IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-30001

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ERASMO AVILES, JR.,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:16-CR-132-1

(Filed Sep. 13, 2018)

Before JONES, BARKSDALE, and WILLETT, Circuit Judges.

PER CURIAM:*

Erasmo Aviles, Jr. was tried and convicted by a jury for conspiracy to possess with intent to distribute a controlled substance, possession of methamphetamine with intent to distribute, and possession of

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

cocaine with intent to distribute. He was sentenced to 240 months in prison. He appeals his conviction, claiming (1) that the district court abused its discretion by allowing his codefendant to invoke the Fifth Amendment, (2) that the government substantially interfered with his codefendant's decision not to testify, and (3) that the government presented inadmissible testimony at his trial. We affirm.

BACKGROUND

On May 12, 2016, Troopers Brent Peart and George Strickland were on duty on Interstate 20. They observed a Yukon brake heavily when approaching the troopers, even though the Yukon was not speeding. The Yukon had a single male occupant, who leaned back in his seat while passing the troopers, thus hiding himself from view. The troopers then noted an Impala traveling behind the Yukon. The Impala also contained a single male occupant who hid himself from view when passing the troopers. The troopers followed the two cars, which appeared to be traveling together. The Yukon had temporary Texas tags and the Impala had Texas plates. Eventually, Trooper Peart pulled over the Yukon and Trooper Strickland pulled over the Impala.

Francisco Guardiola was driving the Impala. He told Trooper Strickland that he was on his way to meet his brother to see about a job in a refinery. When questioned, he could not tell Trooper Strickland where the refinery was located, what town he was meeting his brother in, or the name of the company. Guardiola

appeared nervous. He told Trooper Strickland that he was travelling alone and that the Impala belonged to his uncle. Trooper Strickland had run the license plates of the Impala and found that it was registered to Erasmo Aviles, Jr.

Eventually, Trooper Strickland went back to his vehicle to call a K-9 unit. He also contacted Trooper Peart, who asked him who owned the Impala. Trooper Peart informed Trooper Strickland that Aviles was the driver of the Yukon. The K-9 Unit gave a positive alert on the Impala. Trooper Strickland then searched the vehicle, and found approximately 975 grams of methamphetamine and 315 grams of cocaine. Trooper Strickland placed Guardiola under arrest. At this point, Trooper Peart contacted Trooper Strickland and asked if he had found a camouflage two-way radio. Trooper Strickland searched the Impala and found a two-way camouflage radio set to channel two. No overnight bags, luggage, or clothing were found in the Impala.

Trooper Peart pulled over the Yukon. The driver of the Yukon was Erasmo Aviles, Jr., who stated that he was going to Jackson, Mississippi to visit a friend. Trooper Peart asked Aviles for paperwork for the vehicle, at which point Aviles handed him an insurance card for the Impala. Trooper Peart pointed out the mistake, and Aviles gave him the insurance card for the Yukon. Trooper Peart later testified that Aviles appeared extremely nervous, and frequently answered Trooper Peart's questions with questions. Trooper Peart found this suspicious, because he knew from

training that people do this to buy time to come up with an answer.

Trooper Peart contacted Trooper Strickland and discovered that the Impala was registered to Aviles. He then called for backup. He returned to the Yukon, and asked Aviles if the Impala belonged to him. Aviles began sweating and stated that it did, and that his cousin was driving it. When asked why he was traveling separately from his cousin, Aviles stated that he might stay longer at their destination. Aviles consented to a search of the Yukon. Trooper Strickland then contacted Trooper Peart to tell him they had found narcotics in the Impala, and Trooper Peart arrested Aviles.

Trooper Peart searched the Yukon and found two cell phones and a camouflage two-way radio set to channel two. Trooper Peart did not find any luggage or overnight bags, but did find a jacket that he thought might be a paintball jacket.

Guardiola pled guilty without a plea agreement to conspiracy to possess with intent to distribute a controlled substance, possession of methamphetamine with intent to distribute, and possession of cocaine with intent to distribute. The government requested that his sentencing be postponed until after Aviles's trial, because it "would be interested in Mr. Guardiola's role at that trial, if any, in terms of making a sentencing recommendation to" the court. Guardiola's counsel, Joseph Greenwald, stated that he did not "see the need for it . . . [because] Mr. Guardiola is not planning on participating in that trial." However, after being

assured that this could only benefit Guardiola, Greenwald and the district court agreed to postpone Guardiola's sentencing.

With Greenwald's permission, Aviles's attorney, Eric Johnson, and investigator, Joseph Mann, interviewed Guardiola a week before Aviles's trial. Aviles's attorney then subpoenaed Guardiola to appear at Aviles's trial. Greenwald stated that he would advise Guardiola to plead the Fifth, and Aviles moved to compel Guardiola's testimony.

The district court held hearings regarding the Fifth Amendment issue. Mann testified that Guardiola allegedly stated that Aviles did not know about the drugs in Guardiola's car. Guardiola also told Mann that he was supposed to call someone when he got close to the drugs' delivery destination. The person's phone number was on a piece of paper, which he swallowed after being pulled over. Guardiola himself testified that Johnson advised him during the interview that he had lost his right to plead the Fifth Amendment by pleading guilty. When asked about the content of his statements to Johnson and Mann, Guardiola invoked the Fifth Amendment. The court ruled that Guardiola had validly invoked his Fifth Amendment right against self-incrimination.

Aviles was tried by a jury and convicted on all three counts. He was sentenced to 240 months in prison. On appeal, Aviles contends that the district court abused its discretion when it allowed Guardiola to plead the Fifth Amendment, and the government

substantially interfered with Guardiola's decision not to testify. Aviles also challenges the admission of alleged profiling testimony by Troopers Peart and Leon Defelice.

STANDARD OF REVIEW

We review for abuse of discretion a trial court's decision to exclude a witness based on the witness's invocation of the Fifth Amendment privilege. *United States v. Mares*, 402 F.3d 511, 514 (5th Cir. 2005). "Whether the government substantially interfered with a defendant's right to present witnesses and establish his defense is a fact question" we review for clear error. *United States v. Anderson*, 755 F.3d 782, 792 (5th Cir. 2014).

Evidentiary rulings, if preserved, are reviewed on appeal for abuse of discretion. *United States v. Ramos-Rodriguez*, 809 F.3d 817, 824 (5th Cir. 2016). But if a defendant fails to object to the ruling at trial, we review for plain error. *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 362 (5th Cir. 2010). Under that standard, Aviles must show a forfeited plain (clear or obvious) error that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he does so, we have the discretion to correct the reversible plain error, but should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id. Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (citations and quotation marks omitted).

DISCUSSION

1. Guardiola's Testimony

Aviles first argues that based on counsel's pretrial interview, Guardiola possessed powerful exculpatory information and should not have been allowed to invoke the Fifth Amendment and deprive Aviles of his testimony. Guardiola, he asserts, would not risk self-incrimination by testifying unless he committed perjury at Aviles's trial, which is not a valid reason to invoke the Fifth Amendment privilege. *See United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir. 1986). He disputes that Guardiola could further incriminate himself or risk sentence enhancement because he already pled guilty to all counts in the illegal transaction. Further, his guilty plea was admissible in any potential state prosecution.

The short answer to these contentions is that the district court found otherwise, and Aviles is not in the same position of knowledge or responsibility as Guardiola's lawyer, who advised his client's invocation of the Fifth Amendment. To be sure, "a defendant's Sixth Amendment right of compulsory process to obtain witnesses in his favor must yield to a witness's Fifth Amendment privilege against self-incrimination." *United States v. Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992) (citation omitted). The privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used," *Kastigar v. United States*, 406 U.S. 441, 444–45, 92

S. Ct. 1653, 1656 (1972), but it does not apply when the possibility of self-incrimination is "a remote and speculative possibility." *Steinbrecher v. C.I.R.*, 712 F.2d 195, 197 (5th Cir. 1983).

A guilty plea waives the privilege with respect to the specific charges to which a defendant pled guilty but not other crimes related to the same events. *United States v. Lyons*, 703 F.2d 815, 818 n.2 (5th Cir. 1983). As Aviles observes, a plea or statements made "during the preceding plea colloquy are later admissible against the defendant." *Mitchell v. United States*, 526 U.S. 314, 324, 119 S. Ct. 1307, 1313 (1999). However, "[a] statement admissible against a defendant . . . is not necessarily a waiver of the privilege against self-incrimination." *Id.*

The privilege remains in effect if the defendant has a "legitimate fear of incurring additional criminal liability from testifying" due to impending sentencing. *Hernandez*, 962 F.2d at 1161. Even when a co-conspirator has been convicted and sentenced, this court has affirmed that a co-conspirator may invoke his Fifth Amendment privilege when his testimony could result in a state prosecution. *United States v. Metz*, 608 F.2d 147, 156 (5th Cir. 1979).

Based on these principles, the government disagrees with Aviles's assertion that Guardiola has nothing to fear but a perjury count if he were to testify falsely in Aviles's trial. The appellant's assumption is that Guardiola could answer a few narrow questions refuting Aviles's involvement and leave the stand. It is

not so simple. He could be exposed to thorough cross-examination about his own role in the broader drug conspiracy and trafficking, and the veracity of his previous statements to law enforcement (*e.g.*, that he "just met" Aviles). His statement to Mann about ingesting the paper with an inculpatory phone number could be introduced at Aviles's trial and later prosecuted under Louisiana law. La. Rev. Stat. Sec. 14:130.1 (obstruction of justice). And without a plea agreement, he could remain vulnerable to further federal charges.

The district court also found that Guardiola could become exposed to adverse sentencing consequences based on obstruction of justice or failure to accept responsibility. Guardiola's lawyer noted more generally that if his client testified and made a bad impression on the judge, that alone could harm him at sentencing.

Aviles dismisses as unfounded Guardiola's concerns about his prior contradictory statements and possible obstruction of justice, essentially because they were already memorialized in ways that could be admissible against him in court. Even if we credit such extrinsic sources, however, Aviles is wrong in concluding that no further self-incriminating damage could be done if Guardiola were forced to testify and confront such sources. The district court did not abuse its discretion by acceding to Guardiola's invocation of his Fifth Amendment privilege and not requiring him to testify.

Aviles did not raise this argument in the trial court but now asserts that the government

substantially interfered with Guardiola's decision not to testify because it requested that Guardiola's sentencing be postponed until after Aviles's trial. Aviles contends that Guardiola's attorney would not have advised him to invoke the privilege had Guardiola already been sentenced; hence, the postponement request was a "threat to recommend sentence enhancement (or withhold a favorable recommendation)." This contention misreads the record.

At the time, the government's reasoning for a postponement was that it "would be interested in Mr. Guardiola's role at trial, if any, in terms of making a sentencing recommendation to" the court. Federal law allows a court, upon the government's motion, to impose a sentence less than the statutory minimum "to reflect a defendant's substantial assistance in the investigation or prosecution of another person." 18 U.S.C. § 3553(e). This facially benign request, in any event, did not influence Guardiola's counsel, who replied that he didn't see a need for the continuance because "Guardiola is not planning on participating in [Aviles's] trial."

We are more than dubious about Aviles's contention that a de novo standard of review should apply to this waived argument. He states he was unaware that Guardiola's sentencing had been postponed—although he reviewed the sentencing transcript in which that decision was discussed. Be that as it may, the record does not support any interference with Guardiola's decision not to testify.

2. The Drug Courier Profile Testimony

Louisiana State Trooper Leon Defelice testified as an expert witness for the government. Aviles argues that portions of Defelice's testimony were inadmissible because they improperly offered an opinion about Aviles's knowledge or substantive guilt. The contested portions of Defelice's testimony are quoted below:

- "It's common for [the courier's vehicle] to already be loaded and ready to go, without the other individual even knowing where the drugs are located. . . . And the intent is he or she knows what the trip is about, but they don't necessarily know exactly what type of narcotic and how much of the narcotic is there, or where it is, even, for that fact."
- "The drug couriers in more organized drug trafficking organizations – or DTOs – the courier, his or her job is strictly to drive the product from Point A to Point B. They are very limited on the information that they know, typically."
- "I've been involved in numerous traffic stops where two vehicles were stopped simultaneously in a scenario such as this and the trips were discovered to be credible, plausible. But in that case, even if two-way radios are used, in that case the person in Vehicle A is going to have the exact same story as the person in Vehicle 2 – Vehicle B, even to the intricate detail.

> In a criminal situation where you have two vehicles traveling with each other for the purposes of trafficking in illegal narcotics or guns or money, you're going to have usually some discrepancies in the story. There's going to be some deception."

Defelice also testified that when two vehicles travel together to transport narcotics, the "leader" of the group is normally in the vehicle without the narcotics. In his opinion, the facts of this case were "consistent with drug trafficking" and that Aviles "would be higher up in the hierarchy" between the two drivers.

Aviles also challenges the following testimony by Trooper Peart:

> Because normally when we do get two separate vehicles or more than two separate vehicles involved in smuggling, it's – there's normally a front car and there's normally a tail vehicle. Normally, the tail vehicle is the one that has the narcotics, that we've seen. So I was pretty confident that Trooper Strickland's vehicle had narcotics or something illegal inside of it; so that's why I instructed the K-9 officer to go to him, in case of the driver refusing consent to search.[1]

Because Aviles did not contest this testimony at trial, its admission is reviewed under the plain error

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[1] Aviles also argues in his reply brief that this testimony was inadmissible because it was impermissible background contextual evidence. This argument fails for the same reasons his drug courier profile testimony argument fails.

standard. *Gonzalez-Rodriguez*, 621 F.3d at 362. This court has held that "drug courier profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Medeles-Cab*, 754 F.3d 316, 321 (5th Cir. 2014) (quotations and citations omitted). "[T]here is a fine but critical line between expert testimony concerning methods of operation unique to the drug business, and testimony comparing a defendant's conduct to the generic profile of a drug courier. The former may permissibly help a jury to understand the significance and implications of other evidence. . . . The latter may impermissibly suggest that an innocent civilian had knowledge of drug activity." *Gonzales-Rodriguez*, 621 F.3d at 364.

We need not decide whether the admission of the challenged statements was plainly wrong because Aviles cannot show that the admission affected his substantial rights.[2] "As a general rule, an error affects a defendant's substantial rights only if the error was prejudicial. Error is prejudicial if there is a reasonable probability that the result of the proceedings would have been different but for the error." *Id.* at 363 (citations omitted).

As detailed above, there was ample evidence to show that Aviles knew about the drugs in the Impala. Aviles was the owner of both vehicles, and they had identical two-way radios. Aviles's interaction with the officers was incriminating: he and Guardiola told

[2] For this reason, we also do not address the government's alternative argument that Aviles invited the error.

different stories about where they were going, despite the fact that Aviles later stated they were going to the same destination. Trooper Peart testified that Aviles appeared extremely nervous and began sweating when Trooper Peart asked him about the Impala. Though Aviles had some clothes in the Yukon, he did not have an overnight bag or luggage. Aviles would answer the trooper's questions with questions, a tactic Peart recognized as an effort to gain time while Aviles was conjuring a response. Furthermore, a border patrol agent testified regarding the facts underlying Aviles's previous conviction for drug trafficking.

In sum, there was not a reasonable probability that the result would have been different without the challenged testimony.

For the foregoing reasons, Aviles's convictions are **AFFIRMED**.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal Action
VS.	)	No. 16-CR-0132-02
	)	
FRANCISCO GUARDIOLA	)	

CHANGE OF PLEA HEARING
OFFICIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
S. MAURICE HICKS, JR.,
UNITED STATES DISTRICT JUDGE,
MARCH 15, 2017; 10:00 A.M.
SHREVEPORT, LOUISIANA

FOR THE GOVERNMENT:

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AUSA Allison Duncan Bushnell
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FOR THE DEFENDANT:

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Produced by mechanical stenography, transcript produced by computer.

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* * *

[30] Mr. Guardiola, you now stand convicted as charged in those three counts of the indictment.

That presentence investigation and the written report, the presentence report we discussed, I now order be done. I'm going to urge you to cooperate with the probation officer in furnishing information to being included in that report. There's one very simple reason for that: That presentence report is the single most important document I'm going to use in determining your sentence. Is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Greenwald, per our standard procedure, any letters of support concerning sentencing and any sentencing memoranda that will be filed by you or may be filed by you will be filed under seal. That's to be submitted to my chambers not later than 10 days in advance of sentencing, which is set for July 27, 2017, at 2:00 p.m.

MR. DRUCKER: Your Honor, if I may, Mr. Guardiola's co-defendant's trial is set for August 7. Would it be possible to have Mr. Guardiola's sentencing after Mr. Aviles's trial?

THE COURT: Any objection to that, Mr. Greenwald?

MR. GREENWALD: I don't see the need for it, Your Honor. Mr. Guardiola is not planning on participating in that trial.

THE COURT: What would be the basis for the request, Mr. Drucker, since there's no plea agreement and no cooperation [31] requirement?

MR. DRUCKER: The Government would be interested in Mr. Guardiola's role at that trial, if any, in terms of making a sentencing recommendation to this Court.

THE COURT: So it could only benefit him by postponing as opposed to having a downside for him by postponing his sentencing date?

MR. DRUCKER: I believe so, Your Honor.

THE COURT: Since it could only benefit him, Mr. Greenwald –

MR. GREENWALD: We don't have an objection, then, Your Honor.

THE COURT: Under that stipulation, I'll agree to move it beyond the trial.

MR. DRUCKER: Thank you, Your Honor.

THE COURT: You would expect that trial to last how many days?

MR. DRUCKER: Two, certainly no more than three.

THE COURT: All right. We could then move it to the next week. We could move it to August 17, at 2:00 p.m.

MR. DRUCKER: Thank you, Your Honor.

THE COURT: Mr. Greenwald?

MR. GREENWALD: Yes, Your Honor, that's agreeable.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL NO.: 16-cr-00132-01
V.	DISTRICT JUDGE HICKS
ERASMO AVILES, JR.	MAGISTRATE JUDGE HORNSBY

MEMORANDUM OF LAW ON THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE HEARSAY RULE

(Filed Aug. 7, 2017)

Comes now the United States of America, by and through the undersigned Assistant United States Attorney, who respectfully submits the following memorandum of law on issues raised in the current proceeding:

Erasmo Aviles, Jr. and Francisco Guardiola were charged with conspiring to possess with intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 1);[1] possessing with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 2); and possessing

[1] Count 1 also alleged that the reasonably foreseeable quantity of methamphetamine as to Aviles was 50 grams or more. Docket No. 15.

with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count 3). Docket No. 15.

Guardiola pled guilty to all three counts without a plea agreement. Docket No. 61. He thus has no obligation to cooperate with the United States and has declined to do so. Guardiola has yet to be sentenced.

Trial of Defendant Aviles began on August 7, 2017. Aviles has advised the Court that he intends to call Guardiola to testify in his case-in-chief. Counsel for Guardiola has advised the Court that Guardiola will assert his Fifth Amendment privilege if called to testify. If Guardiola asserts his Fifth Amendment privilege against self-incrimination and refuses to testify, Aviles intends to call his investigator to testify to statements Guardiola allegedly made last week during an interview by Aviles' counsel and investigator. The United States does not know what statements Guardiola made or the specifics about the circumstances under which they were made.

The Fifth Amendment Privilege against Self-Incrimination

A witness's Fifth Amendment privilege against self-incrimination trumps a defendant's Sixth Amendment right to compulsory process. *United States v. Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992); *United States v. Goodwin*, 625 F.3d 693, 700 (5th Cir. 1980).

While Guardiola's guilty plea waives the privilege against self-incrimination with regard to the specific

charges to which he pled guilty, *United States v. Lyons*, 703 F.2d 815, 818 n.2 (5th Cir. 1983); *United States v. Gloria*, 494 F.2d 477, 480 (5th Cir 1974), the privilege remains in effect until he is sentenced. *Hernandez*, 962 F.2d at 1161; *United States v. Kuku*, 129 F.3d 1435, 1437-38 (11th Cir. 1997). Even after sentencing, the privilege would remain because Guardiola could face state charges arising out of the same transaction; he could continue to assert the privilege and refuse to testify. *Lyons*, 702 F.2d at 818 n.2; *In Re Bryan*, 645 F.2d 331, 333 (5th Cir. 1981).

Although Guardiola has a valid claim of privilege, the trial court must conduct a hearing outside of the jury's presence to determine whether the privilege is validly invoked as to each area of inquiry. *Goodwin*, 625 F.2d at 701-02. Guardiola

> need not reveal the details of his possible liability. But he must describe in general terms the basis of the liability actually feared. He must give a description that is at least adequate to allow the trial judge to determine whether the fear of incrimination is reasonable and, if reasonable, how far the valid privilege extends.[2]

Goodwin, 625 F.2d at 702. This does not require a question-by-question invocation of the privilege. Instead, the focus is the "legitimacy of the invocation."

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[2] This questioning is done by the Court. *United States v. Melchor Moreno*, 536 F.2d 1042, 1046 (5th Cir. 1976); *United States v. Rivas-Macias*, 537 F.3d 1271, 1276 n.5 (10th Cir. 2008).

United States v. Kinchen, 729 F.3d 466, 475 (5th Cir. 2013).

The Court must sustain Guardiola's invocation of the privilege "if it is not perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Goodwin.*, 625 F.2d at 701 (citations omitted). He may be totally excused from testifying "if the court finds that he could legitimately refuse to answer essentially all relevant questions." *Goodwin*, 625 F.2d at 701 (citation omitted). Aviles does not have a right to call Guardiola and force him to invoke in front of the jury. *Kinchen*, 729 F.3d at 475.

Hearsay

Hearsay is any statement of the declarant not made during the current trial and offered "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c). While the United States is not privy to Guardiola's alleged statements, it is reasonable to assume that at least part of the statements are considered exculpatory by Aviles and thus offered for the "truth of the matter asserted."

The United States does not know what hearsay exception Aviles will attempt to rely on, but for purposes of this memorandum assumes Aviles will rely on Rule 804(b)(3) of the Federal Rules of Evidence: statement against interest. However, Aviles cannot meet the

exacting standard for admission of Guardiola's statements under this Rule.

For a declaration to be admissible under Rule 804(b)(3),

> (1) The declarant must be unavailable; (2) The statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) The statement must be corroborated by circumstances clearly indicating its trustworthiness.

United States v. Dean, 59 F.3d 1479, 1492 (5th Cir. 1995) (citations omitted).

If the Court allows Guardiola to invoke the privilege against self-incrimination, he would be unavailable. *United States v. Zeno*, 54 Fed. App'x 414, 2002 WL 31718507 *3 (5th Cir. 2002); *United States v. Standifer*, 359 Fed. App'x 530, 534 (5th Cir 2010). However, without knowing what Guardiola allegedly said, the United States cannot say whether the statement was against his penal interest. Indeed, the primary motivation for Aviles calling Guardiola appears to be that at least some of his statements exonerate Aviles, which is not the same as incriminating Guardiola. A statement that exonerates Aviles would not necessarily be against Guardiola's penal interest. *Standifer*, 359 Fed. App'x at 534.

Furthermore, Guardiola was interviewed by Aviles' attorney, who was sure to report the results of the interview to Aviles. This indicates that Guardiola had an "obvious motive for falsification" and "might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement as a whole including the ostensibly disserving portions to be in his interest rather than against it." *United States u. Sarmineto-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981).

Trustworthiness is presumed if the hearsay statement is sought to be admitted under a "firmly rooted exception" to the hearsay rule. *United States v. Bell*, 367 F.3d 452, 466 (5th Cir. 2004) (citations omitted). "If not, the statements must bear adequate indicia of reliability such that adversarial testing would be expected to add little, if anything to the statement's reliability." *Bell*, 367 F.3d at 466 (citations omitted). The proposed statements of Guardiola were not given under circumstances that indicate trustworthiness. Guardiola's statements were given to counsel for the co-defendant and the private investigator hired by Aviles. Guardiola did not have counsel present, and it is unknown to the government whether he was sufficiently advised that he did not have to speak to counsel for Aviles.

In *Dean*, Defendant, Smith, made statements during plea negotiations. Smith stated that his co-defendants did not know of the proposed drug exchange. At trial, Smith objected to the introduction of his statements. *Dean*, 59 F.3d at 1492. In *Dean*, the Court, in analyzing the admission of a statement that

exonerated a defendant, considered circumstances that indicated whether the statement was trustworthy, showing that such a statement was not inherently trustworthy. The Court stated, "Smith's guilt does not preclude the other defendants' involvement, and therefore does not sufficiently corroborate Smith's exculpatory statement." *Dean*, 59 F.3d at 1493. The court also noted that the co-defendants cited no corroborating evidence indicating that Smith's statement was trustworthy.

Here, the circumstances do not indicate inherit trustworthiness. Guardiola was interviewed by Aviles' attorney and investigator without the benefit of his own counsel present. Knowing that whatever he said would be reported back to Aviles, Guardiola had every reason to falsely exonerate Aviles when speaking to his counsel. If indeed Guardiola exonerated Aviles, then Aviles must offer up corroborating proof. *Dean*, 59 F.3d at 1493. The fact that Guardiola stands convicted of the crime does not constitute corroboration. *Dean*, 59 F.3d at 1493.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to counsel for the defendants by operation of the court's electronic filing system.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

* * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA	*	**CRIMINAL NO. 5:16-cr-00132-2**
VERSUS	*	**DISTRICT JUDGE HICKS**
FRANCISCO GUARDIOLA	*	**MAGISTRATE JUDGE HORNSBY**

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MEMORANDUM IN SUPPORT OF DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

(Filed Aug. 7, 2017)

MAY IT PLEASE THE COURT:

Francisco Guardiola specifically invokes his Fifth Amendment right against self-incrimination in refusing to testify at the trial of his co-defendant, Erasmo Aviles, Jr.

Mr. Guardiola relies on two United States Supreme Court decisions addressing the issue. In the first case, *Mitchell v. United States*, the Supreme Court held:

> Where a sentence has yet to be imposed, this Court has already rejected the proposition that incrimination is complete once guilt has

> been adjudicated. *See Estelle v. Smith*, 451 U.S. 454, 462. That proposition applies only to cases in which the sentence has been fixed and the judgment of conviction has become final. *See, e.g., Regina v. U.S.*, 364 U.S. 507, 513. Before sentencing a defendant may have a legitimate fear of adverse consequences from further testimony, and any effort to compel that testimony at sentencing "clearly would contravene the Fifth Amendment." *Estelle, supra,* at 463. *Mitchell v. U.S.*, 526 U.S. 314 (1996).

In the second case, *Estelle v. Smith*, cited in the *Mitchell* case, the Supreme Court held:

> The essence of this basic constitutional principle [Fifth Amendment right against self-incrimination] is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not the simple, cruel expedient of forcing it from his own lips."
>
> The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

The Fifth Circuit Court of Appeals recognized a defendant's right against self-incrimination after a guilty plea in *United States v. Gloria*. In that case,

Milton Frey, who was Gloria's co-defendant and who had not entered a guilty plea yet, invoked his Fifth Amendment right against self-incrimination at Gloria's trial. Gloria was convicted and on appeal, the Appellate Court held:

> Even if Frey had entered his plea prior to Gloria's trial, he could still maintain his right against self-incrimination and refuse to testify on Gloria's behalf. His guilty plea would dissolve that right only as to the offense to which he pled guilty. *See McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Since he ultimately pled guilty only to the conspiracy count, prosecution on the possession count remained a possibility. *U.S. v. Gloria*, 494 F.2d 477 (5th Cir. 1974).

In the present case, Mr. Guardiola respectfully submits that testifying at the trial of his co-defendant could subject him to additional or enhanced punishment. In his case, there are a number of sentencing issues pending before the Court: 1) Acceptance of Responsibility, 2) possible Obstruction of Justice, and 3) Safety Valve Reduction. Mr. Guariola [sic] is fearful that his testimony at Aviles' trial will prevent him from obtaining any positive adjustments and will negatively affect his guideline range.

In addition, Mr. Guardiola has a legitimate fear of the adverse consequences associated with his testimony. It is normal and customary for the Honorable Court to inquire as to the position of the United State [sic] Attorney's Office regarding sentencing. Mr.

Guardiola is fearful that his testimony at Mr. Aviles' trial will negatively affect that position. Lastly and most important, Mr. Guardiola is fearful that his testimony would place him in a negative light with the Honorable Court.

Based on the cited precedent and reasons stated above, Mr. Guardiola respectfully prays that the Honorable Court honor his Fifth Amendment Right Against Self-Incrimination and not force him to testify at trial.

Respectfully submitted,

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ATTORNEY FOR
FRANCISCO GUARDIOLA

CERTIFICATE

I HEREBY CERTIFY that the Memorandum in Support of Defendant's Right Against Self-Incrimination was filed electronically with the Clerk of Court using the CM/ECF System. Notice of this filing will be sent to Ms. Allison D. Bushnell, Assistant

United States Attorney, by operation of the Clerk's electronic filing system.

Shreveport, Louisiana, this 7th day of August, 2017.

/s/ Joseph W. Greenwald, Jr.
Joseph W. Greenwald, Jr.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	)	
VS.	)	Criminal Action No. 16-CR-0132-01
ERASMO AVILES, JR.	)	

TRIAL VOLUME II OF III
OFFICIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
S. MAURICE HICKS, JR.,
UNITED STATES DISTRICT JUDGE,
AUGUST 8, 2017.
SHREVEPORT, LOUISIANA

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* * *

[189] Mr. Guardiola, personally, regarding the statements that were made while he was incarcerated at the Bossier Medium Correctional Facility and the information that the Court gleaned from Mr. Mann's testimony as well as the information the Court has obtained during questioning by Mr. Johnson of Mr. Guardiola, the Court rules as follows:

The Court has heard testimony from Joe Mann, who was present for a statement from defendant Aviles's co-defendant, that is, Mr. Francisco Guardiola. The Court has also heard testimony from Mr. Guardiola himself in which he stated that he intends to invoke his Fifth Amendment privilege against self-incrimination with regard to statements that he made

in response to questions by Mr. Johnson in the presence of Mr. Mann.

The Court notes that Mr. Mann functioned as a private investigator in this matter and was retained or hired by Mr. Johnson, who did the primary questioning of the co-defendant, Guardiola.

First and foremost, the Court rules that Mr. Guardiola has validly invoked his Fifth Amendment privilege as to statements made to Mr. Johnson in the presence of Mr. Mann. Mr. Johnson, of course, is the attorney for the defendant, Erasmo Aviles.

* * *