

# 10-3340

*To Be Argued By:*  
MICHAEL E. RUNOWICZ

---

## United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket No. 10-3340**

---

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

ALAA M. AL JABER, aka Ali, aka Alex,

*Defendant-Appellant,*

FRANCISCO RODRIGUEZ-LLORCA, aka Frank, aka  
Cuba, aka Papalote, aka Franco, ANDRES BOLANOS,

(For continuation of Caption, See Inside Cover)

---

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

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

DAVID B. FEIN  
*United States Attorney*  
*District of Connecticut*

MICHAEL E. RUNOWICZ  
ROBERT M. SPECTOR (*of counsel*)  
*Assistant United States Attorneys*

aka Papalote, aka Enano, aka Pepin, aka Colombia,  
EXGARDO TORRES, aka Chocolatina, aka Choco,  
ARGEMIRO VIRGEN aka Doctor, SIXTO POLANCO,  
aka Adalberto Encarnacion, aka Luis Carrasquillo, aka  
Manuel, EDUARDO MARTINEZ-RUIZ, aka Puchi, aka  
Cuba, aka Puchy, LUIS RAMOS, aka Neo, CARLOS  
ESTUPINAN, aka Doctor, aka Francisco Colon,  
ALFREDO ALDEA, aka Cacique, ARCADIO  
SANTIAGO, aka Quiro, KEVIN SOTO, ANDRES  
PATINO, aka Doctor, aka Professor, aka Juan Felipe,  
NORBELLY RODRIQUEZ, aka Norbelly Diaz, aka  
Norbey, MANUEL DIAZ, aka Juan, aka Diablo, JUAN  
SILVA-CARDOZA, FNU LNU, aka Cesar,

*Defendants.*

## TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	viii
Statement of Issues Presented for Review.....	ix
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings	
Relevant to this Appeal.....	3
Summary of Argument.....	6
Argument.....	8
I. The district court did not abuse its discretion in excluding the hearsay statement contained in co-defendant Sixto Polanco’s plea petition.....	8
A. Relevant facts.....	8
B. Governing law and standard of review.....	10
C. Discussion.....	14
II. The defendant’s claim that the district court abused its discretion in denying a bill of particulars is meritless.....	19

A. Relevant facts. . . . . 19

B. Governing law and standard of review. . . . . 20

C. Discussion. . . . . 22

III. The district court did not abuse its discretion to make evidentiary rulings by denying the defendant’s motion to strike Rodriguez - Llorca’s testimony about traveling to meet the defendant and delivering heroin to him. . . . . 26

A. Relevant facts. . . . . 26

B. Governing law and standard of review. . . . . 30

C. Discussion. . . . . 31

Conclusion. . . . . 33

Certification per Fed. R. App. P. 32(a)(7)(C)

Addendum

## TABLE OF AUTHORITIES

### CASES

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.

<i>Brady v. Maryland</i> , 73 U.S. 83 (1963). . . . .	27, 28, 29, 31
<i>Hemphill v. United States</i> , 392 F.2d 45 (8th Cir. 1968). . . . .	21
<i>United States v. Abreu</i> , 342 F.3d 183 (2d Cir. 2003). . . . .	14
<i>United States v. Al-Moayad</i> , 545 F.3d 139 (2d Cir. 2008). . . . .	14, 31
<i>United States v. Anglin</i> , 169 F.3d 154 (2d Cir. 1999). . . . .	10
<i>United States v. Awadallah</i> , 436 F.3d 125 (2d Cir. 2006). . . . .	14, 30
<i>United States v. Bah</i> , 574 F.3d 106 (2d Cir. 2009). . . . .	30
<i>United States v. Bahadar</i> , 954 F.2d 821 (2d Cir. 1992). . . . .	11

<i>United States v. Barnes</i> , 158 F.3d 662 (2d Cir. 1998). . . . .	22, 25
<i>United States v. Bortnovsky</i> , 820 F.2d 572 (2d Cir. 1987) (per curiam). . . . .	21
<i>United States v. Bowe</i> , 698 F.2d 560 (2d Cir. 1983). . . . .	16
<i>United States v. Brozyna</i> , 571 F.2d 742 (2d Cir. 1978). . . . .	21
<i>United States v. Cephas</i> , 937 F.2d 816 (2d Cir. 1991). . . . .	25
<i>United States v. De La Pava</i> , 268 F.3d 157 (2d Cir. 2001). . . . .	20
<i>United States v. Doyle</i> , 130 F.3d 523 (2d Cir. 1997). . . . .	14
<i>United States v. Evans</i> , 635 F.2d 1124 (4th Cir. 1980). . . . .	17
<i>United States v. Gottlieb</i> , 493 F.2d 987 (2d Cir. 1974). . . . .	22
<i>United States v. Jackson</i> , 335 F.3d 170 (2d Cir. 2003). . . . .	11, 12, 18
<i>United States v. Kelley</i> , 551 F.3d 171 (2d Cir. 2009). . . . .	10, 11

<i>United States v. Lumpkin</i> , 192 F.3d 280 (2d Cir. 1999). . . . .	14
<i>United States v. Maull</i> , 806 F.2d 1340 (8th Cir. 1986).. . . . .	22
<i>United States v. McClean</i> , 528 F.2d 1250 (2d Cir. 1976). . . . .	22
<i>United States v. Panza</i> , 750 F.2d 1141 (2d Cir. 1984). . . . .	21, 22
<i>United States v. Paulino</i> , 445 F.3d 211 (2d Cir. 2006). . . . .	14
<i>United States v. Perez</i> , 387 F.3d 201 (2d Cir. 2004). . . . .	11
<i>United States v. Pipola</i> , 83 F.3d 556 (2d Cir. 1996). . . . .	11, 30
<i>United States v. Pizzaro</i> , 717 F.2d 336 (7th Cir. 1983).. . . . .	12
<i>United States v. Salameh</i> , 152 F.3d 88 (2d Cir. 1998). . . . .	10, 30
<i>United States v. Seewald</i> , 450 F.2d 1159 (2d Cir. 1971). . . . .	15
<i>United States v. Stewart</i> , 590 F.3d 93 (2d Cir. 2009). . . . .	10, 30

<i>United States v. Torres</i> , 901 F.2d 205 (2d Cir. 1990). . . . .	21, 22
<i>United States v. Walsh</i> , 194 F.3d 37 (2d Cir. 1999).. . . . .	20, 21, 22
<i>United States v. Williams</i> , 927 F.2d 95 (2d Cir. 1991).. . . . .	11
<i>Williamson v. United States</i> , 512 U.S. 594 (1994).. . . . .	13

**STATUTES**

18 U.S.C. § 3231. . . . .	viii
21 U.S.C. § 843. . . . .	3
21 U.S.C. § 846. . . . .	2
28 U.S.C. § 1291. . . . .	viii

**RULES**

Fed. R. App. P. 4. . . . .	viii
Fed. R. Crim. P. 7. . . . .	20, 21

Fed. R. Evid. 403.....	9, 14, 17
Fed. R. Evid. 802.....	11
Fed. R. Evid. 804.....	<i>passim</i>

## Statement of Jurisdiction

The district court (Alvin W Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on August 12, 2010. Appendix (“A”) at 35.<sup>1</sup> On August 13, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A36. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

---

<sup>1</sup> The defendant’s appendix, which was created without consultation with the Government, will be referenced to an “A” and the page number. The Government’s Appendix will be referenced to as “GA” and the page number.

**Statement of Issues  
Presented for Review**

- I. Did the district court abuse its discretion in prohibiting the defendant from admitting into evidence a co-defendant's guilty plea petition where the co-defendant was available, where the statement was not against his penal interest, and where the statement had no probative value?
  
- II. Did the district court abuse its discretion in denying the defendant's motion for a bill of particulars, where the indictment fully informed the defendant of the charges against him, the Government made comprehensive pretrial disclosures, and the defendant has not demonstrated any prejudice?
  
- III. Did the district court abuse its discretion and commit reversible error by refusing to strike testimony given by a cooperating co-defendant that he had traveled from Connecticut to Maine to deliver heroin to the defendant where the investigative report of the cooperator's proffer sessions had allegedly failed to disclose this specific information?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 10-3340**

---

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

ALAA M. AL JABER,

*Defendant-Appellant.*

---

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

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

### **Preliminary Statement**

Alaa M. Al Jaber was convicted after trial of conspiring with Francisco Rodriguez-Llorca, Andres Bolanos, and others to possess with the intent to distribute heroin. The evidence at trial was overwhelming, featuring testimony from law enforcement officers who conducted surveillance of the defendant meeting with co-conspirators, numerous recordings of telephone conversations in which the defendant and Rodriguez-Llorca discussed their narcotics trafficking dealings, and

testimony from Rodriguez-Llorca and his wife, Norbelly Rodriguez-Llorca, about the defendant's role as one of Rodriguez-Llorca's customers who purchased and redistributed heroin.

On appeal, the defendant claims that the district court committed reversible error by not permitting him to introduce a written plea petition made by a non-testifying co-defendant, by not having granted his pre-trial motion for a bill of particulars, and by not striking testimony given by Rodriguez-Llorca that he had traveled some two hours to meet with the defendant in order to deliver heroin to him. This Court should reject each claim and affirm the defendant's conviction.

### **Statement of the Case**

On May 23, 2007, agents of the Drug Enforcement Administration ("DEA") filed a 103 page affidavit in support of a criminal complaint charging seventeen individuals with conspiracy to possess with the intent to distribute both heroin and cocaine. A23. On June 5, 2007, a federal grand jury sitting in New Haven, Connecticut, returned a thirty-six count indictment charging those seventeen individuals with various drug trafficking offenses. The defendant was charged in Count One of that indictment with conspiring with the sixteen other defendants to possess with the intent to distribute and to distribute a kilogram or more of heroin, in violation of 21 U.S.C. § 846. In addition, the defendant was also charged in Count 29 along with Francisco Rodriguez-Llorca with using a cellular telephone to commit, cause, or facilitate,

a drug trafficking offense, in violation of 21 U.S.C. § 843(b). A2; A15; A24.

Jury selection took place on June 13, 2008. A28. Trial testimony began on June 24, 2008, and continued through June 26, 2008. A30. On June 30, 2008, the jury found the defendant guilty of Count One, the only count presented to it. A31.<sup>2</sup>

On August 11, 2010, the district court sentenced the defendant to 120 months' imprisonment and to 15 years' supervised release. A35; A72. Judgment entered on August 12, 2010. A35. The defendant timely filed his notice of appeal the following day, August 13, 2010. A36.

The defendant is currently serving his sentence.

### **Statement of Facts and Proceedings Relevant to this Appeal**

Based on the evidence presented at trial,<sup>3</sup> the jury reasonably could have found the following facts: in 2006,

---

<sup>2</sup> On June 24, 2008, before commencement of any testimony, the district court granted the government's motion to dismiss Count 29. A30.

<sup>3</sup> In addition to recordings of intercepted telephone calls involving the defendant, Rodriguez-Llorca and others, and surveillance videos of the defendant and others, the evidence included testimony from DEA special agents Michael Schatz and Alex Koumanelis, Francisco Rodriguez-Llorca, and Norbelly Rodriguez-Llorca.

DEA special agents began to conduct an investigation of Francisco Rodriguez-Llorca, during which some ten to twelve controlled purchases of cocaine and heroin were made from him at his residence located at 148 Gilman Street in Hartford, Connecticut. GA46. During several of these controlled purchases, surveillance officers observed Andres Bolanos at Rodriguez-Llorca's residence.

On October 10, 2006, after one of these controlled purchases, the DEA began a Title III wiretap investigation of Rodriguez-Llorca's telephone. After thirty days of interceptions over that telephone, agents sought and received authorization to intercept communications occurring over several other telephones, including two belonging to Bolanos and one new telephone belonging to Rodriguez-Llorca. GA72-74. During the wiretap, the agents intercepted thousands of calls, many of which were conversations between Rodriguez-Llorca and the defendant. GA77, GA87-91.

At trial, Rodriguez-Llorca testified as a government witness and admitted that he was a drug dealer who had sold both cocaine and heroin starting around June 2006. GA244. According to Rodriguez-Llorca, when he needed heroin to sell to his customers, he would call Bolanos and obtain the heroin from him. GA245. Rodriguez-Llorca identified the defendant as one of his customers. GA267.

Although Rodriguez-Llorca testified about three different heroin transactions during which he sold the defendant varying quantities of heroin packaged for street-level distribution, the focus of his testimony was on a

transaction that occurred in November 2006, during which the defendant had traveled to Rodriguez-Llorca's Gilman Street residence to pick up heroin. In connection with this transaction, a series of intercepted telephone calls between Rodriguez-Llorca and the defendant revealed that, after discussing various prices and quantities of heroin, Rodriguez-Llorca offered to sell heroin to the defendant at a price of \$260 per package (each of which contained 100 bags of heroin), and the defendant ordered 100 packages.<sup>4</sup> GA272, GA274, GA644, GA646.

When the defendant came to Rodriguez-Llorca's residence to pick up the 10,000 bags of heroin, they had not yet been prepared, so that the order was not yet ready for delivery. GA292 The defendant stayed at Rodriguez-Llorca's residence overnight while waiting for the order to be completed. GA293. Norbelly Rodriguez-Llorca also testified about this transaction, recalling that the defendant had come to their residence and stayed overnight because he had been waiting for a heroin order to be completed. GA412-414.

The next day, November 25, 2006, the entire order had still not been finished. The defendant had, however, received a total of 60 packages (6,000 baggies) after Bolanos arrived at Rodriguez-Llorca's residence with a delivery of heroin. GA297. The remaining 40 packages

---

<sup>4</sup> One package contained ten bundles, each of which contained ten little bags of heroin for street distribution. Thus one package was made up of 100 bags of heroin. GA267. Therefore, 100 packages consisted of 10,000 bags of heroin.

(4,000 baggies) were delivered two or three days later, when Rodriguez-Llorca and Bolanos traveled two hours to meet with the defendant. GA299.

### **Summary of Argument**

1. The district court properly denied the defendant's request to admit into evidence a hearsay statement made by co-defendant Sixto Polanco in a written plea petition to plead guilty. Since the co-defendant was not called as a witness and was equally available to both sides, the defendant failed to demonstrate that the declarant of the statement he wished to introduce was unavailable and thus did not establish the initial base for admissibility of the statement. Furthermore, the statement itself, which the defendant sought to introduce to contradict testimony of cooperating witness Rodriguez-Llorca, was not so inculpatory that it would satisfy the requirements of Rule 804(b)(3) of the Federal Rules of Evidence. The statement, if anything, was exculpatory to the declarant. In the statement, Polanco tried to distance himself from a specific heroin transaction, and thus, the statement lacked sufficient circumstances to show that it was trustworthy. Finally, as the district court indicated, the statement was not specific enough to show that the transaction being referred to in the written petition was the same transaction about which Rodriguez-Llorca had testified at trial. The trial court did not abuse its discretion in denying the defendant's admission of this statement, and this decision by the trial court was neither arbitrary, nor irrational.

2. The district court did not abuse its discretion in denying defendant's pre-trial motion for a bill of particulars which sought evidentiary details about the government's case, and not details about the indictment. The court found that the defendant had been provided with sufficient specificity of details of the case, a finding which was not disputed by the defendant and a finding which did not constitute an abuse of the discretion.

3. The district court did not abuse its discretion in denying defendant's motion to strike certain testimony provided by Rodriguez-Llorca about when he and Bolanos traveled to deliver heroin to the defendant. Based on the discovery provided to the defendant prior to trial, Rodriguez-Llorca's testimony that he had traveled to deliver a portion of the 10,000 bag heroin order to the defendant could not have come as a surprise. In addition, the defendant was permitted ample opportunities to cross examine Rodriguez-Llorca and the DEA case agent on the issue of whether Rodriguez-Llorca had disclosed specifically to the Government information about his delivery to the defendant of a portion of the 10,000 bag heroin order. Finally, given the ample evidence of the defendant's guilt and the extensive testimony provided by Rodriguez-Llorca as to his heroin sales to the defendant, any error in failing to strike a small and relatively insignificant portion of Rodriguez-Llorca's testimony was harmless.

## Argument

### **I. The district court did not abuse its discretion in excluding the hearsay statement contained in co-defendant Sixto Polanco's plea petition.**

#### **A. Relevant facts**

The defendant rested his case without presenting any evidence. GA539. Prior to resting, however, the defendant sought to offer into evidence a written guilty plea petition filed in the same case by Sixto Polanco, one of the sixteen people with whom the defendant had been indicted. GA523. In that petition, Polanco wrote:

I am guilty of conspiring with Bolanos and others. We spoke of 10,000 bags of heroin with him and his cousin, but it never happened. There was talk of 260 grams with Bolanos at 250 with a woman but it never happened. Finally, Bolanos sent 150 grams of heroin and 90 were stolen. 60 grams made 9 packages of 10 bundles each and each bundle (bonda) made 10 bags all for sale.

A44. The defendant urged the admission of this petition as a statement made by Polanco against his penal interest. GA523. He claimed that he had not known “until last night that the government wasn’t going to call [Polanco as a witness].” GA523. He acknowledged that he could subpoena Polanco as a witness, but “it seems to me that the easier course, rather than have him come here, show

him this and submit it through him is just to have it be admitted as [a statement against penal interest].” GA523.

The Government objected to the admission of the statement. GA524. It argued that the defendant had failed to show that Polanco was unavailable as a witness and that the defendant could call Polanco as a witness and, in doing so, elicit from him testimony regarding the substance of the plea petition. GA524.

In response, the defendant argued, “[It] sounds like he’s conceding that I can call Mr. Sixto Polanco and put it in that way. It seems to me that it’s easier, for many reasons, just to submit the statement.” GA524. The defendant also said, without elaboration, that Polanco was likely to exercise his right to remain silent if called as a witness. GA524.

The district court clarified that Polanco had already pleaded guilty, suggesting some skepticism of the defendant’s claim that he would exercise his right to remain silent. GA525. The court also indicated that statements made in these plea petitions and during the course of a guilty plea colloquy typically are not “entirely complete statements.” GA526.

By written order filed on June 30, 2008, the district court denied the request and determined that “this evidence would be precluded under Federal Rule of Evidence 403.” A56. The court characterized the defendant’s offer of proof as follows:

Defendant Al Jaber appears to seek to use Polanco's petition to contradict testimony by government witness Francisco Rodriguez concerning a transaction he testified he was involved in with defendant Al Jaber, which Rodriguez testified was the only transaction he engaged in involving 10,000 bags of heroin.

A56. The court explained that Polanco's statement in his plea petition referenced Bolanos, but made no mention of this defendant. A56-A57. It further stated, "[A]lthough Rodriguez testified that he was only involved in one transaction involving 10,000 bags of heroin, there is nothing in the record to support a conclusion that Bolanos was engaged in only one such transaction." A57. The court concluded, "In the absence of any proffer that a foundation can be laid to connect Polanco's statement to the activity engaged in by government witness Rodriguez, admission of Polanco's petition has no probative value and would be seriously misleading to the jury." A57.

#### **B. Governing law and standard of review**

A district court's evidentiary rulings are reviewed only for abuse of discretion. *See United States v. Stewart*, 590 F.3d 93, 133 (2d Cir. 2009) (citing *United States v. Kelley*, 551 F.3d 171, 174 (2d Cir. 2009); *United States v. Anglin*, 169 F.3d 154, 162 (2d Cir. 1999)). Accordingly, this Court has held that it "will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *Id.* (citing *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir.

1998)); *see also United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996).

Although relevant evidence is generally admissible under the Federal Rules of Evidence, such evidence becomes inadmissible when “specifically excluded.” *See Kelley*, 551 F.3d at 175 (citing *United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004)). Federal Rule of Evidence 802 explicitly excludes hearsay unless otherwise provided by the Federal Rules of Evidence, other rules prescribed by the Supreme Court pursuant to statutory authority, or by direct federal statute. *See id.*; *see also Fed. R. Evid. 801* (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).

Rule 804 provides for limited hearsay exceptions when a declarant is unavailable to testify as a witness. *See Fed. R. Evid. 804*. It is well-established that a declarant is unavailable under Rule 804 if he actually asserts his Fifth Amendment right. *See United States v. Jackson*, 335 F.3d 170, 177 n.1 (2d Cir. 2003) (citing *United States v. Bahadar*, 954 F.2d 821, 824 (2d Cir. 1992)). This right, however, must be asserted by the declarant in court, or the declarant’s refusal to testify must be relayed to the court. *See United States v. Williams*, 927 F.2d 95, 98-99 (2d Cir. 1991).

Rule 804(b)(1) renders admissible “[t]estimony given as a witness at another hearing of the same or a different proceeding” – but only “if the party against whom the testimony is now offered . . . had an opportunity and

similar motive to develop the testimony by direct, cross, or redirect examination.” Fed. R. Evid. 804(b)(1). This requirement “operates to screen out those statements, which although made under oath, were not subject to the scrutiny of a party interested in thoroughly testing [their] validity.” *Jackson*, 335 F.3d at 177 (quoting *United States v. Pizzaro*, 717 F.2d 336, 349 (7th Cir. 1983)). This Court has held that statements made by a co-conspirator at his plea allocution, which arguably exculpate a defendant, are not admissible at another defendant’s trial under Rule 804(b)(1); as this Court reasoned, the government has neither the opportunity nor a similar motive to examine the co-conspirator at a plea allocution as it would have at trial. *See Jackson*, 335 F.3d at 177.

Rule 804(b)(3) provides, in part, that a statement is not excluded by the hearsay rule where the statement:

was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position would not have made the statement unless believing it to be true . . .<sup>5</sup>

---

<sup>5</sup> Since the defendant’s trial, Federal Rule of Evidence 804(b)(3) has been amended and now indicates that statements are not excluded under the hearsay rule where the statement is one that:

- (A) a reasonable person in the declarant’s position  
(continued...)

*Id.* Statements that are self-exculpatory or neutral, even if collateral to self-inculpatory statements, do not fall within the category of hearsay statements that are admissible under Rule 804(b)(3). *See Williamson v. United States*, 512 U.S. 594, 598-600 (1994).

Additionally, under Rule 804(b)(3), “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” *Id.* The proponent of the hearsay statement bears the burden for proving the

---

<sup>5</sup> (...continued)

would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The substantive effect of this amendment is to extend the requirement for corroborating circumstances for statements exposing the declarant to criminal liability from where the statement is used to “exculpate the accused” to all statements admitted under Rule 804(b)(3) in criminal cases. Under either version of the Rule, “corroborating circumstances that clearly indicate . . . trustworthiness” of the statement would be required for the statement at issue here.

existence of “corroborating circumstances clearly indicating the trustworthiness of the statement.” *United States v. Paulino*, 445 F.3d 211, 220 (2d Cir. 2006) (citing *United States v. Doyle*, 130 F.3d 523, 543-44 (2d Cir. 1997)). To meet this burden, the proponent must present evidence corroborating (1) the trustworthiness of the declarant and (2) the trustworthiness of the statement itself. *See Paulino*, 445 F.3d at 220 (citing *United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir. 1999)); *accord United States v. Abreu*, 342 F.3d 183, 190 (2d Cir. 2003)).

Finally, “Federal Rule of Evidence 403 provides that, ‘[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” *United States v. Al-Moayad*, 545 F.3d 139, 159 (2d Cir. 2008). “When we are confronted with a Rule 403 issue, ‘so long as the district court has conscientiously balanced the proffered evidence’s probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational.’” *Id.* at 159-160 (quoting *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir.2006)). “To avoid acting arbitrarily, the district court must make a ‘conscientious assessment’ of whether unfair prejudice substantially outweighs probative value.” *Id.* at 160.

### **C. Discussion**

The defendant claims that the district court committed reversible error by not allowing him to introduce the

written plea petition made by Sixto Polano, a co-defendant who had previously pleaded guilty to the heroin conspiracy charge, but had not yet been sentenced. He claimed that the statement made by Polanco in the plea petition which reported that Polanco had talked to Bolanos about 10,000 bags of heroin, but that the transaction had not happened, was not only exculpatory for the defendant, it was admissible under Rule 801(b)(3) as a self-incriminating statement made by an unavailable witness. *See* Def.'s Brief at 4-5.

The district court properly excluded this evidence. First, the defendant failed to demonstrate that Polanco was an unavailable witness. While he had the right to call Polanco as a witness to elicit testimony from him, *cf. United States v. Seewald*, 450 F.2d 1159, 1161-62 (2d Cir. 1971) (noting that every citizen, when called as a witness in a criminal case, has a duty to testify to the facts known to him regardless of the detriment or benefit such might bring to anyone), he chose not to do so. Instead he simply assumed that, because Polanco had not yet been sentenced, he would invoke his fifth amendment privilege against self-incrimination and thereby render himself unavailable. Indeed, the defendant explained his reasoning to the district court by claiming it was “easier” to offer the written plea petition itself, rather than call Polanco as a witness, because he was only interested in admitted the statement from the plea petition. It is for the witness him or herself to make a claim that answers to questions would reasonably implicate him or her in criminal activity; it is not for another person to invoke this claim for the witness.

*See United States v. Bowe*, 698 F. 2d 560, 565 (2d Cir. 1983).

In this case, the defendant had the opportunity to call Polanco as a witness, but chose not to do so, stating openly in court that it was easier simply to offer the hearsay statement from the plea petition. GA523. Of course, by only offering the statement in the plea petition, and not calling Polanco as a witness, the defendant avoided the risk of eliciting testimony from Polanco that was, at worst, damaging to his defense, and, at best, entirely unhelpful to his defense. He also avoided subjecting Polanco to cross examination which could have severely limited the probative value of the statements in the plea petition. Since the privilege was Polanco's to invoke, and there is nothing in the record to demonstrate an intention by him not to testify, Polanco was not unavailable. Therefore, the defendant has failed to establish the first basis for the admissibility of the written plea petition.

Even if this Court were to assume *arguendo* that Polanco was unavailable, the defendant fails to satisfy the other requirement of Rule 804(b). Under Rule 804(b), for a hearsay statement against interest to be admissible, the statement must be so far contrary to the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. *See Fed. R. Evid. 804(b)(3)*. Here, the statement in the plea petition was not so contrary to Polanco's penal interest that it can be said that a reasonable person would not have made it unless it were true. Even though Polanco may have admitted to a crime in the petition, i.e.,

conspiring with Bolanos to distribute heroin, he did not inculcate himself in the more serious crime of being involved in a conspiracy with Rodriguez-Llorca to possess with the intent to distribute a kilogram or more of heroin. At best, in this statement, Polanco implicated himself in a nine package heroin deal with Bolanos. Thus, this statement is insufficient for admission under Rule 804(b). *See United States v. Evans*, 635 F.2d 1124, 1126 (4th Cir. 1980) (stating that, even though a confession technically may be against a declarant's interest, it does not fall within the rule if the "only function of the statement is to support a defense against a charge of a more serious crime").

Polanco's statement is more exculpatory than inculpatory. Even though he admitted to committing a crime with Bolanos, the purpose of the statement was to disavow his participation in several heroin transactions. In the petition, he stated that, although he talked with Bolanos about a 10,000 bag heroin transaction and a separate 260 gram heroin transaction, neither sale occurred. Polanco also stated in the petition that, although Bolanos sent him 150 grams of heroin, someone had stolen 90 grams of that heroin. Thus, the statement did not inculcate Polanco in the 10,000 bag heroin transaction involving Bolanos, Rodriguez-Llorca and the defendant; instead, the statement was a general denial by Polanco that he was involved in any of Bolanos's large scale heroin distribution activities.

The district court justified its ruling excluding the evidence under Rule 403. This justification is also correct. According to the court, the probative value of the evidence

was very low, and the danger of confusing the jury was very high because, although the plea petition made reference to Bolanos and “his cousin”<sup>6</sup> and a potential transaction for 10,000 bags of heroin, it made no mention of the defendant or of Rodriguez-Llorca. In fact, there is nothing in the record that connected the statement in Polanco’s plea petition to the 10,000 bag transaction about which Rodriguez-Llorca had testified. As the district court noted, even though Rodriguez-Llorca had testified that he had only been engaged in one transaction involving 10,000 bags of heroin, there was no evidence that Bolanos had only been involved in one 10,000 bag heroin transaction. Other than the plea petition’s reference to a possible transaction for 10,000 bags of heroin, there was nothing else in the statement or in evidence to otherwise link it to the 10,000 bag heroin transaction between Rodriguez-Llorca and the defendant. The defendant failed to lay any foundation or proffer any evidence to connect Polanco’s statement to the transaction at trial. In the absence of any such connection, the trial court correctly found that the admission of Polanco’s plea petition would have no probative value. A57.

This Court recognizes that the trial court enjoys “broad discretion regarding, the admission of evidence, and the court’s evidentiary determinations will be reversed only if they are “manifestly erroneous.” *Jackson*, 335 F. 3d at 176. Additionally, this Court “will not overturn a district court’s evidentiary rulings unless the court ‘acted

---

<sup>6</sup> There is nothing in the record to identify this cousin, or even to establish if Bolanos has a cousin at all.

arbitrarily or irrationally.” *Id.* (quoting *United States v. Blanco*, 861 F.2d 773, 781 (2d Cir. 1988)). Given that (1) the defendant failed to establish that Polanco was unavailable as a witness, (2) the statement in the plea petition was more exculpatory than inculpatory, and (3) there was no evidence to connect the statement in the plea petition with the purpose for which it was offered, i.e., to impeach Rodriguez-Llorca’s testimony that he had sold the defendant 10,000 baggies of heroin, the district court’s decision to exclude the statement was not arbitrary or irrational, nor did it reflect manifest error. The defendant has not met his heavy burden, and his claim should be denied.

## **II. The defendant’s claim that the district court abused its discretion in denying a bill of particulars is meritless**

### **A. Relevant facts**

On January 14, 2008, the defendant filed a motion for a bill of particulars. A38. This motion requested “[a] list of each transaction[] in which the Government claims Alaa Al Jaber was involved together with any other involved parties, the nature, date and location of said transaction, as it pertains to evidence to be offered against him at trial.” A38. In support of the motion, the defendant argued, in conclusory fashion, that the indictment did not contain this information, and that, without it, he was unable to prepare for trial. GA672. In opposing this motion, the Government responded that it had already “provided the defendant with extensive pre-trial discovery” and that, in

light of the specificity and the clarity of the indictment, and the abundant discovery furnished by the United States to the defendant, a bill of particulars requiring the production of any more information was not appropriate. GA684.

By order filed June 16, 2008, the district court denied the motion stating that the “acquisition of evidentiary detail is not the function of a bill of particulars.” A43. The court also found that it was not disputed that the government had turned over a significant amount of discovery to the defendant in compliance with its obligations under Rule 16 and the local standing order,” and “[t]hus the defendant already has the particularized evidence against him . . .” A43. The defendant did not renew this motion, nor did he raise an objection after this denial, though he did make a passing reference to the court’s denial of the motion in his written motion to strike a portion of Rodriguez-Llorca’s testimony. A75.

#### **B. Governing law and standard of review**

Under the Federal Rules of Criminal Procedure, an indictment must contain a “plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1); *see United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001). Accordingly, an indictment should be specific enough to permit a defendant to prepare a defense, thereby conforming to the Sixth Amendment’s requirement that a defendant “be informed of the nature and cause of the accusation.” *United States v. Walsh*, 194 F.3d 37, 44 (2d

Cir. 1999); *see also United States v. Brozyna*, 571 F.2d 742, 746 (2d Cir. 1978) (holding that indictment should be sufficiently clear so that defendant “will not be misled while preparing his defense”).

When an indictment is insufficient, it may be supplemented by a bill of particulars. *See* Fed. R. Crim. P. 7(f). A bill of particulars is intended to allow a defendant “to identify with sufficient particularity the nature of the charge pending against him, thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted for a second time for the same offense.” *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (*per curiam*).

Accordingly, a bill of particulars is required “only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.” *United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990). A bill of particulars “is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means.” *Walsh*, 194 F.3d at 47; *see Torres*, 901 F.2d at 234; *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984).

In particular, a bill of particulars is not intended to provide the defendant with “evidentiary detail” about the Government’s case. *See Torres*, 901 F.2d at 234 (“Acquisition of evidentiary detail is not the function of the bill of particulars.”) (quoting *Hemphill v. United*

*States*, 392 F.2d 45, 49 (8th Cir. 1968)). Indeed, as a general matter, the Government is “not required to disclose its evidence in advance of trial.” *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974) (citing cases).

The denial of a motion for a bill of particulars is reviewed for “abuse of discretion.” *Walsh*, 194 F.3d at 47 (citing *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998)). This Court has stated that the decision to grant a motion for a bill of particulars lies within the “sound discretion” of the district court. *See Panza*, 750 F.2d at 1148. ““So long as the defendant was adequately informed of the charges against him and was not unfairly surprised at trial as a consequence of the denial of the bill of particulars, the trial court has not abused its discretion.”” *Torres*, 901 F.2d at 234 (quoting *United States v. Maull*, 806 F.2d 1340, 1345-46 (8th Cir. 1986)).

Finally, the denial of a bill of particulars is harmless error if the defendant cannot demonstrate that he was taken by surprise by the evidence presented at trial and that such evidence prejudiced his defense. *See Barnes*, 158 F.3d at 665-66. Indeed, this Court has noted that it has “repeatedly refused, in the absence of any showing of prejudice, to dismiss . . . charges for lack of specificity.” *Walsh*, 194 F.3d at 45 (citing *United States v. McClean*, 528 F.2d 1250, 1257 (2d Cir. 1976)).

### **C. Discussion**

The district court did not abuse its discretion in denying defendant’s motion for a bill of particulars because the

Indictment was sufficient on its face and because the comprehensive disclosures by the Government were sufficient to allow the defendant to prepare for trial and avoid unfair surprise. Moreover, the defendant has entirely failed to show that he was prejudiced by the district court's decision.

As an initial matter, the indictment contained a plain, concise, and definite statement of the essential facts constituting the offense charged. Count One of the indictment clearly stated that the defendant knowingly and intentionally conspired, from in or about July 2006, through May 23, 2007, with specific co-conspirators, including Francisco Rodriguez-Llorca, Andres Bolanos, Norbelly Rodriguez, and others, to distribute one or more kilograms of heroin. A27. Count 29 charged the defendant and Rodriguez-Llorca with knowingly and intentionally using a cellular telephone while conspiring to and in committing, causing, and facilitating, the knowing, intentional, and unlawful possession with the intent to distribute heroin. A15. As such, the Indictment provided the defendant with the essential facts constituting the offenses charged.

Moreover, as the district court found, it was undisputed that the Government had disclosed "a significant amount of discovery material to the defendant in compliance with its obligations under Rule 16 and the local Standing order," A43, thereby apprising the defendant of "the particularized evidence against him." A43. Indeed, at the time that defendant filed this motion, which was well in advance of trial, he had been provided with, among other

items, copies of all telephone calls intercepted over the five cellular telephones for which wiretap orders had been obtained, all of the DEA reports in the case, including surveillance video from November 25, 2006, and the affidavit filed by a DEA special agent in support of the arrest warrant. Thus, the district court did not abuse its discretion in denying the defendant's motion for a bill of particulars.

On appeal, the defendant complains that, at trial, he had been surprised by Rodriguez-Llorca's testimony that he had made a trip to Maine to deliver heroin to the defendant. Def.'s Brief at 7. This claim is unavailing because the details of Rodriguez-Llorca's testimony could not and should not have come as a surprise to him. The defendant was heard on numerous telephone calls discussing prices and quantities of heroin with Rodriguez-Llorca. GA268, GA272, GA641-644. He was also heard on a telephone call arranging to come to Rodriguez-Llorca's house to pick up heroin that he had ordered. In other calls which had been turned over in discovery, Rodriguez-Llorca and Bolanos discussed making arrangements to travel to the defendant and deliver heroin to him after they were unable to fulfill his entire heroin order at Rodriguez-Llorca's house. GA668. In fact, in one recorded telephone conversation, Rodriguez-Llorca told the defendant that he did not have all the heroin ready to give to him and that he and another individual would go to the defendant's residence to complete the delivery. GA665.

There is simply no plausible basis in the record for the defendant to claim that he was unfairly surprised by the details of Rodriguez-Llorca's testimony. Indeed, it was the defendant himself who, during cross-examination of one of the case agents, elicited testimony that, in that agent's arrest warrant affidavit, he had asserted that Rodriguez-Llorca "went halfway to Maine," GA462, negating any claim of surprise as to Rodriguez-Llorca's testimony. Moreover, as the Government explained during the trial, in response to the defendant's criticism of the information disclosed related to Rodriguez-Llorca's prior statements, it had provided the defendant with an investigative report which detailed the results of two proffer sessions with Rodriguez-Llorca. GA346-347. This report contained details of the various heroin transactions that Rodriguez-Llorca engaged in with the defendant. GA346-347. Because this Court has never required the Government to disclose every detail of the prosecution's case, *see United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991) ("[T]he government need not particularize all of its evidence."), the defendant's claim must fail.

Finally, even assuming *arguendo* that the district court abused its discretion in denying a bill of particulars, the defendant has entirely failed to articulate what he would have done differently in preparing his defense. Because the defendant has not alleged, and cannot demonstrate, that he was prejudiced by the district court's decision, the decision should be upheld. *See Barnes*, 158 F.3d at 666 (holding that defendant was unable to articulate any "specific prejudice" resulting from the alleged failure to

disclose the substance of cooperating witness' testimony relating to drug purchases).

**III. The district court did not abuse its discretion by denying the defendant's motion to strike Rodriguez-Llorca's testimony about traveling to meet the defendant and deliver heroin to him.**

**A. Relevant Facts**

On or about November 24, 2006, after ordering 10,000 bags of heroin from Rodriguez-Llorca over the telephone and after the transaction was discussed over numerous intercepted conversations, including several between the defendant and Rodriguez-Llorca and between Bolanos and Rodriguez-Llorca, the defendant traveled to Rodriguez-Llorca's residence to pick up his order. GA285-291. When he arrived there, all of the packages that had been ordered were not ready. GA292. Rodriguez-Llorca told the defendant that he could either take the packages that were ready or wait for the entire order to be finished. GA292. The defendant spent the night at Rodriguez-Llorca's house waiting for the packages to be finished, but they were not finished by the next day. GA292-293.

The next day, Rodriguez-Llorca told the defendant in a recorded telephone call that he had 60 packages (6,000 bags) of heroin that he could give him now and that he and Bolanos would go to the defendant's house the next day to deliver the rest of the order. GA298-299. Rodriguez-Llorca provided the defendant with 60 packages of heroin inside Rodriguez-Llorca's residence that day and delivered

the remaining 40 packages to the defendant a few days later. GA297-299. Rodriguez-Llorca testified that these 40 packages were to be taken to Maine, “but they never got to Maine. We agreed on a place to meet up.” GA293. They met in a “town” at a “shopping center.” GA300. As Rodriguez-Llorca explained, “Between me and [Bolanos], we went in his car to Maine. About two hours, from here to Maine, two hours. And after two hours, we called [the defendant] and we agreed to meet in another town.” GA299. When they met, Rodriguez-Llorca provided the defendant with the other 40 packages of heroin. GA299-300.

After the conclusion of Rodriguez-Llorca’s direct examination, but before the start of his cross-examination, the defendant claimed that the proffer report of Rodriguez-Llorca that had been provided to him in discovery did not make reference to the trip to Maine to deliver heroin to the defendant and that this testimony had come as a surprise to him. GA336-337. As a result, he moved to strike Rodriguez-Llorca’s testimony as to this trip. A75.<sup>7</sup> He claimed, at the time, that the Government had violated its discovery obligations under *Brady v. Maryland*, 73 U.S. 83 (1963) and the Jencks Act by failing to disclose the specific fact that, as part of the 10,000 bag heroin transaction, Rodriguez-Llorca had traveled to the

---

<sup>7</sup> The defendant also moved to strike testimony that Rodriguez-Llorca gave regarding a sale of 20 packages of heroin to the defendant in 2007, but, on appeal, he does not challenge the district court’s denial of this portion of the motion.

defendant to provide him with a portion of the heroin.  
A75.

The following morning, during argument on the motion to strike, the Government responded by pointing out that the proffer report disclosed to the defendant identified multiple occasions in which Rodriguez-Llorca sold heroin to the defendant. GA346-347. Specifically, the report disclosed that, on one occasion, he sold the defendant 30 packages of heroin, and on a second occasion, he sold the defendant 10,000 bags of heroin. GA347. The Government argued that the material in the report was not a prior statement by the witness, as contemplated by the Jencks Act, and was not exculpatory to the defendant, as contemplated by *Brady*. GA348. As the Government stated,

He's been given everything the government has.  
As I said, this is not a verbatim, not even close to being a verbatim statement of what the proffer sessions were about. And as always, not every fact that's ever disclosed or discussed during a proffer session is recorded or put into this statement because it's not intended to be . . . a verbatim transcript and/or statement of a defendant which he is then asked to review or sign.

GA348.

At that point, the defendant conceded that proffer reports are not intended to be verbatim transcripts of a witness's statements and requested permission to ask the

agents, under oath, when they first learned from Rodriguez-Llorca that he had traveled to meet the defendant to provide him with heroin in connection with the 10,000 bag transaction. GA349-350. The court did not find the defendant's argument to be persuasive and expressed skepticism as to his characterization of the requirements under the Jencks Act and *Brady*. GA352-353. The court questioned the defendant's interpretation of *Brady* and reminded him that it required the disclosure of exculpatory evidence, not inculpatory evidence. GA340. It directed counsel to proceed with cross-examination and did not strike any of Rodriguez-Llorca's testimony. GA353. A docket entry from that date indicates that the motion itself was denied. A30.

During the remainder of the trial, as he had requested, the defendant was provided the opportunity to closely question Rodriguez-Llorca and the investigating agents about this issue. He asked Rodriguez-Llorca several detailed questions about his alleged trip to Maine to meet the defendant and insinuated that the Rodriguez-Llorca had failed to disclose this information to the agents and, therefore, was lying about it. GA379-383. He was also permitted to examine extensively DEA special agent Schatz about the trip to Maine. GA458-468. Through this cross examination, he again suggested that Rodriguez-Llorca had not disclosed information related to the alleged Maine trip to the agents and, therefore, had been lying about it. He made reference to the agent's arrest warrant affidavit and grand jury testimony and clarified that, although Rodriguez-Llorca may have made reference to traveling two hours to deliver heroin to the defendant and

traveling “halfway” to Maine, he did not make a specific reference to traveling all the way to Maine to meet the defendant. GA462-465. He made reference to the agent’s proffer report about the two interviews with Rodriguez-Llorca and clarified that “there’s no reference there to a trip to Maine.” GA468.

The defendant never renewed his motion to strike Rodriguez-Llorca’s testimony and appeared to be satisfied with his ability to address the issue through cross examination of the witnesses. Indeed, during his colloquy with the district court regarding the motion to strike, the defendant appeared to recognize that the Government had complied fully with all of its discovery obligations and that the proper way to address any failure of a witness to disclose information to law enforcement prior to his testimony was through cross examination of Rodriguez-Llorca and the relevant officers.

#### **B. Governing law and standard of review**

A district court’s evidentiary rulings are reviewed only for abuse of discretion, *see United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009), and those rulings will only be disturbed if they are arbitrary or irrational. *See Awadallah*, 436 F.3d at 131. Accordingly, this Court has held that it “will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally.” *Stewart*, 590 F.3d at 133 (citing *Salameh*, 152 F.3d at 110; *see also Pipola*, 83 F.3d at 566. In addition, “[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.” *Al-Moayad*, 545 F.3d at 164.

### **C. Discussion**

Citing no legal authority, the defendant argues on appeal that the trial court committed reversible error by not granting his motion to strike the portion of Rodriguez-Llorca’s testimony which discussed his and Bolanos’s trip to meet the defendant and provide him with 4,000 bags of heroin. The defendant claims that “[t]his entire transaction [was] a mystery” and was wholly uncorroborated. *See* Def.’s Brief at 10. He does not assert or allege a discovery violation and appears to abandon any argument based on the Jencks Act or *Brady*. *See id.* at 9-10. Instead, with no case support or legal analysis, he seems to argue that the district court erred in refusing to strike a very small portion of Rodriguez-Llorca’s testimony.

The district court’s refusal to strike this testimony was not an abuse of discretion. The defendant’s claim that the transaction was a mystery and was uncorroborated is not supported by the evidence, and is totally unfounded. First, it is undisputed that the defendant had ample discovery about the alleged 10,000 bag heroin transaction; his only complaint was that the discovery did not contain information about Rodriguez-Llorca’s travel to deliver a portion of this order to the defendant. Second, both the arrest warrant affidavit and the intercepted calls disclosed to the defendant contained allegations that Rodriguez-Llorca had, on at least one occasion, traveled to meet the defendant and deliver heroin to him. GA665.

In addition, the defendant received the relief he requested from the district court. Specifically, he was permitted to cross-examine at length Rodriguez-Llorca and the DEA case agent about Rodriguez-Llorca's alleged failure to disclose, prior to his testimony, information about his delivery of a portion of the 10,000 bag heroin order to the defendant at a location that halfway between Connecticut and Maine.

Finally, any evidentiary error was harmless because the testimony at issue was not at all an important component of the Government's case. In support of its case against the defendant, the Government presented recorded telephone calls, the testimony of surveillance agents, videotaped recordings of meetings between Rodriguez-Llorca and the defendant, testimony by Rodriguez-Llorca regarding several heroin transactions that he engaged in with the defendant, and testimony by Norbelly Rodriguez-Llorca regarding the one 10,000 bag heroin transaction. Had the district court granted the defendant's motion to strike, it would only have removed from the jury's consideration a very small portion of Rodriguez-Llorca's testimony; it would not have had any impact on the vast majority of Rodriguez-Llorca's testimony, which described the various quantities of heroin that he had sold the defendant and detailed the 10,000 bag heroin transaction between Rodriguez-Llorca, Bolanos and the defendant, a transaction that Norbelly Rodriguez-Llorca, Rodriguez-Llorca's wife, had also described to the jury.

**Conclusion**

For the foregoing reasons, this Court should affirm the defendant's judgment of conviction.

Dated: March 23, 2011

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Michael E. Runowicz". The signature is written in a cursive style with a large, looping initial "M".

MICHAEL E. RUNOWICZ  
ASSISTANT U.S. ATTORNEY

ROBERT M. SPECTOR  
Assistant United States Attorney (of counsel)

**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 8,010 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

A handwritten signature in black ink, reading "Michael E. Runowicz". The signature is written in a cursive style with a large, looping initial "M".

MICHAEL E. RUNOWICZ  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

## **Federal Rules of Evidence**

### **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

### **Rule 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.

### **Rule 804. Hearsay Exceptions; Declarant Unavailable**

\* \* \*

**(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

**(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or

proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

\* \* \*

**(3) Statement against interest.**--A statement that:

**(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

**(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

\* \* \*