

No. 15-41235

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVADOR OCAMPO-VERGARA, ALSO KNOWN AS SALVADOR OCAMPO, ALSO
KNOWN AS CHAVA; GUSTAVO ORTIZ-SALAZAR, ALSO KNOWN AS DANIEL, ALSO
KNOWN AS GUS, ALSO KNOWN AS GUSTABO

Defendants-Appellants.

Consolidated with No. 15-41286

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICARDO ORTIZ-FERNANDEZ, ALSO KNOWN AS ALEX,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF TEXAS, SHERMAN DIVISION, THE HONORABLE MARCIA A. CRONE PRESIDING

Initial Brief for Gustavo Ortiz-Salazar

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of the case. These representations are made so that this Court's judges may evaluate possible disqualification or recusal.

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Recommendation on Oral Argument

Ortiz-Salazar requests oral argument. The Government presented opinion testimony regarding Ortiz-Salazar's guilt in violation of Federal Rule of Evidence 704(b) and also introduced guilt-by-association evidence at trial and emphasized it in its closing and rebuttal arguments. The merits of this appeal warrant oral argument, which should aid the Court in its decisional process.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
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Initial Brief for Gustavo Ortiz-Salazar

Statement of Jurisdiction

The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 18 U.S.C. § 1291 as this is an appeal

from a final judgment entered by the United States District Court for the Eastern District of Texas. Jurisdiction is also had under 18 U.S.C. § 3742.

The district court entered written judgment on 9 September 2015. ROA.491–97. Ortiz-Salazar filed a notice of appeal on 14 September 2015, ROA.498, which was timely under Federal Rule of Appellate Procedure 4(b).

Statement of the Issues

Issue One

The district court reversibly erred by allowing the Government's agent to offer opinion testimony that Ortiz-Salazar had the state of mind that constituted an element of conspiracy to possess to distribute.

Issue Two

The district court reversibly erred by allowing the Government to introduce guilt-by-association evidence which it emphasized in argument to obtain Ortiz-Salazar's conviction.

Statement of the Case

This is a drug conspiracy case. The trial last eight days and involved three defendants, 23 witnesses, 10 of which were cooperating defendants. As with many drug conspiracies, the record is complicated and fragmented. *See United States v. Lopez*, 545 Fed. Appx. 301, 302 (5th Cir. 2013).

Government Agent Rick Clough

The Government called Rick Clough, its representative agent, at the start of its case. Clough was a group supervisor for the Drug Enforcement Agency, ROA.1114, who had worked as a special agent in this case. ROA.1116. The Government elicited testimony from him regarding the operations of drug organizations. He described how they utilized hidden compartments in vehicles, ROA.1117, where they operated, ROA.1117, the drug routes they used, ROA.1118, their hub cities, ROA.1118, stamps and masking agents, ROA.1119, their hierarchies, ROA.1121, their use of couriers, ROA.1121, and the relative prices of narcotics. ROA.1123. The Government moved to have him admitted as an expert, and the district court recognized him as such. ROA.1125.

The Government then elicited additional summary testimony from him regarding cooperating defendants, such as their arrests and possession of narcotics, and other facts allegedly supporting the drug conspiracy.

Clough testified about Jose Antonio Figueroa's arrest, his possession of 21 kilograms of heroin, and his subsequent cooperation with law enforcement. ROA. 1126–32. He testified that Figueroa was a courier that had smuggled heroin from Morelos, Mexico, through Dallas to Chicago. ROA.1132. The Government elicited testimony that couriers like Figueroa would also make flights between Mexico and Chicago. ROA.1134.

Clough testified about Luis Palacios, calling him the conspiracy's "cell head" who was based in San Antonio, and who organized loads for the organization. ROA.1135. He testified that he had determined Palacios "was responsible for the transportation of heroin" and that Palacios was later arrested. ROA.1136. He said that Palacios's vehicle had 4 kilograms of heroin and a digital scale in it when Palacios was stopped and arrested. ROA.1137.

He testified about Adriana Diaz O'Campo's arrest in Laredo, Texas. ROA.1142. He testified that her car had 14 kilograms of heroin in it with hidden compartments "like Figueroa's." ROA.1143, 1145. He said her car had an Illinois temporary tag, ROA.1145, and that she had flown from Mexico to Chicago O'Hare prior to the seizure. ROA.1150. He testified that after her arrest, "other couriers of [the] organization and [the] conspiracy [were] identified," and TECS "lookouts" were placed on them.¹ ROA.1154. Daniel Castrejon was with her in the car, and he "de-

¹ TECS stands for Treasury Enforcement Computer System. Clough testified that it was an alert on a particular vehicle or name, when individuals attempt to make an entry into the country, the computer system alerts the inspector that the vehicle needs to be inspected or the passenger. ROA.1154.

termine[d] that one of [his] roles in this conspiracy was to hire drivers.” ROA. 3067.

Alerts were placed on two female “couriers,” one of which was Angelica Velasquez Campos. ROA.1154. Clough testified that she was stopped in her Ford Explorer Sport Trac based on the alert and was found to have five and a half kilograms of heroin and one-quarter gram of cocaine in her car. ROA.1156. He testified that the narcotics had been hidden in a compartment in the floorboard. ROA.1157. The registration and title in the Sport Trac showed that Noemi Vargas, who had married Daniel Vargas, had sold the car to her. ROA.1160–62.

Clough determined that the Vargases were involved in the conspiracy, ROA. 1163, that they were couriers with a travel history of traveling to Mexico with turn arounds to the United States. ROA.1162. He opined this was “pretty consistent with the previous couriers that [he] had identified in the investigation.” ROA.1162. He said, “What we noticed is that a lot of the couriers would fly—drive to Mexico, fly back, and then travel back to Mexico and return with a vehicle. A short turn-around.” ROA.1162. He acknowledged that the Vargases didn’t have any heroin in their possession when they were arrested. ROA.1163.

He testified that he had determined that Salvador Ocampo-Vergara, Noemi Vargas’s ex-husband, “was an individual that was based in Mexico . . . [a]nd his sole responsibility was to orchestrate the shipment of the vehicles from Mexico to Chicago.” ROA.1163.

He testified that Ocampo-Vergara was Araceli Gonzalez's cousin, ROA.1163; she was one of the two female couriers he had previously identified. ROA.1170. He requested that she be stopped and questioned at Chicago O'Hare on a trip from Mexico. ROA.1171. She was traveling with Gustavo Ortiz-Salazar and he asked that he be stopped and questioned as well. ROA.1172. Both were stopped and inspected at the airport, and both denied knowing one another other. ROA.1170–71.

Clough began an investigation of Ortiz-Salazar after this trip with “known courier” Gonzalez. ROA.1171. Gonzalez was arrested after Clough had put a TECS alert on her. ROA.1197. She was stopped at the border at Eagle Pass, Texas, and her red 2004 Chevrolet was found to have 14 kilograms of heroin in it. ROA.1197. The car had an Illinois tag and the heroin had been hidden in the car's rocker panels. ROA.1199.

He discovered that Ortiz-Salazar had previously crossed the border with Alejandro Rodriguez in a Honda CRV six months before Ortiz-Salazar's flight into O'Hare with Gonzalez. ROA.1177. After Gonzalez's arrest, he identified Rodriguez as a member of the conspiracy. ROA.1200. He put a TECS alert on Rodriguez. ROA.1200. Rodriguez was stopped at the border, and Clough advised the border-patrol agents that, based on the investigation of previous couriers that had been arrested, they needed to inspect his vehicle's wheel wells. ROA.3071. Border

agents found heroin in the CRV, the same one he had crossed earlier with Ortiz-Salazar, ROA.1178, 1197, 1201, and arrested him. ROA.1178.

Marisol Valdez, whom Clough “tied to this conspiracy,” was arrested as well. ROA.1203–04. Clough opined that her heroin was “tied to this conspiracy” due to the fact that she had some cellular phones that had some texts from Araceli Gonzalez, “one of the other coconspirators.” ROA.1209.

Clough examined Ortiz-Salazar’s travel patterns and “determined that he was believed to be a courier for the drug trafficking organization that we were investigating.” ROA.1197. He put a TECS lookout for him as well. ROA.1198, 1352. Ortiz-Salazar was arrested in Chicago on 13 June 2014. ROA.1252. He was not in possession of any narcotics at the time. ROA.1252.

Travel with Alejandro Rodriguez

The Government called Alejandro Rodriguez who had pleaded guilty with possession with intent to distribute more than 1 kilogram of heroin in a separate case. EX. 135. He had admitted to attempting to enter the United States via the Lincoln-Juarez Bridge in a brown CRV loaded with 11 kilograms of heroin on 28 January 2013. EX.135.

He testified that he first got involved in distribution in 2009 or 2010 because he needed to make money. ROA.2325. Daniel Castrejon introduced him to Jose

Nava-Romero, a notorious dealer, over the phone. ROA.2324. Nava-Romero knew Castrejon from Tilzapotla, Mexico. ROA.2380.

Nava-Romero hired him, and Rodriguez did one “load” for him for which he was paid \$19,000. ROA.2326. For that load, he drove from Mexico to Chicago, but then he stopped for about a year. ROA.2326.

He met with Carlos Araujo who was from Tilzapotla, Morelos, Mexico, and told him that he was broke. ROA.2329. Araujo said he had a couple of cars he could wash. ROA.2329. Rodriguez then mentioned Nava, and Araujo said he’d talk to his uncle, Rene Araujo (“La Chula”). ROA.2329.

La Chula hired him, gave him cash, a phone, and ticket to Chicago. ROA.2330. He flew to Chicago, and met Alejandro Ortiz-Fernandez (“Alex”).² ROA.2331. Alex gave him more money, set him up in a motel, and then provided a Honda CRV for him to drive a few days later. ROA.2332. He drove the CRV to Mexico and gave La Chula the vehicle. ROA.2333. He waited in Mexico for him to return it, about two or three weeks. ROA.2333. Receiving the CRV, he drove it back to Chicago. ROA.2334. He met Alex when he arrived. ROA.2334. He received \$15,000 from Alex for making the trip. ROA.2335.

Alex called him a couple of months later. ROA.2335. He met with him, and Alex provided him the same Honda CRV. ROA.2336. He drove it to Mexico and deliv-

² Ortiz-Fernandez is consistently called “Alex” in the record so that alias is used for ease of reading and reference.

ered it again to La Chula. ROA.2336. He stayed in Mexico for a few weeks, and received it back from La Chula. ROA.2336.

Preparing to drive the CRV back to Chicago ROA.2336–37, he said he met Ortiz-Salazar at a social event in Tlzapotla, Mexico. ROA.2338. There Ortiz-Salazar told him that he wanted to try a different state (Ortiz was from Arizona), and asked whether he could ride with him to Chicago. ROA.2338. Rodriguez testified “I told him straight, look, I’m—I’m smuggling drugs.” ROA.2338, 2383, 2385. He said Ortiz-Salazar brushed it off, saying, “It doesn’t matter. Just give me a ride.” ROA. 2338. Ortiz-Salazar then asked him how he had gotten involved in smuggling, and mentioned that he was tired of making little money. ROA.2338. He said that Ortiz-Salazar asked him if he could introduce him to some people. ROA.2339.

Ortiz-Salazar accompanied him to Chicago, along with Rodriguez’s younger brother Ernesto. ROA.2339. They crossed the border on 10 May 2012 in Laredo. ROA.1177. Rodriguez admitted that he didn’t tell Ernesto what he was smuggling narcotics. ROA.2340, 2385. During the trip, Rodriguez got tired of driving and had Ortiz-Salazar drive a couple of hours. ROA.2340. He gave Ortiz-Salazar \$2,000 to be generous, to help him out since he was broke. ROA.2340, 2399. When they arrived in Chicago, they went to a Holiday Inn where Alex picked up the CRV. ROA. 2341. He paid Rodriguez \$15,000. ROA.2341. Rodriguez testified that he had seen Ortiz-Salazar and Alex together in the ensuing weeks or months at different clubs. ROA.2341–42.

Rodriguez testified he made three trips with the CRV. ROA.2342. The trip with Ortiz-Salazar was his second trip. ROA.2343. He made his third trip some two or three months later. ROA.2343. Alex called him, and he drove the CRV down to Mexico and delivered it again to La Chula. ROA.2343. After La Chula delivered it back to him, he drove it to San Antonio. ROA.2343. He delivered it to an individual La Chula had instructed him to. ROA.2344. He was paid \$15,000 for that trip. ROA.2344. He stayed in San Antonio for a few days, and then flew to Chicago. ROA.2345.

The CRV was delivered to Chicago where Rodriguez picked it up from Alex, and drove it back down to Mexico. ROA.2345. After receiving it from La Chula again, he attempted to drive it back to Chicago, but was stopped at the border. ROA.2346. This was on 26 January 2013. ROA.2353. Border Patrol found 11.22 kilograms of heroin in the CRV. ROA.2353.

The CRV was the only vehicle he had driven to smuggle narcotics. ROA.2346.

Chauffeur of Alejandro Ortiz-Fernandez

Alejandro Rodriguez testified that Ortiz-Salazar had worked for Alex as his chauffeur. ROA.2342. Santiago Lagunas and Daniel Vargas testified to the same thing. ROA.2968, 2196. Vargas testified that he had also worked as Alex's chauffeur, but hadn't observed him do anything illegal while doing so. ROA.2207.

Travel with Araceli Gonzalez

The Government called Araceli Gonzalez, who had pleaded guilty to conspiring to import more than 5 kilograms of heroin for attempting to drive a Chevrolet Caprice Classic into the United States on 5 January 2013. EX.136. The car had more than 14 kilograms of heroin in it. EX136. She was awaiting sentencing at the time of trial. ROA.2405.

She had made several smuggling trips to Mexico. ROA.2412–2442. She made one trip with Ortiz-Salazar.

On 1 December 2012, Ortiz-Salazar transferred title and registration of the red Chevrolet that was later arrested in to her. ROA.2443. They made a trip together, driving down to Mexico, and crossing the border on 10 December 2012 ROA. 2444. He was to go with her, she said, because there had been a problem with another driver. ROA.2445. His car had gotten stolen. ROA.2445. Because of that incident, she had to have someone with go with her to Mexico. ROA.2446. Ortiz-Salazar was introduced to her as “Daniel.” ROA.2444. He picked her up in the red Chevrolet that they would drive down in when he arrived at her house. ROA.2450.

On the way to Mexico, Ortiz-Salazar told her that his bank accounts had been frozen, and that he was being questioned about money being deposited. ROA. 2451. He said he had driven the Chevy to Mexico before, and said it was a good vehicle, didn’t attract much attention. ROA.2451. Ortiz-Salazar drove for only a couple of hours on the trip because he was sick. ROA.2453.

They crossed the border and met Carlos, La Chula's nephew, and his wife, in Nueva Laredo. ROA.2452. Carlos drove the car from Pachuca, Mexico, to La Chula's home. ROA.2542. Ortiz sat in the passenger side while she sat in the back with the wife. ROA.2543.

They shared a room in a hotel in Pachuca, and were supposed to fly back the next day. ROA.2454. Carlos, who was supposed to take them to the airport, wasn't allowed to drive through Mexico City that day. ROA.2454. So he dropped them off at the edge of the city and they took a cab to the airport, but missed their flight. ROA.2454. They called Salvador Ocampo-Vergara, who picked them up, and they flew out the next day. ROA.2455.

They sat next to each other on the flight from Mexico to Chicago. ROA.2456. She filled out his customs forms because he was sick and asleep. ROA.2456. That is when she discovered his name wasn't "Daniel," but Gustavo. ROA.2457.

She noticed that the agents marked their forms, so they went through separate booths at customs. ROA.2458. She thought it would be better if they split up; she didn't want to be associated with him because of the bank accounts. ROA.2459. They were questioned by two different primary officers. ROA.2117.

Ortiz-Salazar had a backpack and no secondary bags. ROA.2118. He said that had been away for a funeral and said he lived with his uncle. ROA.2123. He had difficulty with easy answers ROA.2123, but was compliant. He denied traveling with anyone. A citizen, he was allowed to leave. ROA.2129, 2153.

She denied knowing Ortiz-Salazar at all, and told the agents that she was flying back because of a family emergency. ROA.2460. Agents found her parking receipt in Ortiz's backpack; she said didn't know how it got there. ROA.2460. She and Ortiz-Salazar didn't leave the airport together. ROA.2461. She never saw or spoke to him again. ROA.2461.

La Chula asked her to pick up the red Chevy in Mexico, ROA.2461, but she refused to do it because of the prior trouble with customs. ROA.2462. She suggested that Ortiz-Salazar drive it back. ROA.2462. La Chula told her that as long as she could get the Chevy back Gustavo would make other trips. ROA.2462.

She flew down and picked up the Chevy. ROA.2465. She was to be paid \$15,000 once she drove it back to Chicago. ROA.2466. She was stopped, however, and arrested at the border where the car was found to have 14 kilograms of heroin in it. ROA.2466.

Travel with Daniel Vargas

The Government called Daniel Vargas, whom Clough identified as a conspirator. ROA.1162-63. He had pleaded guilty to conspiracy to possess with intent to distribute heroin as a co-defendant. EX.137. He testified, hoping for a reduction in his sentence. ROA.2201.

He had chauffeured for Alejandro Ortiz-Fernandez for approximately two or three months, ROA.2175, before he got involved in drug distribution. ROA.2173. He hadn't seen any illegal conduct during his chauffeur service. ROA.2207.

Ortiz-Fernandez asked to make a trip to Mexico, ROA.2175, explaining that he would be dropping off \$5K, but being paid \$10K to make the trip. ROA.2176. He would make the trip in a Black Ford Sport Trac, which Ortiz-Fernandez would buy for him to drive. ROA.2176.

Vargas made the trip with his girlfriend, Clarissa Arroyo, and her two kids. ROA.2177, 2179. They crossed the border at Laredo, met with Salvador Ocampo-Vergara, who guided them through Mexico City to Morelos, and then turned the vehicle over to him. ROA.2180. Ocampo-Vergara gave them \$5,000 and another vehicle so they could see his family in Durango, Mexico. ROA.2181. They went back to Morelos after a couple of weeks, picked up the Sport Trac, and drove it back to Chicago. ROA.2181, 2182. He was paid \$10K for this trip. ROA.2183. He made several more trips, one included an accident. ROA.2184–2191. He stopped transporting for a while, but then decided to make another trip after some time. ROA.2192.

He was supposed to make this next trip in a silver Malibu. ROA.2192. But after he picked up the car, he was robbed at gunpoint. ROA.2193. The thieves took both the expense money and the car. ROA.2193. Police found the car about a week and a half later. ROA.2193. It had been burned. ROA.2193. Vargas testified that he met

both Alex and Ortiz-Salazar at the impound lot where Alex paid to have it towed away. ROA.2193, 2313.

He had moved to California when Alex called him about driving a car out to California. ROA.2193, 2286. He would be paid \$5K to fly to Chicago and take a Nissan Sentra to California. ROA.2194. When he met Alex, he discovered that Ortiz-Salazar would accompany him. ROA.2194. The Nissan's registration and insurance was in his name; Ortiz-Salazar had the details about the contacts in California. ROA.2194, 2196.

During the trip they took turns driving. ROA.2197. While on the trip, Ortiz-Salazar received a call from Alex's wife that Alex had been arrested. ROA.2198, 2199. Later, they were pulled over for speeding in Las Vegas, ROA.2290, and the car was searched with a K-9 unit. ROA.2198, 2291, 2314. Nothing was found, and they were released. ROA.2198. They made it to a hotel in Los Angeles where where a person picked up the car, and returned it a few days later. ROA.2199. The man dropping off the car gave the two \$2K or \$3K to return it to Chicago. ROA.2200. Vargas took all the money. ROA.2200, 2316. He didn't see any drugs on this trip, ROA.2211, and he wasn't aware of any other couriers. ROA.2211. He was just delivering a car. ROA.2211.

A Chart of Telephonic Connections

The Government introduced two summary charts, one entitled “Telephone Connections,” and the other “Border Crossings.” In Telephone Connections, the Government created a matrix of trial defendants, cooperating defendants, and alleged indicted co-conspirators, and their telephonic connections with each other based upon seized telephones and telephone records. EX.162. The Government’s charts shows Ortiz-Salazar having had telephonic connections with Rene Araujo, Alejandro Ortiz-Fernandez (“Alex”), Alejandro Rodriguez, and Angelica Velasco-Campos. EX.162.

A Chart of Border Crossings

The Government introduced its “Border Crossings” summary chart, EX.160, based upon border crossing records that it had introduced at trial. EX.112. The summary chart depicted several individuals arranged in somewhat of a hierarchy. The chart listed Ortiz-Salazar’s border crossings into Mexico, along with certain telephonic contacts. Clough testified that Ortiz-Salazar made his vehicle crossings in the Red 2004 Chevrolet which he had transferred to Araceli Gonzalez, the car in which he accompanied her in a trip to Mexico in December 2012. ROA.1196, 3205, 3207.

The “Telephone Connections” chart showed Ortiz-Salazar having telephonic contact with Rene Araujo, Alejandro Ortiz-Fernandez, Alejandro Rodriguez, and

Angelica Velasco-Campos. It did not show what kind of contact was made or what, if any, conversations took place. EX.162.

A Facebook Transcript

The Government also introduced a translated transcript of Facebook messages between Ortiz-Salazar and Ocampo-Vergara. EX.120A. Agent Clough identified “Dani” or “Danny” in the messages as Daniel Castrejon. ROA.1237. He opined that Ortiz-Salazar was asking for Castrejon’s telephone number. ROA.1237. He testified that they discussed Araceli Gonzalez’s arrest. ROA.1239. He interpreted Ocampo-Vergara’s “it fell” as code for an arrest and characterized the rest of the conversation as talk about Gonzalez’s arrest. ROA.1239–42.

Procedural History

Ortiz-Salazar was indicted for knowingly and intentionally combining, conspiring, and agreeing with co-defendants and other persons unknown to knowingly and intentionally possessing with the intent to distribute one kilogram or more a mixture or substance containing a detectable amount of heroin in violation of 21 U.S.C. § 841(a)(1) and (846). ROA.21–22.

Ortiz-Salazar pleaded not guilty to the charge, and moved to suppress certain testimony of government agents. ROA.99–104. A hearing was held before the magistrate judge. ROA.155–158. The magistrate judge made findings, and recommended that the motion be granted in part, and denied in part. ROA.178–87;

ROA.375– The district court adopted the magistrate’s findings and recommendation. ROA.224. He moved to suppress all pre-trial and in-court identifications.

ROA.107–109. That motion was denied. ROA.172–77, 223.

Ortiz-Salazar also moved the district court to suppress statements found on his and a co-defendant’s Facebook account. ROA.281–85. The magistrate heard evidence, ROA.371–372, and denied the motion. ROA.375–382. The district court adopted the magistrate’s recommendation and order. ROA.385.

The case proceeded to trial. The Government called 23 witnesses in all, 10 of which were cooperating defendants or co-conspirators. The defense moved for acquittal under Rule 29 at the close of the Government’s evidence. ROA.3044. The district court denied the motion. ROA.3046.

The defense recalled Agent Rick Clough in its case in chief. ROA.3051. None of the defendants testified. No objections were interposed to the charge. ROA.3154. The jury convicted Ortiz-Salazar on the sole count of the indictment. ROA.449–52. Upon conviction, the district court ordered that a PSR be completed for sentencing. The PSR calculated a Total Offense Level of 32, and a criminal history category of II. ROA.3331. No acceptance of responsibility was given due to Ortiz-Salazar putting the Government to its proof. ROA.3347–48. Ortiz-Salazar did not file any objections to the PSR, ROA.3331, and the district court sentenced him within the recommended advisory Guideline range. ROA.3331, 3335.

Summary of Argument

Federal Rule of Evidence 704(b) prohibits an expert from stating an opinion about whether a defendant did or did not have a mental state that constitutes an element of the crime charged. On direct examination, Rick Clough, the Government's representative agent, testified that he determined that Ortiz-Salazar was a courier for the drug trafficking organization his agency had been targeting. He made this determination based upon his investigation and the travel patterns that Ortiz-Salazar had exhibited. Both his calling of Ortiz-Salazar a drug courier, and his testimony employing the use of investigatory profile evidence constituted error.

Evidence in a criminal trial must be strictly relevant to the particular offense charged. The Government may not attempt to prove substantive guilt by guilt-by-association evidence. In this case, the Government introduced TECS alert evidence—investigatory profile evidence—to suspected couriers and linked that evidence to their subsequent arrests. The Government used this linkage of inadmissible evidence of other couriers to attempt to prove Ortiz-Salazar's guilt, i.e., Ortiz-Salazar was guilty because he, like the others, had had a TECS alert placed on him. The Government's blatant use of this guilt-by-association evidence, along with its closing arguments, prejudicially affected Ortiz-Salazar's substantial rights. Based on these errors, the Court should vacate his conviction and remand the case for a new trial.

Argument and Authorities

Issue One

The district court reversibly erred by allowing the Government's agent to offer opinion testimony that Ortiz-Salazar had the state of mind that constituted an element of conspiracy to possess to distribute.

Standard of Review

To demonstrate reversible plain error, the appellant must show that “(1) there is error; (2) it is plain; and (3) it affected his substantial rights.” *United States v. Gracia*, 597 F.3d 597, 599–600 (5th Cir. 2008). The error “must be ‘so clear or obvious that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.” *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 363 (5th Cir. 2010) (quoting *United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010)). “As a general rule, an error affects a defendant’s substantial rights only if the error was prejudicial.” *Id.* (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). An error is prejudicial “if there is a reasonable probability that the result of the proceedings would have been different but for the error.” *Id.* “The probability of a different result must be sufficient to undermine confidence in the outcome of the proceedings.” *Id.* “The defendant bears the burden of demonstrating that a plain error affects his substantial rights.” *Id.* (citing *Olano*, 507 U.S. at 734–35). Even if the defendant can meet

this burden, this Court will not exercise its discretion to correct the error unless it seriously affects the fairness, integrity, and public reputation of the judicial proceedings. *Id.*; accord *Gracia*, 522 F.3d at 599–600. “When a defendant does not timely object to an error at trial, satisfying the requirement for the error is ‘difficult, as it should be.’” *Gonzalez-Rodriguez*, 621 F.3d at 363 (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009)).

Prohibited Expert Testimony

Expert testimony may be admitted pursuant to Federal Rule of Evidence 702 if the expert’s “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence.” Under Federal Rule of Evidence 704(b), however, expert testimony may not be admitted in a criminal case to show that the defendant had the requisite mental state to satisfy an element of the crime charged. Rule 704(b) states:

In a criminal case, an expert must not state an opinion about whether the defendant did or did not have a mental state that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Expert opinion of profile evidence and the comparison of an individual’s conduct to that profile is also prohibited. *United States v. Brito*, 136 F.3d 397, 412 (5th Cir. 1998); *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992).

Conspiracy Requires Two or More

Ortiz-Salazar was charged with conspiracy to possess with intent to distribute heroin. ROA.21–22. The Government was, therefore, required to prove:

- 1) That two or more persons, directly or indirectly, reached an agreement to possess with the intent to distribute heroin;
- 2) That the defendant knew of the unlawful purpose of the agreement;
- 3) That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose; and
- 4) That the overall scope of the conspiracy involved a quantity of a mixture or substance containing a detectable amount of heroin.

United States v. Booker, 334 F.3d 406, 409 (5th Cir. 2003); ROA.430–31.

Thus, the conspiracy charged in this case required proof that Ortiz-Salazar had formed an agreement with someone else with the same mental state. In other words, he could not commit the crime alone. The Government stressed this in its opening statement.

Now it says “one or more person” and that is at least two people have to make an agreement. Any of these defendants over here can agree with each other and other people who are going to come in and testify. As long as two people agree, then you have—a conspiracy is being formed. ROA.1080–81.

And then as pointed out yesterday, the agreement appears in each of those three elements, and the agreement is the lynch pin. Once two or more people agree, whether they accomplish that goal or not, they have joined into a conspiracy. ROA.1081.

Clough is Certified as an Expert

After its opening, the Government called Richard Clough, a DEA agent, to testify. Clough, as allowed by Rule 702, initially testified generally about the structure of drug organizations. ROA.1116–1124. He described different types of drugs, hub cities, markings, and pricing. ROA.1116–1124. He also provided background testimony about “couriers.” ROA.1121–22. He said that “couriers” were responsible for transporting drugs to and from locations. ROA.1121. He described investigating their travel patterns “because most organizations are going to utilize multiple couriers, especially if they are distributing large amounts of narcotics.” ROA.1122. The Government moved to admit him as an expert, and the district court certified him as such. ROA.1125.

Clough Ascribes Roles to Ortiz-Salazar and Other Individuals

During his direct examination, Clough ascribed roles for individuals in the conspiracy, thereby providing opinion testimony regarding their respective mental states. For instance, he determined that Luis Palacios was responsible for the transportation of heroin and assigned him the role of “cell head” for the organization. ROA.1135–36. He identified Jose Figueroa as a courier, ROA.1133, and Daniel Castrejon, who was based out of Chicago, as a distributor for the conspiracy. ROA.1141. He testified to putting TECS alerts out for “couriers” and “lookouts,” and

identified Daniel and Noemi Vargas as couriers. ROA.1162. Indeed, the Government directly elicited his opinion about them.

Q: And then based on your investigation, did you determine that both Daniel Vargas and Noemi Vargas were involved in this conspiracy?

A: Yes.

Q: And what was their role?

A: They were couriers.³

ROA.1162–63.

He also identified Araceli Gonzalez and Angelica Velasquez-Campos as couriers,⁴ ROA.1154, 1168, opined that Marisol Valdez was tied to the conspiracy. ROA.1209. He also opined that other people he couldn't even identify were also co-conspirators. ROA.1129, 1140. Finally, he provided expert testimony specifically about Ortiz-Salazar's mental state and his involvement in the conspiracy.

Q: Now based on your investigation and the travel patterns of Gustavo Ortiz-Salazar, what did you determine?

³ The Government asked this twice of Clough. ROA.1253. The second time the defense objected, and the district court overruled the objection. It later changed its mind, and instructed the jury to disregard Clough's answer. ROA.1284. Its residual instruction, however, did not mention Clough's opinion of Ortiz-Salazar at all.

⁴ Based upon the context of the questioning and his answers, his opinions apparently stemmed from conclusions that he had reached based on prohibited investigative facts and profiles. See *United States v. Medeles-Cab*, 754 F.3d 316, 321 (5th Cir. 2014) ("Whatever the profile's benefits to investigation and apprehension, in a federal prosecution, the fact that a defendant fits a drug courier profile may not be used to establish [his] guilt.).

A: We determined that he was believed to be a courier for the drug trafficking organization that we were targeting.

ROA.1196–97.

Clough’s Opinion Testimony Constituted Error

Cough’s opinion testimony constituted plain error in several ways. First, it directly violated Federal Rule of Evidence 704(b) when Clough called Ortiz-Salazar a drug courier. As stated earlier, Rule 704(b) prohibits expert testimony that shows that a defendant had a mental state that constitutes an element of the crime charged. His “[w]e determined that he was believed to be a courier for the drug trafficking organization that we were targeting” was thus a direct and explicit violation of the rule. See *United States v. Morin*, 627 F.3d 985, 998 (5th Cir. 2010) (holding that an agent’s implication that a defendant was a member of a drug organization was plain error); *United States v. Nguyen*, 504 F.3d 561, 572 (5th Cir. 2007) (holding that an agent’s calling a defendant a “co-conspirator” was error).

Second, Clough violated Rule 704(b) when testified that he had concluded Ortiz-Salazar was a courier based upon a profile. He testified that he had determined that the “couriers” were taking flights between Mexico and Chicago, and crossing the border shortly thereafter.⁵ ROA.1134, 1162. He said that he concluded Ortiz-Salazar was a courier based upon similar travel patterns. This type of drug-courier

⁵ Clough’s testimony here constituted courier profile testimony as it dealt with a profile of suspected couriers and not the general operations of a drug-trafficking organization.

profiling is prohibited. *Medeles-Cab*, 754 F.3d at 321 (“Our cases demonstrate that inadmissible drug courier profile testimony involves an agent drawing a direct connection between a drug courier characteristic (or characteristics) and the defendant in order to establish the defendant’s guilt.”); *Brito*, 136 F.3d at 412 (5th Cir. 1998) (holding that a government agent’s comparison of a defendant’s actions to a profile was inadmissible to prove substantive guilt). The Government took advantage of this error when it used his investigative profiling testimony when it argued in closing

And through his travel patterns we too showed you that he was involved as a courier. Through this investigation DEA agents looked at the travel patterns of the couriers. . . . In looking at Gustavo Ortiz-Salazar’s travel patterns, again it was consistent. ROA.3218–19.

Finally, Clough’s labeling of other individuals as “couriers,” “cell heads,” “distributors,” and “co-conspirators” also violated Rule 704(b) because those labels effectively conveyed to the jury that Ortiz-Salazar was likely a member of a drug organization. *See Morin*, 627 F.3d at 998. Ortiz-Salazar was charged with conspiracy. One can’t conspire alone; he needs another illicit actor. Clough, by repeatedly labeling individuals as “couriers,” “co-conspirators,” “cell heads,” etc., necessarily inferred that these individuals had entered into an illicit agreement with another individual, who was Ortiz-Salazar. In other words, Clough’s profiling people as “couriers” or “co-conspirators”—labels that necessarily involve their agreement with another individual—was the functional equivalent of giving his expert opinion that Ortiz-

Salazar had joined a drug organization. See *United States v. Gutierrez-Farias*, 294 F.3d 657, 663–64 (5th Cir. 2002). This is especially true regarding Alejandro Rodriguez, Araceli Gonzalez, and Daniel Vargas. Clough determined that they were couriers/conspirators.⁶ ROA.1176, 1201, 1203 (Rodriguez); ROA.1162 (Vargas); ROA.1168 (Gonzalez). He then testified that Ortiz-Salazar had traveled with Rodriguez and Gonzalez. ROA.1169, 1176. (The Government later established that Ortiz-Salazar had traveled with Vargas.) Clough’s implication was unmistakable: Ortiz-Salazar was a courier because he had traveled with individuals he had determined as being couriers/co-conspirators. Compare *United States v. Resio-Trejo*, 45 F.3d 907, 911 (5th Cir. 1995) (holding that guilty knowledge may not be inferred when a third party might have concealed the controlled substances with the intent to use an unwitting defendant). And the Government took advantage of this crossing-the-line testimony by assimilating it not only into its own line of questioning, but also into its rebuttal.

Q: Okay. All right. Now after Gustavo Ortiz-Salazar was identified as traveling with **known courier** Araceli Gonzalez, was an investigation begun on him?

A: Yes.

ROA.1171–72 (emphasis supplied).

⁶ It is clear that Clough’s profiling/labeling was the product of his own opinions developed during his investigation. Both Rodriguez and Araceli were found to have heroin in their vehicles, arrested, and pleaded guilty well after Ortiz-Salazar had traveled with them. See *United States v. Polasek*, 162 F.3d 878, 885 (5th Cir. 1998) (characterizing evidence of after-the-fact convictions as inadmissible guilt-by-association evidence).

* * * * *

Q: —is that correct? So then you have Gustavo Ortiz-Salazar now with **known courier** Araceli Gonzalez, and now **possible courier** Alejandro Rodriguez?

A: Yeah, he was arrested and I think he had—I can't recall the amount of heroin, I think it was like 11 kilograms.

ROA.3076 (emphasis supplied).

What about the guy in the middle? What about Gustavo Ortiz-Salazar? What evidence and inferences can you draw from the testimony that you heard? Well, he's traveling with Alejandro Rodriguez, a **known** drug courier and he tells him that I'm carrying drugs. ROA. 3303 (emphasis supplied).

But he didn't play a minor role here. He played more of a role than they want you to believe, and the evidence does show that. So he traveled with Alejandro Rodriguez, a **known** carrier. He helped him drive. He was once again traveling with another **known** carrier, Araceli Gonzalez back into Mexico. What inference can you draw from that? He then is traveling out of Mexico with Araceli Gonzalez, another **known** drug courier. ROA.3304 (emphasis supplied).

The Government's use of "known courier" and "possible courier" were all the product of Clough's investigatory labels. Both Rodriguez and Araceli were found to have heroin in their vehicles, arrested, and pleaded guilty only well after Ortiz-Salazar had traveled with them. EXS.135, 136. Consequently, it was error for the district court to allow Clough to provide direct opinion testimony of Ortiz-Salazar's joining of a drug organization and profile drug-courier testimony, and also

to allow him to label or profile individuals as “couriers,” “co-conspirators” when the defendant is on trial for conspiracy.

If the Government were to argue that Clough’s labeling of Ortiz-Salazar’s associates was harmless or of no consequence, its argument would be without merit. The very terms “co-conspirator” and “courier” intrinsically incorporate a second actor (a courier doesn’t courier to himself). By calling Ortiz-Salazar’s associates by those labels without identifying who they had struck their conspiratorial agreement with, Clough created the inference that it was Ortiz-Salazar. This is prohibited by Rule 704(b).

Issue Two

The district court reversibly erred by allowing the Government to introduce guilt-by-association evidence which it emphasized in argument to obtain Ortiz-Salazar's conviction.

The Standard of Review

This Court will reverse a district court's rulings on the admissibility of evidence only on finding an abuse of discretion. *United States v. Liu*, 960 F.2d 449, 452 (5th Cir.), cert. denied, 506 U.S. 957 (1992). "Evidence in criminal trials must be 'strictly relevant to the particular offense charged.'" *United States v. Anderson*, 933 F.2d 1261, 1267-68 (5th Cir. 1991) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337 (1949)). Consequently, a district court's admittance of guilt-by-association evidence constitutes plain error. *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Unit A Cir. 1981).

Mere Association Does Not Prove Guilt

Mere association with persons in the conspiracy or presence at the scene of the crime is not enough for a conviction. *United States v. Gallardo-Tapero*, 185 F.3d 307, 317 (5th Cir. 1999). While a defendant's guilty knowledge and his participation in the conspiracy may all be inferred from the "development and collocation of circumstances," this Court has repeatedly stated that it will not lightly or readily infer one's knowledge and decision to join a conspiracy. *United States v. Maltos*, 985 F.2d

743, 746 (5th Cir. 1992). The Government must “do more than pile inference upon inference upon which to base a conspiracy charge.” *United States v. Williams-Hendricks*, 805 F.2d 498, 502 (5th Cir. 1986). The Government may not prove up a conspiracy merely by presenting evidence placing the defendant in “a climate of activity that reeks of something foul.” *Maltos*, 985 F.2d at 746.

Guilt-By-Association Evidence is Inadmissible to Prove Guilt

It is well established that the Government may not attempt to prove a defendant’s guilt by showing that he associates with “unsavory characters.” *Singleterry*, 646 F.2d at 1018 (finding plain error where the prosecutor asked the defendant whether he associated with felons). “That one is married to, associated with, or in the company of a criminal does not support the inference that the person is a criminal or shares in the criminal’s guilty knowledge.” *United States v. Forrest*, 620 F.2d 446, 451 (5th Cir. 1980) This Court has repeatedly characterized guilt-by-association evidence as “highly prejudicial” and “damaging.” *See Polasek*, 162 F.3d at 887 (citations omitted). Accordingly, this Court has found error in cases where the Government introduced evidence that the defendant’s brother had sold a co-defendant a van with secret compartments for smuggling narcotics, *United States v. Parada-Talamantes*, 32 F.3d 168, 170 (5th Cir. 1994), and where it introduced evidence that a defendant on trial for drug offenses associated with drug dealers. *United States v. Romo*, 669 F.2d 285, 288–89 (5th Cir. 1982).

Evidence of Arrest Is Inadmissible to Prove Guilt

It is also well-established that evidence of an arrest is not admissible for the purpose of proving the conduct for which a person is arrested. *See, e.g., Gonzalez-Rodriguez*, 621 F.3d at 366-67 (citing *United States v. Labarbera*, 581 F.2d 107, 108–09 (5th Cir. 1978)). And this would also be true of law enforcement’s TECS lookouts.⁷ *See Medeles-Cab*, 754 F.3d at 321 (“Whatever the profile’s benefits to investigation and apprehension, in a federal prosecution, that fact that a defendant fits a drug courier profile may not be used to establish [his] guilt.”). It is the evidence of the defendant’s actual connection to drug trafficking, not third-party arrests or investigatory profiles, that must form the basis of the conviction. *See id.*

In this case, the Government weaved guilt-by-association and investigatory arrest evidence of others into its opening statement, its direct questions to its representative agent, and its closing and rebuttal, placing Ortiz-Salazar in a foul climate of unsavory characters, all to secure his conviction.

Inadmissible Evidence and the Government’s Opening

The Government began its case by highlighting inadmissible investigatory lookouts and arrest evidence it intended to rely on to obtain a conviction.

You’ll hear that other couriers were identified in this conspiracy. And based on the identification of suspected couriers, lookouts were

⁷ TECS alerts and their use by law enforcement to profile couriers was defined in the Statement of Facts *supra*. While TECS records themselves may be admissible as business records, *United States v. Puente*, 826 F.2d 1415, 1418 (5th Cir. 1987), evidence of law enforcement’s use of them as investigatory profiling tools is not.

placed on these couriers. And a lookout is basically alerting law enforcement when these suspected couriers are traveling. And you'll hear pursuant to one of those lookouts that Angelica Velasquez Campos was arrested on November 17th of 2012. And she had approximately five and a half kilograms in her possession. She also had 29 kilograms of cocaine. ROA.1084.

You'll hear that another courier named Araceli Gonzalez was identified as a courier for this organization. And you'll hear specifically that based on the lookout that was placed on her, that on December 11th of 2012, she was stopped at Chicago O'Hare Airport as she was coming in from a flight from Mexico . . .

Of course, this raised a red flag to DEA agents and they began an investigation into Gustavo Ortiz-Salazar. And you'll hear not too long after that interview on December 11th of 2012, that Araceli Gonzalez was arrested on January 5 of 2013, and she had approximately 14 kilograms of heroin. ROA.1084.

And you'll hear once the investigation began into Gustavo Ortiz-Salazar—this defendant in the middle—that it was determined that his actions were consistent with the other couriers in this investigation. And that some of the couriers were—if they were already in Chicago, they would either drive their vehicles to Mexico, leave the vehicles there, wait for them to get loaded and then come back. Sometimes if it took too long to load the vehicles, they would fly back home to Chicago then fly back to pick up the vehicle across the border a short time later. Or if some of the couriers were already still in Mexico, they would just drive the load across and then fly back home from Chicago to Mexico.

You'll hear that during the investigation of Gustavo Ortiz-Salazar, that agents determined that he had crossed the border with an individual by the name of Alejandro Rodriguez. Shortly after Araceli Gonzalez was arrested, Alejandro Rodriguez was arrested with 11 kilograms—approximately 11 kilograms of heroin. ROA.1085.

And you'll hear that the two other couriers other than Ortiz-Salazar, the defendant, were identified. Noemi Vargas and her brother Daniel Vargas. You'll hear that they were arrested, as well. They weren't in any possession of any heroin upon their arrest, much like the defendant, Gustavo Ortiz-Salazar. But just because they weren't arrested with any heroin in their possession does not mean that they were not part of the conspiracy. Noemi Vargas, Daniel Vargas, and Ortiz-Salazar all made an agreement to distribute the heroin, and we'll show that to you during this trial. ROA.1086.

What do investigatory alerts on Angelica Velasquez Campos, Angelica Gonzalez, Alejandro Rodriguez or other "suspected couriers" have to do with the substantive guilt of Ortiz-Salazar except establish a profile? And what purpose do all these arrests serve if evidence of arrest isn't admissible to prove guilt or even the conduct for which the person was arrested? While the Government's opening itself was not evidence, the Government's highlighting of its agents' investigatory profiling alerts and resulting arrests of several "suspected couriers,"⁸ even those who weren't arrested without any heroin in their possession, placarded its intention to use inadmissible guilt-by-association and arrest evidence to secure Ortiz-Salazar's conviction.

Inadmissible Arrest and Lookout Evidence

The Government made good on its promised third-party arrest and investigatory profile evidence when it called Agent Clough at the start of trial. It elicited his tes-

⁸ The Government consistently employed the label "courier" in its questioning throughout the trial. This label came from Clough's use of it for various individuals as discussed *supra*.

timony about TECS profile lookouts and resulting arrests to infer a connection between the alerts and substantive guilt.

Q: Okay. All right. Now after Gustavo Ortiz-Salazar was identified with **known courier** Araceli Gonzalez, was an investigation begun on him?

A: Yes.

ROA.1172 (emphasis supplied).

* * * * *

Q: Now based on your investigation and the travel patterns of Gustavo Ortiz-Salazar, what did you determine?

A: We determined that he was believed to be a courier for the drug trafficking organization that we were targeting.

Q: Now you saw that Gustavo Ortiz Salazar had traveled with Alejandro Rodriguez; is that correct?

A: That's correct.

Q: Did you put a lookout for him?

A: Yes, we placed a TECS lookout on him.

Q: And was one also placed on Gustavo Ortiz-Salazar?

A: Yes.

Q: And then I think you had stated before, Araceli Gonzalez also had one?

A: Yes.

Q: Okay. Now based on the — being on the TECS lookout, was Araceli Gonzalez stopped?

A: Yes, she was.

Q: And do you recall where?

A: I believe it was Eagle—Eagle Pass port of entry.

Q: And that was on June 5th of 2013?

A: Yes.

Q: Do you recall how much — what, if anything, was found in her vehicle?

A: Substantial amount of heroin, I believe—I think she had about 14 kilograms of heroin.

ROA.1197.

* * * * *

Q: Now after Araceli Gonzalez was arrested, were other members of the conspiracy identified?

A: Yes.

Q: Okay. And one of those was Alejandro Rodriguez?

A: Yes.

Q: And you say that a TECS lookout was put on him?

A: Yes.

Q: And he was subsequently stopped?

A: Yes.

Q: Where?

A: I believe Alejandro was stopped at the Laredo port of entry.

Q: Was this on January 28th of 2013?

A: Yes.

Q: And was he driving the same vehicle that he had crossed in May with defendant Gustavo Ortiz-Salazar?

A: Yes.

Q: Were narcotics found?

A: Yes.

Q: What kind?

A: I believe it was heroin.

ROA.1200-01.

* * * * *

Q: So after Gustavo Ortiz-Salazar was known to travel with Araceli Gonzalez on the December 11, 2012 Chicago O'Hare incident, is that when you started your investigation on him?

A: Yes.

Q: And in that investigation, is it true that you looked at his travel patterns?

A: That's correct.

Q: And during those travel patterns you saw that on May 10th of 2012, he had crossed the border with Alejandro Rodriguez?

A: Yes.

Q: Okay. And looking into Alejandro Rodriguez's crossings, did you notice—isn't it true that you noticed numerous crossings for Alejandro Rodriguez?

A: Yeah. When we looked at Alejandro Rodriguez, we noticed frequent travel to Mexico. So we also placed a lookout on him, as well.

Q: Okay. And you didn't know if those at that time were personal or drug related for Alejandro Rodriguez—

A: Correct.

Q: —is that correct? So then you have Gustavo Ortiz-Salazar now with **known courier** Araceli Gonzalez, and now with **possible courier** Alejandro Rodriguez?

A: Yes.

Q: When the TECS lookout was put on Alejandro Rodriguez was it about three weeks later he was arrested?

A: Yeah, he was arrested and I think he had—I can't recall the amount of heroin, I think it was like 11 kilograms.

Q: So after that TECS lookout shortly thereafter?

A: Yes.

Q: Then he was arrested with heroin?

A: Yes, I believe he was in a—I'm trying to recall exactly what vehicle he was in. But he was arrested crossing the POE.

Q: After the TECS lookout?

A: Yes.

Q: And the TECS lookout was a result of his association with Gustavo Ortiz-Salazar?

A. That is correct.

ROA.3075–77 (emphasis supplied).

In these lines of questions, the Government incorporated Clough’s opinion testimony into its questioning that Gonzalez was a drug courier, and not only a courier but a notorious one as well. It then established that law enforcement had placed investigatory profile alerts on her, as well as Ortiz-Salazar and Rodriguez. *See* ROA. 1154 (TECS alerts). Then it established that both Gonzalez and Rodriguez were arrested based upon on those alerts and the arrests yielded huge sums of heroin. he implication is unmistakable and highly prejudicial: Ortiz-Salazar was a drug courier because he fit a profile and law enforcement had a placed a TECS alert on him just like it had on all the other suspected couriers who had been arrested. In other words, law enforcement’s TECS alerts equated to substantive guilt. *Compare Williams*, 957 F.2d at 1242 (recognizing that a witness’s testimony may not compare defendant to a drug profile). It should be noted that Rodriguez and Gonzalez

were both arrested well after Ortiz-Salazar had traveled with them.⁹ This Court has held in the past that evidence of after-the-fact convictions of associates was nothing more than guilt-by-association evidence. *See Polasek*, 162 F.3d at 885 (characterizing evidence of after-the-fact convictions as inadmissible guilt-by-association evidence).

If these lines of questions somehow didn't cross the line of guilt-by-association, Clough's outright calling Ortiz-Salazar a drug courier did with regard to profiling. *Cf. Williams*, 957 F.2d at 1241 ("While the government may introduce evidence that the defendant exhibited individual behaviors that make up the profile, it is something entirely different to tell the jury that all the behaviors fit a law enforcement model of a drug courier.").

Further Guilt-By-Association Arrest Evidence

The Government worked to ensure that its agents' TECS investigatory alerts weren't fallible. Gonzalez and Rodriguez were both found to be in possession of heroin when they were arrested, but Ortiz-Salazar was not. So it had Clough compare Ortiz-Salazar to two others that he had determined to be couriers, but who had been arrested without possessing any narcotics at the time.

⁹ Ortiz-Salazar was said to have crossed the border with Rodriguez on 10 May 2012. ROA. 1176-77. Rodriguez was found to have heroin in his car on 28 January 2013. Ex.135. Gonzalez was arrested on when agents found heroin in her car on 5 January 2013. Ex.136.

Q: And at the time of Gustavo Ortiz-Salazar's arrest or Salvador Ocampo-Vergara's arrest, were either one of them in possession of any narcotics?

A: No.

Q: And I believe you testified earlier that Daniel Vargas and Noemi Vargas were also not arrested with any narcotics?

A: That is correct.

Q: But based on your investigation, were they also involved in this conspiracy?

A: Yes.

ROA.1253-54.

The Government's implication through this short line of questions is clear (and made even clearer in its rebuttal): Cough determined that the Vargases were co-conspirators, and they were arrested without any narcotics; Ortiz-Salazar, too, was a co-conspirator even though he was arrested without any narcotics. This is naked guilt-by-association, and that by the use of inadmissible arrest and opinion evidence.

Geographic Guilt-By-Association Evidence

Not content with just TECS alerts and third-party arrest evidence, the Government took the liberty to broaden its guilt-by-association evidence with geography.

Q: Were you able to determine from your investigation that Gustavo Ortiz-Salazar was from the same area in Mexico as several other co-conspirators or people involved in this case?

A: Yes.

ROA.1393.

Using Agent Clough's labeling of "coconspirators," the Government created the inference that Ortiz-Salazar was a co-conspirator because he spent time in a certain "area of Mexico." The Government even emphasized this evidence in its closing:

There was a Mexican voter identification card showing that he was from Tilzapotla Morelos, Mexico. Several of the other couriers were, as well. ROA.3199.

And also made an issue of it in its rebuttal. *See infra; compare* John 1:43 ("Can anything good come out of Nazareth?").

Vehicular Guilt-By-Association Evidence

It also presented guilt-by-association evidence with vehicles.

Q: Now in this particular case did you see consistencies in the types of vehicles that were used by the couriers to transport heroin?

A: Yes.

Q: Including the CRVs, the Nissans, whether they are Altimas, Rogues, or Sentras?

A: Yes.

Q: Okay. Sport Trac?

A: Yes.

Q: The Chevy Malibus?

A: Yes. And the concealment methods also were pretty consistent.

ROA.2696–97.

Again, the Government interjects Clough's opinion testimony into its line of questioning, and associates "couriers" with cars, the implication being that if Ortiz-Salazar drove not one specific car, but one of several different kinds of cars (the Government identified seven in its question), the jury should infer that he is a member of a drug organization.

The Government's Guilt-By-Association Arguments

In spite of its inadmissibility to prove substantive guilt, the Government emphasized that Ortiz-Salazar's associates had been arrested in its closing argument.

And you heard that on March 29th of 2012, Jose Figueroa was arrested. And he had approximately 17 kilograms of heroin hidden in his vehicle, the Dodge Caliber he was driving. ROA.3128.

You heard that on May 30th of 2012, Luis Palacios was detained or stopped in Zavala County with approximately \$19,388 in his show and in his sock and in other parts of the vehicle. You later heard that Luis Palacios was arrested on July 12th of 2012, and then he began to cooperate. . . He pled to 30 kilograms or more of heroin. He knew what he was doing. He didn't find out about the heroin until after he was arrested. But still, ladies and gentlemen, he pled to 30 kilograms or more of heroin. ROA.3184–85.

The car that [Daniel] Castrejon was arrested in, it did belong to Santiago Lagunas. . . And he told you in that time frame—now we're just talking probably, let's say January of 2012—let's say March of 2012, until he was arrested in June of 2012—I think he said March of 2012 until his arrest in June of 2012, that there was 100 kilograms—approximately 100 kilograms that came from Mexico to Chicago before his arrest on June 2nd. . . . And that he gave that kilo press to Alex before going to Cincinnati and subsequently getting arrested. . . . And he told you also that after his arrest on June 2nd of 2012, he had no knowledge if other couriers were hired. ROA.3188–90.

[Adriana Diaz-Campo] was supposed to take the car to Alex, but she was arrested on July 11th of 2012. . . And then you also heard that on June 11th of 2012, she — as she attempted to cross the border in Laredo she was arrested, and she had approximately 14 kilograms of heroin. ROA.3191.

Angelica Velasco-Campos, what did she tell you? That she lived in Morelos, Mexico, prior to her arrest. . . . And then during that time she found out that Castrejon and Diana Campos had been arrested. . . . And whether the agreement happened on the date that she was arrested or prior to, she still made an agreement to transport this heroin and that's what she pled guilty to. ROA.3192–95.

You heard that [Araceli Gonzalez] was arrested on January 5th of 2013, driving that red Chevy. She then discovered she was transporting heroin. . . . Again, they were sitting next to each other, she and Gustavo Ortiz-Salazar. And then she was arrested when she attempted to cross in the red Chevy. The same one that's tied to her and defendant Gustavo Ortiz-Salazar. She had 14 kilograms of heroin at the time of her arrest. ROA.3206–07.

[Alejandro Rodriguez] got arrested when he tried to cross the border on January 28th of 2013. . . . On May 10th, that's the cross with Gustavo Ortiz-Salazar. And then he was arrested, and of course the hidden compartments that have been consistent throughout in this Honda CRV. ROA.3210–11.

And I'll submit to you, ladies and gentlemen, you have to understand at this point several of the couriers have gotten arrested. They are falling. ROA.3212.

[Marisol Valdez's] last trip was the trip of her arrest, at the end of January, 2013. Again, noted lots of the couriers were getting arrested. . . .She didn't fly back home. As she crossed, she was arrested on February 8th of 2013. It was then that she was discovered traveling with heroin. And she had 42 packages of heroin in her vehicle. . . . And I submit to you, ladies and gentlemen, this is one of the hugest seizures that we had, 25 kilograms. Again, couriers are getting knocked off And again, 25 kilograms of heroin was found in her vehicle when she was arrested. ROA.3213-14.

But again, when Daniel Vargas was arrested he had no heroin in his possession. But as you see by his plea agreement, he came in and pled to 10 to 30 kilograms, of trafficking that much. ROA.3218.

On May 10th [Ortiz-Salazar] was with Alejandro Rodriguez in the Honda CRV, the one Alejandro was arrested in later with approximately 11 kilograms of heroin. ROA.3219.

When [Ortiz-Salazar] is arrested, he's arrested in Chicago. ROA. 3221.

[Salvador Lagunas] knew that Adriana Diaz-Ocampo had been arrested at the border trying to cross with drugs and it was Alex who had told him of all this. And at the time after Alex was arrested, he gave consent to search his house. ROA.3222.

In *United States v. Polasek*, the Government produced testimony that several of the defendant's associates had been convicted of the crime for which she was on trial. This Court called those convictions inadmissible guilt-by-admission evidence because the convictions occurred after the defendant's association with them. *Polasek*,

162 F.3d at 885; *see also Singleterry*, 646 F.2d at 1018 (recognizing that the admission of evidence of bad conduct of relatives or friends is error). The same holds true here. Gonzalez, Rodriguez, and Vargas were all arrested and pleaded guilty well after Ortiz-Salazar had traveled with them. EXS.135, 136, 137.

In its rebuttal, the Government hammered home Ortiz-Salazar's association with these unsavory characters and Clough's investigatory opinions of them to prove his guilt.

Why do you think all these people come from the same little town and they all know each other and they have these relationships? Because it's a close-knit group of people doing this in secrecy because they don't want to get caught. And they didn't get caught until this case. ROA.2917.

What about this guy in the middle? What about Gustavo Ortiz-Salazar? What evidence and inferences can you draw from the testimony that you heard? Well, he's traveling with Alejandro Rodriguez, a **known drug courier** and he tells him that I'm carrying drugs. ROA.2924 (emphasis supplied).

So, he traveled with Alejandro Rodriguez, a known carrier. He helped him drive. He was once again traveling with another **known courier**, Araceli Gonzalez back into Mexico. What inference can you draw from that? He then is traveling out of Mexico with Araceli Gonzalez, another **known drug courier**. And she's admitted to you she was. Once again, it's not guilt by association. ROA.2925 (emphasis supplied).

What inference can you draw from his associating with all these individuals. Ask yourself—because they ask you, isn't there a large population of individuals from this town that live in Chicago? They say yes. Well, of the hundreds of thousands of people who live in Chicago, is it just coincidence that this man, Gustavo Ortiz-Fernandez,

winds up with this small group of drug traffickers? He didn't wind up with people that weren't breaking the law and weren't importing drugs. He winds up associating with these drug traffickers. And then you hear he's traveling with one who brings drugs—who brings heroin to Chicago. He's traveling into Mexico with Araceli Gonzalez. He's traveling out of Mexico with Araceli Gonzalez. ROA.2926.

When Ortiz-Salazar was arrested in Chicago, he wasn't in possession of any narcotics. But even that didn't deter the Government from arguing guilt by association. It had elicited Clough's opinion testimony at trial that Daniel Vargas and Luis Palacios were both co-conspirators. It also admitted evidence that they had been arrested without possessing any narcotics. This arrest evidence was irrelevant to prove Ortiz-Salazar's guilt, of course, but the Government emphasized these facts anyway.

Again, he didn't know what type of drug they were transporting or how much. But again, when Daniel Vargas was arrested he had no heroin in his possession. But as you see by his plea agreement, he came in and pled to ten to 30 kilograms of heroin, of trafficking that much. ROA.3218.

He pled to 30 kilograms or more of heroin. He knew what he was doing. He didn't find out about the heroin until after he was arrested. But still, ladies and gentlemen, he pled to 30 kilograms or more of heroin. . . . And again, Luis Palacios was not arrested with any drugs on July—in July of 2012. ROA.3185.

It didn't stop there. Ortiz-Salazar, like Palacios and Vargas, the Government argued, should have pleaded guilty and taken "responsibility" just as they had. Why? Because it had "caught" them with its TECS alerts—drugs or no drugs.

If that is the way that this organization is handling their operation, then why doesn't it apply to him also? Because they didn't catch him with drugs? Well, we didn't catch some of the other people with drugs, but they pled and they were found guilty of it because they were part of this organization and they took responsibility for what they did. ROA.2927.

Third-party witnesses, co-defendants, "other people," pleading guilty had no relevance whatsoever to the issue of Ortiz-Salazar's guilt. By arguing this way, the Government not only prejudiced Ortiz-Salazar's right to a fair trial, it effectively lowered the burden of proof for the jury by implying that it could find him guilty because everyone that it "caught," i.e., identified and arrested, was part of the organization. Finally, the Government's statement that other people "took responsibility" was nothing more than a public shaming for Ortiz-Salazar asserting his constitutional rights, a wholly inappropriate and prejudicial argument and rebuttal.

The Government's Evidence Was Not Overwhelming

Despite the district court's opinion in overruling Ortiz-Salazar's motion for new trial, ROA.480, the evidence against him wasn't overwhelming. He had ridden to Mexico and Araceli Gonzalez and made some ambiguous remarks to her about the car. ROA.2451. He flew back with her to Chicago, and no narcotics were seen or discovered on either trip. She said that Ortiz-Salazar had crossed the border in the

red Chevy before, but the crossing records appear to show a different license tag number from the one that was on the car when she was arrested in it.¹⁰

He drove with Daniel Vargas to California, and they were stopped for speeding. But no drugs were found even though a K-9 unit searched the car. ROA.2198, 2291, 2314. Vargas admitted on cross-examination that what he knew about the trip was that they were delivering a car. ROA.2211.

Ortiz-Salazar has crossed the border with Alejandro Rodriguez, but no narcotics were ever seen or discovered on that trip. ROA.2339–40. Rodriguez testified that he had told Ortiz-Salazar that he was smuggling drugs, but also admitted that he hadn't told his own brother, Ernesto, anything about them. Three witnesses testified that Ortiz-Salazar worked as Alex's chauffeur, but Daniel Vargas admitted that he had seen no illegal activity when he had worked as his chauffeur. ROA.2207.

Finally, Ortiz-Salazar's guilt wasn't established by undercover government agents or informers acting acting him. The only direct evidence against him was from three cooperating witnesses—Gonzalez, Rodriguez, and Vargas. And all three of these witnesses testified in the hope for a lesser sentence. The evidence, therefore, was not overwhelming. *Cf. Polasek*, 162 F.3d at 886.

More importantly, the Government's guilt-by-association evidence likely had a substantial impact on the verdict. As stated *supra*, this Court has characterized

¹⁰ Exhibit 112 includes the vehicle tag numbers that Ortiz-Salazar crossed in, but not the vehicle's identification number. Exhibit 53, photographs of the car Aracelli Gonzalez was arrested in, depict a vehicle with a different numbered license tag.

guilt-by-association evidence as “highly prejudicial” and “damaging.” And as demonstrated, the Government spent considerable time on it, placarding the TECS profile alerts and ensuing arrests in its opening, embedding them in its lines of questioning, and highlighting them in its closing and rebuttal arguments, effectively telling the jury that Ortiz-Salazar was guilty because all of the others the Government had “caught” had pleaded guilty. Given the totality of circumstances, the Government’s guilt-by-association and inadmissible arrest evidence, magnified by its closing arguments was not harmless, but rather plain error that affected Ortiz-Salazar’s substantial rights.

Conclusion

For the foregoing reasons, this Court should vacate Ortiz-Salazar's conviction and remand the case for a new trial.

Dated: 24 February 2016

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Certificate of Service

I certify that today, 24 February 2016, I served a copy of the brief for Appellant and a copy of the record excerpts in this case upon opposing counsel via email and to Mr. Ortiz-Salazar via first-class mail, postage pre-paid, to-wit:

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