

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

MAURICIO HERNANDEZ PINEDA,

Defendant.

S4 15 Cr. 379 (PKC)

THE GOVERNMENT'S MOTIONS *IN LIMINE*

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007

Jacob H. Gutwillig
David J. Robles
Elinor L. Tarlow
Assistant United States Attorneys
Of Counsel

TABLE OF CONTENTS

BACKGROUND 2

 I. The Defendant Begins Providing Drug Traffickers with Protection for Drug Shipments 4

 II. The Defendant Provides Protection for Tony Hernandez’s and CW-2’s Multi-Ton Cocaine Shipments..... 6

 III. The Defendant Continues Supporting and Facilitating Drug Trafficking and Narcotics-Related Corruption as Tony Hernandez and Juan Orlando Hernandez Ascend to Higher Public Office 9

 IV. The Defendant Pressures Possible Witnesses to Protect Tony Hernandez, Juan Orlando Hernandez, and Himself from Prosecution in the United States 12

ARGUMENT 13

 I. Evidence of Narcotics-Related Corruption Is Admissible as Direct Evidence and Pursuant to Rule 404(b) 13

 A. Applicable Law 13

 B. Discussion 14

 II. Statements Made to Cooperating Witnesses by the Defendant’s Co-Conspirators Are Admissible Pursuant to Rules 801(d)(2)(E) and 804(b)(3) 18

 A. Applicable Law 18

 B. Statements Made by CW-3 During a 2007 Conversation with CW-1 About the Defendant Are Admissible as Co-Conspirator Statements..... 21

 C. Statements Made by Co-Conspirators to or in the Presence of CW-2 Are Admissible Under the Hearsay Rules 22

 D. Statements Made to CW-3 by Co-Conspirators Are Admissible Under the Hearsay Rules 26

 III. Electronic Communications by Central American Drug Traffickers Regarding Cocaine Bearing the Initials of the Defendant’s Co-Conspirator Are Admissible 28

 A. Relevant Facts 29

 B. Discussion 30

 VI. Electronic Evidence from Tony Hernandez’s Cellphones, Including Photographs of Machineguns, Is Admissible as Direct Evidence..... 34

 A. Relevant Facts 34

 B. Discussion 36

CONCLUSION..... 40

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

MAURICIO HERNANDEZ PINEDA,

Defendant.

S4 15 Cr. 379 (PKC)

The Government respectfully submits this memorandum in support of motions *in limine* seeking the following rulings with respect to the defendant's upcoming trial:

1. Evidence of narcotics-related corruption, including the use of drug proceeds to fund political campaigns and bribe politicians and law enforcement, is admissible as direct evidence and pursuant to Rule 404(b);
2. Testimony regarding statements by former drug traffickers, politicians, and members of the Honduran National Police who were the defendant's co-conspirators is admissible pursuant to Rules 801(d)(2)(E) and 804(b)(3);
3. Electronic communications by Central American drug traffickers regarding cocaine bearing a stamp with the initials of one of the defendant's co-conspirators are admissible pursuant to Rules 804(b)(3) and 801(d)(2)(E); and
4. Electronic evidence from two cellphones seized from one of the defendant's co-conspirators, including pictures of machineguns, is admissible as direct evidence.

BACKGROUND¹

The defendant played a crucial role in a long-running and destructive criminal scheme to transport ton quantities of cocaine through Central America and into the United States. The defendant abused his position as a high-ranking officer with the Honduran National Police (“HNP”) to protect massive cocaine loads, including drug shipments for Juan Antonio Hernandez Alvarado (“Tony Hernandez”), a former Honduran congressman and the defendant’s cousin, and Joaquín Archivaldo Guzmán Loera, a/k/a “El Chapo,” the former leader of the Sinaloa Cartel. To ensure that he and his co-conspirators could evade detection and arrest, the defendant personally escorted drug loads as they were transported through Honduras; bribed other law enforcement officers not to search his co-conspirators’ cocaine-laden vehicles at security checkpoints; enlisted HNP officers, armed with machineguns, to help him provide protection for those drug loads; passed information to co-conspirators about counternarcotics operations to help them preempt any law enforcement action; and tried to pressure co-conspirators who were facing charges in the United States not to surrender or cooperate. The defendant’s information and access to law enforcement proved critical to the scheme and, in return, he received lucrative bribes from his co-conspirators—as much as \$200,000 for each drug shipment that he protected.

The Government will establish these facts at trial through, among other evidence, (i) testimony from some of the defendant’s former co-conspirators, including testimony from a

¹ The Government respectfully submits that all of the evidence described in this brief, including with respect to acts of bribery and corruption, is admissible as direct evidence. The Government hereby provides notice that it also intends to offer this evidence, in the alternative, pursuant to Rule 404(b). The Government plans to continue to meet with potential witnesses between now and the trial, and will supplement this notice as necessary should the Government learn of any additional Rule 404(b) evidence.

former HNP officer whom the defendant worked with to protect drug shipments (“CW-1”)² and a Honduran drug trafficker and mayor of a town in Honduras who bribed the defendant to provide security for his drug loads (“CW-2”); (ii) expert testimony regarding drug trafficking patterns and methodologies used in Honduras to transport narcotics, similar to those that the defendant and his co-conspirators used; (iii) expert testimony regarding the features of the types of weapons that the defendant and his co-conspirators used; (iv) expert testimony about the history and structure of the Honduran police and political system, including testimony about a Honduran law that was passed in 2012 that permitted the extradition of individuals facing charges in the United States; (v) photographic evidence from electronic devices seized from Tony Hernandez’s phones at the time of his arrest, which show, among other things, the types of firearms used in the course of this conspiracy; and (vi) intercepted communications between two Central American drug traffickers discussing a shipment of cocaine stamped with Tony Hernandez’s initials, “TH.” The Government also may elicit testimony at trial from CW-3, as described below, about certain drug shipments that the defendant helped protect and information that the defendant provided to CW-3 to ensure that CW-3 and his co-conspirators would not be arrested.

In September 2019, a grand jury in the Southern District of New York returned a superseding indictment (the “Indictment”) charging the defendant in three counts. Count One charges the defendant with conspiring to import five kilograms or more of cocaine into the United States, in violation of Title 21, United States Code, Sections 952, 959, 960, and 963. Count Two

² The Government is providing under seal, as Exhibit A, a key for the cooperating witness and co-conspirator numbers.

charges the defendant with using and carrying machineguns and destructive devices during and in relation to Count One, and, in furtherance of Count One, possessing machinegun guns and destructive devices, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 924(c)(1)(B)(ii). Count Three charges the defendant with participating in a conspiracy to use and carry machineguns and destructive devices during and in relation to Count One, and, in furtherance of Count One, possess machineguns and destructive devices, in violation of Title 18, United States Code, Section 924(o). The conduct in Counts One through Three of the Indictment is alleged to have occurred from at least in or about 2000 up to and including in or about 2018.

I. The Defendant Begins Providing Drug Traffickers with Protection for Drug Shipments

Starting at least in or around 2007, the defendant began exploiting his position at the HNP to protect cocaine shipments for CW-3 and another drug trafficker who worked with CW-3 and was the defendant's cousin ("CC-1"). CW-3 initially coordinated his work with the defendant through CC-1. The defendant received bribes in exchange for providing armed security for CW-3's and CC-1's drug loads, enlisted HNP officers armed with firearms, including machineguns, to protect their narcotics shipments, personally escorted those shipments across Honduras to locations near the border of Guatemala in a caravan of vehicles, and used his position and contacts within the HNP to ensure that the caravan escorting the cocaine would not be stopped and searched at various security checkpoints along the way. The defendant provided security for CW-3's drug shipments for several years, several of which contained approximately 1,500 to 2,000 kilograms of cocaine. In return, CW-3 and CC-1 paid the defendant bribes for his help protecting each shipment.

Also beginning in approximately 2007 or 2008, unbeknownst to the defendant, CW-1 also began providing protection for CW-3's drug shipments with another group of HNP officers. In or about 2008, the defendant provided protection for a particular shipment for CW-3 during which he saw CW-1, who was also serving as security for that shipment. The defendant and CW-1 knew one another from their time together as trainees at the Honduran police academy in the early 1990s. The defendant subsequently discussed that shipment with CW-1, complimented CW-1's performance during the course of the shipment, and began to openly discuss the defendant's criminal activity, including by confirming that he had been protecting CW-3's drug shipments in exchange for payment and that the defendant and CW-3 were both protected from law enforcement scrutiny by Tony Hernandez. The defendant also told CW-1 that Tony Hernandez and Juan Orlando Hernandez were his cousins, and spoke about the political power that his cousins, Tony Hernandez and Juan Orlando Hernandez—who would eventually be elected President of the Honduran National Congress and, later, President of Honduras—were amassing in the *Partido Nacional de Honduras* (the “National Party”), as well as in the Honduran Departments (or regions) of Copán and Lempira, among other places.

After these conversations, CW-1 and the defendant continued to jointly provide protection for CW-3's drug loads. CW-3 also continued to pay bribes to the defendant to ensure that CW-3's drug trafficking associates would not be investigated or arrested and to receive information about law enforcement operations. For example, in or around 2010, after CW-3 learned that the defendant was investigating one of CW-3's drug couriers, CW-3 met with the defendant to request that the defendant divert the investigation. CW-3 then provided, based on the defendant's request,

approximately \$50,000 through CC-1 to the defendant and the investigation against CW-3's drug courier did not proceed.

II. The Defendant Provides Protection for Tony Hernandez's and CW-2's Multi-Ton Cocaine Shipments

The defendant's role in drug trafficking expanded as a result of the increasing political power and influence of Tony Hernandez and Juan Orlando Hernandez. During the summer of 2009, then-Honduran President Manuel Zelaya was removed from office following a coup d'état. After the coup, Tony Hernandez—who had by that time established himself as a prolific drug trafficker—met with CW-2, another major drug trafficker who was serving as the mayor of El Paraiso, a municipality near the border of Guatemala that served as a key transshipment point for cocaine leaving Honduras. Tony Hernandez indicated that the coup had improved the chances that Juan Orlando Hernandez would be elected as president of the Honduran National Congress later that year and reiterated his interest in a drug trafficking partnership with CW-2. Tony Hernandez confirmed that he had connections to one or more Colombian drug traffickers and asked questions about CW-2's methods for securing and transporting cocaine.

In approximately 2010, Juan Orlando Hernandez was elected President of the Honduran National Congress and Tony Hernandez finalized his drug trafficking partnership with CW-2. Tony Hernandez explained that members of the *Los Valles* cartel had introduced him to Colombian cocaine suppliers, and that he wanted to receive some cocaine shipments in Honduras without assistance from *Los Valles*.³ Tony Hernandez and CW-2 agreed to receive the shipments in eastern

³ Cooperating witnesses will testify at trial, in substance, that the *Los Valles* group was “one of the most prolific Central American narcotics trafficking organizations,” which earned that reputation through a “combination of brutal violence and public corruption.” OFAC, *Treasury Targets*

Honduras, in the Mosquitia region or the Colón Department on the Atlantic coast, and then transport the drugs toward the Honduras-Guatemala border using helicopters and/or trucks. Tony Hernandez assured CW-2 that the cocaine-laden vehicles would not be interdicted because of Tony Hernandez's access to the police and radar information.

The defendant was a critical law enforcement contact for Tony Hernandez to access that information. In or around 2010, Tony Hernandez set up a meeting in San Pedro Sula with the defendant and CW-2. In advance of the meeting, Tony Hernandez told CW-2 that (i) Tony Hernandez had a relative, *i.e.*, the defendant, who was able to remove people from various leadership positions in the HNP if necessary; (ii) Tony Hernandez paid the defendant for security and assistance with drug shipments; and (iii) CW-2 could rely on the defendant for any situation that arose with his narcotics trafficking activity. Thereafter, in addition to drug shipments with other co-conspirators, Tony Hernandez and CW-2 worked together on numerous cocaine shipments protected by the defendant that regularly consisted of several hundred to over 1,000 kilograms. Between 2010 and 2012, Tony Hernandez supplied CW-2 with large loads of cocaine first by helicopter and later by boat, with the largest one-time shipment consisting of approximately 1,600 kilograms of cocaine.

Tony Hernandez and CW-2's cocaine shipments typically made their way across Honduras to locations near the border of Guatemala, such as El Paraiso. The shipments often traveled in a

Honduran Drug Trafficking Organization and Its Network (Aug. 20, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2611.aspx>. In 2016, Miguel Arnulfo Valle Valle and Luis Antonio Valle Valle pled guilty to drug trafficking charges pending in the Eastern District of Virginia and Southern District of Florida, and they were each subsequently sentenced to 300 months' imprisonment. *See* No. 13 Cr. 20897 (S.D. Fla.).

caravan of vehicles operated by HNP personnel armed with automatic and semiautomatic firearms. The day before each shipment, the defendant would check to see which HNP officers were stationed at particular checkpoints, to ensure that the caravan could pass through without inspection. The defendant, dressed in his HNP uniform, drove at the front of the caravan and would be the first to arrive at and pass through a checkpoint. The defendant would ensure that any officers stationed at the checkpoints were paid to allow the drug caravan to pass through, until the caravan reached the Department of Copán, where CW-2 had the remaining portions of the routes to Guatemala secured. In exchange, CW-2 and Tony Hernandez paid the defendant approximately \$200,000 per shipment. In total, the defendant provided armed security for thousands of kilograms of cocaine as they made their way to the United States.

Several of the shipments for which the defendant provided protection belonged to El Chapo. Between in or around 2010 and 2012, CW-2 and Tony Hernandez helped transport ton quantities of El Chapo's cocaine across Honduras once or twice per month. Those shipments were protected and facilitated by the defendant, who provided information to CW-2 and Tony Hernandez about whether there were any police checkpoints between San Pedro Sula and the border of Guatemala.

CW-2 and Tony Hernandez also sold cocaine to El Chapo multiple times during that period. For example, on at least two occasions in or around 2011, Tony Hernandez sold CW-2 over 1,000 kilograms of cocaine, which CW-2 then sold to El Chapo. The defendant provided the armed police escort for those loads to be transported across Honduras, and CW-2 observed that some of the kilograms were stamped with Tony Hernandez's signature "TH" marking. Prior to these shipments, the defendant, Tony Hernandez, CW-2, and others went to at least one meeting where

it was discussed that the cocaine sold to El Chapo was intended for the United States.

Around this time, the defendant contacted CW-1 to relay that he was providing protection for Tony Hernandez's and CW-2's drug shipments, and wanted CW-1 to provide the defendant with information about law enforcement operations to further protect the drug trafficking activities of Tony Hernandez and CW-2. The defendant also told CW-1 that CW-2 was providing Tony Hernandez a portion of the drug proceeds, who in turn was using some of the money to help finance political campaigns for Juan Orlando Hernandez. Thereafter, CW-1 provided the defendant with that type of information on approximately fifteen occasions. The defendant paid for this information each time that CW-1 provided it, and used the information so that Tony Hernandez and CW-2 could avoid police detection of their drug shipments.

III. The Defendant Continues Supporting and Facilitating Drug Trafficking and Narcotics-Related Corruption as Tony Hernandez and Juan Orlando Hernandez Ascend to Higher Public Office

In approximately 2012, the Honduran National Congress passed legislation that allowed for Honduran nationals to be extradited to the United States to face drug trafficking charges. CW-1 grew concerned about his own fate and asked the defendant about the situation. The defendant told CW-1 that (i) the new extradition law in Honduras was enacted in response to pressure from the United States and was intended to appease the United States government; and (ii) Tony Hernandez had told the defendant that while extradition might be available in theory, it would not be enforced. Sometime thereafter, in approximately 2013, the defendant took CW-1 to Tony Hernandez's home in Tegucigalpa, which the defendant took care of while Tony Hernandez was away. While there, CW-1 observed a closet in a guestroom with stacks of \$20 bills in United States currency, which were packaged in the same manner as bribes that CW-1 had received in

exchange for providing protection of drug shipments and information about law enforcement operations. The defendant subsequently confirmed to CW-1 that drug-related bribe payments were paid at Tony Hernandez's house.

Shortly before the Honduran presidential election in 2013, the defendant went to two meetings among Tony Hernandez, El Chapo, CW-2, and other drug traffickers. At the first meeting, which took place at a ranch in the Copán Department of Honduras, El Chapo asked Tony Hernandez if he could provide continued security for cocaine shipments that the Sinaloa Cartel wanted to transport through Honduras, from its Nicaraguan border to the one with Guatemala. Tony Hernandez told El Chapo that, if Juan Orlando Hernandez won the Honduran presidency, then Tony Hernandez would be able to provide security for the cocaine shipments and would be able to prevent the extradition to the United States of certain drug traffickers, including CW-2. El Chapo then offered Tony Hernandez \$1 million to fund Juan Orlando Hernandez's presidential campaign. A few days later, Tony Hernandez told CW-2 that he had spoken with Juan Orlando Hernandez, and confirmed that they needed the \$1 million for the campaign. Two weeks later, the defendant—who was carrying an M-16 assault rifle—accompanied Tony Hernandez, CW-2, and others to a second meeting with El Chapo and other drug traffickers, this time in El Paraiso. At that meeting, El Chapo provided Tony Hernandez with the \$1 million. The defendant, CW-2, and others then escorted Tony Hernandez and the \$1 million from El Paraiso to La Entrada. The defendant and CW-2, both of whom were carrying military-grade assault rifles, rode in one car with Tony Hernandez, while six other security personnel armed with semiautomatic and automatic rifles rode in another car.

In late 2013, Juan Orlando Hernandez won the presidential election in Honduras and Tony Hernandez was elected as a Honduran congressman in the Lempira Department. The defendant subsequently relayed to CW-1 that Tony Hernandez had informed the defendant that arrangements were being made to eliminate extradition because Tony Hernandez was himself concerned about being extradited to the United States. Around the time that Tony Hernandez was running for congressional office, he told CW-2 that he would no longer be able to sell cocaine to CW-2, but would still be able to provide transportation, protection, and information about law enforcement operations to support the drug trafficking operations of CW-2 and others.

Thereafter, the defendant continued providing security and information about law enforcement operations to his co-conspirators, including to CW-3. In or about 2014, for example, CW-3 continued to transport drug shipments consisting of hundreds of kilograms of cocaine. The defendant helped protect those loads, using CC-1 as an intermediary to provide CW-3 with information to ensure that CW-3's drugs were not seized and CW-3 was not arrested. During that same period, CW-3 documented payments that he made to the defendant for his assistance, including payments for the defendant's help avoiding a particular checkpoint near the border of Guatemala.

The following year, Tony Hernandez used his new position as a congressman to protect his drug trafficking activities with the defendant. In or around 2015, for example, CW-1 was promoted to deputy police chief in Comayagua, Honduras. The defendant told CW-1 that Tony Hernandez was responsible for CW-1's promotion. Thereafter, while in this position, CW-1 continued to provide the defendant with information about police operations around Tegucigalpa and to protect their drug trafficking activities.

IV. The Defendant Pressures Possible Witnesses to Protect Tony Hernandez, Juan Orlando Hernandez, and Himself from Prosecution in the United States

In approximately 2016, CW-1 decided to voluntarily surrender to authorities in the United States in light of charges pending against him. The defendant learned of CW-1's plan and took steps to track CW-1 down, including by approaching CW-1's wife at church in Honduras. CW-1 subsequently met with the defendant in an attempt to dissuade CW-1 from providing information to authorities in the United States about the drug trafficking activities of the defendant, Tony Hernandez, and Juan Orlando Hernandez. The defendant explained that while Juan Orlando Hernandez was working to avoid the extradition of Tony Hernandez to the United States, they could no longer protect CW-1 because Juan Orlando Hernandez wanted to be reelected as president of Honduras. The defendant also warned that CW-1 could not talk about Tony Hernandez, Juan Orlando Hernandez, or the defendant in the United States because the situation was being handled at the Honduran presidential level and was therefore too sensitive. The defendant ended the discussion by apologizing for not being able to help CW-1 and paid CW-1 approximately \$500. The defendant also stated that he was speaking with Juan Orlando Hernandez to try to stop the extradition of drug traffickers to the United States, and that Juan Orlando Hernandez's public support for those extraditions was only to ensure that Juan Orlando would be reelected as president.

In approximately late 2018, the defendant again engaged in similar conduct to try and protect himself, Tony Hernandez, and Juan Orlando Hernandez. The defendant called CW-2 from the presidential palace in Honduras regarding media reports that CW-2 was planning to surrender in the United States. During the call, the defendant told CW-2 that Juan Orlando Hernandez wanted to know if it was true that CW-2 had surrendered and where CW-2 was located. CW-2 confirmed that he was still in Honduras, and the defendant told CW-2 that CW-2 did not need to

be concerned because Juan Orlando Hernandez had confirmed that there was no warrant or extradition order against CW-2. CW-2 understood this call to reflect an effort by the defendant to show that Juan Orlando Hernandez was still protecting CW-2 and his drug trafficking activities, and that CW-2 therefore should not surrender to authorities in the United States.

ARGUMENT

I. Evidence of Narcotics-Related Corruption Is Admissible as Direct Evidence and Pursuant to Rule 404(b)

The defendant's co-conspirators relied on drug proceeds to fund political campaigns and bribe politicians and law enforcement officials, including the defendant himself, in order to ensure the safe passage of their cocaine and protect them from law enforcement action in Honduras. Thus, evidence of narcotics-related corruption in Honduras is admissible at trial, as direct evidence and pursuant to Rule 404(b), in order to establish the nature of the conspiracy and the defendant's role in it, the relationships between co-conspirators, and the defendant's motive and intent.

A. Applicable Law

1. Direct Evidence of the Defendant's Guilt

Relevant evidence "need only tend to prove the government's case," such as "evidence that adds context and dimension to the government's proof of the charges." *United States v. Gonzalez*, 110 F.3d 936, 941 (2d Cir. 1997). Thus, background evidence is relevant and admissible, pursuant to Rule 401, where it tends "to show, for example, the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed." *Id.* (internal quotation marks omitted). Evidence is also admissible if it relates to conduct that: (i) "arose out of the same transaction or series of transactions as the charged offense"; (ii) "is inextricably intertwined with the evidence regarding the charged offense"; or (iii) "is necessary

to complete the story of the crime on trial.” *United States v. Gohari*, 227 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) (quoting *United States v. Robinson*, 702 F.3d 22, 36-37 (2d Cir. 2012)). “Evidence fitting within one of these three categories is considered direct evidence and Rule 404 is not applicable.” *United States v. Fiumano*, No. 14 Cr. 518, 2016 WL 1629356, at *3 (S.D.N.Y. Apr. 25, 2016).

2. Other Acts Evidence Pursuant to Rule 404(b)

Under Rule 404(b), courts “may allow evidence of other acts by the defendant if the evidence is relevant to an issue at trial other than the defendant’s character and if the risk of unfair prejudice does not substantially outweigh the probative value of the evidence.” *United States v. Ulbricht*, 79 F. Supp. 3d 466, 479 (S.D.N.Y. 2015). “This Circuit follows the inclusionary approach, which admits all other act evidence that does not serve the sole purpose of showing the defendant’s bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402.” *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011) (internal quotation marks omitted). In general, evidence is admissible under Rule 404(b) “if (1) it is introduced for a proper purpose, (2) it is relevant to the charged offense, (3) its prejudicial effect does not substantially outweigh its probative value and (4) is admitted with a limiting instruction if requested.” *United States v. Rutkoske*, 506 F.3d 170, 176-77 (2d Cir. 2007).

B. Discussion

The defendant and his co-conspirators relied heavily on bribing public officials, members of law enforcement, and other drug traffickers to ensure that their narcotics activities would be protected. At trial, the Government intends to offer evidence, including cooperating witness testimony, of bribes that were paid to the defendant, other HNP officials, Tony Hernandez, and

Juan Orlando Hernandez.

As described above, starting at least in or around 2007, the defendant was paid to abuse his position at the HNP to provide security for large cocaine loads transported through Honduras, including loads belonging to CW-2, CW-3, and Tony Hernandez. The Government expects that CW-2 will testify at trial, for example, that the defendant received as much as \$200,000 for protecting CW-2's and Tony Hernandez's drug shipments on numerous occasions over multiple years. Similarly, from in or about 2007 to in or about 2009, on several occasions, CW-3 also bribed the defendant with approximately \$5,000 to ensure that security checkpoints were removed and his drug shipments could pass through Honduras safely on their way to the Guatemala border. And, as described above, CW-3 also bribed the defendant to ensure that a particular drug trafficking associate—whom the defendant was purportedly investigating—would not be charged in Honduras.

The defendant, in turn, paid bribes to other HNP officials to ensure that his co-conspirators' drug trafficking activities would not be impeded. The Government expects that, if called to testify at trial, CW-3 will describe, for example, that the defendant paid officials who were stationed at checkpoints not to search and seize vehicles carrying CW-3's drug loads. CW-1 also will testify that the defendant paid him to provide information about potential law enforcement actions, which the defendant then passed along to Tony Hernandez and CW-2.

Finally, the Government expects to offer cooperating witness testimony that, in or around 2013, the defendant traveled with Tony Hernandez, and other drug traffickers, to meet with El Chapo. At one of those meetings, El Chapo provided Tony Hernandez with \$1 million to fund Juan Orlando Hernandez's presidential campaign in exchange for continued protection of cocaine

shipments across Honduras. The defendant subsequently provided armed security for Tony Hernandez to transport that payment.

Evidence of such high-level corruption involving the defendant and his co-conspirators is admissible as direct proof because it is inextricably intertwined with the charged crimes and necessary to complete the story of the crimes on trial. *See Gohari*, 227 F. Supp. 3d at 317. The evidence tends to explain, for example, why the co-conspirators came together, how they operated, and why they were able to continue crimes of this magnitude unabated for years. The defendant's receipt of bribes is part of the charged conspiracy—the compensation that he received from his co-conspirators for the security and information that he was providing to them—and explains the importance of the role that the defendant played in the conspiracy. The defendant's payment of bribes to other HNP officers further explains how the conspiracy operated: how the defendant and his co-conspirators were able to avoid detection at checkpoints and receive sensitive law enforcement information.

Similarly, the \$1 million bribe that El Chapo provided is direct evidence of the charged conspiracy. That bribe was used to ensure that Juan Orlando Hernandez would be elected as President of Honduras, so that he could protect the defendant and his co-conspirators from prosecution. The bribe was also used as payment for the defendant and his co-conspirators to protect El Chapo's drug loads, as the defendant had previously done. Moreover, the circumstances surrounding the payment also demonstrate that the defendant was a highly trusted member of the conspiracy who served as an armed escort for Tony Hernandez to transport that \$1 million payment securely. *See United States v. Delligatti*, No. 15 Cr. 491, 2018 WL 1033242, at *6 (S.D.N.Y. Feb. 23, 2018) (“[W]here potential evidence explains the development of the illegal relationship . . .

and explains the mutual trust that existed between the coconspirators, it will be plainly admissible.” (internal quotation marks omitted)); *cf. United States v. Robles*, 1999 WL 707902, at *7 (5th Cir. 1999) (finding evidence sufficient in drug trafficking case where jury could infer that defendant “intend[ed] to pay bribes or otherwise provide protection to the [drug trafficking organization] by finding out whether members of the organization were targets of police investigations”). Indeed, for similar reasons, the Government sought to admit, and the Court permitted, such testimony in the prior trials of Tony Hernandez and another large-scale narcotics trafficker and member of the conspiracy, Geovanny Fuentes Ramirez. *See United States v. Juan Antonio Hernandez Alvarado*, S2 15 Cr. 379 (PKC), Sept. 13, 2019 Final Pretrial Conference Tr. at 4-5 (finding that evidence of narcotics-related corruption appeared to constitute “direct evidence of the conspiracy,” and ultimately permitting such evidence to be introduced at trial); *United States v. Geovanny Fuentes Ramirez*, S6 15 Cr. 379 (PKC), Feb. 12, 2021 Final Pretrial Conference Tr. at 7-8 (ruling that evidence of narcotics-related corruption was admissible as “evidence in furtherance and during the charged conspiracy”).

In the alternative, and for similar reasons, the corruption evidence is admissible pursuant to Rule 404(b) because it illustrates the broader criminal plan of the defendant and his co-conspirators to use drug trafficking to assert power and control in Honduras, and is probative of the defendant’s motive and intent in joining the conspiracy, namely to enrich himself by receiving bribes from politicians and other drug traffickers. *See United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996) (noting that evidence is admissible under Rule 404(b) “to explain how a criminal relationship developed” and “help the jury understand the basis for the co-conspirators’ relationship of mutual trust”). Thus, evidence of narcotics-related corruption involving the

defendant and his co-conspirators is relevant and has substantial probative value.

Finally, evidence of narcotics-related corruption is not unduly prejudicial relative to other proof the Government expects to offer. Under the defendant's direction and supervision, Honduran police escorted massive cocaine shipments belonging to the defendant's co-conspirators so that it would not be seized. The defendant, the police, and other security personnel participated in these activities while heavily armed with military-grade weapons. The defendant's and his co-conspirators' payment of bribes is no more sensational than that conduct. Accordingly, evidence of the full breadth of the corruption that facilitated the charged conspiracy is not barred by Rule 403.

II. Statements Made to Cooperating Witnesses by the Defendant's Co-Conspirators Are Admissible Pursuant to Rules 801(d)(2)(E) and 804(b)(3)

Several of the defendant's co-conspirators made statements to CW-1, CW-2, and CW-3 regarding the drug trafficking conspiracy, their joint efforts to protect themselves and their drug trafficking operation, and their attempts to increase their power in Honduras. As set forth below, evidence of these statements is either not hearsay, exempted under the hearsay rules, or both, and has significant probative value.

A. Applicable Law

1. Rule 801(d)(2)(E): Co-Conspirator Statements

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides in relevant part that “[a] statement is not hearsay if . . . the statement is offered against an opposing party and was made by the party's co-conspirator during and in furtherance of the conspiracy.” To admit a statement pursuant to this Rule, the Court must find two facts by a preponderance of the evidence: *first*, that a conspiracy that included the declarant and the defendant existed; and *second*, that the statement

was made during the course and in furtherance of that conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

Once a conspiracy is shown to exist, the “evidence sufficient to link another defendant to it need not be overwhelming,” and “the ‘in furtherance’ requirement of Rule 801(d)(2)(E) is satisfied” when, for example, “a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance.” *United States v. Paone*, 782 F.2d 386, 390 (2d Cir. 1986) (internal quotation marks omitted). Statements between co-conspirators that “provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy,” further the conspiracy, *United States v. Simmons*, 923 F.2d 934, 945 (2d Cir. 1988), as do statements “that apprise a co-conspirator of the progress of the conspiracy,” *United States v. Rahme*, 813 F.2d 31, 36 (2d Cir. 1987).

2. Rule 804(b)(3): Statements Against Interest

Under Rule 804, if a declarant is “unavailable,” there is an exception to the hearsay rule where:

- (A) a reasonable person in the declarant’s position would have made [the statement] only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3). This rule “is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” *Williamson v. United States*, 512 U.S. 594, 599 (1994).

To satisfy Rule 804(b)(3), the proponent of the statement must show by a preponderance of the evidence: “(1) that the declarant is unavailable as a witness, (2) that the statement is sufficiently reliable to warrant an inference that a reasonable man in [the declarant’s] position would not have made the statement unless he believed it to be true, and (3) that corroborating circumstances clearly indicate the trustworthiness of the statement.” *United States v. Wexler*, 522 F.3d 194, 202 (2d Cir. 2008) (internal quotation marks omitted). A declarant is unavailable for purposes of Rule 804 if, as relevant here, the declarant is “exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies,” Fed. R. Evid. 804(a)(1), or “is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure the declarant’s attendance or testimony,” *id.* 804(a)(5)(B).

“A statement will satisfy Rule 804(b)(3)’s requirement that it ‘tended’ to subject the declarant to criminal liability if it would be probative in a trial against the declarant.” *United States v. Persico*, 645 F.3d 85, 102 (2d Cir. 2011) (internal quotation marks omitted). Moreover, a declarant need not “be aware that the incriminating statement subjects him to immediate criminal prosecution,” but instead, that the “incriminating statement sufficiently tended to subject the declarant to criminal liability so that a reasonable man in his position would not have made the statement unless he believed it to be true.” *United States v. Lang*, 589 F.2d 92, 97 (2d Cir. 1978) (internal quotation marks and citation omitted).

Finally, the Second Circuit requires corroboration of both the declarant’s and the statement’s trustworthiness. *United States v. Doyle*, 130 F.3d 523, 543-44 (2d Cir. 1997). Statements made to co-conspirators, not in response to questioning, and not made in coercive

atmospheres are sufficiently reliable for purposes of this Rule. *See, e.g., United States v. Matthews*, 20 F.3d 538, 546 (2d Cir. 1994).

B. Statements Made by CW-3 During a 2007 Conversation with CW-1 About the Defendant Are Admissible as Co-Conspirator Statements

The Government respectfully submits that the following statements, which took place in or about 2007 during a conversation between CW-1 and CW-3 (long before either became a cooperating witness, when they were still participating in the charged narcotics conspiracy), are admissible through the testimony of those cooperating witnesses:

1. CW-3 told CW-1 that the defendant provided security for drug shipments and that the defendant provided CW-3 with information concerning law enforcement operations to protect CW-3's drug trafficking activities.
2. CW-3 described to CW-1 that the defendant was "the man's cousin," a reference to the fact that the defendant is a cousin of Juan Orlando Hernandez who was, at that point in time, an already influential Honduran political figure.

The statements that CW-3 made to CW-1 about the defendant fall squarely within Rule 801(d)(2)(E)'s exclusion for co-conspirator statements. The evidence at trial will establish that the defendant, CW-1, and CW-3 were co-conspirators, and that these statements were in furtherance of the charged conspiracy because they helped establish the relationship between CW-1 and the defendant, spurring their joint protection of cocaine shipments for CW-3 and others. *See, e.g., United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989) (finding "in furtherance" requirement met where statements "prompt the listener to respond in a way that facilitates the carrying out of criminal activity" (internal quotation marks omitted)). As described above, at the time of this conversation, CW-1 provided police protection for CW-3's cocaine loads. The defendant also was providing similar protection for CW-3. And after CW-3 made these

statements to CW-1, the defendant and CW-1 began working together to provide protection for CW-3's cocaine shipments, and did so on numerous occasions.

Moreover, CW-1 will testify that he understood that CW-3's description of the defendant as "the man's cousin" was a reference to the defendant's familial relationship with Juan Orlando Hernandez. This statement demonstrated that the defendant was well-connected and could provide protection for drug shipments, given Juan Orlando Hernandez's rising prominence in Honduran politics. CW-3's description of the defendant's relationship to Juan Orlando Hernandez further demonstrates that the statements were made in furtherance of a conspiracy to rely on government protection to facilitate large-scale drug trafficking. The statements that CW-3 made to CW-1 are thus co-conspirator statements made during and in furtherance of the charged conspiracy, and are admissible through CW-1's and/or CW-3's testimony under Rule 801(d)(2)(E).

C. Statements Made by Co-Conspirators to or in the Presence of CW-2 Are Admissible Under the Hearsay Rules

The Government respectfully submits that the following categories of statements, referred to below as "Statement [number]," are admissible through the testimony of CW-2:

1. In or around 2010, prior to CW-2 meeting the defendant, Tony Hernandez told CW-2 that (i) he had a relative who was able to remove people from various leadership positions in HNP if necessary, referring to the defendant; (ii) he paid the defendant for security and assistance with drug shipments; and (iii) CW-2 could rely on the defendant for any situation that arose with his narcotics trafficking activity. ("Statement-1")
2. In or around 2010 and 2011, Tony Hernandez proposed selling cocaine to CW-2 and told CW-2 that he had a cocaine laboratory in Lempira to produce kilogram quantities of cocaine. Around this time, Tony Hernandez and CW-2 participated in additional discussions concerning their cocaine trafficking, including conversations in which Tony Hernandez agreed to supply CW-2 with cocaine to sell to the Sinaloa Cartel. Tony Hernandez assured CW-2 that their cocaine shipments would not be interdicted because of Tony Hernandez's access to the police, which CW-2 subsequently understood to be a reference to the defendant. ("Statement-2")

3. In or around 2010, the defendant attended at least one meeting during which Tony Hernandez and CW-2, among others, discussed that El Chapo was trafficking drugs that were going to be sold in the United States and that El Chapo needed help ensuring that his loads of drugs—which amounted to shipments of approximately 500 kilograms and more—were safely transported through Honduras. During those meetings, Tony Hernandez and CW-2 discussed the logistics of those shipments. (“Statement-3”)
4. In or around late 2013, the defendant went to meetings during which El Chapo asked Tony Hernandez whether Tony Hernandez would be able to provide continued protection for the Sinaloa Cartel’s cocaine loads in Honduras. Tony Hernandez told El Chapo that, if Juan Orlando Hernandez won the presidency, then Tony Hernandez would be able to provide security for the cocaine shipments and would be able to prevent the extradition of the leaders of *Los Valles* and CW-2. El Chapo offered Tony Hernandez \$1 million to fund Juan Orlando Hernandez’s presidential campaign. A few days later, Tony Hernandez told CW-2 that he had spoken with Juan Orlando Hernandez, and that they needed the \$1 million for the campaign. (“Statement-4”)
5. In or around 2013, Juan Orlando Hernandez instructed CW-2 not to seek reelection because of media reports regarding CW-2’s drug trafficking activities. Juan Orlando Hernandez warned that he could not continue to protect CW-2 if he remained in office, particularly in light of extradition-related pressures. Juan Orlando Hernandez also asked CW-2 to support his campaign for the Honduran presidency by bribing local politicians so that they would muster support for Juan Orlando Hernandez from their constituencies. Juan Orlando Hernandez later thanked CW-2 for the assistance and told CW-2 that, as promised, CW-2 would be protected from prosecution and law enforcement targeting. (“Statement-5”)

The Statements described above are admissible at trial for multiple, independent reasons.

To start, all of the Statements are admissible as co-conspirator statements under Rule 801(d)(2)(E).

The Government will establish by a preponderance of the evidence that the defendant, Tony Hernandez, Juan Orlando Hernandez, El Chapo, and CW-2 were members of the charged conspiracy. As reflected above, cooperating witnesses, including CW-2, will testify that the defendant provided protection for Tony Hernandez and CW-2’s cocaine shipments, some of which were being transported for El Chapo. In addition, El Chapo paid a \$1 million bribe to Tony Hernandez for Juan Orlando Hernandez’s presidential campaign in order to continue receiving protection from Tony Hernandez and Juan Orlando Hernandez. That bribe included a promise to

continue to protect El Chapo's narcotics as they traveled through Honduras—protection which the defendant had helped to provide. The evidence at trial will also establish that Tony Hernandez sold cocaine to CW-2, which was protected on its way to Guatemala by the defendant and sold to El Chapo for distribution in the United States.

The Statements reflect conversations between and among co-conspirators in furtherance of a conspiracy to traffic cocaine or to leverage that drug trafficking to maintain and enhance their political influence in Honduras, which in turn served to enrich the members of the conspiracy and protect them from prosecution. For example, Statement-1 reflects a conversation between Tony Hernandez and CW-2 in anticipation of a meeting with the defendant, who was to provide armed protection and intel for Tony Hernandez and CW-2's cocaine shipments. In making Statement-1, Tony Hernandez was vouching for the defendant's trustworthiness and reliability, and the statement was intended to ensure that CW-2 had confidence in the defendant's ability and disposition to engage in the contemplated drug trafficking operations with Tony Hernandez and CW-2. Similarly, Statement-2 and Statement-3 reflect conversations between Tony Hernandez and CW-2 concerning their large-scale drug trafficking, including with El Chapo, as well as the protection that Tony Hernandez assured CW-2 he could provide by leveraging his contacts in law enforcement, such as the defendant. Statement-4 and Statement-5 likewise reflect Tony Hernandez's and Juan Orlando Hernandez's involvement in the narcotics-related corruption that furthered the objectives of the charged conspiracy by protecting drug traffickers such as CW-2 and ensuring that their criminal activity could thrive. *See United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999) (finding "in furtherance" requirement met where statements "induce a coconspirator's assistance"); *Persico*, 832 F.2d at 716 (finding "in furtherance" requirement met

where statements “solicited [listener’s] assistance”). Indeed, Statement-5 further underscores the importance that Juan Orlando Hernandez’s reelection would have on his ability to protect members of the charged conspiracy, including CW-2, and provides additional context for the defendant’s later attempts to dissuade CW-2 from self-surrendering and potentially cooperating with authorities in the United States. Moreover, to the extent Statement-4 reflects questions from El Chapo, and Statement-5 reflects directions made by Juan Orlando Hernandez to CW-2, those statements are not hearsay. *See, e.g., United States v. Kuthuru*, 665 F. App’x 34, 38 (2d Cir. 2016) (“Questions and commands are ordinarily not hearsay . . .”).

Each of the Statements is also independently admissible as against the penal interests of Tony Hernandez, Juan Orlando Hernandez, and El Chapo. The Statements, on their face, expose those individuals to criminal liability because they directly reference their involvement in drug trafficking and bribery. The Statements also bear the requisite indicia of reliability because they were made between co-conspirators engaged in joint criminal conduct, *i.e.*, “to a person whom the declarant believe[d] was an ally,” rather than to “curry favor with authorities.” *See United States v. Saget*, 77 F.3d 223, 230 (2d Cir. 2004); *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007). In addition, multiple witnesses—including CW-1 and CW-2—will testify about facts corroborating the trustworthiness of the Statements. For example, CW-2 will testify that he sold cocaine with Tony Hernandez, and CW-1 will testify that he provided information to the defendant to protect Tony Hernandez and CW-2’s cocaine shipments. Moreover, undisputable facts—such as Juan Orlando Hernandez ultimately winning the election and CW-2’s determination not to run again for public office—further underscore the reliability of the Statements.

Finally, Tony Hernandez, Juan Orlando Hernandez, and El Chapo are each unavailable. Tony Hernandez and El Chapo are currently serving life sentences, and would likely invoke their Fifth Amendment rights if called to testify. Juan Orlando Hernandez is detained pending trial, which is currently scheduled to begin on April 24, 2023, and would also likely invoke his Fifth Amendment right to testify. Accordingly, the Statements are also independently admissible under Rule 804(b)(3).

D. Statements Made to CW-3 by Co-Conspirators Are Admissible Under the Hearsay Rules

The Government respectfully submits that the following categories of statements, referred to below as “Statement [number],” are admissible through the testimony of CW-3:

1. In or around 2007, CC-1 told CW-3 that, on at least one occasion, CW-1 and the defendant were both providing protection for a cocaine shipment and recognized each other. At the time, CC-1 expressed concern that, by seeing the defendant, CW-1 would realize that Tony Hernandez was involved in the cocaine transaction. (“Statement-6”)
2. Prior to CW-3 meeting the defendant in 2010, CC-1 told CW-3 that the defendant assisted other drug traffickers with protection and helped them transport drugs through Puerto Cortes, a port city on the northern coast of Honduras, close to San Pedro Sula. CC-1 further advised CW-3 that anything could be fixed through the defendant. (“Statement-7”)
3. In or around 2013, CW-3, Tony Hernandez, and others transported more than 2,000 kilograms of cocaine across nine shipments. In connection with these nine shipments, CC-1 told CW-3 that they need not worry about the cocaine being seized by law enforcement in Honduras because the defendant was providing information about any police checkpoints along the route so that those checkpoints could be avoided. (“Statement-8”)
4. In or around 2013, two HNP officers (“CC-2” and “CC-3”) told CW-3 that the defendant was involved in cocaine trafficking.⁴ Specifically, CC-2 and CC-3 requested

⁴ CC-2 and CC-3 are nephews of Juan Carlos “El Tigre” Bonilla Valladares, the former director of the HNP. “El Tigre” has a long history of corruption and involvement in violence and narco-

access to trucks with false bottoms that CW-3 used to covertly transport cocaine, and told CW-3 that it was the defendant who would be overseeing their safe transport. (“Statement-9”)

As with the statements in Section C immediately above, each of the Statements made to CW-3 is admissible under Rule 801(d)(2)(E) and Rule 804(b)(3). The Statements are all admissible as co-conspirator statements because they reflect co-conspirator conversations about their joint criminal conduct and were intended to, and did, further the objectives of the charged conspiracy. For example, Statement-6 reflects CC-1’s concern that, by having seen the defendant protecting one of CW-3’s cocaine loads, CW-1 would realize that Tony Hernandez was involved in drug trafficking, thereby jeopardizing Tony Hernandez’s role in their conspiracy and ability to provide protection from arrest and prosecution. Statement-7 put CW-3 on notice that the defendant had been engaged in drug trafficking and was prepared to continue engaging in that same conduct with CC-1 and CW-3. Indeed, as described in the Background section above, the defendant was paid by CC-1 in exchange for his protection of CW-3’s and CC-1’s drug loads from approximately 2007 through 2009. Similarly, Statement-8 reflects an attempt by CC-1 to assure CW-3 that the defendant would continue providing protection for their drug loads, just as the defendant had done in prior years. And finally, Statement-9 reflects an attempt by CC-2 and CC-3 to use CW-3’s trucks to transport a cocaine load, which the defendant would ensure would not be intercepted. In sum, each of these Statements demonstrates efforts by co-conspirators to further the objectives of

trafficking in Honduras, and his case remains pending in this District. *See United States v. Juan Carlos Bonilla Valladares*, S8 15 Cr. 379 (PKC).

the criminal conspiracy they participated in with the defendant, and are thus admissible under Rule 801(d)(2)(E).

The Statements are also admissible under Rule 804(b)(3) as against the penal interests of CC-1, CC-2, and CC-3. Like the statements in Section C above, the Statements here, on their face, expose the declarants to criminal liability because they reference their involvement in drug trafficking. There are also sufficient corroborating circumstances indicating their trustworthiness: (i) CW-1, CW-2, and CW-3 all corroborate the defendant's involvement in protecting loads of cocaine; (ii) CW-1 will testify that he saw the defendant during a particular load and, after that, began speaking with the defendant about their joint criminal activity; and (iii) CW-3 permitted CC-2 and CC-3 to use his trucks to facilitate cocaine shipments. And finally, CC-1, CC-2, and CC-3 are each unavailable because they are located abroad, outside the Government's subpoena power, and in any event would likely invoke the Fifth Amendment even if they were questioned under oath regarding these activities. *See United States v. Ortiz*, 962 F. Supp. 2d 565, 573 (S.D.N.Y. 2013) (finding witness unavailable where located outside United States at time of trial). The Statements are thus also admissible under Rule 804(b)(3).

III. Electronic Communications by Central American Drug Traffickers Regarding Cocaine Bearing the Initials of the Defendant's Co-Conspirator Are Admissible

In June 2016, two drug traffickers in Central America ("CC-4" and "CC-5") exchanged electronic communications via the messaging application BlackBerry Messenger, which included discussion of purchasing hundreds of kilograms of cocaine in San Pedro Sula, Honduras, that were marked with a stamp bearing Tony Hernandez's initials, "TH." During the exchange, the traffickers exchanged a photograph of one of the "TH"-stamped kilograms. As described below, these messages, which plainly expose CC-4 and CC-5 to criminal liability, are admissible both as

statements against penal interest under Rule 804(b)(3) and, separately, as co-conspirator statements under Rule 801(d)(2)(E), because they reflect a discussion between purchasers of cocaine who were part of the same distribution chain as the members of the charged conspiracy.

A. Relevant Facts

On June 23, 2016, CC-4 and CC-5 exchanged communications for approximately five hours via BlackBerry Messenger, which were lawfully intercepted pursuant to a Title III wiretap in another District. (*See* Ex. B (translations of the intercepts)).⁵ CC-4 and CC-5 exchanged these messages using Blackberry accounts subscribed in aliases rather than their names. During the exchange, CC-4 used a device that was connected to a Honduran telecommunications service provider, and CC-5's device was connected to a Guatemalan provider.

In sum, the interceptions revealed that CC-5 was late paying CC-4 in connection with a prior drug deal because CC-5's "client" had not paid him yet. (Ex. B. at 2: 5). CC-4 was seeking to collect on the debt so that he could buy more cocaine. (*Id.* at 2:1, 7). He sent CC-5 a photograph of one of the kilograms, which bore the defendant's "TH" stamp:

⁵ Exhibit B, which was previously admitted as GX 402 at Tony Hernandez's trial in October 2019, includes references to "Male-1" and "Male-2." For the Court's reference, CC-4 is "Male-1" and CC-5 is "Male-2."



(*Id.* at 2:3). CC-4 indicated that the “TH”-stamped kilograms were in San Pedro Sula, Honduras (“SPS”). (*Id.* at 2:7). He also expressed concern that he and CC-5 had “never made them,” *i.e.*, the group supplying the cocaine, “wait like this.” (*Id.* at 4:3). CC-4 and CC-5 agreed that they had to handle communications with the supplier carefully, and CC-4 indicated that “[h]e is the only one who gives me” cocaine. (*Id.* at 5:11). Throughout the day, CC-4 continued to pressure CC-5 for payment so that he could “pick up 200 things,” *i.e.*, kilograms of cocaine, from “the picture that I sent.” (*Id.* at 6:1-3). CC-5 urged caution because he had no money to pay for the drugs at that time. (*E.g., id.* at 6:13).

B. Discussion

1. The Messages Are Admissible Pursuant to Rule 804(b)(3)

The electronic messages between CC-4 and CC-5 are admissible pursuant to Rule 804(b)(3). Both CC-4 and CC-5 are unavailable because they are located outside the United States and likely would invoke the Fifth Amendment with respect to these communications if given the

opportunity.⁶ The entire exchange is against the penal interests of CC-4 and CC-5 because they discussed past, present, and future drug dealings using fairly explicit language whose import was made even clearer by the transmission of the photograph of a kilogram of cocaine.

There are also sufficient indicia of reliability related to the BlackBerry messages. As described above, CW-2 will testify about Tony Hernandez's use of a cocaine stamp bearing his initials. CC-4 and CC-5 exchanged messages in private using BlackBerry accounts subscribed in aliases rather than their names, reflecting their deliberate attempts to avoid detection when discussing their criminal conduct. Their use of Central American service providers corroborates references in the communications to San Pedro Sula and other evidence of the defendant's involvement in drug trafficking in Honduras. CC-4 and CC-5 also had no reason to lie. To the contrary, CC-5 stated explicitly, "between you and I we always tell each other what the reality is." (Ex. B at 4:1). CC-5 explained that he was owed money, which caused his delinquency in payment to CC-4, and CC-4 informed CC-5 that his supplier of the "TH"-stamped cocaine was pressuring him to consummate a deal. CC-4 and CC-5 did not appear to seek to shift blame for their criminal conduct, and they had no reason to suspect that the communications were being intercepted such that it might be in their interests to puff regarding their connections or the "TH"-stamped cocaine they sought to distribute. Thus, the BlackBerry communications are admissible pursuant to Rule 804(b)(3).

⁶ The prosecution team responsible for the wiretap yielding the messages believes that it has identified one of the participants in the exchange but not the other, has charged the individual in question, and is seeking to effect his provisional arrest in order to pursue extradition. The identification of this individual, however, has no bearing on his unavailability because he remains at large in an unknown location in Central America.

The messages are also direct proof of the charged conspiracy and satisfy Rule 401. As described above, CW-2 will testify that the defendant provided protection for cocaine loads sold by Tony Hernandez and CW-2, some of which bore the same “TH”-stamped marking reflected in the photograph exchanged by CC-4 and CC-5. The messages, on their face, reflect that the “TH”-stamped cocaine—which was sold by the charged conspiracy—was still being sold in or around 2016 (*i.e.*, within the time frame charged in the Indictment). The messages also reflect that CC-4 and CC-5 were downstream purchasers of cocaine, further corroborating the testimony of multiple cooperating witnesses who will describe that Tony Hernandez—who worked with CW-2, the defendant, and others—was in fact distributing cocaine that was leaving Honduras.

The evidence at trial will also establish that, in or around the summer of 2016, around the time the messages were exchanged, the defendant continued to play a crucial role in protecting Tony Hernandez’s drug operation. Indeed, as described above, around this time, the defendant learned that CW-1 was contemplating surrendering to authorities and attempted to dissuade CW-1 from providing information about, among other people, Tony Hernandez. The defendant’s attempts to continue to protect Tony Hernandez’s drug business—the same business reflected in the messages—further underscores the relevance of the messages. As such, the messages serve as direct proof of the conspiracy that Government will be required to prove at trial.

2. The Messages Are Admissible Pursuant to Rule 801(d)(2)(E)

The messages are also separately admissible as co-conspirator statements. The content of the messages demonstrates that CC-4 and CC-5 were downstream purchasers of Tony Hernandez’s cocaine, through a connection to an intermediary they had worked with previously, and were therefore part of the same conspiracy and distribution chain as Tony Hernandez and the defendant.

See United States v. Hernandez, 521 F. App'x 14, 17 (2d Cir. 2013) (“Preliminary questions of this nature are to be resolved by the court by a preponderance of the evidence, which may include reference to the hearsay statements themselves so long as other independent evidence corroborates the fact of the defendant’s participation in the conspiracy.”); *see also United States v. Parker*, 554 F.3d 230, 238 (2d Cir. 2009) (describing a “chain conspiracy” in which “[o]ne who establishes a continuing business of selling drugs in large, wholesale quantities knows that the success of his selling business depends on the ability of his customers to resell to others, who in turn will resell to still others, until the product ultimately is sold to retail consumers”). CC-4 and CC-5 used the Spanish slang “Cuas” to address each other, which reflected friendship and familiarity, and the communications demonstrated that CC-4 and CC-5 had worked together previously in drug trafficking. (*See* Ex. B at 2:11 (“[Y]ou are always so punctual in paying me.”)). The communications also indicated that CC-4 and CC-5 had worked previously with the person offering them Tony Hernandez’s “TH”-stamped cocaine, and that CC-4 and CC-5 considered the relationship to be sensitive. (*Id.* at 5:11 (“He is the only one who gives to me”)); *id.* at 4:3 (“Since this had never happened that they had to wait like this[.]”); *id.* at 4:11-13 (“I answer him as soon as soon as he sends a message because if not he might get the wrong idea, that I lost something you know. It is my responsibility to keep him posted,” // “Yes, Cuas, I’m the same.”)).

Other evidence demonstrates by a preponderance that the defendant was a participant in the conspiracy with CC-4, CC-5, and Tony Hernandez. CC-4 used a device, connected to a Honduran service provider, to inform CC-5 that the “TH”-stamped cocaine was in San Pedro Sula and to discuss that he wanted to go pick up 200 kilograms of that cocaine. (Ex. B at 6:1-11). As described above, the defendant regularly provided protection for Tony Hernandez and CW-2’s

cocaine loads from San Pedro Sula to towns in Honduras that bordered Guatemala, such as El Paraiso. Moreover, the Government expects that at trial, CW-2 will testify that the photograph exchanged by CC-4 and CC-5 depicts the “TH” stamp used by Tony Hernandez to mark the kilograms of cocaine that Tony Hernandez sold in large quantities to other narcotics traffickers, including El Chapo, and for which the defendant provided protection.

Finally, the communications between CC-4 and CC-5 were in furtherance of the conspiracy because they related to prior criminal dealings, a pending drug debt owed by CC-5 and his “client,” and ongoing drug negotiations between CC-4, CC-5, and downstream suppliers of Tony Hernandez’s cocaine related to the purchase of hundreds of the “TH”-stamped kilograms that were stored in Honduras. *E.g.*, *Maldonado-Rivera*, 922 F.2d at 959 (finding “in furtherance” requirement met where statements “seek to induce a coconspirator’s assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy”). Therefore, the messages set forth in Exhibit B are admissible pursuant to Rule 801(d)(2)(E).

VI. Electronic Evidence from Tony Hernandez’s Cellphones, Including Photographs of Machineguns, Is Admissible as Direct Evidence

A. Relevant Facts

On or about November 23, 2018, Tony Hernandez was arrested at Miami International Airport. Law enforcement officers seized two cellphones from Tony Hernandez in connection with that arrest. Law enforcement officers then searched the contents of Tony Hernandez’s cellphones pursuant to a judicially authorized search warrant.⁷

⁷ On October 27, 2022, the Honorable Robert W. Lehrburger issued a search warrant reauthorizing law enforcement to review the contents of Tony Hernandez’s cellphones for evidence of drug trafficking and firearms offenses. The Government is in the process of reviewing the contents of

The Government introduced as evidence certain of the contents seized from Tony Hernandez’s cellphones at Tony Hernandez’s trial in October 2019, including, among other things: photographs of firearms, including of automatic weapons; United States currency that trial evidence showed was consistent with drug proceeds; contact information for co-conspirators; and photographs of co-conspirators. For example, the images below were admitted as evidence:



The trial evidence established that the image on the left depicts a standard AR style rifle, and that the image on the right depicts a short barrel AR style rifle. The Government also introduced an image (pictured below) of what was identified at trial as a CZ Scorpion Evo, a machinegun, inscribed with Juan Orlando Hernandez’s name: “JUAN ORLANDO HERNANDEZ, PRESIDENTE DE LA REPUBLICA HONDURAS.”

Tony Hernandez’s cellphones and may seek to offer additional evidence from Tony Hernandez’s cellphones at the defendant’s trial.



B. Discussion

As described above, the evidence at trial will establish that the defendant and his co-conspirators used and carried firearms—including military-grade weapons, such as those depicted above—during and in furtherance of their narcotics trafficking. Indeed, the trial testimony will establish that the defendant provided heavily armed security through the HNP for Tony Hernandez’s drug shipments and that the defendant also carried an assault rifle with him to drug trafficking meetings, including the 2013 meeting in which El Chapo offered Tony Hernandez a \$1 million bribe for Juan Orlando Hernandez’s presidential campaign in exchange for continued protection of cocaine loads in Honduras.

Evidence from Tony Hernandez’s cellphones, including the photographs of machineguns depicted above, is admissible as direct evidence against the defendant.⁸ The fact that Tony

⁸ Absent a stipulation as to the authenticity of the contents of the cellphones, the Government will seek to offer this evidence through a law enforcement witness who performed the extractions of the data from the cellphones.

Hernandez has photographs of firearms is probative of the defendant's guilt, particularly as it pertains to Counts Two and Three of the Indictment, which charge him with using and carrying firearms during and in relation to the drug trafficking crime charged in Count One (or aiding and abetting the same), and conspiring with Tony Hernandez, Juan Orlando Hernandez, and others to commit firearms offenses and with using and carrying firearms, respectively. Indeed, with respect to aiding and abetting under Count Two, it is enough that the defendant facilitated drug shipments to or through a location where he knew that another participant would take steps to protect the shipment using a machinegun or destructive device, or otherwise facilitated the drug trafficking offense charged in Count One knowing that an accomplice would be using or carrying a gun in relation to that crime. *See Rosemond v. United States*, 572 U.S. 65, 77-78 (2014) (“An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one.”).

Similarly, photographs of firearms are direct evidence of the drug trafficking crime charged in Count One. Firearms constitute a tool of the drug trade. *See, e.g., United States v. Muniz*, 60 F.3d 65, 71 (2d Cir. 1995) (“[T]here are innumerable precedents of this court approving the admission of guns in narcotics cases as tools of the trade.”); *United States v. Vegas*, 27 F.3d 773, 778 (2d Cir. 1994) (“[T]his Court has repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade.” (internal quotation marks omitted)). That is particularly true where, as here, the

defendant and his co-conspirators used heavy weaponry, including machineguns and destructive devices, to protect their drug shipments.

Here, photographs of firearms in Tony Hernandez's cellphones are direct evidence of the charged crimes. The defendant is alleged to have abused his position in the HNP to provide and facilitate armed security for massive drug loads for, among other co-conspirators, Tony Hernandez. The testimony at trial will establish that members of the charged conspiracy, including the defendant and Tony Hernandez, carried and used machineguns in connection with their drug trafficking. The testimony will also establish that the defendant aided and abetted the use and carrying of guns during and in relation to the drug trafficking crime charged in the Indictment by, among other things, (i) attending meetings with other armed drug traffickers and security personnel; (ii) organizing the armed transport of drug loads through Honduras; and (iii) bribing law enforcement officers at checkpoints so that caravans of cocaine-filled vehicles, protected by men with machineguns, could pass through security checkpoints without issue. Thus, evidence that Tony Hernandez, an accomplice and a member of the charged conspiracy, had photographs of the types of guns used to facilitate the drug trafficking crime charged in Count One corroborates that testimony and constitutes direct proof.

Moreover, multiple cooperating witnesses are expected to testify concerning the possession of firearms by the defendant, Tony Hernandez, and their co-conspirators in connection with the charged crimes, including the same types of firearms depicted in Tony Hernandez's cellphones. Thus, photographs of firearms on Tony Hernandez's cellphones directly corroborate that testimony. *See United States v. Riccardi*, 620 F. App'x 11, 15 (2d Cir. 2015) ("The district court acted well within its discretion in concluding that the guns and ammunition were not being offered

to prove propensity but, rather, as direct evidence of the charged robbery crimes as well as corroboration for [a cooperating witness's] testimony that Riccardi had provided him with the guns he used to commit the robbery."); *United States v. Scott*, 677 F.3d 72, 81 (2d Cir. 2012) ("We have 'consistently held [other act evidence] admissible to corroborate crucial prosecution testimony.'" (quoting *United States v. Everett*, 825 F.2d 658, 660 (2d Cir. 1987))).

Finally, admitting the photographs would not be unduly prejudicial. Evidence of Tony Hernandez's possession of firearms does "not involve conduct any more sensational or disturbing than the crimes with which" the defendant was charged. *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990). Indeed, multiple witnesses will testify about the defendant's use of the very same types of firearms to protect drug shipments for Tony Hernandez. Accordingly, this evidence is not barred by Rule 403.

CONCLUSION

For the foregoing reasons, the Government respectfully submits that the Court should grant the relief requested herein.

Dated: New York, New York
October 28, 2022

Respectfully submitted,

DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

By: /s/
Jacob H. Gutwillig
David J. Robles
Elinor L. Tarlow
Assistant United States Attorneys
212-637-2215 / 2550 / 1036

Cc: Defense Counsel
(Via ECF & Email)