05-5962-cr

To Be Argued By:
STEPHEN B. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5962-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JORGE ORLANDO ARDILA, aka Omar, aka The Old Man, aka Cesar Tulio Zuniga-Pacheco, aka Jorge Builis, aka Omar Gonzalez, aka Angel Rivera,

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 (Alan H. Nevas, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The judgment of conviction entered on October 26, 2005. (DA 137).[1] The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), on November 1, 2005 (DA 17), and this Court has appellate jurisdiction over his challenge to his conviction pursuant to 28 U.S.C. § 1291.

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[1] References to the Defendant-Appellant's Appendix are designated as ("DA __"); and to the Government's Appendix as ("GA __").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion when it denied the defendant's request, made for the first time on the first day of trial, for a further continuance of his case which had then been pending fifteen months, so that he could locate a witness who had no relevance to any material fact at trial?

2. Did the district court abuse its discretion when it denied the defendant's request to withdraw prior oral and written waivers of the Speedy Trial Act's thirty-day time period before proceeding to trial on a superseding indictment containing the same charges as had been pending against him for fifteen months, so that the defendant could locate a witness who had no relevance to any material fact at trial?

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Preliminary Statement

On December 14, 2004, after seven days of trial, a jury found the defendant, Jorge Orlando Ardila, guilty of various drug offenses. The evidence at trial established that Ardila, known as "Omar," had been the primary supplier of heroin and a frequent supplier of cocaine to

Frankie Estrada and the Estrada Organization (also known as "The Terminators") in Bridgeport, Connecticut. Estrada ran one of the most prolific, profitable and violent drug trafficking organizations in the history of Bridgeport before it was effectively dismantled following the successful prosecution of its members for offenses involving racketeering, murder, illegal firearms, drug trafficking, and obstruction of justice. *See generally United States v. Jones*, 455 F.3d 134, 139 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3437 (Feb. 20, 2007); *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1637 (2006); *United States v. Estrada*, 320 F.3d 173, 178 (2d Cir. 2000).

Ardila was originally indicted on September 18, 2003, and the substance of the charges against him was replicated in two superseding indictments, returned on January 6, 2004, and November 9, 2004. He waived – both orally and in writing – the Speedy Trial Act's provision that normally would have prevented trial from commencing until 30 days had elapsed after the return of the superseding indictment. A jury was selected on December 1, 2004.

On the day evidence was to begin, the defendant moved to continue the trial or, alternatively, for permission to rescind his prior waivers of the thirty-day period, so he could locate a former roommate who would testify that she was living with the defendant in Florida in 1980. The court denied the motion, explaining that the previous indictments had put the defendant on notice of the charges he faced, that the waivers were valid, and that defense

counsel was prepared to proceed. Trial proceeded, and the jury returned guilty verdicts on all counts against Ardila. The court sentenced him to 30 years in prison.

Ardila raises two interrelated claims for the first time on appeal. First, he claims that the district court abused its discretion when it denied his request for a continuance, made on the morning evidence was to begin, so that he could try to locate his former roommate. Next, he claims that the district court abused its discretion when it denied his request to withdraw prior oral and written waivers of the thirty-day time period before proceeding to trial on the Second Superseding Indictment, so that the defendant could locate the same witness.

This Court should reject both challenges and affirm the conviction.

Statement of the Case

On September 9, 2003, the defendant, Jorge Orlando Ardila, was arrested on a criminal complaint charging him with conspiring to possess with intent to distribute and distributing heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and possessing with intent to distribute and distributing heroin, in violation of 21 U.S.C. § 841(a)(1). (DA 5-6); (GA 1).

On September 18, 2003, a federal grand jury sitting in Hartford, Connecticut, returned a five-count Indictment against Ardila for the same conduct. (DA 6); (GA 20-22).

On January 6, 2004, a federal grand jury returned a First Superseding Indictment, which bifurcated the cocaine and heroin conspiracies against Ardila into two counts, renumbered the remaining counts, and added a co-defendant, Daniel Caro, to the heroin conspiracy charged in Count Two, and to the substantive June 5, 2003, controlled purchase charged in Count Six. (DA 7); (GA 23-26).

On November 9, 2004, a federal grand jury returned a Second Superseding Indictment, which added an additional co-defendant, Christopher Carrillo, to the heroin conspiracy and added three substantive counts against Carrillo alone for controlled purchases of heroin. (DA 11, 20-25); (GA 27-32).[2]

Ardila was arraigned on the Second Superseding Indictment on November 12, 2004, and pled not guilty. (DA 11); (Arraignment Tr. 11/12/04 1-10). That same day, the district court held a status conference during which Ardila orally waived the Speedy Trial Act's thirty-day limitation period before proceeding to trial on a superseding indictment. (GA 50-52). His oral waiver was supplemented by a written Speedy Trial waiver entered on December 1, 2004, before jury selection. (GA 56-64); *see also* Court Exhibit 1 (GA 33).

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[2] The indictment, which was returned between the decisions of the Supreme Court in *Blakely v. Washington*, 542 U.S. 961 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), also included notice of additional, aggravating sentencing factors.

Jury selection took place on December 1, 2004, and evidence began on December 6, 2004. (DA 12-14).

On December 13, 2004, at the close of the government's case, the defendant moved for a judgment of acquittal. (Tr. 12/13/04 162-64). The court denied the motion. (Tr. 12/13/04 165-66).

On December 14, 2004, the jury returned guilty verdicts on all counts against Ardila: Counts One through Six of the Second Superseding Indictment. (Tr. 12/14/04 168-74).

The defendant never moved for a judgment of acquittal or for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure at any time after the jury's guilty verdict and its discharge. (DA 1-19).

On October 26, 2005, Judge Nevas imposed a non-Guidelines sentence of 360 months of imprisonment and a $25,000 fine on Ardila. (DA 137).

Ardila filed a timely notice of appeal on November 1, 2005. (DA 17). He is presently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Facts of the Offense

The facts of the offense are not in dispute.

During the prosecution of the *Estrada* case, Frankie Estrada and several other members of the organization began cooperating with the government, leading to the identification of the organization's primary narcotics supplier and a corresponding "spin-off" investigation into that individual – the defendant, Ardila. (Tr. 12/6/04 35-75; 316-29).

Beginning in the summer of 1996, Ardila became the primary supplier of heroin, and a frequent supplier of cocaine, to Estrada and his organization. (Tr. 12/7/04 131-85); (Tr.12/8/04 58-59). From the summer of 1996 until the arrest of Estrada and numerous members of his organization in November 2000, it was conservatively estimated that Ardila supplied over 250 kilograms of heroin and over 100 kilograms of cocaine to the Estrada Organization in Bridgeport alone. (Tr. 12/7/2004 181-85; 193-94). Ardila supplied kilograms of heroin to other narcotics traffickers in Connecticut as well. (Tr. 12/10/04 206-07; 257-58; 259-61).

The evidence at trial included narcotics obtained through controlled purchases made by cooperating sources, as well as weapons, ammunition, counter-surveillance equipment, narcotics, narcotics packaging materials and

drug paraphernalia (e.g., heroin brand stamps, ink pads, small glassine envelopes, grinding equipment, an electronic scale and breathing masks) – all of which were seized at various locations connected to Estrada's organization. (Tr. 12/6/04 41-75; 101-14; 127-43). The seized narcotics – which included six "bricks" (one "brick" being 100 folds or bags) of heroin from one location (Tr. 12/6/04 69-70); 200 folds of heroin from another location (Tr. 12/6/04 108); and nineteen "bricks" of heroin from yet another location (Tr. 12/6/04 143) – had been supplied to Estrada by the defendant, Ardila. (Tr. 12/7/04 204-13; 226-29).

The evidence at trial also included consensual recordings of, and heroin obtained through, controlled purchases made directly from Ardila on March 3, 2002, July 1, 2002, August 1, 2002, and June 5, 2003 (Tr. 12/7/04 36-37); (Tr. 12/8/04 92-118; 170-204); (Tr. 12/9/04 202-24); (Tr. 12/10/04 56-86), which also formed the basis for the substantive counts of possession with intent to distribute that were brought against Ardila. *See* Second Superseding Indictment, Counts 3-6 (DA 21-22).

The evidence at trial, which included the testimony of six cooperating witnesses, showed that Ardila's narcotics came directly from Colombia and that Ardila or his associates made numerous trips to Miami and the New York City area airports to obtain narcotics smuggled into the country from Colombia. (Tr. 12/9/04 137-46; 161-65); (Tr. 12/10/04 224-28). Among other methods, the drugs were smuggled into the country in materials such as the heels and soles of women's shoes, in disposable diapers,

inside clothing, inside sanitary napkins, and inside birthday cakes. (Tr. 12/7/2004 237-42; Tr. 12/9/04 162-65; Tr. 12/10/04 224-28).

Ardila was extremely conscious of law enforcement and took substantial steps to maintain a low profile and avoid detection of his narcotics trafficking activities. For example, Ardila was very wary of speaking openly about drugs on the phone (Tr. 12/7/04 166-69; 12/9/04 165-66); made frequent use of pay phones (Tr. 12/7/04 20-21); and switched his cellular telephone as often as once a week (Tr. 12/10/04 210). Ardila had access to multiple cars, dealer plates and a license at an area auto auction, which permitted him to change vehicles frequently. (Tr. 12/7/04 20-21; 35-36; Tr. 12/10/04 228-32). Ardila frequently engaged in counter-surveillance techniques to avoid detection by law enforcement. For example, law enforcement officers frequently saw Ardila engage in the practice of "squaring blocks" – i.e., driving around a block for no apparent reason to see who else might follow him, in an effort to identify whether physical surveillance was being conducted by law enforcement. (Tr. 12/7/04 20-21). Ardila also used a volunteer position at St. George's Roman Catholic Church in Bridgeport to further disguise his activities. (Tr. 12/7/04 166).

In an additional effort to avoid detection, Ardila used multiple aliases, identities and dates of birth. (Tr. 12/13/04 77-82; 100-129). Indeed, during post-arrest statements, Ardila told law enforcement officers that he had used so many false identities and it had been so long since he used

his real name, that he could not remember what it was. (Tr. 12/13/04 81).

During post- arrest statements, although Ardila denied trafficking cocaine, he acknowledged trafficking heroin and specifically asked about protection for himself and his family were he to cooperate with the government. (Tr. 12/13/04 82-83).

B. Procedural History

On September 9, 2003, Ardila was arrested on a criminal complaint that charged him with conspiring to possess with intent to distribute and distributing heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; as well as substantive counts of possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). (DA 5-6); (GA 1). The complaint was supported by a detailed affidavit, indicating that Ardila had supplied the Estrada Organization with cocaine from the summer of 1996 through Estrada's arrest in November 2000; and that Ardila had supplied the Estrada Organization and others with heroin from the summer of 1996 through Ardila's arrest in September 2003. (GA 6-9). The complaint affidavit also described, in detail, four controlled purchases of heroin that were made from Ardila on March 3, 2002, July 1, 2002, August 1, 2002, and June 5, 2003, which also served as the basis for additional substantive counts of possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). (GA 10-18).

On September 18, 2003, a federal grand jury returned a five-count Indictment against Ardila for the very same conduct. (DA 6). Specifically, Count One of the original Indictment charged that Ardila, from the summer of 1996 through September 2003, had conspired to possess with intent to distribute and had distributed heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (GA 20). Counts Two through Five of the Indictment charged Ardila with possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1) for the controlled purchases made from him on March 3, 2002, July 1, 2002, August 1, 2002, and June 5, 2003, respectively. (GA 21-22). Accordingly, the conduct charged was precisely the same as had been alleged in the criminal complaint.

On January 6, 2004, a federal grand jury returned a First Superseding Indictment, which divided the cocaine and heroin conspiracies charged against Ardila into two counts, renumbered the remaining counts, and added a co-defendant, Daniel Caro, to the heroin conspiracy and the June 5, 2003, controlled purchase. (DA 7); (GA 23-26). As before, the conduct charged was precisely the same as had been alleged in the criminal complaint and the original Indictment.

On November 5, 2004, after the case had been pending for over a year, and after Ardila had been granted several continuances, Judge Nevas, during a calendar call in court, scheduled the case for jury selection on December 1, 2004, with evidence to begin on December 6, 2004. (DA 10).

On November 9, 2004, a federal grand jury returned a Second Superseding Indictment, which added an additional co-defendant, Christopher Carrillo, to the heroin conspiracy and added three substantive counts against Carrillo alone for controlled purchases of heroin. (DA 11, 20-25). The charges in this indictment changed nothing with respect to Ardila, and the conduct at issue remained precisely the same as had been alleged beginning in September 2003 with the criminal complaint and through the return of the original Indictment, the First Superseding Indictment, and the Second Superseding Indictment.

On November 12, 2004, Ardila was arraigned and pled not guilty to the Second Superseding Indictment. (DA 11). The district court held a status conference to discuss the upcoming trial on the same day. (DA 11); (Status Conference Tr. 11/12/04 1-15).

Because jury selection was scheduled to take place nineteen days later, on December 1, 2004, and evidence was scheduled to begin twenty-four days later, on December 6, 2004, the district court inquired whether Ardila was willing to waive the Speedy Trial Act's thirty-day waiting period before proceeding to trial on a superseding indictment. (GA 50-52). Ardila, with the advice of counsel and the assistance of an interpreter, orally waived the thirty-day limitation. *Id.*

> [Prosecutor]: Now, there are a couple of issues with respect to Mr. Ardila that we do need to take up, however, and that would be that Mr. Ardila, to

the extent that he would be proceeding to trial in fewer than 30 days, would have to agree to a trial in less than 30 days on the superseding indictment, and I believe Attorney O'Reilly has had conversations with Mr. Ardila to that effect, and we should probably make a record of that.

Mr. O'Reilly: I spoke with him last night at Wyatt, Your Honor, and I informed him of that, and we're ready to – we will be ready to go [to trial] at that time.

The Court: Okay.

(GA 50). The court directed defense counsel to articulate the waiver issue for the record and canvassed the defendant.

The Court: Well – just put on the record what the problem is.

Mr. O'Reilly: Well, first of all, just to let you know, Your Honor, we – he was presently arraigned on the second superseding indictment, and you know, there's a 30-day window that needs to be waived before he

can go to trial within that 30 days. I've discussed that with him and he's agreeing to waive that; and then secondly, Mr. –

The Court: Wait a minute. Let's just – Mr. Ardila, you understand that you've just been recently arraigned on the latest indictment, and there's a 30-day period within which the – window that you have, that you are not required to go to trial, but you can waive that and go to trial as quickly as possible, and my understanding is you wish to waive that because you want this trial to begin as soon as possible; is that correct?

The Defendant: Yes, sir.

The Court: All right. So you waive that 30-day period?

The Defendant: I waive the 30 days and – Yes, the things seem okay as they are.

(GA 51-52); *see also* Def.'s Brief at 18 ("At the arraignment, the Defendant orally waived the thirty-day waiting period set forth in 18 U.S.C. § 3161 . . . ."); (GA 68) (defense counsel stating that Ardila "previously orally

waived the 30-day period . . . at the time of his arraignment.").

On November 30, 2004, the day before jury selection, the district court held an additional status conference to discuss any issues for the upcoming trial. (Tr. 11/30/04 1-10). While discussing the anticipated length of trial, defense counsel stated, "I think the defense case would be very short, if there is any – if there is even one." (GA 54).

Before jury selection began the following day, the government asked the court to reconfirm that Ardila had no objection to proceeding within that thirty-day period and requested a written waiver. *See* 18 U.S.C. § 3161(b)(2); (GA 56-57). The following exchange occurred:

> Mr. O'Reilly: . . . We did that the last time we were here, and I think in an abundance of caution, the government wants a written waiver because that's what the rule actually says.
>
> I haven't had an opportunity to provide it to them as of yet.
>
> The Court: Have you discussed that with your client?
>
> Mr. O'Reilly: I have in the past, Your Honor. But I'll do it –

The Court: Just do it now and have him sign it. Do you have it here for him to sign?

Mr. O'Reilly: I drafted something this morning, Your Honor. It's just very basic, but I think it will cover it.

The Court: Why don't you discuss it with him and have him sign it right now.

(GA 57).

As counsel for Ardila conferred with his client, the district court "just as a matter of information," and without "pressuring you in any way," informed counsel that, due to the court's schedule, if the trial did not commence in December, the court would not be available until the following April or May. (GA 58-59).

After a private discussion between Ardila, defense counsel and the interpreter, counsel for the defendant submitted Ardila's written waiver to the court and asked the court to canvas him on it. (GA 59). The following exchange occurred:

The Court: All right. Well, first, I think the record should reflect that for about the last twenty minutes or so, Mr. O'Reilly and the

interpreter have been conversing with Mr. Ardila.

Obviously, the Court is not privy to what that conversation was, but I assume, Mr. O'Reilly, that you were explaining the rule to him about that he has the right to be tried – that he can – there can be a delay of at least thirty days or more from the time the superseding indictment –

Mr. O'Reilly: I have.

The Court: – was returned. But he can waive that and elect to go to trial now.

Mr. O'Reilly: That's true, Your Honor. I did explain that to him. However, the entire twenty minutes wasn't consumed by that discussion. He had other issues that he was asking me about and was – and it was a – he needed to focus on the issue at hand.

The Court: All right.

Mr. O'Reilly: He finally did.

(GA 59-60).

The court proceeded to canvas Ardila directly. The court explained the thirty day limitation further and asked the defendant whether he was willing to waive that period and proceed to trial. (GA 60-62). At the end of that canvas the following transpired:

The Court: The question is, do you want to go ahead this morning with jury selection and start the trial next Monday?

The Defendant: Yes.

The Court: Yes or no?

The Defendant: Monday, yes.

The Court: Yes, you want to do that? Okay.

The Defendant: Yes, sir.

(GA 62). The court proceeded as follows:

The Court: Then you have to waive the thirty day requirement. Mr. O'Reilly has explained it to you. I've explained it to you. You want to waive it or not?

The Defendant: Yes, yes, I waive it then.

The Court: All right. Then the waiver is accepted and the Court finds that it was knowingly and voluntarily entered into.

(GA 63). The court designated and filed the written waiver as Court Exhibit 1. (GA 64); *see also* (GA 33).

A jury was chosen, and evidence was scheduled to begin on December 6, 2004.

On December 6, 2004, just before evidence was to begin, the defendant requested a continuance of the trial. In the alternative, he asked to rescind his waiver of the thirty-day limitation. He claimed that a further continuance and/or rescission of the waiver was necessary so that he could locate a witness who would testify that the defendant and the witness lived together in Florida in 1980. Ardila claimed that he had been in a car accident approximately ten years prior, which he claimed had caused him memory problems, and he had only now begun to recall events and people who he claimed might exonerate him. (GA 66-67). Counsel further indicated that, during a meeting with Ardila over the intervening weekend, he had expressed a desire to rescind his prior waiver of the thirty day limitation period. (GA 68). Counsel for the defendant, however, was prepared to proceed, notwithstanding his client's request:

> Your Honor, just to give a little history here, as you well know, I was appointed to represent Mr. Ardila because his previous counsel had been excused from the case. Your Honor gave me six or seven weeks to prepare, which I feel is sufficient. I feel that I am prepared to go forward.
>
> However, as I – after my appointment, I immediately went to visit Mr. Ardila in the Wyatt Detention Center. I probably visited him six or seven times in the six or seven week period, and his claim is that the intensity of our interaction and the development of the evidence has caused him to recall events that he was not aware of previously, and that he has now remembered evidence that Mr. Ardila claims will be a substantial factor in exonerating him in this case, and he expressed that to me, this new evidence, yesterday.

(GA 69). Counsel requested that the court either continue the trial or allow the defendant to "rescind the waiver and allow Mr. Ardila to be tried after the 30-day period." (GA 69-70).

The court summarized the history of the waiver as follows:

> My understanding of the record is that while I was not at the arraignment, based on representations of counsel that he did, in fact, waive the 30 days at the time of his arraignment, and based on that waiver, of course, everyone proceeded to prepare

for trial. Jury selection was scheduled, and at the time of jury selection last week . . . I believe it was Mr. Reynolds for the government, indicated that the waiver should be in writing, and Mr. O'Reilly prepared something by hand – a handwritten waiver and gave it to Mr. Ardila to sign.

My recollection is that there was a long conversation between Mr. O'Reilly and Mr. Ardila, lasting some 15 or 20 minutes, or perhaps even longer, and Mr. O'Reilly indicated that there was some issue or problem with respect to Mr. Ardila signing a waiver.

Upon the Court's further inquiry, it was – Mr. O'Reilly reported that the conversation was mainly not about the waiver, but that Mr. Ardila was raising a number of other issues with him during this conversation at counsel table, and that the waiver was not a major part of their discussion.

The Court had colloquy with Mr. Ardila, explaining to him that if the matter did not go forward with jury selection last Wednesday and proceed to trial today, because of the Court's schedule, it was likely that he would not be tried until next April or May, and he would just simply have to wait. He indicated that he understood that, and then he signed the waiver. He signed the

> waiver in open court, and it was made a court exhibit.
>
> While the court obviously has no direct knowledge or direct evidence, the Court's suspicion or guess is that Mr. Ardila received some form of legal advice from [a] person or – a person or persons unknown who are fellow inmates at the jail, when he got back and this is what has caused him now to say he wants to retract his waiver. Certainly isn't based on any legal advice that Mr. O'Reilly has given him, but I think in fairness I should hear from Mr. Ardila, and hear what he has to say, and then the Court will rule.

(GA 70-72).[3]

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[3] The court's suspicions regarding Ardila's sudden recollections were arguably borne out during a court-ordered psychological evaluation of the defendant performed at FCI Butner in aid of sentencing. Specifically, during the pre-sentence investigation, Ardila claimed that he had "always heard voices"; had heard them several times during his pre-trial and pre-sentence periods of incarceration; and had even felt someone breathe on him in a holding cell while he was alone. PSR ¶60. In light of this, on or about February 18, 2005, the court ordered a psychological/psychiatric study of the defendant in aid of sentencing. (DA 15). The evaluation found that "Mr. Ardila's self-report of post-accident functioning did not provide evidence of any significant difficulties in daily functioning." *See Excerpt from Forensic Evaluation, Mental Health*

(continued...)

The defendant responded as follows:

> Mr. Ardila: What I realize is – Well, I did not live here in 1980. At that time I was living in Florida. After that I went to Puerto Rico. I had an accident. I'm trying to remember the name of the attorney who represented me in Puerto Rico, and I've not been able to remember his name. I'm trying to because I have a lot of things that work in my favor because I was not living here at that time.

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[3] (...continued)
Department, Federal Medical Center, Butner, North Carolina dated July 29, 2005 at 15. (GA 35). The report further found that "it does not appear Mr. Ardila suffers from a mental illness. He may have some mild cognitive problems, but these deficits are not sufficient to warrant any diagnosis . . . . Given his previous reports of hearing voices, consideration was made as to whether Mr. Ardila might suffer from a psychotic disorder. However, the voices he reported are not at all consistent with a psychotic disorder . . . . It appears this may have simply been a religious experience he had several months ago, which was brief in nature and has not occurred since." *Id.* at 16. The report concluded that, "[A]t most, Ardila may have forgotten particular details related to the offense behavior (*e.g.*, precise cost or amount of drugs, the time and date of a particular transaction, *etc.*), however, his memory, reasoning, and decision making are largely intact." *Id*. at 17. (GA 37).

And, Your Honor, I ask you to please give me this opportunity so that I can – Well, not me, but so that my wife can get in contact – the woman I was living in – with at that time, so she can come and give testimony for me on my behalf.

The Court: In 1980? Are we talking about 1980?

Mr. Ardila: Yes. Yes. Yeah, 1980 and forward.

The Court: What does 1980 have to do with this indictment?

Mr. Ardila: What my attorney told me yesterday that Mr. Juan Rosario says that I was working with him, and that was a lie, and then Edward Gonzalez, also talking about his father. Those are lies, and I want to be able to prove it.

Mr. O'Reilly: What he told me yesterday, Your Honor, is that that was for – throughout the '80s, and –

The Court: Well, I'm looking at the indictment, and the indictment –

the dates in the indictment, the earliest date is beginning in the summer of 1996, but all the other dates are beginning in March of 2002, July 2002, August 2002, June 2003. So there are no dates that go beyond – back beyond 1996.

Mr. O'Reilly: I think what his issue is, is the credibility – to attac[k] the credibility of certain government witnesses, Your Honor. I explained to him yesterday, essentially the observation that you just made. However, he thinks it's essential to the impeachment of government witnesses.

The Court: Let me inquire of you, Mr. O'Reilly. I know, based on conversations we've had in Chambers and yesterday on the telephone, that you feel you are prepared. You have met with your client, what did you say, six or seven times?

Mr. O'Reilly: I would – I don't know exactly, Your Honor, but yes, I'd say that. Yes.

The Court: And I take it that those sessions were lengthy?

Mr. O'Reilly: Yes.

The Court: And that – Is it fair to say that you are – you feel that you're prepared to go forward this morning, and that [you're] comfortable that you've done everything necessary to prepare yourself and your client for this trial?

Mr. O'Reilly: Yes, Your Honor, with the caveat that what Mr. Ardila just articulated was informed to me yesterday. However, I'd just like to leave it at that.

The Court: All right.

(GA 72-75).

Government counsel proffered the following:

> I would just offer an observation, Your Honor. Mr. Rosario, who the defendant referred to earlier, will be offering some background evidence which predates the date in the indictment, indicating that he was in contact with the defendant. He will explain how their drug

trafficking relationship developed through – from in or about the late '80s through the early '90s, and it would be – it's the government's understanding that he will testify that the defendant used to make regular trips from Connecticut down to Florida.

So even assuming the defendant's claims were true, it's not in the form of an alibi that the defendant is offering at this time. The government's contention [is] that the defendant had sources of supply in, among other places, Florida, and that he regularly made trips down there.

So unless he has a witness who can say that it was physically impossible for the defendant to leave Florida, it simply would not rise to the level of evidence which would tend to exonerate the defendant.

(GA 75-76).

The court added the following observations:

The Court would also note that, looking at the substantive counts of the superseding indictment, there can be no surprises for the defendant or his counsel, comparing the second superseding indictment to the previous indictment, or to the one immediately preceding this indictment.

> The substantive counts essentially [are] saying, with respect to this defendant, there may be other defendants who are added, but the substantive counts with respect to this defendant are the same, with the exception of the addition of so-called *Blakely* enhancing factors, which have been added, but in terms of the substantive counts, they're the same. So I think that should be noted for the record.

(GA 76).

The court therefore denied the defendant's request for a continuance:

> Having heard from counsel, the Court finds that the waiver – 30-day waiver was proper, was done orally. It was then confirmed in writing. The defendant had ample opportunity to discuss the issue of the waiver with counsel. Mr. O'Reilly has represented to the Court that he has met with his client six or seven times, that he feels he's prepared to go forward and therefore we will proceed with the trial this morning.

(GA 76-77).

At trial, Juan Rosario testified that he had met Ardila approximately twenty years earlier and, among other things, accompanied the defendant on trips to Florida to obtain narcotics smuggled into the United States. (GA 79-93). Rosario's direct narcotics trafficking relationship

with Ardila, however, did not begin until the early 1990s. *Id.* Specifically, Rosario began traveling to Florida and New York with Ardila in the early 1990s. Rosario took trips with him to Florida for that purpose a few years before the witness went to prison in February of 1996. (GA 92-93) It was not until the late 1990s or early 2000s that Rosario reconnected with Ardila and became involved in Ardila's distribution of heroin. *Id.* In short, Rosario did not meet Ardila until about 1984 or 1985 and his narcotics trafficking relationship with Ardila did not begin until 1993 or 1994. *Id.*

Cooperating witness Edwin Gonzalez testified that he had met Ardila approximately twenty years earlier. (Tr. 12/10/04 193-94). Gonzalez was twenty-nine years old at the time of his testimony and recalled having met the defendant through the witness's father when the witness was ten or eleven years old. (Tr. 12/10/04 at 194). No testimony was ever elicited from Gonzalez that related to narcotics trafficking predating 1999.[4]

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[4] Juan Rosario was disclosed as a cooperating witness on November 5, 2003. (GA 39, 40). Edwin Gonzalez was disclosed as a cooperating witness after he waived indictment, pled guilty to a one-count information and entered into a cooperation agreement with the government on October 1, 2004. (GA 46). Although the government was under no obligation to do so, the report (or "FBI 302") of Edwin Gonzalez's debriefings with the government was provided to defense counsel on November 22, 2004, almost three weeks before his December 10 and 13, 2004 testimony. (GA 46). Similarly, the report (or "FBI 302") of Juan Rosario's (continued...)

On October 26, 2005, Judge Nevas sentenced Ardila. Because Ardila had a total adjusted offense level of 43, the Sentencing Guidelines called for a sentence of life imprisonment. (Tr. 10/26/05 17). Judge Nevas, however, imposed a non-Guidelines sentence of 360 months of imprisonment and a $25,000 fine. At Ardila's sentencing, Judge Nevas noted that the evidence at trial against Ardila was "overwhelming" (Tr. 10/26/05 18) and commented: "You were a major drug dealer, Mr. Ardila, [a] major drug dealer, and you . . . skated below the radar screen for many, many years . . . . The evidence is overwhelming." (Tr. 10/26/05 51).

SUMMARY OF ARGUMENT

1. Ardila has not met, and cannot meet, his burden of showing that the district court clearly abused its broad discretion in an arbitrary manner that substantially impaired his defense when it denied his eleventh-hour request for a continuance. First, the district court's denial of the motion did not alter defense counsel's trial plan in any way, and the defendant had been aware of the charges and the conduct to be proven at trial for over fifteen months prior to his requested continuance. Second, denial of his request for a continuance was proper because the proffered testimony from Ardila's former roommate had no temporal relevance and did not call the credibility of the

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[4] (...continued)
debriefings with the government was provided to defense counsel on November 30, 2004, more than a week before his testimony on December 9, 2004. (GA 48).

government's witnesses into question. Finally, Supreme Court precedent instructs that an abuse of discretion cannot be found where, as here, a request for a continuance is made by the defendant himself, but defense counsel clearly and unequivocally represents to the court that he is fully prepared and ready to go to trial.

2. Contrary to the assumptions of the parties and the district court below, the thirty-day waiting period of the Speedy Trial Act is not reset by the return of a superseding indictment. *See United States v. Rojas-Contreras*, 474 U.S. 231, 234 (1985). Ardila's waiver was therefore superfluous, and there was no violation of the Speedy Trial Act. Even assuming *arguendo* that a new waiting period had commenced, the district court did not abuse its broad discretion when it denied Ardila's motion to rescind prior waivers of that waiting period. First, Ardila's interest in rescinding his waiver had nothing to do with the purpose of the thirty-day waiting period, but rather was made to locate a witness whose proffered testimony was irrelevant. Second, as the district court found, the Second Superseding Indictment presented "no surprises," as the charges and conduct remained the same from the filing of a detailed criminal complaint fifteen months earlier. Third, as the district court found, Ardila's sudden wish to rescind his prior waivers was based on subjective beliefs of the defendant and not on any legal advice of counsel. Finally, the defendant's waivers were both knowing and voluntary, as they were made in open court, three times, with the assistance of counsel and an interpreter, and after the court conducted a thorough canvas.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN THE CONDUCT OF TRIAL WHEN IT DENIED THE DEFENDANT'S BELATED REQUEST FOR A CONTINUANCE

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts and Proceedings Relevant to this Appeal" section above.

B. Governing Law and Standard of Review

This Court reviews a district court's denial of a request for a continuance for an abuse of discretion. *See United States v. Pascarella*, 84 F.3d 61, 68 (2d Cir. 1996) ("'The disposition of a request for continuance rests in the discretion of the trial judge and the exercise of that discretion will not be disturbed unless a clear abuse is shown.'") (quoting *United States v. Bentvena*, 319 F.2d 916, 934-35 (2d Cir. 1963)); *see also United States v. Hurtado*, 47 F.3d 577, 584 (2d Cir. 1995) ("[W]e review the district court's decision not to grant a continuance for time to prepare for an abuse of discretion. . . . The sole requirement of such a denial is that it be reasonable under the circumstances.").

The district court has "broad" discretion over the conduct of trials before it and this Court will not reverse absent a showing of arbitrariness and prejudice to the

defendant. *See United States v. Cusack*, 229 F.3d 344, 349 (2d Cir. 2000) (district court "has broad discretion to grant or deny a motion for a continuance") (citing *Pascarella*, 84 F.3d at 68)); *United States v. Arena*, 180 F.3d 380, 397-98 (2d Cir. 1999); *United States v. Beverly*, 5 F.3d 633, 641 (2d Cir. 1993) ("To demonstrate an abuse of this discretion, a defendant must demonstrate arbitrary action that substantially impaired the defense."); *see also United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996) (motion to adjourn the start of trial is left to the discretion of the trial judge); *United States v. King*, 762 F.2d 232, 235 (2d Cir. 1985) ("[t]o show abuse of that discretion, the defendant must demonstrate that the court's denial of a continuance was arbitrary and substantially impaired his defense."). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964).

C. Discussion

Ardila has failed to show that the trial court clearly abused its discretion in an arbitrary manner that substantially impaired his defense.

Ardila's request to continue the trial was made on the first day of trial, five days after the jury was empaneled and moments before evidence was to begin. At the time of his request, his case had been pending for fifteen months. (DA1-12). Moreover, the charges he faced and the conduct at issue had remained unchanged since September of 2003. (GA 1). As the trial court observed, "there can be no surprises for the defendant or his counsel . . . the substantive counts are the same . . . ." (GA 76). Further, Ardila was aware in November of 2003 that Rosario would be a witness – more than a year before he testified on December 9, 2004. (GA 40). Similarly, Edwin Gonzalez was disclosed as a cooperating witness shortly after he entered a plea and cooperation agreement on October 1, 2004 – almost a month and a half before his testimony on December 10th and 13th, 2004. (GA 43). Finally, the government provided the defendant with the reports of the FBI's interviews of Rosario and Gonzalez – which set forth the substance of their anticipated testimony – at least a week before they testified and well before the defense case, which began on December 13, 2004. (GA 46, 48).

Because Ardila had more than fifteen months to consider the conduct alleged in the case and had substantial notice regarding the trial schedule, the anticipated witnesses, and the testimony to be elicited

during trial, the district court's decision to deny his request for a continuance moments before the jury was to enter the courtroom was neither arbitrary nor a clear abuse of discretion. *Pascarella*, 84 F.3d at 68-69 (district court did not abuse its discretion in refusing defendant's request for one-week postponement of trial, first requested four days before trial began, to enable defendant's newly selected lawyer to prepare for trial); *United States v. Bein*, 728 F.2d 107, 114 (2d Cir. 1984) (district court did not abuse its discretion in denying one-day stay for President's Day where defendant knew two weeks in advance that he might have to call witnesses on President's Day).

Likewise, the defense was not "substantially impaired," nor was the defendant prejudiced by the court's refusal to grant a continuance. First, the denial did not appear in any way to alter defense counsel's trial plan. *See* (GA 54) ("I think the defense case would be very short, if there is any – if there is even one.").

Second, Ardila's request for a continuance was so that he could locate a former roommate who would have testified that she lived with Ardila in Florida in or about 1980.[5] As the district court aptly noted, however, the proffered testimony was irrelevant because Ardila's indictment alleged: (1) a conspiracy to possess with intent to distribute and distribution of cocaine from 1996 through 2001; (2) a conspiracy to possess with intent to distribute

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[5] No showing was made, to the trial court or this Court, that Ardila was or would have been unable to locate the witness in the week or more before the defense case began.

and distribution of heroin from 1996 through 2003; and (3) substantive charges that Ardila possessed with intent to distribute heroin on four dates in 2002 and 2003. (GA 73-74; 76).

At best, the proffered testimony might have been relevant to challenge Rosario and Gonzalez's memory or credibility about remote background facts leading to the charged conduct. Rosario's testimony, however, was that he and Ardila did not begin their narcotics trafficking relationship until the early 1990s, more than a decade after the events the proffered witness would have testified about. Moreover, it was not until the late 1990s or early 2000s that Rosario reconnected with Ardila and became involved in his distribution of heroin, nearly two decades after the events the proffered witness would have testified about. (GA 79-89; 91-93). Similarly, Gonzalez's testimony was limited to his interactions with Ardila beginning in 1999 or early 2000. Thus, Ardila's claimed need for a continuance was to locate a witness identified only at the eleventh hour and who had little, if any, relevance to the charged conduct. *Cf.*, *e.g., Cusack*, 229 F.3d at 349 (district court did not abuse its discretion in denying defendant's motion for a continuance to allow an additional handwriting expert – who the defendant announced for the first time in the middle of trial that he intended to call – to prepare for his trial testimony); *see also United States v. Mauro*, 80 F.3d 73, 76-77 (2d Cir. 1996) (denial of a continuance was proper in light of the "marginal relevance" of the proffered testimony); *Bein*, 728 F.2d at 114 (denial of a continuance was not an abuse

of discretion where proffered testimony would not have aided appellants).

Because the proffered testimony from Ardila's former roommate had little or no relevance to the matters at trial, it cannot be said that the district court abused its discretion or that the appellant's defense was "substantially impaired."

Finally, Supreme Court precedent indicates that an abuse of discretion cannot be found where, as here, the request for a continuance is made by the defendant himself but defense counsel clearly informs the trial court that he or she is fully prepared and ready for trial. *See Morris v. Slappy*, 461 U.S. 1, 12 (1983). It is undisputed that the requested continuance was from the defendant, rather than defense counsel. *See* (GA 69; 74-75); *see also* Def.'s Brief at 12 ("The Defendant himself made the request directly to the District Court and not through counsel."). Counsel for the defendant, however, represented that he was fully prepared to proceed with trial. *See* (GA 69) ("Your Honor gave me six or seven weeks to prepare, which I feel is sufficient. I feel that I am prepared to go forward."); *see also* (GA 74-75). As the Supreme Court stated in a similar context, "[i]n the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial, it [i]s far from an abuse of discretion to deny a continuance" requested by the defendant himself. *Morris*, 461 U.S. at 12. Indeed, here, as in *Morris*, "[o]n this record, it would have been remarkable had the trial court not accepted counsel's assurances." *Id*.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST TO WITHDRAW HIS ORAL AND WRITTEN WAIVERS OF THE SPEEDY TRIAL ACT'S THIRTY-DAY TIME PERIOD BEFORE PROCEEDING TO TRIAL ON A SUPERSEDING INDICTMENT

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts and Proceedings Relevant to this Appeal" section above.

B. Governing Law and Standard of Review

1. Speedy Trial Act

The Speedy Trial Act provides, in relevant part:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

18 U.S.C. § 3161(c)(2). The Supreme Court has held that this statute "clearly fixes the beginning point for the trial preparation period as the first appearance through counsel," and "does not refer to the date of the indictment, much less to the date of any superseding indictment." *United States v. Rojas-Contreras*, 474 U.S. 231, 234

(1985). Accordingly, a defendant is not entitled to a new thirty-day trial preparation window following the return of, or arraignment on, a superseding indictment. *Id.*

2. Withdrawals of Speedy Trial Act Waivers

Although there appears to be no case law in this Circuit directly addressing the standard of review for a district court's denial of a motion to withdraw a waiver under the Speedy Trial Act, as set forth above, a district court has broad discretion over its trial timetable, and decisions made by the trial court in that regard are reviewed for an abuse of discretion. *See, e.g., Cusack*, 229 F.3d at 349; *Pascarella*, 84 F.3d at 68; *Arena*, 180 F.3d at 397-98; *Beverly*, 5 F.3d at 641; *Edwards*, 101 F.3d at 19; *King*, 762 F.2d at 235. In addition, other Circuits have applied an abuse of discretion standard to a district court's denial of a motion to withdraw other, previously waived rights. *See, e.g., United States v. Holmen*, 586 F.2d 322, 323-24 (4th Cir. 1978) (per curiam) (applying abuse of discretion standard to district court's denial of defendant's motion to withdraw his waiver of a jury trial); *United States v. Angiulo*, 497 F.2d 440 (1st Cir. 1974) (applying abuse of discretion standard to district court's denial of a defendant's motion to withdraw his previously granted motion for a transfer of venue).

Similarly, and by way of analogy, this Circuit applies an abuse of discretion standard to a district court's denial of a defendant's motion to withdraw a guilty plea. *See, e.g., United States v. Yu*, 285 F.3d 192, 198 (2d Cir. 2002)

(whether a defendant is permitted to withdraw a plea "is a matter largely left to the discretion of the district court"); *United States v. Hernandez*, 242 F.3d 110, 112 (2d Cir. 2001) ("We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion."). In that context, when reviewing the district court's decision, this Court may overturn findings of fact by the lower court only if they were clearly erroneous, and reverse its decision only if the denial of the motion was an abuse of discretion. *United States v. Schmidt*, 373 F.3d 100, 102 (2d Cir. 2004) (per curiam); *United States v. Juncal,* 245 F.3d 166, 170-71 (2d Cir. 2001); *United States v. Gregory*, 245 F.3d 160, 164 (2d Cir. 2001).

In addition, "a defendant's mistaken subjective impressions . . . in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to [grant a motion to withdraw a guilty plea]." *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972). Moreover, a district court does not abuse its discretion by relying on a defendant's statements during a previous canvas and by discrediting later self-serving and contradictory statements as to whether an earlier decision was knowingly and intelligently made. *Cf. Juncal*, 245 F.3d 171 (citing *Blackledge v. Allison,* 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *see also United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999) ("[S]tatements made to a federal judge in open court are not trifles that defendants may elect to disregard. . . . [W]hen the judge credits the defendant's statements in open court, the game is over.").

C. Discussion

For two reasons, the district court did not err in commencing trial within 30 days of the return of the superseding indictment. First, in light of the Supreme Court's authoritative interpretation of § 3161(c)(2), the return of the superseding indictment, which simply reiterated the previous charges against the defendant, did not give rise to a new thirty-day waiting period; accordingly, the defendant's waiver was superfluous.[6] Second, even if a waiver had been required, the district court did not abuse its discretion when it denied Ardila's request to rescind his oral and written waivers.

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[6] The Government did not raise this argument before the district court. Nevertheless, this Court is free to affirm a district court's decision on any ground that is supported by the record. *See, e.g., United States v. Gregg*, 463 F.3d 160, 166 (2d Cir. 2006) (per curiam); *United States v. Yousef,* 327 F.3d 56, 156 (2d Cir. 2003).

1. The Thirty-Day Waiting Period Established by § 3161(c)(2) Was Not Reset by the Second Superseding Indictment

Although both parties and the district court were operating on the assumption that the defendant's waiver was required to commence trial within thirty days of the superseding indictment, that assumption was flawed. As the Supreme Court held in *Rojas-Contreras*, the thirty-day waiting period does not restart upon the filing of a superseding indictment.[7]

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[7] The parties' and the district court's assumption likely originated from the District of Connecticut's Speedy Trial Plan. Although *Rojas-Contreras* stands for the proposition that the return of a superseding indictment does not trigger a new thirty-day waiting period under the Speedy Trial Act, the District of Connecticut's Speedy Trial Plan, which was last amended in 1984, prior to the Supreme Court's decision in *Rojas-Contreras*, appears to be to the contrary. Specifically, Paragraph 7 of the District of Connecticut's Speedy Trial Plan, entitled "Minimum Period for Defense Preparation," reads, in pertinent part: "[u]nless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days *from the date on which the indictment or information is filed,* or, if later, from the date on which counsel first enters an appearance . . . ." *See Final Speedy Trial Plan for the District of Connecticut,* ¶ 7 (D. Conn. 1984) (emphasis added). Although this provision appears to conflict with the Supreme Court's holding in *Rojas-Contreras* that Section 3161(c)(2) fixes the beginning point for the trial preparation period as the first (continued...)

In all relevant respects, the situation in the present case corresponds to the one confronted by the Supreme Court in *Rojas-Contreras*. In that case, the defendant had been indicted on February 18, 1983. *See* 474 U.S. at 233. He was arraigned that same day, and trial was set for April 19, 1983. In mid-March 1983, the Government realized that the indictment contained a minor error (it alleged that a prior conviction occurred on "December 17" rather than "December 7") and obtained a superseding indictment with the correction on April 15, 1983. The defendant was arraigned on the superseding indictment on April 18. At a pretrial conference later that day, the defendant sought a continuance, on the ground that the superseding indictment triggered a new thirty-day waiting period under the Speedy

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[7] (...continued)
appearance through counsel, it is well established, in any event, that the Speedy Trial Plans implemented by the district courts do not, in and of themselves, create or confer substantive rights for a defendant beyond those that already exist pursuant to the Sixth Amendment and the Speedy Trial Act. *See*, *e.g.*, *United States v. Yagid*, 528 F.2d 962, 966 (2d Cir. 1976) ("The purpose of all the Plans for Achieving Prompt Disposition of Criminal Cases has been to serve the public interest in the prompt adjudication of criminal cases and not 'primarily to safeguard defendants' rights.'") (quoting *United States v. Flores*, 501 F.2d 1356, 1360, n.4 (2d Cir. 1974)); *see also Final Speedy Trial Plan for the District of Connecticut,* ¶ 10(b) ("Nothing in this plan shall be construed to require that a case be dismissed or a defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §§ 3162 and 3164.").

Trial Act. The district court denied the continuance, *id.* at 233; and the Ninth Circuit reversed, *id.* at 233-34.

The Supreme Court ultimately agreed with the district court that the superseding indictment did not restart the thirty-day clock. *Id.* at 234. In reaching this conclusion, the Supreme Court focused on the text of § 3161(c)(2), which directs that "the trial shall not commence less than thirty days *from the date on which the defendant first appears through counsel.*" 474 U.S. at 234 (emphasis added in *Rojas-Contreras*). As the Court explained, "[t]he statute clearly fixes the beginning point for the trial preparation period as the first appearance through counsel. It does not refer to the date of the indictment, much less to the date of any superseding indictment." *Id.* The Court noted that its holding did not curtail a district court's "broad discretion" to grant continuances "when necessary to allow further preparation." *Id.* at 236. A court's authority under § 3161(h)(8) to grant an "ends of justice" continuance "should take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant." *Id.* In *Rojas-Contreras*, the Court held that the defendant "was not prejudiced" by the minor technical correction contained in the superseding indictment, and that the district court accordingly did not err in denying a continuance.

As in *Rojas-Contreras,* the defendant here "was not prejudiced" by the return of the superseding indictments. As noted above, the substance of the charges against Ardila never changed from the time he was brought up on a criminal complaint. Accordingly, even under an ends-of-

justice analysis, the district court did not err in refusing to postpone the trial.

2. Assuming Arguendo That the Thirty-Day Waiting Period Was Reset, The District Court Did Not Abuse Its Discretion in Denying Ardila's Request to Withdraw His Waivers

Even if the Supreme Court had reached a contrary conclusion in *Rojas-Contreras* and held that the thirty-day waiting period is restarted by the return of a superseding indictment, or assuming *arguendo* that the thirty-day waiting period set forth in the District's Speedy Trial Plan is an appropriate exercise of the district court's "ends of justice" authority under § 3161(h)(8) notwithstanding *Rojas-Contreras*, it would still be true that the district court here did not abuse its discretion in denying Ardila's motion to withdraw his waiver.

As an initial matter, it should be noted that Ardila does not challenge the validity of his waivers and concedes that he waived that right both orally and in writing. *See, e.g.,* Def.'s Brief at 18 ("At the arraignment, the Defendant orally waived the thirty-day waiting period set forth in 18 U.S.C. §3161 . . . . In addition, before jury selection, on December 1, 2004, the Defendant's attorney drafted and the Defendant executed a handwritten waiver."); *see also* (GA 33; 50-52; 56-64).

Rather, Ardila's claim is that the district court abused its discretion when, on the first day of evidence, it denied

his motion to withdraw his earlier waivers. *See* Def.'s Brief at 11-12 ("Summary of Argument" . . . . "[T]he District Court improperly denied the Defendant the opportunity to withdraw his waiver of the thirty-day waiting period provided by the Speedy Trial Act. The Defendant sought to withdraw his waiver in order to locate additional witnesses that would further his defense. As a result, the decision to deny the Defendant the opportunity to withdraw his waiver was an abuse of discretion."); *see also id.* at 19 ("The trial court improperly denied the Defendant the opportunity to withdraw his waiver of the thirty-day waiting period.); *id.* at 22 ("[T]he District Court improperly denied the Defendant permission to withdraw his waiver of the thirty-day requirement set forth in the Speedy Trial Act."); *id.* ("In conclusion, the District Court abused its discretion when it refused the Defendant the opportunity to withdraw his waiver of the thirty-day requirement found in the Speedy Trial Act.").

For much the same reasons articulated in Section I above, the district court's denial of Ardila's effort to rescind his oral and written waivers of the thirty-day waiting period was not an abuse of discretion.

First, Ardila's motion to withdraw his waivers was made at the same time as, and in conjunction with, his request for a continuance. Both were made for the express purpose of locating the same former roommate who would have testified that she lived with Ardila in Florida one to two decades before the charged offenses. *See* (GA 69-70) (requesting that the court either continue the trial or that the court allow Ardila to "rescind the waiver and allow

Mr. Ardila to be tried after the 30-day period"); *see also* Def.'s Brief at 21 ("the Defendant sought to withdraw his waiver in order to locate additional witnesses that, presumably, would further his defense"). Accordingly, it is undisputed that Ardila's effort to rescind his waiver had *nothing* to do with the purpose of the thirty-day waiting period – i.e., to give a defendant time to digest and prepare to respond to allegations in an indictment. Nor did Ardila claim that the waivers were not knowingly, intelligently and voluntarily made. Rather, the request was solely for the purpose of delay, to locate a witness who the trial court determined had no relevance to any issue at trial.

As the district court observed at the time of Ardila's request to rescind, "there can be no surprises for the defendant or his counsel, comparing the second superseding indictment to the previous indictment, or to the one immediately preceding this indictment . . . . the substantive counts with respect to this defendant are the same . . . ." (GA 76). In other words, there was nothing before the trial court – and nothing is offered to this Court – to suggest that Ardila's eleventh hour vacillation was triggered by any substantive change occasioned by the Second Superseding Indictment. In fact, there could not have been, inasmuch as identical charges as to Ardila had been pending for fifteen months.

Here, moreover, an experienced trial court had serious doubts about the proffered reason for the defendant's request. The district court observed that the defendant's vacillation was likely based on advice of fellow inmates and the subjective beliefs of the defendant, and "certainly

[wa]sn't based on any legal advice that Mr. O'Reilly ha[d] given him." (GA 72). Where, as here, the defendant suddenly requested to withdraw a month-old oral waiver which he confirmed on the record both orally and in writing, the district court cannot be said to have abused his discretion when he discredited the defendant's request and denied it. *United States ex rel. Curtis*, 466 F.2d at 1098 ("a defendant's mistaken subjective impressions . . . in the absence of substantial objective proof showing that they were reasonably justified, do not provide sufficient grounds upon which to [grant a motion to withdraw]"); *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992) (when evaluating whether a defendant has shown a "fair and just reason" for moving to withdraw a plea, the "fact that a defendant has a change of heart prompted by his reevaluation of either the Government's case against him or the penalty that might be imposed is not a sufficient reason to permit withdrawal").

In addition, while the defendant does not challenge the validity of the waivers on appeal, it bears noting that they were both knowingly and voluntarily entered. At his arraignment on November 12, 2004, the defendant clearly and unequivocally waived, without question or hesitation, the thirty-day waiting period. Both the court and counsel explained the right to the defendant on the record and what he would be giving up by proceeding to trial in December. (GA 51-52). The defendant stated "I waive the 30 days . . . ." (GA 52).

On December 1, 2004, when government counsel asked the court to confirm the defendant's waiver and to require

a written waiver, the defendant twice more confirmed his preference for a prompt December trial and confirmed that he was willing to waive the thirty-day limitation. He did so orally and in writing following a full and complete canvas by the court. (GA 56-64). Thus, the district court's reliance on those waivers – which the defendant thrice confirmed in open court – was reasonable, proper, and cannot be construed as an abuse of discretion.

In short, a review of the record reveals no error in the district court's determination that Ardila's waivers were knowing and voluntary, let alone an abuse of discretion. Moreover, there has been no showing – nor could there be – that the district's court's denial of Ardila's request to rescind the waiver prejudiced the defendant in any way. As noted above, Ardila had been on notice of the charges and alleged conduct for over fifteen months; the proffered witness had, at best, marginal relevance; and counsel clearly and unequivocally represented that he was fully prepared and ready to proceed. On this record, it cannot be said that the district court abused its discretion when it denied the defendant's motion to withdraw his prior waivers of the thirty-day waiting period.

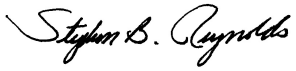
CONCLUSION

For the foregoing reasons, the appellant's requests for a new trial should be rejected and the judgment of the district court should be affirmed.

Dated: March 30, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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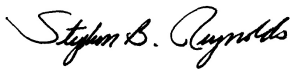
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 10,720 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3161. TIME LIMITS AND EXCLUSIONS.

. . . .

(c)(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

. . . .

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

RULE 50(B), FEDERAL RULES OF CRIMINAL PROCEDURE; SPEEDY TRIAL ACT OF 1974; AND SPEEDY TRIAL ACT AMENDMENTS ACT OF 1979 FOR THE DISTRICT OF CONNECTICUT.

FINAL SPEEDY TRIAL PLAN.

7. ***Minimum Period for Defense Preparation.***

Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed pro se. In circumstances in which the 70-day time limit for commencing trial on a charge in an indictment or information is determined by

reference to an earlier charge in an indictment or information pursuant to section 4(d), the 30-day minimum period shall also be determined by reference to the earlier indictment or information. When prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea, a new 30-day minimum period will not begin to run. The court will in all cases schedule trials so as to permit defense counsel adequate preparation time in light of all the circumstances.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Ardila

Docket Number: 05-5962-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/30/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: March 30, 2007