searched by US Customs and Homeland Security." GA361. Mascari was concerned, because he had anticipated that the shipment would contain a large quantity of cocaine. *Id*. Over the next several days, Mascari and co-defendants Raymond Pacheco and Jesus Arias, the brother of the defendant, searched for the cocaine among the pallets in the Mascari warehouse. GA361-66. On August 6, 2007, Mascari, Pacheco and Jesus Arias located the cocaine shipment in the pallets. GA366.

Based on a prior agreement between Mascari and Antonio Miguel Arias, the cocaine was to be delivered to the Arias fruit warehouse in the Bronx. GA367. At around 1:00 a.m. on August 7, 2007, the morning after the cocaine was located, Mascari loaded the drug-laden pallet into a truck and headed for the Bronx. He pulled out of the warehouse and entered the southbound ramp of I-95, heading for New York. As he did so, FBI agents who had been monitoring the Mascari warehouse initiated moving surveillance of the Mascari truck. Sensing that he was being followed, Mascari returned to the warehouse, where he unloaded the drugs, and then proceeded to New York. GA368-73, 54-59. Near Stamford, Connecticut, Connecticut State Troopers, acting at the direction of the

FBI, pulled Mascari and his truck over. GA60. The troopers searched the truck with Mascari's consent. GA374-75. Canine units were used to perform the search, GA61, and they alerted to the presence of cocaine. GA62-63. However, no cocaine was found, GA63, as Mascari had left it back in his warehouse. GA372-73.

When Mascari returned to the warehouse after the search, he learned that an unwitting Mascari employee had sent the pallets of bananas which contained the cocaine to a Mascari customer, Junior's Produce in Hunt's Point Market in the Bronx. GA378-80.

Mascari conveyed this information to Pacheco, who arranged to pick up the drug-laden banana shipment at Junior's Produce. GA380. That evening, the bananas and the drugs were loaded onto a truck for transport from the Hunt's Point Market. However, based on information provided by their informant, the FBI was aware the shipment was being moved and, as the truck left the market, federal agents pulled it over. GA94-95. The driver, while nervous, GA101, consented to inspection of the truck. GA97. When the agents opened the truck, they could clearly see the wrapped bricks of cocaine through air holes in the banana boxes. GA98. The banana boxes were found to contain a total of 444 kilogram bricks of cocaine. GA103.

With an eye towards spreading misinformation, the agents at the search told the driver that they found only 75 kilograms, and let him go, anticipating that he would report this fact to other members of the conspiracy. *Id*. The

following day, Mascari received a telephone call from Antonio Miguel Arias, who told Mascari, "I know what you did. You know what you did." GA381. Mascari interpreted this to mean that Arias blamed him for the, ostensibly, missing 369 kilograms. *Id.* At the time, Arias was in the Dominican Republic, GA384, and unable to confront Mascari in person, but Mascari assured Arias that, once Arias returned, the two would meet and Arias would be satisfied that Mascari had nothing to do with the "missing" drugs. GA383-84.

B. The FBI undercover recording

Several days after Mascari received the telephone call from Arias, FBI agents sent an undercover operative posing as a Colombian male with an interest in the lost cocaine into the Mascari warehouse to confront Mascari and demand that Mascari explain the missing drugs. GA155-56. Recalling Arias's previous accusation, and believing that the blame had been placed on him, Mascari provided the undercover operative – who was wearing a recording device, GA156 – with documentation to establish that Mascari had, in fact, been stopped on August 7. GA385-86.

C. The cooperation of Mascari

On August 13, 2007, FBI agents approached Mascari in the driveway of his residence, and confronted him with the drug seizure. GA386-87. After consulting with an attorney, Mascari agreed to cooperate with the agents. GA388. On August 15, 2007, GA159, represented by an

attorney, Mascari met with agents at FBI headquarters in New Haven and was fully debriefed. At the debriefing, Mascari agreed to cooperate fully with the agents, and also to use FBI recording devices to gather evidence against other members of the conspiracy. GA390-91.

At trial, Mascari testified that, while on a vacation in the Dominican Republic in 2007, he met with Antonio Miguel Arias, a longtime customer of the Mascari Brothers fruit and banana business. Arias provided Mascari with rooms at a luxury resort, women, and cocaine. GA314-20. According to Mascari, during that trip, Arias told Mascari that Mascari could "make a lot of money" using his import business. Arias explained to Mascari that all that was needed was for Arias to be able to slip "a little piece of paper" into bananas transported to the Mascari warehouse. Arias assured Mascari that Arias would "keep [Mascari] clean." GA321-24. The two met several times over the next month or two, and Arias elaborated on a proposed scheme by which large quantities of cocaine would be concealed in boxed bananas and shipped from Turbo, Colombia to Bridgeport, Connecticut for Mascari to receive. In return, Mascari would be paid two million dollars. Mascari's sole responsibility under the scheme proposed by Arias was to identify and isolate the drug-laden pallets of bananas from each load arriving from Colombia, which would be identified by a farm code number to be provided to Mascari by Raymond Pacheco, and make them available to Arias as though it were a legitimate transaction. GA323-32. Mascari agreed to participate in Arias's plan, and the cocaine shipments began. GA332-39.

Mascari testified that, in the months after his meeting with Arias, he participated in several such transactions involving hundreds of kilograms of cocaine, including one where Arias came to the Mascari warehouse, personally unpacked the pallets, and showed Mascari the cocaine. At one point, Arias gave Mascari a kilogram of cocaine as a tip or reward. GA339. However, despite importing hundreds of kilograms of cocaine with Arias during the course of the scheme, Mascari was never paid. GA352. Mascari presumed he would be paid at some point in the future, when the series of shipments contemplated by Arias was completed. GA340.

D. The August 27 Santiago recording

On August 27, 2007, while Arias was still in the Dominican Republic, GA401, one of his employees and co-conspirators, Nelson Santiago, traveled to the Mascari warehouse to speak with Mascari. GA400-01. During that conversation, which Mascari recorded, Santiago's comments revealed that Santiago possessed extensive knowledge about the seized drug shipment, including knowledge of both the reported and actual quantities of cocaine. *See* Argument § I.A, *infra*. Santiago also implicated Antonio Miguel Arias in the conspiracy. *Id.*

E. The September recording and meeting

Early on the morning of September 10, 2007, without advance warning, Santiago came to visit Mascari at the Mascari warehouse, and told Mascari that Arias – now returned to the United States – wanted to meet Mascari

immediately at a nearby hotel in New Haven. GA412. Mascari followed Santiago to the hotel where, in the parking lot, Santiago told Mascari the number of the room in which Arias was waiting for him. GA413. Mascari was able to make a recording of this brief conversation with Santiago, GA417, and the meeting between the two men was memorialized by surveillance agents who had responded to the scene after being alerted by Mascari. GA170-73.

When Mascari arrived at the hotel room referenced by Santiago, Arias was present, GA414, searched Mascari for a recording device – which Mascari was wearing but was able to conceal – told him to leave his cell phone in the bedroom, and conducted the meeting in the bathroom, GA415, away from earshot of two females Arias brought with him to the hotel. GA414. As Mascari had anticipated, Arias had set up the meeting to discuss "what had happened:" the seizure of the 444 kilograms of cocaine, and the apparent discrepancy between the quantity anticipated and the quantity seized as reported to the driver by the FBI. GA415. During the conversation, which Mascari recorded, Arias told Mascari, "I'm dead inside," over the loss of what Arias described as his $12 million drug shipment. A100. On the recording, Arias declared that "somebody robbed me," A90, expressed his suspicion that "the Badge" (*i.e.*, police officers) stole the "missing" drugs, A92, and sought Mascari's assurance that "you're not working for nobody?" A114. Ultimately, Arias told Mascari that the two of them would participate in one more delivery of cocaine, telling Mascari that this time, "it's just going to be you and me," after which he left the

hotel room. A116. Outside the hotel, while surveillance agents were unable to see Arias's face, they observed a male subject enter a vehicle registered to Arias's wife and drive away. GA178, 188.

F. The December 4 cocaine seizure

On or about December 4, 2007, Arias called Mascari, and told Mascari to expect him. GA448. Mascari understood the meeting to be in connection with the drug conspiracy. *Id.* Arias later called and told Mascari that Arias could not come personally, but that he would send someone. *Id.* Mascari informed the FBI, GA452, and on December 4, agents observed Nelson Santiago meet Mascari in a diner parking lot near Mascari's warehouse, pull alongside Mascari's vehicle car and make an exchange through the driver's side window before driving away. GA574-75. According to Mascari, Santiago provided him with a small envelope containing a piece of paper. GA449-51. On the paper was a code identifying a pallet in Mascari's warehouse. *Id*. After Santiago left, Mascari used the code to locate a pallet, and to locate the cocaine shipment within. He then notified waiting FBI agents. GA452-53. Agents responded to the warehouse, located the pallet, GA575, and subsequently confirmed that it contained 50 kilograms of cocaine. GA579-81.

G. The arrest of Arias

On December 5, 2007, the FBI arrested Miguel Arias at his home in Bethlehem, Pennsylvania. GA582-84. On December 13, 2007, he was charged in the indictment,

along with Nelson Santiago, Raymond Pacheco and his brother, Jesus Arias, with conspiracy to possess with intent to distribute five kilograms or more of cocaine, in connection with the 444 kilograms seized on August 7, 2007, and attempt to possess with intent to distribute five kilograms or more of cocaine, in connection with the 50 kilograms seized on December 4, 2007. A7, 41.[3]

H. The first trial

Between May 19 and May 27, 2009, Arias and Santiago were tried before a jury and U.S. District Judge Alvin W. Thompson. A27-28. During the trial, Arias moved the district court for an order compelling the testimony of Hugo Figueroa, who Arias alleged was the confidential informant who provided the information on which the investigation in the case was based. A27, 120. FBI reports indicated that the confidential informant had been involved with the conspiracy to import cocaine before he agreed to cooperate, and that he was to receive approximately one third of the cocaine in the July 30 shipment which was seized by the FBI. A129. On May 20, Figueroa appeared before the district court, absent the jury, and was questioned by a co-defendant's counsel. GA906. He asserted his Fifth Amendment privilege, GA907, which

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[3] On March 24, 2008, Mascari waived indictment and was charged in an information with conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine. On the day he was charged, he appeared before the district court and entered a plea of guilty to the charge in the information pursuant to a written plea agreement. GA884.

the court sustained. GA928. Following completion of evidence, and after the jury indicated that it could not reach a verdict as to either defendant, the district court declared a mistrial. A28-29.

I. Arias's motion to compel

A re-trial was scheduled for June 2009. A29. On June 12, 2009, Arias again filed a motion to compel the testimony of Hugo Figueroa, alleged by Arias to be an FBI informant. A29, 119. Arias argued, in essence, that Figueroa was so well-placed in the alleged drug organization that he should have known of Arias's role, and that, as Figueroa had never mentioned Arias to his FBI handlers, there was available a reasonable inference that Arias was, in fact, not involved in the organization. *See* A151. The district court denied the motion, stating that

> [d]elving into whether Figueroa was so "well-placed" in the cocaine conspiracy that he would necessarily have had information regarding defendant Arias's involvement would require Figueroa to respond to a wide array of questions concerning activities, undoubtedly including illegal activities, in which he engaged that could have resulted in him being "well-placed", or not. It is easy to see from the implications of the questioning to which he would be subjected on both direct examination by defendant Arias and cross-examination by the government that responsive answers could furnish a link in the chain of

> evidence needed to prosecute Figueroa for a federal crime.

Id. In response to the suggestion of Arias that the information he sought to elicit from Figueroa would be limited to information obtained and provided by Figueroa under the supervision of the FBI, the district court observed,

> it is apparent from the documents submitted to the court that if Figueroa was ever "well-placed," he did not become so under the supervision of the government.

Id.

J. Arias's motion *in limine*

On June 16, 2009, following jury selection for the second trial, Nelson Santiago entered a plea of guilty to Count One of the indictment, in which he was charged with conspiracy to possess with intent to distribute five kilograms or more of cocaine. A30. On June 17, 2009, Arias filed a motion *in limine* to preclude (as relevant here) the government from offering as evidence the August 27, 2007 recorded conversation between Mascari and Nelson Santiago.[4] A30, 45. On June 22, 2009, the

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[4] Arias's motion also sought to preclude admission of the September 10, 2007 conversation between Mascari and Santiago. Arias does not challenge the district court's decision (continued...)

district court denied the motion, stating that, based on the record, it "appears likely that the government will be able to introduce evidence to support a *Geaney* finding." A117-18.[5]

On June 26, 2009, the district court issued a written decision setting forth its *Geaney* findings on that conversation. A267-72.

K. Verdict and sentence

Trial began on June 22, 2009, and on June 26, 2009, the jury found Arias guilty on both counts of the indictment. A32. On November 6, 2009, the district court sentenced Arias to a total effective sentence of 360 months of imprisonment, to be followed by ten years of supervised release, A262-63, and he is currently serving the sentence imposed by the district court. This appeal followed.

Summary of Argument

I. The district court properly admitted the August 27, 2007 recorded conversation between Nelson Santiago and William Mascari as a co-conspirator statement under Fed.

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[4] (...continued)
to admit that conversation on appeal.

[5] The district court's reference to "*Geaney* findings" comes from this Court's decision in *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), setting forth the factual findings required for admission of co-conspirator statements.

R. Evid. 801(d)(2)(E). When Santiago approached Mascari on August 27, 2007, he did so during the course of the conspiracy as Arias's co-conspirator, and for the purpose of furthering the conspiracy by obtaining information from Mascari. Therefore, the recording of that conversation was admissible as non-hearsay evidence against Arias under Rule 801(d)(2)(E).

Significant evidence supported the district court's finding on the existence of the charged conspiracy to possess and distribute cocaine. Mascari described in detail the proposal made to him by Arias to assist in bringing hundreds of kilograms of cocaine into the United States concealed in banana shipments, as well as the successful course of the conspiracy until August 2007. His description of the conspiracy was corroborated in part when, on two occasions, August 7 and December 4, 2007, agents seized cocaine concealed in boxes of bananas. On both occasions, the bananas passed through the warehouse of William Mascari, and were identified in the manner proposed by Arias and described by Mascari. Mascari testified extensively about his involvement in the conspiracy; his participation with Arias, Santiago, Pacheco and Jesus Arias; and his responsibility for several additional shipments of cocaine.

Similarly, the evidence fully supported the district court's finding that Santiago and Arias were both members of the conspiracy on August 27, 2007. The recording itself is unambiguous evidence of Santiago's knowledge and involvement in the conspiracy. In the conversation, Santiago demonstrates knowledge of the actual quantity of

cocaine present in the August shipment, as well as the seizure quantity falsely reported to the driver by the FBI agents who seized the drugs, and he is aware of the use of farm codes to identify the drug-laden pallets. Rather than expressing shock that cocaine would be found in a purportedly legitimate shipment, he attempts to discover the reason for the "missing" quantity of drugs. Furthermore, he mentions "Miguel" repeatedly in connection with the cocaine, making clear the involvement of Arias in the conspiracy.

The evidence from the conversation was corroborated by other evidence showing Santiago's and Arias's membership in the conspiracy. Specifically, Mascari's extensive testimony about the existence and workings of the conspiracy fulfilled this requirement. In addition, on September 10, Santiago brought Mascari to a meeting with Arias to discuss the cocaine seizure. And on December 4, 2007, Santiago brought Mascari the codes that identified the pallet in which the cocaine seized by FBI agents on that date was hidden. The weight of the evidence conclusively established that Santiago and Arias were co-conspirators.

In addition, the record also supports the finding by the district court that Santiago's purpose in the conversations was to further the conspiracy. The district court found that "it is apparent that the purpose of the Aug. 27 conversation is for Santiago to find out what happened in connection with the 444 kilogram shipment so he can determine the status of the conspiracy and continue to be apprised of its

status." A271. That conclusion, evident from the conversation and its context, was not clearly erroneous.

Finally, even if there were some error in the district court's factual findings allowing admission of the August 27 recording, any such error would be harmless on this record. The case against Arias was strong. The August 27 recording, moreover, was only a small piece of that evidence, and the statements made in that recording were corroborated by other evidence in the record. They were not necessary to tie Arias to the conspiracy, and indeed were cumulative of other evidence already in the record.

II. The district court correctly sustained Hugo Figueroa's assertion of his Fifth Amendment privilege against self-incrimination and denied Arias's motion to compel Figueroa's testimony. The district court properly concluded that Figueroa could not respond to the line of questions proposed by Arias without having to discuss his involvement in a range of illegal activities. As the court noted, Figueroa was involved with drug trafficking, and reasonably could fear prosecution if he testified about his activities. Further, this was not a case where Arias intended to ask questions that were limited in scope. Rather, Arias's stated intent was to establish that Figueroa had complete knowledge of every aspect of the conspiracy, such that his failure to identify Arias as a conspirator would be exculpatory. The district court correctly held that such broad questioning would likely force Figueroa to reveal incriminating information.

The defendant attempted to overcome Figueroa's assertion of privilege by positing that Figueroa was acting as an agent of the FBI when he infiltrated the conspiracy. But as the district court found, if Figueroa were "well-placed" in the conspiracy, he achieved that position before he became a government agent.

In any event, even if the exclusion of Figueroa's testimony was error, any error was harmless. A government agent testified at trial to the main issue Arias sought to introduce through Figueroa's testimony (*i.e.*, that the informant (Figueroa) never told the FBI about Arias as a member of the conspiracy. Accordingly, any testimony to that same effect by Figueroa would have been cumulative.

The assertion of privilege by Figueroa was appropriate, and thus the district court did not abuse its discretion in denying Arias's motion to compel the testimony of Figueroa.

Argument

I. The district court's factual findings supporting admission of the recorded conversation of August 27, 2007 between Mascari and Santiago as non-hearsay evidence were not clearly erroneous.

A. Relevant facts

1. The August 27, 2007 recorded conversation

Nelson Santiago was known to William Mascari as an employee and associate of the defendant, Antonio Miguel Arias. When Mascari and his guests visited the Dominican Republic in 2005, Santiago had met them at their resort at the behest of Arias, stayed with them, partied with them, and used cocaine with them. GA287. During a subsequent trip to the Dominican Republic in February 2007, Arias and Santiago met Mascari in a car at the airport, at which point Santiago provided Mascari with cocaine. GA316-18.

On August 27, 2007, Nelson Santiago met William Mascari at the Mascari Brothers warehouse in New Haven, Connecticut. GA394-95. Mascari, who was already cooperating with the FBI, covertly recorded the conversation between the two men which ensued. GA396. An overview of that conversation follows.

Santiago first asks, "What happened?" A55. From the ensuing conversation it is clear that Mascari interprets this to refer to the seizure of the cocaine on August 7, 2007.

Mascari explains that Tito, [co-defendant Raymond Pacheco], came to the warehouse, "was looking for, you know[,] that pallet and, ah, they couldn't find it for that whole week . . . . then Tito and Jesus, [co-defendant Jesus Arias], came here that Monday [August 7, 2007] and found it." *Id.* Santiago appears to be familiar with the two men mentioned by Mascari, clarifying "Jesus too? Jesus come too?" *Id.* "Yeah," Mascari continues, explaining that after they found the pallet, Tito offered to bring it down in a truck, but Mascari stopped him, saying that he would bring it down himself. A55-56. Mascari tells Santiago about how he was followed, "so, I turned around, and, I brought the pallet back here . . . and I called Jesus and I said listen[:] the avocado[,] meaning that pallet [containing the drugs]. . ." A57. Santiago cuts him off, "yeah, I know what you're talking about." *Id.*

Santiago apparently wishes to learn more about the other conspirators: "you know what happened to Tito?" *Id.* "I have no idea," Mascari responds, but says that Miguel called Mascari from the Dominican Republic, "and he said, I know what you did, I know what you did and then he said there was a hundred and something missing out of the pallet." A57-58. "Three hundred," corrects Santiago. A58. "There's 300 missing?" says Mascari, feigning incredulity. *Id.* During the course of the conversation, Santiago expresses his fear that the missing cocaine was in fact stolen, asking detailed questions about the search by Customs at the Bridgeport harbor and the activities of Raymond Pacheco. *See* A60. "Tito found the pallet," Mascari says, "Do you think Tito tried stealing it?" A64. "I don't trust any of them," responds Santiago. *Id.*

At one point, Mascari asks, "Who sent you here today[,] or did you just came [sic]" A62. "No," responds Santiago, "coming because I'm working for [unintelligible] because you know, ah, everybody he take the money go to the DR [Dominican Republic], leave me over here. . . . He over there in the DR, he got a lot of women and lot of shit, and nice [unintelligible]." *Id.* Mascari testified that he understood these statements by Santiago to refer to Arias, GA400-01, who Mascari understood to be in the Dominican Republic at the time. GA401.

2. The defendant's motion *in limine*

Prior to trial, Arias filed a motion *in limine* seeking preclusion of the anticipated offer of the recording of the conversation by the government at trial. The district court denied the motion *in limine*, *see* A117-18, and later admitted the recorded conversation into evidence at trial when it was offered by the government pursuant to Fed. R. Evid. 801(d)(2)(E). *See* GA399. The court subsequently issued a written ruling memorializing its factual findings to support admission of the conversation as a co-conspirator statement under Rule 801(d)(2)(E). A267-72.

The court first concluded, by a preponderance of the evidence, that the conspiracy as charged in the indictment existed and that it included Santiago and Arias, among others. A268-69. The court pointed to Mascari's testimony about his meeting with Arias in the Dominican Republic to discuss the cocaine importation agreement, about Arias's presence for the first delivery involving Mascari,

and about Arias's reaction to the August 7 seizure. A268. In addition, the court pointed to Mascari's conversation with Arias on September 10, and how that conversation "reflect[ed] that . . . Arias suffered a loss of approximately $12 million as a result of the seizure of the 444 kilograms of cocaine" and "that . . . Arias planned to proceed differently in the future." A268. And as the court noted, Mascari's testimony was corroborated in part by other evidence at trial.

With respect to Santiago, the court found as follows:

> Mascari's testimony, together with Santiago's statements themselves, establishes that Santiago was more than a mere employee of defendant Arias's produce business. Santiago was involved in cultivating the relationship with Mascari in the Dominican Republic. Mascari's testimony establishes that Santiago brought the farm code to Mascari for the December 2007 shipment, at a time when Pacheco was no longer considered reliable by defendant Arias.

A269.

Turning to the question of whether the August 27 conversation was made during, and in furtherance of the conspiracy, the court found it "apparent" that the statement was made during the conspiracy. A270. In addition, the court concluded that Santiago's purpose in the August 27 conversation was "to find out what happened in connection with the 444 kilogram shipment so he can

determine the status of the conspiracy and continue to be apprised of its status." A271.

B. Governing law and standard of review

1. Admissibility of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E)

An out-of-court statement offered to prove the truth of the matter asserted therein generally constitutes hearsay under Fed. R. Evid. 801(c), and, as such, is subject to limits on its admissibility under Fed. R. Evid. 802. However, such a statement is not hearsay when "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

To qualify a statement as Rule 801(d)(2)(E) non-hearsay, the party seeking admission must *first* establish the existence of the conspiracy, and prove that both declarant and the party-opponent were members of the conspiracy at the time the declarant made the statement. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("[T]he existence of a conspiracy and petitioner's involvement in it are preliminary questions of fact that . . . must be resolved by the court."). "[T]here is no requirement that the person to whom the statement is made also be a member [of the conspiracy]." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989). A preponderance-of-the-evidence standard governs the district court's preliminary factual determination. *See In re Terrorist Bombings of U.S. Embassies in East Africa*,

552 F.3d 93, 136 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2778 (2009) and 130 S. Ct. 1050 (2010).

"The essence of conspiracy is agreement among two or more persons to join in a concerted effort to accomplish an illegal purpose." *United States v. Parker*, 554 F.3d 230, 234 (2d Cir.), *cert. denied*, 130 S. Ct. 394 (2009). To prove conspiracy, the evidence must show that "'two or more persons agreed to participate in a joint venture intended to commit an unlawful act.'" *Id.* (quoting *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997)). "[T]he objective of the joint venture need not be the crime charged in the indictment." *United States v. Russo*, 302 F.3d 37 (2d Cir. 2002). As for the substance of their agreement, prosecutors need only show that the "'alleged coconspirators entered into a joint enterprise with consciousness of its general nature and extent.'" *In re Terrorist Bombings,* 552 F.3d at 137-38 (quoting *Beech-Nut*, 871 F.2d at 1191). That is, conspiracy "does not necessarily imply agreement on every particular . . . so long as the coconspirators share a 'common purpose' and agree on the 'essential nature' of the enterprise." *United States v. Capanelli*, 479 F.3d 163, 166-67 (2d Cir. 2007) (citing *Beech-Nut*, 871 F.2d at 1191).

In determining the existence of the conspiracy, the court may take a broad view of the evidence, and may consider the offered statements themselves. *See Bourjaily*, 483 U.S. at 178, 181 ("The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. . . a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may

examine the hearsay statements sought to be admitted."). However, this Circuit has clarified that "these hearsay statements are presumptively unreliable, and, for such statements to be admissible, there must be some independent corroborating evidence of the defendant's participation in the conspiracy." *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996) (internal citation omitted). Such corroborating evidence "need show only a likelihood of an illicit association between the declarant and the defendant . . . and the proof may be totally circumstantial." *United States v. DeJesus*, 806 F.2d 31, 34 (2d Cir. 1986) (internal quotation marks and citations omitted). Further, when "the hearsay evidence itself so convincingly implicates the defendant, a district court may require less corroboration to find . . . that the defendant participated in the conspiracy for purposes of admitting co-conspirators' statements against him." *United States v. Padilla*, 203 F.3d 156, 162 (2d Cir. 2000).

Second, the party seeking admission must prove that the statements were made "in furtherance" of the conspiracy. Fed. R. Evid. 801(d)(2)(E). This implies that "'the statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy . . . .'" *United States v. Diaz*, 176 F.3d 52, 85 (2d Cir. 1999) (quoting *United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993)). This means that "a narrative conversation that amounts to mere 'idle chatter'" does not satisfy the requirement. *Id.* However, courts have taken an expansive view of conversations "in furtherance" of a conspiracy: examples include "providing reassurance to a co-conspirator, . . . serving to foster trust and

cohesiveness, or informing coconspirators as to the progress or status of the conspiracy." *Tracy*, 12 F.3d at 1196.

Offered statements are evaluated with respect to the extent to which the declarant can be found to have intended to further the conspiracy. It is unnecessary that the statements *actually* further the conspiracy. "[I]t is enough that the statements were made with the *intent* to further the conspiracy's purpose. [Rule 801(d)] does not require actual furtherance." *United States v. Stewart*, 433 F.3d 273, 293 n.4 (2d Cir. 2006).

Finally, when the co-conspirator statements are in the form of covert recordings, it is often the case that one party to the conversation is not a co-conspirator. In particular, someone acting on behalf of law enforcement cannot be a co-conspirator, because they lack the requisite intent of furthering the conspiracy. *See United States v. Carlton*, 442 F.3d 802, 811 (2d Cir. 2006) ("[A] 'person who enters into such a [conspiratorial] agreement while acting as an agent of the government . . . lacks the criminal intent necessary to render him a *bona fide* co-conspirator.'") (quoting *United States v. Vazquez*, 113 F.3d 383, 387 (2d Cir. 1997)). Therefore, their words in the conversation do not fall under the non-hearsay provisions of Rule 801(d)(2)(E). However, when the statements are included to render the conversation intelligible, and not for their truth, they are not hearsay. *See United States v. Sorrentino*, 72 F.3d 294 (2d Cir. 1995) ("The statements of the [informant] were not offered to prove the truth of the matters asserted but only

to render what Sorrentino said in these conversations intelligible. There was thus no admission of hearsay evidence."), *overruled on other grounds*, *United States v. Abad*, 514 F.3d 271, 274 (2d Cir. 2008).

2. Standard of review

This Court reviews for clear error a district court's preliminary factual findings on the existence of the "conspiracy involving the declarant and the non-offering party and [on] whether the statement was made during the course and in furtherance of the conspiracy." *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 137.

Even when the district court is found to have erred in admitting evidence, a verdict will not be vacated if the error was harmless. *See* Fed. R. Crim. P. 52; Fed. R. Evid. 103(a). *See Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007) ("[A] new trial should be granted only if a substantial right of a party is affected – as when a jury's judgment would be swayed in a material fashion by the error."). "A district court's erroneous admission of evidence is harmless 'if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury.'" *United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008) (quoting *United States v. Garcia*, 291 F.3d 127, 143 (2d Cir. 2002)).

In reviewing whether an error was harmless, this Circuit considers: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with

respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *Id.* (quoting *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007)).

C. Discussion

1. A cocaine-trafficking conspiracy existed

In this case, the district court found that the government amply proved the existence of the charged conspiracy. A268. This finding was not clearly erroneous because the court had before it abundant evidence of the existence of a cocaine-trafficking conspiracy.

First and foremost, Mascari testified at length about the existence and course of the conspiracy, explaining its origin and objects, and detailing numerous overt acts committed in its furtherance. He explained that the conspiracy was born out of a proposal made to him by Arias at a meeting in the Dominican Republic in February 2007 that Mascari assist Arias in importing cocaine into the United States. GA323-32. Mascari outlined the manner in which the conspiracy was to operate: that multiple kilogram bricks of cocaine would be secreted in commercial shipments of bananas from Turbo, Colombia directed to Mascari, and that Mascari would isolate the drug-laden bananas and make them available to Arias and his associates. *Id.* Mascari provided details of several multi-kilogram shipments of cocaine which he received during the course of the conspiracy, *see* GA332-39, and

described conversations and meetings which took place within the conspiracy following the seizure by the FBI of 444 kilograms of the conspirators' cocaine in August 2007. GA55-76, 414, 436-42, 448-53. Finally, Mascari described the events which culminated in his receipt of a 50-kilogram shipment of cocaine to Arias and his associates in December 2007. *Id.*

Second, the testimony of Mascari was substantially corroborated by other evidence in the case. This evidence included the following: the August 2007 cocaine seizure by the FBI, GA103, the recorded conversation between Mascari and Nelson Santiago on August 27, 2007, A54-77, the recorded conversation between Mascari and Arias on September 10, 2007, A78-116, various ensuing surveillances placing Arias and/or his co-conspirators at the Mascari Brothers warehouse during the autumn of 2007, GA171-79, 181-85, 574-75, the December 2007 delivery to Mascari by Santiago of a slip of paper containing the farm code corresponding to an anticipated shipment of cocaine, GA449-50, and the seizure by the FBI of the 50 kilograms of cocaine to which the farm code corresponded on December 4, 2007, GA576-79.

2. Nelson Santiago and Arias were members of the conspiracy.

Similarly, district court's finding that both Santiago and Arias were members of the conspiracy was not clearly erroneous. A268-69. The record before the district court was abundantly sufficient to serve as a basis for the district court to find that Nelson Santiago and Arias participated in the conspiracy while aware of the conspiracy's "general nature and extent," and thus were members of the conspiracy.

First, the recording of the August 27 conversation itself provides unambiguous evidence of Santiago's membership in the conspiracy. During the conversation, he and Mascari discuss the FBI cocaine seizure. Not only does Santiago not appear surprised by the content of the discussion, as he would be were he merely a legitimate fruit worker, but also he makes clear his knowledge of the transport of cocaine in the banana shipments. Specifically, when Mascari first mentions the amount of cocaine thought to be missing from the shipment, based on misinformation provided by the FBI at the time of the seizure, Santiago corrects him by volunteering a more accurate approximate number of missing kilograms based on the misinformation: "300." A58. When Mascari asks Santiago how many kilograms were supposed to be in the shipment, Santiago replies, correctly, "Three, four hundred something." A60. Further, from his own repeated use of the names of three of the primary conspirators, "Tito" (Pacheco), "Jesus" (Arias's brother) and "Miguel" (Arias), throughout the recording, he demonstrates that he is familiar with each in

connection with the illegal enterprise under discussion. He knowledgeably discusses with Mascari the law enforcement search of the Napier Star at Bridgeport harbor. *See* A70, 75-76. He also knowledgeably discusses the difficulty Jesus and Tito encountered finding the drug-laden bananas in the Mascari Brothers warehouse the day before the seizure, *see* A55-57, 63-64, and events surrounding the Connecticut State Police stop of Mascari and his truck prior to the seizure. *See* A69-70. When Mascari asks Santiago if he thinks Tito was responsible for the cocaine loss, Santiago replies, "I don't trust any of them." A64. Santiago explains that he feels this way, not because Tito is Puerto Rican, but because, "Ah, you see the guy, he, every time he quiet, he only listen . . . .you see what I mean?" *Id.*

In short, during the entire recorded conversation, Santiago evinces no surprise at the presence of the cocaine. Rather, he directs his questions towards finding information about precisely what Mascari did leading up to the seizure, without expressing shock as to why cocaine was inside a supposedly legitimate shipment.

Santiago indicates in the conversation that he is not coming to visit Mascari on his own initiative, but because he is working for someone, who is currently in the Dominican Republic. *See* A62. Mascari testified that he understood this person to be Arias, GA400-01, and while the name of Santiago's employer is unintelligible in the transcript, the remainder of the conversation refers repeatedly to Arias, *id*., who is also Santiago's employer in Arias's legitimate fruit business.

This Circuit requires that some evidence independent of the offered statements exist to support the finding of conspiracy. *See Tellier*, 83 F.3d at 580. Mascari's testimony regarding the involvement of Santiago and Arias in the conspiracy fulfills this requirement. In addition to his testimony about the meaning of the conversation itself, Mascari explained that Santiago was the one who brought him to the meeting with Arias on September 10, GA412, at which Arias discussed the August cocaine seizure with Mascari, GA415, and made plans with him for a future shipment. A112-16. This testimony was corroborated by the testimony of a surveillance officer, who saw Santiago meet with Mascari in the hotel parking lot on September 10, GA170-73, as well as the recorded conversation in which Santiago told Mascari the number of the room in which Arias was waiting. In addition, Mascari testified that Santiago brought him the farm code number for the December 2007 shipment of cocaine. GA449-51. This is corroborated by the testimony of a surveillance officer who saw Santiago deliver the envelope containing the farm code, the slip of paper on which the farm code was written, GA574-75, and the December 4 FBI seizure of the 50 kilograms of cocaine to which the number corresponded. GA579-81.

In light of this record, it was not clearly erroneous for the district court to find by a preponderance of the evidence that Santiago had the requisite knowledge of the general extent of the joint enterprise necessary to establish his participation in the conspiracy. The evidence against Arias is no less compelling, with his virtual admission in the recorded September 10, 2007 conversation that the

cocaine belonged to him. *See* A100-01. This Circuit has held that in the court's decision to admit co-conspirator statements, "[w]here there are two permissible views of the evidence, the court's choice between them cannot be deemed clearly erroneous." *United States v. Maldonado-Rivera*, 922 F.2d 934, 959 (2d Cir.1990). The fact of the conspiracy between these individuals was such a permissible view and was compelled by the evidence, and the findings of the district court were thus not clearly erroneous.

3. Santiago's statements were made in furtherance of the conspiracy.

The district court's finding that the August 27, 2007 conversation was made in furtherance of the conspiracy was also amply supported in the record. A270-71.

Statements made to attempt to "provide[] reassurance to a coconspirator . . . or inform[] coconspirators as to the progress or status of the conspiracy" can properly be found to have been made in furtherance of the conspiracy. *Tracy*, 12 F.3d at 1196. The August 27 conversation falls squarely into this category.

On August 7, the FBI seized some 444 kilograms of cocaine from a truck outside the Hunt's Point Market. As Arias told Mascari during their September 10 recorded conversation, he lost $12 million due to that seizure. *See* A100-01. He was so disturbed about it that his "stomach is all fucked up, bro. I don't have no peace. I'm dead inside." A100. But on August 27, 2007, Arias was

vacationing in the Dominican Republic. GA401. He had no way to speak to Mascari face-to-face, size the man up and decide for himself whether or not Mascari was involved in the loss. As Mascari testified at trial, Nelson Santiago had been a trusted associate of Arias for years. A400. When Arias could not go to interview Mascari about the seizure himself, he sent Santiago. Accordingly, the purpose of Santiago's conversation with Mascari was to extract information about the details of the seizure of the drugs on August 7, and to acquire information from Mascari to help Arias determine whether or not Mascari was behind the loss. This is evident from the overall content of the conversation.

Santiago's questions and comments are designed to elicit from Mascari information about the events surrounding the seizure, asking, "What happened?" A55. Without any other introduction or explanation, Mascari begins to discuss the evening that Tito and Jesus Arias came to the Mascari Brothers warehouse to attempt to locate the cocaine. *Id*. Rather than stop Mascari and ask him what he is talking about, Santiago listens, and from time to time asks a question to further prompt Mascari to provide information. A55. As Mascari goes on to explain exactly what he did leading up to the seizure, Santiago contributes little beyond occasional prompts. During the conversation, Santiago leads Mascari to discuss Tito and Jesus Arias, each of whom was involved in the transaction, and has Mascari describe what each of them did. Santiago expresses distrust for Tito, A59, and this leads Mascari to provide his own opinion about Tito's trustworthiness. *Id*.

The most reasonable construction of the recorded conversation of August 27, 2007 is that Santiago had been sent to interview Mascari about the seizure at a time Arias was unable to. If, as Arias suggests in his Brief at 25, the only purpose of Santiago's visit to Mascari Brothers on August 27 was to purchase bananas, there was no reason for Santiago to engage in a lengthy conversation with Mascari about the seizure, or to talk to Mascari at all. However, the conversation itself establishes that the entire episode focused on the seizure, and nothing else of substance. The reasonable inference is that Santiago was acting on behalf of Arias, and in reporting back to Arias, Santiago would be "providing reassurance" to a co-conspirator, and informing a co-conspirator "as to the progress or status of the conspiracy." Whether or not Santiago or Arias believed that the interview yielded useful information about the seizure is irrelevant. What are relevant are Santiago's intent and his efforts to acquire it. *See Stewart,* 433 F.3d at 293 n.4. Accordingly, it was not clearly erroneous for the district court to determine that Santiago's statements were those of a co-conspirator made in furtherance of a conspiracy.

The decision of the district court to admit the August 27, 2007 statements of Nelson Santiago as non-hearsay evidence under Rule 801(d)(2)(E) should be affirmed.

As to Mascari's words on the recording, they were necessarily admitted to make the conversation as a whole intelligible, and not for the truth of the matters asserted. Because the conversation was an attempt by Santiago to extract information from Mascari, Mascari would

necessarily be doing much of the talking. Therefore, to conceal Mascari's words from the jury would needlessly obscure the purpose of the conversation.

Under the circumstances here, no purpose would have been served by an offer of Mascari's statements for their truth. Mascari himself testified in detail over two days to the same matters. From the defense perspective, there was no limitation placed by the district court on the ability of defense counsel to cross-examine Mascari about his statements of August 27 or his own construction of them. The decision of the district court to allow the admission of the statements was not clearly erroneous.

4. In the alternative, any error in the admission of the August 27 recording was harmless.

In *Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004), this Circuit distilled from Supreme Court precedents a set of four factors to be considered in a harmless error analysis of improperly admitted evidence: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *Id.* at 468.

In *Zappulla*, the trial court admitted a murder suspect's confession in violation of his *Miranda* rights. Applying the four factors, the Court of Appeals found that: (1) the remainder of the case was weak, *id.* at 468-71; (2) "the prosecutor heavily emphasized Zappulla's confession, mentioning it as the first piece of evidence against him," *id.* at 472; (3) "the persuasive influence of a signed confession cannot be underestimated," *id.* at 473; and (4) the confession was not merely cumulative, but "filled in a missing link to the prosecution's case: motive," *id.* at 472. Therefore, the admission of the confession was harmful error and the conviction was vacated. *Id.* at 474.

In a case cited by the defendant, this Court applied the four-factor test to find harmful error in *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008). The defendants in that case were charged with providing material support to terrorist organizations. *Id.* at 145. The primary evidence against them was the testimony of a government informant, whose credibility had been severely damaged on cross-examination. *Id.* at 154. In rebuttal, the United States introduced notes that the informant had made in meetings with the defendants, and used these notes in place of further testimony by the witness. *Id.* at 167. Admission of the notes was found to be error. In the application of the four factors to determine whether the error was harmful, the Court found that (1) overall "[the] evidence [was] not overwhelming", *id.* at 170; (2) "the government used the notes basically as a substitute for [the informant's] testimony, repeatedly supporting its arguments with assertions from the notes rather than with [the informant's] statements on the stand," *id.* at 169; (3)

the notes were highly important, in that "they buttressed the testimony of a witness whose credibility had otherwise been severely damaged," *id.*; and (4) they were not cumulative of other evidence, but rather "they were the government's only source suggesting that [the defendant] maintained close ties with Bin Laden and financially supported Al-Qaeda. . . .," *id.* at 171-72.

In contrast, the four *Zappulla* factors applied to this case weigh heavily in favor of the government. First, the overall case against Arias was strong. Mascari testified that the conspiracy was born out of a proposal made to him by Arias at a meeting in the Dominican Republic in February 2007 that Mascari assist Arias in importing cocaine into the United States. Mascari explained that under Arias's scheme, hundreds of kilogram bricks of cocaine were be secreted in commercial shipments of bananas from Turbo, Colombia directed to Mascari, so Mascari could then isolate the drug-laden bananas and make them available to Arias and his associates. Mascari testified regarding several multi-kilogram shipments of cocaine which he received during the course of the conspiracy, and described conversations and meetings which took place within the conspiracy following the seizure by the FBI of 444 kilograms of the conspirators' cocaine in August 2007. Finally, Mascari described the events which culminated in his receipt of a 50-kilogram shipment of cocaine to Arias and his associates in December 2007. The testimony of Mascari was substantially corroborated by the August 2007 cocaine seizure by the FBI, the recorded conversation between Mascari and Arias on September 10, 2007, various ensuing

surveillances placing Arias and/or his co-conspirators at the Mascari Brothers warehouse during the autumn of 2007, the December 2007delivery to Mascari by Santiago of a slip of paper containing the farm code for an anticipated shipment of cocaine, and the seizure by the FBI of the 50 kilograms of cocaine to which the farm code corresponded on December 4, 2007.

Second, government counsel did not heavily emphasize the recording of the August 27 conversation, or rely on it for facts not established by other evidence or in lieu of testimony from Mascari, as was the case in *Al-Moayad*. Rather, Mascari's testimony and the corroborating evidence stood on their own. In fact, in the summation the prosecutor made only two references to the recording. GA706-8, 739-41. The recording received, at most, a minor emphasis, and paled in probative, inculpatory value compared to the other evidence against Arias in the case.

Third, the nature of the recording itself was not highly prejudicial. Most of the conversation consists of Mascari responding to questions by Santiago about his own recollections of past events, and on Santiago's speculations as to who has stolen the "missing" cocaine. Arias is mentioned only on several occasions, and while it is clear from the conversation that both parties believe that Arias had knowledge of the events, no statements are made by either party that explicitly accuse Arias of illegal activity. Therefore, this evidence is not of a sort that would have had a highly prejudicial effect on the jury.

Fourth, the evidence was cumulative of both Mascari's own testimony and that of the federal agents that testified at the trial. On the recording, Mascari discusses extensively the events of the early morning of August 7, 2007, when he was followed by the FBI and later searched. The FBI agents provided this information in their direct examination, as did Mascari. In other words, the conversation was not necessary to tie Arias to the cocaine conspiracy.

The ruling of the district court should be affirmed.

II. The district court did not abuse its discretion in denying Arias's motion to compel the testimony of Hugo Figueroa.

A. Relevant facts

The initial search of the vessel Napier Star at the harbor in Bridgeport resulted from information provided by an FBI confidential informant. GA118-19. During the course of the first trial, Arias alleged that this confidential informant was Hugo Figueroa, and issued a subpoena to compel his testimony. GA916. On May 20, 2009, Figueroa appeared before the district court outside the presence of the jury, and claimed the privilege against self-incrimination when asked questions by the attorney for Nelson Santiago, a co-defendant of Arias in the first trial. GA907. The questions posed to Figueroa were designed to demonstrate that he was involved in criminal activity. *See*, *e.g.*, GA915 ("Mr. Figueroa, isn't it true that had you [sic] an arrangement with Mr. William Mascari concerning the distribution of drugs?"). Santiago's attorney acknowledged that his "purpose for bringing Mr. Figueroa [to the court] was to show that he was engaged in criminal activity and that he was going to say who else was engaged in criminal activity." *Id.* The court sustained Figueroa's assertion of the privilege as to this line of questioning. GA928.

Arias, however, proposed an alternative line of questioning. His position was that "this gentleman was not involved in criminal activity; that this gentleman was working for the FBI, assisting the FBI at all times." GA916-17. Counsel for Arias stated that he would ask two

lines of questions, both examining Figueroa's activities between April and August 2007. GA917. First, counsel for Arias pointed out that FBI reports indicated that their confidential informant had provided information that a shipment of cocaine was to arrive on a ship from Colombia. GA918. Counsel for Arias indicated an intention to "establish that [Figueroa] obtained this information and that he provided it to the FBI, and that it had nothing to do with [Arias]." *Id.*

Second, counsel for Arias noted that the same report "indicated that over time [the informant] had been introduced to members of the cocaine organization and had become such a trusted associate in the organization he was permitted to handle and make deliveries of large amounts of bulk cash." GA919. As the district court observed at that point, "That certainly sounds incriminating." *Id*. The stated purpose of counsel for Arias was to "show that [the informant] was someone that was trusted, was well placed within this group . . . . And at no time, not even once, did he ever indicate that [Arias] was involved." GA920.

Both government counsel and an attorney for Figueroa objected to the admission of this evidence. GA920-22. Figueroa's attorney argued that, by reference to the FBI reports, the defendant was "seeking to introduce for the truth of the matter asserted therein out-of-court statements allegedly made by an individual to an FBI agent out of court," rather than for the non-hearsay purpose of merely confirming that the information was given to the FBI. GA920-21. And by attempting to establish the truth of the

matter asserted, "[t]hese statements the counsel seeks to elicit go directly to whether [Figueroa] was participating in . . . large-scale narcotics transactions [and] money laundering." *Id*. These statements could lead to prosecution of Figueroa. Furthermore, in addition to the substantive charges, "if there were statements made to an agent, if contradictory statements were made here on the stand, that can lead to charges of perjury, obstruction of justice and other charges." The district court then added, "1001." *Id*.

The district court expressed concerns about the probative value of the anticipated statements if offered for a non-hearsay purpose, and the difficulty of ensuring that the jury not consider them for their truth. GA922. The district court noted that if Arias wanted to establish whether or not his name was ever mentioned to the FBI by the informant, he could ask the FBI agents directly.[6] GA928.

Further, this testimony, if allowed, would come at the cost of potential self-incrimination by Figueroa. The district court expressed concern that it would not be possible to lay a foundation to establish that Figueroa was "well-placed," and cooperating with the FBI, without "him admitting that he was involved in something so that he was in a position to be of help to the FBI. And that would be

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[6] In fact, during the second trial, FBI special agent Scott Byers stated that Arias was never mentioned by the FBI confidential informant. GA113.

incriminating." GA924. Therefore, the court sustained the claim of privilege. GA928.

During the second trial, the defendant again filed a motion to compel the testimony of Hugo Figueroa. A119. The motion was based on the arguments made by Arias previously, namely that Hugo Figueroa had penetrated the cocaine conspiracy on behalf of the FBI, A120, and therefore, because his placement in the conspiracy was on behalf of the FBI, it was not criminal, questions on that matter could not be incriminating. A126. Counsel for Arias indicated again that his purpose in calling Figueroa would be to ask if he had heard of Arias in connection with the cocaine conspiracy, and stated that he expected that Figueroa would reply in the negative. A124. Therefore, Arias claims, because Figueroa was "well-placed" in the conspiracy, his failure to implicate Arias would be exculpatory. A125.

The trial court again denied the motion, stating that

> [d]elving into whether Figueroa was so 'well-placed' in the conspiracy that he would necessarily have information regarding defendant Arias's involvement would require Figueroa to respond to a wide array of questions concerning activities, undoubtedly including illegal activities, in which he engaged that would result in him being 'well-placed' or not. It is easy to see from the implications of the questioning to which he would be subjected on both direct examination . . . and cross examination by the government that

> responsive answers could furnish a link in the chain of evidence needed to prosecute Figueroa. . . .

A151. The court rejected Arias's principal assertion, that Figueroa had infiltrated and had become well-placed in the organization on behalf of the FBI, finding that "it is apparent from the documents submitted to the court that if Figueroa was ever 'well-placed,' he did not become so under the supervision of the government." *Id.*

Arias now claims that the district court abused its discretion in denying the motion to compel Figueroa's testimony, and that he was prejudiced by the error of the district court.

B. Governing law and standard of review

1. Scope and limitations of the privilege against self-incrimination

The Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege against self-incrimination "extends not only to those disclosures that in and of themselves would support a conviction, but also to those that might 'furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.'" *United States v. Lumpkin*, 192 F.3d 280, 285 (2d Cir. 1999) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). "At the same time, Fifth Amendment privilege claims should be closely scrutinized because allowing a witness not to testify compromises the Sixth

Amendment right of an accused 'to have compulsory process for obtaining witnesses in his favor.'" *Id.* (quoting *Washington v. Texas*, 388 U.S. 14, 17 (1967)). "A valid Fifth Amendment claim does, however, provide a justification for compromising an accused's Sixth Amendment rights." *United States v. Rodriquez*, 706 F.2d 31, 36 (2d Cir. 1983).

Because of the competing interests at issue in this context, a witness may not merely provide a "blanket assertion of the Fifth Amendment privilege in response to any and all questions asked of her." *Id*. at 37. Rather, once a claim of privilege has been made, the trial court "must determine whether that claim is valid in relation to the subject area about which inquiry is sought." *Id*. That is, "[i]t is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken." *Hoffman*, 341 U.S. at 486 (internal quotations and citations omitted).

While it is the responsibility of the claimant to demonstrate the merits of his claim of privilege, the Supreme Court has set a low bar for sustaining the claim. "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87. This Circuit has observed, therefore, "that a district court should not require the witness to prove her claim in a strict sense, as this would cause her to surrender the very protection which the privilege is designed to

guarantee." *Rodriquez*, 706 F.3d at 37 (internal quotation omitted). The claimant must show only "a reasonable possibility that his own testimony will incriminate him, not establish it by a preponderance of the evidence." *Estate of Fisher v. Commissioner of Internal Revenue*, 905 F.2d 645, 650 (2d Cir. 1990). Further, the decision to sustain the privilege is fact-intensive. "The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Hoffman*, 341 U.S. at 487 (quotation omitted).

Finally, once a valid claim of privilege has been sustained by the court, "[t]he district court has the discretion to prevent a party from calling a witness solely to have him or her invoke the privilege against self-incrimination in front of the jury." *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993).

2. Exceptions to the privilege for government agents and informants

The privilege against self-incrimination only applies where the information revealed could, in fact, relate to some matter for which the claimant can fear prosecution. Therefore, in very limited circumstances, if the claimant is protected from prosecution on a matter, he cannot fear that his statements on that matter will be incriminating. Relevant to this case, "a government informant is protected from criminal prosecution for conduct engaged in during the course of that agency." *United States v.*

Zappola, 646 F.2d 48, 53 (2d Cir. 1981) (citing *United States v. Anglada*, 524 F.2d 296, 300 (2d Cir. 1975)).

In *Anglada*, the defendant maintained that an informant acting on behalf of law enforcement induced him to sell heroin. 524 F.2d at 297. Anglada sought to call the informant as a witness, and the informant invoked the protection of the Fifth Amendment. *Id.* at 300. The Court held that this situation was possibly an exception to the privilege, due to "the protection afforded [the informant] against a criminal charge in the Anglada transaction because [the informant] was acting at the Government's request." *Id.*

Similarly, in *Zappola,* the defendants subpoenaed an FBI informant to pose five specific questions: the first four concerned the subject matter of two meetings (ostensibly attended by the informant on behalf of the FBI) between the informant and the defendant on specific dates; the fifth concerned whether the informant made reference to a specific business transaction in a conversation with FBI agents. *See Zappola*, 646 F.2d at 51 n.3 (providing the text of the specific questions). The witness claimed a Fifth Amendment privilege, and refused to answer. *Id.* at 51. The Court of Appeals held that these questions related specifically to his service as a government agent, and because such a witness "cannot reasonably fear prosecution with respect to his activities as a government agent . . . . he cannot legitimately invoke the privilege against self-incrimination as to questions of limited scope dealing solely with those activities." *Id*. at 53. The Court made clear, however, that the line of questioning was to be

sharply limited to "carefully phrased, limited questions" regarding the time, place and content of the meetings, but that "questions concerning the purpose of the meetings or a summary of prior circumstances may not be required." *Id.* at 54.

Although the *Zappola* Court required the government informant to answer limited questions, this Court has made clear that "[t]he fact that an individual has cooperated with the Government does not abrogate that person's Fifth Amendment privilege with respect to any and all questions relating to his cooperation." *United States v. Tutino*, 883 F.2d 1125, 1139 (2d Cir. 1989). A witness may have "a legitimate fear of prosecution in other areas, such as his prior activities leading to his cooperation with the Government." *Id.*

3. Standard of review

This Circuit does not appear to have clearly articulated a standard by which to review a district court's decision to sustain a witness's claim of privilege. However, the weight of opinion from the other circuits is strongly in favor of an abuse of discretion standard. *See, e.g., United States v. Allmon*, 594 F.3d 981, 984 (8th Cir. 2010), *petn for cert. filed*, No. 09-11364 (June 12, 2010); *United States v. Longstreet*, 567 F.3d 911, 922 (7th Cir.), *cert. denied*, 130 S. Ct. 652 (2009); *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 371 (3d Cir. 2004); *United States v. Klinger*, 128 F.3d 705, 709 (9th Cir. 1997); *United States v. Whittington*, 786 F.2d 644, 646-47 (5th Cir. 1986); *United States v. Carlin*, 698 F.2d 1133, 1136 (11th Cir. 1983).

The Tenth Circuit appears to be the only exception, taking the position that the decision to sustain the assertion of privilege is reviewed *de novo*. *See United States v. Rivas-Macias*, 537 F.3d 1271, 1278 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1371 (2009). However, this does not appear to be consistent with the Supreme Court's admonition that "the trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Hoffman*, 341 U.S. at 487 (internal quotations omitted). A review *de novo* in the Court of Appeals – by its very nature – lacks any degree of personal perception, of the peculiarities or otherwise. Nor does it afford the trial court the traditional deference granted to those courts on evidentiary rulings or findings of fact. *See Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010) ("We review a district court's evidentiary rulings for abuse of discretion, and will reverse only for manifest error."). Therefore, this Court should review the district court's decision to sustain Figueroa's claim of privilege according to an abuse of discretion standard.

C. Discussion

1. The district court properly denied Arias's motion to compel the testimony of Figueroa.

A court may not accept a "blanket refusal" of a witness asserting a Fifth Amendment privilege to respond to any and all questions, but rather must make a particularized inquiry as to the specific subject matter implicated by the

proposed area of inquiry. *See Rodriquez*, 706 F.2d at 37. In this case, Figueroa's refusal was grounded in a fear that Arias's particular line of questioning would force him to reveal evidence of his criminal involvement with narcotics trafficking both before and during his involvement with the FBI. A144-47. Arias made clear that he intended to ask Figueroa about the full breadth and depth of his involvement with the drug-trafficking conspiracy. A119-27. The district court recognized that by answering such questions, Figueroa would subject himself to possible self-incrimination. A151.

Further, by testifying, Figueroa would have subjected himself to a possible perjury charge if he had made statements that conflicted with any prior statements he made to the FBI. A witness may be charged with either perjury, if the government believes that the statements made in court were false, or lying to a federal agent, if the government believes that the original statements made to the FBI were false. Therefore, in light of Figueroa's concern about self-incrimination for matters related to drug trafficking, the district court properly sustained his Fifth Amendment privilege and denied Arias's motion to compel.

It was not improper for the trial court to refuse to conduct an evidentiary hearing at the time of the second trial. All that the law requires is for the trial court to make a "particularized inquiry" into the claim of privilege; an evidentiary hearing is not specifically required. In *United States v. Rodriquez*, the defendant Rodriquez assisted Melody Law in obtaining a false passport in conjunction

with Law's prostitution business. 706 F.2d at 33. Law had pled guilty to the passport matter, and was not exposed to prosecution on that charge, but when called as a witness, Law claimed her Fifth Amendment privilege, which the trial court sustained, *id.* at 35, and the Court of Appeals upheld, *id.* at 39. The recognition by the court that Law faced prosecution for prostitution, and that any questioning about the false passport would necessarily lead to questions related to the prostitution charges, were sufficient particularized grounds to support sustaining the privilege. *Id.* A separate evidentiary hearing was not required. Similarly, as the district court here understood the facts, Figueroa faced a risk of prosecution for his involvement in drug trafficking before – and possibly during – any cooperation with the FBI. The areas of questioning proposed by Arias[7] were, by their very nature, designed to expose that involvement. Therefore, the court had a clear understanding of the jeopardy in which Figueroa could be placed if forced to testify, and correctly decided to sustain his claim of privilege.

Arias claims that his intended line of questioning is consistent with the government-agent exception to the privilege, and therefore should have been allowed. He posits that Figueroa became well-placed in the conspiracy

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[7] The fact that Arias never submitted to the district court a set of specific questions he proposed to put to Figueroa is significant because, as counsel for Figueroa pointed out, "the failure to particularize his inquiry and reduce his inquiry to paper lends itself to this counsel's argument that defense counsel is merely on a fishing expedition." A146.

on behalf of the FBI, and argues that any questions asked in relation to Figueroa's involvement in the conspiracy cannot be incriminating, because "[y]ou don't commit a crime if you're doing it for the FBI." GA295.

However, as the district court recognized, both his theory and its application to the facts in this case are flawed. First, the law is clear that a government informant is not subject to questioning "with respect to any and all questions relating to his cooperation" *Tutino*, 883 F.2d at 1139. Rather, he is only subject to questioning on a very narrow range of topics specifically performed in the course of his agency with the FBI. In *Zappola*, the permissible questions were limited to the contents of particular meetings between the informant and the defendant attended by the informant on behalf of the FBI. *See* 646 F.2d at 51 n.3. In contrast, Arias sought to ask broad questions about the entire extent of Figueroa's involvement. This line of questioning goes beyond the narrow scope of any agency Figueroa may have had with the FBI.

Second, Arias bases his argument on a claim that Figueroa's activities in connection with the drug conspiracy were conducted on behalf of the FBI. However, when the district court ruled on Arias's motion to compel, it found from the facts in evidence, that "if Figueroa were ever 'well-placed' [in the conspiracy], he did not become so under the supervision of the government." A151. As an FBI agent testified at trial, "most [confidential informants are] looking to help themselves out of a criminal matter that's pending in court." GA32. It was reasonable for the

district court to infer that this informant did not become well-placed under the supervision of the FBI, as Arias speculates and alleges, but rather was already well-placed, and would incriminate himself were he to discuss his criminal connections. Accordingly, Arias's claim that Figueroa was immune from prosecution, and thereby met the government-agent exception to the privilege, is speculative, at best.

Any basis for Arias's attempt to compel Figueroa's testimony is weaker for Arias's failure to pose a specific set of questions. Had Arias posed a specific set of "carefully phrased, limited questions," the district court may have been able to assess the validity of Figueroa's Fifth Amendment claims strictly with respect to those questions. In distinguishing *Zappola,* this Circuit in *Rodriquez* made clear that a defendant would have a stronger case to compel a witness's testimony where he offers a specific set of questions to be asked. *Rodriguez*, 706 F.2d at 39. However, Arias made it clear that his line of questioning was to be open-ended by never narrowing and reducing to writing the specific questions he intended to put to Figueroa.

Finally, insofar as Arias did pose a line of questioning – whether Figueroa made certain statements to the FBI, and whether he knew Arias – the trial court found at the first trial that these had limited probative value and were redundant of other testimony. GA927 . The judge has broad discretion in evidentiary rulings, and may exclude evidence if "its probative value is substantially outweighed by . . . considerations of . . . waste of time, or needless

presentation of cumulative evidence." Fed. R. Evid. 403. Arias sought to question Figueroa on whether or not he had made the statements recorded in the FBI reports. He also sought to ask Figueroa whether or not he had told the FBI agents about Arias. The district court considered these questions to have minimal probative value if they were admitted for non-hearsay purposes (that is, if they were not admitted for the truth of the matter contained). Furthermore, the questions were duplicative of questions previously asked of the FBI agents; that is, whether or not that had been told of Arias by their informant. The FBI testimony answered these questions in the negative. GA113, 134.

The district court properly exercised its discretion in denying Arias's motion to compel the testimony of Figueroa.

2. In the alternative, any error by the district court in denying Arias's motion to compel was harmless.

Even if the district court erred in sustaining Figueroa's privilege against self-incrimination, and denying Arias's motion to compel Figueroa's testimony, the errors do not merit reversal. "[A] district court's ruling excluding evidence may be reversed for abuse of discretion only if the ruling affected a party's substantial rights (i.e., was clearly prejudicial)." *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center*, 466 F.3d 97, 101 (2d Cir. 2006). "An erroneous evidentiary ruling affects substantial rights only when, considering the record

as a whole, it had a substantial and injurious effect or influence on the jury's verdict." *Crigger v. Fahnestock and Co., Inc.*, 443 F.3d 230, 238 (2d Cir. 2006) (internal quotation marks omitted).

First, the practical exclusion of a statement by Figueroa – that he never mentioned Arias to the FBI in the course of the conspiracy – could not have had an injurious effect on the verdict, because this fact had already been introduced into evidence. FBI Special Agent Scott Byers testified that the confidential informant never mentioned Antonio Arias. A113, 134. Nevertheless, the jury convicted Arias, apparently unconvinced that the FBI informant's failure to mention Arias was sufficient to exculpate him. To accept Arias's argument that the failure of the district court to compel Figueroa's testimony had a substantial effect on the jury's verdict, one must assume that the jury, upon hearing the same evidence a second time from a second source, would have changed its verdict. That is, Arias claims that upon the second hearing of a fact that was never challenged – but rather conceded by the prosecution – the jury would have developed reasonable doubt. This is highly unlikely.

Finally, the jury learned during the presentation of evidence that conspiracies are secretive by nature. Thus, although the jury learned that the FBI informant never named Arias as a principal in the conspiracy, this did not necessarily imply that Arias was not, in fact, a member of the conspiracy. Rather, it as easily could be evidence that segments of the conspiracy were isolated from each other, or that the informant merely had a small role to play, with

limited exposure to the other members. The jury logically could have concluded that the informant intentionally was kept in the dark about the full membership of the conspiracy, out of a concern for exactly the situation here: that the informant would cooperate with law enforcement. Therefore, even if Figueroa had testified, and even if the defendant was able to show that he was "well-placed," yet could not name Arias as the leader of the conspiracy, his testimony would have no decisive probative value. Thus, the absence of his testimony did not have a demonstrable prejudicial effect on the verdict or on Arias.

Conclusion

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

Dated: September 16, 2010

Respectfully submitted,

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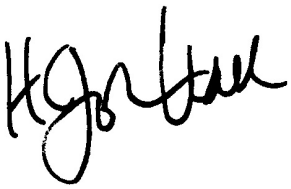

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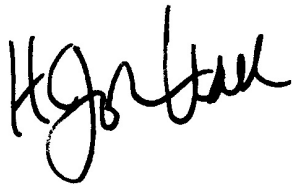
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 approximately 13,673 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

Fed. R. Crim. P. 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Evid. 801(d)(2). Definitions.

* * *

(d) Statements which are not hearsay. A statement is not hearsay if--

* * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The

contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Fed. R. Evid. 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. R. Evid. 103. Rulings on Evidence

(a) Effect of Erroneous Ruling.--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof.--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

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