NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR SOSA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal agent's testimony about an out-of-court agent's report of drug trafficking by an unindicted coconspirator, when linked to and used against the defendant, a clear violation of the Confrontation Clause because it goes to the truth of the matter asserted? See Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

2. Does the Fifth Circuit's justification for the admission of an out-of-court agent's statements about drug trafficking by an unindicted coconspirator as merely an explanation of why an agent took investigatory steps abrogate a defendant's confrontation rights under the Sixth Amendment? See United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004); see also United States v. Cromer, 389 F.3d 662, 676, 679 (6th Cir. 2004).

3. When a prosecutor improperly bolsters the testimony of cooperating witnesses – who are the only witnesses with knowledge who claim the defendant was involved in the offense – by portraying to the jury that the prosecutor and the judge believe that the cooperating witnesses are truthful, does the improper bolstering affect the defendant's substantial rights?

4. Does improper expert testimony by a federal agent that the defendant is the wholesaler and distributor in a drug trafficking organization and fits the profile of a drug trafficker affect the defendant's substantial rights when the only witnesses with knowledge of the offense who implicate the defendant in the offense are cooperating drug trafficking witnesses who are receiving a benefit from their plea agreements and whose credibility has been improperly bolstered?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.[1]

[1] In the district court, however, Genaro Luera was charged in the same indictment with Sosa, but Luera entered a plea of guilty, cooperated with the government, and testified against Sosa at trial. See infra text, at 3, 17-18.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – (Cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (Cont'd)

Page

CASES – (Cont'd)

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

MISCELLANEOUS

OPINIONS BELOW

On July 25, 2018, the Fifth Circuit affirmed the judgment of conviction in this case. See United States v. Sosa, 897 F.3d 615 (5th Cir. 2018). The Fifth Circuit's opinion is reproduced as an Appendix. The district court did not enter a written opinion.

JURISDICTION

On July 25, 2018, the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 90 days after that date and thus is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . ." U.S. Const. amend. VI.

Fed. R. Evid. 704 provides: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b).

Fed. R. Crim. P. 52 provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT OF THE CASE

Oscar Sosa and a codefendant, Genaro Luera, were charged in this case with conspiracy and with possession with intent to distribute methamphetamine. Sosa was convicted of both counts following a jury trial and was sentenced to 360 months in custody, 5 years of supervised release, and a $200 special assessment. On appeal, the Fifth Circuit affirmed. United States v. Sosa, 897 F.3d 615 (5th Cir. 2018).

The case began on March 25, 2014, when Juan Sarmiento and Jose Galvan were stopped by police at a bus stop in Harlingen, Texas. They both lied and said that they were not carrying anything illegal, but an officer found methamphetamine in Sarmiento's jacket and Galvan's pockets. They gave differing statements to law enforcement. Sarmiento initially said that an unknown man at the bus station had given him the jacket and a bag of narcotics, but then said that he and Galvan had met with an unknown person at Church's Chicken restaurant off of International in Brownsville, and the man gave them the jacket and a bag of narcotics. Sarmiento said he had visited his son in Matamoros, Mexico, and was taking the drugs to a man named Oscar in Plant City, Florida, for about $2,000. He said he did not know anything about the source of the drugs or Oscar's relationship to their origin.

Galvan said he had met with a man named Freddie at the Church's Chicken restaurant off of International Boulevard and that Freddie had given him the jacket with extra narcotics. Galvan said he was taking the drugs to Plant City, Florida, and that a man named Oscar was going to meet them. He was going to be paid about $2,500 and had done the same thing about a month ago. Galvan stated that he thought 2 females, Betty and Patti, were possibly the owners or managers of the narcotics. Neither Sarmiento nor Galvan mentioned Genaro Luera.

Sarmiento ultimately decided to cooperate and to testify at Sosa's trial. The government initially asked him about his guilty plea in this case, his cooperation, his sentencing range of 108 to 120 months, and his 80-month prison by the judge who was presiding at Sosa's trial. The prosecutor and Sarmiento then discussed the following:

Q. Okay. Now, in connection with that, do you remember about when you were sentenced?

A. I believe it was in October or November of 2014.

. . .

Q. . . . **And that's when you got your favorable recommendation from the Government and that's when you got your reduction in your sentence.**

. . . And -- and what did we ask you to do when you came in? **What was the one thing that the Government said, if you want to come in and cooperate, we just need you to do this? What is that?**

A. **To, you know, say the truth.**

Q. **And whatever truth that is, we just wanted you to say the truth?**

A. **Yes.**

. . .

Q. Okay. But, as far as the deal goes, the deal -- in fact, **I was the prosecutor on your case, right?**

A. Yes.

Q. **Okay. So the deal between you and I was tell the truth and you'll get a favorable sentencing recommendation; is that right?**

A. **Yes.**

Q. **And you told the truth and I recommended to Judge Hanen that you get a third off your sentence?**

A. **Yes.**

Q. **And Judge Hanen gave you 80 months?**

A. **Yes.**

Q. **And so you did get a reduction on your sentence?**

A. **Yes.**

Q. And so you're now here in front of the jury and you're keeping up your end of the deal. And what was your end of the deal?

A. To cooperate.

Q. **And to what?**

A. **Say the truth.**

Q. **Tell the truth.** And no other promises, no other deals, no other hopes, other than please don't get me killed in prison?

A. Yes.

ROA.838-41 (emphasis added). Sarmiento also testified about his conviction for aggravated assault with a deadly weapon, his use of marijuana and cocaine with Galvan, and his work and living arrangements with Galvan.

This was Sarmiento's second trip from Florida to Texas to pick up drugs. Plans for his first trip were initiated in 2013 when he and Galvan were doing drugs and Galvan recruited him. Galvan told him he had done this successfully in late November or early December for a fee and that Genaro and Oscar had told him to get another person to help. Galvan said that Genaro and Oscar were going to hire them and would call and meet them at a gas station to get bus tickets. According to Sarmiento, Oscar and Genaro would come to the house with money for expenses and bus tickets and would talk to Galvan about the arrangements.

Early in 2014, Sarmiento and Galvan drove to a gas station, Galvan got in Genaro's green Cadillac, and returned with money for bus tickets, saying it was from Genaro and Oscar. Galvan and Sarmiento bought the bus tickets, took a bus to Brownsville, were picked up by Galvan's cousin, and stayed at the cousin's house. Galvan told Sarmiento that the drugs were coming from Oscar's family in Mexico. After Galvan and Sarmiento waited and smoked marijuana for 2 days, Galvan received a call from Freddie, who then brought them a duffle bag with drugs and helped them tape the bundles of drugs, about half a kilogram for each man, to their ankles. Sarmiento testified that they were subsequently picked up by Oscar and Genaro in Oscar's brown Cadillac and that they gave the drugs to Oscar. A few days later, the 2 men met Genaro and received $2,500 each for their trip.

For Sarmiento's second trip, Oscar and Genaro came to his home and spoke with Galvan, and he heard bits of the conversation in which they told Galvan they wanted another person to go with them to bring back more drugs. Galvan decided that he and Sarmiento would just bring back more drugs themselves. Weeks later, Genaro called Galvan, and he and Sarmiento met Oscar and Genaro at Genaro's brother's house, where Genaro gave Galvan the money for the trip. Galvan and Sarmiento bought the bus tickets, traveled to Brownsville, and waited there for 2 weeks.

Galvan's cousin picked them up at the Brownsville bus station, and Galvan and Sarmiento waited, smoked marijuana, and used cocaine. Sarmiento also walked across the border into Mexico twice to visit his children. Near the end of the second week, Freddie called, brought drugs to Sarmiento and Galvan, and Sarmiento sewed the bundles into a jacket while Galvan put bundles in his pockets. Galvan and Sarmiento went to the bus station and bought

bus tickets in fake names using money that Genaro had wired them from Florida by way of 2 Money Grams because they had used all their money on food, marijuana, and cocaine.

When Sarmiento and Galvan returned to the Brownsville bus station, they got nervous, and Galvan called Genaro and had Galvan's cousin drive them to the Harlingen bus station, where they were arrested. At trial, Sarmiento admitted that he had told law enforcement lies and half-truths upon his arrest. After his initial statements, Sarmiento cooperated with the government, identified Genaro and Oscar, and was told that their names were Genaro Luera and Oscar Sosa. Although Sarmiento was "not too sure," he believed that the person in charge of the drug deal was Oscar's aunt. However, Sosa never sent Sarmiento and Galvan any Money Grams, gave them any money, or sent them texts, and it was Luera who did those things. Sarmiento admitted that he never had any direct communication with either Sosa or Luera and only had communications with Galvan.

Galvan also testified at trial. He admitted that he had numerous prior convictions, had been sentenced to prison, had been convicted in this case, and was serving a 20-year prison sentence for it. Initially, Galvan and the prosecutor had the following discussion concerning his cooperation and his sentence:

> Q. . . . **Did you make a deal with me that, if you were to testify truthfully, if you were to cooperate truthfully, that you would receive a sentence reduction?**
>
> **A. Correct.**
>
> . . .
>
> Q. Okay. And as a result of that, instead of getting life, or what we would consider 360 months, you received what?

A. 240 months.

Q. Okay. And in connection with that cooperation, Galvan, **what's the one thing that the Government asked of you?** What did we ask you to do?

A. To tell my role, participation and to mention the other -- the people that were behind it.

Q. Okay. Well, let me ask you this: Did we tell you who we wanted you to mention?

A. No, ma'am.

Q. Okay. **What did we tell you to do instead? What did we ask of you?**

A. To tell the truth.

Q. **That's right. Come in and tell the truth. Okay.** And as it is right now, do you -- have you already been sentenced for this crime?

A. Yes, ma'am.

. . .

Q. And that was here in this courtroom?

A. Yes, ma'am.

Q. Before the Honorable Judge Andrew Hanen?

A. Yes.

. . .

Q. Okay. Now, your end of the deal was to come in and testify truthfully. Are you holding up your end of the bargain?

A. Correct.

. . .

Q. Okay. But that cooperation is based on one thing and one thing only and what is that cooperation based on, Galvan?

A. That I point out who was behind the –

Q. Again, I don't want you to give the jury a mis-impression. Let's tell it like it is. Am I telling you who to point out?

A. No.

Q. Okay. What do I want you to do, Galvan?

A. Tell the truth.

ROA.980-83 (emphasis added).

Galvan explained that he had transported drugs from Texas to Florida on 3 occasions beginning in 2013 when his friend, Genaro Luera, had asked him if he wanted to make money when Galvan was living at Sarmiento's house. Galvan, who had been using marijuana and cocaine since he was a teenager and had used crack cocaine and methamphetamine, had met Luera in 2007 or 2008, had stayed with him, and knew that he sold drugs because he had purchased drugs from him and might have sold drugs for him. Galvan testified that Luera's wife was Sosa's cousin.

In October or November of 2013, Galvan met with Luera and Sosa, who he only knew as Oscar, and Luera asked him if he wanted to transport drugs for a lady named Patti in Mexico from Brownsville to Florida for a fee. Luera told Galvan to call the people in Texas to see what his fee would be, and Sosa supposedly gave him the phone number to contact to pick up the drugs. He was supposed to contact Bertha. Galvan made the phone call, and about a week later Luera called him, told him he had bought him a bus ticket, and asked if he was ready. Luera brought Galvan the bus ticket and some money for expenses, and Galvan could not remember if Sosa was with him.

Galvan took the bus to Brownsville, called the phone number given to him, and spoke with a person named Bertha who notified Patti. Patti told him to wait until she sent someone to him. Galvan stayed with his cousin for less than a week smoking marijuana and then received a phone call and met Freddie who gave him 4 bundles of methamphetamine at Church's on International. Galvan called Luera because he thought he was going to transport cocaine and did not want to transport methamphetamine. Patti called Galvan and convinced him to continue. The next day, Freddie helped him strap the bundles of methamphetamine onto his shins, and he took them back to Plant City, Florida, where Luera and Sosa picked him up in Luera's green Cadillac. Luera was driving, and they dropped Galvan off in Wimauma, Florida, but he handed the drugs to Sosa on the way there. Luera subsequently paid Galvan $2,500 in increments.

Later in 2013, Luera approached Galvan about a second trip. In response to a suggestion to bring another person, Galvan asked his cousin, Juan Sarmiento, to take the trip and shared details of his first trip. Galvan thought that Luera and Sosa gave him and Sarmiento money but that they bought their own bus tickets. Luera always handled the money and gave him money. Galvan bought the bus tickets, and he and Sarmiento traveled to Brownsville. Galvan and Sarmiento stayed at his cousin's house for about a week. On the fourth day, Patti called and said she was going to send someone to them. A couple of days later, Freddie came with double the previous amount of methamphetamine and helped them tape the drugs to their legs. Galvan and Sarmiento returned to Florida by bus, and Luera and Sosa picked them up Sosa's brown Cadillac and drove them to Wimauma. During the drive, Galvan and Sarmiento took the drugs off of their shins and handed them

to Luera. Luera ultimately paid the 2 men $2500 each.

A couple of months later, Luera asked the 2 men to make a third trip and to get a third person to help them, but they decided to handle the trip themselves. Luera came to their house and dropped off the money for the bus tickets, and, around March 18th, they bought the tickets, traveled to Brownsville and stayed with Galvan's cousin. Patti called and discussed problems crossing the drugs from Mexico. Sarmiento subsequently visited his children in Mexico, and Galvan spoke with Luera, but "might have" spoken to Sosa. Finally, Freddie brought a bag to Galvan's cousin's house, where Galvan and Sarmiento stashed it, and Galvan phoned Luera for money because they had used their money eating and buying drugs. Luera wired Sarmiento around $300. The stashed bag contained 10 bundles of methamphetamine, and Sarmiento sewed some of the bundles into his jacket, while Galvan put some in his pockets. After Galvan's cousin drove the men to the Brownville bus station, they became nervous and contacted Luera. Galvan's cousin drove them to the Harlingen bus stop, where they were arrested.

At trial, Galvan admitted that he had initially lied to law enforcement by stating that: (1) Freddie had given him the drugs at Church's on International, which was true only on the first trip; (2) he had only transported drugs once before; and (3) only Sosa was going to pick him up in Florida without mentioning his friend Luera in order to protect him.

Luera testified at trial that his wife, Cinthia, is Patti's niece and Sosa's first cousin. Luera admitted that he has been selling drugs since he was 14 years old. He also admitted that his bond was revoked in this case because he had planned to have another person "rip somebody off" for their money in what appeared to be a drug deal. At the beginning of

Luera's testimony, the government discussed the following with him:

Q. All right. Now, you agreed -- you plead [sic] guilty in this case?

A. Yeah.

Q. Okay. And what was the range of punishment you were -- you were looking at currently?

A. 10 to life.

Q. All right. And you're pending sentencing?

A. Yes.

Q. Okay. ***Who did you plead guilty before?***

A. ***I believe it was Judge Hanen.***

Q. ***Okay. Do you recognize this Judge?***

A. ***Yeah, that's him.***

Q. All right. ***And who are you pending sentencing with?***

THE COURT: Should I say ***let the record reflect he's identified me?***

ROA.1405-07 (emphasis added).

The government also discussed with Luera the plea agreement, the possibility that the government would recommend as much as one-third off of his sentence, and the court's authority to accept or reject it. It also talked to him about telling the truth as follows:

Q. Well, let me ask you this: What would happen if you're not truthful here today with regards to the United States filing a recommendation?

A. Oh, I can get charged with perjury.

Q. Okay. And then would -- and you're aware what perjury is?

A. Yes.

Q. Okay. And additionally, let's put it this way, were you told that, ***if you are not truthful today, that the United States would not file a recommendation asking Judge Hanen to consider leniency in your case***?

A. Yes.

Q. Okay. So, if you lie today, there's two things that could happen to you, right?

A. Yes.

Q. One is perjury and ***one is no recommendation***?

A. Correct.

. . .

Q. Okay. Now, are you here -- do you see -- is -- is one of your attorneys here in this courtroom?

A. Yes.

Q. Okay. And have you had a discussion with him about the nature of your cooperation?

A. Um, yes.

Q. Okay. And have -- and I know there's another attorney you've met with more but, when you have been interviewing with us in preparation for trial, has your attorney been present during -- during certainly the starting of that cooperation and -- and through parts of the -- the hearing, the meetings?

A. Yes.

Q. Okay. And has your attorney -- I don't want you to talk about any attorney/client, ***what I mean is private conversations you've had, but I know, in our presence, has your attorney said, is it fair to say, that he's encouraged you to be truthful***?

A. Yes.

Q. ***Okay. And has he at least warned you of the consequences of*** [sic] ***if you are not truthful today***?

A. Yes.

Q. And are you aware and have we had this discussion that being truthful is not telling the United States what it wants to hear?

A. Yes.

Q. Okay. And do you realize and have we had the discussion that telling the truth is not just simply saying what you said in the past? If you were mistaken or if you even lied in the past; you understand that?

A. Yes.

ROA.1409-12.

Luera then testified as follows. Sosa, his mother, Patti, and his aunt, Bertha, have no legal status in the United States. At some point, Sosa became aware that Luera was dealing drugs, and Sosa began spending more time with him. Around February of 2013, Luera had a discussion with Sosa about cocaine, and he asked Sosa if he could get him cocaine. Over the next 5 to 6 months, Luera purchased cocaine from Sosa for resale. When supplies of cocaine dried up and people started asking Luera for methamphetamine, he started buying methamphetamine from Sosa.

In about September of 2013, Sosa said that he had gotten a call from his aunt, Bertha, and that he needed someone to go to Texas to pick up stuff (i.e., drugs). Galvan was present and offered to go because he had done this before. Luera told Sosa that Galvan was trustworthy, but that he was a crackhead. In November, Luera went to Galvan's house and gave him $300 to $400 for the trip. Galvan purchased the ticket, took a bus to Texas, and returned to Florida. According to Luera, he learned that Galvan had made the trip successfully only when Sosa informed him of that, and he learned from Galvan that Sosa had

given him his aunt's phone number. Luera and Sosa went to Galvan's house, and Galvan handed the drugs to Sosa. Luera told Galvan he would pay him in 2 days, and Luera and Sosa left. This first load was supposed to be cocaine, but when Sosa took out the drugs they turned out to be methamphetamine. Sosa gave Luera $2500 to pay Galvan 2 to 3 days later. Sosa gave Luera 9 ounces of methamphetamine on consignment, and he ultimately paid Sosa $5400 for it and made $1800 to $2000 in profit. On 2 occasions, Sosa paid Luera $200 to drive him 60 to 90 miles away to Plant City, Florida, because Sosa did not have a license. Sosa would either drop something off or pick up a stack of wrinkled money totaling $10,000 to $15,000.

In January of 2014, Sosa called Luera because he could not get in touch with Galvan, and he needed him again. Luera found Galvan on a bender smoking crack and told him he was needed again. Sosa told Galvan that his aunt, Bertha, said that they needed a second person because Galvan could not do it by himself. A few days later, Galvan called and said that his cousin, Juan Sarmiento, would help. After Luera and Sosa met Sarmiento, Sosa called his aunt and told her that they had found someone. Subsequently, Luera gave Galvan and Sarmiento about $400 each, for which he was reimbursed by Sosa, and Galvan and Sarmiento took a bus to Texas. Galvan and Sarmiento made the trip successfully, as Galvan already had the aunt's phone number, and she would have given him instructions.

Galvan called Luera from the bus when he was in Florida, and Luera and Sosa picked him and Sarmiento up at the bus station in Plant City. The two men got in the back of the car and handed Sosa a bag containing the drugs, and he counted the packets, and placed the bag on the floor. Luera gave Galvan and Sarmiento $200 each immediately, and he later gave

them a total of $2500 each when Sosa gave him the money. Luera also received 14 ounces of methamphetamine on consignment for which he paid Sosa more than $10,000.

The next trip took place in March right after Galvan's birthday, and he and Sarmiento celebrated it by partying during the whole trip. During the trip, Sarmiento visited his children in Mexico. At some point, Galvan called Luera and said that they needed money to return to Florida, and so Luera sent 2 Money Grams totaling around $400 to Sarmiento in Brownsville. Luera also sent other Money Grams to Mexico at various times as either Sosa would pay him to do so or Luera would do so in connection with cars he was buying and selling for himself or when he was assisting Bertha's daughter to sell cars for Bertha. According to Luera, after Sosa told him about the arrest of Galvan and Luera, he continued to sell methamphetamine for Sosa.

At trial, the government also introduced the testimony of a federal agent to testify that Sosa fit the profile of a wholesaler/distributor in a drug trafficking organization. With regard to the typical drug trafficking organization ("DTO"), Agent Jason Bradford testified to the following:

> Q. (By Ms. Betancourt) Okay. Agent Bradford, if you don't mind, then, kind of, I guess, give the jury the hierarchy of what of a typical -- I guess, in lingo, when you and I talk, we call them DTO's, right? Drug trafficking organizations?
>
> . . .
>
> A. In our area, a typical DTO. So, we will make this the U.S./Mexico border. We have Mexico to the south, United States to the north. Typically what we see, we have a source of supply, which we'll call an SOS, okay? And then we have a transportation coordinator. Okay. Sometimes they're different, sometimes they can be the same. Okay?

> From here, we have what we call couriers, okay? And what the source of supply does, if they're separate, they'll get a transportation coordinator. The transportation coordinator will get couriers. And their job is to get the drugs from Mexico into the United States, okay?
>
> Now, these couriers can continue to a destination city somewhere in the U.S., okay? Or, what they can do, is give it to couriers on the United States side, okay?
>
> Now, in between here, it switches up. Every DTO may operate differently. Sometimes you have stash houses, and that's my little stash house, where they will keep the drugs until, you know, they are ready to move them to this destination city.
>
> Sometimes it's large amounts, sometimes it's small amounts. Sometimes they won't use stash houses at all. These couriers will go straight to the destination city.
>
> In the destination city, sometimes they go to a stash house, sometimes they go straight to what we call a wholesaler. Okay? Or a distributor, okay?
>
> This distributor will have different clients. So it starts branching out like a tree, okay? There might be many couriers here, okay? But for these purposes, we'll keep it simple, okay?
>
> So the wholesaler distributor gives it to the clients, okay? And then these clients will sell on the street, street level, make street level deals. Or there might be one level in between there, or many. It just depends.

ROA.1757-60.

Later in his testimony, Agent Bradford made it crystal clear for the jury who the people were, including Sosa, who were serving in these positions in the so-called typical DTO in this case:

> All right. So, again, we're going to start off with the source of supply of transportation coordinator. Sometimes they're the same, sometimes they're different, okay?
>
> In this case, we recognize Patti and Bertha Sosa as filling those roles, okay? The investigation showed that an unknown man named Freddie LNU, meaning

last name unknown, filled the role of the courier because he would take the drugs into the United States. Okay?

Once it got to the United States, we had more couriers, okay? And you got to see them live and in person. That was Galvan and Sarmiento, okay?

They went to a wholesaler, then the distributor who we will recognize as Mr. Oscar Sosa.

Oscar had clients. That was Mr. Genaro Luera. And then Luera sold to, and this is unique, back to Galvan and other people. Okay?

Luera also spoke about unknown other clients and customers that Sosa had, but he didn't have extensive knowledge of.

ROA.1777-78. Agent Bradford's conclusions were based on statements made by Luera, Galvan, and Sarmiento and other evidence in this case.

Agent Bradford also explained other standard features of the profile of drug traffickers and how Sosa fit those too. Notwithstanding that Sosa was in the country illegally and could obtain no official identification that would have allowed him to put vehicles or real property in his name, Agent Bradford testified that drug traffickers do not keep records, do not use e-mails, do not leave a paper trail, and do not deal in cash. He then testified that Sosa fit this profile of a drug trafficker by testifying that the Money Grams were not in Sosa's name, that Sosa had no cars, no phones, and no homes in his name, and that Sosa did not have a job, as follows:

Q. . . . When you're looking at that and you're not finding any assets -- well, really, three things – not finding any assets in Sosa's name, is that somehow in fact indicative of -- of some things that say, okay, you know what, it's kind of strange he doesn't have any assets in his name, that tells me what?

A. Yes, we consider that conduct common of drug traffickers.

Q. And why is that?

A. Because they don't want to leave a trail for their assets.

Q. Okay. And why –

A. Anything in their name removes the cloak of anonymity.

Q. Okay. And if they do leave a paper trail of using drug proceeds to purchase assets, what happens to those assets?

A. The Government can seize them.

ROA.1798. Furthermore, unlike a law abiding citizen who will register phones in his or her name, there was no phone number for Sosa, and none of the cooperating witnesses had a phone number for Sosa.

In response to Agent Bradford's testimony, defense counsel cross examined him regarding the numerous inconsistencies in the prior statements and testimony of Sarmiento, Galvan, and Luera, as well as their lies, including: (1) Galvan did not disclose Luera's name to authorities in his first interview because Luera is his friend, and he was trying to protect him; (2) Galvan and Sarmiento both lied during their initial interviews by stating that they picked up the drugs on that trip at Church's Chicken on International; (3) Sarmiento said his second trip took two weeks, but Galvan said that it took a week; (4) Sarmiento said that Luera handed Galvan money in a car at a gas station, but Galvan testified that Luera gave him money at Sarmiento's house; (5) Galvan said that on the first trip Galvan and Sarmiento took in November Luera gave him the bus tickets, but Luera said that he handed Galvan $400 so that he could buy the bus tickets; (6) Sarmiento testified that on the first trip he placed 2 packages of drugs on his legs, with one-half kilo on each leg, but Galvan remembers that they placed 4 packages of drugs on their legs, with 2 packages on each leg; (7) Sarmiento

testified that, when they got back to Florida, Sosa showed up driving his brown car and that they gave the drugs directly to him, but Galvan testified that Luera and Sosa showed up in Sosa's car and that he and Sarmiento both gave the drugs directly to Luera, while Luera testified that he was driving at the time; (8) Sarmiento testified there was a meeting at his house prior to the third trip where it was mentioned that a third person was needed, but Galvan did not mention a meeting prior to the third trip; (9) Luera said that they never talked about or were looking for a third person, and Galvan said that Luera asked him about getting a third person and that he and Sarmiento got together and talked about it and decided they did not need a third and could make more money without one; (10) Galvan said that a month before the November trip Luera asked him to be a courier and he turned it down because he did not need the money but that when Luera came back and asked him again he agreed, while Luera said that Galvan overheard a conversation and volunteered; (11) Luera testified that Sosa gave Galvan the phone number for Patti, but Galvan never mentioned that fact in his debriefings; and (12) with regard to the November trip, Galvan testified that, when he saw that the drugs were methamphetamine and not cocaine, he told Freddie he did not want to be involved, got a call from Patti, and called Luera about it, but Luera testified that he did not know the drugs were methamphetamine until Galvan returned to Florida.

Of course, even during much of Agent Bradford's testimony the government still had not introduced any independent evidence that the Patti and the Bertha who had spoken on the phone to the drug traffickers had any relation to Sosa. Instead, the thought that these women, who were the source of the methamphetamine in Mexico, had any relation to Sosa was based on the say-so of the cooperating drug traffickers who only had met with Freddie

and heard voices on the phone of females who claimed that their names were Patti and Bertha. In order to introduce "information" that "was common, was consistent and corroborated what [Agent Bradford] knew from the cooperators about Patti and Bertha," the prosecutor had Agent Bradford testify that he had been contacted by the DEA office in the Houston Division "[b]ecause they had checked some of our internal indices running the name of Patricia Sosa," and "the name Patricia Sosa popped up." ROA.1831.

The prosecutor asked Agent Bradford why the DEA office in Houston had contacted him, and the following testimony and conversation ensued:

> A. We had -- well, the Houston division had an under cover operation going on in which a -- a Patricia contacted an under cover agent and had a phone call. During that phone call, Patricia discussed with this agent acting in an under cover capacity about being a courier to bring drugs from Mexico to the Houston area.
>
> Q. Okay. Patricia being a courier or the undercover officer being a courier?
>
> A. The undercover officer being a courier.
>
> Q. Okay.
>
> A. So, again, it's consistent with the transportation coordination slot that we had for Patricia Sosa.
>
> Q. Okay. So just that nugget of information is -- is common and it's consistent?
>
> A. Yes.
>
> Q. But were you and the agent in DEA, were y'all able to then corroborate that y'all were talking about the same Patricia Sosa?
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> A. Yes.
>
> Q. How did y'all do that?

A. The agent took the number that he was contacted by Patricia Sosa with and he entered it into Facebook and that phone number linked to Patricia Sosa's Facebook page. With that information, he ran the name Patricia Sosa in our data base to de-conflict when it came up with our case. With that information, he reached out to me and told me the story.

Q. Okay. And when he -- you say that he used the number that the woman Patricia Sosa contacted you on. That phone number was what type of number? Where was the -- the phone number was from where?

A. It was a Mexican phone number.

Q. Okay. And during the under cover's conversation with Patricia, did that in fact -- was that fact corroborated that she was in Mexico and needed couriers in the U.S.?

A. Yes.

ROA.1831-33.

In Sosa's defense, his mother in law, Patti Ramirez, testified that her daughter, Lasandra Sosa, began dating Sosa in March of 2014 and that Sosa moved into their home thereafter and lived there until February 19, 2015. She testified about Sosa's employment as a day laborer in landscaping at a golf course and that he was very nice, always calm and happy, was not loud or flashy, and was a wonderful father to his children. On February 19, 2015, Sosa and his wife moved to New York to find work. Ms. Ramirez had met Sosa's mother, Patti, in 1995, but Patti did not visit her home. She and Mrs. Sosa had met Patti the week before the trial in this case as Mrs. Sosa had wanted to meet her mother in law.

The testimony of Sosa's wife, Lasandra Sosa, was similar to that of Ms. Ramirez. She testified that, when dating, they did not spend much money and that Sosa bought inexpensive clothes. Sosa respected her as a person, acted like a father to her son, and was an amazing father to her son and his own children. At first, Sosa was not working, but then in April and

May of 2014 he received a few paychecks and began working as a day laborer. Mrs. Sosa also testified about their journey to New York to look for work and their move to Pasadena, Texas, where Sosa's uncle gave him a job. Mr. and Mrs. Sosa had a joint bank account and rented an apartment together. Sosa had undertaken legal proceedings to gain custody of his 2 daughters, and Mrs. Sosa was planning to file a petition for him to become a United States citizen. Sosa had a strained relationship with his mother, Patti, who would call him occasionally asking for money, and Sosa would send her $40 to $50. Mrs. Sosa visited Patti the weekend before the trial when she went to Mexico to visit her relatives. At the end of trial, the jury returned a verdict of guilty on both counts.

On appeal, Sosa argued that his convictions should be reversed due to 3 plain errors as well as their cumulative prejudicial effect: (1) the improper admission of Agent Bradford's so-called expert testimony that Sosa was the wholesaler and distributor in the drug trafficking organization at issue at trial and fit the profile of a drug trafficker; (2) the government's improper bolstering of Luera, Galvan, and Sarmiento, who were the only witnesses with knowledge who implicated Sosa in the offense, by portraying to the jury that the prosecutor and the judge believed that these cooperating witnesses were telling the truth; and (3) the improper admission, through Agent Bradford's testimony, of out-of-court statements by an federal undercover agent that Patricia Sosa had called him and asked him to be a drug courier. See App. Br. 37-55.

The Fifth Circuit affirmed nevertheless. United States v. Sosa, 897 F.3d 615 (5th Cir. 2018). However, the Fifth Circuit agreed that Agent Bradford's so-called expert testimony that Sosa was a drug wholesaler and distributor and fit the profile of a drug trafficker was

"egregious" and "obvious error" "[g]iven the number of times we have found quite similar profile testimony improper." Id. at 620. But, the Fifth Circuit held that the conflicts in the testimony of the cooperating witnesses (whose truthfulness was improperly bolstered by the prosecutor, see id. at 620-23), "were not so significant to convince us that the inadmissible profile evidence was likely the difference maker at trial." Id. at 620. And, the Fifth Circuit also agreed that the prosecutor had improperly bolstered the testimony of Galvan and Sarmiento by conveying to the jury that the prosecutor and the judge believed these two cooperating witnesses were telling the truth and thereby "put his stamp of approval" on their testimony. Id. at 620-21. The Fifth Circuit also appeared to agree that the prosecutor had improperly bolstered Luera's testimony by "discuss[ing] with him *ad nauseum* the need to tell the truth." Id. at 621. Stating that the "prejudice inquiry thus is a close call," the Fifth Circuit nevertheless "conclude[d] Sosa has not established that the bolstering substantially affected the outcome," reasoning that "the testimony of three cooperating witnesses presented a strong case of guilt even in light of some inconsistencies in their testimony," although, "[i]n one sense this may make the bolstering more prejudicial because it resulted in the endorsed credibility of the key testimony." Id. at 622.

With regard to the violation of the Confrontation Clause by Agent Bradford's testimony about an out-of-court undercover agent's report to him that Sosa's mother, Patricia Sosa, had phoned him and asked him to be a courier of drugs from Mexico to the Houston area, the Fifth Circuit held that "there was no clear Confrontation Clause violation" from the agent's testimony because the testimony was "introduced to explain why an officer took investigatory steps" and because "[i]t only mentioned Patricia Sosa." Id. at 623. The Fifth

Circuit completely ignored that the prosecutor had linked the out-of-court statements about drug trafficking to Sosa and used them against him by stressing in his closing argument that it was no coincidence that Patricia Sosa was trying to get a courier to bring drugs to Houston, Texas, when Sosa was living in the Houston area.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari because the Fifth Circuit's decision that an out-of-court statement that an unindicted coconspirator asked an undercover agent to act as a drug courier, which was used against Sosa, was not a clear violation of the Confrontation Clause is in conflict with Crawford v. Washington, 541 U.S. 36 (2004), United States v. Cromer, 389 F.3d 662 (6th Cir. 2004), and United States v. Silva, 380 F.3d 1018 (7th Cir. 2004).

A. Introduction.

This Court should grant certiorari because the Fifth Circuit's decision that a federal agent's testimony at trial about an undercover agent's report that Sosa's mother, Patricia Sosa, had phoned him and asked him to be a drug courier and transport drugs to Houston, Texas, violated the Confrontation Clause and conflicts with Crawford v. Washington, 541 U.S. 36 (2004), United States v. Silva, 380 F.3d 1018 (7th Cir. 2004), and United States v. Cromer, 389 F.3d 662 (6th Cir. 2004). The out-of-court agent's statements about Patricia Sosa were introduced for the truth of the matters asserted and were used by the prosecutor in his closing argument to convince the jury that Sosa was guilty of drug trafficking. As discussed in the opinions of the Sixth and Seventh Circuits, the stock justification for the introduction of out-of-court statements as an explanation of why an officer or agent took certain actions, which the Fifth Circuit used in this case, abrogates a defendant's confrontation rights under the Sixth Amendment.

B. This Court Should Grant Certiorari in Light of the Clear Violation of the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him." U.S. Const. amend. VI. In Crawford, this Court made clear that the Confrontation Clause generally bars witnesses from reporting the out-of-court statements of nontestifying declarants. See Crawford, 541 U.S. at 54-56; see also Davis v. Washington, 547 U.S. 813, 821 (2006). "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Davis, 547 U.S. at 821. In Crawford, moreover, this Court "held that fidelity to the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Bullcoming v. New Mexico, 564 U.S. 647, 658 (2011) (internal quotation marks and brackets omitted); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309-10 (2009).

There was a clear violation of the Confrontation Clause in this case. Agent Bradford's testimony involved "'[t]estimonial statements of [a] witness[] absent from trial,'" there was no showing that the "'declarant [wa]s unavailable,'" and "'the defendant'" did not have "'a prior opportunity to cross-examine'" the out-of-court Houston DEA agent. See Bullcoming, 564 U.S. at 658 (quoting Crawford, 541 U.S. at 59) (initial brackets in original, and others added). Moreover, the out-of-court statements by the DEA agent were testimonial because they were "'made under circumstances which would lead an objective witness reasonably to believe that the statement[s][] would be available for later use at trial.'" Melendez-Diaz, 557 U.S. at 311 (quoting Crawford, 541 U.S. at 52).

Both the prosecutor's questions to Agent Bradford and Agent Bradford's answers containing the out-of-court statements show that the statements were introduced for the truth

of the matters asserted and as corroboration for the truth of what Agent Bradford believed. The prosecutor prefaced his questions with defense counsel's challenge earlier in the week that the government "d[id]n't know that Patti and Bertha deal in drugs in Mexico." ROA.1830. The prosecutor then asked Agent Bradford the following question:

> So was there a time during the course of the investigation where you had some information that was brought to your attention that, again, was common, was consistent and corroborated what you know from the cooperators about Patti and Bertha?

ROA.1830. Agent Bradford gave the following response:

> A. We had -- well, the Houston division had an under cover operation going on in which a -- a Patricia contacted an under cover agent and had a phone call. During that phone call, Patricia discussed with this agent acting in an under cover capacity about being a courier to bring drugs from Mexico to the Houston area.
>
> Q. Okay. Patricia being a courier or the undercover officer being a courier?
>
> A. The undercover officer being a courier.
>
> Q. Okay.
>
> A. So, again, it's consistent with the transportation coordination slot that we had for Patricia Sosa.
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> Q. Okay. So just that nugget of information is -- is common and it's consistent?
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> A. Yes.
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> Q. But were you and the agent in DEA, were y'all able to then corroborate that y'all were talking about the same Patricia Sosa?
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> A. Yes.
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> Q. How did y'all do that?

A. The agent took the number that he was contacted by Patricia Sosa with and he entered it into Facebook and that phone number linked to Patricia Sosa's Facebook page. With that information, he ran the name Patricia Sosa in our data base to de-conflict when it came up with our case. With that information, he reached out to me and told me the story.

Q. Okay. And when he -- you say that he used the number that the woman Patricia Sosa contacted you on. That phone number was what type of number? Where was the -- the phone number was from where?

A. It was a Mexican phone number.

Q. Okay. And during the under cover's conversation with Patricia, did that in fact -- was that fact corroborated that she was in Mexico and needed couriers in the U.S.?

A. Yes.

ROA.1831-33.

And, in his closing rebuttal argument, the last argument the jury heard, the prosecutor relied on the out-of-court statements of the undercover DEA agent to argue that Sosa was a drug trafficker and was conspiring to traffic drugs with his mother, Patti Sosa:

> . . . He's living in Pasadena. I understand that the defense discounts this. And I'm talking about when the Defendant is in Houston, in Pasadena, but what are the coincidences? And you heard a little bit of it today. What are the coincidences that the Defendant happens to go to Pasadena, Texas in -- near Houston and, in 2016, there's an under cover DEA person agent talking to Patti and talking about drugs. And, guess what? It's not getting a body carrier to Brownsville anymore, it's getting a drug courier to Houston.

ROA.2159.

The Houston DEA agent's out-of-court statements about Sosa's mother's participation in drug trafficking clearly were made during a criminal investigation that he was conducting and were communicated to Agent Bradford, who was conducting his own criminal investigation and mounting a prosecution against Sosa for trial. The admission of

these out-of-court statements thus was a clear violation of the Confrontation Clause. The Fifth Circuit's conclusion to the contrary, see Sosa, 897 F.3d at 623 ("As a result, there was not clear Confrontation Clause violation."), thus is in conflict with this Court's decision in Crawford.

And, the Fifth Circuit's rationale for its conclusion is misguided and has been criticized by other courts of appeals as an abrogation of a defendant's Confrontation Clause rights. First, the Fifth Circuit's reliance on the fact that the out-of-court statements "only mentioned Patricia Sosa," Sosa, 897 F.3d at 623, betrays a misunderstanding of the Confrontation Clause. Out-of-court statements do not need to expressly mention the defendant to violate the Confrontation Clause. "The Confrontation Clause of the Sixth Amendment gives the accused the right to be 'confronted with the witnesses against him.' This has long been read as securing an adequate opportunity to cross-examine ***adverse witnesses***." United States v. Owens, 484 U.S. 554, 557 (1988) (emphasis added). The out-of-court undercover DEA agent was clearly an "adverse" witness to Sosa because those statements were used by the prosecutor in his closing argument to show that Sosa was conspiring with Patricia Sosa to import drugs. See supra text, at 37-38. The Fifth Circuit's reliance on the fact that the undercover agent's statements did not expressly mention Sosa, therefore, misconstrues the protections of the Confrontation Clause.

The Fifth Circuit's reliance on the justification that the out-of-court statements were admitted to "explain why an officer took investigatory steps," Sosa, 897 F.3d at 623, poses a "particularly problematic area in hearsay law" and "a similar problem for confrontation." 2 McCormick on Evidence § 252 (7th ed. 2016) (page number unavailable) (available on

Westlaw). To begin with, the reason why Agent Bradford's testimony about the DEA agent's out-of-court statements was introduced was to show confirmation and corroboration for the truth of the matters asserted, which goes to the heart of the Confrontation Clause. See supra text, at 28. In addition, as Judge Easterbrook has pointed out: "Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule." United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004) (citation omitted). In other words, allowing the admission of out-of-court statements "to show why the police investigated X[,] . . . would eviscerate the constitutional right to confront and cross-examine one's accusers." Id. (citing Crawford). The Sixth Circuit agrees. See United States v. Cromer, 389 F.3d 662, 674 (6th Cir. 2004) (quoting Silva, 380 F.3d at 1020). In fact, in Cromer, the Sixth Circuit held that the introduction of out-of-court statements much like the ones introduced here was plain error that affected the defendant's substantial rights, in light of Crawford and "Crawford's affirmation of the importance of the constitutional right of confrontation," and that "compromised the fairness and integrity of [the defendant]'s trial." Cromer, 389 F.3d at 679

Finally, the Fifth Circuit reasoning that the out-of-court statements "would not have told [the jury] anything it did not already know," Sosa, 897 F.3d at 623, ignores the fact, acknowledged by the prosecutor in the preface to his question, see supra text, at 28, that the out-of-court statements supplied corroboration for Agent Bradford's position that it was Patricia Sosa who was supplying the drugs from Mexico, which was a fact contested by the

defense. See supra text, at 27-28.[2] The violation of the Confrontation Clause thus was a crucial part of the government's case. Up to that point, the only evidence regarding any interaction that anyone had had with "Patti" or "Bertha" was found in the testimony of Galvan and Sarmiento, who mentioned that female voices on the phone had used those names, although they had only had personal contact with and received drugs from Freddie. Moreover, Galvan's and Sarmiento's lies and inconsistent statements made their testimony, including the testimony about Patti and Bertha as drug traffickers, suspect at best. With Agent Bradford's testimony about the Houston DEA agent's conversation with Patti about being a courier and the statements about Patti's phone number and its relation to her Facebook page, the government added an independent layer of evidence that it could use to convince the jury that Sosa's mother was a supplier of methamphetamine to add credibility to its story that Sosa, as her son, was the wholesaler/distributor.

This independent source of information, who was not subject to any cross examination at all, was crucial for the government because it allowed it to escape the box of having to rely only on Galvan, Luera, and Sarmiento, all of whom had problematic testimony. And, the government relied on the out-of-court statements heavily to argue for a guilty verdict in its closing rebuttal argument, the last argument the jury heard, by pointing out that

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[2] Whether the out-of-court statements informed the jury of anything new appears to be an issue aimed at the harm from their admission as opposed to whether the Confrontation Clause was violated. Although Sosa addresses this issue here out of an abundance of caution, this Court need not, and should not, engage in any analysis regarding the harm resulting from this error. Rather, this Court should, "[c]onsistent with [its] normal practice where the court below has not yet passed on the harmlessness" of any error, [ ] remand this case to the Court of Appeals for it to consider in the first instance whether the [Confrontation] error was harmless." United States v. Neder, 527 U.S. 1, 25 (1999); see also Hicks v. United States, 137 S. Ct. 2000, 2000 (Gorsuch, J., concurring) (stating the same with regard to harmless and plain error).

while Sosa as living in Pasadena, Texas, in the Houston area, Patricia Sosa phoned the Houston DEA Agent and recruited him to be a courier. See supra text, at 29.

Because of the clear violation of the Confrontation clause and the significant role that it played in the government's prosecution and in the resulting guilty verdicts, and because the Fifth Circuit's opinion is in conflict with the decisions of this Court and other lower courts, this Court should grant certiorari in this case. See Crawford, 541 U.S. at 52-59; Cromer, 389 F.3d at 679, Silva, 380 F.3d at 1020; see also United States v. Bruno, 383 F.3d 65, 79 (2d Cir. 2004).

II. This Court should grant certiorari because the Fifth Circuit's decision affirming the convictions despite its holding that the prosecutor improperly bolstered the witnesses who incriminated Sosa and improperly used a federal agent as an expert to brand Sosa as a drug trafficking wholesaler and distributor who fits a drug trafficking profile misapplied this Court's standard on "plain error" review and deprived Sosa of his right to due process.

A. Introduction.

In this case, only three witnesses had personal knowledge of the offense – Sarmiento and Galvan, who transported methamphetamine from Texas to Florida, and Luera, who met them when they arrived in Florida. All three agreed to cooperate with the government. They testified that Sosa was the person overseeing the drug trafficking. There was no other evidence showing that Sosa received drugs or participated in or planned the drug trafficking. The defense attacked the credibility of these three witnesses contending that they were lying, and it showed that their stories contained inconsistencies and lies and that some of the lies could only be explained by the witnesses' collaboration about them. See supra text, at 2-4, 19-20.

To counter this attack and strengthen its case, the prosecutor improperly bolstered the credibility of these witnesses by questioning them in a way that told the jury that he and the judge believed that the witnesses were telling the truth. See supra text, at 3-4, 7-8, 11-13. In its opinion, the Fifth Circuit found that the prosecutor had improperly bolstered these witnesses. Sosa, 897 F.3d at 620-22. The prosecutor also countered the defense's attack and strengthened its case by putting on a federal agent as an expert and having him testify that Sosa was a wholesaler and distributor in the drug trafficking organization who functioned just like a wholesaler and distributor in the typical drug trafficking organization and that he fit the profile of a drug trafficker because, among other things, he had no assets in his name. See supra text, at 16-19. In its opinion, the Fifth Circuit again found that the prosecutor had engaged in this improper conduct. Sosa, 897 F.3d at 619-20.

Despite the fact that, as the government stated at oral argument in the Fifth Circuit, "the whole trial was about credibility,"[3] the Fifth Circuit held that these two errors did not affect Sosa's substantial rights, reasoning that: (1) with regard to the improper bolstering, the "prejudice inquiry thus is a close call," but that "Sosa has not established that the bolstering substantially affected the verdict" and that "the testimony of three cooperating witnesses presented a strong case of guilt even in light of some inconsistencies in their testimony," although, "[i]n one sense this may make the bolstering more prejudicial because it resulted in the endorsed credibility of the key testimony"; and (2) with regard to the improper expert

[3] The government made this statement at approximately 24 minutes and 23 seconds on the Fifth Circuit's recording of the argument, which can be found on the Fifth Circuit's web site, www.ca5.uscourts.gov, under Oral Argument Information and then under Oral Argument Recordings.

testimony that Sosa was a drug trafficker and fit the profile of a typical drug trafficker, the inconsistencies of the cooperating witnesses were "not so significant" that "the inadmissible profile testimony was likely the difference maker at trial." Id. at 620, 622. As explained below, because the Fifth Circuit's decision misapplied this Court's standard on "plain error" review and deprived Sosa of his right to due process, this Court should grant certiorari.

B. This Court Should Grant Certiorari Because the Fifth Circuit Has Misapplied this Court's Standard on "Plain Error" Review and Deprived Sosa of Due Process.

"Rule 52(b) permits an appellate court to recognize 'a plain error that affects substantial rights' even if the claim of error was 'not brought' to the district court's 'attention.'" Marcus v. United States, 560 U.S. 258, 262 (2010) (quoting Fed. R. Crim. P. 52(b)). "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.'" Id. (brackets in original) (quoting United States v. Puckett, 556 U.S. 129, 135 (2009)).

Under the third prong of plain-error review, for an error to affect substantial rights "[i]n the ordinary case, . . . there must be a reasonable probability that the error affected the outcome of the trial." Marcus, 560 U.S. at 262. When examining whether there is a reasonable probability that an error affected the outcome, however, the "question is not whether the defendant would more likely than not have received a different verdict," but

whether the "trial result[ed] in a verdict worthy of confidence" or whether the error instead "'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (discussing and quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). The "reasonable probability" test, therefore, "is not a sufficiency of the evidence test." Kyles, 514 U.S. at 434. Rather, the question is whether there is "a 'reasonable probability' (less than a preponderance of the evidence) of shifting even one juror's vote." Turner v. United States, 137 S. Ct. 1885, 1896-97 (2017) (Kagan, J., dissenting) (citing Cone v. Bell, 556 U.S. 449, 452, 470 (2009), and Kyles, 514 U.S. at 434).[4] In other words, "if one cannot say, with fair assurance, after pondering all that happened without stripping away the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Kotteakos v. United States, 328 U.S. 750, 765 (1946).

As discussed above, in this case, there were three witnesses to the offense, Galvan, Sarmiento, and Luera, who cooperated with the government and whose say-so was the only evidence that Sosa was overseeing and involved in the drug trafficking offense. Moreover, as characterized by the government, the trial was all about the credibility of these three witnesses. The defense pointed out lies that they had told, inconsistencies in their testimony and past statements, and lies on which they collaborated.

To rebut the defense and shore up the weaknesses in its case, the government had a federal agent testify as an expert that: (1) Sosa was the wholesaler/distributor in a drug

[4] See also Charles v. Stephens, 736 F.3d 380, 392 (5th Cir. 2013) (stating that the "reasonable probability" standard is less onerous than a preponderance of the evidence).

trafficking organization that fit the typical drug trafficking organization; (2) he was a drug trafficker because he fit the profile of a typical drug trafficker, as he did not have homes, cars, or phones in his name; and (3) he was guilty of drug trafficking in this case because, as was the case with a typical drug trafficker, the Money Grams were not in his name. See supra text, at 16-19. And, the agent added, on top of all of this, that Sosa's conduct was "common of drug traffickers." See supra text, at 18. The prosecutor also conveyed to the jury via his questioning of the cooperating witnesses that both he and the judge believed these witnesses were telling the truth. See supra text, at 3-4, 7-8, 11-13.

In its opinion, the Fifth Circuit held that the federal agent's so-called expert testimony that Sosa was a drug wholesaler and distributor and fit the profile of a drug trafficker was "egregious" and "obvious error" "[g]iven the number of times we have found quite similar profile testimony improper." Sosa, 897 F.3d at 620. The Fifth Circuit also agreed that the prosecutor had improperly bolstered Galvan and Sarmiento by conveying to the jury that the prosecutor and the judge believed these two cooperating witnesses were telling the truth and thereby "put his stamp of approval" on their testimony. Id. at 620-21. The Fifth Circuit additionally appeared to agree that the prosecutor had improperly bolstered Luera's testimony by "discuss[ing] with him *ad nauseum* the need to tell the truth." Id. at 621.

The Fifth Circuit held, however, that the conflicting testimony of the cooperating witnesses was "not so significant to convince us that the inadmissible profile evidence was likely the difference maker at trial." Id. at 620. And, stating that the "prejudice inquiry thus is a close call" with regard to the improper bolstering of the cooperating witnesses, the Fifth Circuit nevertheless "conclude[d] Sosa has not established that the bolstering substantially

affected the outcome," id. at 622, reasoning that "the testimony of three cooperating witnesses presented a strong case of guilt even in light of some inconsistencies in their testimony," although, "[i]n one sense this may make the bolstering more prejudicial because it resulted in the endorsed credibility of the key testimony." Id.

The reasons given by the Fifth Circuit for refusing to reverse Sosa's convictions misapplied this Court's "affects substantial rights" test under the third prong of plain-error review. The question under the third prong was not, as the Fifth Circuit asked, whether these errors individually or collectively were "difference maker[s]" at trial or "substantially affected the outcome." Id. at 620, 622. Nor was the question, as the Fifth Circuit asked, whether the evidence was sufficient even in light of the inconsistencies in the testimony of the cooperating witnesses. Id. at 622; see Kyles, 514 U.S. at 434. Rather, the question the Fifth Circuit should have asked is whether the errors "undermine[d] confidence in the outcome of the trial," Kyles, 514 U.S. at 434 (internal quotation marks and citation omitted), meaning that there is "a 'reasonable probability' (less than a preponderance of the evidence) of shifting even one juror's vote." Turner, 137 S. Ct. at 1896-97 (Kagan, J. dissenting). In light of the fact that the trial was all about the credibility of the testifying witnesses, that the prosecutor improperly bolstered their credibility by telling the jurors that he and the judge believed these witnesses, that the prosecutor had a federal agent brand Sosa as a guilty drug trafficker, and that the Fifth Circuit found that the cooperating witnesses were inconsistent and that the prejudice from the bolstering of their credibility was "a close call," Sosa, 897 F.3d at 622, "one cannot say, with fair assurance, after pondering all that happened without stripping away the erroneous action from the whole, that the judgment was not substantially

swayed by the error," Kotteakos, 328 U.S. at 765, and it thus "is impossible to conclude that substantial rights were not affected." Id. at 765. In other words, there clearly was "a 'reasonable probability' (less than a preponderance of the evidence) of shifting even one juror's vote." Turner, 137 S. Ct. at 1896-97 (Kagan, J. dissenting).

Moreover, under the Due Process Clause, Sosa was entitled to a jury trial at which the government was required to persuade the factfinder of his guilty beyond a reasonable doubt. See Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993). The Fifth Circuit and the trial court deprived Sosa of that right by allowing the prosecutor to: (1) have a federal agent testify as an expert that Sosa was guilty because he was a drug trafficker who fit the profile of a wholesaler and distributor in a typical drug trafficking organization and acted in a way that fit the profile of a drug trafficker; and (2) tell the jurors that he, as the prosecutor, and the judge believed that the cooperating drug trafficking witnesses were telling the truth.

This Court, therefore, should grant certiorari to provide much needed clarification on the application of the third prong of plain-error analysis to trial error and to address the misapplication of the third prong and the deprivation of due process in this case.

CONCLUSION

Petitioner, Oscar Sosa, prays that this Court grant certiorari in this case.

Date: November 9, 2018

Respectfully submitted,

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documents [the Defense is] asking for?

GOVERNMENT: No, Your Honor.

THE COURT: All right. So they don't have them. So you asked for them. You don't have them. That doesn't mean it ends. You could have pursued it.

J.A. 57. Later, in adopting the unsupported $40 estimate, the district court reasoned that requiring GameFly to produce records substantiating their losses would be unfair:

[I]t would be nice to have a very lengthy report by the victim, but the bottom line is it's a little twisted for the victim to have to expend more money and time to prove their losses when—when the defendant is admitting his guilt. ... [T]o get the restitution, they have to come back and spend a lot more time to prepare the restitution numbers. That's what's being asked here. I don't think that's required.

J.A. 76.

We cannot agree. Restitution under the MVRA "must be based on findings as to the value of the property as of the date of loss or the date of sentencing, and as to the value of any part of the property that is returned, as of the date of return. Even if it is difficult [or inconvenient] to measure those values, nonetheless, that is what the statute requires." *Mullins*, 971 F.2d at 1147 (describing the VWPA); *see also* MVRA, 18 U.S.C. § 3663A(b)(1)(B) (using nearly identical language to the VWPA). Nothing in the record indicates it would be difficult for GameFly to produce records substantiating its losses. Furthermore, the district court made no findings as to the value of the games on either the date of loss or on the date of sentencing. The district court also did not resolve how many games were ultimately recovered and therefore did not establish how many games Steele is accountable for. Therefore remand is also necessary for findings of fact to support the restitution order.

IV.

All we have is GameFly's unsupported estimate of its replacement costs. There is no evidence that fair market value would have been inadequate or difficult to determine. And the record contains no proof of the victim's actual loss. The district court abused its discretion by accepting GameFly's proffer of its losses because that amount represented the cost to purchase all new discs, rather than the discs' fair market value. And the Government failed to meet its burden of proving the disputed loss amount. We therefore vacate the order of restitution and remand for further factual findings consistent with this opinion.

VACATED AND REMANDED

UNITED STATES of America, Plaintiff-Appellee

v.

Oscar SOSA, Defendant-Appellant

No. 17-40460

United States Court of Appeals, Fifth Circuit.

FILED July 25, 2018

Background: Defendant was convicted in the United States District Court for the Southern District of Texas, Andrew S. Hanen, J., of bringing methamphetamine from Mexico into United States. Defendant appealed.

Holdings: The Court of Appeals, Gregg Costa, Circuit Judge, held that:

(1) trial court's error, in allowing government to introduce impermissible profiling testimony, was not plain;

(2) trial court's error, in allowing government to improperly bolster cooperating witnesses' credibility, was not plain; and

(3) Confrontation Clause violation did not occur.

Affirmed.

Jennifer Walker Elrod, Circuit Judge, filed concurring opinion.

1. Criminal Law ⚖1030(1)

The four significant hurdles of plain error review defendant must surmount to receive a new trial are: (1) there must be an error or defect, (2) the error must be clear or obvious, rather than subject to reasonable dispute, (3) the error must have affected the appellant's substantial rights, and (4) the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings.

2. Criminal Law ⚖474.5

Government introduced impermissible profiling testimony by having expert witness not only describe typical aspects and behavior of drug trafficking organization but also tell jury where defendant fit into that structure, in prosecution for bringing methamphetamine from Mexico into United States; testimony stepped well past fine but critical line between expert testimony concerning methods of operation unique to drug business and testimony comparing defendant's conduct to generic profile of drug courier. Fed. R. Evid. 704(b).

3. Criminal Law ⚖474.5

An expert witness may explain to a jury the mechanics of a drug trafficking organization; when stated in general terms, such testimony may help the jury understand the significance and implications of certain conduct, but the ultimate responsibility of linking a defendant's conduct with the typical characteristics of drug trafficking must be left to the jurors.

4. Criminal Law ⚖1036.6

Trial court's error, in allowing government to introduce impermissible profiling testimony by having expert witness not only describe typical aspects and behavior of drug trafficking organization but also tell jury where defendant fit into that structure, was not plain, in prosecution for bringing methamphetamine from Mexico into United States, although Drug Enforcement Administration (DEA) agent exceeded bounds of opinion testimony in identifying defendant as a drug trafficker; three co-conspirators also made that identification, documentary evidence provided some general corroboration of conspiracy cooperating witnesses described, and prosecutor did not remind jury of agent's improper testimony during closing argument. Fed. R. Evid. 704(b).

5. Criminal Law ⚖2098(5)

Government improperly bolstered cooperating witnesses' credibility, in prosecution for bringing methamphetamine from Mexico into United States; prosecutor did not just mention that plea deal required witness to testify truthfully but also elicited testimony that both prosecutor and judge had already determined that his testimony was truthful.

6. Criminal Law ⚖1037.1(2)

Trial court's error, in allowing government to improperly bolster cooperating witnesses' credibility, was not plain, in prosecution for bringing methamphetamine from Mexico into United States; reciprocal corroboration provided by three conspirators identifying defendant as fellow participant in their crime was likely much greater factor in jury's acceptance of that testimony than was the bolstering,

bolstering was not repeated during closing argument, and jury was instructed that it alone had to evaluate witness credibility.

7. Criminal Law ⚖662.8

Confrontation Clause violation did not occur when Drug Enforcement Administration (DEA) agent mentioned tip implicating defendant's mother, in prosecution for bringing methamphetamine from Mexico to United States; tip did not implicate defendant, it only mentioned defendant's mother, who was acknowledged participant in drug trafficking, and because jury's consideration of tip for its truth rather than as explanation of agent's actions would not have told it anything it did not already know, at a minimum it was not obvious that statement was offered for its truth. U.S. Const. Amend. 6.

8. Criminal Law ⚖662.8

The Confrontation Clause bars testimonial statements offered against the defendant when there has been no opportunity for cross-examination. U.S. Const. Amend. 6.

9. Criminal Law ⚖419(2), 662.8

There is not a hearsay or Confrontation Clause problem when the evidence is not being used for the truth of the matter asserted. U.S. Const. Amend. 6.

10. Criminal Law ⚖419(3)

Courts must be vigilant in ensuring that attempts to explain the officer's actions with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth; that danger is greatest for statements that implicate the defendant.

11. Criminal Law ⚖1186.1

"Cumulative error doctrine" provides that an aggregation of non-reversible errors, i.e., plain errors failing to necessitate reversal and harmless errors, can merit a new trial.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Texas, Andrew S. Hanen, U.S. District Judge

Jessica Carol Akins, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office Southern District of Texas, Houston, TX, for Plaintiff-Appellee.

Marjorie A. Meyers, Federal Public Defender, Kayla R. Gassmann, H. Michael Sokolow, Assistant Federal Public Defenders, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant.

Before ELROD, COSTA, and HO, Circuit Judges.

GREGG COSTA, Circuit Judge: *

Oscar Sosa was convicted of bringing methamphetamine from Mexico into the United States. Sosa argues that three errors he did not object to during his five-day trial rendered the proceeding unfair. Two of his claims—the prosecution's use of drug profiling evidence and bolstering of witnesses' credibility—are errors that we have repeatedly warned the government about. Troubled as we are by the continued use of these improper tactics, we do not find that Sosa has met his burden of showing that the errors substantially affected the outcome of the trial. *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). We also find no clear or obvious Confrontation Clause violation.

* Judge Ho concurs in the judgment only.

I.

The case against Sosa began with the arrest of two drug couriers, Juan Sarmiento and Jose Galvan, in Harlingen, Texas. A DEA task force received a tip about two suspicious subjects heading to a gas station that also served as a bus stop. Two sheriff's deputies and a DEA agent stopped Sarmiento and Galvan before they could board a bus and obtained consent to search their luggage and persons. The officers found six bundles of crystal meth sewn into the lining of Sarmiento's jacket and four bundles in Galvan's pockets. Galvan and Sarmiento were arrested and interviewed.

The two suspects gave conflicting statements about the origin of the drugs, but both said they were planning on taking the meth to a man named Oscar in Plant City, Florida. They also identified two women, "Betty" and "Patti," as the "owners or managers" of the narcotics. Police later identified those individuals as Patricia Sosa and Bertha Sosa, Oscar Sosa's mother and aunt, respectively, who lived in Mexico and supplied the drugs. The attempt to identify "Oscar" led investigators to Sosa. The investigation further revealed that Genaro Luera was connected to Patricia and Bertha because they were his wife's aunts.

The government argued that the conspiracy worked like this: (1) Patricia and Bertha obtained the drugs in Mexico; (2) Sosa and Luera hired couriers such as Galvan and Sarmiento to pick up the drugs from the U.S. side of the Texas-Mexico border and transport them to Florida; and (3) Sosa and Luera received the meth in Florida where they sold it.

Galvan, Sarmiento, and Luera all pleaded guilty and agreed to cooperate, which included testifying against Sosa. All three identified Oscar (both in-court and through a photo array) as a member of their drug trafficking organization. In addition to the testimony of these three cooperators, the government called DEA Agent Jason Bradford who testified as an expert on drug trafficking. A Customs and Border Patrol officer also testified about the various familial relationships. The jury convicted Sosa on both of the charged counts: possession with intent to distribute 50 grams or more of meth and conspiracy to commit that offense.

Sosa now challenges his conviction based on three alleged errors that he did not identify in the district court: first, that the government presented impermissible profiling evidence when the DEA agent linked the profile of a drug dealer to Sosa's behavior; second, that the government improperly bolstered the credibility of all three eyewitnesses; and third, that the government violated the Confrontation Clause when a DEA agent testified about a tipster's statements that inculpated Sosa's mother. Sosa also argues the conviction should be reversed based on the cumulative effect of the three errors, even if each error alone does not warrant reversal.

II.

[1] Because Sosa failed to object to this testimony, which might have eliminated the errors, he must surmount the significant hurdles of plain error review to receive a new trial. There are four of them: (1) there must be an "error or defect," (2) the error must be "clear or obvious, rather than subject to reasonable dispute," (3) the error "must have affected the appellant's substantial rights," and (4) the error must have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

A.

[2, 3] The first alleged error is that the government introduced impermissible profiling testimony by having the expert witness not only describe the typical aspects and behavior of a drug trafficking organization but also tell the jury where Sosa fit into that structure. An expert witness may explain to a jury the mechanics of a drug trafficking organization. *See United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010). When stated in general terms, such testimony may help the jury "understand the significance and implications of" certain conduct. *Id.*; *United States v. Medeles-Cab*, 754 F.3d 316, 321 (5th Cir. 2014). But the ultimate responsibility of linking a defendant's conduct with the typical characteristics of drug trafficking must be left to the jurors. *Gonzalez-Rodriguez*, 621 F.3d at 364. If the profile testimony itself makes that connection, then it crosses into the forbidden territory in which testimony with the "expert" imprimatur is allowed to opine on the ultimate issue of guilt which is for the "trier of fact alone." FED. R. EVID. 704(b); *Medeles-Cab*, 754 F.3d at 321.

Agent Bradford's testimony stepped well past the "fine but critical line" between "expert testimony concerning methods of operation unique to the drug business, and testimony comparing a defendant's conduct to the generic profile of a drug courier." *Gonzalez-Rodriguez*, 621 F.3d at 364. Bradford began with acceptable testimony describing the typical roles within a drug trafficking organization, such as the couriers, the wholesalers, and the distributors. But the testimony invaded the province of the jury when Bradford began matching those roles to individuals in the case, including the defendant, in this manner:

> [the Prosecution] - ... Can you kind of draw this drug trafficking organization with the players that you know from your investigation.
>
> [Agent Bradford] - ... All right. So, again, we're going to start off with the source of supply or transportation coordinator. Sometimes they're the same, sometimes they're different, okay?
>
> In this case, we recognize Patti and Bertha Sosa as filling those roles, okay? The investigation showed that an unknown man named Freddie LNU, meaning last name unknown, filled the role of the courier because he would take the drugs into the United States. Okay?
>
> Once it got to the United States, we had more couriers, okay? And you got to see them live and in person. That was Mr. Galvan and Mr. Sarmiento, okay? They went to a wholesaler, then the distributor who we will recognize as Mr. Oscar Sosa.
>
> Oscar had clients. That was Mr. Genaro Luera. And then Mr. Luera sold to, and this is unique, back to Mr. Galvan and other people. Okay?
>
> Mr. Luera also spoke about unknown other clients and customers that Mr. Sosa had, but he didn't have extensive knowledge of.

That alone would be impermissible. But the government went even further in eliciting testimony (via a leading question no less) that Sosa's specific behavior was "common of drug traffickers":

> [the Prosecution] - When you're looking at [Sosa's records] and you're not finding any assets—well, really, three things—not finding any assets in Mr. Sosa's name, is that somehow in fact indicative of—of some things that say, okay, you know what, it's kind of strange he doesn't have any assets in his name, that tells me what?
>
> [Agent Bradford] - Yes, we consider that conduct common of drug traffickers.

[the Prosecution] - And why is that?

[Agent Bradford] - Because they don't want to leave a trail for their assets.

Given the number of times we have found quite similar profile testimony improper, the above testimony was obvious error. *See, e.g., Gonzalez-Rodriguez*, 621 F.3d at 366 (finding obvious error when a law enforcement agent expressly linked a defendant's behavior with general profiling evidence to prove knowledge of the crime); *United States v. Vedia*, 288 F. App'x 941, 947–48 (5th Cir. 2008) (explaining that it was obvious error when an expert witness used "drug profiling" to imply that most drug couriers know that they are carrying drugs in their vehicle and thus the defendant likely knew he had drugs in his vehicle). The government, while not conceding error, at least ultimately recognized that the testimony was problematic in stating during oral argument that it "would not advise [its] prosecutors to do this again." Today's opinion, and the body of precedent it relies on that is filled with similar warnings, should add an exclamation point to that advice.

Even with egregious error, however, a defendant's failure to seek correction at trial means he must show "a reasonable probability that his trial would have come out differently." *Gonzalez-Rodriguez*, 621 F.3d at 367. This third requirement of plain-error review has prevented defendants from obtaining relief in most of the other cases involving improper drug profiling testimony. *See, e.g., Gonzalez-Rodriguez*, 621 F.3d at 367–68 (refusing to reverse improper use of profiling evidence despite obvious error because the witness's "ultimate opinion, although improper, was unlikely to have swayed the jury's conclusion."); *Vedia*, 288 F. App'x at 947–48 (finding a witness's drug profiling testimony an "error that is clear under current law" but refusing to reverse because "the jury had sufficient evidence to convict Vedia of possession with intent to distribute cocaine"); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 879 (5th Cir. 2003) (holding a DEA Agent's profiling evidence was "improper" but not sufficient to vacate the conviction on plain error review because there were curative jury instructions and sufficient other evidence "from which the jury could infer [the defendant's] guilt.").

[4] It does so once again. Although the DEA agent exceeded the bounds of opinion testimony in identifying Sosa as a drug trafficker, three co-conspirators also made that identification, and they are allowed to. None of the documentary evidence, which included money transfers and phone records, pinpointed Sosa's involvement, but it did provide some general corroboration of the conspiracy the cooperating witnesses described. Perhaps recognizing that the testimony of three co-conspirators is difficult to overcome especially when he bears the burden of showing prejudice, Sosa seeks to highlight inconsistencies among the three accounts. There are certainly some. But they are not so significant to convince us that the inadmissible profile testimony was likely the difference maker at trial. Nor did the prosecutor remind the jury of the agent's improper testimony during closing argument. Because Sosa is unable to prove prejudice, he is not entitled to a new trial.

B.

[5] That same obstacle to plain error correction also prevents us from granting Sosa relief on his second claim—that the government improperly bolstered the cooperators' credibility—even though it too has merit. The government contends there was no improper bolstering, emphasizing that it can introduce evidence of a cooperator's plea agreement and let the jury know that truthful testimony is a requirement of

that agreement. *See United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989) ("Admission of a plea agreement wherein the witness has agreed to testify truthfully or face prosecution for perjury is not impermissible bolstering of the witness."). But that is not the extent of Sosa's complaint. He invokes the principle that prosecutors are not permitted to bolster a witness's credibility by implying that the prosecutor, or even worse the neutral judge, has determined the testimony to be truthful. *See United States v. Gracia*, 522 F.3d 597, 601 (5th Cir. 2008) ("[A] personal assertion by a prosecutor of a government witness's credibility is impermissible.").

That is what happened here. The most glaring example involved Sarmiento's testimony. The prosecutor did not just mention that the plea deal required Sarmiento to testify truthfully, but also elicited testimony that both the prosecutor and the judge had already determined that his testimony was truthful. This serious error occurred because unlike the usual situation when a cooperating codefendant is still pending sentencing when he testifies, Sarmiento already had been sentenced. This is how the prosecutor used the reduction for substantial assistance the court had already awarded Sarmiento:

> Q. Okay. So the deal between you and I was tell the truth and you'll get a favorable sentencing recommendation; is that right?
>
> A. Yes.
>
> Q. *And you told the truth* and I recommended to Judge Hanen that you get a third off your sentence?
>
> A. Yes.
>
> Q. And Judge Hanen gave you 80 months?
>
> A. Yes.
>
> Q. And so you did get a reduction on your sentence?
>
> A. Yes.
>
> Q. *And so you're now here in front of the jury and you're keeping up your end of the deal.* And what was your end of the deal?
>
> A. To cooperate.
>
> Q. And to what?
>
> A. Say the truth.
>
> Q. Tell the truth. And no other promises, no other deals, no other hopes, other than please don't get me killed in prison?
>
> A. Yes.

(emphasis added).

This problem repeated itself when Galvan testified. The prosecutor again highlighted that the same judge presiding over Sosa's trial had already given the witness a one-third reduction from his Guidelines range when the only basis for doing so was Galvan's honoring his agreement to "testify truthfully."

The final cooperating witness to testify, Luera, had not yet been sentenced. So although the prosecutor discussed with him *ad nauseam* the need to tell the truth, any bolstering did not involve this greater danger of telling the jury that the one neutral party in the trial—the judge—had endorsed the credibility of a key government witness.

Because the questioning of at least Sarmiento and Galvan put the prosecutor's and judge's stamp of approval on their credibility, improper bolstering occurred. *See United States v. Young*, 470 U.S. 1, 18–19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (explaining that a problem with bolstering is that a prosecutor's opinion of a witness's credibility "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence"); *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999) (noting it is improper for the government to "invoke[ ] the aegis of governmental imprimatur");

United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir. 2007) (recognizing improper vouching when a witness "agreed with the prosecutor's suggestion that the prosecutors and the judge in other trials believed he testified truthfully, and that if he had 'lied, given false testimony at those trials,' he would not have been given a reduction in his sentence"); *United States v. Francis*, 170 F.3d 546, 550–51 (6th Cir. 1999) (finding improper bolstering when the prosecutor elicited testimony suggesting that a plea agreement only materialized after the government determined the witness's statements to be truthful).

[6] But we need not decide whether this error was an obvious one under our case law, which addresses improper bolstering of law enforcement witnesses (not co-conspirators) during closing argument (not witness examination).[2] *See, e.g., United States v. Aguilar*, 645 F.3d 319, 323–26 (5th Cir. 2011); *United States v. Raney*, 633 F.3d 385, 395 (5th Cir. 2011) (per curiam); *Gracia*, 522 F.3d at 600. Even assuming Sosa clears the first two hurdles of plain error review, he again cannot show that the improper bolstering affected his substantial rights. As we have discussed, the testimony of three cooperating witnesses presented a strong case of guilt even in light of some inconsistencies in their testimony. In one sense this may make the bolstering more prejudicial because it resulted in the endorsed credibility of the key testimony. On the other hand, the reciprocal corroboration provided by three conspirators identifying Sosa as a fellow participant in their crime was likely a much greater factor in the jury's acceptance of that testimony than was the bolstering. The prejudice inquiry thus is a close call, but that does not get Sosa where he needs to be as he has the burden of demonstrating a reasonable likelihood that the bolstering influenced the verdict. *Molina-Martinez v. United States*, —— U.S. ——, 136 S.Ct. 1338, 1348–49, 194 L.Ed.2d 444 (2016) (recognizing that the defendant bears the burden of establishing prejudice on plain error review and noting that a "remand for retrial" poses greater "difficulties" than a remand for resentencing). Additional obstacles to clearing that hurdle are that the bolstering was not repeated during closing argument when it can be most potent and the jury was instructed that it "alone must evaluate witness credibility." *Ramirez-Velasquez*, 322 F.3d at 875 (citing this jury instruction and whether the bolstering "permeate[d] the entire atmosphere of the trial" as factors in assessing the impact of bolstering (quoting *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir. 1989))). We conclude Sosa has not established that the bolstering substantially affected the outcome.

C.

[7] Sosa also argues that a Confrontation Clause violation occurred when Agent Bradford mentioned a tip implicating Patricia Sosa. Bradford was asked how the DEA determined that Patricia Sosa was involved in dealing drugs from Mexico. He explained that he was contacted by the Houston DEA office, which had received an automated alert that other agents were investigating the name "Patricia Sosa." Bradford stated that the two offices determined they were investigating the same Patricia Sosa and that an undercover agent had confirmed that Patricia was looking for couriers to transport drugs from Mexico into the Houston area.

[8–10] The Confrontation Clause bars testimonial statements offered against the defendant when there has been no oppor-

2. Supreme Court law on bolstering also addresses it in the context of closing argument. *See Young*, 470 U.S. at 18–19, 105 S.Ct. 1038.

tunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68–69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But as every student taking Evidence quickly learns, there is not a hearsay or confrontation problem when the evidence is not being used for the truth of the matter asserted. *Williams v. Illinois*, 567 U.S. 50, 70, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). One example of that is when a law enforcement tip is introduced to explain why an officer took investigatory steps. *See United States v. Smith*, 822 F.3d 755, 761–62 (5th Cir 2016); *United States v. Carrillo*, 20 F.3d 617, 619–20 (5th Cir. 1994). As we recently recognized, courts must be vigilant in ensuring that these attempts to "explain the officer's actions" with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth. *United States v. Kizzee*, 877 F.3d 650, 659 (5th Cir. 2017) (explaining that absent a defense challenge to the adequacy of the investigation, "there is a questionable need for presenting [these] out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial"). That danger is greatest for statements that implicate the defendant. *Id.* at 659 (citing *Taylor v. Cain*, 545 F.3d 327, 335 (5th Cir. 2008); *United States v. Johnston*, 127 F.3d 380, 394 (5th Cir. 1997)). The tip Bradford recounted did not. It only mentioned Patricia Sosa, who was an acknowledged participant in the drug trafficking. Because the jury's considering the tip for its truth rather than as an explanation of the agent's actions would not have told it anything it did not already know, at a minimum it was not obvious that this statement was offered for its truth. As a result, there was no clear Confrontation Clause violation.

D.

[11] Sosa argues that even if he does not prevail on his individual claims, a new trial is warranted due to cumulative error. This doctrine provides that "an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors)" can merit a new trial. *United States v. Delgado*, 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc). We do not find that this case is one of the "rare instances" when reversal for cumulative error is appropriate. *Id.* at 344.

* * *

Today's outcome is the same as many of our prior decisions addressing drug profiling testimony and bolstering of witnesses: we find that the government engaged in misconduct but nonetheless conclude the defendant cannot meet the heavy burden of obtaining reversal for error he did not object to during trial. If the ultimate end of prosecution is securing convictions, it may not be surprising that this trend has not deterred these improper trial tactics. Of course, winning is not supposed to be a prosecutor's lodestar. Striking "hard blows" but not "foul ones" in pursuit of justice is. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Fidelity to that higher calling would prevent us from seeing these errors yet again.

JENNIFER WALKER ELROD, Circuit Judge, concurring:

I write separately to emphasize that I do not condone the prosecutorial misconduct here and, as the Supreme Court has suggested we should, continue to discourage it. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n.23, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (Rehnquist, J.) ("We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it.").

The prosecutor's decision to invoke the imprimatur of the court in its efforts to persuade was no doubt improper. We have repeatedly admonished the government about the impropriety of the type of prosecutorial comments and profiling testimony used here. Yet it appears the government has again ignored our previous admonishments. *See United States v. Bowen*, 818 F.3d 179, 191 (5th Cir. 2016) ("We have repeatedly chastised federal prosecutors for making improper remarks in closing arguments ...." (quoting *United States v. Rodriguez-Lopez*, 756 F.3d 422, 433 (5th Cir. 2014))); *United States v. Aguilar*, 645 F.3d 319, 324 (5th Cir. 2011) (recounting that "the government has been cautioned repeatedly by this court against making such arguments, yet we continue to face them on appeal" (quoting *United States v. Raney*, 633 F.3d 385, 395 (5th Cir. 2011))); *United States v. McCann*, 613 F.3d 486, 496 (5th Cir. 2010) (holding that it was improper to make a "largely emotional appeal" to jurors that the officers should be believed because of their status as officers); *United States v. Pittman*, 401 F. App'x 895, 899 (5th Cir. 2010) (concluding that there was improper bolstering where the prosecutor stated that the agents were "just doing their job" and had no reason to lie); *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366 (5th Cir. 2010) (describing improper profile testimony as "over the line"); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 879 (5th Cir. 2003) ("The government goes too far in soliciting the functional equivalent of an opinion ...."); *United States v. Gallardo-Trapero*, 185 F.3d 307, 319–21 (5th Cir. 1999) (stating that it is improper to invoke "the aegis of a governmental imprimatur" to bolster witness credibility).

I am reminded of Justice Jackson's famous charge to the federal prosecutor that "[o]nly by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor." Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys in Washington, D.C. (Apr. 1, 1940), *in* 24 J. Am. Jud. Soc'y 18, June 1940, at 18–20. "[T]he United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

Mark Anthony FORNESA; Ricardo Fornesa, Jr., Plaintiffs-Appellants

v.

FIFTH THIRD MORTGAGE COMPANY, also known as Fifth Third Bank, Defendant-Appellee

Mark Anthony Fornesa; Ricardo Fornesa, Jr., Plaintiffs-Appellants

v.

Fifth Third Mortgage Company, Defendant-Appellee

No. 17-20324
Summary Calendar

United States Court of Appeals, Fifth Circuit.

Filed July 27, 2018

Background: Chapter 13 debtor and his son sued bank for foreclosing on real prop-