

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JOHN XAVIER PORTILLO, also known as John Portillo, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Whether the initial appearance before a Magistrate after the right to counsel has attached is a critical stage of the proceeding under the Sixth Amendment requiring the provision of counsel for the accused.

## **PARTIES TO THE PROCEEDING**

The Petitioner is John Xavier Portillo, the defendant and defendant-appellant in the courts below. The Respondent is the United States of America, the plaintiff and plaintiff-appellee in the courts below

## TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS BELOW.....	3
JURISDICTION.....	3
CONSTITUTIONAL PROVISION INVOLVED.....	3
STATEMENT OF THE CASE.....	3
1.    Statement of Facts.....	3
2.    Statement of Jurisdiction in Court of First Instance.....	5
3.    Proceedings Below.....	5
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	13
APPENDIX A:    Opinion of the United States Court of Appeals for the Fifth Circuit, reported at 969 F. 3d 144 (August 5, 2020).....	001A
APPENDIX B:    Order of the United States Court of Appeals for the Fifth Circuit on Petition for Panel Rehearing, dated September 1, 2020.....	056A
APPENDIX C:    Judgment in a Criminal Case, United States District Court, Western District of Texas, dated October 3, 2018.....	057A
APPENDIX D:    Transcript of Initial Appearance Hearing, January 6, 2016.065A	
APPENDIX E:    Sixth Amendment.....	084A
APPENDIX F:    Rule 5, Federal Rules of Criminal Procedure.....	085A

## TABLE OF AUTHORITIES

### CASES

<i>Brewer v. Williams</i> , 430 U.S. 387 (1977).....	2
<i>Douglas v. California</i> , 372 U.S. 353 (1963).....	9
<i>Estelle v. Smith</i> , 451 U.S. 454 (1981).....	9
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	8
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	8
<i>Kirby v. Illinois</i> , 400 U.S. 689(1972).....	2,12
<i>Massiah v. United States</i> , 377 U.S. 201 (1964).....	12
<i>McAfee v. Thaler</i> , 630 F. 3d 383 (5 <sup>th</sup> Cir. 2011).....	6
<i>Mempa v. Rhay</i> , 389 U.S. 128 (1967).....	8, 9
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932).....	7,9
<i>Rothgery v. Gillespie County</i> , 554 U.S. 191(2008).....	2,9
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	7
<i>United States v. Ash</i> , 413 U.S. 300 (1973).....	8, 12
<i>United States v. Cronic</i> , 466 U.S. 648 (1984).....	7
<i>United States v. Gouveia</i> , 467 U.S. 180 (1984).....	2,7
<i>United States v. Wade</i> , 388 U.S. 218 (1967) .....	9
<i>White v. Maryland</i> , 373 U.S. 59 (1963).....	9

### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. VI.....	3,7
18 U.S.C. § 1254(1).....	3
18 U.S.C. § 1291.....	5
18 U.S.C. § 3742.....	5

18 U.S.C. § 3231.....	5
Rule 5, Federal Rules of Criminal Procedure.....	10,12

## OTHER AUTHORITIES

American Bar Association Standards for the Defense Function, Standard 4-1.2 Functions and Duties of Defense Counsel.....	11
Rhea Kemble Brecher, <i>The Sixth Amendment and the Right to Counsel</i> , 136 U. Pa. L. Rev. 1957.....	7
Jonathon G. Neal, <i>Critical Stage: Extending the Right to Counsel to the Motion for New Trial Phase</i> , 45 WM. & MARY L. REV. 783 (2003).....	8
Walter V. Schaefer, <i>Federalism and State Criminal Procedure</i> , 70 HARV. L. REV. 1 (1956).....	1

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner John Xavier Portillo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

**INTRODUCTION**

The Sixth Amendment guarantees to right to counsel to an accused person in a criminal proceeding. “[T]he right to counsel...means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him-‘whether by way of formal charge, preliminary hearing,

indictment, information, or arraignment.”” *Brewer v. Williams*, 430 U.S. 387, 398 (1977)(quoting *Kirby v. Illinois*, 400 U.S. 689(1972)).

It is well settled that the Sixth Amendment right to counsel attaches upon the commencement of a criminal proceeding, including, for example, the return of an indictment. *Rothgery v. Gillespie County*, 554 U.S. 191,198(2008)(quoting *United States v. Gouveia*, 467 U.S. 180,188 (1984)). In *Rothgery*, this Court affirmed that the Sixth Amendment right to counsel attached at an initial appearance (under Texas state practice) proceeding before a magistrate. Not addressed was the question of whether an initial appearance constituted a “critical stage” of the proceedings under the Sixth Amendment so that the accused is entitled to the presence of appointed counsel. *Id.*

Petitioner complained in the United States Court of Appeals for the Fifth Circuit that he was denied his right to counsel guaranteed by the Sixth Amendment when he was not provided counsel at the time of his initial appearance before a magistrate judge following his arrest after return of the indictment.

The Court of Appeals concluded, in part, that Petitioner had not shown a deprivation of his Sixth Amendment right for the reason that the initial appearance was not a “critical stage” at which an accused person is entitled to be represented by counsel.

## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 969 F. 3d 144 (5<sup>th</sup> Cir. 2020). App. 001A.

## **JURISDICTION**

The Court of Appeals entered its judgment on August 5, 2020. App. 001A. Petitioner timely filed a Petition for Panel Rehearing in the Court of Appeals on August 19, 2020. The Court of Appeals entered an Order denying the Petition for Rehearing on September 1, 2020. App. 056A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. App. 084A.

## **STATEMENT OF THE CASE**

### 1. Statement of Facts:

Upon his arrest at the commencement of this case, John Portillo was taken before a United States Magistrate for his initial appearance pursuant to Rule 5, Federal Rules of Criminal Procedure. App.065A; App. 085A. At this point in the proceedings he had been indicted. He had the right to counsel under the Sixth Amendment. He was not represented by counsel at the initial appearance. App. 065A

He was not notified that he had the right to counsel at the initial appearance. The reference to the right to counsel did not inform Portillo that he had the right to have counsel present and participating during the initial appearance. App. 074A. The Initial Appearance in this case took place on January 6, 2016. App. 065A. The court explained to Mr. Portillo the nature of the charges set forth in the indictment. App. 069A-070A. The court inquired of Mr. Portillo as to whether he understood the nature of the legal charges against him and ascertained that he did so understand the indictment. App. 070A-071A. The court then reviewed the range of punishment and made sure that Portillo understood the possible penalties. App. 071A-072A. The court explained Portillo's constitutional rights and inquired of Portillo whether he understood his rights. The court inquired as to counsel and Portillo verified that he had hired Jay Norton (a lawyer who was later disqualified due to conflicts of interest). App. 075A. Norton was not present at the Initial Appearance. App. 065A. With respect to pretrial release, the court noted that the Government had filed a motion for detention and announced a hearing date for that motion. App. 080A. Finally, the court inquired of Portillo whether he understood what had taken place and he stated that he did. App. 081A. Portillo did have a question about the proceedings which the court answered:

THE COURT: Any questions?

DEFENDANT PORTILLO: No.

THE COURT: Mr. Forster --

DEFENDANT PORTILLO: Well, yes, I do. You said I have a hearing on the 11th?

THE COURT: Yes, sir.

DEFENDANT PORTILLO: And it will be for what?

THE COURT: It's a detention hearing and an arraignment. The arraignment is basically a taking of your not guilty plea on the indictment. The detention hearing will be to determine whether you can be released on bond in this case. App. 081A.

2. Statement of Jurisdiction in Court of First Instance:

The district court had jurisdiction of this criminal proceeding for offenses against the laws of the United States under 18 U.S.C. § 3231.

3. Proceedings Below:

The case was tried before a jury. App. 008A On May 17, 2018, the jury returned a verdict of guilty on each of the Thirteen counts in the Fourth Superseding Indictment. App. 008A. On September 24, 2018, Appellant was sentenced by the district court to two life sentences to run consecutively plus twenty years. App. 057A. The “Judgment in a Criminal Case” was signed on October 3, 2018. App. 057A. The Judgment was a final decision of the district court disposing of all issues and parties in the case. Federal Rule of Appellate Procedure 4(b)(A)(1) requires that the Notice of Appeal be filed within 14 days of the entry of judgment. Notice of appeal was timely filed on September 25, 2018. The Court of Appeals had jurisdiction of the appeal from a final judgment of the District Court under 28 U.S.C. § 1291 and to review the sentence imposed by the district court under 18 U.S.C. § 3742.

Petitioner raised his complaint about denial of his right to counsel on appeal. The Court of Appeals concluded that Petitioner had not established a denial of his right to counsel because the initial appearance before a magistrate was not a “critical stage” of the proceedings against him. App. 011A. As a result, although the right to counsel had attached based on the return of the indictment, he was not entitled to a lawyer during the proceeding:

Portillo’s initial appearance bears none of the markings of a critical stage. During the hearing, the magistrate judge briefly recited the facts of the indictment, the maximum penalties Portillo faced, and the government’s intent to detain him without bond pending trial. The magistrate repeatedly warned Portillo not to “talk about the facts” of his case and confirmed that Portillo intended to hire his own attorney. Portillo was not forced to make any potentially incriminating statements that could jeopardize his defense, and he was not asked to make strategic decisions about his case. In short, Portillo’s initial hearing did not pose the kind of difficult circumstances that “require[] aid in coping with legal problems or assistance in meeting [a defendant’s] adversary.” *McAfee v. Thaler*, 630 F. 3d 383, 391 (5<sup>th</sup> Cir. 2011)(citation omitted).

App. 011A.

### **REASONS FOR GRANTING THE WRIT**

The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The initial appearance before a magistrate following the commencement of criminal proceedings is a critical stage at which counsel should be provided for the accused.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Amendment's first phrase, “[i]n all criminal prosecutions,” indicates that “Sixth Amendment rights commence only at the initiation of an adversary proceeding, be it by indictment, arraignment, or criminal complaint.” Rhea Kemble Brecher, *The Sixth Amendment and the Right to Counsel*, 136 U. Pa. L. Rev. 1957, 1957 (1988). The initial inquiry is whether the prosecution of a crime has commenced. It has been decided that the return of an indictment by a grand jury constitutes the commencement of a criminal prosecution for purposes of the Sixth Amendment. *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

Inherent in the idea of the adversarial system is the notion that both sides ought to be zealously represented. *United States v. Cronic*, 466 U.S. 648, 656 (1984) (“[t]he right to effective assistance of counsel is this the right to the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard

would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956), cited in Jonathon G. Neal, *Critical Stage: Extending the Right to Counsel to the Motion for New Trial Phase*, 45 WM. & MARY L. REV. 783, 803 (2003). The significance of the right to counsel is recognized in this Court’s decisions. In *Gideon v. Wainwright*, this Court stated:

[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. 372 U.S. 335, 344 (1963).

This Court has held that criminal defendants have a Sixth Amendment right to effective assistance of counsel at every “critical stage” of prosecution. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Critical stages of the prosecution include every stage of the prosecution which implicates substantial rights of the accused. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). Whether a period is a critical stage of the prosecution turns on whether, at the time in issue, “the accused required aid in coping with legal problems or assistance in meeting his adversary. *United States v. Ash*, 413

U.S. 300, 313 (1973). Stages found to be “critical” for the right to counsel analysis, include: psychiatric interview (*Estelle v. Smith*, 451 U.S. 454, 471 (1981)); sentencing (*Mempa v. Rhay*, 389 U.S. at 128); pretrial lineup (*United States v. Wade*, 388 U.S. 218 (1967)); preliminary hearings (*White v. Maryland*, 373 U.S. 59 (1963)(the character of the preliminary hearing in case was similar to an arraignment); and direct appeals of right. (*Douglas v. California*, 372 U.S. 353 (1963)).

In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), this Court discussed the importance of the right to assistance of counsel, stating:

The right to be heard would be, in many cases, of little avail of it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman...is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put to trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. *Id.*

In *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), this Court addressed the right to counsel at an initial appearance: “[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Id.* *Rothgery* addressed the question of attachment of the right. It left open, the question of whether an initial

appearance before a judicial officer was a “critical stage” under a Sixth Amendment analysis requiring the presence of counsel.

The Initial Appearance procedure followed in this case is prescribed by Rule 5 of the Federal Rules of Criminal Procedure. App. 085A. Rule 5 requires that “a person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge... *Id.* The procedure prescribed in Rule 5 is of constitutional import. Subsection (d), entitled “Procedure in a Felony Case” provides in paragraph (1), entitled “Advice”:

- (1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:
  - (A) the complaint against the defendant, and any affidavit filed with it;
  - (B) the defendant’s right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;
  - (C) the circumstances, if any, under which the defendant may secure pretrial release;
  - (D) any right to a preliminary hearing;
  - (E) the defendant’s right not to make a statement, and that any statement made may be used against the defendant; and
  - (F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant’s country of nationality that the defendant has been arrested—but that even without the defendant’s request, a treaty or other international agreement may require consular notification.

The judicial officer is required to notify the accused, among other things, of the nature and cause of the accusation against him, the right to counsel, and the privilege

against self-incrimination. The rule requires the court to notify the accused of certain rights guaranteed under the Bill of Rights (Fifth and Sixth Amendments). In addition, section (d)(2), requires that the “judge must allow the defendant reasonable opportunity to consult with counsel. App. 085A. This “opportunity” is meaningless if the defendant has no counsel.

In this particular case, the careful magistrate judge went beyond the requirements of Rule 5 in his admonishments to the unrepresented Petitioner. As the Court of Appeals recognized: [t]he magistrate repeatedly warned Portillo not to ‘talk about the facts’ of his case...” App. 011A. This is not required. Certainly not every arrested person receives such advice, as it is not required by Rule 5. Actually, it is not the role of the neutral and detached magistrate, to provide such legal advice to an accused person, rather, that is something that legal counsel may or may not advise his or her client, following consultation and an assessment of the client’s legal situation. Counsel may make a determination that it would be in the client’s interest to make a statement or talk about the facts. The American Bar Association Standards for the Defense Function, Standard 4-1.2 Functions and Duties of Defense Counsel, provides in paragraph (a):

(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

In this case, the court stepped outside its function and played the part of the defense function. While this was clearly done with the best of intentions, the court should not have been put in the position of assuming a defense function. There should have been a defense counsel for the accused present and able to advise the accused as to how to proceed. The Court of Appeals assumed in its opinion that “Portillo’s initial hearing did not pose the kind of difficult circumstances that ‘require[] aid in coping with legal problems or assistance in meeting [a defendant’s] adversary.’” App. 011A. Simply because the initial appearance is deemed routine, does not mean that it lacks importance-this is the very first interaction between the accused and the tribunal that will determine his fate. It is the time “that a defendant finds himself faced with the prosecutorial forces of organized society. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). This alone should render it critical.

Under the Sixth Amendment, a defendant is entitled to legal representation at a critical stage of a criminal proceeding. *See e.g. Massiah v. United States*, 377 U.S. 201, 205 (1964). This Court’s implementation of the Sixth Amendment right reflects “the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system.” *United States v. Ash*, 413 U.S. 300, 307 (1973). In order to ensure the full protections of the Sixth Amendment be provided equally and without regard to a person’s financial resources, counsel should be made available to all persons facing a Rule 5 Initial Appearance following

their indictment on felony charges. This opportunity was not afforded to Petitioner. The Court of Appeals' decision that he was not entitled to counsel was erroneous and should be overturned.

## **CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

August 5, 2020

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOHN XAVIER PORTILLO, also known as John Portillo; JEFFREY FAY PIKE, also known as Jeffrey Pike, also known as Jeffrey F. Pike,

Defendants - Appellants

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Appeals from the United States District Court  
for the Western District of Texas

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Before SMITH, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

In 2018, following a three-month-long jury trial, defendants-appellants Jeffrey Pike and John Portillo were convicted of multiple counts related to a RICO conspiracy. Their convictions arise out of their positions as high-ranking officials with the Bandidos Outlaws Motorcycle Club, a “one-percent” motorcycle club with deep roots in Texas. In this direct appeal, they urge a variety of errors related to the district court’s pretrial procedures, the admissibility of certain evidence, and the sufficiency of the evidence. For the following reasons, we AFFIRM.

**APPENDIX A**

No. 18-50793

## **I. General Factual Background**

We begin with an overview of the evidence presented at trial, recounting the facts in the light most favorable to the jury’s verdict. *See United States v. Mahmood*, 820 F.3d 177, 181–82 (5th Cir. 2016).

### **A. The Bandidos Outlaws Motorcycle Club**

The Bandidos Outlaws Motorcycle Club (“Bandidos”) is an international motorcycle club with approximately 1100 members worldwide. Members of the club describe it as a “one percent” motorcycle club—a designation that signifies loyalty, brotherhood, and commitment. According to Special Agent Scott Schuster, the government’s expert witness, the “one percent” classification is a way for the Bandidos to “brand[] themselves as . . . outlaw[s].” Johnny Romo, a member of the Bandidos, explained at trial that the “one percent” term means that “we’re above all the other clubs.” Though there are other one-percent motorcycle clubs in the country, the Bandidos consider themselves “the most dominant.”

The Bandidos use a variety of symbols to identify themselves to one another and to outsiders. Members of the club wear a three-piece patch, which includes an emblem of a cartoon character known as “the fat Mexican.” In the emblem, the character is depicted holding a semi-automatic pistol and a machete. The bottom section of the patch, known as the “bottom rocker,” identifies “the territory that [each] Bandido is going to claim.” In Texas, for example, the bottom rocker indicates that a member belongs to a Texas-based chapter. The Bandidos closely guard the integrity of the bottom rocker, and only allow full members of the club to wear the three-piece patch. Before becoming an official member, prospects can join support clubs, which are “a stepping stone to get closer to the Bandidos.” Once an individual becomes a full member, he has “patched in.”

No. 18-50793

Though the Bandidos have chapters across the world, the club has a particularly strong presence in Texas. The club was founded in March 1966 in San Leon, Texas. At the time of trial, there were between 35 and 40 Bandidos chapters in Texas, with about 400 Bandidos members statewide. The Bandidos is the only major one-percent motorcycle club in Texas.

The Bandidos maintain a highly-organized management structure. Several national officers are responsible for organizing regular events, including an annual summer run and a spring birthday run. Local chapters are self-governing and largely autonomous, though they are required to pay dues to the national office to support the cost of the group's events. The national office includes a President, Vice President, Secretary, Treasurer, and several Sergeants-at-Arms. In addition to organizing events, national officers control the selection and distribution of patches. Patches are often distributed to acknowledge a member's sacrifices on behalf of the club.

Jeffrey Pike served as national President of the Bandidos from 2005 until 2016. Pike assumed this role after the group's former President, George Wegers, pleaded guilty to a RICO conspiracy. According to Schuster, the Bandidos President, also known as El Presidente, has "full authority to make decisions on a day-to-day basis." Some members of the Bandidos refer to the President's role as a "dictatorship." Pike disputes this characterization, and testified that the "individual chapters run themselves." Pike also testified that it was his goal as President to make the group "more mainstream" and "more family oriented" than it had been under Wegers's leadership.

In 2002, John Portillo was promoted from local chapter president of the San Antonio Bandidos chapter to national Sergeant-at-Arms. In that position, Portillo was responsible for protecting the group's national officers and managing relationships between local chapters and rival clubs. Pike selected Portillo as National Vice President, or El Vice Presidente, in 2013. Schuster

No. 18-50793

testified that the Vice President's "purpose" was to provide the President "with plausible deniability." In one recorded conversation introduced at trial, Portillo explained that he thought of himself as "Jeff's guy." "I'm here to protect [Pike] . . . I'm gonna protect [him] from the fuckin bullshit that's going on." In another wiretapped conversation, Portillo was recorded explaining that he "don't make no majors without [Pike] knowing about it."

### **B. Murder of Robert Lara**

In 2001, Jay Negrete, a member of the San Antonio Bandidos chapter, was shot and killed. At the time of Negrete's death, Portillo was president of Negrete's local chapter. Magenta Winans learned that Robert Lara was responsible for the killing, and she reported the tip to the club. Portillo instructed a group of Bandidos members, including Richard Merla, to "take care of" Lara. Merla and several other Bandidos lured Lara to a park, where they were told to wait for Portillo to give them the order to kill Lara. Once they got the order, they shot Lara at least twelve times. They did not stay on the scene to see if Lara was "moving or if he was dead or alive." They got back in their truck and drove to the home of Portillo's brother, who was a member of a Bandidos support club. Lara was later found dead by the police.

When Merla next spoke with Portillo, Portillo told him that he could never talk about Lara's murder. Merla gave Portillo the gun used to shoot Lara, and Portillo burned it with a torch. Merla and the other Bandidos were awarded "Expect No Mercy patches," which were intended to honor members who "drew blood or shed blood for the club."

### **C. Murder of Anthony Benesh**

In 2005, Anthony Benesh and his friend Carl Michael Burford decided that they wanted to start the first Hell's Angels chapter in Texas. Hell's Angels, another one-percent motorcycle club, had chapters across the United States, but not in Texas. Benesh got a Hell's Angels tattoo on his back, painted his

No. 18-50793

motorcycle red and white, and began wearing a motorcycle vest and jacket with an emblem that matched his tattoo. The patch on his vest identified him as “Vice President” of the Hell’s Angels.

Burford testified that he traveled to Arizona to meet with Sonny Barger, the national president of the Hell’s Angels, to get approval to start a Texas chapter. Barger denied this account, claiming that he would not have had the authority to approve a new Hell’s Angels chapter. Benesh and Burford’s actions quickly provoked anger from the Bandidos. Burford tried to avoid conflict by limiting his use of the Hell’s Angels vest, but Benesh regularly wore his patch around Austin. Adrianna Faircloth, Benesh’s girlfriend, testified that Benesh started receiving threatening calls about his display of the Hell’s Angels patch.

Johnny Romo, a Bandidos member, testified that he learned about Benesh from Portillo. Portillo told him that there were two Hell’s Angels “riding their bikes” in Austin. He explained that members of the local Austin chapter had “tried everything” to fix the problem, including “threats, intimidation, [and] fear.” At the time, Portillo and Johnny were both Sergeants-at-Arms for the Bandidos national office. Portillo told Johnny that Pike had personally directed them to “take . . . out” Benesh and Burford. Johnny testified that Portillo told him “This came from Jeff Pike, we need to take them out.” Johnny interpreted this order to mean that Portillo and Pike wanted him to “kill [Benesh], murder, to get rid of him.” Johnny explained that the club wanted to stop Benesh and Burford because there “shouldn’t be no other one percenters but the Bandidos in Texas.”

Johnny testified that Portillo told him to assemble a group of Bandidos members and go to Austin. Johnny picked a few people he trusted to accompany him, including Robbie Romo, his brother. At the time, Robbie was a prospective member of the Bandidos who had not yet “patched in.”

No. 18-50793

The day before the murder, Johnny and the other men drove from San Antonio to Austin to look for Benesh. They stayed outside Benesh's house until dusk, and then drove home to San Antonio. They returned to Austin the following day, and Robbie brought a rifle with him. They drove to Benesh's house, waited until he exited, then followed him and his family to a restaurant, where they parked outside. About an hour later, Johnny saw Benesh coming out of the restaurant and alerted Robbie. Robbie got his rifle ready by positioning it outside of the passenger's side window, aimed it at the driver's side of Benesh's truck, and shot the back of Benesh's head. Benesh was dead when the police arrived. Faircloth, Benesh's girlfriend, told the officers that she had warned Benesh "not to set up a Hell's Angel's chapter here." Johnny and the crew quickly fled the scene and immediately called Portillo from a pay phone to tell him "it's . . . done."

When Johnny saw Pike a few months later, Pike gave him a hug and a kiss and told him that he was "very proud" of him. After the murder, Robbie, who was a prospect at the time of the shooting, was allowed to "patch[] in early." Johnny was permitted to start an "underground chapter" of the Bandidos, the "Fat Mexican Crew," which answered directly to Pike. Johnny and the crew also received Expect No Mercy patches.

#### **D. Rivalry with the Cossacks**

The Cossacks are a motorcycle club based in North Texas. In 2014, Pike gave the Cossacks permission to add a Texas bottom rocker symbol to their patch. Pike believed this was a "natural transition for the club," and he hoped that the gesture would "open[] a line of communication between the two clubs." Eventually, however, the Bandidos became concerned that the Cossacks were displaying the bottom rocker in a "disrespectful" manner. Portillo told Johnny, "We're not going to fuck around with them Cossacks, dude, it's on." Justin Forster testified that he heard Portillo tell Pike that the group had to "do what

No. 18-50793

we got to do” to deal with the Cossacks. Pike responded, “Whatever y’all do, just be careful.”

At trial, the government introduced evidence pertaining to several violent altercations between the Cossacks and the Bandidos.

- **Fort Worth, December 2014:** The Bandidos attacked Cossacks members at a Fort Worth bar using guns, clubs, and flashlights. During the attack, they took one man outside and shot and killed him. In a recorded call between Romo and Portillo after the incident, Portillo explained that the Bandidos were “at war with these mother fuckers.”
- **Palo Pinto County, March 2015:** Arthur David Young, a member of the Cossacks, was at a gas station when he was approached by a group of Bandidos in a black car. When he refused to remove his vest, they hit him repeatedly in the head with a hammer.
- **Port Aransas, August 2015:** A group of Bandidos attacked several Cossacks members and their wives with beer bottles, knives, and other weapons. After the incident, Portillo was recorded saying that Pike “knows a little bit about it.”

#### **E. Trial and Sentencing**

Following the government’s fourth superseding indictment, a grand jury in the Western District of Texas returned a true bill charging Pike and Portillo with the following thirteen counts:

- **Count One:** RICO Conspiracy, 18 U.S.C. § 1962(d) (Portillo and Pike)
- **Count Two:** Murder in Aid of Racketeering (for the murder of Robert Lara), 18 U.S.C. §§ 1959(a)(1), 2 (Portillo)
- **Count Three:** Murder in Aid of Racketeering (for the murder of Anthony Benesh), 18 U.S.C. §§ 1959(a)(1), 2 (Portillo and Pike)
- **Count Four:** Conspiracy to Commit Murder in Aid of Racketeering, 18 U.S.C. § 1959(a)(5) (Portillo and Pike)
- **Count Five:** Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering, 18 U.S.C. § 1959(a)(6) (Portillo and Pike)

No. 18-50793

- **Count Six:** Assault with a Dangerous Weapon in Aid of Racketeering (Palo Pinto County, Texas), 18 U.S.C. §§ 1959(a)(3), 2 (Portillo and Pike)
- **Count Seven:** Assault with a Dangerous Weapon in Aid of Racketeering (Port Aransas, Texas), 18 U.S.C. §§ 1959(a)(3), 2 (Portillo and Pike)
- **Count Eight:** Using and Discharging a Firearm During and in Relation to a Crime of Violence (murder of Robert Lara), 18 U.S.C. §§ 924(j)(1), 2 (Portillo)
- **Count Nine:** Using and Discharging a Firearm During and in Relation to a Crime of Violence (murder of Anthony Benesh), 18 U.S.C. §§ 924(j)(1), 2 (Portillo and Pike)
- **Count Ten:** Conspiracy to Distribute and Possession with Intent to Distribute 500 Grams or More of Methamphetamine and Cocaine, 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), (B) (Portillo)
- **Count Eleven:** Possession with Intent to Distribute Cocaine, 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C) (Portillo)
- **Count Twelve:** Conspiracy to Interfere with Commerce by Threats or Violence, 18 U.S.C. § 1951 (Portillo and Pike)
- **Count Thirteen:** Felon in Possession of a Firearm, 18 U.S.C. § 922(g)(1) (Portillo)

The case proceeded to a three-month-long jury trial in 2018. On May 17, 2018, the jury returned a verdict finding Portillo and Pike guilty on all counts. In 2018, Portillo was sentenced to two life sentences plus two consecutive terms of ten years on counts eight and nine. Pike was sentenced to one life sentence, plus a consecutive term of ten years on count nine. The defendants filed timely notices of appeal from their judgments and sentences.

## II. Discussion

### A. Sixth Amendment Right to Counsel

Portillo was indicted on December 16, 2015 and arrested on January 6, 2016. On the day of his arrest, Portillo had an initial appearance before a magistrate judge. Portillo argues that he was deprived of his Sixth Amendment rights because he was not represented by counsel during this appearance.

#### i. Standard of Review

Sixth Amendment claims are typically subject to de novo review. *See United States v. Simpson*, 645 F.3d 300, 307 (5th Cir. 2011). However, if a

No. 18-50793

defendant could have argued to the district court that he was deprived of his Sixth Amendment rights but failed to do so, we review the claim for plain error only. *See Burton v. United States*, 237 F.3d 490, 501 (5th Cir. 2000). Here, neither Portillo nor his counsel argued to the district court that he was deprived of his Sixth Amendment rights during his initial appearance. To establish plain error, a defendant must show a clear or obvious error that affected his substantial rights. *See United States v. Olano*, 507 U.S. 725, 734–35 (1993). If a defendant meets that standard, the court “should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905 (2018) (internal quotation marks and citation omitted).

## ii. Analysis

“In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *United States v. Pleitez*, 876 F.3d 150, 157 (5th Cir. 2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984)). The Supreme Court has explained that the right protected by the Sixth Amendment “is limited by its terms: ‘it does not attach until a prosecution is commenced.’” *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). A prosecution commences with “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)).

In *Rothgery*, the Supreme Court held that the Sixth Amendment right to counsel attached at the time of a defendant’s “initial appearance before a

No. 18-50793

judicial officer.” *Id.* at 199. As in Portillo’s case, the initial appearance in *Rothgery* involved a formal notification of “the charge in the complaint, . . . various rights in further proceedings,” and a determination of “the conditions for pretrial release.” *Id.* (citing 1 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 1.4(g), p.135 (3d ed. 2007)). Portillo correctly relies on *Rothgery* for his assertion that his Sixth Amendment right to counsel attached during this hearing. *See id.*; *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Though Portillo’s Sixth Amendment rights had attached by the time of his initial appearance, he was not necessarily entitled to a lawyer during the proceeding. Whether Sixth Amendment rights have attached is a separate inquiry from whether “counsel must be *present* at a postattachment proceeding.” *Rothgery*, 544 U.S. at 211 (emphasis added); *see also Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986), *overruled on other grounds by Montejo v. Louisiana*, 566 U.S. 778 (2009). After attachment occurs, a defendant “is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings.” *Rothgery*, 554 U.S. at 212.

“Neither the Supreme Court nor the Fifth Circuit have [sic] delineated all of the critical stages at which a defendant is entitled to the presence of counsel under the Sixth Amendment.” *Pleitez*, 876 F.3d at 157. However, both courts have identified some general characteristics that help to determine whether a proceeding gives rise to a Sixth Amendment right to counsel. A critical stage is a “trial-like confrontation[] at which counsel would help the accused in coping with legal problems or meeting his adversary.” *Rothgery*, 554 U.S. at 212 n.16 (cleaned up). During a critical stage, “the results of the confrontation might well settle the accused’s fate and reduce the trial . . . to a mere formality.” *Gouveia*, 467 U.S. at 189 (citation omitted). We have explained that “[a] stage is . . . ‘critical’ where circumstances indicate that

No. 18-50793

counsel's presence is necessary to ensure a fair process." *Pleitez*, 876 F.3d at 157–58.

Portillo's initial appearance bears none of the markings of a critical stage. During the hearing, the magistrate judge briefly recited the facts of the indictment, the maximum penalties Portillo faced, and the government's intent to detain him without bond pending trial. The magistrate repeatedly warned Portillo not to "talk about the facts" of his case and confirmed that Portillo intended to hire his own attorney. Portillo was not forced to make any potentially incriminating statements that could jeopardize his defense, and he was not asked to make strategic decisions about his case. In short, Portillo's initial hearing did not pose the kind of difficult circumstances that "require[] aid in coping with legal problems or assistance in meeting [a defendant's] adversary." *McAfee v. Thaler*, 630 F.3d 383, 391 (5th Cir. 2011) (citation omitted).

We therefore hold that Portillo was not deprived of his Sixth Amendment rights during his initial appearance. *See United States v. Dohm*, 597 F.2d 535, 543 (5th Cir. 1979) ("The Constitution does not require that an accused have an attorney with him at his initial appearance before a magistrate."), *vacated in irrelevant part by United States v. Dohm*, 618 F.2d 1169, 1175 (5th Cir. 1980); *United States v. Lopez*, 426 F. App'x 260 (5th Cir. 2011); *see also United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473–74 (11th Cir. 1992) (holding that an initial appearance is not a critical stage because it serves a largely administrative function), *abrogated on other grounds as recognized by United States v. Rainey*, 362 F.3d 733, 735 (11th Cir. 2004).

## **B. Anonymous Jury**

Both defendants appeal the district court's decision to empanel an anonymous jury and impose a variety of safety measures. The court's order (1) prohibited jurors from revealing "their names, addresses, or places of

No. 18-50793

employment to the parties”; (2) required all jurors to be “kept together during recesses” and accompanied by the United States Marshals Service during lunch; and (3) ordered the United States Marshals to provide off-site parking and transportation for jurors to and from the courthouse.

### **i. Standard of Review**

A district court’s decision to empanel an anonymous jury is reviewed for an abuse of discretion. *See United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995). The district court must “base its decision on more than mere allegations or inferences of potential risk.” *Id.* at 1427. In reviewing the district court’s decision, the appeals court may refer to evidence elicited at trial, in addition to evidence presented before trial. *Id.* “[T]he use of anonymous juries will be upheld where evidence at trial supports the conclusion that anonymity was warranted.” *Id.*

### **ii. Analysis**

Empaneling an anonymous jury “is a drastic measure[] which should be undertaken only in limited and carefully delineated circumstances.” *Id.* “[T]his court [has] approved the use of anonymous juries only ‘when needed to ensure against a serious threat to juror safety.’” *United States v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996) (quoting *Krout*, 66 F.3d at 1427).

In *Krout*, we identified a set of factors that “may justify jury protection by anonymity.” 66 F.3d at 1427. These include:

- (1) the defendants’ involvement in organized crime; (2) the defendants’ participation in a group with the capacity to harm jurors; (3) the defendants’ past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation and harassment.

No. 18-50793

*Id.* (citing cases). In evaluating whether the district court abused its discretion in empaneling an anonymous jury, we look to the “totality of the circumstances.” *United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996) (citation omitted). Certain factors—such as “evidence that the defendant has in the past or intends in the future to tamper with the jury”—may be sufficient on their own to warrant an anonymous jury. *Id.*; *see also Krout*, 66 F.3d at 1427 n.7 (observing that “[a] lesser showing” on some factors “might be adequate where specific evidence exists linking the defendant to organized crime”); *United States v. Herrera*, 466 F. App’x 409, 424 (5th Cir. 2012) (affirming use of an anonymous jury even where there was no evidence on the third *Krout* factor).

Here, all of the *Krout* factors support the district court’s decision to impose jury safety measures. First, the indictment charged both defendants with serving at the highest levels of an organized criminal group, demonstrating that their involvement in organized crime was “both deeply rooted and far-reaching.” The allegations about the Bandidos closely resemble allegations about the Texas Mexican Mafia, the criminal group that was prosecuted in *Krout*. *See* 66 F.3d at 1427–28. Like the Texas Mexican Mafia, the Bandidos self-identify as “outlaws,” and the evidence at trial established the highly structured nature of the organization, which frequently resorted to violence to assure its power in Texas motorcycle society.

The district court likewise did not abuse its discretion in concluding that the Bandidos had the capacity to harm jurors and had previously attempted to interfere with the judicial process and intimidate witnesses. At trial, the government introduced evidence that the Bandidos “instill a climate of fear of reprisal” for witnesses who cooperate with law enforcement. The culture of the Bandidos—including the “Expect No Mercy” patch and the group’s history of encouraging violence against outsiders like Robert Lara and Anthony

No. 18-50793

Benesh—further underscored the potential danger to jurors. *See United States v. Riggio*, 70 F.3d 336, 340 n.22 (5th Cir. 1995) (holding that a history of witness threats provided a “reasonable basis to conclude that similar threats and attempts at intimidation were likely to be made to the jurors if their identities were known”).

The fourth *Krout* factor—the potential that the defendants would face lengthy sentences and large monetary penalties if convicted—was easily met here. Six of the charges against the defendants carried maximum life sentences.

Finally, the district court did not abuse its discretion in concluding that there was a risk of significant media attention associated with this case. At the time of the district court’s order, the case had already received considerable press coverage. And as the government points out, that publicity continued throughout trial. *See, e.g., United States v. Edwards*, 303 F.3d 606, 614 (5th Cir. 2002) (citing “the intense media interest and highly charged emotional and political fervor that surrounded the trial” as a basis for anonymity protections); *Branch*, 91 F.3d at 724 (approving the use of anonymous jury where there was an “enormous amount of world-wide media attention generated by the case” and the trial “aroused deep passions” (cleaned up)).

In addition, the district court took care to provide a “neutral explanation” for the anonymity procedures, thus minimizing the risk of potential prejudice. *See, e.g., Krout*, 66 F.3d at 1426 n.5; Am. Jur. 2d Jury § 184 (explaining the need to “giv[e] jurors a plausible and nonprejudicial reason for not disclosing their identities”). The court explained that the measures were “routine” and intended to ensure jurors’ privacy. We have observed that similar explanations reduce the risk of prejudice to defendants. *See Riggio*, 70 F.3d at 340 n.23; *see also United States v. Ross*, 33 F.3d 1507, 1521 (11th Cir. 1994) (holding that the court’s “careful instruction” about the need for the protections “eviscerated

No. 18-50793

any possible inference of Appellant’s guilt arising from the use of an anonymous jury”). Likewise, the court required jurors to complete a supplemental questionnaire and allowed additional voir dire questioning, ensuring that the defendants “had access to a sufficient amount of information concerning each of the prospective jurors.” *Herrera*, 466 F. App’x at 424; *see also Branch*, 91 F.3d at 724 (noting that “there is no showing that refusing to release the names and addresses of the jury prejudiced the defendants’ ability to select an impartial jury”).

For the same reasons, the security measures ordered by the court were not an abuse of discretion. In similar contexts, we have approved identical precautions, including driving jurors to and from the courthouse, and we have evaluated these measures using the same *Krout* factors identified above. *See Herrera*, 466 F. App’x at 424 (affirming the use of “off-site parking and transportation to-and-from the courthouse for the jury members”); *see also Ross*, 33 F.3d at 1519 (affirming district court order requiring jurors to “meet each morning in a central location to which federal marshals would return them at the close of the court day”). We therefore hold that the district court did not abuse its discretion in empaneling an anonymous jury and imposing security measures to protect the jury.

### **C. Sufficiency of the Evidence**

Pike argues that there was insufficient evidence presented at trial to support his conviction. Because Pike preserved his challenge by moving for acquittal under Federal Rule of Criminal Procedure 29, we review his claim de novo. *United States v. Oti*, 872 F.3d 678, 686 (5th Cir. 2017). This review is “highly deferential to the verdict.” *Id.* (quoting *United States v. Cannon*, 750 F.3d 492, 506 (5th Cir. 2014)). An appellate court “must affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, *any* rational trier of fact could have found the

No. 18-50793

essential elements of the crime beyond a reasonable doubt.” *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc).

**i. Count Three**

Count Three charged Pike with aiding and abetting Anthony Benesh’s murder in support of a racketeering enterprise, a crime under the Violent Crimes in Aid of Racketeering (“VICAR”) Act. 18 U.S.C. §§ 1959(a)(1), 2. In order to establish a violation of this statute, the government must prove: “(1) an enterprise engaged in racketeering; (2) the activities affected interstate commerce; (3) a murder; and (4) the murder was committed for payment by the enterprise or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise.” *United States v. Owens*, 724 F. App’x 289, 296 (5th Cir. 2018) (cleaned up); *see also United States v. Velasquez*, 881 F.3d 314, 332 (5th Cir. 2018).<sup>1</sup>

“Proof that a defendant was merely associated with a criminal, or that [he] was present at the scene of a crime is not, without more, sufficient to sustain a conviction for aiding and abetting a criminal venture.” *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978). “[A] person is liable . . . for aiding and abetting a crime if (and only if) he (1) takes an affirmative step in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

There was sufficient evidence presented at trial for the jury to find Pike guilty of Count Three. Johnny Romo testified that Portillo told him Benesh and Burford were riding their motorcycles in Austin, and that an order had come

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<sup>1</sup> Pike primarily argues that the government did not establish that he was personally involved in Benesh’s murder. However, he also makes a cursory argument that the evidence did not prove that he was involved in a racketeering enterprise, and he argues in his challenge to Count Twelve that the Bandidos’ activities did not affect interstate commerce. As we explain below, we find the evidence sufficient to establish these other elements of the charges against Pike.

No. 18-50793

directly from Pike to “take them out.” Johnny testified that he interpreted the phrase “take out” to mean “to kill him, murder, to get rid of him.” Though Pike argues that this term could have referred to a violent act other than murder, it was within the province of the jury to interpret the meaning of the term and to conclude that Pike directed the brothers to kill Benesh. *See, e.g., United States v. Jones*, 839 F.2d 1041, 1048 (5th Cir. 1988) (“The jury was entitled to interpret [the defendant’s] words as evidence of conspiracy.”). Robbie Romo, Johnny’s brother, also testified that his brother told him that Pike was the person who “wanted this Hell’s Angel killed.”

The government also introduced substantial circumstantial evidence regarding Pike’s role in the organization and the responsibilities of the Bandidos President. Portillo was recorded explaining that he “don’t make no majors without [Pike] knowing about it.” Referring to another incident, Portillo was recorded explaining that it would be “the end of me” if I “try to do that without Jeff’s permission.” Justin Forster, another Bandidos member, testified that “[a]ny significant decision making . . . falls on [the President].” There was also evidence introduced at trial demonstrating that Pike expressed support for Benesh’s murder after it occurred, including by personally approving the creation of the “Fat Mexican Crew.” *See Owens*, 724 F. App’x at 296 (explaining that the murder must be committed “for the purpose of gaining entrance to or maintaining or increasing position in an enterprise” (citation omitted)). Collectively, this evidence was sufficient for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *See United States v. Dovalina*, 262 F.3d 472, 475 (5th Cir. 2001) (“Direct evidence of intent is not necessary to support a defendant’s conviction.”).

## ii. Count One

Count One charged Pike with a RICO conspiracy. To establish liability under the RICO Act, the government must prove “(1) that two or more people

No. 18-50793

agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.” *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998).

With respect to the first prong, there was sufficient evidence introduced at trial to show that Pike and other Bandidos members agreed to engage in a pattern of racketeering activity. 18 U.S.C. § 1962(c). Racketeering is defined in the Act to include a number of offenses relevant here, including “murder, robbery, . . . extortion, . . . or dealing in a controlled substance.” § 1961(1). A pattern of racketeering activity is defined to include “at least two acts of racketeering activity.” § 1961(5). There was ample evidence demonstrating that Pike made an agreement with other Bandidos to support these activities. This includes Romo’s statement regarding Pike’s order to murder Benesh and Justin Forster’s testimony regarding Pike’s knowledge of, and support for, the group’s rivalry with the Cossacks. There was also substantial evidence introduced at trial showing that other Bandidos members met to discuss their agreement to commit murder, deal drugs, and engage in other related activities on behalf of the club. Even if Pike was not himself a party to these meetings, he can still be held liable if there is evidence that he “knowingly and willfully participated in the agreement.” *Smith v. United States*, 568 U.S. 106, 110 (2013); *see also United States v. Delgado*, 401 F.3d 290, 296 (5th Cir. 2005) (en banc); *Posada-Rios*, 158 F.3d at 857. These activities fit within the definition of racketeering because they were intended to assure the supremacy of the Bandidos through murder, extortion, and drug dealing. *See, e.g., United States v. Henley*, 766 F.3d 893, 907–08 (8th Cir. 2014) (concluding that there was sufficient evidence of “racketeering activity” where “all of the predicate acts shared a similar purpose of asserting the dominance of the [group] and punishing those who committed real or perceived transgressions against the club or its members”).

No. 18-50793

The evidence was also sufficient to establish that Pike knew of and agreed to the objectives of the RICO offense. The government introduced specific evidence establishing Pike's involvement in the Bandidos' criminal activities, including Johnny's statement about Pike's ordering Benesh's murder and Pike's endorsement of the war with the Cossacks. *See Owens*, 724 F. App'x at 296–97 (upholding a RICO conspiracy conviction where there was evidence of the defendant's "leadership role" in a criminal enterprise and his "involvement in" criminal acts committed by the group). There is also evidence in the record establishing that Pike ordered an "ass kicking" for Hell's Angels members in Connecticut who were causing conflict with the Bandidos. And, as the government points out, Pike's role as President placed him at the top of the Bandidos organizational chart, which provided powerful circumstantial evidence of his oversight of major decisions and activities taken by the group. We have explained that evidence of this kind is often relevant and highly probative in the context of a conspiracy charge. *See Posada-Rios*, 158 F.3d at 857–58. Although Pike identifies contrary evidence in the record suggesting that he wanted to clean up the Bandidos' image, this evidence does not refute the persuasive evidence of guilt. *See, e.g., United States v. Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998) (observing that it is the "responsibility of the trier of fact fairly to resolve conflicts in testimony." (citation omitted)).

### **iii. Count Nine**

Count Nine charged Pike with aiding and abetting the discharge of a firearm in furtherance of Benesh's murder. 18 U.S.C. §§ 924(j)(1), 2. The jury was instructed that it could find Pike guilty of this count on a *Pinkerton* theory of liability. *See Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946). Under *Pinkerton*, Pike could be found guilty as long as the use of the firearm was both reasonably foreseeable and in furtherance of the conspiracy. *Id.*; *see also United States v. Dean*, 59 F.3d 1479, 1490 (5th Cir. 1995) (upholding § 924(c)(1)

No. 18-50793

conviction under a *Pinkerton* theory of liability where there was no evidence that the defendants were aware that their co-conspirator was armed before he committed the crime).

As explained above, the evidence was sufficient for the jury to find Pike guilty of a RICO conspiracy. Because the evidence also supports the conclusion that Benesh was murdered as a punishment for a “real or perceived transgression[] against the club or its members,” *Henley*, 766 F.3d at 907–08, the evidence was sufficient to find that Benesh was murdered in furtherance of the conspiracy. Finally, it was reasonably foreseeable that a firearm would be used to murder Benesh. *See United States v. Wilson*, 105 F.3d 219, 221 (5th Cir. 1997) (holding that a defendant can be held liable under *Pinkerton* “regardless of whether he had knowledge of or participated in the substantive acts”). As a result, there was sufficient evidence to support Pike’s conviction on Count Nine.

#### **iv. Counts Four through Seven**

Counts Four through Seven charged Pike with VICAR offenses related to the Bandidos’ rivalry with the Cossacks. *See* 18 U.S.C. §§ 1959(a)(3), (5), (6), 2. Pike was found guilty of conspiring to commit murder and assault with a deadly weapon against Cossacks members in aid of racketeering (Counts Four and Five), aiding and abetting the Bandidos’ assault of a Cossack in Palo Pinto County (Count Six), and aiding and abetting the assault of another Cossack in August 2015 in Port Aransas (Count Seven).

With respect to Counts Four and Five, there was sufficient evidence introduced at trial to show that Pike was aware of the Bandidos’ disagreements with the Cossacks and that he endorsed the group’s plans to address the problem through violence. *See Salinas v. United States*, 522 U.S. 52, 63 (1997) (“A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense.”). When Portillo

No. 18-50793

explained that he wanted to “turn up the heat” on the Cossacks, Pike reportedly said “whatever y’all do, y’all be careful.” In the same conversation, Pike agreed to “turn his back” on the Bandidos’ future retaliatory actions. And in another conversation, Portillo explained that Pike told him to “play ball” and “batter up motherfucker” when discussing the group’s plans for addressing the problem with the Cossacks in Crystal City. The government also introduced evidence of assaults and murders against Cossack members throughout Texas, including the murder of a Cossack associate during the altercation in Fort Worth and violent assaults in Port Aransas and Palo Pinto County. This evidence was sufficient to convict Pike even if there is no evidence that Pike agreed to the *specific* acts of the conspiracy. *See id.*; *Velasquez*, 881 F.3d at 332. Evidence presented at trial supported the conclusion that Pike made all major decisions for the group and therefore participated in the conspiracy. *See United States v. Salvatore*, 110 F.3d 1131, 1137 (5th Cir. 1997), *abrogated on other grounds by Cleveland v. United States*, 531 U.S. 12 (2000).

Likewise, the evidence was sufficient to find Pike guilty on Counts Six and Seven. The specific instances of violence in Palo Pinto County and Port Aransas were both reasonably foreseeable and in furtherance of the conspiracy. *See Pinkerton*, 328 U.S. at 645–48. These acts of violence were intended to punish the Cossacks for their perceived transgressions against the group. *See Henley*, 766 F.3d at 907–08. As a result, these acts were “the very essence of, and thus a reasonably foreseeable part of,” the conspiracy. *United States v. Maceo*, 947 F.2d 1191, 1198 (5th Cir. 1991).

#### **v. Count Twelve**

Finally, Count Twelve charged Pike with conspiring to interfere with interstate commerce by extortion or robbery, a violation of the Hobbs Act, 18 U.S.C. § 1951. To establish liability under this statute, the government need only show that interstate commerce was affected “in any way or degree.” *Id.*

No. 18-50793

The government introduced evidence at trial showing that Pike authorized a plan for Bandidos to travel from Texas to New Mexico to violently confiscate patches from members who were challenging his authority. Justin Forster testified that Pike told him to “handle the problem” caused by these members. Forster traveled with a few other Bandidos members to New Mexico, where they “started beating everybody up” who refused to say that Pike was their President. Forster testified that he forcefully confiscated sixteen patches from defiant New Mexico Bandidos members, and they burned the majority of the patches and paraphernalia. Even if the patches belonged to the Bandidos and not to the disobedient individual members, this evidence was sufficient to convict Pike. *See United States v. Sturman*, 49 F.3d 1275, 1284 (7th Cir. 1995) (“One may be found guilty of extortion even for obtaining one’s own property.”); Lucas Martin, *Extortion, Blackmail, and Threats*, 31A Am. Jur. 2d Extortion, Blackmail, etc. § 96 (2020) (“A defendant’s claim of right to property is irrelevant in an extortion case.”).

We therefore hold that the evidence was sufficient to support Pike’s conviction on all counts.

#### **D. Evidentiary Rulings**

The defendants challenge several of the district court’s evidentiary rulings, arguing that the district court improperly admitted certain evidence and that the errors affected their substantial rights.

Where a defendant preserved his objection to the admissibility of the evidence, we review the district court’s rulings for an abuse of discretion. *United States v. Cantu*, 167 F.3d 198, 203 (5th Cir. 1999). “A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence.” *United States v. Insaulgarat*, 378 F.3d 456, 464 (5th Cir. 2004). In criminal cases, the court’s “review of evidentiary rulings . . . is necessarily heightened,” and the court should ensure that the

No. 18-50793

evidence is “strictly relevant to the particular offense charged.” *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991) (citation omitted).

Where the defendant did not object to the admissibility of the evidence at trial, we review the claim for plain error only. *United States v. Bilbo*, 19 F.3d 912, 916 (5th Cir. 1994). “We find plain error when: (1) there was an error; (2) the error was clear and obvious; and (3) the error affected the defendant’s substantial rights.” *United States v. Infante*, 404 F.3d 376, 394 (5th Cir. 2005). If these elements are met, the court “should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Rosales-Mireles*, 138 S. Ct. at 1905 (internal quotation marks and citation omitted).

### **i. Agent Schuster’s Expert Testimony**

Over the defendants’ objections, the district court granted the government’s motion to introduce expert testimony from Special Agent Scott Schuster. The court explained that Schuster had taken time to develop his understanding of the Bandidos through years of investigation and conversations with insiders and outsiders, demonstrating that his understanding of the group was “far above that of the general public.” Before bringing the jury back to the courtroom, however, the court placed limitations on Schuster’s testimony. The court warned the government that Schuster would not be “allowed to give any direct opinion about the guilt or innocence . . . of any defendant in this case.” If Schuster veered across that line, the court warned the government that there would be grounds to declare a mistrial. At trial, Schuster testified about the organizational structure of the Bandidos and the roles of each national officer. After the verdict was announced, the defendants moved for a new trial on the basis of Schuster’s testimony, and the district court denied the motion.

No. 18-50793

Pike and Portillo both argue that the district court abused its discretion in admitting expert testimony from Schuster. They argue that (1) Schuster was not qualified to testify as an expert; (2) Schuster impermissibly restated inadmissible hearsay; and (3) Schuster violated Federal Rule of Evidence 704(b) by testifying to the specific mental state of the defendants.

First, the district court did not abuse its discretion when it held that Schuster was qualified to testify as an expert. Under Federal Rule of Evidence 702, a witness “who is qualified as an expert by knowledge, skill, experience, training, or education” may testify as long as (1) his “scientific, technical, or other specialized knowledge . . . will help the trier of fact to understand the evidence or to determine a fact in issue”; (2) “the testimony is based upon sufficient facts or data”; (3) “the testimony is the product of reliable principles and methods”; and (4) “he has reliably applied the principles and methods to the facts of the case.” During voir dire, Schuster explained that he developed his knowledge of the Bandidos over twelve years as an FBI special agent, including eight years working on a task force investigating gangs and at least five years investigating the Bandidos in particular. His knowledge was based on interviews with current and former Bandidos members, document review, and collaboration with confidential informants.

We have previously approved the qualifications of experts who use their investigative training to testify about organized criminal enterprises like the Bandidos. In *United States v. Washington*, 44 F.3d 1271, 1283 (5th Cir. 1995), we affirmed the qualifications of two government agents who testified as experts about “the significance of certain conduct or methods of operation unique to the drug distribution business.” Other circuits have similarly affirmed the qualifications of experts who use their law enforcement training to gain an understanding of insular criminal groups. *See, e.g., United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016); *United States v. Mejia*, 545 F.3d 179,

No. 18-50793

194 (2d Cir. 2008). These cases clarify that a law enforcement expert does not need “scientific” knowledge in order to be qualified as an expert; instead, “other types of specialized knowledge,” including an investigative background, are often far more applicable in the context of a criminal organization. *Rios*, 830 F.3d at 413. Schuster’s knowledge about the Bandidos was informed by years of on-the-ground investigative training. This training made Schuster’s testimony reliable and sufficiently supported to be admissible at trial. *See id.* at 414; *United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000).

Likewise, the district court did not abuse its discretion in concluding that Schuster’s testimony would be helpful to the jury. In *Washington*, we held that the testimony of an “experienced narcotics agent” regarding “the significance of certain conduct or methods of operation unique to the drug distribution business” would be “helpful in assisting the trier of fact understand the evidence.” 44 F.3d at 1283. Schuster’s law enforcement expertise allowed him to “impart[] evidence regarding the inner-workings of organized crime, which has been held to be a proper subject of expert opinion.” *Rios*, 830 F.3d at 413 (cleaned up). Other courts have similarly allowed law enforcement experts to testify about the structure of a criminal enterprise, including an insular group’s insignia, history, culture, and organizational hierarchy. *See id.* at 413–14 (observing that “an FBI agent in a case about organized crime may properly give expert testimony on the structure, organization, and the rules of the organized-crime entity” (cleaned up)); *United States v. Kamahele*, 748 F.3d 984, 998 (10th Cir. 2014); *United States v. Van Dorn*, 925 F.2d 1331, 1338–39 (11th Cir. 1991).

Pike argues that Schuster impermissibly testified about easily verified facts—an area courts have declared off-limits for expert witnesses. *See Mejia*, 545 F.3d at 190 (“An increasingly thinning line separates the legitimate use of an officer expert to . . . explicate an organization’s hierarchical structure from

No. 18-50793

the illegitimate and impermissible substitution of expert opinion for factual evidence.”); *see also United States v. Haines*, 803 F.3d 713, 731 (5th Cir. 2015) (observing that the “aura of special reliability” given to experts creates a risk that the jury might place “undue weight” on the expert’s testimony based on the “perception that the officer was privy to facts not presented at trial” (citation omitted)). Pike notes that Schuster testified about specific historical crimes committed by Bandidos, and argues that this testimony was fact-specific and not helpful to the jury. As the government argues, however, Schuster did not speak about “purely factual matters establishing the elements of the *charged* crime.” *See Mejia*, 545 F.3d at 194–96 (holding that certain expert testimony about the defendant’s alleged crimes was unhelpful because it was “well within the grasp of the average juror”). Moreover, Schuster was not the case agent who investigated Pike and Portillo, thus minimizing any prejudice potentially caused by his testimony. *See Haines*, 803 F.3d at 730–31; *United States v. Sykes*, 277 F. App’x 397, 398 (5th Cir. 2008) (dismissing claim that expert erroneously testified as both an expert and fact witness where there was no evidence that the “theoretical concerns” about a witness’s dual roles prejudiced the defendants).

Second, Schuster did not impermissibly reveal hearsay during the course of his testimony. Under Federal Rule of Evidence 703, an expert can base his opinion on otherwise inadmissible facts and data, including hearsay, as long as these sources are “reasonably rel[ied] on” by experts in the field. Here, Schuster’s reliance on hearsay evidence, including statements made by Bandidos members in interviews and intercepted phone calls, is “consistent with the ordinary practices of law enforcement officers, who routinely and reasonably rely upon hearsay in reaching their conclusions.” *Mejia*, 545 F.3d at 197 (cleaned up). Schuster used his expertise to synthesize “various source

No. 18-50793

materials,” rather than simply regurgitating information he learned from those sources. *See id.*

For the same reason, Portillo’s Confrontation Clause argument also fails. Portillo did not object to Schuster’s testimony on this basis, so we review this claim for plain error only. Portillo does not identify any “testimonial statements within the meaning of *Crawford v. Washington*, [541 U.S. 36 (2004),] or any impermissible hearsay at all, relayed by [Schuster’s] testimony.” *United States v. Akins*, 746 F.3d 590, 603 (5th Cir. 2014). As long as an expert forms his opinion by “amalgamating . . . potentially testimonial statements,” his testimony does not violate the Confrontation Clause. *Rios*, 830 F.3d at 418 (emphasis added); *see also Akins*, 746 F.3d at 603.

Finally, the defendants argue that Schuster’s testimony impermissibly opined on their mental states. Under Federal Rule of Evidence 704(b), an expert witness in a criminal case “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.” We have interpreted Rule 704(b) narrowly, explaining that it only prohibits statements that “directly opine[] on the ultimate issue of [a defendant’s] mental state.” *United States v. Dvorin*, 817 F.3d 438, 448 (5th Cir. 2016) (emphasis added); *see also United States v. Speer*, 30 F.3d 605, 610 (5th Cir. 1994) (“Rule 704(b) is not strictly construed and prohibits only a direct statement of the defendant’s intent.”); 29 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* § 6285, at 395 (1997) (“Rule 704(b) usually bars only a direct statement that defendant did or did not have the required mental state.”).

Pike argues that Schuster violated Rule 704(b) when he testified about the typical characteristics of the Bandidos President. According to Pike, this testimony was impermissible because it communicated the opinion that Pike “must have known of and participated in the charged offenses.” He relies upon

No. 18-50793

our opinion in *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002), where we held that a district court abused its discretion when it permitted expert testimony about the knowledge typically possessed by drug couriers. We explained that this testimony crossed the “borderline long recognized . . . between a mere explanation of the expert’s analysis of the facts and a forbidden opinion on the ultimate legal issue in the case.” *Id.* (cleaned up). Pike argues that Schuster’s testimony veered across this line because it suggested that Pike, as President of the Bandidos, necessarily had knowledge of the activities of all of the club’s members. However, he fails to identify any testimony from Schuster that “directly opined on the ultimate issue” of Pike’s mental state. *Dvorin*, 817 F.3d at 448. In a similar context, we have held that expert testimony about the typical mental state shared by individuals in a specific criminal role does not violate the Rule 704(b) bar. *See United States v. Morin*, 627 F.3d 985, 996 (5th Cir. 2010).

Even if it was an abuse of discretion for the district court to admit this or any other part of Schuster’s testimony, any error was harmless. Under the harmless error doctrine, “judgment will be affirmed . . . unless the error affected a substantial right of the defendant.” *United States v. Valencia*, 600 F.3d 389, 423 (5th Cir. 2010). “An error affects substantial rights if there is a reasonable probability that the improperly admitted evidence contributed to the conviction.” *United States v. Sumlin*, 489 F.3d 683, 688 (5th Cir. 2007). The government bears the burden of establishing that the erroneous admission of evidence was harmless beyond a reasonable doubt. *United States v. Ebron*, 683 F.3d 105, 131 (5th Cir. 2012). An “error is harmless if, in light of the whole record, the contested evidence did not contribute to the verdict.” *United States v. Dixon*, 185 F.3d 393, 398 (5th Cir. 1999).

Here, several other witnesses independently confirmed many statements made by Schuster about the authority of the President, the history of the

No. 18-50793

Bandidos, and the group's organizational structure and operations. We have explained that an error can be harmless when the improperly admitted evidence merely duplicates other evidence in the record. *See Akins*, 746 F.3d at 600 ("To the extent that certain portions of [the expert's] testimony at times crossed the line . . . it was cumulative of other testimony and therefore harmless."); *United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011); *Krout*, 66 F.3d at 1433. Likewise, any erroneously admitted testimony "constituted only a small portion of an otherwise strong case." *Gutierrez-Farias*, 294 F.3d at 663. The government introduced substantial evidence of guilt, further supporting the conclusion that any error was harmless. *See Washington*, 44 F.3d at 1283 (holding that an error is harmless if there is "overwhelming evidence establishing [the defendant's] guilt"). Against this backdrop, any errors in the admission of Schuster's testimony did not impact the defendants' substantial rights, and we therefore affirm.

## **ii. Prior Consistent Statements**

The defendants argue that the district court erred when it admitted three prior consistent statements during the trial. Pike and Portillo both argue that the district court erred when it admitted: (1) Johnny Romo's statement to law enforcement after he was arrested for the murder of Anthony Benesh, and (2) Robbie Romo's confession to law enforcement after he was implicated by his brother in Benesh's murder. Separately, Portillo argues that the district court erred when it admitted a confession Richard Merla gave to law enforcement after he was arrested for the murder of Robert Lara.

### **a. Romo Brothers' Statements**

After he was arrested on federal narcotics charges in 2014, Johnny Romo began cooperating with federal authorities. The government later learned that Johnny and his brother Robbie were responsible for the murder of Anthony Benesh, and they arrested Johnny on murder charges in March 2017. Johnny

No. 18-50793

gave a lengthy statement confessing to his involvement in the murder and implicating his brother as the shooter. The government later recorded a conversation between Johnny and Robbie during which Johnny encouraged Robbie to cooperate with the government. Immediately after that conversation, Robbie confessed to his role as the shooter.

Both of the Romo brothers testified at trial. During direct examination, they each implicated Pike and Portillo in Benesh's murder. On cross examination, the defendants cast doubt upon the reliability of the Romos' testimony, suggesting that the brothers were fabricating their stories in order to receive a benefit from the government.

Appellants point to no improper use by the government of the Romo brothers' prior consistent statements during direct examination. However, during cross-examination, both defendants asked the brothers about their confessions to law enforcement. During Portillo's cross of Johnny, Johnny admitted that he provided information about Portillo's involvement in the murder only after he communicated with Robbie. Pike's counsel also used portions of Johnny's conversation with the authorities during his cross examination, suggesting that Johnny had previously told the authorities that he did not intend to murder Benesh and only wanted to beat him up. During their cross of Robbie, the defendants used portions of Robbie's recorded confession to argue that Robbie had previously told law enforcement that he did not go to Austin with the intent to kill Benesh, casting doubt on the consistency of his story.

After Johnny testified, the district court granted the government's request to introduce Johnny's confession. The court held that this recorded statement was admissible as a prior consistent statement under Federal Rule of Evidence 801(d)(1)(B). The government introduced the video recording and the transcript of Johnny's conversation with the agents during its direct

No. 18-50793

examination of Chad Lloyd, one of the agents involved in the investigation of the Benesh murder.

Later, the court addressed the admissibility of Robbie's statement and also found that it was admissible as a prior consistent statement. The statement was introduced during the government's direct examination of Jeb Killian, another federal agent involved in the investigation.

**b. Richard Merla's Statement**

Two years after Robert Lara was shot and killed in retaliation for killing a Bandidos member, Richard Merla was arrested for killing another man. While he was in jail, Merla confessed to killing Lara in 2002 and implicated Portillo in Lara's murder. On cross-examination, Portillo's counsel attacked Merla's credibility, suggesting that he implicated Portillo only because he was angry at him for expelling him from the Bandidos. Portillo also suggested that Merla's memory was unreliable and that there were inconsistencies between his in-court testimony and his prison confession. During the government's redirect of Merla, the court allowed the government to introduce Merla's confession as a prior consistent statement. In his one-page confession, Merla stated that "[t]he murder of Robert Lara was planned and executed by Chapter President John Portillo of the Southwest Chapter of Bandidos."

**c. Analysis**

The government argues that all three statements were admissible under Federal Rule of Evidence 801(d)(1)(B) or under Federal Rule of Evidence 106.

Federal Rule of Evidence 801(d)(1)(B) provides that a declarant-witness's prior consistent statement is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement," and the prior statement is offered for one of two reasons: "(i) to rebut an express or implied charge that the declarant recently fabricated [his testimony] or acted from a

No. 18-50793

recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground."

First, the government argues that the Romo brothers' statements were admissible under 801(d)(1)(B)(i) to "rebut the implication that the Romo brothers . . . had fabricated their testimony in the hopes of receiving a lower sentence under the terms of their plea agreements." In *Tome v. United States*, 513 U.S. 150 (1995), the Supreme Court explained that a prior consistent statement is admissible under this rule if "the statement [was] made *before* the alleged fabrication, influence, or motive came into being." *Id.* at 156 (emphasis added). If it was made after that motive arose, it is "inadmissible." *Id.* "Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because [he] has been discredited." *Id.* at 157.

Here, the defendants' cross-examinations implied that the Romos created a falsified narrative in the hopes of receiving leniency from the government. Because this claimed motive to fabricate also existed at the time that the prior consistent statements were made, the admission of these statements under Rule 801(d)(1)(B)(i) violated *Tome*. See *id.* at 700. When Johnny and Robbie confessed to law enforcement, they were both arguably motivated by a desire to shift the blame onto Pike and Portillo in order to obtain the benefits of cooperation. Despite the government's arguments to the contrary, this motivation existed regardless of the fact that the brothers did not have specific plea agreements until well after they made their confessions. Indeed, at the time that Johnny spoke with law enforcement and implicated himself and his brother in Benesh's murder, Johnny had already told the authorities that he wanted to help his brother get a plea deal, and both brothers testified that they spoke with law enforcement with the full

No. 18-50793

awareness that they may be able to reduce their sentences through cooperation.

This same motivation—a desire to obtain the benefits of government cooperation—persisted at trial, distinguishing this case from cases where we have permitted the admission of prior consistent statements under *Tome*. In *United States v. Wilson*, for example, we allowed the government to introduce a letter written by a government cooperator years before his plea bargain, in which the cooperator implicated the defendant in drug crimes. 355 F.3d 358, 361 (5th Cir. 2003). We noted that the letter was written before the cooperator had a plea agreement; critically, however, it was also written “to a person who could not directly help [the witness] avoid prison time,” thus eliminating the cooperator’s motivation to lie. *Id.* (emphasis added). Unlike *Wilson*, the Romo brothers’ prior statements were made to law enforcement—the *same* people who could help the Romos get the benefits of cooperation. Because the motive implied by the defendants—the brothers’ desire to obtain leniency from the government—existed when the prior statements were made as well as at trial, the prior statements were inadmissible under 801(d)(1)(B)(i). *See United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001).

In the alternative, the government argues that all three statements were admissible under 801(d)(1)(B)(ii). Though it is not clear that the district court relied on this portion of the rule when it found the statements admissible, “[t]hat is not the end of our inquiry.”<sup>2</sup> *United States v. Jensen*, 41 F.3d 946, 958

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<sup>2</sup> In arguing that Johnny’s confession was admissible, the government explained that Johnny’s credibility had been “attacked on a number of grounds,” but did not specifically cite Rule 801(d)(1)(B)(ii). The court then discussed the history of the 2014 amendment, but did not clearly indicate the basis for its admissibility holding. Later, when discussing the admissibility of Robbie’s prior statement, the government explained that it was offering the statement as a “prior consistent statement” after Robbie was “attacked thoroughly on cross-examination,” but did not explain the specific portion of the rule that gave rise to its argument.

No. 18-50793

(5th Cir. 1994). “If the evidence was admissible on any ground, the district court’s reliance on other grounds does not affect the defendant’s substantial rights.” *Id.* Under 801(d)(1)(B)(ii), a prior consistent statement may be admitted “to rehabilitate the declarant’s credibility as a witness when attacked on another ground.” *Id.* Subsection ii was added to the rule in 2014 “to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.” Fed. R. Evid. 801 (Advisory Committee’s Note to 2014 Amendment); *see also United States v. Flores*, 945 F.3d 687, 705 (2d Cir. 2019) (admitting prior consistent statement where defendant argued that the witness could not be trusted because the incident occurred long ago).

We do not agree that the Romo brothers’ statements were admissible under 801(d)(1)(B)(ii). The government cites several instances where the defendants identified inconsistencies between the brothers’ earlier statements and their testimony at trial. Specifically, the defendants suggested that the brothers’ earlier statements diverged from their testimony on several points, including: (1) how Robbie got the gun, (2) how Robbie was selected to be the shooter, (3) when Portillo gave the order to kill Benesh, and (4) whether the plan was to kill Benesh or simply to threaten him. In all cases, however, these inconsistencies were identified by the defendants in order to make a broader point: that the brothers subsequently changed their stories in order to get favorable deals from the government. Throughout the cross-examinations, the defendants repeatedly suggested that the brothers coordinated their stories—and clarified previous inconsistencies—because they believed that they would only get “credit” if they could “point the finger at either John or Jeff or both.” Put differently, the defendants accused the Romo brothers of inconsistency only to support their claim that the brothers fabricated their stories—a motive

No. 18-50793

that fits squarely within 801(d)(1)(B)(i), and not the alternative 801(d)(1)(B)(ii).

In the Advisory Committee's Note to the 2014 Amendment, the committee explained that “[t]he amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes.” Fed. R. Evid. 801 (Advisory Committee's Note to 2014 Amendment); *see also United States v. Magnan*, 756 F. App'x 807, 818 (10th Cir. 2018). The *Tome* limitation predates Rule 801 and was a well-established common law principle that was accepted by the drafters of the rule. *See Tome*, 513 U.S. at 161–62 (recounting history of rule). In order to faithfully give effect to the drafters' intentions, courts must interpret Rule 801 with this rule in mind. *Id.* (“The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary.”). If the *Tome* limitation is mapped on to Rule 801(d)(1)(B)(ii), a litigant may not introduce a prior consistent statement if that statement was made at a time when the litigant allegedly had a motive to fabricate—even if the litigant supplements his attack on the witness's credibility by pointing to other flaws in the declarant's testimony.

Here, the plain language of 801(d)(1)(B)(ii) precludes the admission of the prior consistent statements under these circumstances because the defendants did not attack the Romo brothers on “another ground.” By permitting the admission of a consistent statement when a witness is “attacked on *another* ground” (emphasis added), the Rule necessarily restricts the admissibility of a statement when the witness is attacked on a ground specifically delineated in 801(d)(1)(B)(i): an accusation that the witness “recently fabricated” a story, or is “act[ing] from a recent improper influence or motive.” *See* 801(d)(1)(B)(i). Here, it is impossible to separate the defendants' attack on the brothers' motivations from their charges of inconsistency, making

No. 18-50793

it difficult to hold that the brothers were attacked on “another ground.” *See Magnan*, 756 F. App’x at 818–19; *see also United States v. Purcell*, --- F.3d ---, 2020 WL 4211555, at \*27–28 (2d Cir. July 23, 2020) (affirming admission of statements under Rule 801(d)(1)(B)(ii) where the declarant was accused of making inconsistent statements *and* defense counsel never suggested “that the accuracy of [declarant’s] trial testimony was marred by recent fabrication or a recently created improper motive or influence”).

At least one circuit has noted that it is an open question whether the *Tome* rule applies to 801(d)(1)(B)(ii), though that court ultimately declined to hold that the district court had plainly erred in admitting the evidence under subsection ii. *See United States v. Davis*, 896 F.3d 784, 789 (7th Cir. 2018). The government identifies no cases in which our court or another court has admitted a prior consistent statement under similar circumstances. There are only a handful of circuit cases in which the admission of a prior consistent statement under 801(d)(1)(B)(ii) has been affirmed, but all involve distinct factual contexts. *See, e.g., United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017) (admitting statement where declarant was repeatedly accused of “faulty memory”); *United States v. J.A.S., Jr.*, 862 F.3d 543, 545 (6th Cir. 2017) (admitting statement after declarant’s credibility was attacked on “collateral grounds”). The government likewise cites no cases where a court concluded that a declarant was attacked on “another ground,” even though it was undisputed that the declarant was primarily attacked on the basis of an improper motivation. *Cf. Purcell*, --- F.3d ----, 2020 WL 4211555, at \*27–28. In light of the clear limitation in *Tome* and the defendants’ consistent attempts to argue that the Romo brothers had a motivation to lie, we decline to hold that 801(d)(1)(B)(ii) permits such an end-run around the limitation in 801(d)(1)(B)(i). We therefore hold that the Romo brothers’ statements were not admissible under 801(d)(1)(B)(ii).

No. 18-50793

In contrast to the Romo brothers' statements, the government identifies at least one portion of Portillo's cross examination of Merla where Portillo questioned Merla's memory of the events surrounding Robert Lara's killing. Portillo's counsel stated that "[e]vents were fresher on [Merla's] mind" closer to the murder, and suggested that this was a basis for inconsistencies in his testimony about whether Portillo gave the go-ahead to murder Lara. Portillo's attack on Merla's memory was sufficient to justify the admission of his prior consistent statement under Rule 801(d)(1)(B)(ii). *See Flores*, 945 F.3d at 705 (admitting prior consistent statements after a charge of faulty memory, even though the faulty memory accusations "were brief and were not [defendants'] main challenges" to the credibility of the witness). Because Merla was attacked on a ground other than his alleged motive to fabricate, the district court did not abuse its discretion in admitting this statement.

The government makes one final argument for the admissibility of the statements, asserting that all three statements were admissible under the common law rule of completeness. That rule, which has been "partially codified . . . in Rule 106" of the Federal Rule of Evidence, allows a party to introduce other portions of a written or recorded statement when the opposing side introduced only a portion of that statement. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The rule ensures that all parts of such a statement are "considered contemporaneously," *id.* at 172, and "guards against the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material," *United States v. Burns*, 162 F.3d 840, 853 (5th Cir. 1998) (internal quotation marks and citation omitted). The rule operates independently from Rule 801(d)(1)(B) and allows the admission of such statements even when they are

No. 18-50793

otherwise barred by the hearsay rules. *See United States v. Mohr*, 318 F.3d 613, 626 (4th Cir. 2003).

The government cites pages from the record where the defendants referred to specific portions of the statements that were later introduced at trial. But the government does not clearly explain why this questioning created a misleading impression about the *entirety* of the prior consistent statements. We have explained that the rule of completeness justifies admission of a statement only where it is “necessary to qualify, explain, or place into context the portion already introduced.” *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (citation omitted); *see also United States v. Sanjar*, 876 F.3d 725, 739 (5th Cir. 2017) (“The rule comes into play . . . only when the additional inquiry is needed to ‘explain, vary, or contradict’ the testimony already given.” (quoting *United States v. Pacquet*, 484 F.2d 208, 212 (5th Cir. 1973))). The government has not demonstrated that the statements admitted into evidence were necessary to correct any misleading impressions created by the defendants’ references to the prior statements. *See United States v. Altwater*, 954 F.3d 45, 49–50 (1st Cir. 2020) (rejecting a rule of completeness argument where the proponent failed to meet his burden of showing that the full statement was necessary to correct a misimpression).<sup>3</sup>

We therefore hold that the district court abused its discretion in admitting the Romo brothers’ prior consistent statements. This conclusion does

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<sup>3</sup> The government makes the related argument that the prior consistent statements were admissible in order to “contextualize[], clarif[y], or amplif[y] the meaning of” the inconsistent testimony used by the defendants in their cross-examinations. *See United States v. Cotton*, 823 F.3d 430, 437 (8th Cir. 2016). Even if this argument justified the admission of some portion of the statements, the government does not explain why this rule justified the admission of the entirety of the brothers’ confessions. However, the defendants’ affirmative use of portions of the brothers’ confessions and the government’s avoidance of using the confessions in its direct examinations of the brothers collectively add to our conclusion that the district court’s error was harmless.

No. 18-50793

not end our analysis, however. We must still affirm if the district court’s error was harmless. *See, e.g., United States v. Jones*, 664 F.3d 966, 974 (5th Cir. 2011). Here, the improperly admitted prior statements duplicated the Romo brothers’ “lengthy, specific, and detailed accounts” of Portillo’s and Pike’s involvement in the two murders, which they repeated during trial. *Magnan*, 756 F. App’x at 819; *Akins*, 746 F.3d at 600. This stands in contrast to a situation like *Tome*, where the prior consistent statements were considerably more detailed and persuasive than the testimony introduced at trial—thus adding to their prejudicial impact. *Magnan*, 756 F. App’x at 819. In addition, the government introduced powerful circumstantial evidence to support the defendants’ involvement in Benesh’s murder, including evidence about each defendant’s role within the organization and evidence about the aftermath of the murder and the defendants’ reactions. *See, e.g., United States v. Sanders*, 952 F.3d 263, 273 (5th Cir. 2020) (“Criminal conspiracies can be established on circumstantial evidence alone.”); *cf. Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”). This circumstantial evidence provided an additional basis to convict the defendants, even without the Romo brothers’ testimony regarding the defendants’ direct involvement in the murder. It is notable that the defendants do not point to reliance by the government on these statements in its principal or rebuttal closing arguments. Our own review of the closing arguments confirms that the government did not heavily rely upon the Romo brothers’ confessions, making it difficult for us to conclude that the inadmissible evidence “permeate[d] the record.” *United States v. Westmoreland*, 841 F.2d 572, 579 (5th Cir. 1988). To the contrary, the prior consistent statements were not themselves a crucial part of the government’s case against the defendants. *See United States v. Whittington*, 269 F. App’x 388, 408 (5th Cir. 2008) (holding error harmless

No. 18-50793

where the improperly admitted evidence “was of minimal assistance” to the government).

Given the totality of the evidence, we are unable to conclude that “there is a reasonable probability that the improperly admitted evidence contributed to the conviction.” *Sumlin*, 489 F.3d at 688. We therefore hold that the district court’s error was harmless, and we affirm.

### **iii. Criminal Convictions of Former Bandidos Leaders**

The district court allowed several witnesses to testify about the conviction of George Wegers, who served as President of the Bandidos immediately before Pike. Wegers pleaded guilty to a RICO indictment in 2005. The court found this testimony relevant to the charges against both defendants because Weger’s conviction occurred “during the period when the alleged conspiracy took place.” However, the court simultaneously reminded the jury that “the defendants here are not responsible for Mr. Wegers’s conduct and the fact that he may have pled guilty is not to be considered by you as evidence of the guilt of the defendants.”

When Pike testified at trial, he repeatedly denied any knowledge of other Bandidos’ criminal activities and argued that the Bandidos became a “family-oriented” club under his leadership. As a result, the court allowed the government to question Pike about his knowledge of other members’ criminal convictions. The court again cautioned the jury that this testimony was not, “in any way, shape or form[.] . . . evidence against the defendants in this case.” The court explained that the jury could only consider the evidence “as to the state of mind of Mr. Pike when he joined and maintained his membership in the Bandidos.” After the close of evidence, the court reminded the jury that “[t]he defendants are not on trial for any act, conduct, or offense not alleged in the indictment.” Pike and Portillo argue that this evidence was irrelevant and

No. 18-50793

that the probative value of this evidence was substantially outweighed by the risk of unfair prejudice.

“Evidence is relevant if . . . it has any tendency to make a fact more or less probable . . . and . . . the fact is of consequence in determining the action.” Federal Rule of Evidence 401. Rule 403 of the Federal Rules of Evidence allows a court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” “In reviewing Rule 403 findings, we give great deference to the court’s informed judgment and will reverse only after a clear showing of prejudicial abuse of discretion.” *United States v. Peden*, 961 F.2d 517, 521 (5th Cir. 1992) (internal quotation marks and citation omitted).<sup>4</sup>

“[A] defendant’s guilt may not be proven by showing that he associates with unsavory characters.” *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (quoting *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. Unit A 1981)). As a result, we have explained that evidence about a third party’s criminal conviction—absent any evidence “connecting [that person] to [an] alleged conspiracy”—is “irrelevant to any issue in th[e] case,” and is instead “a highly prejudicial attempt to taint defendant’s character through ‘guilt by association.’” *United States v. Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978).

In the context of a conspiracy charge, however, evidence about a defendant’s co-conspirators’ actions is often highly relevant. *See, e.g., United States v. Ocampo-Vergara*, 857 F.3d 303, 307–08 (5th Cir. 2017). “[T]he agreement, a defendant’s guilty knowledge and a defendant’s participation in

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<sup>4</sup> The government argues that Portillo did not contemporaneously object to all of the challenged testimony, and therefore his challenge should be reviewed for plain error only. In *United States v. Love*, 472 F.2d 490, 496 (5th Cir. 1973), however, we held that a defendant’s failure to object is “excused” if his co-defendant objects, since an additional “motion or objection would have been a useless formality.” We review both defendants’ Rule 403 challenge for an abuse of discretion.

No. 18-50793

the conspiracy all may be inferred from the development and collation of circumstances,” including evidence about the defendant’s “presence and association with other members of a conspiracy.” *Id.* (internal quotation marks and citations omitted). As a result, we have held that evidence about an associate’s guilt is admissible as long as it has some tendency to establish the elements of a conspiracy against the defendant himself. *See, e.g., United States v. Chavful*, 100 F. App’x 226, 231 (5th Cir. 2004) (admitting gang letter where it was “probative of [defendant’s] association with other members of the conspiracy”); *United States v. Rodriguez*, 162 F.3d 135, 143 (1st Cir. 1998).

Here, the challenged evidence was relevant to the conspiracy charges against Portillo and Pike. Wegers was convicted of a RICO conspiracy based on his activities as the Bandidos President in 2005—the same time that Pike assumed the role of National President. The dates of the charged conspiracy in this case overlap with Wegers’s conviction. As the government argues, the timing of Wegers’s racketeering conviction—which occurred when Pike was National Vice President—undermines the defendants’ argument that they were unaware that Bandidos members were engaged in criminal activity. *See United States v. Greenwood*, 974 F.2d 1449, 1459 (5th Cir. 1992) (dismissing defendants’ guilt by association argument where the evidence supported the conclusion that the defendant was aware that the operation “he wished to join was an on-going criminal enterprise”). It also casts doubt upon their claim that the Bandidos was simply a family-friendly motorcycle club, not connected to violence or criminal activities. The evidence of other Bandidos’ members convictions was also relevant to rebut Pike’s defense, which rested on the argument that he was unaware of criminal activity committed by other Bandidos members. The Bandidos members whose criminal convictions were discussed at trial were involved in similar racketeering activity during the course of the defendants’ involvement in the club, undermining Pike’s claims

No. 18-50793

that the club was more “mainstream” during his Presidency and that the club itself existed simply for innocent entertainment purposes. *See, e.g., Ocampo-Vergara*, 857 F.3d at 308 (explaining that no guilt by association problems arise if “the defendant’s offense is connected to others’ conduct”); *Chauful*, 100 F. App’x at 231 (observing that letter from non-defendant was relevant because it “served to rebut [defendant’s] attempt to distance himself from the gang and the other members of the conspiracy”). Though evidence that can only be used to establish guilt by association is “improper and highly prejudicial,” evidence that is relevant on its own terms is admissible if “reasonable inferences” regarding the defendants’ guilt “could be drawn . . . by a reasonable juror.” *United States v. Parada-Talamantes*, 32 F.3d 168, 169–70 (5th Cir. 1994).

The district court likewise did not abuse its discretion in declining to exclude this evidence under Rule 403. “Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403.” *United States v. Pace*, 10 F.3d 1106, 1115–16 (5th Cir. 1993) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)). Here, the district court’s repeated limiting instructions reminded jurors that evidence about non-defendants’ criminal activity could not be used to prove the defendants’ guilt. We have held that similar cautionary instructions can help to reduce the possibility of unfair prejudice. *See, e.g., United States v. Sanders*, 343 F.3d 511, 518 (5th Cir. 2003) (“Under the Rule 403 standard, when the court issues a limiting instruction, it minimizes the danger of undue prejudice.”). The court gave “extensive and immediate limiting instructions” and reiterated those instructions after the close of evidence. *United States v. Juarez*, 866 F.3d 622, 628–29 (5th Cir. 2017) (citation omitted). These instructions reminded the jurors that evidence about other Bandidos members did not prove the defendants’ guilt and could instead only be used for “limited purposes.” *United States v. Guerra*, 402 F. App’x 973,

No. 18-50793

976 (5th Cir. 2010). We therefore hold that the district court did not abuse its discretion in admitting this evidence.

**iv. *Goodfella's* Comment**

During his testimony, Agent Schuster explained that his knowledge of the Bandidos was based on interviews with “patched-in” members and other “associate[s]” of the group, including “hang-arounds or support club members.” On cross-examination, the defendants used this testimony to suggest that Schuster had only spoken to a handful of Bandidos members, rendering his opinions unreliable and unsupported. The government objected, arguing that the defendants’ questions misstated Schuster’s testimony regarding the basis for his knowledge.

The district court agreed and sustained the government’s objection. The court explained that Schuster’s testimony revealed that he had “two insider informants,” but that he also spoke with a “bunch of hangers-on and other people who were . . . not in the club itself, but nonetheless were involved in the club.” To help explain the role of non-member “hangers-on,” the court analogized to the movie *Goodfellas*:

Now, if I can use an example that maybe the jury might be familiar with and I’m not for a moment suggesting that the Bandidos are in any way, shape or form like this organization, but we all remember maybe the movie Goodfellas. Remember that movie? . . .

. [T]he main character in Goodfellas was Irish and there was another guy named Burke who was also Irish. Those people were not actually members of the mafia because you cannot become a member of the mafia unless you are Italian and you can trace your Italian lineage. They were Irish, but they worked with, for and were involved [] deeply in mafia activities, but they were not actually members of the mafia. So those people if we were trying that case wouldn’t be members of the mafia, but they would be people who were associated with them, okay. . . . I used that example because it’s a very easy one to draw, not because I’m suggesting that the people who were involved with the Bandidos were like the two people who were involved in the movie.

No. 18-50793

Neither of the defendants objected to the district court's explanation.

Portillo argues that the district court's comment was unfairly prejudicial. Because he failed to object to this comment during trial, we review his challenge for plain error only. *United States v. Williams*, 620 F.3d 483, 488–89 (5th Cir. 2010).

“A district judge in a jury trial is ‘governor of the trial for purposes of assuring its proper conduct and of determining questions of law.’” *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 425 (5th Cir. 1990) (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)). As a result, judges have both “the right and the duty to comment on the evidence to ensure a fair trial.” *Id.* Because judges have “enormous influence on the jury,” however, they “must act with a corresponding responsibility” when making comments or questioning witnesses. *United States v. Williams*, 809 F.2d 1072, 1086 (5th Cir. 1987); *see also United States v. Middlebrooks*, 618 F.2d 273, 277 (5th Cir. 1980) (“It is well known that juries are highly sensitive to every utterance by the trial judge.” (cleaned up)).

We do not agree that the district court committed plain error when it made the *Goodfellas* statement. This stray statement was unnecessary. However, the court was careful to provide the jury with limiting instructions. The district judge explained that he was not suggesting that there was any resemblance between the Bandidos and the mafia, reducing the risk that the jury would have interpreted the judge as demonstrating a bias towards the government. The court was also careful to explain at the close of evidence that the jury should “disregard anything [the court] may have said during the trial in arriving at your own verdict.” We have held that the prejudicial impact of a district court's comments may be “adequately cured by the trial court's instructions to the jury . . . to ignore his comments and to be the sole judge of

No. 18-50793

the facts.” *Johnson*, 892 F.2d at 426. In *United States v. Bermea*, 30 F.3d 1539, 1571–72 (5th Cir. 1994), we approved nearly identical curative instructions, holding that “a curative instruction such as this one can operate against a finding of . . . error.”

Even if the statement was clear and obvious error, Portillo fails to explain how it affected his substantial rights. When determining whether a prejudicial court comment impacted the jury’s verdict, it is necessary to review those actions in the context of “the entire trial record.” *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 579 (5th Cir. 2001) (citation omitted). Here, the court’s comment takes up just a page of the transcript in a three-month-long trial. The relative insignificance of this one stray comment demonstrates that any error “did not deprive the defendants of their rights to a fair trial.” *Williams*, 809 F.2d at 1090.

#### **v. Access to Psychiatric Records**

Magenta Winans testified on behalf of the government about Robert Lara’s murder. On direct examination, Winans also testified about her own drug use and her mental health history. She explained that she had been diagnosed with “PTSD, bipolar disorder two, anxiety, depression, ADHD, and dyslexia,” and she testified that she “lost a lot of . . . memory” and “really forgot all about everything” after her son died.

During cross-examination, Winans was asked to provide more detail about her psychiatric treatment and medications. She told the jury that she was on several medications that help “keep [her] calm” and “help [her] so [she] can sleep and . . . keep the rage off.” At one point, she was taking as many as eight medications a day. She sees a doctor once or twice a month and had been seeing the same doctor since 2014. When the court asked if the medications ever “affect[ed] [her] ability to think or reason,” she replied affirmatively,

No. 18-50793

stating that they impact her thinking abilities and that she “couldn’t really drive” while she was on the medications.

Before Winans was subjected to cross examination, Portillo moved for production of her psychiatric, psychological, and counseling records. With support of counsel, Winans opposed the disclosure of the material. The court ordered the records produced to a magistrate judge for *in camera* review. After reviewing the records, the magistrate judge held that the records were protected by the psychotherapist-patient privilege and denied Portillo’s motion.

“We review factual findings underlying a ruling of psychotherapist-patient privilege for clear error, and we review application of the legal principles *de novo*.” *United States v. Murra*, 879 F.3d 669, 680 (5th Cir. 2018) (citing *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008)). “A district court’s factual finding is clearly erroneous ‘if, on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed.’” *Id.* (quoting *United States v. Brown*, 650 F.3d 581, 588 (5th Cir. 2011)).

The psychotherapist-patient privilege was first identified by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). In that case, the Court held that the privilege “promotes sufficiently important interests to outweigh the need for probative evidence.” *Id.* at 9–10 (cleaned up). To obtain the benefits of the privilege, the communication must be confidential, between a licensed psychotherapist and her patient, and conducted “in the course of diagnosis or treatment.” *Id.* at 15. Portillo makes two arguments to challenge the court’s conclusion that the documents were privileged: (1) Winans waived the privilege when she disclosed her “mental health treatment, diagnoses and medications during her testimony,” and (2) as a criminal defendant, his constitutional rights to confrontation and due process override the privilege.

No. 18-50793

Neither of these arguments demonstrates that the court erred when it denied Portillo's motion to access the records.

First, Winans did not waive the privilege simply by testifying about her psychiatric conditions and medication history. The privilege protects confidential *communications* between a psychotherapist and a patient. Winans testified about the *facts* of her medical diagnoses and medication history, but she did not provide any details about the nature of her conversations with her doctor. In *Murra*, we explained that a witness does not waive the privilege merely by disclosing "facts" to "third parties and at trial." 879 F.3d at 680. Winans had a "reasonable expectation of confidentiality" in her confidential communications with her psychotherapist, and her disclosure of the fact of that relationship—as well as the nature of her medication regimen—does not demonstrate that "any portion of those confidential communications was revealed . . . to any third party." *Id.* at 681 (citation omitted).

Our own independent review of Winans's psychiatric records confirms that Winans did not reveal confidential information at trial. Winans's records detail confidential discussions with her doctor about her treatment and condition. Even though Winans's current medication regimen falls outside of the privilege, her forthcoming testimony about these details demonstrates that there was "no relevant underlying fact discussed in [her] psychotherapy sessions that was not fully explored during [her] testimony and cross-examination at trial." *Id.* at 680–81. She did not "attempt[] to hide behind the privilege to avoid giving testimony about those facts," *id.* at 681, and there was therefore no basis to conclude that she waived the privilege or that disclosure was necessary to reveal facts that are not subject to the privilege. *See also id.* ("[The defendant] cannot be permitted . . . to review confidential communications and *then* advise the court of the harm she suffered as a result of the withholding.").

No. 18-50793

Similarly, we do not believe that Portillo’s constitutional rights were violated by the court’s failure to disclose these records. With respect to Portillo’s claim under the Confrontation Clause, there is no basis to conclude that Portillo’s ability to cross-examine Winans was hampered by the denial of his motion. Portillo’s counsel was permitted to ask Winans detailed questions about her psychiatric treatment and medication regimen on cross-examination, distinguishing this case from *Davis v. Alaska*, 415 U.S. 308 (1974); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 52–53 (1987) (plurality) (explaining that the Confrontation Clause is not “a constitutionally compelled rule of pretrial discovery,” but instead merely ensures the right of a defendant to question an adverse witness). Likewise, Portillo’s *Brady* claim fails because he has not demonstrated that the “prosecution team had access” to Winans’s records—a necessary prerequisite for the claim to succeed. *Summers v. Dretke*, 431 F.3d 861, 874 (5th Cir. 2005).

We therefore hold that the district court did not abuse its discretion in denying Portillo access to Winans’s psychiatric records.

#### **vi. Sonny Barger’s Prior Convictions**

When Barger testified on behalf of the defense, he explained that the Hell’s Angels and the Bandidos had peacefully co-existed for decades. He denied that the clubs were enemies, and he claimed that the Hell’s Angels was simply a “fun-loving motorcycle club,” not a group predisposed to violence. Over Pike’s objections, the district court allowed the prosecution to impeach Barger with two prior convictions: (1) felony drug trafficking in 1973, and (2) conspiracy to transport and receive explosives with the intent to kill and

No. 18-50793

damage buildings in 1989. The defendants argue that the district court abused its discretion when it admitted these convictions.<sup>5</sup>

“Extrinsic evidence, which includes prior convictions, is admissible under the general standards of Rules 402 and 403 to contradict specific testimony, as long as the evidence is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice.” *United States v. Lopez*, 979 F.2d 1024, 1034 (5th Cir. 1992); *see also United States v. Moon*, 802 F.3d 135, 146 (5th Cir. 2015) (“Although [the defendant] invokes Rule 609 in asserting that the evidence surrounding his 2001 robbery conviction was improperly admitted, that rule is beside the point where, as here, the challenged evidence was offered to contradict the specific testimony.”).

In several cases, we have affirmed the admissibility of a prior conviction where the witness’s testimony either explicitly denied the conviction or created a misleading impression that could only be corrected through admission of the conviction. In *United States v. Carter*, 953 F.2d 1449 (5th Cir. 1992), we held that a prior misdemeanor conviction was admissible to contradict the witness’s statement that he was continuously employed during the period of time when he was actually incarcerated. *Id.* at 1456, 1458. Likewise, in *Lopez*, we affirmed the admission of evidence about a prior marijuana conviction when it was used to contradict the witness’s testimony that he “never had seen and did not recognize” the drug. 979 F.2d at 1034.

The government argues that Barger’s convictions were admissible to contradict Barger’s testimony that the Hell’s Angels was simply a “fun-loving

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<sup>5</sup> Pike preserved this error when he objected during trial. Though Portillo did not discuss this issue in his brief, he adopted Pike’s argument in his own brief. Federal Rule of Appellate Procedure 28(i) permits this practice as long as the issue does not raise “fact-specific challenges to [a defendant’s] own conviction or sentence.” *United States v. Alix*, 86 F.3d 429, 434 n.2 (5th Cir. 1996). The defendants’ challenge to the admission of Barger’s convictions is not fact-specific or individual to either defendant.

No. 18-50793

motorcycle club.” Barger’s 1989 conspiracy conviction was related to a “plot to kill members of the Outlaw motorcycle club in Louisville, Kentucky,” suggesting that the Hell’s Angels participated in violent retaliatory attacks—not simply “fun-loving” entertainment. Likewise, Barger’s drug conviction cast doubt upon his innocent characterization of the Hell’s Angels, suggesting that the club and its members were involved in drug trafficking.

Even if the contradictions between Barger’s testimony and his prior convictions are not as direct as the contradictions in *Lopez* and *Carter*, any error in admitting these convictions was harmless. Barger’s testimony was relatively brief, and it did little to challenge the elements of the charges against the defendants. The government presented substantial evidence to dispute Barger’s claim about the relationship between the Hell’s Angels and the Bandidos and to establish the defendants’ responsibility for Benesh’s murder. *See United States v. Simmons*, 374 F.3d 313, 321 (5th Cir. 2004) (holding error harmless where there was “overwhelming direct and circumstantial evidence” of the defendant’s guilt). Because Barger’s testimony played such a minor role in the trial as a whole, the defendants are unable to show that “there is a reasonable probability that the improperly admitted evidence contributed to the[ir] conviction[s].” *Sumlin*, 489 F.3d at 688.

#### **vii. Portillo’s Prior Statement**

During Pike’s case-in-chief, he moved to admit a letter that Portillo had written him ten months after the two defendants were indicted. In the letter, Portillo wrote that he was “truly sorry about this mess.” He told Pike “[t]his is bullshit,” and “I plan to fight this to the end + take what I got coming.” He also told Pike “You had nothing to do with it. You or I cannot control what people do 24-7. I hope to see you soon + not in a courtroom.”

The district court held that the letter was inadmissible. First, it was inadmissible under Rule 806 to impeach Portillo’s recorded conversations

No. 18-50793

because Portillo had never made any statements implicating Pike that would have been inconsistent with the letter. The court also found that Pike was trying to introduce the letter as substantive evidence, rather than impeachment evidence. And because Portillo's statement that Pike "had nothing to do with it" was vague, the court found the letter "nebulous at best." The court also held that the letter should be excluded under Rule 403 because it had "very little probative value given its obliqueness" but could "be extremely damaging to Mr. Portillo if the Government is then able to argue that Mr. Portillo . . . has basically admitted the entire case."<sup>6</sup>

Federal Rule of Evidence 806 allows a party to attack the credibility of a declarant whose hearsay statement has been admitted into evidence. Under the rule, the party can impeach the hearsay declarant "by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. "The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it." *Id.*; *see also United States v. Moody*, 903 F.2d 321, 328 (5th Cir. 1990); *United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988).

In order to determine whether a statement is admissible under Rule 806, the court must "first decide whether the proffered statement is actually inconsistent with the hearsay statement already admitted." *Graham*, 858 F.2d at 990; *see also United States v. Hale*, 422 U.S. 171, 176 (1975) ("As a preliminary matter . . . the court must be persuaded that the statements are indeed inconsistent."). As the Supreme Court stated in *Hale*, "the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue

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<sup>6</sup> For the purposes of reaching a decision, the court assumed that Pike would be able to establish that the letter was in fact written and signed by Portillo.

No. 18-50793

of credibility is ordinarily in the discretion of the trial court.” 422 U.S. at 180 n.7.

Pike argues that Portillo’s letter was admissible as impeachment evidence under Rule 806 because it was inconsistent with statements made by Portillo in a set of recorded phone conversations introduced at trial. Pike points to a number of comments made by Portillo during the course of these recordings: (1) “I was talking to the general manager, he said play ball. Said batter up motherfucker;” (2) “I asked the guy in Houston to turn his back from what I’m gonna do;” (3) “His word is final;” and (4) “I don’t make no majors without him knowing about it.” Pike argues that these statements suggested Pike was involved in specific decisions made by Portillo and by the Bandidos; by contrast, he argues that Portillo’s letter, which stated that Pike “had nothing to do with it,” was inconsistent with these comments because it demonstrated Pike’s lack of knowledge about the Bandidos’ crimes.

The district court did not abuse its discretion when it held that Portillo’s letter was not inconsistent with any of these statements. Portillo’s recorded conversations suggest that Pike, as the President of the Bandidos, was aware of some of the Bandidos’ criminal activities. But these specific comments are not necessarily inconsistent with the vague and “nebulous” comments in Portillo’s jailhouse letter. As the district court found, it is unclear from the letter what “it” meant. Given this uncertainty, it is not inconsistent for Portillo to have acknowledged Pike’s knowledge about Portillo’s major decisions, while also stating that Pike was not affiliated with other specific and discrete crimes. Even if it might have been within the district court’s discretion to find that the statements here were inconsistent, that does not necessarily mean that the court’s contrary conclusion was erroneous. *See, e.g., Gonzalez v. Fresenius Med. Care N.A.*, 689 F.3d 470, 480 (5th Cir. 2012).

No. 18-50793

For similar reasons, the district court did not abuse its discretion when it held, in the alternative, that the evidence was inadmissible under Rule 403. Given the inconclusive nature of the inconsistency, the probative value of the letter was minimal, especially when set against the high risk of prejudice. *See United States v. Lewis*, 796 F.3d 543, 545 (5th Cir. 2015) (“A district court’s ruling regarding Rule 403 is reviewed with an especially high level of deference to the district court, with reversal called for only rarely and only when there has been a clear abuse of discretion.” (cleaned up)). As a result, we affirm the district court’s decision to deny admission of Portillo’s letter.

#### **E. Duplicative Special Assessments**

The district court imposed a special assessment of \$100 on each of Portillo’s thirteen crimes of conviction. Portillo argues that the district court’s imposition of duplicative special assessments violates the Double Jeopardy Clause. Because he did not object to his sentence on this basis before the district court, we review his challenge for plain error only. *See United States v. Danhach*, 815 F.3d 228, 238 (5th Cir. 2016).

The imposition of multiple special assessments on concurrent counts of conviction can violate the constitutional prohibition against imposing “multiple punishments for the same act.” *United States v. Kimbrough*, 69 F.3d 723, 729 (5th Cir. 1995) (“[F]or double jeopardy purposes, sentences are not truly concurrent where a mandatory special assessment is separately imposed on each conviction.”). However, *Kimbrough* makes clear that separate special assessments violate the double jeopardy clause only if the assessments were imposed for the *same* criminal act. *See, e.g., Whalen v. United States*, 445 U.S. 684, 688 (1980). There is no double jeopardy problem if the special assessments were imposed for “distinct criminal acts.” *Danhach*, 815 F.3d at 239.

Portillo was sentenced to concurrent sentences on counts 1, 4, 5, 6, 7, 10, 11, 12, and 13. Those counts charged him with: a racketeering conspiracy,

No. 18-50793

conspiracy to commit murder in aid of racketeering, conspiracy to commit an assault with a deadly weapon in aid of racketeering, assault with a dangerous weapon in aid of racketeering in Palo Pinto, assault with a dangerous weapon in aid of racketeering in Port Aransas, conspiracy to distribute and possession with intent to distribute a controlled substance, possession with intent to distribute cocaine, conspiracy to interfere with commerce by threats or violence, and possession of a firearm as a felon. These crimes all involve distinct offenses and required the jury to find distinct elements to convict. Portillo fails to argue how those offenses “should be considered to constitute the same offense.” *Lopez*, 426 F. App’x at 264. He has therefore failed to establish plain error, and we affirm.<sup>7</sup>

### **III. Conclusion**

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

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<sup>7</sup> The defendants also argue that the cumulative error doctrine requires reversal of their convictions. Though we agree that the district court’s admission of the Romo brothers’ prior consistent statements was erroneous, this single harmless error does not require reversal. *See United States v. Ceballos*, 789 F.3d 607, 621 (5th Cir. 2015) (holding that reversal is required only when otherwise harmless “errors so fatally infected the trial that they violated the trial’s fundamental fairness” (cleaned up)); *United States v. Delgado*, 672 F.3d at 343–44.

# United States Court of Appeals for the Fifth Circuit

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No. 18-50793

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JOHN XAVIER PORTILLO, *also known as* JOHN PORTILLO; JEFFREY FAY PIKE, *also known as* JEFFREY PIKE, *also known as* JEFFREY F. PIKE,

*Defendants—Appellants.*

---

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 5:15-CR-820-1

---

## ON PETITIONS FOR REHEARING

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are DENIED.

## APPENDIX B

## UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

OCT 03 2018

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY *PS* DEPUTY CLERK

UNITED STATES OF AMERICA

v.

JOHN XAVIER PORTILLO  
aka *John Portillo, John Portillo*  
Defendant.Case Number: 5:15-CR-00820-DAE(1)  
USM Number: 64953-380JUDGMENT IN A CRIMINAL CASE  
(For Offenses Committed On or After November 1, 1987)

The defendant, JOHN XAVIER PORTILLO, was represented by Mark Stevens and Robbie Ward, Esq.

On a motion of the United States, the Court dismissed the remaining counts of the indictment, first superseding indictment, second superseding indictment, and third superseding indictment as to this defendant.

The defendant was found guilty on Counts One (1ssss), Two (2ssss), Three (3ssss), Four (4ssss), Five (5ssss), Six (6ssss), Seven (7ssss), Eight (8ssss), Nine (9ssss), Ten (10ssss), Eleven (11ssss), Twelve (12ssss), and Thirteen (13ssss) of the Fourth Superseding Indictment by a jury verdict on May 17, 2018 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Counts, involving the following offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1962(d), 18 U.S.C. § 1963(a)	RICO Conspiracy	03/18/2016	One (1ssss)
18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 2	Murder in Aid of Racketeering, Aiding and Abetting	01/31/2002	Two (2ssss)
18 U.S.C. § 1959(a)(1) and 18 U.S.C. § 2	Murder in Aid of Racketeering, Aiding and Abetting	03/18/2006	Three (3ssss)
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Murder in Aid of Racketeering	01/06/2016	Four (4ssss)
18 U.S.C. § 1959(a)(6)	Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering	01/06/2016	Five (5ssss)
18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2	Assault with a Dangerous Weapon in Aid of Racketeering, Aiding and Abetting	03/22/2015	Six (6ssss)
18 U.S.C. § 1959(a)(3) and 18 U.S.C. § 2	Assault with a Dangerous Weapon in Aid of Racketeering, Aiding and Abetting	08/22/2015	Seven (7ssss)
18 U.S.C. § 924(j)(1) and 18 U.S.C. § 2	Using and Discharging a Firearm During and in Relation to a Crime of Violence, specifically, VCAR Murder, Aiding and Abetting	01/31/2002	Eight (8ssss)
18 U.S.C. § 924(j)(1)	Using and Discharging a Firearm 057A	03/18/2006	Nine (9ssss)

APPENDIX C

18-50793.1402

DEFENDANT: JOHN XAVIER PORTILLO  
 CASE NUMBER: 5:15-CR-00820-DAE(1)

and 18 U.S.C. § 2

During and in Relation to a Crime  
 of Violence, specifically,  
 VCAR Murder, Aiding and Abetting

21 U.S.C. § 841(a)(1), 841(b)(1)(A)  
 and (B) and 21 U.S.C. § 846

Conspiracy to Distribute and Possession  
 With Intent to Distribute 500 Grams or  
 More of Methamphetamine and Cocaine

01/06/2016

Ten (10ssss)

21 U.S.C. § 841(a)(1),  
 21 U.S.C. § 841(b)(1)(C)

Possession With Intent to Distribute  
 Cocaine

01/06/2016

Eleven (11ssss)

18 U.S.C. § 1951(b)(2),  
 18 U.S.C. § 1951(a)

Conspiracy to Interfere with Commerce  
 by Threats or Violence

01/06/2016

Twelve (12ssss)

18 U.S.C. § 922(g)(1),  
 18 U.S.C. § 924(a)(2)

Felon in Possession of a Firearm

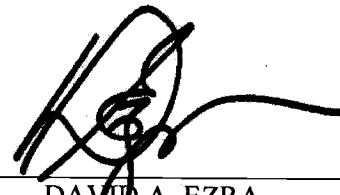
01/06/2016

Thirteen (13ssss)

As pronounced on September 24, 2018, the defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 3rd day of October, 2018.



DAVID A. EZRA  
 Senior United States District Judge

DEFENDANT: JOHN XAVIER PORTILLO  
 CASE NUMBER: 5:15-CR-00820-DAE(1)

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **two (2) life sentences plus 20 years**. This term consists of two hundred forty (240) months in each of counts one (1ssss), six (6ssss), seven (7ssss), eleven (11ssss), and twelve (12ssss); one hundred twenty (120) months in each of counts four (4ssss), ten (10ssss), and thirteen (13ssss); 36 months in count five (5ssss) all to run concurrently to each other and concurrent to counts (one (1ssss), Three (3ssss), eight (8ssss) and nine (9ssss); LIFE in counts two (2ssss) and three (3ssss) both to run consecutively to each other; one hundred twenty (120)months in each of counts eight (8ssss) and nine (9ssss) to run consecutively to each other and consecutively to all other counts. The defendant is to receive credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The court makes the following recommendation to the Bureau of Prisons:

- 1) That the defendant be incarcerated as close to San Antonio, Texas as possible
- 2) That the defendant participate in educational/vocational programs while incarcerated
- 3) That the defendant participate in physical exercise while incarcerated
- 4) That the defendant NOT be placed in a Supermax Facility

The defendant shall remain in custody pending service of sentence.

## RETURN

I have executed this judgment as follows:

---



---



---

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

---

UNITED STATES MARSHAL

---

By  
 DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN XAVIER PORTILLO  
CASE NUMBER: 5:15-CR-00820-DAE(1)

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a total term of **five (5) years**. This term consists of Three (3) years in each of counts one (1ssss), four (4ssss), six (6ssss), seven (7ssss), eleven (11ssss), twelve (12ssss), and thirteen (13ssss); and five (5) years in each of counts two (2ssss), three (3ssss), eight (8ssss), nine (9ssss), and ten (10ssss); and one (1) year in count five (5). **Terms to run concurrent.**

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

- 1) The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.
- 2) The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs. The probation officer shall supervise the participation in the program (provider, location, modality, duration, intensity, etc.). During treatment, the defendant shall abstain from the use of alcohol and any and all intoxicants. The defendant shall pay the costs of such treatment if financially able.
- 3) The defendant shall submit to substance abuse testing to determine if the defendant has used a prohibited substance. The defendant shall not attempt to obstruct or tamper with the testing methods. The defendant shall pay the costs of testing if financially able.
- 4) The defendant shall not communicate, or otherwise interact, with any known member of the Bandidos OMO, without first obtaining the permission of the probation officer.

DEFENDANT: JOHN XAVIER PORTILLO  
 CASE NUMBER: 5:15-CR-00820-DAE(1)

## CONDITIONS OF SUPERVISION

### Mandatory Conditions:

1. The defendant shall not commit another federal, state, or local crime during the term of supervision.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
4. The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
5. If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
6. If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
7. If the judgment imposes restitution, the defendant shall pay the ordered restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. (if applicable)
8. The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If the judgment imposes a fine, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
10. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

### Standard Conditions:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within seventy-two (72) hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) After initially report to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant shall answer truthfully the questions asked by the probation officer.
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least ten (10) days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.
- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view..
- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the

DEFENDANT: JOHN XAVIER PORTILLO  
CASE NUMBER: 5:15-CR-00820-DAE(1)

probation officer at least ten (10) days before the change. If notifying the probation officer at least ten (10) days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within seventy-two (72) hours of becoming aware of a change or expected change.

- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within seventy-two (72) hours.
- 10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- 14) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pays such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 15) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 16) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- 17) If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report to the nearest U.S. Probation Officer.

DEFENDANT: JOHN XAVIER PORTILLO  
 CASE NUMBER: 5:15-CR-00820-DAE(1)

## CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 655 E. Cesar E. Chavez Blvd, Room G65, San Antonio, TX 78206. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$1,300.00	\$0.00	\$0.00

### SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of \$1,300.00. The amount represents \$100.00 for each of the following counts: One (1ssss), Two (2ssss), Three (3ssss), Four (4ssss), Five (5ssss), Six (6ssss), Seven (7ssss), Eight (8ssss), Nine (9ssss), Ten (10ssss), Eleven (11ssss), Twelve (12ssss), and Thirteen (13ssss). Payment of this sum shall begin immediately.

### FINE

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOHN XAVIER PORTILLO  
CASE NUMBER: 5:15-CR-00820-DAE(1)

## FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

- 1) Motorcycle Blue Harley Davidson Motorcycle, VIN: 1HD1KHMI3CB691239; License Plate No. 4RW157;
- 2) Firearms Ruger, Model SR45, .45 caliber pistol, serial number 380-22927;
- 3) Taurus International, Model 85, .38 caliber revolver, serial number XC65936;
- 4) American Derringer, Model 2, .25 caliber pen pistol, serial number PP1 117;
- 5) Assorted Ammunition and Accessories; and
- 6) Currency \$17,827.20, More or Less, in United States Currency seized on January 6, 2016 at 3003 Jupe Drive, San Antonio, Texas 78222

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, )  
v. )  
(1) JOHN XAVIER PORTILLO, ) Docket No. 5:15-CR-820-DAE  
(3) JUSTIN COLE FORSTER, ) San Antonio, Texas  
Defendants. ) January 6, 2016  
 ) 11:19 a.m. to 11:47 a.m.  
)

TRANSCRIPT OF INITIAL APPEARANCE  
BEFORE THE HONORABLE JOHN W. PRIMOMO  
UNITED STATES MAGISTRATE JUDGE

10 COURT RECORDER: FTR Gold

11 | TRANSCRIBER:

CHRIS POAGE  
655 East Cesar E. Chavez Blvd., Suite G-65  
San Antonio, TX 78206  
Telephone: (210) 244-5036  
chris\_poage@txwd.uscourts.gov

15 Proceedings reported by electronic sound recording. Transcript produced by computer-aided transcription.

1 (Open court at 11:19 a.m.)

2 THE COURT: Please be seated.

3 United States of America versus Richard Louis Rogers,  
4 SA:15-CR-826. Are you Richard Louis Rogers?

5 DEFENDANT ROGERS: Yes, sir.

6 THE COURT: You can remain seated, sir.

7 United States of America versus Odilia Graciela Chacon,  
8 SA:15-CR-825. Are you Ms. Chacon?

9 DEFENDANT CHACON: Yes, sir.

10 THE COURT: United States of America versus John  
11 Javier Portillo, SA:15-CR-820. Are you Mr. Portillo?

12 DEFENDANT PORTILLO: Yes, sir.

13 THE COURT: United States of America versus Justin  
14 Cole Forster, SA:15-CR-820. Are you Mr. Forster?

15 DEFENDANT FORSTER: Yes, sir.

16 THE COURT: And United States of America versus Jose  
17 Hector Navarrete-Cardenas, SA:15-CR-844. Are you  
18 Mr. Navarrete?

19 DEFENDANT NAVARRETE: Yes, sir.

20 THE COURT: I need for the five of you to please  
21 remain seated, raise your right hands to the best of your  
22 ability and be sworn by the clerk.

23 (The oath was administered)

24 THE COURT: During this hearing I will advise each of  
25 you of the criminal charges that have been filed against you,

1 the penalties you face and your constitutional rights. I will  
2 not discuss the facts of your cases, and you should not talk  
3 about the facts at this hearing.

4 Mr. Rogers, do you suffer from any mental condition or take  
5 any drugs that might interfere with your ability to understand  
6 what we are doing today?

7 DEFENDANT ROGERS: No, sir.

8 THE COURT: Ms. Chacon?

9 DEFENDANT CHACON: No, sir.

10 THE COURT: Mr. Portillo?

11 DEFENDANT PORTILLO: No, sir.

12 THE COURT: Mr. Forster?

13 DEFENDANT FORSTER: No, sir.

14 THE COURT: Mr. Navarrete?

15 DEFENDANT NAVARRETE: No, sir.

16 THE COURT: Mr. Rogers, you're charged by indictment  
17 in Count 1 with making and subscribing a false tax return.  
18 That's also the charge in Count 2 and Count 3 of the  
19 indictment. And Counts 4 through 9 charge you with aiding and  
20 assisting in the preparation and presentation of a false tax  
21 return.

22 Did you receive a copy of the indictment that was filed  
23 against you?

24 DEFENDANT ROGERS: Yes, sir.

25 THE COURT: Did you read that?

1 DEFENDANT ROGERS: Yes, sir.

2 THE COURT: Do you understand the charges that have  
3 been filed against you?

4 DEFENDANT ROGERS: Yes, sir.

5 THE COURT: The penalty you face on each of those  
6 counts if you're found guilty is up to three years in jail, a  
7 fine up to \$100,000. That doesn't sound right. I would think  
8 the fine would be 250 -- \$250,000 on each count. Up to three  
9 years of supervised release and a \$100 special assessment, as  
10 well as restitution in the amount of approximately \$66,000.

11 Do you understand the penalties that you face if you're  
12 found guilty?

13 DEFENDANT ROGERS: Yes, sir.

14 THE COURT: Ms. Chacon, you are charged in a one count  
15 indictment with misapplication by a credit union employee. Did  
16 you receive a copy of the indictment filed against you?

17 DEFENDANT CHACON: Yes, sir.

18 THE COURT: Did you read that?

19 DEFENDANT CHACON: Yes, sir.

20 THE COURT: Do you understand what you are charged  
21 with?

22 DEFENDANT CHACON: Yes, I do.

23 THE COURT: The penalty you face if you're found  
24 guilty is up to 30 years in jail, a fine up to \$1 million, a  
25 term of supervised release of up to five years and a \$100

1 special assessment. Do you understand that?

2 DEFENDANT CHACON: Yes.

3 THE COURT: Mr. Portillo and Mr. Forster, you're  
4 charged in the same indictment. And I'm going to go through --  
5 there's nine counts altogether. And I'm going to go through  
6 each count because some of them apply to some of you, and some  
7 of them -- one of you, and some of them apply to both of you.

8 Count 1 -- and just remembering that there are a lot of  
9 allegations about facts in here. And I'm not -- I'm not  
10 vouching for any of the facts, and you don't need to talk about  
11 the facts. In fact, I don't want you to talk about the facts.  
12 I just want you to understand the nature of the legal charge  
13 that's been brought against you in each one of these  
14 indictments.

15 The first charge is a racketeering conspiracy charge which  
16 alleges that the two of you and other individuals were employed  
17 and associated with the Bandidos outlaw motorcycle organization  
18 which was -- which was engaged in activities that affected  
19 interstate and foreign commerce, and that you conspired to  
20 conduct and participate in the conduct of the affairs of that  
21 organization, and that multiple acts were committed, which  
22 involved murder, robbery, extortion and racketeering as well as  
23 trafficking in controlled substances. That's the charge  
24 against you in Count 1.

25 Now, in Count 2, if I'm reading it correctly, that charges

1 both of you with conspiracy to commit assault with a dangerous  
2 weapon in aid of racketeering.

3 Count 3 charges Mr. Portillo only with assault with a  
4 dangerous weapon in aid of racketeering.

5 Count 4 charges Mr. Portillo only with assault with a  
6 dangerous weapon in aid of racketeering.

7 Count 5 charges Mr. Portillo and Mr. Forster with  
8 conspiracy to distribute and to possess with intent to  
9 distribute 500 grams or more of methamphetamine.

10 Count 6 charges Mr. Portillo only with possession with  
11 intent to distribute 500 grams or more of methamphetamine.

12 Count 7 charges Mr. Forster only with possession with  
13 intent to distribute methamphetamine.

14 Count 8 charges Mr. Forster only with possession with  
15 intent to distribute methamphetamine.

16 Count 9 charges both of you with conspiracy to interfere  
17 with commerce by extorsion.

18 Mr. Portillo, did you receive a copy of the indictment that  
19 I'm referring to?

20 DEFENDANT PORTILLO: Yes, sir.

21 THE COURT: Did you have a chance -- I know it's long  
22 and there's a lot of stuff in there. I mean, it's I guess  
23 about 20 pages or so long. Did you have a chance to read that?

24 DEFENDANT PORTILLO: Most of it, sir.

25 THE COURT: And do you understand the nature of the

1 charges against you?

2 DEFENDANT PORTILLO: Yes, sir.

3 THE COURT: Mr. Forster, did you have a chance to read  
4 the indictment or at least the legal charges against you?

5 DEFENDANT FORSTER: Yes, sir.

6 THE COURT: And do you understand the nature of those  
7 legal charges?

8 DEFENDANT FORSTER: Yes, sir.

9 THE COURT: Now, I'm going to try to give you the  
10 penalties that apply to each one of those.

11 Count 1, which -- and you're all charged -- the two of you  
12 are both charged in Count 1, the penalty that you face if  
13 you're found guilty is up to life in prison and a fine up to  
14 \$250,000, up to five years of supervised release, which is  
15 similar to parole, and a \$100 special assessment.

16 Now, Count 2, which applies to both of you, carries up to  
17 three years in jail, fine up to \$250,000, up to one year of  
18 supervised release and a \$100 special assessment.

19 Count 4, which applies to Mr. Portillo only, would carry  
20 the same penalty of up to three years of imprisonment, fine of  
21 up to \$250,000, one year of supervised release and a \$100  
22 special assessment.

23 Count 5, which is the conspiracy to distribute and to  
24 possess with intent to distribute 500 grams or more of  
25 methamphetamine, which applies to both of you, if you're found

1 guilty, the penalty you face is a minimum of ten years, a  
2 maximum of life in prison, up to ten million dollars in fines  
3 and a five-year term of supervised release, plus the \$100  
4 special assessment.

5 Count 6, which is against Mr. Portillo only, would carry  
6 that same penalty of a minimum of ten years, a maximum of life  
7 in prison, a fine up to \$10 million, up to five years of  
8 supervised release and a \$100 special assessment.

9 Count 7 and 8, which applies to Mr. Forster only, carries a  
10 penalty of up to 20 years in jail, up to one million dollar  
11 fine, up to three years -- no, a minimum of three years of  
12 supervised release and a \$100 special assessment.

13 Count 9, which applies to both of you, if you're found  
14 guilty, carries up to 20 years of imprisonment, a fine up to  
15 \$250,000, up to three years of supervised release and a \$100  
16 special assessment.

17 Mr. Portillo, do you understand the possible penalties that  
18 you face if you're found guilty?

19 DEFENDANT PORTILLO: Yes, sir.

20 THE COURT: Mr. Forster?

21 DEFENDANT FORSTER: Yes, sir.

22 THE COURT: Mr. Navarrete, in your case you were  
23 sentenced by Judge Sparks up in Austin to a term of  
24 imprisonment, followed by three years of supervised release.

25 The petition alleges that you illegally reentered the

1 United States in violation of your terms of supervised release.  
2 Did you receive a copy of the petition that was filed against  
3 you?

4 DEFENDANT NAVARRETE: Yes, sir.

5 THE COURT: Did the interpreter read that for you?

6 DEFENDANT NAVARRETE: Yes, sir.

7 THE COURT: Do you understand the charge against you?

8 DEFENDANT NAVARRETE: Yes, sir.

9 THE COURT: If that charge is found to be true, then  
10 your term of supervised release could be revoked, you could be  
11 imprisoned for up to two years, followed by an additional term  
12 of supervised release of up to three years. Do you understand  
13 that?

14 DEFENDANT NAVARRETE: Yes, sir.

15 THE COURT: Mr. Navarrete, in your case your next  
16 court appearance will be a preliminary hearing -- revocation  
17 hearing to determine if there's probable cause to believe you  
18 violated your supervised release conditions. If there is  
19 probable cause to believe you violated those conditions, your  
20 case will be set for a final revocation hearing before  
21 Judge Sparks. No. Wait. Your case is now here in San Antonio  
22 before Judge Ezra. So Judge Ezra would be the judge who's  
23 going to -- you would see at your final revocation hearing.

24 If he finds that you have violated your conditions, he  
25 could keep you on supervised release and modify your

1 conditions. He could extend your term of supervised release or  
2 revoke supervised release.

3 At these hearings you will be present, and you'll be  
4 represented by an attorney. The government must present its  
5 evidence against you, and your attorney will have the  
6 opportunity to cross-examine the government's witnesses. You  
7 will also have the right to present evidence on your own  
8 behalf. Do you understand that?

9 DEFENDANT NAVARRETE: Yes, sir.

10 THE COURT: Mr. Rogers, Ms. Chacon, Mr. Portillo and  
11 Mr. Forster, each of you has the right to a jury trial on the  
12 charges that have been brought against you. At trial, the  
13 government must bring its witnesses to court, and your attorney  
14 will have the opportunity to cross-examine those witnesses.  
15 You are presumed to be innocent. And before you can be found  
16 guilty, the government must prove your guilt beyond a  
17 reasonable doubt.

18 The United States Constitution guarantees you the right to  
19 remain silent. You are not required to make a statement before  
20 trial. And if you choose not to testify at trial, that cannot  
21 be held against you. You're entitled to consult with an  
22 attorney prior to questioning and to have the attorney present  
23 during questioning. If you make a statement against your  
24 interests, however, it can be used against you in court.

25 Mr. Rogers, do you understand that?

1 DEFENDANT ROGERS: Yes, sir.

2 THE COURT: Ms. Chacon?

3 DEFENDANT CHACON: Yes, sir.

4 THE COURT: Mr. Portillo?

5 DEFENDANT PORTILLO: Yes, sir.

6 THE COURT: Mr. Forster?

7 DEFENDANT FORSTER: Yes, sir.

8 THE COURT: Mr. Rogers, it's my understanding that  
9 you're -- wait. Let me look at your financial affidavit, which  
10 I don't have.

11 (Pause)

12 THE COURT: You are qualified for court-appointed  
13 counsel. And I will appoint Michael Gross to represent you in  
14 your case.

15 DEFENDANT ROGERS: Yes, sir.

16 THE COURT: Your next court appearance, Mr. Rogers,  
17 will be your arraignment on January the 19th at 1:30 in the  
18 afternoon.

19 Ms. Chacon, is this -- let me ask you something about your  
20 financial affidavit.

21 DEFENDANT CHACON: Yes, sir.

22 THE COURT: See if this is correct. It indicates that  
23 you have --

24 Ms. Muzza, why don't you ask her if this is correct.

25 (Discussion off the record)

1                   THE COURT: Ms. Chacon, the Court finds you're  
2 qualified for court-appointed counsel. And I'll appoint the  
3 Federal Public Defender to represent you in your case.

4                   Mr. Portillo, you hired Jay Norton?

5                   DEFENDANT PORTILLO: Yes, sir.

6                   THE COURT: Mr. Forster, the information I have is  
7 that you were going to try to hire Jay Norton?

8                   DEFENDANT FORSTER: Yes, sir. I'm going to.

9                   THE COURT: Okay. We really frown upon the same  
10 attorney representing two people in the same case. And Jay  
11 Norton would be the first one to tell you that. It's not  
12 impossible, but it creates a conflict of interest for him for a  
13 lot of reasons that either I or some other judge will explain  
14 to you if you actually go through and do that. Not saying you  
15 can't do it. But if you do it, it creates a lot of stumbling  
16 blocks in your case.

17                  So if there's somebody else that you can retain, you might  
18 consider retaining someone else. I understand -- we've got  
19 your financial affidavit. So if you're not able to retain  
20 somebody, then we'll appoint somebody for you. But I'll give  
21 you a chance to hire somebody.

22                  But if you have a second attorney in mind who's not in the  
23 office or not partnered with Jay Norton -- you know, it has to  
24 be out of his office -- it would be better to go to that other  
25 attorney. And there are a lot of reasons, I'm not going to go

1 into today. It's just -- and Jay will tell you. I've  
2 already -- and he may refuse to represent you because he's  
3 representing Mr. Portillo. But it creates a conflict of  
4 interest for him representing two defendants in the same case.

5 So in the meantime, I will give you a chance to hire  
6 somebody. And then we'll talk about it at your next hearing if  
7 you're not, you know -- if he's here or if you're not able to  
8 hire somebody.

9 Do you have a question?

10 DEFENDANT FORSTER: So could I take the  
11 court-appointed right now, and then hire one because --

12 THE COURT: Well, your next hearing's going to be a  
13 detention hearing. Government's moving for detention for both  
14 of you. So neither one of you is getting out on bond today.  
15 So you're going to need a lawyer pretty quick.

16 DEFENDANT FORSTER: Okay.

17 THE COURT: Let me look at your financial affidavit.

18 (Discussion off the record)

19 THE COURT: You filled out a financial affidavit,  
20 didn't you, Mr. Forster? I thought you did.

21 DEFENDANT FORSTER: Yes, sir.

22 (Discussion off the record)

23 THE COURT: The Court finds you are qualified for  
24 court-appointed counsel, and I will appoint the Federal Public  
25 Defender to represent you. If you're able to hire an attorney,

1 you can always have an attorney substitute for the Public  
2 Defender later on. But it would be better, since you do have a  
3 hearing coming up in the near future, to have the attorney  
4 appointed now --

5 DEFENDANT FORSTER: Okay.

6 THE COURT: -- or have an attorney for you now.

7 (At the bench off the record)

8 THE COURT: Mr. Navarrete, your next court appearance  
9 will be your preliminary revocation hearing on January the 15th  
10 at 9:30 in the morning. And you've hired David Dilley?

11 DEFENDANT NAVARRETE: Yes.

12 THE COURT: Okay. Mr. Rogers, in your case the  
13 government does not oppose your release on bond pending trial.  
14 I'm going to order that you be released upon the signing of a  
15 \$25,000 unsecured bond. You do not have to deposit any money  
16 in order to be released, but you must sign a bond that would  
17 obligate you to pay the government the sum of \$25,000 if you  
18 violate any of the Court's bond conditions or if you fail to  
19 appear for court.

20 You must, while on bond, report to pretrial services as  
21 directed. You must reside at an address preapproved by  
22 pretrial services. And your travel will be restricted to the  
23 state of Texas unless you receive prior permission of pretrial  
24 services to travel outside that area. And you must maintain  
25 any mental health treatment as directed by your licensed

1 healthcare professional.

2 Do you understand those conditions?

3 DEFENDANT ROGERS: Yes, sir.

4 THE COURT: And I told you about your next court  
5 appearance being January the 19th at 1:30?

6 DEFENDANT ROGERS: Yes, sir.

7 THE COURT: Okay. And, Ms. Chacon, in your case the  
8 government also does not oppose your release. I'm going to set  
9 your bond conditions as a \$50,000 unsecured bond. You also  
10 need not deposit any money in order to be released. But you  
11 also would be responsible to the United States for that amount  
12 if you fail to appear for court or violate any of the Court's  
13 bond conditions.

14 You must report to pretrial services as directed, maintain  
15 or seek verifiable employment, surrender any passport to  
16 pretrial services and obtain no new passport. You must reside  
17 at an address approved by pretrial services, and your travel  
18 will be restricted to the continental United States unless you  
19 receive prior permission to travel outside that area.

20 And you must notify your current employer, or any other  
21 employer that you may have, of the instant offense if  
22 employment involves the handling of funds or sensitive  
23 financial information, which your current employment does seem  
24 to involve.

25 Do you understand those conditions?

1 DEFENDANT CHACON: Yes, sir.

2 THE COURT: Mr. Rogers and Ms. Chacon, if you violate  
3 any condition of your bond, a warrant will be issued for your  
4 arrest, and you'll be placed into jail. Also, your bond would  
5 be revoked, and you'd be liable to the United States for the  
6 sum of your bond. If you fail to appear for court, you can be  
7 prosecuted for a separate criminal offense which carries a  
8 sentence that would run consecutively to any sentence that you  
9 might receive for the charges now pending.

10 Mr. Portillo and Mr. Forster, in your cases the government  
11 has filed written motions to detain you without bond pending  
12 trial.

13 In your case, Mr. Forster, it's my understanding that you  
14 were already on bond and were at the time that these offenses  
15 were committed. Therefore, your detention hearing will not be  
16 held immediately. There has to be a time period of up to ten  
17 days in which the state authorities are notified so that they  
18 can issue a warrant for your arrest based upon violations of  
19 their conditions, if that's what they choose to do. So your  
20 detention hearing will be held January the 15th at 10:00 in the  
21 morning.

22 Mr. Portillo, your hearing will be held January the 11th at  
23 2:30 in the afternoon.

24 And your arraignments will be held at the same time as your  
25 detention hearings.

1           Mr. Rogers, do you understand what we've done today, sir?

2           DEFENDANT ROGERS: Yes, sir.

3           THE COURT: You have any questions?

4           DEFENDANT ROGERS: No, sir.

5           THE COURT: Ms. Chacon, do you understand what we've  
6 done today, ma'am?

7           DEFENDANT CHACON: Yes.

8           THE COURT: Any questions?

9           DEFENDANT CHACON: No, sir.

10          THE COURT: The two of you will need to go with the  
11 court security officer to the marshal's office for processing.  
12 And after that, you'll be released.

13          Mr. Portillo, do you understand what we've done today, sir?

14          DEFENDANT PORTILLO: Yes, sir.

15          THE COURT: Any questions?

16          DEFENDANT PORTILLO: No.

17          THE COURT: Mr. Forster --

18          DEFENDANT PORTILLO: Well, yes, I do. You said I have  
19 a hearing on the 11th?

20          THE COURT: Yes, sir.

21          DEFENDANT PORTILLO: And it will be for what?

22          THE COURT: It's a detention hearing and an  
23 arraignment. The arraignment is basically a taking of your not  
24 guilty plea on the indictment. The detention hearing will be  
25 to determine whether you can be released on bond in this case.

1           Mr. Forster, do you understand what we've done today, sir?

2           DEFENDANT FORSTER: Yes, sir.

3           THE COURT: Any questions?

4           DEFENDANT FORSTER: No, sir.

5           THE COURT: Mr. Navarrete, do you understand what  
6 we've done today, sir?

7           DEFENDANT NAVARRETE: Yes, sir.

8           THE COURT: Do you have any questions?

9           DEFENDANT NAVARRETE: No, sir.

10          THE COURT: And I think I indicated your preliminary  
11 revocation hearing is January the 15th at 9:30 in the morning.

12          DEFENDANT NAVARRETE: Yes, sir.

13          THE COURT: Mr. Portillo, Mr. Forster and  
14 Mr. Navarrete are remanded to the custody of the U.S. Marshal.

15          \* \* \*

16          (Hearing adjourned at 11:47 a.m.)

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2 I certify that the foregoing is a correct transcript from  
3 the electronic sound recording of the proceedings in the  
4 above-entitled matter.

6 Date: 12/11/2018 /s/ Chris Poage  
7 655 East Cesar E. Chavez Blvd., Suite G-65  
San Antonio, TX 78206  
Telephone: (210) 244-5036

## **United States Constitution, Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## **Rule 5, Federal Rules of Criminal Procedure**

### Initial Appearance

#### (a) In General.

##### (1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

##### (2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

- (i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and
- (ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) Appearance Upon a Summons. When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) Place of Initial Appearance; Transfer to Another District.

(1) Arrest in the District Where the Offense Was Allegedly Committed. If the defendant is arrested in the district where the offense was allegedly committed:

- (A) the initial appearance must be in that district; and
- (B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

- (A) in the district of arrest; or
- (B) in an adjacent district if:
  - (i) the appearance can occur more promptly there; or
  - (ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

- (A) the magistrate judge must inform the defendant about the provisions of Rule 20;
- (B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;
- (C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;
- (D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:
  - (i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and
  - (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and
- (E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(4) Procedure for Persons Extradited to the United States. If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

- (A) the complaint against the defendant, and any affidavit filed with it;
- (B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;
- (C) the circumstances, if any, under which the defendant may secure pretrial release;
- (D) any right to a preliminary hearing;
- (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and
- (F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested—but that even without the defendant's request, a treaty or other international agreement may require consular notification.

(2) Consulting with Counsel. The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) Detention or Release. The judge must detain or release the defendant as provided by statute or these rules.

(4) Plea. A defendant may be asked to plead only under Rule 10.

(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.