Nos. 08-50248, 08-50269

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JOSEPH FERGUSON AND WILLIAM FERGUSON,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The defendants have not stated their position regarding oral argument. The United States does not believe argument is necessary to resolve this appeal because the legal issues are straightforward.

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JURISDICTIONAL STATEMENT

A federal grand jury charged the defendants under 18 U.S.C. 241, 242, and 924(c), and also under 21 U.S.C. 841(a)(1) and 846. The district court had jurisdiction under 18 U.S.C. 3231. Final judgments were entered on May 12, 2008, and on June 6, 2008. The defendants filed timely notices of appeal. This Court has jurisdiction to review the district court judgments and sentences under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court's limitation on the defendants' cross-examination of three government witnesses regarding their alleged involvement in an unrelated, uncharged homicide was constitutional under the Confrontation Clause.

2. Whether the district court properly calculated Defendant Joseph Ferguson's sentence, and whether the sentence is reasonable.

3. Whether Defendant William Ferguson's sentence is constitutional under the Eighth Amendment.

STATEMENT OF THE CASE

On February 28, 2006, a federal grand jury in the Central District of California returned a seventh superseding 34-count indictment against the defendants, William Ferguson and Joseph Ferguson (JF RE 1-46, 399).[1] The indictment charged the defendants with conspiracy against rights and deprivation of rights under color of law, in violation of 18 U.S.C. 241 and 242; conspiracy to

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[1] The following record citations are used in this brief: "JF RE" and "WF RE" for the record excerpts of Defendant Joseph Ferguson and Defendant William Ferguson, respectively; "JF Br." and "WF Br." for the initial appellant briefs of Defendant Joseph Ferguson and Defendant William Ferguson, respectively; "Supp. RE" for the United States' supplemental record experts; "Tr." for the trial transcript; and "Exh." for a trial exhibit.

possess and attempt to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; and using, carrying, or brandishing a firearm during commission of a crime of violence or drug trafficking offense, in violation of 18 U.S.C. 924(c) (JF RE 1-46). Each count also charged the defendants with aiding and abetting, in violation of 18 U.S.C. 2(a) (JF RE 1-46). The charges were brought in connection with a scheme in which the defendants and their co-conspirators, between January 1999 and June 2001, gained entry into numerous residences and other premises by pretending to be on official police business and, once inside, stole drugs, money, jewelry, and other valuables (JF RE 4-7).

Before trial, the United States filed a motion *in limine* to preclude the defendants from offering any evidence, argument, or cross-examination regarding the alleged involvement of three government witnesses in an unrelated, uncharged homicide (JF RE 47-63). The defendants opposed the motion, arguing that they had a Sixth Amendment right to cross-examine the witnesses about the homicide and any expectations the witnesses may have had regarding leniency from prosecution in connection with their cooperation and testimony in this case (JF RE 132-150, 159-169). Following evidentiary hearings held on August 8, 2007, and September 18, 2007 (JF RE 194-336), the court issued a written order granting in

part and denying in part the United States' motion (JF RE 337-341, 358-359).

The defendants were tried before a jury from January 2-23, 2008 (JF RE 413-415). On January 30, 2008, the jury returned a verdict finding Defendant Joseph Ferguson guilty on three counts and Defendant William Ferguson guilty on seventeen counts (1/30/08 Tr. 18-33). Both defendants were convicted of conspiracy against rights (18 U.S.C. 241), as charged in Count 1; conspiracy to possess a controlled substance with intent to distribute (21 U.S.C. 841(a)(1) and 846), as charged in Count 2; and attempt to possess a controlled substance with intent to distribute (21 U.S.C. 841(a)(1) and 846), as charged in Count 19. In addition, Defendant William Ferguson was convicted of deprivation of rights under color of law (18 U.S.C. 242), as charged in Counts 3, 10, 16, 26, 29, and 32; attempt to possess a controlled substance with intent to distribute (21 U.S.C. 841(a)(1) and 846), as charged in Counts 4, 17, 27, and 33; and using, carrying, or brandishing a firearm during commission of a crime of violence or drug trafficking offense (18 U.S.C. 924(c)), as charged in Counts 5, 18, 28, and 34 (1/30/08 Tr. 21-33).[2]

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[2] The jury found Defendant William Ferguson not guilty on Counts 11, 13, 14, and 15 (1/30/08 Tr. 24-25), and could not reach a decision regarding his guilt on Counts 6, 7, 8, 9, 12, 20, 21, 22, 23, 24, 25, 30, and 31 (1/30/08 Tr. 23-24, 27-28, 30). The jury also could not reach a decision regarding Defendant Joseph Ferguson's guilt on Counts 16, 17, and 18 (1/30/08 Tr. 25-26).

On May 5, 2008, the court sentenced Defendant Joseph Ferguson to a term of 97 months' imprisonment and four years' supervised release (JF RE 380-381). On May 19, 2008, the court sentenced Defendant William Ferguson to 1,224 months' imprisonment and five years' supervised release (5/19/08 Tr. 23).

The defendants filed timely notices of appeal from their convictions and sentences (JF RE 389; WF RE 891).

The defendants are currently in custody serving their sentences.

STATEMENT OF THE FACTS

1. The Conspiracy (Counts 1-2)

Ruben Palomares joined the Los Angeles Police Department (LAPD) in the mid-1990s (1/8/08 Tr. 40). A couple of years later, he was shot in both legs while working undercover (1/8/08 Tr. 40-41). Subsequently, he worked patrol in the Rampart Division, where he was implicated in a corruption scandal (1/8/08 Tr. 42-46). He also underwent several surgeries on his shoulder and was struggling to pay child support (1/8/08 Tr. 46-47). By January 1999, Palomares began to feel "bitter" about police work (1/8/08 Tr. 46). Around that same time, he reconnected with a childhood friend, David Barajas, who was a drug dealer (1/8/08 Tr. 47-48). Palomares offered to use his authority as a police officer to collect debts for Barajas in order to make some easy money (1/8/08 Tr. 48-49). Barajas's wife,

Michelle Barajas, told Palomares that he could make more money by going to a place where she knew drugs were being stored and stealing them (1/8/08 Tr. 51). Specifically, she described a house where he could expect to find 500 kilos of cocaine, which was worth about ten million dollars (1/4/08 Tr. 158; 1/8/08 Tr. 52). David and Michelle Barajas agreed that, if successful, Palomares could keep half of that money (1/8/08 Tr. 52).

Palomares agreed to steal the drugs and began to formulate a plan (1/8/08 Tr. 53). He knew that he would have to identify himself as a police officer in order to gain access to the house and to be able to search it without resistance (1/4/08 Tr. 159-160; 1/8/08 Tr. 53). He thus planned to approach the house in a black-and-white patrol car while dressed in uniform (1/4/08 Tr. 159-160; 1/8/08 Tr. 53). Once he found the cocaine, he would turn it over to David and Michelle Barajas, who would give it to another friend to sell on their behalf (1/4/08 Tr. 158-159; 1/8/08 Tr. 54). Palomares also knew that he would need help (1/8/08 Tr. 54). He enlisted his good friend and fellow LAPD officer, Defendant William Ferguson (1/4/08 Tr. 160-161; 1/8/08 Tr. 55-57; 1/9/08 Tr. 4). Other participants included Oscar Loaiza, who was Palomares's cousin, and Rodrigo Duran, who was a Los Angeles County Sheriff and a childhood friend of Palomares, and David Barajas (1/4/08 Tr. 146-157; 1/8/08 Tr. 61-63).

The group met at Palomares's home to prepare (1/4/08 Tr. 161; 1/8/08 Tr. 65). Everyone, including those who were not police officers, dressed in police attire, carried a badge and a gun, and wore gloves to avoid leaving fingerprints (1/4/08 Tr. 168-172; 1/8/08 Tr. 65-69, 73-74). Defendant William Ferguson wore his own LAPD uniform (1/4/08 Tr. 169; 1/8/08 Tr. 66). They discussed the plan and everybody's designated roles (1/4/08 Tr. 159-162, 167-172; 1/8/08 Tr. 65). Defendant William Ferguson and Palomares then went to the LAPD academy, where Palomares worked, and picked up a black-and-white patrol car (1/4/08 Tr. 162, 172; 1/8/09 Tr. 58, 74). Once they received a call from Michelle Barajas confirming that drugs were at a house on Colorado Street, they met Duran, David Barajas, and Loaiza (1/4/08 Tr. 172-177; 1/8/08 Tr. 77; Exh. 58). They parked and positioned the patrol car outside the house in a manner that made the car visible to the residents inside the house (1/8/08 Tr. 78).

As they had planned, Defendant William Ferguson, Palomares, and Duran approached the house while the others stayed outside searching the surrounding areas and looking out for other police officers or suspicious activity (1/4/08 Tr. 178-183; 1/8/08 Tr. 77-79). Because Defendant William Ferguson and Palomares had more police experience, they knocked on the door and entered the house first (1/4/08 Tr. 178-179). They identified themselves as police officers and told the

residents, falsely, that they had a warrant to search for narcotics (1/4/08 Tr. 179; 1/8/08 Tr. 79). Once inside, Defendant William Ferguson and Palomares ordered the residents to sit down on the sofa and then instructed Duran to guard the residents while they searched the house (1/4/08 Tr. 180-182; 1/8/08 Tr. 80-81). Defendant William Ferguson and Palomares searched the entire house but did not find any drugs (1/4/08 Tr. 184; 1/8/08 Tr. 80-82).

Having left the Colorado Street house empty-handed, Palomares decided to try again (1/8/08 Tr. 83). David and Michelle Barajas told him about a "stash house" where Mexican narco-traffickers temporarily stored drugs after arriving in the United States (1/8/08 Tr. 83-84). Palomares called Defendant William Ferguson and the others (1/8/08 Tr. 84-85). They followed the same plan, but this time, Defendant William Ferguson searched the house and found $115,000 and 15 kilos of cocaine (1/8/08 Tr. 85-87).

As Defendant William Ferguson, Palomares, and others continued to commit home-invasion robberies, they recruited more people to join the conspiracy (1/8/08 Tr. 88-89). Palomares invited his other cousin, Gabriel Loaiza (Oscar Loaiza's brother), into the group (1/8/08 Tr. 89; 1/11/08 Tr. 122). Gabriel Loaiza helped them steal 50 pounds of marijuana from a house on Thorson Street (1/11/08 Tr. 122-123, 127-128; Exh. 4). The next person to join the conspiracy

was Defendant William Ferguson's younger brother, Defendant Joseph Ferguson (1/8/08 Tr. 90-91). Defendant Joseph Ferguson was brought in because all the other conspirators were friends or relatives of Palomares, and Defendant William Ferguson wanted somebody else involved who he personally could trust (1/8/08 Tr. 92-93). Defendant William Ferguson asked Palomares if his brother could participate as a "lookout," and Palomares agreed (1/8/08 Tr. 92-93).

2. Cedar Street (Counts 3-5)

With Defendant Joseph Ferguson now in on the scheme, the conspirators committed another robbery in October 1999, at a house on Cedar Street (1/4/08 Tr. 111-115; 1/8/08 Tr. 94-98; Exh. 42). During this robbery, Defendant William Ferguson and the others, posing as police officers, pointed their guns in the face of a male resident; threw him to the ground; cuffed him and his wife; and searched the house for drugs and money while the couple's children slept in the bedrooms (1/4/08 Tr. 115-117). Unable to find any drugs or money, the group interrogated the couple; kicked the man; and threatened to take the couple's children away if they did not tell them where the drugs were located (1/4/08 Tr. 117-118). The group used cell phones to communicate with Defendant Joseph Ferguson, who was outside serving as a lookout (1/8/08 Tr. 96-97). After the group left, the couple discovered they were missing $3,000 (1/4/08 Tr. 121-124). Out of fear, the

couple immediately moved out of the house (1/4/08 Tr. 124-125).

3. The 911 Call And The Continuation Of The Conspiracy

The defendants continued to conspire with Palomares and the rest of the gang to steal drugs, money, and other valuables from numerous other locations until June 2001, when Palomares was arrested (1/9/08 Tr. 8-9).[3] At one point, David Barajas began flashing his money around and beating his wife, Michelle (1/8/08 Tr. 102). Palomares believed that Barajas, who was on probation, was having a negative impact on the operation of the conspiracy and decided to remove him by getting him arrested (1/8/08 Tr. 102). Palomares met with both defendants to devise a plan (1/8/08 Tr. 104). They decided to set up a fake home invasion where Barajas would be assigned to serve as a lookout (1/8/08 Tr. 103). Meanwhile, the defendants would call 911 and report that a man who fit Barajas's description was seen brandishing a gun inside his vehicle (1/8/08 Tr. 103).

Defendant Joseph Ferguson volunteered to make the call (1/8/08 Tr. 105).

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[3] Palomares testified that he participated in more than 40 home-invasion robberies during the two and a half year-long conspiracy, and that he made more than $1,000,000 (1/8/08 Tr. 262-263). At trial, he recounted only 16 of those robberies (1/8/08 Tr. 262), all of which involved Defendant William Ferguson. Defendant Joseph Ferguson was implicated in at least seven robberies. This brief does not set forth all of the robberies and attempted robberies that were described at trial, but rather, summarizes only those facts material to the counts of conviction.

Defendant William Ferguson and Palomares waited in a nearby park while Defendant Joseph Ferguson called 911 from a pay phone and told the dispatcher that he saw a man who matched Barajas's description pull out a semi-automatic revolver in an act of road rage, and that he heard a gunshot (1/8/08 Tr. 106-111; 1/16/08 Tr. 205-207; Exh. 66). The police arrived and arrested Barajas (1/8/08 Tr. 112). Afterwards, Palomares and the defendants went to Gabriel Loaiza's house, where Defendant Joseph Ferguson made everybody laugh by imitating the scared-sounding voice he used on the call (1/8/08 Tr. 112-113). As a result of Defendant Joseph Ferguson's 911 call, Barajas's parole was revoked and he spent one year in jail (1/8/08 Tr. 112).

The defendants and their co-conspirators continued to commit robberies while posing as police officers, including a robbery on March 16, 2000, at a house on Nebraska Street (1/8/08 Tr. 122-123; Exh. 41). While Defendant Joseph Ferguson served as a lookout, Defendant Willliam Ferguson and Palomares searched the house and recovered three firearms, some jewelry, and a small amount of cocaine (1/4/08 Tr. 107; 1/8/08 Tr. 127-128).

4. 85th Street (Count 10)

On May 25, 2000, the defendants, Palomares, and several other conspirators went to a house on 85th Street after receiving information that money or possibly

drugs could be found there (1/3/08-2 Tr. 7-8; 1/8/08 Tr. 138-139; Exh. 37).[4] When Defendant William Ferguson was unable to find anything of value inside the house, he and the others threatened the residents (1/3/08-2 Tr. 14, 16, 45; 1/8/08 Tr. 144, 147). They also used a crowbar to pry open a shed that was adjacent to the house, damaging the door (1/3/08-2 Tr. 25-27; 1/8/08 Tr. 147-49).

5. Pearl Street (Counts 16-18)

On August 12, 2000, Defendant William Ferguson, the Loaiza brothers, and several others entered a house on Pearl Street, where they expected to find either 50 kilos of cocaine or $500,000 (1/4/08 Tr. 30; 1/8/08 Tr. 170; 1/10/08 Tr. 12; 1/11/08 Tr. 161; Exh. 24). Defendant Joseph Ferguson served as the main lookout and was responsible for communicating with those inside the house and also with the other lookouts, which this time included Palomares (1/8/08 Tr. 176-178). Inside the house, Defendant William Ferguson and the other conspirators handcuffed the homeowner, Frederick Staves, and took him to the living room, where they ordered him to kneel (1/4/08 Tr. 33-37; 1/11/08 Tr. 176-177). They asked him if he had drugs or money, and when he answered "no," they punched

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[4] Because the trial transcripts for January 2, 2008, and January 3, 2008, are not consecutively paginated, this brief will distinguish the different volumes for each day by placing a number after the date. For example, "1/3/08-2" refers to the second volume transcript from January 3, 2008.

and kicked him (1/11/08 Tr. 178).

Meanwhile, Gabriel Loaiza and another co-conspirator found two teenaged girls asleep in an upstairs' bedroom (1/3/08-2 Tr. 73-74; 1/11/08 Tr. 178-179). They flashed lights in their faces; told them to get on the floor or they would be arrested; searched them physically while fondling the breasts of the older girl; brought them downstairs; cuffed their hands behind their backs; and ordered them to kneel (1/3/08-2 Tr. 73-80; 1/4/08 Tr. 38; 1/11/08 Tr. 179). Gabriel Loaiza assigned someone to guard the girls in the living room while he rejoined the group interrogating Staves (1/11/08 Tr. 180-181).

Defendant William Ferguson and the Loaiza brothers blindfolded Staves and carried him to the hallway, where they took turns interrogating and beating him repeatedly (1/4/08 Tr. 38; 1/11/08 Tr. 178, 181-183). Staves believed that he might not survive their attacks (1/4/08 Tr. 41-42). Defendant William Ferguson and the Loaizas grabbed Staves and carried him farther down the hallway, away from the girls (1/4/08 Tr. 42). They removed his handcuffs and bound his feet with duct tape and his arms with zip-ties (1/4/08 Tr. 43). Defendant William Ferguson told Staves that he was a DEA agent and again asked Staves about the drugs and money (1/4/08 Tr. 43; 1/11/08 Tr. 187). When Staves continued to deny having any drugs or money in the house, Oscar Loaiza kicked him and struck him

on the back with a club; told him that he should have been "paying rent," *i.e.*, bribing the police to continue his drug activities; shoved a gun in his mouth and threatened to kill him; and used a cigarette lighter and aerosol can to burn his back (1/4/08 Tr. 43-45; 1/8/08 Tr. 179). Defendant William Ferguson and the others beat Staves for about 45 minutes (1/4/08 Tr. 45-46; 1/11/08 Tr. 182, 184). The girls could hear Staves screaming and grunting in pain from the living room (1/3/08-2 Tr. 83).

The group left Staves's house after finding only a small amount of cash, jewelry, and a gold-plated gun in one of the bedrooms (1/4/08 Tr. 40; 1/11/08 Tr. 185). The defendants were present when the group later divided up the valuables they stole from Staves's home (1/8/08 Tr. 180; 1/10/08 Tr. 19; 1/11/08 Tr. 190-191).

6. Williams Street (Count 19)

On October 2, 2000, Defendant William Ferguson, Palomares, and a friend of Palomares named Alvin Moon broke into the garage of a residence on Williams Street and stole somewhere between 900 and 1,200 pounds of marijuana (1/8/08 Tr. 182-192; 1/10/08 Tr. 22-23, 76, 142-154; 1/11/08 Tr. 193-194; Exh. 72). At the time, they were dressed in business suits and carried badges and guns (1/8/08 Tr. 186; 1/10/08 Tr. 147). Defendant William Ferguson and Moon loaded the

marijuana into Moon's truck and then took it to Defendant Joseph Ferguson's house (1/8/08 Tr. 190-193; 1/10/08 Tr. 155-156, 159-167). When they arrived, Defendant Joseph Ferguson opened his garage and provided plastic storage containers for repackaging the marijuana (1/8/08 Tr. 196-197; 1/10/08 Tr. 159-163). Working together, they repackaged the marijuana in Defendant Joseph Ferguson's garage and then loaded some of it into Moon's truck and the rest of it into Defendant William Ferguson's car (1/10/08 Tr. 164). The four men drove the marijuana to a ranch owned by another cousin of Palomares, Juan Mendoza (1/8/08 Tr. 198, 200-205; 1/10/08 Tr. 26, 168-173; 1/11/08 Tr. 193). The defendants, Palomares, and Moon hid the marijuana in an animal pen at Mendoza's ranch (1/8/08 Tr. 207-208; 1/10/08 Tr. 70-74, 175).

Palomares and the defendants also discussed their plan for protecting and selling the drugs, as well as their plan for sharing the profit (1/8/08 Tr. 210; 1/10/08 Tr. 74-75). Mendoza later sold some of the marijuana and gave the money to Palomares (1/8/08 Tr. 211). Palomares paid Defendant William Ferguson, who was expected to share the money with his brother (1/8/08 Tr. 211). Notably, around the same time the defendants stole the marijuana from the Williams Street residence, Defendant Joseph Ferguson was also preparing to begin training as a police officer at the Long Beach Police Academy (1/9/08 Tr. 5-6; 1/10/08 Tr.

177).

7. 41st Place (Counts 26-28)

On February 5, 2001, Defendant William Ferguson, Palomares, Alvin Moon, Gabriel Loaiza, and several others searched a tire shop on 41st Place, while posing as police officers, to look for drugs or money (1/3/08-2 Tr. 78-84, 115; 1/8/08 Tr. 230-239; 1/10/08 Tr. 194; 1/11/08 Tr. 73-79; Exh. 10). When they arrived, a woman who asked to see their search warrant was told, "[s]hut up, you fucking whore" and then slapped in the face (1/3/08-2 Tr. 89, 120-121). The group took the wallets of everyone inside the shop and stole their cash (1/3/08-2 Tr. 121; 1/10/08 Tr. 201).

Palomares and Gabriel Loaiza grabbed Cornelio Ramos, who they believed to be the shop owner, and took him to the back office where they pointed a gun at his head and threatened to kill him if he moved (1/3/08-2 Tr. 85, 91-92, 121; 1/8/08 Tr. 240-244; 1/11/08 Tr. 85, 222). They struck him with a stick twice across the back, once across the head, and then in the ribs (1/3/08-2 Tr. 88-93; 1/8/08 Tr. 242; 1/11/08 Tr. 222). Ramos screamed and cried as they grabbed his head and tried to snap his neck (1/3/08-2 Tr. 94, 122; 1/10/08 Tr. 203; 1/11/08 Tr. 86, 223). Following their orders, Ramos opened the safe, and Palomares and Loaiza took $5,000 (1/3/08-2 Tr. 91-93, 96; 1/11/08 Tr. 224). Before they left,

Palomares stole some weapons, and Moon cut the phone lines, disabled the security camera, and removed the surveillance tapes (1/3/08-2 Tr. 99-103, 125-126; 1/8/08 Tr. 247-248; 1/10/08 Tr. 196-197, 203; 1/11/08 Tr. 89).

8. Duncan Avenue (Count 29)

On March 2, 2001, Defendant William Ferguson, Palomares, Gabriel Loaiza, and Moon went searching for drugs at a house on Duncan Avenue, where Leticia Angulo lived with three young children (1/2/08-2 Tr. 5-15, 60-61; 1/10/08 Tr. 183; 1/11/08 Tr. 235-238; Exh. 1). Defendant William Ferguson and Moon drew their guns, and Gabriel Loaiza threatened to break open a bedroom door if Angulo did not unlock it (1/2/08-2 Tr. 13; 1/10/08 Tr. 190). Moon ordered Angulo and the children to go into the bedroom and close the door so that they could bring a canine unit inside to search for drugs (1/2/08-2 Tr. 17; 1/10/08 Tr. 192). The home was ransacked, the walls and windows were damaged, and a watch was stolen (1/2/08-2 Tr. 19, 24, 61-62).

9. Hubbard Street (Counts 32-34) And The Conspiracy's End

A couple of months later, Defendant William Ferguson and Palomares stole 15 kilos of cocaine from a house on Hubbard Street (1/8/08 Tr. 251-257; 1/10/08 Tr. 31-34, 213-214; Exh. 88). They made $250,000 each in profit (1/8/08 Tr. 259). Palomares planned to use $100,000 of his money to buy more cocaine from

a Colombian narco-trafficker (1/9/08 Tr. 6-7; 1/11/08 Tr. 234). On June 8, 2001, he went to San Diego with Gabriel Loaiza and Moon to meet the narco-trafficker, who in fact was an undercover federal DEA agent (1/9/08 Tr. 7; 1/10/08 Tr. 215; 1/11/08 Tr. 241-242). Palomares, Loaiza, and Moon were arrested on drug charges (1/9/08 Tr. 7-9; 1/10/08 Tr. 215; 1/11/08 Tr. 234, 241).

SUMMARY OF THE ARGUMENT

The parameters set by the district court for cross-examination of cooperating witnesses Ruben Palomares, Gabriel Loaiza, and Alvin Moon to exclude details of an unrelated, uncharged homicide did not violate the defendants' rights under the Confrontation Clause. The court allowed the defendants to mount a wide-ranging inquiry into the witnesses' credibility, including asking the witnesses about their status as suspects in the homicide; about whether they hoped or believed that their cooperation against the defendants would benefit them in the homicide investigation; and about their understanding of the potential punishment that might be imposed upon a murder conviction. The defendants' claim that the district court should have allowed unfettered inquiry into the details of the separate homicide investigation is without merit because those details were not probative of bias. Under well-established authority, the district court properly exercised its broad discretion to exclude the details to avoid substantial prejudice,

confusion, and undue consumption of time. Moreover, any error would be harmless because the defense had more than enough ammunition to attack the credibility of Palomares, Gabriel Loaiza, and Moon, which they did, and because there was sufficient evidence corroborating the material points of those witnesses' testimony.

Furthermore, the district court properly calculated Defendant Joseph Ferguson's 97-month sentence under the guidelines. Defendant Joseph Ferguson was not entitled to a two-level decrease for his role in the offense because he did not satisfy his burden of showing that he was a minor participant. The court's finding that the defendant did not play a minor role in the offense is clearly supported by the record, which shows that the defendant played a critical role in the Williams Street robbery and the broader drug conspiracy. The court's finding that the defendant could reasonably foresee use of a firearm is also supported by the record, which shows that the defendant was in the presence of several people who were armed during the Williams Street robbery, as well as other robberies during the course of the conspiracy. The sentence ultimately imposed, 97 months, is also reasonable. The court properly considered the sentencing factors under 18 U.S.C. 3553(a) and adequately set forth its reasons for imposing a sentence at the bottom of the guidelines range, rather than a lesser sentence.

Finally, Defendant William Ferguson's argument that his 1,224-month sentence violates the Eighth Amendment is foreclosed by circuit precedent. This Court has repeatedly upheld the constitutionality of consecutive sentences imposed pursuant to 18 U.S.C. 924(c). The defendant's constitutional challenge should therefore be rejected, and his sentence affirmed.

ARGUMENT

I

THE DISTRICT COURT'S LIMITATION ON CROSS-EXAMINATION OF THREE GOVERNMENT WITNESSES REGARDING THEIR ALLEGED INVOLVEMENT IN AN UNRELATED, UNCHARGED HOMICIDE DID NOT VIOLATE THE CONFRONTATION CLAUSE

The defendants argue (JF Br. 26-32; WF Br. 18-29) that the district court's limitation on cross-examination of three cooperating witnesses violated their rights under the Confrontation Clause of the Sixth Amendment to the Constitution. The defendants are incorrect.

A. Background

On June 8, 2001, co-conspirators Ruben Palomares, Gabriel Loaiza, and Alvin Moon were arrested in San Diego, California, on drug charges (JF RE 219, 241, 296). At that time, Moon gave a statement to law enforcement officers regarding an unsolved homicide that occurred in Huntington Park, California (JF

RE 217). Moon stated that in November 2000, he, Palomares, Gabriel Loaiza, Oscar Loaiza, and Palomares's other cousin, Manny, encountered a man, who was carrying a knife and who appeared to be intoxicated, in a restaurant parking lot (JF RE 66, 69, 74). Moon stated that when the man got into his car and drove away, he and the others got into Moon's car and followed the man to a nearby apartment building because Palomares said he wanted to beat him up (JF RE 78-83). According to Moon, once they arrived at the apartment building, Palomares, Gabriel Loaiza, and Oscar Loaiza got out of Moon's car and approached the man in his vehicle (JF RE 89-90). Moon stated that he then observed Palomares, Gabriel Loaiza, and Oscar Loaiza taking turns at striking the man, who was sitting in the driver's seat (JF RE 92-100). Moon stated that when they returned to Moon's car, Oscar Loaiza said that he had stabbed the man (JF RE 100, 104, 106). The man was later found dead (JF RE 126-129).

Before trial, the United States moved to exclude any evidence or cross-examination regarding the alleged involvement of Palomares, Gabriel Loaiza, and Moon, who all testified on behalf of the government, in the Huntington Park homicide (JF RE 47-63). The defendants opposed the motion, arguing that they had a right to question the witnesses about the prosecution or non-prosecution of the homicide because it was relevant to the witnesses' bias and motive (JF RE

132-150, 159-169). Defendant Joseph Ferguson also argued, subsequently, that he should be allowed to challenge the credibility of Palomares, Gabriel Loaiza, and Moon by asking them questions about how the homicide was committed, hoping to elicit inconsistent or contradictory statements from each of them (JF RE 209-211).

The district court held two evidentiary hearings on the motion *in limine* (JF RE 194-336). Palomares, Gabriel Loaiza, and Moon each testified that, in pleading guilty to federal civil rights and drug charges in the instant case, they agreed to cooperate with the government and entered into plea agreements (JF RE 216, 237-238, 291-293). The witnesses also testified that they understood that their plea agreements applied only to the instant case and that they did not believe they would receive any leniency or benefits in connection with the Huntington Park investigation, or in any other state or federal proceeding (JF RE 217-218, 238-240, 292-295, 306). In addition, the witnesses testified that no promises or assurances outside of the plea agreement had been made to them regarding the Huntington Park homicide (JF RE 217-218, 240, 293). Finally, although Moon stated that he "hoped" his cooperation and testimony in this case would be viewed favorably by state prosecutors, he also testified that he understood that if charges were filed against him in the Huntington Park case, his cooperation in this case

would not help him (JF RE 218, 221-222, 232-233).

Consistent with their testimony, Judge Charles Chung, who was formerly a prosecutor in the Los Angeles County District Attorney's Office, and who was initially assigned to the Huntington Park case to evaluate its merit for prosecution, testified that he had no contact with Palomares, Gabriel Loaiza, Moon, or their attorneys (JF RE 249-250, 253). He also testified that he recommended against prosecution of the Huntington Park case due to insufficient evidence, and that he made that determination without any influence or interference from the federal government (JF RE 250-253, 265). On the contrary, Chung testified, the United States Attorney's Office for the Central District of California (USAO) told him that, from the standpoint of the federal government, there was no reason the State could not file charges in the Huntington Park matter, and that the USAO even provided assistance to him regarding potential witnesses that might be able to corroborate his case (JF RE 265-266).

Similarly, former Huntington Park Police Officer Jeffrey Franklin testified that, after learning that one of the homicide suspects was a Los Angeles police officer who was being investigated by the federal government, he called the USAO, and that the USAO advised him that he should feel free to continue his investigation of the Huntington Park homicide, which he did (JF RE 269).

Franklin also testified that he later spoke with Special Agent Phil Carson of the Los Angeles FBI office about whether it would be possible to include the homicide in the federal case as part of a "continuing criminal enterprise" (JF RE 270). Franklin testified that Carson later told him that the homicide did not fit into the "continuing criminal enterprise" theory, and that he should feel free to continue his investigation at the state level if he so chose (JF RE 272).

Finally, Franklin testified that he subsequently contacted the Los Angeles County District Attorney's Office about filing charges, but was told that the office had determined that a state prosecution would not be a good use of resources given that the suspects at that time were already facing lengthy prison sentences in the federal case (JF RE 272, 277-278). Franklin testified that he then consulted with his supervisors in the Huntington Park Police Department and that they all agreed to suspend the homicide investigation pending the outcome of the federal case (JF RE 272-273). Franklin further testified that all of these discussions were entirely independent from the United States government, and that he was not aware of any agreements between the federal government and the state government, or between the state or local government and the suspects, regarding leniency in pursuing the Huntington Park homicide case (JF RE 273-275).

Following these hearings, the district court issued an order permitting the

defendants to cross-examine Palomares, Gabriel Loaiza, and Moon about their status as suspects in the Huntington Park case, but prohibiting the defendants from asking any questions about the homicide itself (JF RE 337-341). In support of that ruling, the court found that although "none of the witnesses has been made any promise or assurance of any kind regarding the homicide case, * * * it would be reasonable for the witnesses to hope, or even to believe, that their cooperation, assistance and testimony in this case would be viewed favorably by local law enforcement officials in determining how the homicide should be resolved" (JF RE 339).

Accordingly, the court held, the defendants could ask the three government witnesses "if they understand that they are the subject of a homicide investigation[;] * * * that they might possibly be charged in that case; and that they have known of that fact since the time of their arrest in 2001" (JF RE 340). In addition, they could ask "for their understanding of whether any promises or assurances have been made to them regarding the homicide by any law enforcement organization, and * * * whether they have any belief or hope that their assistance in this case will benefit them in the homicide case" (JF RE 340). The court, however, held that "Defendants will not be permitted to inquire into the facts and circumstances of the alleged homicide. Presently it is uncharged

conduct, and permitting the Defendants to question witnesses on the subject runs the risk of creating substantial prejudice, jury confusion and the undue consumption of time" (JF RE 339).

Defendant Joseph Ferguson subsequently filed a "request for clarification," asking the court again for permission to cross-examine the witnesses regarding the details of the homicide in order to highlight the seriousness of the offense (JF RE 342-347). The court denied the request, but stated that the defendants could identify the witnesses as "suspects in the homicide," and that they also could cross-examine them "regarding the potential punishment that might be imposed upon a murder conviction" (JF RE 358). The court ruled, however, that the defendants could not "suggest or imply that the witness is seeking to avoid the death penalty," concluding that the Huntington Park homicide does not present a case warranting death or life without parole under state law (JF RE 358). The court further stated that Moon "may be asked whether he gave a statement to law enforcement officers regarding the homicide" (JF RE 359).

B. Standard Of Review

This Court recently resolved an intra-circuit split regarding the proper standard of review for Confrontation Clause challenges to a trial court's ruling on the permissible scope of cross-examination into a cooperating witness's bias and

motivation to lie, concluding that such challenges should be reviewed "for abuse of discretion." *United States* v. *Larson*, 495 F.3d 1094, 1102 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1647 (2008).

C. The District Court Did Not Abuse Its Discretion In Precluding Cross-Examination Into The Details Of The Homicide

"The Confrontation Clause of the Sixth Amendment, which guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him, includes the right of effective cross-examination." *Larson*, 495 F.3d at 1102 (internal quotation marks and citations omitted). "Effective cross-examination is critical to a fair trial because '[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Ibid*. (quoting *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974)). Thus, an important function of cross-examination is to expose "a witness' motivation in testifying." *Ibid*. (quoting *Davis*, 415 U.S. at 316-317). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986) (quoting *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)).

This Court considers three factors to determine whether a defendant's

Confrontation Clause right to cross-examine a witness on the issue of bias or motivation to lie was violated: "(1) [whether] the excluded evidence was relevant; (2) [whether] there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) [whether] the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness." *Larson*, 495 F.3d at 1103 (quoting *United States* v. *Beardslee*, 197 F.3d 378, 383 (9th Cir. 1999), cert. denied, 530 U.S. 1277 (2000)). Applying the three factors here, the district court did not abuse its discretion when it allowed cross-examination into the witnesses' status as suspects in the Huntington Park homicide, but precluded questions concerning the details of how that homicide occurred. Even assuming the court erred, the error was harmless. See *Van Arsdall*, 475 U.S. at 684 (holding that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause is errors, is subject to *Chapman* harmless-error analysis").

1. The Excluded Evidence Was Not Relevant

The defendants argue (JF Br. 26-32; WF Br. 24-29) that, in order to show the true extent of each witness's bias, it was necessary for them to highlight the seriousness of the Huntington Park homicide and the witnesses' alleged involvement in that offense by eliciting details about how that homicide occurred,

such as who was carrying a gun and how many times the victim was beaten or stabbed. The defendants' argument lacks merit.

The district court properly concluded that the details of the homicide were not relevant to the issue of bias. This Court upheld a similar ruling in *United States* v. *Mitchell*, 502 F.3d 931, 967 (9th Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008). In that case, a cooperating witness entered a plea agreement that required him to testify truthfully about an armed robbery and a double murder that he participated in along with the defendant. See *id*. at 966. The agreement also required him to testify truthfully about the murders of two other victims, Begay and Sam, in which the defendant was not involved. See *id*. at 966-967. Under the agreement, if the witness did not tell the truth, the government could prosecute him for any crime and seek the maximum penalty. See *id*. at 967. The district court permitted the defendant to cross-examine the witness about the terms of the plea agreement, but did not allow the defendant to cross-examine him about the details of the murders of Begay and Sam. See *ibid*. The defendant challenged that ruling as a violation of his rights under the Confrontation Clause, but this Court affirmed, explaining that:

> [i]n order for the Confrontation Clause to be satisfied, where a plea agreement allows for some benefit or detriment to flow to a witness as a result of his testimony, the defendant must be permitted to cross

> examine the witness sufficiently to make clear to the jury what benefit or detriment will flow, and what will trigger the benefit or detriment, to show why the witness might testify falsely in order to gain the benefit or avoid the detriment. This was allowed.

Ibid. (internal quotation marks and citation omitted). Accordingly, this Court concluded that "[i]t was not necessary for the jury to hear in detail about the Begay/Sam murders * * * in order to assess the benefit [the cooperating witness] received for his cooperation, and thus his motivation to lie." *Ibid*. Such details "would have been distracting and of marginal probative value." *Ibid*. Rather, it was only necessary for the jury to hear "what the plea bargain was objectively worth * * * and of its subjective value to [the witness] as he was willing to cooperate against [the defendant]." *Ibid*.

Similarly, here, the district court's restriction on cross-examination to exclude details of the Huntington Park homicide did not violate the defendant's rights under the Confrontation Clause because those details were not probative of the witnesses' potential bias or motivation to testify falsely. As the court observed, the Huntington Park homicide was "a collateral event in the extreme" (JF RE 320) that "doesn't really go to anything that's terribly probative" (JF RE 212). Objectively, Palomares, Gabriel Loaiza, and Moon had nothing to gain in

connection with the Huntington Park case by cooperating in this case.[5] Subjectively, only Moon testified that he "hoped" that his cooperation in this case might be viewed favorably by state prosecutors in the Huntington Park case (JF RE 339). Nonetheless, the court permitted the defendants to extensively cross-examine all three witnesses about their status as suspects in that case and about what hopes and beliefs they had regarding leniency (JF RE 338-339; Supp. RE 89, 162-163, 182, 190). The court also permitted questions about the potential punishment that might be imposed upon a murder conviction (JF RE 358), even though such information is "at best marginally relevant to a witness' potential bias and motive in testifying." *Larson*, 495 F.3d at 1106 (internal quotation marks and citation omitted). As in *Mitchell*, however, the court properly concluded that the details regarding how the homicide was committed were not probative of the witnesses' potential bias or motivation to testify falsely, and therefore excluded

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[5] Defendant Joseph Ferguson incorrectly asserts (JF Br. 29) that "[a]fter it was learned by police who the members of the murder gang were (fed cooperators), the murder gang traded possible life sentences for the prospect of not being charged at all since the prosecutor was taking a 'wait and see approach.' All the gang had to do was simply inform and testify against the Ferguson brothers." As set forth above, no agreement existed, and no promises or assurances were made to the witnesses or their counsel regarding the possible prosecution of the Huntington Park case in exchange for their testimony in this case. Rather, as former Huntington Park Police Officer Franklin testified, the decision to "wait and see" was based on allocation of state resources, not pressure or interference from the federal government (JF RE 272-275).

them. See also *United States* v. *Lightfoot*, 483 F.3d 876, 882 (8th Cir.) (affirming exclusion of cross-examination of two cooperating witnesses about their involvement in an unrelated, uncharged double homicide where "the record reflects no agreements that [the witnesses] would receive any leniency for the * * * murders, and neither plea agreement contains provisions immunizing [the witnesses] from state or local prosecution"), cert. denied, 128 S. Ct. 682 (2007).

2. Other Issues Outweighed The Defendants' Interest

Even if the details of the Huntington Park homicide were relevant to the witnesses' potential bias and motivation to lie, other issues outweighed the defendants' interest in exploring that topic on cross-examination.

First, as the district court stated, allowing cross-examination into the facts and circumstances of the homicide would have resulted in a "mini trial about what we're supposed to believe about what happened or didn't happen in connection with a crime that's not part of this case" (JF RE 212). The court explained that presenting such evidence to the jury would have "run[] the risk of creating substantial prejudice, jury confusion and the undue consumption of time" (JF RE 339). The court had discretion to determine that these issues outweighed the defendants' interest in cross-examining the witnesses about the details of the homicide. See *Van Arsdall*, 475 U.S. at 679 ("[T]rial judges retain wide latitude

insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, * * * or interrogation that is repetitive or only marginally relevant."); accord *Larson*, 495 F.3d at 1101; see also, *e.g.*, *Beardslee*, 197 F.3d at 384 (finding no Confrontation Clause violation in precluding cross-examination of witness's traffic citations because "the marginal relevance of such evidence would likely have been outweighed by the risk of confusing the jury").

Second, as the district court observed, the witnesses likely would have invoked their Fifth Amendment right against self-incrimination (JF RE 210, 288). In *United States* v. *Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984), the defendant attempted to cross-examine a cooperating witness about a murder he allegedly committed to show that the witness was biased, but the district court upheld the witness's claim of privilege against self-incrimination. This Court affirmed, explaining that "[e]vidence relevant to bias may be excluded because of the Fifth Amendment privilege." *Ibid*. Accordingly, the court did not abuse its discretion in precluding cross-examination into the details of the Huntington Park homicide because other issues outweighed the defendants' interest.

3. The Jury Had Enough Information To Assess The Witnesses' Credibility

Finally, the district court's exclusion of the details of the Huntington Park homicide was proper because the jury had more than enough information to assess each witness's credibility. Palomares, who was the government's lead witness, testified, among other things, that in his capacity as an LAPD officer, he repeatedly planted evidence on suspects, falsified police reports, and perjured himself in court (Supp. RE 17-19, 80-81, 107, 110-112); that he was the leader of the conspiracy in this case and that he committed at least 40 home-invasion robberies while purporting to carry out official police duties (Supp. RE 72, 77); that he was arrested in San Diego while attempting to purchase $100,000-worth of cocaine from a Colombian drug dealer (Supp. RE 74-75); that, following that arrest, he was charged and pleaded guilty to conspiracy, drug, and gun charges, and was sentenced to 15 years' imprisonment (Supp. RE 76, 82); that for two years following his arrest, he repeatedly lied to the FBI about his involvement in this case (Supp. RE 76, 90-91); that both in this case and in the San Diego case, he tried to "trick" prosecutors into believing that he was cooperating, when in fact he was not (Supp. RE 78-79); that he finally entered a plea agreement in this case that required him to cooperate and testify truthfully in exchange for the government's

recommendation for a downward departure at sentencing (Supp. RE 82); that indeed he hoped to receive a "big" downward departure because he was facing a minimum sentence of 25 years' and a maximum sentence of life imprisonment, which could be imposed consecutively to his 15-year sentence in the San Diego case (Supp. RE 82-86); that he hoped the government would file a motion for a reduced sentence in the San Diego case (Supp. RE 87); that he hoped to serve less than 15 years total between the two cases (Supp. RE 88); that he was a homicide suspect in the Huntington Park case (Supp. RE 89); and that he has lied repeatedly over the years to law enforcement, to his significant other, to his employer, and to others to cover up his criminal conduct (Supp. RE 92-106, 109).

Similarly, Gabriel Loaiza testified that he participated in the conspiracy in this case and, while pretending to be a police officer, committed at least 25 home-invasion robberies (Supp. RE 176); that he was arrested in San Diego along with Palomares and that he currently is serving a 15-year sentence for his role in that matter (Supp. RE 177-179); that he pleaded guilty in this case and agreed to cooperate (Supp. RE 165-166, 184-185); that he is facing a minimum sentence of 25 years' and a maximum sentence of life imprisonment, but that he hoped that his sentence would be reduced to less than 25 years (Supp. RE 181-182); that he also hoped for a sentence reduction in the San Diego case (Supp. RE 181); that he is a

homicide suspect in the Huntington Park case but that he has not yet been charged by state prosecutors (Supp. RE 182, 190); and that his in-court testimony conflicted in many ways with prior statements he gave regarding Defendant Joseph Ferguson's role in this case (Supp. RE 183, 185-189).

Finally, Moon testified that he participated in the conspiracy in this case from October 2000, until he was arrested in San Diego in June 2001 (Supp. RE 133, 158); that he initially lied to investigators about his role in the San Diego case and in this case (Supp. RE 159-160); that he eventually agreed to plead guilty and cooperate in both cases (Supp. RE 131, 157); that he served a 27-month sentence in the San Diego case and that he currently faces a maximum sentence of life imprisonment in this case (Supp. RE 132, 157); that he gave a statement to law enforcement about the Huntington Park homicide and that he currently is a suspect in that case (Supp. RE 162-163); that the investigation into the Huntington Park homicide is still open and that he hopes he will not get charged in that case if he cooperates in this case (Supp. RE 163); and that, in fact, he has been cooperating since 2001, and so far, he has not been charged (Supp. RE 163).

The jury, therefore, had more than enough information to assess the credibility of Palomares, Gabriel Loaiza, and Moon. Accordingly, the district court did not abuse its discretion in precluding cross-examination into the facts

and circumstances of the Huntington Park homicide. See *Larson*, 495 F.3d at 1103-1104 (finding no Confrontation Clause violation in restricting cross-examination of cooperating witness where "the jury was sufficiently apprised of [her] incentive to testify to the Government's satisfaction"); *Mitchell*, 502 F.3d at 967 (finding no Confrontation Clause violation in precluding cross-examination of witness's involvement in an unrelated homicide where witness already testified that he had pleaded guilty and agreed to cooperate in exchange for a 55-year reduction in his sentence); *Lightfoot*, 483 F.3d at 880 (upholding exclusion of cross-examination about a witness's involvement in an unrelated, uncharged double homicide where "the jury was given a great deal of information bearing on [his] reasons for cooperating with the government," including information that he "was a gang-affiliated criminal"; that he "had lied to law enforcement" about his involvement in the case; that he "had reached a plea agreement with the government"; and that he "was hoping for a sentence reduction for his cooperation in the case").

4. Even Assuming The District Court's Limitation On Cross-Examination Was Error, Such Error Was Harmless

Whether a Confrontation Clause error is harmless depends upon "a host of factors," including "the importance of the witness's testimony in the prosecution's

case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684; accord *United States* v. *Schoneberg*, 396 F.3d 1036, 1043 (9th Cir. 2005). Although the testimony of Palomares, Gabriel Loaiza, and Moon was important to the government's case, any error the district court may have committed in limiting cross-examination of those three witnesses was harmless beyond a reasonable doubt because extensive cross-examination was permitted, and because there was other, corroborating evidence.

As set forth above, the defendants had more than enough ammunition to attack the witnesses' credibility, which they did, including the opportunity to question the witnesses about their status as suspects in the Huntington Park homicide, as well as the potential punishment that might be imposed on a homicide conviction. "Given [the defendants'] ability and success at impeaching [the cooperating witnesses'] testimony, any Confrontation Clause violation stemming from the limits on cross-examination was harmless beyond a reasonable doubt." *United States* v. *Johnson*, 297 F.3d 845, 857 n.5 (9th Cir. 2002), cert. denied, 537 U.S. 1242 (2003).

In addition, the jury was presented with sufficient, independent evidence corroborating the material points of those witnesses' testimony. For example, the jury heard from another co-conspirator, Juan Mendoza, that Defendant Joseph Ferguson was present at the ranch following the Williams Street robbery (Supp. RE 123-127). In addition, co-conspirator Rodrigo Duran testified that the 911 call, which Defendant Joseph Ferguson admitted making (Supp. RE 199), was in furtherance of the conspiracy (Supp. RE 15). Defendant Joseph Ferguson's guilt was further corroborated by compelling circumstantial evidence, such as phone records documenting communication between Defendant Joseph Ferguson and his co-conspirators on the days of the robberies (Supp. RE 202-220), as well as his roommate's testimony that they possessed plastic containers exactly like the ones used to repackage the marijuana stolen from the Williams Street house (Supp. RE 192-193). Similarly, numerous other witnesses, including other co-conspirators as well as victims, implicated Defendant William Ferguson in the robberies he committed (Supp. RE 2-3, 5-7, 9-11, 13-14, 114-116, 123-127, 164). Accordingly, any error committed by the district court in precluding the defendants from asking the witnesses about the details of the Huntington Park homicide was harmless beyond a reasonable doubt.

II

THE DISTRICT COURT PROPERLY CALCULATED DEFENDANT JOSEPH FERGUSON'S SENTENCE AND THE SENTENCE IS REASONABLE

A. Calculation Of The Defendant's Sentence

The court adopted the findings and recommendation of the pre-sentence report (PSR) and sentenced Defendant Joseph Ferguson to a term of 97 months' imprisonment and four years' supervised release (JF RE 378, 380-381). The PSR calculated the defendant's offense level for Count 1, charging a civil rights conspiracy in violation of 18 U.S.C. 241, as follows:

Base offense level, U.S.S.G. § 2H1.1(a)(2)	12
Increase for "under color of law," U.S.S.G. § 2H1.1(b)(1)	+6
Decrease for minor role in the offense, U.S.S.G. § 3B1.2	-2
Adjusted offense level	*16*

(PSR 13-14). The PSR grouped the defendant's convictions on Counts 2 and 19, charging conspiracy and attempt to possess a controlled substance with intent to distribute in violation of 21 U.S.C. 841(a)(1) and 846, and calculated the offense level as follows:

Base offense level, U.S.S.G. § 2D1.1(a)(3)	28
Increase for use of a dangerous weapon, U.S.S.G. § 2D1.1(b)(1)	+2

Adjusted offense level *30*

(PSR 14-15). Pursuant to U.S.S.G. § 3D1.3(a), the higher offense level of 30 was used (PSR 15). Because the defendant had no criminal history, the applicable sentencing range was 97 to 121 months' imprisonment (PSR 16, 21). The court imposed the lowest possible sentence within that range (JF RE 380-381).[6]

B. Standard Of Review

This Court "review[s] all sentencing decisions for an abuse of discretion, regardless of whether the district court applies a sentence inside or outside the suggested guidelines range." *United States* v. *Tankersley*, 537 F.3d 1100, 1109 (9th Cir. 2008), cert. denied, 2009 WL 559345 (June 8, 2009) (No. 08-1104). First, this Court "must determine whether the district court properly calculated the applicable range under the advisory guidelines." *Ibid*. This Court "review[s] de novo the district court's interpretation of the Sentencing Guidelines, and [it] review[s] for clear error the district court's determination of the facts." *Id.* at 1110. Second, this Court "review[s] the sentence for substantive reasonableness." *Ibid*.

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[6] The defendant's convictions on Counts 2 and 19 required that he be sentenced to a minimum of 60 months. See 21 U.S.C. 841(b)(1)(B)(vii).

C. The District Court Did Not Clearly Err In Finding That The Defendant Was Not A Minor Participant

Defendant Joseph Ferguson argues (JF Br. 33-36) that the district court erred by refusing to grant him a two-level decrease for his role in the offense, pursuant to U.S.S.G. § 3B1.2(b). The defendant's argument lacks merit.

The federal sentencing guidelines advise that the offense level of a defendant who, based on his role in the offense, "was a minor participant in any criminal activity," should be decreased by two levels. U.S.S.G. § 3B1.2(b). A "minor participant" is someone "who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2(b), comment. (n.5). This determination is "heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2(b), comment. (n.3(C)). The defendant has the burden "to persuade the sentencing judge by a preponderance of the evidence that he played a minor role in the offense." *United States* v. *Cordova-Barajas*, 360 F.3d 1037, 1042 (9th Cir. 2004). The court, however, "is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." U.S.S.G. § 3B1.2(b), comment. (n.3(C)).

The defendant failed to satisfy his burden of showing that he played a minor role in the offense. He argues that he was entitled to a two-level decrease for his

role in the offense because he "was clearly only a drug transporter" in the Williams Street robbery, charged in Count 19 (JF Br. 35). This argument fails as a matter of fact. As the defendant acknowledges in his brief, he not only helped transport the marijuana to the ranch, he also allowed it to be stored and repackaged in his garage; provided containers for repackaging the marijuana; and, once at the ranch, participated in hiding the marijuana in an animal pen (JF Br. 34). Based on these facts, the district court ruled that he was not entitled to a minor-role adjustment (JF RE 364-365).

The defendant relies on *United States* v. *Rojas-Millan*, 234 F.3d 464 (9th Cir. 2000), to argue that he was "substantially less culpable" than Palomares and his brother, Defendant William Ferguson, in the Williams Street robbery (JF Br. 35). Under *Rojas-Millan*, however, the defendant's conduct must be compared to *all* of the other participants in the offense. See 234 F.3d at 473-474. The record shows that at least nine individuals were involved in the Williams Street robbery (Supp. RE 39-74, 118). The defendant clearly was not less culpable than Juan Mendoza, Gabriel Loaiza, or Pablo and Jack, who did not become involved in the crime until after the marijuana was stolen, repackaged, and transported to the ranch (Supp. RE 65, 69, 117-129, 153-155, 167-175). Nor was the defendant less culpable than Jesus Dominguez Estrada, who gave Palomares information about

the Williams Street location, but did not participate in stealing, repackaging, storing, or concealing the marijuana (Supp. RE 114a-115b). Accordingly, he was not a minor participant because he was not "less culpable than most other participants." U.S.S.G. § 3B1.2(b), comment. (n.5).

In any event, the court also found that the defendant's involvement in the broader drug conspiracy, charged in Count 2, precluded a finding that the defendant played a minor role in the offense because, even before the Williams Street robbery, the defendant "was already involved in the conspiracy in a number of respects," and that his participation "involve[d] multiple actions over a period of time" (JF RE 364-365). Indeed, the record shows that the defendant had been involved in the conspiracy for at least one year and had participated in at least four different home-invasion robberies before the Williams Street robbery (Supp. RE 21, 33, 35, 38). On each occasion, the defendant served as the lookout, which cooperating witnesses described as a very important role because no robbery would be committed by anyone in the conspiracy unless somebody was outside checking for suspicious activity and making sure that no real police officers were in the area (Supp. RE 20, 156).[7] Also, as the court acknowledged (JF RE 373-

[7] Palomares testified that the defendant also served as a lookout during the Williams Street robbery (Supp. RE 43-44). Moon, however, testified that he served as the lookout while Palomares and Defendant William Ferguson stole the

374), the defendant played a critical role in ensuring that the conspiracy continued during that year by volunteering to make the anonymous false 911 call, which resulted in the arrest of David Barajas (Supp. RE 22-32). Accordingly, the court did not clearly err in finding that the defendant was not a minor participant. See, *e.g.*, *United States* v. *Smith*, 282 F.3d 758, 772 (9th Cir. 2002) (finding no clear error in denying minor-role adjustment to defendant who "may not have been the financier or leader of the organization," but who was involved in multiple acts during course of drug conspiracy); cf. *Tankersley*, 537 F.3d at 1110-1111 (finding no clear error in denying four-level decrease for minimal role in the offense where defendant had opportunity to withdraw from conspiracy but instead continued to participate and ensure the conspiracy's success).

D. The Court Did Not Clearly Err In Finding That The Defendant Could Reasonably Foresee Use Of A Firearm

Defendant Joseph Ferguson further argues (JF Br. 36-39) that the district court erred in enhancing his offense level by two levels, pursuant to U.S.S.G. § 2D1.1(b)(1), for use of a dangerous weapon. The defendant's argument lacks merit.

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marijuana, and that he did not see Defendant Joseph Ferguson until they arrived at his home to repackage the drugs (Supp. RE 136-148). The district court did not seem to rely on Palomares's version in denying the minor-role adjustment.

The federal sentencing guidelines state that the offense level should be increased by two levels "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3). Because the defendant was engaged in a "jointly undertaken criminal activity," his offense level may be increased so long as the weapon's presence was "reasonably foreseeable * * * in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B).

The district court's finding that the defendant could reasonably foresee that a firearm would be used in furtherance of the offense was not clearly erroneous. The court adopted the findings of the PSR, which found:

> Even though the defendant was not present when his co-defendant stole the marijuana from the Williams [Street] residence, it was foreseeable to him that they would posses firearms in carrying out the offense. The defendant was still a member of the conspiracy – he participated in robberies both before and after the date of the Williams [Street] burglary. He was well aware of how the robberies were carried out (i.e., the use of police uniforms and weapons). Given his knowledge of the conspiracy, it is reasonably foreseeable to this defendant, who was himself a police officer, that Palomares and Moon possessed firearms during the burglary (JF PSR Add. 1).

The defendant's argument (JF Br. 37) that "there was no evidence that [he] saw or

knew that guns were being carried by other conspirators" involved in the Williams Street robbery is contradicted by the record. Palomares testified that both he and Moon were armed (Supp. RE 43), and Moon testified that both Palomares and Defendant William Ferguson were armed (Supp. RE 134). The defendant was in the presence of all three men and, in fact, helped them repackage and transport the marijuana to the ranch (Supp. RE 144-152). The defendant would have known that they were armed. Indeed, Juan Mendoza testified that, even though it was dark, he could see that the people who arrived at his ranch with the marijuana were carrying guns (Supp. RE 126).

The court also found that it was reasonably foreseeable to the defendant that firearms would be used in the broader conspiracy:

> With respect to the firearm, it's my view that while he may have been in what the report describes as a minor role in the civil rights aspect of the conspiracy, he certainly was deeply involved enough to be convicted of the conspiracy. He is responsible for the foreseeable acts of those who participated in the conspiracy, and those foreseeable acts plainly included the use of weapons (JF RE 365).

These findings were supported by the record. The defendant became involved in the conspiracy at least one year before the Williams Street robbery and by then had participated in at least four other robberies (Supp. RE 21, 33-34, 37). He participated in each robbery with Palomares and his brother, who always carried

guns (Supp. RE 194-197). Before the 85th Street robbery, the defendant attended a preparation meeting, where everyone who dressed as police officers had badges and guns (Supp. RE 34).

The defendant's reliance (JF Br. 37) on *United States* v. *Lopez*, 384 F.3d 937, 944 (8th Cir. 2004), is misplaced because in that case, unlike here, there was no evidence showing that the defendant "knew or should have known that [the co-conspirator] possessed a firearm." The district court's application of the two-level enhancement under U.S.S.G. § 2D1.1(b)(1) was thus proper and should be affirmed. See, *e.g.*, *United States* v. *Ortiz*, 362 F.3d 1274, 1278 (9th Cir. 2004) (affirming district court finding that defendant knew that his co-conspirator always carried a gun and, therefore, could reasonably foresee that gun would be used in the offense even though defendant was not present at the time).

E. The Sentence Is Reasonable

Defendant Joseph Ferguson next argues (JF Br. 39-43) that his 97-month sentence is unreasonable because it was greater than necessary to accomplish the sentencing goals set forth in 18 U.S.C. 3553(a). The defendant's argument lacks merit.

Although this Court has declined to adopt a presumption of reasonableness for sentences imposed within the guidelines range, this Court recognizes that "a

correctly calculated Guidelines sentence will normally not be found unreasonable on appeal." *United States* v. *Carty*, 520 F.3d 984, 988 (9th Cir.), cert. denied, 128 S. Ct. 2491 (2008). This is because "appellate courts must 'give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" *United States* v. *Autery*, 555 F.3d 864, 872 (9th Cir. 2009) (quoting *United States* v. *Gall*, 128 S. Ct. 586, 597 (2007)). As already explained, the district court properly calculated the guidelines range and sentenced the defendant to the lowest possible sentence within that range (JF RE 380). The defendant, however, contends that his sentence is unreasonable in light of his background, service as a police officer, and family obligations (JF Br. 41). None of these factors supports the conclusion that the court abused its discretion by imposing an in-guidelines sentence of 97 months.

Indeed, in *Carty*, this Court upheld a district court's decision to sentence a defendant at the bottom of the guidelines range, rather than give a lesser sentence, because "the sentencing judge 'set forth enough to satisfy [the Court] that he has considered the parties' arguments and has a reasonable basis for exercising his own legal decisionmaking authority.'" 520 F.3d at 996 (quoting *United States* v. *Rita*, 127 S. Ct. 2456, 2468 (2007)). Like the defendant in this case, the defendant in *Carty* argued for a lesser sentence in light of his history, characteristics, and

family obligations. See *id*. at 995. This Court found no abuse of discretion in rejecting the defendant's request for a lesser sentence:

> Here the district judge had presided over Carty's trial. He reviewed the PSR and the parties' submissions that discussed applicability of § 3553(a) factors; and he listened to testimony adduced at the sentencing hearing and to argument by both parties. The judge acknowledged Carty's specially strong family support and the impact prolonged incarceration would have. Based on all these factors, the judge imposed the sentence. The sentence was within, but at the low end of, the Guidelines range.

Ibid. (quoting *Rita*, 127 S. Ct. at 2468). Accordingly, this Court concluded that the sentence was reasonable. See *id*. at 996.

The district court in this case also had a reasonable basis for imposing a sentence at the bottom of the guidelines range. At the hearing, the court explained that it reviewed and considered all submitted materials, including the parties' position briefs, letters supporting the defendant, the PSR, and the PSR addendum (JF RE 362-363). The court also heard argument from the parties and, as the defendant points out (JF Br. 42), devoted a significant amount of time to discussion of the Section 3553(a) factors.[8] The court explained:

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[8] Section 3553(a) requires the court to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among the defendants with similar records who

> The nature and circumstances of the offense * * * were very serious matters, and Mr. Ferguson knowingly and willfully, voluntarily associated himself with these activities, which are the sorts of things which bring great disrespect to the legal system, to law enforcement officers.
>
> * * * [I]n 34 years as a lawyer and 12 years as a judge, the testimony and evidence that I saw in this case was the most astonishing I've ever encountered. The idea that police officers would associate themselves together to commit home invasion robberies is shocking, and Mr. Ferguson helped out in that endeavor.
>
> It is just a shame that someone in his situation, in his position, with his family – comes from a good family, I don't have any doubt about that * * * I believe when he says he doesn't know why he did what he did or why he didn't do certain things that he might have done, I believe that, but it doesn't change the facts.
>
> This is the kind of case where it's important that the punishment reflect the seriousness of the offense to promote respect for the law and to provide just punishment[, but] I also have to take into account sentencing disparity. * * *
>
> So taking into account all of the 3553 factors, looking at the Sentencing Guidelines, I do think the Guidelines establish a reasonable range for sentence in this case, and I will sentence at the low end of the range (JF RE 379-380).

The court also responded to the defendant's argument concerning his family obligations by recommending that he "be housed in a facility in Southern California," and by declining to "impose a fine in this case because that would

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have been found guilty of similar conduct; and the need to provide restitution to any victims. See *Carty*, 520 F.3d 991 (citing 18 U.S.C. 3553(a)(1)-(7) & *Gall*, 128 S. Ct. at 596-597 n.6).

place an undue burden on his dependents" (JF RE 380-381). The court, therefore, properly considered the factors under 18 U.S.C. 3553(a) and adequately set forth its reasons for imposing a sentence at the bottom of the guidelines range. The defendant's sentence is reasonable and should be affirmed.

III

DEFENDANT WILLIAM FERGUSON'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Defendant William Ferguson challenges (WF Br. 29-35) the constitutionality of his 1,224-month sentence. The defendant's argument fails because it is precluded by binding circuit precedent.

A. The Defendant's Sentence

The district court sentenced Defendant William Ferguson to a term of 1,224 months' (102 years') imprisonment (Supp. RE 201). This sentence was dictated by statute because the defendant was found guilty of Counts 5, 18, 28, and 34, which charged the defendant with use of a handgun during a crime of violence or drug trafficking offense, in violation of 18 U.S.C. 924(c). That provision requires a mandatory minimum sentence of seven years for the first conviction, 18 U.S.C. 924(c)(1)(A)(ii), plus a mandatory minimum sentence of 25 years for each subsequent conviction, 18 U.S.C. 924(c)(1)(C)(i), which must be imposed "in

addition to the punishment provided for such crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A). Accordingly, the defendant was sentenced to a mandatory minimum term of 984 months' (82 years') imprisonment for his four convictions under 18 U.S.C. 924(c). As required, this sentence was imposed consecutive to the 360-month concurrent sentence imposed for the defendant's violent crime and drug trafficking convictions charged in Count 1 (18 U.S.C. 241); Counts 3, 10, 16, 26, 29, and 32 (18 U.S.C. 241); and Counts 2, 4, 17, 19, 27, and 33 (21 U.S.C. 841(a)(1) and 846), which included a 60-month mandatory minimum for his convictions on Counts 2 and 19. See 21 U.S.C. 841(b)(1)(B)(vii).

B. Standard Of Review

This Court reviews *de novo* the legality of a district court's sentence under the Eighth Amendment. See *United States* v. *Harris*, 154 F.3d 1082, 1083-1084 (9th Cir. 1998), cert. denied, 528 U.S. 830 (1999).

C. The Defendant's Argument Is Precluded By Circuit Precedent

The defendant does not dispute the calculation of his sentence on any particular count, but rather, contends that the lengthy consecutive sentence violates the Eighth Amendment's ban on cruel and unusual punishment because it is grossly disproportionate to the sentences imposed on his co-conspirators. The

defendant's constitutional challenge is precluded by circuit precedent.

This Court repeatedly has "held that, '[o]utside of the death penalty context, the Eighth Amendment is offended *only* by sentences that are 'grossly disproportionate' to the crime.'" *United States* v. *Gomez*, 472 F.3d 671, 673 (9th Cir. 2006) (quoting *United States* v. *Aguilar-Muniz*, 156 F.3d 974, 978 (9th Cir. 1998)) (emphasis added); see also *United States* v. *Zavala-Serra*, 853 F.2d 1512, 1518 (9th Cir. 1988) (explaining that "the proportionality requirement of the [E]ighth [A]mendment does not require that a defendant's sentence be harmonized with sentences imposed * * * on other defendants"). "Generally, as long as the sentence imposed on a defendant does not exceed statutory limits, this [C]ourt will not overturn it on Eighth Amendment grounds." *United States* v. *Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001); accord *United States* v. *Albino*, 432 F.3d 937, 938 (9th Cir. 2005) (per curiam); *Gomez*, 472 F.3d at 673.

This Court also repeatedly has held that consecutive sentences imposed pursuant to 18 U.S.C. 924(c) do not violate the Eighth Amendment. See *Harris*, 154 F.3d at 1084; *Parker*, 241 F.3d at 1117-1118; *United States* v. *Wilkins*, 911 F.2d 337, 340 (9th Cir. 1990). In *Harris*, a case very similar to this one, the defendant was convicted of five counts of robbery under 18 U.S.C. 1951(a), and five counts of use of a firearm during a crime of violence under 18 U.S.C.

924(c)(1). See 154 F.3d at 1083. Consequently, he was sentenced to 1,141 months' (95 years') imprisonment. See *ibid*. This Court upheld the sentence, concluding that it was not "grossly disproportionate" in violation of the Eighth Amendment. *Id*. at 1084. Most of the defendant's 1,224-month sentence in this case also resulted from multiple violations of 18 U.S.C. 924(c), which required the district court to impose a minimum sentence of 984 months, in addition to punishment for his other 13 convictions, including a 60-month mandatory minimum under 21 U.S.C. 841(b)(1)(B)(vii). Accordingly, this Court should affirm the defendant's sentence.

CONCLUSION

This Court should affirm the defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with 9th Circuit Rule 28-4 and this Court's order of March 9, 2009, granting the United States' an enlargement of 1,400 additional words to file a single consolidated appellee brief, because it contains 12,428 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14-point Times New Roman font.

s/ Tovah R. Calderón
TOVAH R. CALDERON
Attorney

Dated: July 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tovah R. Calderón
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