07-1662-cr

To Be Argued By:
ALINA P. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1662-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

FELIPE SANTANA,
Defendant-Appellant,

NEW HAVEN POLICE DEPARTMENT, CHASE MANHATTAN BANK, BRIDGEPORT POLICE DEPARTMENT, WILLIAM BAILEY, ERNIE GARCIA, USCA,
Interested-Parties.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On December 13, 2006, following a *Crosby* remand, the district court entered a ruling declining to resentence the defendant. GA 75-76. On February 22, 2007, the defendant filed a motion for reconsideration of the district court's denial of his motion for resentencing. That motion was denied on March 26, 2007. GA 38. On April 13, 2007, the defendant filed an untimely notice of appeal. GA 38.[1] This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

This Court has already affirmed the convictions and sentences of Santana's two co-defendants, Jacobs and Herredia. *See United States v. Herredia*, 153 Fed. Appx. 50 (2d Cir. 2005).

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[1] The government waives any objection to the timeliness of the defendant's notice of appeal. *See United States v. Frias,* 521 F.3d 229, 233 (2d Cir. 2008) (concluding that the time limits of Fed. R. App. P. 4(b) are not jurisdictional).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether Santana waived any challenge to his joint trial with two co-conspirators, where trial counsel moved for severance mid-trial rather than pretrial, and where even a timely motion would have been properly denied.

2. Whether Santana's claim that he withdrew from the charged conspiracy is both legally irrelevant and factually unsupported.

United States Court of Appeals

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Preliminary Statement

Defendant Santana was a street-level heroin dealer who rose to a supervisory level and was placed in charge of one of the retail heroin distribution outlets operated by the Estrada narcotics trafficking organization in the area of Noble and Ogden streets in Bridgeport, Connecticut. After a three-week trial, a federal jury convicted the defendant, and two co-defendants, of conspiring to distribute narcotics. Santana's co-defendants were convicted of the charged conspiracy to possess with intent

to distribute in excess of 1,000 grams of heroin. Santana was convicted of the lesser-included offense of conspiring to possess with intent to distribute in excess of 100 grams of heroin. As a result of this conviction, the court sentenced Santana to 180 months in prison.

Defendant Santana now appeals his conviction, challenging the district court's denial of his motion to sever, claiming that he was denied the effective assistance of counsel by his lawyer's failure to move for severance pretrial. He also claims that he withdrew from the conspiracy when he attempted to cooperate with law enforcement authorities, and he seems to be under the impression that withdrawal would have constituted an affirmative defense to the conspiracy charge. Because all of these challenges are meritless, this Court should affirm the defendant's conviction and sentence.

Statement of the Case

On June 20, 2001, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants alleged to be involved in drug trafficking activity primarily in and around Bridgeport, Connecticut, including the defendant-appellant Felipe Santana. Count Twelve of the Third Superseding Indictment charged Santana with unlawfully conspiring to possess with intent to distribute 1000 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A), and 846. GA 60-61.

The district court (Stefan R. Underhill, J.) severed the trials of groups of the defendants and scheduled a joint

trial of Santana and two other co-defendants (Daniel Herredia and Makene Jacobs), with jury selection on November 8, 2001. On November 13, 2001, the government began presenting its trial evidence. Trial continued through November 30, when the district court gave final instructions to the jury. GA 28-30, 631. On November 30, 2001, the jury rendered verdicts of guilty on Count Twelve against all three defendants. GA 69-72. Santana was convicted of the lesser-included offense of conspiring to possess with intent to distribute in excess of 100 grams of heroin, in violation of 21 U.S.C. §§ 841(b)(1)(B) and 846. GA 71.

On October 7, 2002, the court sentenced Santana to a 180-month term of imprisonment. Judgment entered on October 11, 2002, and on October 22, 2002, Santana filed his notice of appeal. GA 35, 73-74.

On April 6, 2005, the case was remanded for proceedings consistent with *United States v. Crosby*, 397 F.3d 103 (2d. Cir. 2005). GA 37, 77. On December 13, 2006, the district court entered a ruling declining to resentence the defendant. GA 75-76.

On February 22, 2007, the defendant filed a motion for reconsideration of the district court's denial of his motion for resentencing. That motion was denied on March 26, 2007, and on April 13, 2007, the defendant filed his notice of appeal. GA 38. The defendant is serving his sentence.

Statement of Facts

At trial, the government's evidence against Santana rested principally on the testimony of numerous cooperating witnesses concerning both their drug dealing activities generally and their specific dealings with the defendant. In addition, numerous law enforcement officers testified about their physical surveillance of the defendant and others, and the seizure of physical evidence, while lab personnel testified concerning their testing of substances seized for the presence of heroin.

Part 1 below summarizes the evidence that showed the large-scale operation and activities of the Frank Estrada drug trafficking organization. The summary is brief because, as is common in this type of case, the defendant, and his two co-defendants at trial (Daniel Herredia and Makene Jacobs) did not generally dispute the existence of a large conspiracy to distribute heroin. Part 2 reviews the specific evidence linking the defendant to the heroin trafficking conspiracy and detailing his participation in it. Part 3 summarizes the post-trial proceedings.

1. General evidence of the Estrada heroin distribution conspiracy

For much of the 1990s and into the year 2000, Frank Estrada (also known as "Big Dog" and the "Terminator") presided over a massive drug dealing organization. The Estrada organization operated primarily in the P.T. Barnum housing project in Bridgeport, but had offshoots elsewhere in Bridgeport, New Haven, and Meriden,

Connecticut. GA 248, 262, 531, 535, 541, 555-559, 564-565.

Within P.T. Barnum, the Estrada organization was one of the principal drug trafficking groups, with each organization operating in distinct areas of the project which other dealers or organizations were not permitted to infringe. GA 269-271, 292, 626-628.[2] Members of the organization sold drugs principally between Buildings #4 and #5 and by the mailboxes between Buildings #11 and #12. GA 315-317. The drugs sold at P.T. Barnum included heroin and crack cocaine. GA 316, 579,625-626.

To operate his drug trafficking organization, Estrada relied on numerous "lieutenants" who, in turn, supervised "runners" or street-level dealers within the housing project. GA 578-581. Estrada's principal lieutenants included Edward "French Fry" Estrada, William "Billy the Kid" Rodriguez, Isaias "Eso" Soler,[3] Hector "Junebug"

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[2] The other principal drug trafficking organization in P.T. Barnum was run principally by members of the Jones family, including Luke, Lance, Lonnie, and Lyle Jones. *See, e.g., United States v. Lewis*, 386 F.3d 475 (2d Cir. 2004), *op. supplemented by United States v. Lewis*, 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1355 (2005); *United States v. Jones*, 381 F.3d 114 (2d Cir. 2004), *op. supplemented by United States v. Jones*, 108 Fed. Appx. 19 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 916 (2005).

[3] *See United States v. Soler*, 124 Fed. Appx. 62 (2d Cir. 2005), *cert. denied*, 546 U.S. 821 (2005).

Gonzalez,[4] Michael "Mizzy" Hilliard,[5] Charles "Chino" DeJesus, Felix "Dino" DeJesus, and Jermaine "Fats" Jenkins. GA 95-98, 542-544, 607 .

The lieutenants obtained prepackaged heroin from Estrada which they distributed to street-level dealers for retail sale. They then remitted proceeds from those sales to Estrada. GA 578-581. An individual bag of heroin ordinarily sold on the street for $10. The baggies were collected in bundles of ten, and ten bundles made up a "brick" or "G pack" of heroin, worth $1,000 for street-level sale. GA 579. For the sale of a brick, the "runner" would generally keep $100-$300, and the "lieutenant" would keep $100-$200, with the remainder of the proceeds going back to Frank Estrada. GA 580-581. One of Estrada's lieutenants testified to having six to ten dealers working for him at P.T. Barnum and selling up to $200,000 or $300,000 per week of heroin. GA 237, 567-569.

The heroin sold by the Estrada organization was prepared for sale at "bagging sessions." During these sessions, uncut heroin obtained by Estrada was cut, ground into powder, spooned into glassine "fold" baggies, taped for sale, and then sometimes stamped with Estrada's distinct brand names, such as "Hawaiian Punch,"

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[4] *See United States v. Estrada*, 188 F.Supp. 2d 207 (D. Conn. 2002), *aff'd*, 320 F.3d 173 (2d Cir. 2003).

[5] *See United States v. Estrada*, 116 Fed. Appx. 325 (2d Cir. 2004).

"Judgment Day," "No Way Out," and "Set It Off." *See, e.g.*, GA 595-605; *see also* GA 94-97.

Estrada carried a gun and protected his drug dealing operation with firearms. GA 596. Other members of the organization also carried guns, and guns were ordinarily present during bagging sessions. *See, e.g.*, GA 132-133, 596-597.

Estrada also owned two *bodegas* (small grocery stores) and a nightclub. He often received money from drug sales at these locations, and he used the stores to launder his drug money. GA 86, 113, 135-136, 169.

Estrada operated another retail heroin organization near the corner of Noble and Ogden Avenues on the east side of Bridgeport. Nelson Carrasquillo, Estrada's chief lieutenant at the Noble and Ogden operation, testified that during the summer of 2000, he would meet Estrada every two days at the club to deliver narcotics proceeds of approximately $32,500 from the sale of fifty bricks of heroin. GA 184-186.

In July 1999, defendant Santana began working as a street-level seller at the Noble and Ogden drug retail outlet. GA 111, 161. Santana soon rose to the rank of lieutenant, and began supervising other street sellers, and handing out heroin and collecting money from the street sellers. GA 112, 165-167.

In addition to cooperating witness testimony, several law enforcement officials testified concerning seizures of

heroin, firearms, and other incriminating evidence from co-conspirators involved in the Estrada organization. The substance of their testimony is summarized below.

A. In February 1996, Bridgeport Police Sergeant John Cummings observed William Rodriguez and Eddie Mercado engaged in fourteen hand-to-hand drug sales at the P.T. Barnum project. GA 252-255. The police arrested Rodriguez and Mercado and recovered more than 200 bags of crack cocaine and approximately $2,700 cash from Mercado's person. The police also searched a car in connection with this arrest and found approximately 200 small bags of crack, 100 glassine folds of heroin, and a Tech 9 automatic pistol. GA 256-257.

Cummings was assigned to the housing project in the year 2000, and he again observed hand-to-hand drug transactions. GA 260 261. Although he did not identify the individuals involved in the transactions, during the four months he was assigned to the housing project, he regularly saw Frankie Estrada, Edward Estrada, Jermaine Jenkins, Makene Jacobs, Yamaar Shipman, Glenda Jimenez, and Viviana Jimenez, and would often see them congregating in a large group. GA 262-270.

B. Bridgeport Police Sergeant Juan Gonzalez arrested Felix DeJesus on February 5, 1997, for an outstanding warrant unrelated to the instant investigation, at which time he seized a gun and three bags containing 68 folds of "Set It Off" heroin, a brand name distributed by the Estrada organization. GA 306-307, 312.

C. On June 17, 1996, Bridgeport Police Detective Thomas Russell (retired) searched an apartment in the housing project and seized 220 glassine envelopes containing heroin, drug paraphernalia, a smoke grenade, two guns, and Frank Estrada's fingerprint inside the drawer of a safe where guns were stored. GA 361-369.

D. Bridgeport Police Detective Richard DeRiso (retired), interviewed William "Billy the Kid" Rodriguez on March 7, 1997. The information that Rodriguez provided resulted in the issuance of a Connecticut Superior Court search warrant for an apartment at 80 Granfield Avenue in Bridgeport. In that apartment, the police found evidence of a massive "bagging" operation, including boxes containing hundreds of empty glassine envelopes commonly used to package narcotics, two handguns, small amounts of crack cocaine and heroin, four coffee grinders used to grind heroin, and packaging materials, stamps, and boxes marked "Set It Off," "Ransom," and "Monkey B." GA 396-418.

2. Evidence specific to Felipe Santana

In the summer of 1999, Nelson Carrasquillo was the lieutenant in charge of running the day-to-day operations of an Estrada retail heroin distribution outlet at the corner of Noble and Ogden Streets in Bridgeport, Connecticut. GA 98, 101-103. Carrasquillo hired several street-level sellers. In July 1999, one of Carrasquillo's dealers, Erasmo Ortiz, recruited one of his friends, defendant Santana, to join the Noble and Ogden operation as a street seller. GA 110-112.

Santana became one of approximately four street sellers working at the location. The operation included various shifts during which the workers sold Estrada brand heroin ("Hawaiian Punch") to a steady stream of customers. Carrasquillo paid Santana and his other sellers $200 per "brick" of heroin and kept $150 per brick for himself. The remaining $650 was, in turn, passed up the chain to Isaias Soler, Edward Estrada, two higher ranking lieutenants, or to Frank Estrada himself. GA 103, 112, 114-116, 125, 149-150, 178.

Shortly after Santana began selling heroin for Carrasquillo, business at the Noble and Ogden location began booming. Carrasquillo was asked by Frank Estrada to take on more responsibilities and was elevated to a higher rank in the organization. Estrada asked Carrasquillo to find another lieutenant to run the day-to-day operations at Noble and Ogden. GA 112, 114, 170, 184, 228. Carrasquillo offered the job to Santana, who was one of his best sellers. Santana accepted and took over the lieutenant position at Noble and Ogden. GA 112. Santana had several sellers working for him. GA 164-165.

Between July and October 1999, Carrasquillo, Santana and their crew sold an average of four "bricks" (100 individual baggies, worth a total of $1,000) of "Hawaiian Punch" brand heroin a day. GA 162-163.

On October 27, 1999, officers of the Bridgeport Narcotics Tactical Team ("TNT") were conducting surveillance at 727 Noble Avenue, an apartment building at the corner of Noble and Ogden. The surveillance

officers observed several narcotics transactions. GA 457-462. After watching Santana direct the sale of narcotics to various customers, the offices arrested him. GA 459-461. A search of the area led to the recovery of a plastic bag with little bags containing heroin, attached to a piece of clothing hanging on a clothesline in the rear area of the apartment building. GA 463. At the time of the arrest, Santana identified himself under the alias "Omar Soto." GA 467.

On October 29, 1999, members of the TNT squad were again conducting surveillance at 727 Noble Avenue. As before, they saw Santana selling drugs and arrested him. Santana was found to be in possession of a plastic bag containing numerous folds of heroin that he had been selling to various customers in the area of Noble and Ogden. GA 470-478. Santana again identified himself as "Omar Soto" when he was placed under arrest. GA 478.

On December 21, 1999, members of the TNT squad saw Santana selling drugs from inside a car parked near the corner of Noble and Stillman streets. GA 484-485. They arrested Santana for a third time, and found a small quantity of heroin inside his car. GA 486.

3. Post-trial proceedings

On November 30, 2001, the jury found Santana guilty on Count Twelve, but found on the special verdict form that his participation involved only 100 grams or more of heroin. GA 69-72. On October 7, 2002, the district court

sentenced Santana to 180 months in prison, to be followed by eight years of supervised release. GA 73-74.

SUMMARY OF ARGUMENT

1. Santana waived any objection to a joint trial with co-defendants Jacobs and Herredia by failing to file a pretrial severance motion. *See* Fed. R. Crim. P. 12(b)(3)(D), (f). Such a waiver is excusable only for "good cause," and this Court has held that counsel's inadvertence does not satisfy that standard.

Nor can Santana establish that his counsel was constitutionally ineffective for failing to file a pretrial severance motion, and instead moving for severance mid-trial. Counsel's performance was neither deficient nor prejudicial because a pretrial severance motion would have been meritless. Santana was properly joined for trial with two co-defendants charged in the same drug conspiracy. He suffered no unfair spillover prejudice from a videotape of co-defendant Jacobs selling narcotics to a woman with small children in the P.T. Barnum housing projects. The videotape would have been admissible at a separate trial involving only Santana because it proved the extent of the narcotics conspiracy that he was charged with joining; the judge repeatedly instructed the jury on the need to consider the evidence separately with respect to each defendant; and the jury clearly followed those instructions, as evidenced by their verdicts attributing different drug quantities to Santana and his co-defendants.

2. Santana's claim that he withdrew from the conspiracy is both legally irrelevant and factually unsupported. This Court has held that withdrawal from a conspiracy is not a defense where (as here) the defendant participated in the charged conspiracy prior to the date of withdrawal. Nor was Santana's withdrawal arguably relevant in any other respect. He did not, for example, claim that he had withdrawn from the conspiracy so early that the limitations period had run by the time of the indictment, or that the court improperly admitted co-conspirator statements that were made after his purported withdrawal. In any event, any claim that he had withdrawn from the conspiracy was factually unsupported by the evidence. Even while he was attempting to cooperate with law enforcement authorities under the false name of "Omar Soto," he was still engaged in narcotics trafficking. The jury had more than sufficient evidence to reject any affirmative defense based on Santana's purported withdrawal from the conspiracy.

ARGUMENT

I. Santana waived any challenge to his joint trial with two co-conspirators, where trial counsel moved for severance mid-trial rather than pretrial, and where even a timely motion would have been properly denied.

A. Relevant facts

Count Twelve of the Third Superseding Indictment charged 20 defendants with conspiracy to possess with intent to distribute 1,000 grams or more of heroin. GA 60-61. The district court set a joint trial for three of those defendants – Santana, Daniel Herredia, and Makene Jacobs – in November 2001. GA 28.

The trial evidence established that Santana was a street-level distributor at the retail distribution site at Noble and Ogden Avenues. GA 116. Makene Jacobs was a lieutenant in the Estrada organization who distributed narcotics within the P.T. Barnum housing project. *See supra* Statement of Facts, Part 1. Daniel Herredia received pre-packaged heroin which he distributed for the organization in New Haven. *See supra* Statement of Facts, Part 1.

During the trial, the government played a surveillance videotape of Jacobs standing in P.T. Barnum distributing narcotics to a woman with two small children. Tr.11/27/2001, 187-189. Santana did not appear in the videotape, nor was there evidence that he sold heroin at

the P.T. Barnum retail outlet of the Estrada organization. Jacobs' counsel did not object to the admission of any part of this videotape. The next morning, counsel for Santana moved to sever his trial from that of Jacobs. GSA (attached) 2-3. Santana's counsel argued that once the jury had seen the videotape, it resulted in unfair spill-over prejudice against him. *Id*. Counsel for defendant Herredia joined in the motion. GSA 4.

The district court denied the motion to sever, finding that

> [t]he risk of spill-over I think is minimized by the fact that the three defendants being tried together in this case are distinct in the allegations made against them. That is, there is no allegation, no evidence that Mr. Santana was involved in any way in anything that happened at the housing project. And visa versa. And Mr. Herredia is alleged to have been involved in activities in New Haven, so that the three defendants here are distinct geographically, they are distinct in terms of time, at least to a certain extent the time they are alleged to have been involved, and I think that minimizes any spill-over effect because Mr. Santana simply has nothing to do with anything that happened at the housing project.
>
> And the video I agree was very strong evidence but I don't believe it's going to have any spill-over effect on the other defendants because it was so specific to Mr. Jacobs. So I understand the concern

but believe that a fair trial can be had in this case for all three defendants.

GSA 9.

B. Governing law and standard of review

1. Severance

The Supreme Court and this Court recognize a "preference in the federal system for joint trials of defendants who are indicted together." *United States v. Blount*, 291 F.3d 201, 208-209 (2d Cir. 2002) (quoting *Zafiro v. United States*, 506 U.S. 534, 537 (1993)). "Joint trials promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *United States v. Nosov*, 153 F. Supp. 2d 477, 481 (S.D.N.Y. 2001) (internal quotation omitted); *see also Richardson v. Marsh*, 481 U.S. 200, 209-10 (1987) (describing benefits of joint trials).

Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of two or more defendants in the same indictment. *United States v. Turoff*, 853 F.2d 1037, 1042 (2d Cir. 1988). Rule 8 permits joinder where the parties to be joined are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Therefore, "multiple defendants cannot be tried together on two or more 'similar' but unrelated acts or transactions," but may be tried together if the charged acts

"are part of a 'series of acts or transactions constituting an offense or offenses.'" *Turoff*, 853 F.2d at 1043.

For joinder to be proper under Rule 8(b), the acts in which the defendants are alleged to have participated (1) must arise under a common plan or scheme, or (2) be unified by a substantial identity of facts or participants. *United States v. Rittweger*, 259 F. Supp. 2d 275, 283 (S.D.N.Y. 2003) (citing *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)); *see also United States v. Cervone*, 907 F.2d 332, 341 (2d Cir. 1990). Under this standard, the mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants engaged in the same series of acts or transactions constituting an offense. *United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988); *see also United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988) ("The established rule is that a non-frivolous conspiracy charge is sufficient to support joinder of defendants under Fed. R. Crim. P. 8(b).").

The question of proper joinder raises a question of law subject to *de novo* review. *United States v. Feyrer*, 333 F.3d 110, 113 (2d Cir. 2003).

Even if joinder is proper under Rule 8(b), the district court has the discretion to sever the trial pursuant to Rule 14 which provides, in relevant part:

> If the joinder of . . . defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants'

> trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14. While Rule 14 provides a mechanism for discretionary severance upon a showing of substantial prejudice, a defendant seeking such severance bears a heavy burden of persuasion. *See United States v. Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989) ("To challenge the denial of a severance motion, a defendant must sustain an extremely difficult burden.") (internal quotation marks omitted).

A motion to sever should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539; *United States v. Yousef*, 327 F.3d 56, 150 (2d Cir. 2003). "Merely establishing that a defendant would have had a better chance for acquittal at a separate trial is not sufficient to show substantial prejudice." *Tutino*, 883 F.2d at 1130.

A district court's evaluation of the potential for substantial prejudice must take into account that once a defendant is a member of a conspiracy, "all the evidence admitted to prove that conspiracy, even evidence relating to acts committed by co-defendants, is admissible against the defendant." *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998). A defendant is not entitled to severance of his trial from that of a co-defendant simply because the evidence against the co-defendant is far more

damaging that the evidence against him. *See, e.g.*, *United States v. Diaz*, 176 F.3d 52, 103 (2d Cir. 1999).

Because evidence to prove a conspiracy often involves acts of co-conspirators independent from other co-conspirators, there arises a possibility of spillover prejudice. Among the factors considered in determining whether a jury could keep the evidence separate as to each defendant are the following: (1) whether the evidence to be presented at the joint trial would be admissible in a single-defendant trial; (2) whether the court can properly instruct the jury to keep the evidence separate as to each defendant; and (3) whether the jury actually evaluated the evidence and rendered independent verdicts. *See United States v. Casamento*, 887 F.2d 1141, 1153 (2d Cir. 1989); *see also United States v. Villegas*, 899 F.2d 1324, 1347 (2d Cir. 1990). "No one of the factors is dispositive." *Id.* at 1347.

In accordance with the *Casamento* factors, this Court has repeatedly held that a trial court can carefully instruct the jury in a way to avoid the possibility of spillover prejudice. *See Feyrer*, 333 F.3d at 115; *United States v. Miller*, 116 F.3d 641, 679 (2d Cir. 1997). The ultimate question is whether the jury can "compartmentalize the evidence presented to it, and distinguish among the various defendants in a multi-defendant suit." *See United States v. Triumph Capital Group, Inc.*, 260 F. Supp. 2d 432, 439 (D. Conn. 2002) (internal quotation marks omitted).

Thus, the existence of prejudice does not guarantee severance. *See Zafiro*, 506 U.S. at 538-39; *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998). Rather, the defendant "must show that the prejudice to him from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *Walker*, 142 F.3d at 110. Even where the risk of prejudice is high, the court can implement less "drastic" measures such as limiting instructions, that will suffice as an alternative to granting severance. *See Zafiro*, 506 U.S. at 538-39.

Because the district court is given broad discretion to fashion an appropriate remedy for any potential prejudice, this Court has recognized that it rarely overturns the denial of a motion to sever. *Feyrer*, 333 F.3d at 114-115. Indeed, a district court's decision to deny a motion to sever is "virtually unreviewable." *Diaz*, 176 F.3d at 102. A district court's decision will be reversed "only if a defendant can show prejudice so severe that his conviction constituted a miscarriage of justice, and that the denial of his motion constituted an abuse of discretion." *Salameh*, 152 F.3d at 115 (internal quotation marks and citations omitted).

2. Ineffective assistance of counsel

A claim of constitutionally ineffective assistance of counsel is subject to well-established criteria for review. "To support a claim for ineffective assistance of counsel, petitioner must demonstrate," first, "that his trial counsel's performance 'fell below an objective standard of

reasonableness . . . .'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (per curiam) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In determining whether counsel's performance was objectively reasonable, this Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy.'" *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (alteration in original) (quoting *Strickland*, 466 U.S. at 689).

Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Johnson*, 313 F.3d at 818. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As relevant to this case, when a defendant alleges that his counsel was ineffective for failing to file a motion, the defendant must show that the motion would have been meritorious and that there is a reasonable probability that "the verdict would have been different" if the motion had been granted. *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990) (dealing with suppression motion) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375-76 (1986)).

This Court has expressed its reluctance to decide ineffective assistance of counsel claims on direct review, but it has also held that "direct appellate review is not

foreclosed." *Gaskin*, 364 F.3d at 467-68. This Court continues to recognize that when a criminal defendant on direct appeal asserts trial counsel's ineffective assistance to the defendant, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000); *see also United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004).

In choosing among these options, this Court has been mindful of the Supreme Court's direction that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see Gaskin*, 364 F.3d at 467-68. But this direction, as interpreted by this Court, is not an injunction against reviewing new ineffective assistance claims on direct appeal, but rather an expression of the Supreme Court's view that, "the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Doe*, 365 F.3d at 153 (alteration in original) (quoting *Massaro*, 538 U.S. at 501).

For this reason, this Court may resolve ineffective assistance claims on direct appeal "when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting

United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003)); *see also Matos*, 905 F.3d at 32.

This Court reviews a claim of ineffective assistance of counsel *de novo*, *United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001), but "[w]here the district court has decided such a claim and has made findings of historical fact, those findings may not properly be overturned unless they are clearly erroneous," *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004). Moreover, when reviewing factual findings, "particularly strong deference" is owed when "the district court premises its findings on credibility determinations." *Id.*

C. Discussion

Santana belatedly argues that he was improperly joined with co-defendants Jacobs and Herredia under Federal Rule of Criminal Procedure 8(b). He further argues that even if joinder was proper, the district court should have granted his motion to sever pursuant to Rule 14 because of the prejudicial impact of a videotape of co-defendant Jacobs. Apparently recognizing that this claim was waived by trial counsel's failure to move for severance pretrial, Santana tries to resuscitate the claim by arguing that counsel was ineffective for waiting until mid-trial to request a severance. For the reasons set forth below, these arguments all fail.

1. Santana waived any claim to severance by failing to assert that claim pretrial, as required by Fed. R. Crim. P. 12(b)(3)(D).

As a preliminary matter, Santana waived any argument that he was improperly joined with Herredia and Jacobs by failing to raise that claim before trial. Rule 12(b)(3)(D) states that among the motions that "must be raised *before* trial" are "a Rule 14 motion to sever charges or defendants." (Emphasis added). Rule 12(e) provides that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides." Because Santana raised his severance claim for the first time mid-trial, he has waived any objection to a joint trial. *See, e.g., United States v. Page*, 521 F.3d 101, 110 (1st Cir. 2008); *United States v. Yousef*, 327 F.3d 56, 144 (2d Cir. 2003) (finding waiver of belated suppression claim); *United States v. Crowley*, 236 F.3d 104, 108-10 (2d Cir. 2000) (finding waiver of belated specificity challenge to indictment).

Relief from a waiver under Rule 12 is available only for "good cause." Fed. R. Crim. P. 12(e). Although this Court has not precisely defined the contours of "good cause," it has held that counsel's simple failure to learn earlier of the facts giving rise to the late motion does not satisfy the standard. *See United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993) (declining to consider belated suppression motion, where counsel failed to discuss case with client to learn facts in a timely manner; noting that to overcome waiver, defendant may show both "(1) cause for

the defendant's non-compliance, and (2) actual prejudice arising from the waiver"). Indeed, this Court has held more broadly that "[i]nadvertence by counsel . . . does not constitute cause" for purposes of excusing a Rule 12(b) waiver. *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) (citing *Indiviglio v. United States*, 612 F.2d 624, 631 (2d Cir.1979), for the proposition that "counsel's failure to make suppression motion before trial constituted waiver whether omission resulted from inadvertence or strategy").

Moreover, "it makes no difference whether the claim of attorney oversight is raised on direct appeal, or collateral attack." *Forrester*, 60 F.3d at 59; *Indiviglio*, 612 F.2d at 630. "[I]t is irrelevant whether counsel's failure to raise at trial [the defendant's belated claim] is characterized either as a matter of sheer inadvertence or as one of professional judgment that a motion on such grounds would have been unsuccessful, because neither is sufficient to constitute 'cause' within the meaning of Rule 12 . . . ." *Indiviglio*, 612 F.2d at 630 (footnote omitted).

For the reasons discussed in the following section, even if constitutionally ineffective assistance of counsel can be deemed "good cause," Santana cannot make the extraordinary showing that his counsel's performance was so deficient and prejudicial as to violate the Sixth Amendment and thereby excuse his waiver.

2. Santana's counsel was not constitutionally ineffective for failing to move for severance pretrial, where such a motion would have been meritless.

Because Santana was properly joined for trial with his co-conspirators, Santana's trial counsel was not constitutionally ineffective for failing to move for severance before trial. Put another way, the performance of Santana's lawyer was neither deficient nor prejudicial, where he simply failed to file a meritless motion.[5]

Santana's motion to sever was entirely premised upon the potential for spillover prejudice from a videotape showing defendant Jacobs selling narcotics to a woman with two small children. This Court has already concluded, in co-defendant Herredia's case, that the district court's denial of severance based on the videotape was not an abuse of discretion. *See United States v. Herredia*, 153 Fed. Appx. 50, 55 (2d Cir. 2005). Santana offers no reason why his situation is any different from that of Herredia, and so this Court's prior ruling should govern the outcome of this appeal as well.

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[5] Although Santana failed to raise this ineffectiveness claim below, it is based entirely on the face of the record and therefore is amenable to resolution on direct appeal. *See United States v. Herredia*, 153 Fed. Appx. 50, 55 (2d Cir. 2005) (reaching co-defendant Jacobs' claim that counsel was ineffective for failing to move to exclude videotape from evidence).

Indeed, an evaluation of the *Casamento* factors demonstrates that, as this Court has previously held, the district court did not abuse its discretion in denying Santana's motion to sever. This analysis would have been the same, regardless of whether the motion had been filed before or during trial.

First, because the videotape was used to show acts in furtherance of the underlying conspiracy, the evidence likely would have been admissible against Santana even if he had been tried separately from Jacobs and Herredia. *See Salameh*, 152 F.3d at 111. The videotape was direct and highly probative evidence of Jacobs selling drugs in P.T. Barnum. Rule 403 provides for evidence to be excluded only if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be *unfair*. The unfairness contemplated involves some adverse effect beyond tending to prove a fact or issue that justifies admission." *Costantino v. Herzog*, 203 F.3d 164, 174-75 (2d Cir. 2000) (citation omitted).

Here, Santana was not unfairly prejudiced by the videotape evidence. The videotape provided dramatic evidence of a conspirator selling narcotics during the time period charged in the indictment in an area known to be controlled by the Estrada organization. This evidence was highly probative of the nature and extent of the conspiracy

with which Santana was charged, and as corroboration of the government's cooperating witnesses. Santana identifies no *unfair* prejudice, beyond the tendency of the videotape to show that he was guilty of the offense charged, to justify exclusion under Rule 403.[6] In sum, any objection to its introduction would have been denied.

Second, the court repeatedly and properly instructed the jury to keep the evidence separate as to each defendant. As the defendant concedes, "Judge Underhill instructed the jury to view the evidence against each defendant separately and independently." Def. Br. at 20. In the court's final instructions, it repeatedly admonished the jury to evaluate the evidence against each defendant separately. For example, the court stated:

> Although there are three defendants on trial, you are to consider each defendant as if he were on trial alone. You are required to render a verdict regarding each defendant separately. Your verdict for each individual defendant must be based solely upon the evidence concerning that defendant. The guilt or innocence of each defendant on trial must be determined separately and must be based solely on the evidence or the lack of evidence presented concerning his involvement in the alleged

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[6] On appeal, Makene Jacobs claimed this his trial counsel was ineffective for failing to move to preclude the introduction of the videotape. His claims were rejected, and his conviction and life sentence were affirmed. *See United States v. Herredia*, 153 Fed. Appx. 50 (2d Cir. 2005).

> conspiracy. This is true even though there may be evidence regarding the involvement of others. The guilt or innocence of any one defendant should have no bearing on the guilt or innocence of any other defendant. Before you can find any one defendant on trial guilty of the charge against him, you must be persuaded of his guilt beyond a reasonable doubt by the evidence of his personal involvement.

GA 648; *see also* GA 645 ("In a criminal case, the government must prove each element of the crime beyond a reasonable doubt against each defendant."); GA 646 ("In order for the government to prove that a defendant is guilty of the offense charged, it must prove all elements of the offense beyond a reasonable doubt against that defendant."); GA 664 ("It is important for you to note that each defendant's participation in the conspiracy must be separately established by independent evidence."). Although the court did not give a specific limiting instruction at the time of the playing of the videotape, it was counsel for defendant Santana who claimed that a limiting instruction would not dispel any prejudice from the videotape. GSA 2-3.

Third, the jury's verdict establishes that it indeed evaluated the evidence as to each defendant separately. The jury was presented with a special verdict form which required it to determine the amount of heroin each defendant agreed to possess with intent to distribute. GA 69-72. Although the jury found beyond a reasonable doubt that both Herredia and Jacobs' agreements included

1,000 grams or more of heroin, GA 69-70, the jury found that Santana's agreement included only 100 grams or more of heroin, GA71-72. These verdicts establish that the jury evaluated the evidence and rendered independent verdicts as to each defendant.

In sum, because the videotape would likely have been admissible against him in a separate trial, because the district court provided appropriate instructions to protect against spillover prejudice, and because it appears that the jury was able to follow those instructions, Santana cannot show that the denial of his motion to sever resulted in a conviction that "constituted a miscarriage of justice." *Salameh*, 152 F.3d at 115.[7]

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[7] The showing of prejudice necessary to establish a claim of spillover prejudice or improper joinder is essentially the same as that needed to establish prejudice under *Strickland*. For much the same reasons set forth above, Santana has failed to show that, even if a pretrial severance motion had been granted, the outcome of a separate trial would have been different. The testimony of cooperating witnesses and law enforcement officers about Santana's repeated drug dealing in the Noble Street area would have been more than sufficient to convict him without the videotape. Accordingly, Santana has failed to show that he was prejudiced in any way by counsel's failure to move for severance before trial.

II. Santana's claim that he withdrew from the charged conspiracy is both legally irrelevant and factually unsupported.

A. Relevant facts

The defendant was arrested on a number of occasions by members of the Bridgeport Police Department who frequently conducted physical surveillance in the area of Noble and Ogden streets in the summer of 1999. The defendant was observed engaging in narcotics trafficking activity in October and December 1999. GA 456, 470, 472, 482. At the time of his arrests, the defendant, who used the false name of "Omar Soto," expressed his desire to cooperate with law enforcement authorities. GA 437.

In the summer of 1999, Detective Angel Llanos of the Bridgeport Police Department was assigned to the Bridgeport FBI Safe Streets Task Force ("Task Force") and was assigned to the Estrada narcotics trafficking investigation. GA 431-432. Detective Llanos worked closely with members of the Bridgeport TNT who had arrested Santana. When Santana agreed to cooperate with law enforcement authorities, Detective Llanos was signed him up to be a confidential informant to be used in the on-going Estrada investigation. GA 439.

Santana agreed to engage in the controlled purchase of narcotics, at the direction and under the supervision of law enforcement, from Nelson Carrasquillo, who was one of the main targets of the Estrada investigation. GA 440-443.

On December 16, 1999, the defendant, still falsely posing as "Omar Soto," the defendant was directed to make a controlled purchase of narcotics from Nelson Carrassquillo. GA 441. During the course of the investigation, law enforcement agents discovered that the defendant was using a false name and had continued to engage in narcotics trafficking activities in direct violation of the terms he had agreed to when he began cooperating with law enforcement. GA 445-450.

In its closing instructions to the jury, the district court included the standard instructions on withdrawal from a conspiracy as an affirmative defense. GA 669-670.

B. Governing law and standard of review

This Court has held that withdrawal from a conspiracy is not a defense where the defendant participated in the charged conspiracy prior to the date of withdrawal. *United States v. LoRusso*, 695 F.2d 45, 55 n.5 (2d Cir. 1982); *see also United States v. Rogers*, 102 F.3d 641, 644 (1st Cir. 1996) (withdrawal from a conspiracy is not an affirmative defense if the conspiratorial agreement has already been made).

There are other types of cases where withdrawal from a conspiracy could preclude the introduction of certain evidence against a defendant, or where withdrawal might give rise to a statute-of-limitations defense. For example, a district court must determine whether a defendant's alleged withdrawal from a conspiracy precludes the government from offering certain coconspirator statements

against him at trial pursuant to Fed. R. Evid. 801(d)(2)(E). *United States v. Nerlinger*, 862 F.2d 967 (2d Cir. 1988). A defendant's affirmative withdrawal from a conspiracy may bar prosecution if the statute of limitations has run by the time the indictment is filed in the case; this is a question for a jury to decide. *See United States v. James,* 609 F.2d 36, 41-42 (2d Cir. 1979); *United States v. Flaharty*, 295 F.3d 182, 192-93 (2d Cir. 2002).

C. Discussion

The defendant claims that his state arrests during the course of his participation in the Estrada drug trafficking conspiracy, and his attempt to cooperate with law enforcement authorities, constituted a withdrawal from the conspiracy. Def. Br. at 25-27. Although he is not clear on the point, he seems to be arguing that such a withdrawal would have constituted an affirmative defense to the conspiracy charge. The evidence in this case, however, clearly established the defendant's role as a seller and lieutenant in the Estrada organization during the summer of 1999. *See* GA 112, 116. Thus, it makes no difference whether or not the defendant subsequently withdrew or retired from the charged conspiracy, after he was arrested in October 1999. Even if the defendant had withdrawn after his October 1999 arrests, such a withdrawal is not an affirmative defense to the crime he had already committed.

First, it is settled law that withdrawal from a conspiracy is not a defense where the charged conspiracy alleges participation by the defendant sometime prior to the withdrawal. *United States v. LoRusso*, 695 F.2d 45, 55

n.5 (2d Cir. 1982) (holding that withdrawal from conspiracy is not defense to conspiracy count directed at period prior to withdrawal).

Because the evidence clearly established that Santana joined the Estrada heroin trafficking organization in July 1999, and worked throughout the summer months as both a street-level seller and a lieutenant at one of its most lucrative drug spots, his arrest in October 1999 is of no moment. GA 99, 112, 116; *see United States v. Rogers*, 102 F.3d 641, 644 (1st Cir. 1996) (withdrawal is not a defense to a conspiracy charge if the conspiracy violation has already occurred). As the First Circuit explained in *Rogers*, "[t]he traditional rule here is strict and inflexible: since the crime is complete with the agreement, no subsequent action can exonerate the conspirator of that crime." *Id.* Thus, it simply does not matter if the defendant withdrew from the conspiracy at some point after he had fully participated in it.

Nor did this case involve any of the limited situations where a defendant's withdrawal from a conspiracy could have had some impact on the trial. For example, Santana did not claim that the government should have been precluded from introducing coconspirator statements that were made after he had allegedly withdrawn from the conspiracy. *See Rogers*, 102 F.3d at 644 (withdrawal can prevent admission of coconspirator statements that are made after a defendant withdrawals); *United States v. Nerlinger,* 862 F.2d 967 (2d Cir. 1988); *see generally* Fed. R. Evid. 801(d)(2)(E). Nor did he claim that his purported withdrawal from the conspiracy in October 1999 somehow

took his prosecution outside the statutory limitations period. *See Rogers*, 102 F.3d 641, 644 (withdrawal will normally start the running of the statute of limitations)*; see also United States v. James,* 609 F.2d 36, 41-42 (2d Cir. 1979). Indeed, such a claim would have been frivolous, since the third superseding indictment was returned in June 20, 2001, GA 18 – less than two years into the five-year limitations period set by 18 U.S.C. § 3282, if one accepts *arguendo* Santana's claim to have withdrawn from the conspiracy by October 1999.

Finally, the fact remains that the jury was instructed (inappropriately, as it turns out) on withdrawal as an affirmative defense, and they quite properly rejected it on this record. The jury was certainly entitled to conclude that the defendant had not affirmatively withdrawn from the conspiracy, but instead used a false name when he was arrested and continued to engage in narcotics trafficking at Noble and Ogden after his arrests. GA 450, 482. The defendant contends that he was "compelled to continue doing something" (sell drugs) in order to keep up appearances with his coconspirators while he secretly worked for law enforcement authorities. Def. Br. at 27. But the defendant had agreed to refrain from engaging in "illegal or improper conduct as long as I am working with the Bridgeport police department." GA 448-449. Thus, by continuing to engage in narcotics trafficking, he violated his agreement with the Bridgeport Police Department, and demonstrated that he had not withdrawn from the conspiracy. *See United States v. Massino*, — F.3d — , 2008 WL 4530517, at *12 (2d. Cir. 2008) (per curiam) ("Although arrest *may* constitute withdrawal, whether it

does is a fact-dependent question . . . .") (rejecting the notion that there is a rebuttable presumption that a person withdraws from a conspiracy when arrested).

Moreover, the defendant's use of a false name (Omar Soto) at the time of the arrests by local law enforcement and when he agreed to assist law enforcement, further demonstrated the defendant's continued participation in the conspiracy. GA 446-449. Indeed, the defendant had instructed Nelson Carrasquillo, his boss on the drug block, that in the event he (the defendant) was arrested, Carrasquillo should bond him out under the name "Omar Soto." GA 166. Santana explained that he was "hot" and that Carrasquillo should use "Omar Soto" instead of his real name in the event Santana was arrested. *Id*. Thus, while the defendant held himself out as "cooperative" with law enforcement, there was more than sufficient evidence that he never ceased his participation in the conspiracy.

In sum, the defendant's claim that he withdrew from the conspiracy in October of 1999, after he had been an active member since July of 1999, is not a valid defense to the conspiracy charge in this case, and should be rejected. There is also no connection between his alleged withdrawal from the conspiracy to a statute of limitations issue or even to an evidentiary issue, further demonstrating the irrelevance of his claim. Furthermore, the jury was charged on the affirmative defense of withdrawal, and clearly rejected any such defense. Thus, the defendant's claims are without merit, and his conviction should be affirmed.

CONCLUSION

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

Dated: November 12, 2008

Respectfully submitted,

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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 8,674 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Alina Reynolds

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ASSISTANT U.S. ATTORNEY

GOVERNMENT'S
SUPPLEMENTAL APPENDIX

Excerpt from Trial Transcript dated November 28, 2001
[pages 8-10]

the government's case and before we get to the defense case.

THE COURT: All right. Well, 804(b)(3) was what I assumed was going to be the argument today and it sounds like it may be, but --

MR. GLADSTONE: Whoever said practicing law can't be creative?

THE COURT: It's another layer on the onion if you don't intend to call him whether you can even determine he's unavailable. He's not, he's going to be obligated, I assume, to take the Fifth unless you're going to ask him questions.

MR. GLADSTONE: Right.

THE COURT: So I mean it's a circular problem.

MR. GLADSTONE: Yes, and I would agree.

THE COURT: All right. Mr. Hillis?

MR. HILLIS: Before we begin, your Honor, after the videotape of yesterday, your Honor should know that I don't request severances in conspiracy trials as a matter of course but after the videotape of yesterday, I will submit to the court and to Mr. Hernandez a motion for severance for my client. I think that the showing of that videotape, while it -- clearly I saw it beforehand, the showing in slow motion of the lady with the two children buying heroin from a codefendant is so prejudicial to my client's case that I am requesting that he be severed from this case; the reason being that there's no

way that I can take that skunk out of the jury box at this point with regard to him. And more importantly, he was incarcerated at the time that that was going on, so even if you take the theory of him being involuntarily excised from the conspiracy, I think that he is never going to be able to overcome the prejudice of that tape and the playing of that tape, and I don't think it was really relative to him at all.

THE COURT: Let me be clear what you're asking for.

MR. HILLIS: I'm asking that he be given another trial and to be severed because he is not going to, he is never going to be able to overcome the power of that tape. And while it was clearly shown to us, you know, provided to counsel, I can't make a claim that it was a surprise or anything, untoward event, you know, we have to deal -- a lot of times we deal with what comes at us at the time it comes at us, and having seen that videotape, it is my belief that I will never be able to provide him with a defense, with a fair enough defense. And he had nothing to do with P T Barnum, he had nothing to do with the sale to that woman and I don't think that he's ever going to be able to overcome the prejudice of that tape and I don't think that tape was applicable to him. I don't think -- and I don't think that a cautionary instruction by the court with regard to the limited, you know, a limiting instruction is going to help in this matter. It's out and I don't believe

he's going to get a fair trial at the end of the day.

MR. GLADSTONE: I would join in that motion, your Honor.

MR. HILLIS: And I have learned, Judge, I'll tell you I learned a long time ago, the first case I tried was against AUSA Hernandez and I think Judge Dorsey reminded me that there is a lot of prejudicial things that come in about your client but this is a prejudicial issue that had nothing, that in any regard had nothing to do with him. It's not related to him, it's nowhere related to the government's theory of conspiracy with regard to him. It's not the same area. There has been no tie-up between this defendant and the defendant on the videotape and Mr. Santana.

THE COURT: Are you going to make a written motion?

MR. HILLIS: I am, Judge. I just didn't have the time to research it.

THE COURT: All right. The other issue that I had was the backs of these photographs, the information. Any objection to that?

MR. HILLIS: None for Mr. Santana, your Honor.

MR. WARREN: No, your Honor.

THE COURT: Any objection to the information on the backs of the photographs?

MR. GLADSTONE: No, your Honor, none.

Excerpt from Trial Transcript dated November 29, 2001
[pages 6-8]

reviewed it with Mr. Herredia and he's read through it, he's fine with it as well.

THE COURT: All right. There was also the issue of alternates. I don't know if anybody's thought about whether we want to go with 11 in the event that we need to, or go with alternates and have them available.

MR. WARREN: I think the consensus that we seemed to reach yesterday is that we're probably not going to get to the jury until tomorrow morning, that we would hold the alternates until the end of the day and we'd have plenty of time to discuss that, but I'd want sometime to talk with my client whether he would want to waive or have an alternate, so I think we're covered for Friday and will have time to confer on that.

THE COURT: All right. Mr. Gladstone, I haven't seen it yet but I intend to grant your motion to adopt the motion to sever filed by Mr. Hillis. Let me have any argument, any additional argument, Mr. Hillis, you want to make on that motion. Obviously I heard you briefly yesterday on it.

MR. HILLIS: A few things have come up since I filed the motion, Judge. Once again, the testimony and any spill-over effect of the testimony of Mr. Jacobs again is going to come into play with regard to my motion for severance and further trial, and there is a prospective

part of this motion as well, and that is if Your Honor allows them to bring in some tape showing the association, showing the association between Mr. Vereen and Nelson Carrasquillo, the problem with that is, Judge, is that the Nelson Carrasquillo issue was not brought up on the direct examination of Mr. Vereen. It was brought up on cross examination by the government, so therefore, they were the ones that generated this and I don't think that it's proper for them to have a rebuttal case on any information that they elicited, they themselves elicited that would have an effect on Mr. Santana.

So, in the event that -- in the event that you do grant them the ability to play that, Judge, that would also be part of my severance motion as well.

THE COURT: All right. Any response by the government?

MS. MARQUEZ: Your Honor, I think we do have -- it is appropriate rebuttal evidence.

THE COURT: Let's -- let me put that aside because we're going to get to the rebuttal issue in just a minute but in terms of the motion to sever --

MS. MARQUEZ: We continue to oppose that, Your Honor. This is a conspiracy case. We've elicited lots of evidence that has nothing to do with Felipe Santana and he's free to argue that, but that is not a grounds for

severed case, especially at this point. He was aware of all this evidence and it's come in, it's been admitted as relevant to one of the coconspirators. He can argue that it has nothing to do with his client, but it certainly is not grounds for severance.

MR. HILLIS: And again, Judge, perhaps I didn't -- I would just want to make it clear to the government what my argument is. I certainly understand the pressures, we face it every time we have a conspiracy case. The ultimate issue is whether that video played in slow motion has such a spill-over effect on Mr. Santana that he in effect is not going to get a fair trial. And I would just remember, or just remind the court when this tape was being played, the amount and the level of people fidgeting and making noise abated and this was almost to the point where I could in good faith tell the court that the jury was shocked to see it. That's the problem. Is the jury going to remember that instance and is that instance alone going to prevent Mr. Santana from having a fair and impartial jury in his case. It's got really nothing to do with whether he's prejudiced or whether we want to sit here and whine to you. The issue is when they played it again during closing and when it was played, is it going to prevent them from giving him a fair consideration, and my argument is yes, it is.

THE COURT: All right. I disagree. I'm going to deny the motion to sever. The risk of spill-over I think is minimized by the fact that the three defendants being tried together in this case are distinct in the allegations made against them. That is, there is no allegation, no evidence that Mr. Santana was involved in any way in anything that happened at the housing project. And visa versa. And Mr. Herredia is alleged to have been involved in activities in New Haven, so that the three defendants here are distinct geographically, they are distinct in terms of time, at least to a certain extent the time they are alleged to have been involved, and I think that minimizes any spill-over effect because Mr. Santana simply has nothing to do with anything that happened at the housing project.

And the video I agree was very strong evidence but I don't believe it's going to have any spill-over effect on the other defendants because it was so specific to Mr. Jacobs. So I understand the concern but believe that a fair trial can be had in this case for all three defendants.

Let's turn to the scope of rebuttal. I'll tell you very quickly where I'm leaning on that and that is to permit the government to put on a rebuttal case but not to permit the government to play the videos that have been

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Santana

Docket Number: 07-1662-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@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 11/12/2008) and found to be VIRUS FREE.

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Dated: November 12, 2008

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November 12, 2008

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