08-2620-cr

To Be Argued By:
EDWARD T. KANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2620-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANGEL GUZMAN, also known as Angel,
Defendant,

LUIS RODRIGUEZ, also known as Face,
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 (Janet C. Hall, U.S.D.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant was sentenced on May 22, 2008, and judgment entered on May 28, 2008. Government's Appendix ("GA") 636. On May 22, 2008, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. GA 636. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

I. Did the district court abuse its discretion in declining to require Angel Guzman to take the witness stand to assert his Fifth Amendment privilege, or err in refusing to compel the government to seek immunity for Guzman?

II. Did the district court abuse its discretion in refusing to provide a missing witness instruction with respect to government informant Victor Ranero, where Ranero had asserted a valid Fifth Amendment privilege, the government had stated valid reasons for not seeking to immunize Ranero, and the record was devoid of any evidence that Ranero, even if he were to testify, would provide information that was exculpatory to the defendant?

III. Even if the district court's decisions on the preceding issues were erroneous, were these errors harmless, given the overwhelming body of evidence presented in the case, including the testimony of three law enforcement officers who conducted physical and audio surveillance during the transactions, two cooperating witnesses who were involved in the transactions, and the defendant himself?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2620-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANGEL GUZMAN, also known as Angel,
Defendant,

LUIS RODRIGUEZ, also known as Face,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On January 16, 2008, after hearing three days of evidence, a jury returned a guilty verdict against the defendant, Luis Rodriguez, also known as "Face," for one count of distributing crack cocaine and one count of unlawfully possessing a firearm affecting interstate commerce as a previously convicted felon. Those

convictions arose from the defendant's participation in the sale of crack cocaine to a cooperating witness on September 26, 2006; and in the sale of a sawed-off shotgun to the same cooperating witness two days later.

The defendant now maintains that during trial, the district court erred by (1) refusing to allow him to call co-defendant Angel Guzman as a witness before the jury after Guzman asserted his Fifth Amendment privilege, or to compel the government to seek immunity for Guzman; and (2) refusing to provide the jury with a missing witness instruction as to Victor Ranero, a government informant who also asserted his Fifth Amendment privilege. For the reasons that follow, the district judge did not abuse her discretion on either of those issues and, in any event, any error would have been harmless in light of the overwhelming evidence supporting the jury's verdict.

Statement of the Case

On June 26, 2007, a federal grand jury in the District of Connecticut returned a five-count indictment charging the defendant and Guzman with various drug trafficking and firearms offenses. Count One charged the defendant with conspiracy to possess with the intent to distribute 5 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). Count Two charged him with possession with intent to distribute and distribution of crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2. Count Three charged him with unlawful possession of a firearm affecting interstate commerce as a previously convicted

felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Count Five charged him with unlawful possession with intent to distribute 5 grams or more of crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

The case was assigned to the Honorable Janet C. Hall. On December 17, 2007, co-defendant Guzman pleaded guilty to Count One of the indictment. On December 25, 2007, the government filed a Second Information to Establish a Prior Drug Conviction as to the defendant, pursuant to 21 U.S.C. § 851. On January 7, 2008, the government moved to dismiss Counts One and Five of the indictment as to the defendant. Beginning on January 14, 2008, the government presented its case as to the two remaining charges, Counts Two and Three. On January 16, 2008, after less than three hours of deliberation, the jury returned a guilty verdict on both counts. On May 22, 2008, the defendant was sentenced to concurrent prison terms of 262 months on each count, to be followed by six years of supervised release. That same day, the defendant filed a timely notice of appeal pursuant to Fed. R. App. 4(b). On May 28, 2008, the judgment was entered. The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The evidence shows that the defendant participated in the sale of crack cocaine and a sawed-off shotgun to a cooperating witness.

At trial, the government presented its case through the testimony of three officers from the Stamford Police Department; the testimony of the cooperating witness, Kenneth Tremble, who purchased the crack cocaine and sawed-off shotgun from the defendant; and the testimony of co-defendant Luis Colon, who brought the sawed-off shotgun to the defendant's home. The government also presented numerous exhibits, including the drugs and the gun.

In September 2006, officers from the Stamford Police Department received information from a known and reliable informant, Victor Ranero, regarding suspected criminal activity of the defendant, Luis Rodriguez, also known as "Face." GA 46-47, 140, 158. As a result of that information, the officers contacted federal agents from the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), to provide a cooperating witness who could conduct a controlled purchase of narcotics and firearms from the defendant. GA 48. The ATF agreed to the arrangement and provided a cooperating witness, Kenneth Tremble. GA 49. Officers devised a plan to have Ranero introduce Tremble to the defendant and to have Tremble attempt to purchase crack cocaine or firearms from the defendant. GA 49-50, 199, 201-02.

On the evening of September 26, 2006, Ranero drove Tremble to the defendant's home. GA 200-01. Earlier, officers had met with Ranero and Tremble and had given Tremble a digital transmitter to allow officers to listen in on conversations. GA 52-53, 201. Officers also gave Tremble $1,500 to buy drugs or guns. GA 53. Several officers were dispatched to the defendant's home to conduct surveillance. GA 54. Upon arrival, Ranero and Tremble met the defendant and a second man, later identified as co-defendant Angel Guzman. GA 63-65, 145-46, 202-03. After introductions, the defendant and Tremble began negotiations regarding the sale of firearms to Tremble. GA 69, 203. The defendant indicated that he could sell firearms, but that he did not have any available that evening. GA 204-05. The conversation then switched to the topic of drugs, and Guzman indicated, in the defendant's presence, that he could provide Tremble with crack cocaine. GA 71, 206-08. Tremble eventually purchased 3.7 grams of crack cocaine from the defendant and Guzman, in exchange for $250. GA 74-75, 208-09. In addition, Tremble made a down payment of $50 for the purchase of firearms. GA 74, 206.

Two days later, on September 28, 2006, law enforcement officers arranged to have Tremble meet the defendant again at the defendant's home in order to buy firearms. GA 79-80, 160-61, 228-29. This time, Tremble went without Ranero. GA 82, 229. Officers met with Tremble beforehand and gave him the digital transmitter and $1,000. GA 80, 161-62, 229. Officers conducted physical surveillance during the transaction. GA 80, 163. During that transaction, Tremble met with the defendant

on the porch of the defendant's home. GA 82, 164, 230. After a brief conversation, Tremble inquired about the status of the firearms, at which point the defendant placed a call on his cell phone. GA 84, 165, 231-33. Shortly after the call was completed, Guzman came out of the defendant's house and had a conversation about drugs with Tremble, in the defendant's presence. GA 85, 166-67, 234. A few minutes later, a green Range Rover arrived at the defendant's residence and a man, later identified as Luis Colon, came out of the vehicle carrying a case. GA 85-87, 167-68, 234-36. Colon greeted the defendant, Guzman, and Tremble on the defendant's porch, and removed a sawed-off shotgun from the case. GA 167-68, 237-39. The defendant and Tremble negotiated the price of the shotgun, and Tremble eventually paid an additional $350 to purchase the firearm. GA 94, 168-69, 240-41.

The defendant testified at trial. He admitted that he met with Tremble, Ranero and Guzman on the evening of September 26. However, according to the defendant, he "did not know one bit about [the drug] transactions. I wasn't there. I wasn't standing next to them." GA 400. He testified that he did not have any discussions about weapons that evening. GA 400-01. The defendant further admitted that he saw Tremble meet with Guzman and Colon on the evening of September 28; however, he denied having a conversation with Colon on a cell phone and denied knowledge of or participation in a transaction involving firearms. GA 408-16.

B. The district court denies the defendant's motion to force Guzman and Ranero to take the stand in order to assert their Fifth Amendment privilege before the jury and refuses to immunize either witness.

1. Angel Guzman

Co-defendant Angel Guzman pleaded guilty to Count One of the indictment on December 17, 2007. GA 625. In the stipulation of offense conduct, the parties agreed that "from in or about September 2006, until in or about October 2006, the defendant unlawfully conspired to possess with the intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base ('crack cocaine') with Luis Rodriguez aka 'Face.'" GA 620. With respect to Guzman's sentencing guidelines range, the parties agreed that "the government reserves its right to argue at sentencing for a two-level enhancement, pursuant to U.S.S.G. § 2D1.1(b)(1), on grounds that the defendant possessed a firearm. If the Court were to find that enhancement applicable, the defendant's resulting Guidelines range would be a term of imprisonment of between 60 and 63 months and a fine range of $10,000 to $2,000,000." GA 616. The government and Guzman did not enter into a cooperation agreement. At the time of the defendant's trial, Guzman had not yet been sentenced.

At trial, the defendant attempted to call Guzman as a defense witness. Guzman's attorney informed the judge that if called to testify, Guzman would assert his Fifth

Amendment privilege, given that "[Guzman] would be asked about drugs and guns in the case that can only implicate things for his sentence exposure." GA 101-02. Consequently, the district court held a hearing outside the jury's presence and confirmed that Guzman would in fact assert his Fifth Amendment privilege if called by the defense. GA 173-76.

The following day, the district judge stated her ruling on the issue of Guzman's testimony as follows:

> I know one subject was the question of Mr. Guzman and assertion of his Fifth Amendment privilege. I had an opportunity over the evening to take a look at some Second Circuit cases. The leading case appears to be the United States versus Melvin Deutsch, 987 F.2d 878. In that case, the defendant had wanted to call someone to testify and they had a preliminary examination and other than preliminary answers to questions like who he was and where he lived, he then asserted his Fifth Amendment. The trial judge, Judge Mi[s]hler, refused to [let] the defendant call that witness during trial. The preliminary stuff was outside the presence of the jury. In this case, Deutsch at 883 through 884, the court discusses the issue and begins by stating that the district [judge] has discretion to prevent a party to call a witness, solely to have him or her invoke the privilege for self-incrimination in front of the jury. It has a string cite that's half a column long of other circuit courts that adopted that view and relies upon a case of the

Supreme Court, Johnson versus the United States in which the court said quote if the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury and no inferences whatever can be legitimately drawn by them from the legal assurance by the witness of their constitutional right. The allowance of the privilege would be mockery of justice. It then goes on to talk about how because no inference can be properly drawn from the assertion, obviously there is a fear the prejudicial effect. If I have discretion obviously then I need to balance under 403. The fear of the prejudicial effect is that the jury will draw an inference, despite the greatest exhortation and instructions to the jury. Like I always like to assume that the jury will follow the Court's instructions, I must say in the face assertion of the Fifth Amendment privilege, particularly given by comments made by people in voir dire and jury selections over the years that I have had, I think this is one of the hardest things for jurors to accept the idea that people won't testify. I think it's human inclination to draw an inference in this effect to wildly speculate because the inference isn't clear one way or another would be drawn so I think in this case, it is highly prejudicial if there's the chance that one or more of the jurors would draw that inference despite being told not to. They talk about the probative value of the evidence is lessened by the ability of the other party to cross-examine. There's no probative value in my

> opinion. Obviously this isn't how the circuit analyzed it. If you can draw no inference, the only probative value is that man took his Fifth Amendment privilege. Since no inference is permitted. I know of no relevant evidence to be taken from the fact of the assertion. If I thought long enough, I might think of a hypothetical situation where the mere assertion of the privilege was itself evidence of something but that's not this case so I think that in this case, having looked at the probative and prejudicial aspects raised by 403 and understanding I have discretion, the court sees no reason in this instance that would justify after balancing the probative and prejudicial effects that would make it appropriate for me to admit – appropriate for me to permit I guess I will say, the placing of Mr. Guzman before the jury in the obvious as we established yesterday, assertion by him of his privilege as to questions concerning the facts pertinent to this case as well as the facts relevant to any other of his conduct vis-a-vis drug dealing I suppose so Mr. Guzman will not be testifying or asserting his privilege in front of the jury I guess is what we understood we were calling him for.

GA 217-20.

2. Victor Ranero

The government had initially intended to call Ranero as a witness in its case-in-chief. GA 221. However, on the

Saturday prior to the beginning of trial, during an interview with the government, Ranero disclosed that he had made several unauthorized purchases of cocaine from the defendant at or around the time of the subject controlled purchases. GA 221, 298, 477. The government chose not to call Ranero and had counsel appointed for him. GA 297. The defendant thereafter sought to call Ranero as a defense witness.

Based upon the risk of potential state or federal prosecution as a result of his unauthorized purchases of narcotics, GA 222, the district court held a hearing outside the jury's presence to determine whether Ranero would assert his Fifth Amendment privilege. GA 296-300. Although Ranero was not there, Ranero's attorney was present and stated that she had spoken to her client at length about his testimony and confirmed that if called upon to testify, he would invoke his Fifth Amendment privilege as to the relevant subject matter. GA 299. The district judge thereafter concluded that Ranero did not need to testify. GA 300.

C. The district court denies the defendant's request to provide a missing witness instruction.

Prior to summations, counsel for the defendant requested that the district court provide a missing witness instruction, given that Guzman and Ranero had been unavailable to testify and that the government had failed to take actions to grant immunity for those witnesses. The district court denied the defendant's request for a missing witness charge, and reasoned as follows:

The difficulty I'm having is that you want to be able to ask the jury to draw a negative inference against the government because Mr. Ranero didn't testify and there's, as I understand it, two steps to decide about whether to give the charge I think also about whether to allow an argument. The first one has to do with availability or unavailability. The second has to do with if the testimony would have been exculpatory. It doesn't seem right to me and I think the law supports this view that any side would get to argue to the jury, look, he wasn't here, never came in and never testified. You never heard a word out his mouth. That's because if he comes in through the government, he would have helped us. There would have been exculpatory testimony. I don't know what record we have here that supports that inference. In other words, I haven't heard anything about Mr. Ranero that he would have testified in any way helpful to your client. . . .

We have had a representation that recently he's told the government things which inculpate him. In other words, it is against his interest to have told the government this and what he told him is against Mr. Rodriguez's interest. . . .

I believe the case law in the Second Circuit informs as to the question of giving a charge on a missing witness and also in allowing argument with or without it. Without it particularly I really need to have analyzed two things. Whether the witness is uniquely available to one side and second if the

witness were called, the testimony he would give would be favorable to the other side. It strikes me that this case at least with respect to the issue of whether to give the charge is quite similar to *Meyerson*. And in *Meyerson*, they comment favorably upon other circuits' decisions which expressly hold that a witness's unavailability to both the defendant and the government when that witness asserts his Fifth Amendment privilege. . . .

So then I guess if I'm right, though, that *Meyerson* requires me to look at availability in a factual sense, not automatic sense of Fifth Amendment not available to both sides, clearly the witnesses here are not available to the defense. They cannot get testimony from someone who is asserting the Fifth Amendment privilege.

On the government side, the government can in this instance under the circumstances I think in both cases, their reasons for not making the witness available. In other words, granting them immunity are sound and well grounded and, therefore, I think demonstrate if, in fact, the witness is not available to them. They have in both instances, as they did this morning, expressed reasons why it is not in the government's interest to grant immunity to these witnesses. First of all, from the government's point of view, both of them would be cumulative I think. In other words, they have got testimony to prove the elements of their case. They don't need either of these two witnesses. Certainly that's not the

defendant's view of these two witnesses but it is from the government's point of view it is. And second, in both instances, I think they have very solid reasons why they don't wish to grant immunity. There are still I think there are open issues about Mr. Guzman and his position on the gun issue. My sense is probably at sentencing the lawyer is going to try to thread the needle and Mr. Guzman will not open his mouth particularly given the government's indication. If he tries to deny use of the gun, they would pursue perjury against him. He certainly has stipulated, though, to involvement with Mr. Rodriguez in the drug offense. That's in his plea agreement. That's a stipulation that Mr. Rodriguez did it with him. With respect to Mr. Ranero, I raised the question yesterday of clearly there's evidence of Mr. Ranero's – actually the government's response this morning answered that. To the extent, he has now admitted to the government unauthorized transaction with the defendant, the government has indicated an interest in perhaps prosecuting him for that. With respect to those unauthorized purchases, the government really has no other evidence I guess other than his admission at least at this point so to immunize him would make it difficult to prosecute him or go against him. And with the associated problems which Attorney Kang identified in terms of recusal, et cetera, for himself and possibly others. I guess all of that is to say at the end of the analysis that taking the facts in the record before me, it is my conclusion that the witness is unavailable to the

government as well as the defendant in these circumstances.

Even if I'm mistaken about that analysis, though, the second step in the analysis requires that I find that if the witness were called, his testimony be favorable to the defendant. In other words, I can't possibly let a lawyer. I can't charge the jury and let the lawyer argue you should infer that, for example, if Ranero came in, he would have killed the government's case. . . . And in this instance, I don't really see that there's a basis for me to conclude that either of these gentlemen's testimony would be exculpatory. . . .

For example, with Mr. Guzman, he pled guilty to . . . [a] conspiracy count and in the stipulation of offense conduct, he stipulates at page 8 of the plea agreement in or about September '06 until October of '06, he unlawfully conspired with intent to distribute crack cocaine with Luis Rodriguez so we know clearly that his testimony – somebody can always change their mind but it is pretty fair to assume this testimony if compelled would be to admit exactly what he stipulated to. Drug conspiracy with Mr. Rodriguez which would certainly not be exculpatory.

As to the gun issue, it is not quite clear what he would say but given the position his lawyer is taking in an effort to avoid an enhancement for use of the gun under the drug charge, I think it is fair to

> say that his testimony would not be that he was the sole person involved in the gun transaction to the exclusion of Mr. Rodriguez.
>
> With respect to Mr. Ranero . . . [t]here really isn't anything to suggest that he would testify in an exculpatory way with respect to Mr. Rodriguez. And clearly – well, based on what he said as recently as Saturday to the government about other drug dealing with the defendant that would clearly not be exculpatory. So I don't have anything on the record that suggests to me that Mr. Ranero would be exculpatory.

GA 473-79.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in declining to require Angel Guzman to take the stand solely to assert his Fifth Amendment privilege where, after conducting a hearing outside the jury's presence, the district judge correctly concluded that Guzman intended to validly assert that privilege on testimony relating to the defendant's case. The district court, in precluding the defense from calling Guzman to the stand, considered the proper legal standard, *United States v. Deutsch*, 987 F.2d 878 (2d Cir. 1993), and, after conducting a balancing test under Fed. R. Evid. 403, correctly held that the probative value of having Guzman assert his Fifth Amendment privilege in the jury's presence would be substantially outweighed by the danger of unfair prejudice.

There was also no error in the court's decision not to compel the government to immunize Guzman's testimony. The defendant has not even attempted to carry his burden of establishing that this decision violated his due process rights. Regardless, any such attempts would fail because (1) there is nothing in the record to suggest that the government, through its own overreaching, forced Guzman to invoke his Fifth Amendment privilege or that it engaged in discriminatory use of immunity to gain a tactical advantage; and (2) the district judge clearly stated that if compelled, Guzman's testimony would not have been exculpatory and would be cumulative.

2. The experienced district judge also did not abuse her discretion in refusing to provide a missing witness instruction with respect to Victor Ranero. The district judge again applied the proper legal standard, *United States v. Myerson*, 18 F.3d 153 (2d Cir. 1994), and correctly concluded that Ranero, on account of his assertion of a valid Fifth Amendment privilege and the government's statement of valid reasons for not seeking to grant immunity, was unavailable to both parties. Moreover, the district court held that refusal to give a missing witness instruction was proper under *Myerson* because the record was devoid of any evidence that Ranero, even if he were to testify, would provide information exculpatory to the defendant.

3. Lastly, even assuming that the district court erred on the issues relevant to this appeal, any hypothetical error was harmless. The defendant's guilt was overwhelmingly established by the evidence presented to the jury at trial,

including the testimony of three law enforcement officers who conducted physical and audio surveillance during the transactions, two cooperating witnesses who were involved in the transactions, and the defendant himself.

ARGUMENT

I. The district court did not abuse its discretion in declining to require Guzman to take the witness stand to assert his Fifth Amendment privilege, and did not err in refusing to compel the government to seek immunity for Guzman.

A. Governing law and standard of review

The district court has the discretion to prevent a party from calling a witness solely to have him or her invoke the privilege against self-incrimination. *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993). The district court's determination is reviewed for abuse of discretion. *Id.* at 884. "Most of the circuits which have addressed this issue have held it not to be error for a district court to bar such a witness from testifying." *Id.* at 883 (collecting cases).

The Supreme Court has stated that "[i]f the privilege claimed by the witness be allowed, the matter is at an end." *Johnson v. United States*, 318 U.S. 189, 196 (1943) (quoting *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853)). In that situation, "'[t]he claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately

drawn by them from the legal assertion by the witness of his constitutional right.'" *Id.* "Although neither party may properly draw such inferences, 'it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.'" *Deutsch*, 987 F.2d at 884 (quoting *United States v. Vandetti*, 623 F.2d 1144, 1148 (6th Cir. 1990)). "The district court, in its discretion, must weigh the relevant factors in determining whether to exclude the witness and 'determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice.'" *Deutsch*, 987 F.2d at 884 (quoting *Vandetti*, 623 F.2d at 1149).

Moreover, as a general rule, the government is under no obligation to grant use immunity to witnesses the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment if not immunized. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006) (internal citations omitted). "A grant of use immunity may well hamper the government in a future prosecution of a witness." *Id.* (citing *United States v. Todaro*, 744 F.2d 5, 9 (2d Cir. 1984)).

In certain narrow circumstances, however, due process concerns may compel the government to choose between seeking to confer immunity for its own witnesses as well as the defense's, or not seeking immunity at all. *See United States v. Dolah,* 245 F.3d 98, 105 & n.5 (2d Cir. 2001), *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36 (2004); *United States v. Bahadar,* 954 F.2d 821, 826 (2d Cir. 1992). This choice must be made only where the defense can carry the burden

of proving the following three elements: (1) the government, through its own overreaching, has forced the witness to invoke the Fifth Amendment or, that the government has engaged in discriminatory use of grants of immunity to gain a tactical advantage; (2) the witness's testimony is material, exculpatory, and not cumulative; and (3) the defendant has no other source to obtain the evidence. *United States v. Diaz*, 176 F.3d 52, 115 (2d Cir. 1999).

A trial court's decision not to compel the government to choose between granting immunity to defense witnesses or forgoing its own use of immunized testimony is reviewed for abuse of discretion and subject to harmless error analysis. *See Ebbers*, 458 F.3d at 118 (abuse of discretion); *Dolah*, 245 F.3d at 106-07 (harmless error). Where the defendant fails to raise this issue at trial, the trial court's decision may be reversed only for plain error. *See* Fed. R. Crim. P. 52(b).

B. Discussion

The district judge did not abuse her discretion in declining to require Guzman to take the witness stand. Her in-depth recitation and analysis of the *Deutsch* opinion demonstrates that the district court was aware of the appropriate legal standard to apply in this situation. GA 217-20. Moreover, the district judge correctly applied *Deutsch* to the facts of this case. First, the court held a hearing outside the jury's presence and confirmed that Guzman would indeed assert his Fifth Amendment privilege on the subject matters relevant to the defendant's

case if called as a defense witness, and that there was a valid basis for Guzman to assert his privilege. GA 173-78. Second, the district judge conducted the appropriate balancing test under Fed. R. Evid. 403 and determined that the probative value of having Guzman assert his Fifth Amendment privilege in front of the jury would be substantially outweighed by the danger of unfair prejudice. GA 219-20.

The district judge did not abuse her discretion. She not only applied the proper legal standard, but her analysis under Fed. R. Evid. 403 was correct. Guzman, during his testimony outside the jury's presence, stated that he would assert his privilege on the subject matters that were relevant to the defendant's case. GA 176-79. The district court thus correctly concluded that Guzman's testimony before the jury would have "no probative value." GA 219. Moreover, the district court's conclusion that Guzman's assertion before the jury would be "highly prejudicial" because "one or more of the jurors would draw [an improper] inference [from Guzman's assertion] despite being told not to," was correct and consistent with decisions reached in this circuit and other appellate courts. GA 219; *see Deutsch*, 987 F.2d at 884 ("After viewing the transcript of Berube's testimony taken outside the presence of the jury, we do not find an abuse of discretion in its exclusion."); *see also United States v. George*, 778 F.2d 556, 562-63 (10th Cir. 1985); *Vandetti*, 623 F.2d at 1147-49; *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978); *Royal v. Maryland*, 529 F.2d 1280, 1281 (4th Cir. 1976); *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976); *United States v. Lacouture*, 495 F.2d

1237, 1240 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970).

The defendant's attempt on appeal to distinguish *Deutsch* – to suggest that Guzman possessed exculpatory evidence – is simply not supported by the record. Def. Br. at 14. Indeed, the district court made a specific finding to the contrary and concluded that Guzman did *not* possess exculpatory information:

> [I]n this instance, I don't really see that there's a basis for me to conclude that either of these gentlem[e]n's testimony would be exculpatory. Obviously because of the assertion of the Fifth Amendment privilege where we don't know precisely what they would say but we have a pretty good indication. For example, with Mr. Guzman, he pled guilty to . . . [a] conspiracy count and in the stipulation of offense conduct, he stipulates at page 8 of the plea agreement in or about September '06 until October of '06, he unlawfully conspired with intent to distribute crack cocaine with Luis Rodriguez so we know clearly that his testimony – somebody can always change their mind but it is pretty fair to assume this testimony if compelled would be to admit exactly what he stipulated to. Drug conspiracy with Mr. Rodriguez which would certainly not be exculpatory.
>
> As to the gun issue, it is not quite clear what he would say but given the position his lawyer is

> taking in an effort to avoid an enhancement for use of the gun under the drug charge, I think it is fair to say that his testimony would not be that he was the sole person involved in the gun transaction to the exclusion of Mr. Rodriguez.

GA 478-79.

Moreover, the district court's decision not to compel the government to grant use immunity to Guzman was not an abuse of discretion. The record reflects that defense counsel failed to raise this issue at trial, and thus the plain error standard of review applies as well. *See* Fed. R. Crim. P. 52(b).

The defendant has not even attempted to carry his burden of satisfying the three elements required to raise a due process challenge for the failure to immunize Guzman. Even if raised, such attempts would fail at least as to the first and second elements.

As an initial matter, there is nothing in the record to suggest that the government, through its own overreaching, forced Guzman to invoke his Fifth Amendment privilege or that it engaged in discriminatory use of immunity to gain a tactical advantage. Indeed, if anything, the district court made findings consistent with the conclusion that the government had *not* engaged in overreaching or discriminatory use of immunity to gain a tactical advantage. Specifically, the district judge found that with respect to both Guzman and Ranero, the government "expressed reasons why it is not in [its]

interest to grant immunity to these witnesses" and that "in both instances, I think [the government has] very solid reasons why they still don't wish to grant immunity." GA 476.

Moreover, the defendant would be unable to satisfy his burden of demonstrating the second prong. The district judge clearly stated that if compelled, Guzman's testimony would not have been exculpatory, GA 478-79, and would be cumulative. GA 476 ("[F]rom the government's point of view, both [Guzman and Ranero's testimony] would be cumulative I think. In other words, [the government] ha[s] got testimony to prove the elements of their case. They don't need either of these two witnesses.").

In sum, the district court's decision not to compel the government to immunize Guzman's testimony did not violate the defendant's due process rights.[1]

---

[1] The defendant has not pursued on appeal the argument that the district court erred in refusing to require Ranero to take the witness stand to assert his Fifth Amendment privilege and in refusing to compel the government to immunize Ranero's testimony. Even if pursued, however, those arguments would fail for the same reasons discussed in this section relating to Guzman.

II. The district court did not abuse its discretion in refusing to provide a missing witness charge with respect to Ranero.

A. Governing law and standard of review

A district court's refusal to provide a requested missing witness instruction is reviewed for abuse of discretion. *United States v. Myerson*, 18 F.3d 153, 160 (2d Cir. 1994).

"It is well settled that when a party has it peculiarly within its power to produce witnesses and fails to do so, 'the jury may infer that the testimony, if produced, would be unfavorable to that party.'" *Id.* at 158 (quoting *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988) (internal quotation marks omitted)). "However, 'when a witness is equally available to both sides, the failure to produce is *open* to an inference *against both parties*.'" *Myerson*, 18 F.3d at 158 (quoting *Torres*, 845 F.2d at 1169) (internal quotation marks omitted) (emphasis in original). The "availability" of a witness depends on the witness's relation to the parties, rather than merely on physical presence or accessibility. *Myerson*, 18 F.3d at 158 (citing *Torres*, 845 F.2d at 1170, and *United States v. Rollins*, 487 F.2d 409, 412 (2d Cir. 1973)). A witness is not deemed to be available to the prosecution simply because it could immunize that witness. A prosecutor can be compelled to grant a defense witness immunity only in "'extraordinary circumstances,'" rather than "'whenever it seems fair to grant it.'" *Myerson*, 18 F.3d at 153 (quoting *Blissett v. LeFevre*, 924 F.2d 434, 441 (2d Cir. 1991)).

"In refusing to require that a missing witness charge be given in each instance that a witness asserts his Fifth Amendment privilege, appellate courts have recognized that such a requirement would unnecessarily infringe on the prosecutorial decision of whether or not to grant immunity." *Myerson*, 18 F.3d at 159 (citing *United States v. Flomenhoft*, 714 F.2d 708, 713-14 (7th Cir. 1983)). "Moreover, a prosecutor's failure to immunize a witness does not, categorically, give rise to an inference that the witness's testimony would be unfavorable to the government." *Myerson*, 18 F.3d at 159 (citing *Morrison v. United States*, 365 F.2d 521, 524 (D.C. Cir. 1966)).

Consequently, this Circuit has held that "in the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge." *Myerson*, 18 F.3d at 160; *see also, e.g., United States v. St. Michael's Credit Union*, 880 F.2d 579, 598 (1st Cir. 1989) ("[T]he government's failure to immunize a witness, without more, does not give rise to a missing witness instruction," and no "negative inference may be drawn from that prosecutorial decision."); *United States v. Brutzman*, 731 F.2d 1449, 1453-53 (9th Cir. 1984) (where witness invoked Fifth Amendment privilege and government did not immunize testimony, witness was unavailable to both sides); *Flomenhoft*, 714 F.2d at 713-14 (absent "clear prosecutorial abuse of discretion violating the due process clause," failure to immunize witness invoking privilege does not provide grounds for missing witness instruction); *United States v. Simmons*, 663 F.2d 107, 108 (D.C. Cir. 1979) (per curiam) (no missing witness

charge where witness was unavailable to both parties as a result of invoking privilege); *United States v. Martin*, 526 F.2d 485, 486-87 (10th Cir. 1975) (same).

B. Discussion

The district court did not abuse its discretion in refusing to provide a missing witness instruction in this case. Just as she did with respect to her analysis of the exclusion of Guzman's testimony, the district judge was cognizant of the correct legal precedent on the missing witness instruction – this Court's decision in *Myerson* – and properly applied *Myerson* to the facts of this case. GA 474-76.

First, the district judge considered whether Ranero was "available" to both the defense and the government and, in analyzing that issue, she evaluated "all the facts and circumstances bearing upon the witness's relation to the parties, rather than mere physical presence or accessibility." *Myerson*, 18 F.3d at 158 (internal quotation marks omitted). The district court concluded that Ranero was "clearly . . . not available to the defense," given that the defendant "cannot get testimony from someone who is asserting the Fifth Amendment privilege." GA 476. The district judge also found that Ranero was unavailable to the government. In reaching that conclusion, the district court reasoned that "[t]here aren't any extraordinary circumstances or facts that exist that the government is playing games about the immunity grant." GA 475. Moreover, the court stated that the government's reasons for not granting immunity to Ranero were "sound and well

grounded." GA 476. On that point, the district judge noted:

> [Ranero] has now admitted to the government unauthorized transaction with the defendant, the government has indicated an interest in perhaps prosecuting him for that. With respect to those unauthorized purchases, the government really has no other evidence I guess other than his admission at least at this point so to immunize him would make it difficult to prosecute him or go against him. And with the associated problems which Attorney Kang identified in terms of recusal, et cetera, for himself and possibly others. I guess all of that is to say at the end of the analysis that taking the facts in the record before me, it is my conclusion that [Ranero] is unavailable to the government as well as to the defendant in these circumstances.

GA 477-78.

In this regard, the district judge's detailed analysis as to why Ranero was unavailable to both parties was even more robust than the finding that was accepted by this Court in *Myerson*. 18 F.3d at 158 (affirming district court's finding where the trial judge had stated that "the Government had sufficient reason for not calling [Cooper] and not immunizing him").

Second, the district judge considered whether Ranero would provide exculpatory testimony for the defendant and

concluded that "there isn't a basis for that inference." GA 478. The judge noted that:

> With respect to Mr. Ranero . . . [t]here really isn't anything to suggest that he would testify in an exculpatory way with respect to Mr. Rodriguez. And clearly – well, based on what he said as recently as Saturday to the government about other drug dealing with the defendant that would clearly not be exculpatory. So I don't have anything on the record that suggests to me that Mr. Ranero would be exculpatory.

GA 479.

Indeed, the district court found that, if anything, Ranero's testimony that he made additional unauthorized purchases of narcotics from the defendant would inculpate, rather than exculpate, the defendant. GA 474 ("We have had a representation that recently he's told the government things which inculpate him. In other words, it is against his interest to have told the government this and what he told him is against Mr. Rodriguez's interest.").

For these reasons, the district court's conclusion that Ranero did not have any information of exculpatory value to the defendant is correct, and there is nothing to the contrary in the record. Moreover, the defendant's assertion on appeal that Ranero was "identified as the Government's confidential informant and was included on its list of witnesses" misses the mark. Def. Br. at 15-16. As *Myerson* makes clear, the question of whether the

government's failure to immunize a witness warrants a missing witness instruction depends not on whether that witness was an informant or included on the original list of the government's prospective witnesses, but on whether that witness would provide information that is exculpatory value to the defendant. *See* 18 F.3d at 160.

In short, the district court did not abuse its discretion by refusing to give a missing witness charge as to Ranero. *See id.* ("We therefore hold that in the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge.").

III. Any hypothetical error in declining to require Guzman to testify, in refusing to compel the government to seek immunity for Guzman, and in refusing to provide a missing witness instruction as to Ranero was harmless.

A district court's refusal to require a witness to take the stand in order to assert a valid Fifth Amendment privilege is subject to harmless error review. *See Deutsch*, 987 F.2d at 884 ("Moreover, in light of the overwhelming evidence against Deutsch, the district court's determination, if in error, would constitute harmless error."). A trial court's decision not to compel the government to grant immunity to defense witnesses as well as a trial court's decision to refuse to provide a missing witness instruction are similarly reviewed for harmless error. *Dolah*, 245 F.3d at

106-07 (immunity); *Torres*, 845 F.2d at 1171 (missing witness charge).

Because the immunity claim sounds in due process, the harmless error standard for constitutional claims would normally apply to a properly preserved claim on that issue – that is, the government would be required to prove beyond a reasonable doubt that the result of the proceeding would have been the same, even absent the error. *See, e.g., United States v. Friedman*, 300 F.3d 111, 127-28 (2d Cir. 2002). Reversal would be warranted only if there were a "reasonable probability" that without the error, the result of the proceeding would have been different. *See, e.g., United States v. Merrill*, 513 F.3d 1293, 1307 (11th Cir. 2008); *United States v. Sumlin*, 489 F.3d 683, 688 (5th Cir. 2007); *United States v. Smith*, 987 F.2d 888, 892 (2d Cir. 1993). Because the defendant did not argue in the district court that Guzman should have been immunized, however, his claim is now subject to plain-error review, and the burden of proving prejudice shifts to him. Under plain-error review, the defendant must show (1) that there was error (2) that is plain and (3) that affects his substantial rights; if all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 734-35 (1993); *see also United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009).

By contrast, the defendant's other two challenges – that the district court erred by not requiring Guzman to assert

his Fifth Amendment privilege before the jury, and by not giving a missing witness charge – are not constitutional claims. Accordingly, they are subject to harmless-error review under the more demanding standard of *United States v. Kotteakos*, 328 U.S. 750 (1946), under which reversal is warranted only if the alleged error had a "substantial and injurious effect" on the verdict. 328 U.S. at 776; *United States v. Kaplan*, 490 F.3d 110, 122-23 (2d Cir. 2007) (harmless error applied to evidentiary rulings); *United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir. 2003) (same); *United States v. Salameh*, 152 F.3d 88, 141-42 (2d Cir. 1998) (harmless error applied to jury instruction claims).

Whatever the standard for measuring harmlessness, it is clear that the alleged errors could not have had any impact on the outcome of the defendant's trial. The jury was presented with overwhelming evidence that demonstrated the defendant's participation in the controlled purchase of crack cocaine on September 26, 2006, and the controlled purchase of a sawed-off shotgun on September 28, 2006. The government presented in its case-in-chief the testimony of three Stamford police officers who conducted physical surveillance of both transactions and/or contemporaneously listened to conversations involving the defendant and Kenneth Tremble. GA 42-108, 138-54, 156-85. The jury also heard from Tremble, who testified that the defendant had negotiated the sale of the sawed-off shotgun, and that the defendant actively participated in the sale of crack cocaine. GA 187-246. Lastly, Luis Colon testified that he brought a sawed-off shotgun to the defendant's residence on

September 28, and confirmed the defendant's knowledge and participation in the sale of that firearm. GA 271-85.

Based upon the foregoing evidence, the jury had more than enough evidence to conclude that the defendant distributed, or aided and abetted in the distribution of, crack cocaine on September 26, and that the defendant unlawfully possessed the sawed-off shotgun on September 28. Moreover, the jury had the benefit of having the defendant testify and to evaluate the credibility of his version of the facts that he was present during both transactions, but was unaware that sales of narcotics or a firearm were taking place. GA 390-416. The errors that the defendant now claims on appeal, in light of this overwhelming evidence, were thus harmless by any measure.

CONCLUSION

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

Dated: March 6, 2009

Respectfully submitted,

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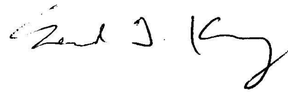

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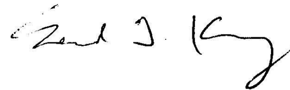

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