[**Redacted Version**]
Nos. 06-50677, 06-50678, 06-50679, 07-50037

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FERNANDO CAZARES,
GILBERT SALDANA,
ALEJANDRO MARTINEZ,
PORFIRIO AVILA,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

LEGISLATIVE HISTORY:

LEGISLATIVE HISTORY (continued): **PAGE**

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 06-50677, 06-50678, 06-50679, 07-50037

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FERNANDO CAZARES,
GILBERT SALDANA,
ALEJANDRO MARTINEZ,
PORFIRIO AVILA,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

Defendants-Appellants Fernando Cazares, Gilbert Saldana, Alejandro Martinez, and Porfirio Avila were indicted and convicted under the criminal laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment as to Cazares, Saldana, and Martinez on November

22, 2006 (E.R. 6067-6084), and as to Avila on January 24, 2007 (E.R. 6095-6098).[1] The four defendants filed timely notices of appeal: November 21, 2006 (Saldana); November 27, 2006 (Cazares); November 30, 2006 (Martinez); January 29, 2007 (Avila). E.R. 6085-6094, 6099. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by shackling defendants to their chairs during trial.

2. Whether defendants waived their right to be present and to a public trial during portions of the voir dire.

3. Whether the district court erred in admitting hearsay testimony under the forfeiture by wrongdoing doctrine.

4. Whether the district court erred in admitting the testimony of a government expert on the racial attitudes of the Avenues gang.

---

[1] Citations to "E.R. __" refer to pages in the Appellants' Excerpts of Record. Citations to " S.E.R. __" are to page numbers in Appellants' Joint Sealed Excerpts of Record. Citations to "S.S.E.R. __" are to page numbers in Appellee's Supplemental Excerpts of Record filed with this brief. Citations to "Br. App. __" and "Br. Saldana __" are to page numbers in Appellants' Joint Opening Brief and Appellant Gilbert Saldana's Supplemental Opening Brief, respectively.

5. Whether the admission of Saul Audelo's testimony concerning a gun he sold to one of the defendants was plain error.

6. Whether the court abused its discretion by restricting the defendants' cross-examination of certain government witnesses.

7. Whether the testimony of the government's firearms expert on the certainty of her conclusions was plain error.

8. Whether 18 U.S.C. 245(b)(2)(B) is a valid exercise of Congress's power as applied in this case.

9. Whether the court erred in denying defendant Saldana's motion to suppress statements made to police.

10. Whether defendants' Due Process rights were violated by the cumulative effect of the claimed errors.

STATEMENT OF THE CASE

1. On November 16, 2005, the United States filed a three count Second Superseding Indictment charging the defendants with civil rights offenses related to a series of assaults and murders of African-Americans in the Highland Park neighborhood of Los Angeles. That neighborhood was claimed as gang territory by the defendants' gang, Avenues 43. E.R. 99-113.

Count One charged five defendants[2] with violating 18 U.S.C. 241 by conspiring to interfere with the federally protected housing rights of African-Americans in Highland Park through violence and threats of violence. E.R. 102-110. Count One alleged numerous overt acts committed in furtherance of this conspiracy by the defendants, and other co-conspirators, including threats, assaults, shootings, and the murder of two African-American men (Kenneth Wilson and Christopher Bowser).

Counts Two and Three charged Saldana, Cambero, Martinez, and Cazares (but not Avila) with additional offenses relating to the murder of Kenneth Wilson. E.R. 111-113. Count Two charged the four defendants with violating 18 U.S.C. 245(b)(2)(B) and 18 U.S.C. 2(a) by shooting and killing Wilson because of his race and because he was exercising his federally protected right to use the public streets of Los Angeles. This count further alleged that the offense involved the use of dangerous weapons and resulted in the death of Wilson.

Count Three charged the same four defendants with violating 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1), and 18 U.S.C. 2(a), by possessing, carrying, using, and

---

[2] The fifth defendant, Merced Cambero, Jr., is a fugitive and was not brought to trial.

discharging three firearms during and in furtherance of the murder of Wilson. E.R. 112-113. This count further alleged that the offense caused the death of Wilson through the use and discharge of the firearms and that Wilson's death involved circumstances constituting murder.

2. Defendants' 25-day joint trial was held in 2006. Defendants made numerous motions to exclude evidence or for a mistrial, which we address below as relevant to this appeal.

On August 1, 2006, the jury found Saldana, Martinez, and Cazares guilty on all Counts, and Avila guilty on Count One. E.R. 6051-6066. Sentencing hearings were held on November 20, 2006 (Saldana, Martinez, and Cazares), and January 22, 2007 (Avila). S.S.E.R. 178-181. Saldana, Martinez, and Cazares were sentenced to life imprisonment on each count (the life sentences on Counts One and Two to be served concurrently; the life sentence on Count Three to be served consecutively). E.R. 6067-6084.[3] Avila was sentenced to life imprisonment on

---

[3] Saldana's sentence is to be served consecutively to the life sentences he is serving in state custody for the murder of Jonathan Padron on October 28, 2000, and the attempted murder of Paul Anguiano on July 11, 2000. See E.R. 144, 6067-6072; *People* v. *Saldana*, No. B172482, 2005 WL 3113058 (Cal. App. 2d Nov. 22, 2005).

Count One. E.R. 6095-6098.[4]

The court entered final judgment as to Cazares, Saldana, and Martinez on November 22, 2006 (E.R. 6067-6084), and as to Avila on January 24, 2007 (E.R. 6095-6098). The four defendants filed timely notices of appeal. E.R. 6085-6094, 6099.

STATEMENT OF THE FACTS

This case arises out of the harassment, assault, and murder of African-American individuals in the Highland Park neighborhood of Los Angeles between 1995 and 2001 by a clique of a Latino street gang, the Avenues, called Avenues 43.

1. The Avenues 43 Gang

The Highland Park area of Los Angeles, California, although ethnically diverse, is predominantly Latino. E.R. 2915, 3785. The area is controlled by a Latino street gang, the "Avenues," which is divided into cliques, each of which "claimed" as gang "territory" a different area of Highland Park. E.R. 2642, 2884,

---

[4] Avila was convicted in state court for the first-degree murder of Christopher Bowser and another African-American man (Anthony Prudhomme), and is serving concurrent life sentences for those convictions. E.R. 6054-6055; see generally *People* v. *Avila*, No. B174161, 2005 WL 2065211 (Cal. App. 2d Aug. 29, 2005) (affirming Avila's state court murder convictions).

2886-2887, 3614, 3757, 3777-3781. All four defendants – Saldana (known as "Lucky"), Martinez ("Bird"), Cazares ("Sneaky"), and Avila ("Dreamer") – belonged to a clique called Avenues 43, which claims an area in Highland Park surrounding 43rd Avenue, and had approximately 20 to 40 active members. E.R. 2897-2903, 3783, 4853. One of the most important aspects of being a member of the gang was loyalty to the gang and the neighborhood.

Avenues 43 is closely linked to another Avenues clique, called Avenues 57, which claims the territory near 57th Avenue. E.R. 100, 3758. Members of Avenues 43 and Avenues 57 considered themselves to be part of the same larger gang. E.R. 3758. Jose De La Cruz ("Clever"), one of the government's two cooperating witnesses who were involved in the gang activity underlying the indictment, including the murder of Wilson, was a member of Avenues 57. E.R. 2905-2906, 3759. The government's other cooperating witness, Jesse Diaz ("Listo"), was a member of Avenues 43. E.R. 2901-2902.

Avenues 43 members distinguished themselves by tattoos, gang signals, and clothing. E.R. 2866-2880, 3607-3609, 3751-3752, 3927, 4893-4897. They regularly "hung out" together at various locations in Highland Park, including Montecito Park, which they "controlled." E.R. 2904-2905, 3606-3611, 3764-3765, 4851-4852. They also went "tagging" (writing graffiti) during "missions," where

they went out to commit crimes or look for "enemies." E.R. 2935, 3760-3772, 4870-4871. The graffiti was often racially derogatory and written on buildings where African-Americans lived. E.R. 2927, 4870. At these times, they were always armed and usually carried a police scanner. E.R. 2935-2936, 3772.

Between 1995 and 2001, more African-Americans moved into Highland Park. Avenues members were not happy with the changing makeup of their neighborhood. During this same time period, there was an increase in the number of crimes targeting African-American individuals. E.R. 4859-4860, 4868-4872.

2. The Conspiracy To Interfere With Federally-Protected Housing Rights Of African-American Individuals

Between at least 1994 and 1999, defendants and their co-conspirators met on a regular basis to discuss the "business" of the gang, which included an agreement among the gang members to keep African-Americans from "infesting" their Hispanic neighborhood. E.R. 2915-2921, 2969-2971, 3785-3791. Avenues members regularly referred to African-Americans as "Niggers" or "mayetes" (a derogatory Spanish word). E.R. 2643, 2912, 2983-2985, 3787-3789. As members of Avenues 43, the four defendants and their co-conspirators agreed to threaten and use violence – "whatever it took; killing, shooting, scaring, beating up, robbing" (E.R. 2919-2920) – against African-Americans living in, or passing through, Highland Park, in order to drive them out of the neighborhood and off the streets.

E.R. 2916-2920, 2972-2976, 3789-3798. The defendants did not like African-Americans, and did not want them "walking in our streets, or playing in our parks, or anything like that." E.R. 3789; see also E.R. 159-160, 2643-2646, 4867-4868. The evidence at trial established numerous incidents of racial violence by the defendants in furtherance of the conspiracy, including the murder of Kenneth Wilson.

3. Specific Acts Of Harassment, Assault, And Killing Of African-American Individuals By Defendants

a. The Murder Of Kenneth Wilson

Kenneth Wilson, an African-American man, was shot to death on April 18, 1999, at approximately 3:30 a.m. while sitting in his friend's Cadillac after returning from a club with his nephew, Julius Williams. E.R. 2475-2481, 2491, 3805. The three defendants charged in Count Two (Saldana, Martinez, and Cazares), acting in concert with two Avenues gang members who cooperated with the federal prosecution (Diaz and De La Cruz), murdered Wilson simply because Wilson was an African-American man and was in the neighborhood and using the public streets claimed by the Avenues gang. E.R. 2968, 3944, 4228-4230. The murder occurred on 52nd Avenue, a public street that traverses a portion of Highland Park. E.R. 3805. According to Diaz and De La Cruz, the murder of Kenneth Wilson was part of a larger agreement by Avenues gang members to use

violence to drive African-Americans from the neighborhood claimed by the gang. E.R. 2970-2971, 3302-3303, 3787-3791, 3944, 4228-4232.

Diaz and De La Cruz testified about the involvement of the three defendants in Wilson's murder. E.R. 2927-2958, 3805-3839. Both witnesses testified that six Avenues gang members – Saldana, Cambero, Martinez, Cazares, Diaz, and De La Cruz – set out in a stolen Chevy van on the night of April 18, 1999, to look for a member of another gang, go tagging, and commit crimes. E.R. 2928-2929, 3753-3756, 3806-3810. There was a box of spray paint cans and a police scanner in the van. E.R. 2930, 2936, 3808-3809. Several of the gang members had weapons: Saldana had a 9 mm Ruger (a type of Luger) semiautomatic handgun; De La Cruz had a shotgun; and Cambero had a .357 revolver. E.R. 2939-2940, 3836-3838. Martinez was driving, and Cazares was in the front passenger seat. E.R. 3807-3808.

The defendants drove around Highland Park, periodically stopping to write graffiti on walls. E.R. 2943-2944, 3810. When they decided to "call it a night," they headed back toward 43rd Avenue. E.R. 2944-2945. When they turned onto 52nd Avenue, Martinez spotted Wilson driving a Cadillac in the opposite direction. E.R. 2945-2946, 3812. Wilson was trying to park the car after dropping off his passenger. E.R. 3817. Martinez pointed at Wilson and said "Hey, * * * [y]ou guys

want to kill a nigger?" E.R. 2945, 2967, 3811-3812, 4223-4224. The other five Avenues members agreed. E.R. 2946. The defendants did not know Wilson or care whether he was in a rival gang; the "issue" was that "he was black." E.R. 2967-2968, 3812, 4224-4225.

Martinez double-parked the van, and Saldana, Cambero, and De La Cruz jumped out into the street with their guns. E.R. 2946-2929, 3152-3153, 3813-3814. The Cadillac drove away but did a U-turn and slowly came back down 52nd Avenue. E.R. 2948, 3153-3154, 3805-3813. As the Cadillac drove back toward the van, Saldana, Cambero, and De La Cruz fired at the Cadillac and Wilson. E.R. 2948-2950, 3805, 3817-3821. Cambero shot Wilson one time with his .357 from the passenger side door; De La Cruz shot five times from the right rear of the car with his shotgun; Saldana shot at the car two times with his 9 mm handgun. E.R. 2485, 2949-2951, 3814-3821, 3923-3926, 4673, 4676.

After the gunfire, the Cadillac veered to the side and hit a parked car. E.R. 2951, 3926-3927, 3819-3821. A single bullet from Cambero's .357 had hit Wilson in the back of the neck, severing his carotid artery. E.R. 3396-3401, 4676-4677. Wilson died within minutes.

While Saldana, Cambero, and De La Cruz shot at the Cadillac and Wilson, the other three co-conspirators – Martinez, Cazares, and Diaz – remained in the

van, keeping a lookout for the police. E.R. 2952, 3821-3822. After the shooters returned to the van, the six co-conspirators drove to Ulysses Street, where Saldana and Martinez lived. E.R. 2953-2954, 3826. Cambero said that he shot first and hit Wilson, so that "by the time you guys shot him, he was already dead." E.R. 3824. Saldana went to his house to hide the guns, and Martinez and Cazares disposed of the van. E.R. 2954-2955, 3826-3827.

In October 1999, Diaz was convicted of an unrelated attempted murder that occurred after the Wilson murder; he was sentenced to 20 years imprisonment. E.R. 2884, 2958, 3107. In December 1999, while in prison, Diaz was interviewed by police detectives and, in exchange for immunity, told them about the murder, implicating Saldana, De La Cruz, and Cambero. E.R. 3108-3118.

On February 13, 2000, De La Cruz was arrested for the Wilson murder. E.R. 3839-3840. De La Cruz was interviewed by detectives, who played a tape of Diaz's police interview; De La Cruz then confessed to his role in the crime. E.R. 3847-3850. De La Cruz was prosecuted and convicted for the Wilson murder in state court, and was sentenced to 45 years to life. E.R. 3862.

The testimony of Diaz and De La Cruz, describing Wilson's murder and the participation of Saldana, Martinez, and Cazares, was corroborated by physical evidence found at the scene. Criminalists who examined the Cadillac testified that

the rear window had been shot out, there were bullet marks on the trunk and the right rear side of the car, and a bullet hole in the rear passenger side door window. E.R. 3332-3333, 3434. Shotgun pellets, fragments of bullet jackets, and fired bullets were found in the car. E.R. 3343, 3380. A firearms expert (Diana Paul) testified that at least three firearms were used in the crime, including a 9 mm Luger, a shotgun, and another gun that could have been a .357. E.R. 4667-4677.

There was also evidence that Saldana's 9 mm weapon was the same firearm used in the murders of Rene and Jaime Cerda committed by a White Fence gang member, Saul Audelo, two months before the Wilson murder. E.R. 3486, 3498.[5] Audelo was convicted of those murders and sentenced to life imprisonment without parole. E.R. 3486, 3508. When Audelo was initially questioned about the Cerda murders, he denied killing them but admitted owning a 9 mm Ruger and selling it to Saldana shortly after the murders. S.S.E.R. 65-67, 78-81. A police detective (Gabriel Rivas) subsequently interviewed Saldana at the police station (at this time Saldana was not a suspect in any crime). Saldana admitted purchasing a

---

[5] See Issue 5, *infra*. Cerda is sometimes spelled "Serta" in the trial transcripts.

9 mm Ruger from Audelo. S.S.E.R. 80.[6] At trial, Audelo testified that he sold the weapon used in the Cerda murders to Saldana, whom he had previously met in county jail. E.R. 3487-3488, 3498, 3510-3511. Rivas also testified that Saldana admitted having bought the 9 mm weapon from Audelo. E.R. 3573. Further, De La Cruz testified that Saldana told him that Saldana bought the 9 mm gun from a White Fence gang member he met in prison. E.R. 3923-3924. A firearms expert (Diana Paul) concluded that the bullet casings from the Cerda and Wilson murders were fired from the same gun, a 9 mm Ruger. E.R. 4670.[7] In addition, Saldana's girlfriend, Eneida Montano, testified that Saldana told her that the police were looking for him for the murder of a "mayate." E.R. 3625-3626.

Finally, the government presented evidence that 52nd Avenue, where the Wilson murder occurred, is a street provided and maintained by the City of Los Angeles. E.R. 4509-4510, 4520-4531.

---

[6] See Issue 9, *infra*.

[7] See Issue 7, *infra*.

b. The Harassment And Murder Of Christopher Bowser

On December 11, 2000, defendant Avila shot Christopher Bowser, an African-American man, several times in the head and killed him as Bowser waited at a bus stop in Highland Park. E.R. 4439-4452. This murder was carried out to prevent Bowser from testifying against defendant Martinez concerning an earlier assault and as part of defendants' conspiracy to drive African-American individuals out of defendants' neighborhood. E.R. 2922-2925, 3801-3803. Evidence admitted at trial established the following events leading up to Bowser's death.

For at least five years prior to his death, Bowser was repeatedly subjected to racial harassment and assaults, and told to stay out of the Highland Park neighborhood, by Avenues gang members. E.R. 2647-2648, 2618, 2659-2663, 3801-3803, 4275-4279. During these incidents, the gang members repeatedly referred to Bowser as a "nigger" and a "mayate." E.R. 2648, 2659. Despite the repeated racial harassment and assaults, Bowser refused to move or stop going out in Highland Park. E.R. 2667-2668, 4303-4304, 4488.

On October 26, 2000, Avila and Martinez assaulted Bowser as he waited for a bus on Figueroa Street in Highland Park. E.R. 3736-3740, 4319, 4324, 4491. Although Bowser reported the incident to the police, he declined to press charges,

fearing retaliation from the Avenues. E.R. 3741-3743. Several days later, after Martinez threatened him with a gun, Bowser changed his mind. As a result, on November 30, 2000, Bowser identified Martinez in a photo array, and on December 3, 2000, Martinez was arrested for the assault. E.R. 4296-4304. Eight days later, on December 11, 2000, Bowser was executed by Avila at the same bus stop where he had previously been attacked. E.R. 4439-4450, 4452.

At trial, Diaz and De La Cruz testified that they targeted Bowser for assaults because Bowser was black and walked around Highland Park "like it was his neighborhood." E.R. 2922-2925, 3801-3803. Their testimony was corroborated by other witnesses who were permitted to testify conditionally about hearsay statements Bowser made to them about the assaults and harassment he had suffered. See E.R. 2618-2620 (Celeste Schaffer, a resident of Highland Park); E.R. 4281-4283 (Pedro Avelar, a friend of Bowser), E.R. 4296-4304 (John Padilla, an LAPD detective); E.R. 4488-4489 (Angela Cortez, the mother of Bowser's child); E.R. 3736-3743 (Fernando Carrasco, an LAPD officer).[8] Further, Angela Cortez, the mother of Bowser's child, testified that she received a telephone call from Bowser a few days before his murder in which he sounded "anxious" and

---

[8] See Issue 3, *infra*.

"uneasy," and told her that he wanted to see his child because the Avenues were after him. E.R. 4496.

In addition, the government introduced tape-recorded evidence that on December 16, 2000, five days after Bowser's execution, a fellow gang member and co-conspirator who was in state prison, Dusty Chavez, made a telephone call to Avila in which Avila referred to Bowser as a "mayate," admitted that he and Martinez assaulted Bowser in October, stated that Bowser "reported" the assault and identified Martinez, and as a result Martinez's residence was "raided." Avila then commented about Bowser: "that fool's gone." E.R. 4421-4424 & Gov't Exh. 437.[9] Finally, a witness to the October 2000 assault testified that one of the assailants wore a blue mechanics shirt (E.R. 4336-4337), and there was other testimony that at the time of this assault Avila and Martinez worked at a company and wore similar shirts (E.R. 4394-4397).[10]

---

[9] Gov't Exhibit 437, included in the United States' Supplemental Excerpts of Record (see S.S.E.R. 182-197) is a transcript of the December 16, 2000, telephone call, an audiotape of which (Gov't Exhibit 436) was admitted into evidence and played at trial. See generally E.R. 4419-4424, 4906-4907.

[10] The government also introduced evidence of the murder of Anthony Prudhomme, an African-American who lived in Highland Park, who on November 3, 2000, was shot in the head and killed in his bed. E.R. 4458-4467. An LAPD officer who investigated the crime scene testified that he thought the Prudhomme

(continued…)

c. Other Assaults And Harassment

In connection with the defendants' policy of using violence to drive African-Americans from Highland Park, evidence was introduced at trial concerning the following incidents:

(i) Celeste Schaffer

Celeste Schaffer and her family lived in Highland Park from 1987 to 1996. During that time, they were repeatedly harassed by Avenues gang members. Her young daughters, Ebony and Celeste, were chased into a store by gang members who called them "niggers" and "mayates." Her daughters and sons were called "niggers" and "mayates" on numerous other occasions. Celeste Schaffer was similarly harassed going to the store and to a taco truck. Avenues gang members would call her a "black bitch" and tell her she needed to move out of the neighborhood. Eventually, she did move out of the neighborhood because she was afraid that her children might get killed. E.R. 2601-2621, 2641.

(…continued)

murder might be linked to the Bowser murder, and therefore asked firearms experts to determine if Prudhomme and Bowser were killed with the same gun. E.R. 4466. An LAPD firearms expert, Diana Paul, testified that Prudhomme and Bowser were killed with the same .25 caliber firearm. See Issue 7, *infra*. The court took judicial notice of the fact that Avila was convicted in state court of murdering Bowser and Prudhomme. E.R. 6054-6055; see note 4, *supra*.

(ii) Don Petrie

Don Petrie, Celeste Shaffer's son, and his family lived in Highland Park from the early 1990s until 1997. E.R. 2642. During this time, he knew that Avenues 43 controlled the area, and he was repeatedly harassed, chased, assaulted, and called "nigger" and "mayate" by the gang members. E.R. 2643-2644. Avenues 43 gang members told him to stay out the neighborhood and that he was not welcome there.

On one occasion, Petrie and his African-American friends were playing basketball at the Montecito Recreation Center. Avenues gang members were having a meeting in the same park outside the gym, and the person who ran the gym told the basketball players to stay in the gym because there were going to be problems. Eventually, the African-Americans left the gym from the opposite side. Petrie never returned to the gym. E.R. 2643-2644.

On another occasion, Petrie was walking in a park with Bowser when they were confronted by an Avenues gang member with a gun who told Petrie to stay out of the neighborhood and never come back to the park. E.R. 2644. Petrie was also threatened by Avenues 43 gang members at various bus stops. E.R. 2644-2645. He was told that he was not welcome in the area, and shot at. E.R. 2645. He never returned to those bus stops. E.R. 2645.

Outside a movie theater, Avenues gang members called Petrie and his girlfriend "mayate" and "nigger," told them to stay out of the neighborhood, and threw trash cans at them. He never went back to that theatre. E.R. 2646. The same Avenues 43 members harassed him at a grocery store, calling him the same racially derogatory names and telling him to stay out of the neighborhood. E.R. 2640-2647. Petrie was similarly harassed and threatened by Avenues members at a taco truck, at a 7-Eleven, and by gang members who were driving around. E.R. 2647-2649. In one instance, Martinez jumped out of a car with a gun and chased him back to his house. E.R. 2648-2649. In another instance, gang members who frequently harassed Petrie drove on the wrong side of the street and tried to run him over. E.R. 2659-2660. And in yet another similar incident, gang members tried to run over Petrie and Bowser. E.R. 2660. Avenues gang members harassed and assaulted Petrie and Bowser outside a liquor store, throwing bottles at them while calling them "niggers" and telling them to stay out of the neighborhood. E.R. 2661-2662.

Finally, during this same time period, Petrie found messages chalked on his driveway. The messages included two chalk body outlines and the words "Avenues 43rd," "Niggers, stay out," and "We don't want you here, niggers." E.R.

2664. As a result of this repeated harassment and violence, in 1997 Petrie and his family moved out of Highland Park. E.R. 2664.[11]

(iii) Dagan Wallace

In 2000, Dagan Wallace lived in Highland Park. On September 3, 2000, Wallace was listening to music in his yard when he was approached by Avenues gang members, who identified themselves as such. One of the gang members pulled out a gun, pointed it at Wallace, and said "what's up, nigger." Wallace ran inside in fear and called the police. In a subsequent incident, Avenues gang members approached Wallace as he was getting out of his car and called him a "monkey." E.R. 2744-2753.

(iv) Jimmie And Patricia Israel

Jimmie Israel, his brother, and his sister Patricia lived in Highland Park in the fall of 2000. They often communicated through walkie-talkies. In one instance, someone who identified himself as an Avenues member cut into a call and said: "You niggers need to get off our block. We are going to burn down your house." Similar remarks were made on other occasions. Eventually, Jimmie Israel

---

[11] During his testimony, Petrie identified Saldana, Martinez, and Avila in the courtroom as some of the Avenues 43 gang members who racially harassed and assaulted him. E.R. 2665-2666.

learned that the persons breaking into the call, who identified themselves as Avenues members, were Hispanics he often saw gathered at a house down the street. E.R. 2765-2773.

In October 2000, Jimmie Israel's nephew and Patricia Israel were riding bikes down the street toward the house where the gang members gathered. One of the gang members came into the street, knocked Patricia Israel off her bike, and began hitting and stomping on her. Jimmie Israel quickly rode his bike to his sister, and as he approached the assailant pulled out a box cutter and swung it at him. Jimmie Israel moved behind a car while a second gang member continued assaulting his sister. The gang member with the box cutter then said: "I am tired of seeing you niggers on my block. It's time for you niggers to get out of here. I don't want you over here." E.R. 2775-2781.

When Jimmie Israel returned home, his mother called the police. E.R. 2783. The police officer who went to the gang members' house to investigate was repeatedly called a "nigger" as other gang members laughed. E.R. 2841-2845. Jimmie Israel later identified Martinez in police photographs as the gang member who assaulted him with the box cutter and called him a "nigger." E.R. 2783-2790.

(v) Pedro Avelar

Pedro Avelar lived in Highland Park from approximately 1994 until the time of the trial. He is Latino and was a friend of Bowser's and another African-American man. He was aware of Avenues gang activity in the neighborhood and was friends with some Avenues members. When he walked around Highland Park with his African-American friends, Avelar was frequently harassed by Avenues gang members. He was called a "nigger lover" and told he would be killed if he did not stop hanging around with African-Americans. In one instance, Avelar and Bowser were driving in Avelar's truck when Avenues gang members pulled alongside the truck, punched Bowser in the face, and directed racial slurs at Avelar. E.R. 4270-4279.

(vi) Tania Alamin And Mike Sampson

In July 2000, Tania Alamin and her African-American boyfriend, Mike Sampson, were walking in Highland Park when Hispanic men in a car called Sampson a "mayate." Alamin and Sampson kept walking, but the car parked and two persons got out, one with a red metal club. As the two persons from the car walked toward Sampson, one of them called Sampson a "fucking nigger" and said they were going to kill him. Alamin ran across the street to call the police, and looked back to see Sampson getting beaten with the metal club. The assailants

eventually ran back to their car and left. Alamin and Sampson gave the police a description of the assailants. E.R. 4960-4993.

A police officer testified that based on Alamin's and Sampson's description of the assailants and their car, that night he pulled over a car to conduct an investigative stop. E.R. 4991-4996. One passenger ran away, but the officer questioned the driver, who identified himself as Cazares and a member of Avenues 43. E.R. 4997-4501. During a search of the car, the officer found a red metal club that matched Alamin's description, as well as two police scanners. E.R. 5003-5008.

(vii) Assault Of African-American At A Jack-In-The-Box Restaurant

Diaz and Saldana saw an African-American teenager in front of a Jack-in-the-Box restaurant in Highland Park. Diaz approached the teenager and said: "What's up, fucking nigger." Diaz then pulled out a knife to stab him, but the teenager saw the knife and ran into the street into oncoming traffic. E.R. 2987-2989.

(viii) Assaults Of African-Americans In Montecito Park

Avenues gang members gathered in Montecito Park, which they believed "belonged" to them, nearly every day. In 1999, Diaz, Saldana, and Martinez saw a homeless African-American man walking through the park, said to each other

"look at this fucking nigger," and then assaulted the man. Saldana pistol-whipped him with his gun; the gun discharged, and the gang members ran away. E.R. 2989-2992. In another incident, Avenues gang members attacked African-Americans who were playing basketball in the gym. The Avenues members yelled racial slurs, and eventually chased the African-Americans out of the gym into the streets. E.R. 2992-2995, 3935.

(ix) Assault Of African-American Man At Romona Hall

Around 1997-1998, Cambero, Martinez, Avila, and Diaz were driving around and saw an African-American man using a pay telephone outside Romona Hall in the "Avenues neighborhood" in Highland Park. One of them said "look at this fucking nigger on the phone," and then they stopped the car and walked over to the man. Avila struck him in the head with a "dent puller" (a tool that pulls dents out of cars). As the man ran away, the gang members chased him and then Martinez and others further assaulted him. E.R. 2996-2999.

(x) Harassment Of African-American Student In Sycamore Park

In 1998, De La Cruz and Cambero went to Sycamore Park in Highland Park to walk De La Cruz's dog. An African-American student walked past them, and Cambero sicced the dog on the student, saying "get him, get him, get him, get the

nigger." De La Cruz also called the student racial epithets. E.R. 3932-3934. The student was able to run away without being physically attacked.

(xi) Harassment Of African-American Girls On The Street

Sometime between 1998 and 2000, De La Cruz, Saldana, and Cambero were in a car when they saw a group of African-American girls on the street. The gang members yelled racial epithets at the girls, calling them "niggers" and "monkeys." E.R. 3934-3935.

SUMMARY OF THE ARGUMENT

1. Defendants acknowledge that there is no evidence that any of the jurors who sat for the trial saw the defendants in shackles. As a result, the shackling could not have been prejudicial and was not a violation of the Confrontation Clause. In any event, the court's decision to shackle the defendants resulted from its consultation with the Marshals Service. Also, there were compelling circumstances warranting shackling – two of the defendants had been convicted of murder in state court and were serving life sentences, and the case involved the trial of violent street gang members who were involved in multiple murders and other violent conduct. Even if an abuse of discretion, the shackling was harmless error.

2. Defendants waived their rights to a public trial and to be present for those portions of the voir dire conducted in an adjacent room with counsel present because they did not object to it (and in fact acquiesced in it). In any event, the manner in which the district court conducted voir dire was proper, and could not have affected the outcome or the fairness of the trial. There was no plain error.

3. The district court did not err in admitting Bowser's hearsay statements under Fed. R. Evid. 804(b)(6) (forfeiture by wrongdoing). The court cited ample evidence establishing that Avila and Martinez engaged in wrongdoing, the wrongdoing was intended to procure Bowser's unavailability, and the wrongdoing did procure Bowser's unavailability. Because all defendants either directly engaged in the wrongdoing (Avila killing Bowser at Martinez's request), or acquiesced in the foreseeable wrongdoing as part of a conspiracy, all defendants forfeited their right to object to the admission of Bowser's statements. For the same reasons, admission of this testimony did not violate defendants' Confrontation Clause rights.

4. Robert Lopez's expert testimony that the Avenues gang did not like African-Americans and were "targeting" them did not relay inadmissible hearsay to the jury in violation of Fed. R. Evid. 703. Police experts in gang activities regularly and necessarily rely upon "street intelligence" in forming their opinions,

as Lopez appropriately did here. Moreover, no "testimonial" statements were admitted against the defendants; therefore, there was no Confrontation Clause violation.

5. Because defendants elicited on cross-examination the testimony of Sal Audelo concerning how he knew that the gun he sold to Saldana was used in the Cerda murders, defendants invited any error and cannot now complain that the evidence should have been excluded. In any event, the testimony was not inadmissible hearsay, did not violate defendants' Confrontation Clause rights, and its admission was not plain error.

6. The district court did not abuse its discretion or violate defendants' Confrontation Clause rights in limiting defendants' cross-examination of four government witnesses (Jesse Diaz, Jose De La Cruz, Saul Audelo, and Eneida Montano). Trial judges retain wide latitude to impose reasonable limits on cross-examination, and the Confrontation Clause does not guarantee unbounded cross-examination. In any event, if the court erred in any of the instances cited by defendants, the error was harmless.

7. Diana Paul's expert testimony that her findings matching bullets and bullet casings were to a "scientific certainty," to which defendants did not object, was neither improper nor, in any event, plain error. In the context of her

testimony as a whole, Paul's testimony that her conclusions were to a "scientific certainty" meant that, under her method of analysis, there was a match. She made clear that she was not suggesting that there was absolute certainty. In any event, these statements could not have affected the outcome or fairness of the proceeding. The court instructed the jury that it had to decide which testimony to believe, could accept or reject expert testimony, and could give it as much weight as they thought it deserved in light of all of the evidence presented.

8. Defendants concede that this Court has expressly held that 18 U.S.C. 245(b)(2)(B) is a valid exercise of Congressional power under both Section 2 of the Thirteenth Amendment and the Commerce Clause. With respect to their "as applied" challenge, Section 245(b)(2)(B)'s application to private violence, motivated by the victim's race and because the victim was using a public facility (here, a public street), falls within Congress's power under Section 2 of the Thirteenth Amendment to proscribe conduct that constitutes a badge or incident of slavery, and is directed at conduct that Congress has recognized substantially affects interstate commerce.

9. Because Saldana was not "in custody" for purposes of the *Miranda* rights, the district court did not err in denying Saldana's motion to suppress statements he gave to police officers when questioned about a gun used in the

Cerda murders. The undisputed facts make clear that Saldana came to the police station voluntarily; understood that the officers were asking for his help in finding a gun; was told that he was not a suspect and not under arrest; was not handcuffed; and never indicated that he wanted to stop talking or go home.

10. Defendants' argument that the cumulative effect of the trial errors they raise violates their due process rights, and warrants reversal, fails for two reasons: there was no error, harmless or otherwise, and even if there was, no combination of the alleged errors deprived defendants of a fair trial. There was overwhelming evidence of defendants' guilt, not only from participating gang members, but also from numerous victims of the underlying acts (racial assaults and harassment), weapons experts, and others who linked various defendants to elements of the crimes charged.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SHACKLING THE DEFENDANTS DURING TRIAL

A. Standard Of Review

This Court reviews a decision to shackle defendants during trial for abuse of discretion. *United States* v. *Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004). If there was an abuse of discretion, harmless error analysis applies; *i.e.*, the

government must show beyond a reasonable doubt that the shackling did not contribute to the verdict. *Chapman* v. *California*, 386 U.S. 18, 22-26 (1967); *United States* v. *Barrera-Medina*, 139 F. App'x 786, 796 & n.4 (9th Cir. 2005).

B. Background

Defendants filed a pre-trial motion requesting that they not be shackled at trial, asserting that under the Fifth and Fourteenth Amendments they have the right to be free of physical restraints in front of the jury, absent a specific justification, so as not to suggest their guilt. S.S.E.R. 135-136. The United States responded that it "defers to the U.S. Marshal's Service on the issue of courtroom security and therefore takes no position on th[e] Motion." S.S.E.R. 128. The district court, without explanation, denied the motion "without prejudice." E.R. 49-50.

At the beginning of jury selection, potential jurors were kept in two different rooms, one of which had a video feed from the courtroom. A potential juror in the room with the video feed notified defense counsel that she and others were able to see and hear what was going on in the courtroom before the judge entered the courtroom. During that time, Martinez was taken out of the courtroom in handcuffs. Because defense counsel was concerned that the jury panel might have seen the defendant handcuffed, they requested a new untainted jury panel. The court stated it would confirm that the jurors did not see anything. E.R. 1174-1178.

The court questioned the first 50 potential jurors about what they may have seen or heard on the monitor. The court excused a juror who heard the word "Beretta" and a juror who saw the defendants handcuffed. Nevertheless, defense counsel renewed the request for a new panel, asserting that "[i]f one person saw somebody coming in handcuffs, it's likely that somebody else saw that." The court responded that it would ask all potential jurors whether they saw or heard anything on the video monitor. E.R. 1221-1223.

The following day defense counsel renewed their objection to the jury pool. The court denied the motion, noting that there was no evidence that any potential jurors were tainted. E.R. 1340-1341. The court resumed questioning individual jurors, excused another potential juror who saw the defendants on the monitor in handcuffs, and directed the juror not to talk with the other potential jurors. E.R. 1352. Shortly thereafter, however, the court dismissed all of the potential jurors who were in the room with the video feed (with the exception of six jurors already questioned and not excused), but not the entire jury pool, rejecting the notion that those potential jurors not in the room with the video feed should also be excused because of a presumption of taint. E.R. 1364-1368, 1431. Over the following four days, the court asked potential jurors if they saw any of the defendants on the monitor. See, *e.g.*, E.R. 1903-1913.

On the first day of testimony, the court again addressed this issue, stating:

> [C]ounsel and I painstakingly talked to each and every juror, and I think there probably was two or three or maybe four that had possibly seen defendants standing up and may have actually seen them in shackles. Those jurors were excused.
>
> The Court through its examination of all the potential jurors that may have been subjected to that satisfied itself that * * * none of the jurors had seen the defendants standing and was that the panel was not tainted. There was perhaps a couple of jurors who had seen the defendants seated, and I just want to point out that there is a three-and-a-half to four-foot barrier that prevents anyone from seeing any shackles or handcuffs when the defendants are seated.

E.R. 52-53.

The court also addressed a newspaper article about the case that mentioned that the defendants were shackled but also that the restraints were not visible to others in the courtroom. E.R. 2463. The court noted that it had cautioned the jurors not to read anything about the case, and would do so again. The court also asked the jurors if they had read anything about the case since "yesterday," and no juror responded that he or she had. E.R. 2463, 2469.

At this point, defense counsel again objected to the shackling. Counsel also moved for a mistrial, asserting that regardless whether a juror saw the shackling or the article, the shackling "sends a message that these guys are so dangerous that they can't even walk around." E.R. 2464-2465. The court denied the motion. E.R. 2465. Counsel then moved to remove all but the leg shackles. The court

responded that it would talk to the marshals "and see what concerns they have," but noted that "I don't think the marshals have taken any steps lately [lightly]" and "two of the defendants are serving life terms for murder." E.R. 2466-2467.

C. The District Court Did Not Abuse Its Discretion In Shackling The Defendants And, In Any Event, The Shackling Could Not Have Affected Defendants' Right To A Fair Trial

Defendants argue that being shackled in front of the jury during trial undermined the presumption of innocence, and therefore violated their due process rights under the Fifth and Fourteenth Amendments. Br. App. 32-42. Shackling, however, has long been recognized as a constitutionally permissible means to safeguard courtroom security in appropriate circumstances. *Morgan* v. *Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994) (per curiam) (noting that shackling is not per se unconstitutional). This Court has recognized that "a trial judge is charged with the grave responsibility of guarding the safety of courtroom personnel, parties, counsel, jury and audience"; for this reason, the "judge has wide discretion to decide whether a defendant who has a propensity for violence poses a security risk and warrants increased security measures." *Ibid*; see generally *Deck* v. *Missouri*, 544 U.S. 622, 629 (2005) ("a judge, in the exercise of his or her discretion, [may] take account of special circumstances, including security concerns, that may call for shackling"). In exercising that discretion, the court is entitled to rely in part on

the Marshals Service's professional expertise and experience in determining the proper means for ensuring courtroom security. *United States* v. *Howard*, 480 F.3d 1005, 1013 (9th Cir. 2007); see also *United States* v. *Baker*, 10 F.3d 1374, 1401 (9th Cir. 1993) (noting the trial court "agreed with the Marshall that all nine in-custody defendants should be shackled during trial"). The "general rule is that a court may not order a defendant to be physically restrained unless the court is persuaded by compelling circumstances that some measure is needed to maintain security of the courtroom, and the court must pursue less restrictive alternatives before imposing physical restraints." *Howard*, 480 F.3d at 1012 (internal quotation marks omitted).

The primary concern with shackling is that it might undermine the presumption of innocence accorded the defendants by jurors who view the defendant in shackles. *Howard*, 480 F.3d at1012; see also *Jones* v. *Meyer*, 899 F.2d 883, 885 (9th Cir. 1990) (shackling "may reverse the presumption of innocence"). Such a concern is totally lacking where, as here, the court took measures to ensure that the jury never viewed the defendants' shackles, and there is no evidence that any juror who sat for trial saw the defendants in shackles. Moreover, even restraints which are visible to a jury (unlike those at issue in this

case) may be used if justified by an interest specific to a particular trial. *Deck*, 544 U.S. at 629.

Defendants argue that the shackling warrants reversal for two reasons. First, they argue that the court's questioning of prospective jurors to determine if they saw or heard anything on the video monitor violated the presumption of innocence and put the jury on notice that the defendants "were to be feared." Br. App. 40. Defendants argue that given this questioning, and that "defendants were obviously unable to move in this extraordinarily high security courtroom," the jury "had to believe the defendants were dangerous." Br. App. 40. This argument is specious; indeed, it rests on the very precautions the court took to ensure that no juror was tainted by the video feed and possible exposure to the fact that defendants were shackled.

The court ultimately dismissed the entire jury panel that was in the overflow room, and asked all remaining jurors whether they had seen or heard anything on the video feed. It is hard to see how the court's generalized questions to the potential jurors about this incident – *e.g.*, "were you able to see any of the defendants on the monitor * * * [and] did you hear any specific conversations" (*e.g.*, E.R. 1446) – could have instilled a fear of the defendants. Further, the district court made clear that all "custody defendants," whether shackled or not, do

not walk around in the courtroom, and therefore the fact that the defendants were immobile is irrelevant. E.R. 2465. Nothing in connection with the court's handling of the video feed incident suggests anything other than that the court carefully addressed defendants' concern that potential jurors might be tainted, and took appropriate steps to ensure that those jurors who sat at the trial were not.

Second, defendants argue that "[t]here was no evidence that the shackling was necessary," the court made "no finding that the use of physical restraints was justified," and they were "severely prejudiced" by the "unjustified security procedures." Br. App. 40. This argument also fails. First, defendants acknowledge that there is no evidence that any juror who sat for the trial "actually saw the defendants in shackles." Br. App. 40. Absent such evidence, this Court has found that the shackling could not have prejudiced the defendant's right to a fair trial and, even if an abuse of discretion, was harmless error. *Rhoden* v. *Rowland*, 172 F.3d 633, 636 (9th Cir. 1999); see also *United States* v. *Mejia*, 559 F.3d 1113, 1117-1118 (9th Cir. 2009); *United States* v. *Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997); *Williams* v. *Woodford*, 384 F.3d 567, 592 (9th Cir. 2004); *Baker*, 10 F.3d at 1402-1403. In this regard, this Court has also found that a "brief or inadvertent glimpse" of a shackled defendant "is not inherently or presumptively prejudicial," and that absent a showing of the "actual prejudice" there was no

"constitutional error." *Ghent* v. *Woodford*, 279 F.3d 1121, 1133 (9th Cir. 2002); see *United States* v. *George*, 291 F. App'x 803, 805 (9th Cir. 2008). Likewise, this Court has rejected the argument that the jurors "must have realized that the [defendants] were shackled" where the defendants offered no evidence in support of that claim; that is the case here. *Baker*, 10 F.3d at 1402; see also *Barrera-Medina*, 139 F. App'x at 797 (rejecting notion that shacking inherently prejudicial).

In addition, this Court has concluded that the trial court need not conduct a hearing and make findings before ordering that a defendant be shackled. *Morgan*, 24 F.3d at 52 (citing *Jones*, 899 F.2d at 886). In any event, in this case there were compelling circumstances warranting shackling. As the court noted, two of the defendants were in custody serving life sentences for murder. Further, this case involved the trial of violent street gang members who were involved in multiple murders and other violent conduct, and for this reason the trial was held in a high security courtroom. See S.S.E.R. 133. Finally, the court consulted with the Marshals Service. E.R. 2466-2467; see also E.R. 2464 (defense counsel suggesting that Marshals recommended that defendants be shackled); cf. *United States* v. *Lu*, 174 F. App'x 390, 396 (9th Cir. 2006) (shackling not an abuse of

discretion given security concerns arising from the "violent nature of the defendants and their extensive criminal histories").

In sum, because defendants have made no showing that any of the jurors who sat for the trial actually saw the defendants in shackles, or that the shackles were visible to the jurors, the shackling could not have violated defendants' presumption of innocence or contributed to the verdict. This is particularly true given that the evidence of guilt was overwhelming. Cf. *Cox* v. *Ayers*, 613 F.3d 883, 891 (9th Cir. 2010) ("unconstitutional shackling * * * results in prejudice only if the evidence of guilt is not 'overwhelming.'"). For this reason, any error was harmless.

II

DEFENDANTS WAIVED THEIR RIGHTS TO A PUBLIC TRIAL AND TO BE PRESENT WITH RESPECT TO PORTIONS OF THE VOIR DIRE HELD IN AN ADJACENT ROOM

A. Standard Of Review

The district court questioned prospective jurors on bias and hardship outside the presence of the defendants and the public (but with counsel present). Defendants acquiesced in this arrangement – and, as to some jurors, requested it – and thereby waived their rights to a public trial and to be present. See Br. App. 43; *United States* v. *Levine*, 362 U.S. 610 (1960) (failure to object to courtroom

closure constituted waiver of right to public trial); see also *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (defendant or counsel must assert right under Rule 43 to be present or right is waived; court need not get an express "on the record" waiver each time); *United States* v. *Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009); *United States* v. *Jackson*, 13 F. App'x 581, 583 (9th Cir. 2001).

If the district court's actions are reviewable at all, the plain error rule applies. *United States* v. *Terrazas*, 190 F. App'x 543, 548 (9th Cir. 2006) (given failure to object to defendant's lack of presence, "we review for plain error"); *United States* v. *Romero*, 282 F.3d 683, 689 (9th Cir. 2002) (same). Under this rule, the Court must determine whether there was clear or obvious error that affected the defendants' substantial rights, *i.e.*, that affected the outcome of the case and seriously affected the fairness of the proceeding. See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010); Fed. R. Crim. P. 52(b).

B. The Voir Dire Process

Jury selection took six days. On the first day, the district court decided that, instead of addressing hardship issues with each juror at sidebar, it would do so in an adjacent conference room "because it will just be easier and no one will hear us." E.R. 1207. The voir dire was then generally conducted as follows: the court asked the prospective jurors in open court whether they saw the defendants on the

monitor before jury selection began (see Issue I, *supra*) and about their familiarity with the case, potential biases, ability to follow the law, medical issues, and undue hardships. For those who answered in the affirmative, the court questioned the jurors individually in the adjacent conference room with counsel present. See, *e.g.*, E.R. 1249-1250, 1255, 1267-1271, 1480-1483, 1696-1700, 2015-2027. Often, the court asked questions requested by counsel. See, *e.g.*, E.R. 1802-1805, 1988-2001. At the same time, some questioning took place in open court, during which time defendants could observe the jurors.[12] See, *e.g.*, E.R. 1491-1520, 1546-1549, 1557-1566, 1579-1587, 1678-1685, 1696-1700. During all questioning, a court reporter was present.

Defense counsel never objected to this approach. Indeed, at one point counsel for Avila asked the court if it was going to use the same procedure as used before in examining the next panel of jurors, *i.e.*, "taking the juror individually into the jury room and discussing hardship and * * * other things." E.R. 1953. Counsel stated that the "selection ought to be done the same way it was done

---

[12] Defendants acknowledge that "appearances, court instructions as to the charges, scheduling, * * * admonitions, * * * general voir dire questions * * * and exercise of peremptories" took place in open court in front of the defendants." Br. App. 43-44.

earlier because it would look a little odd if the * * * jurors already seated, having gone through th[e] rather extensive private interviews, now see that the new batch doesn't have that." E.R. 1953-1954. The court responded that it did "intend to take people at sidebar in the jury room like we have done before." E.R. 1954. No other counsel objected to this procedure. On another occasion, defendants themselves waived their right to be present.[13] Further, once jury selection was finished, the court asked counsel if there was "any legal cause why the jury panel should not now be sworn," and each defense counsel responded "no." E.R. 2218.

C. The Individual Voir Dire Did Not Violate Defendants' Constitutional Rights Or Constitute Plain Error

1. The Right To A Public Trial

The Supreme Court has recognized that, with exceptions, a defendant's right to a public trial extends to voir dire. See *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501 (1984); *Presley* v. *Georgia*, 130 S. Ct. 721 (2010). In

---

[13] In one instance, the court decided to ask the second jury panel as a group if they had vacation plans that would conflict with the trial. Because that questioning was going to be held in a different courtroom, the court asked each defendant, after instructing them to consult with counsel, if he objected "to the court and counsel going over [to the other courtroom] to make that announcement to the prospective jurors while you remain here in the courtroom." E.R. 2096-2099. Each defendant responded that he did not object. E.R. 2100.

Press-Enterprise Co., the district court closed the voir dire to the public for all but three days of six weeks, citing the right of the defendant to a fair trial and privacy concerns for the potential jurors. 464 U.S. at 503, 510. The Court concluded that "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.* at 511. The Court also noted, however, that limited closure may be warranted to safeguard a juror's privacy interests. *Id.* at 511-512. Generally, the party seeking to close the hearing must advance an overriding interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. *Id*. at 510-511; see also *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984). In *Presley*, the Court held that the defendant's Sixth Amendment rights were violated by excluding the public from the voir dire, over the objection of the defendant, who invoked his right to a public trial. 130 S. Ct. at 722-723. The Court also stated that "[w]hile the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule" when necessary to protect the defendant's right to a fair trial or "the government's interest in inhibiting the disclosure of sensitive information." *Id.* at 724.

Here, questioning prospective jurors about their biases and hardships outside the presence of the public did not constitute plain error. First, the voir dire did not

clearly violate the defendants' right to a public trial, given that defendants were aware that the public was excluded from portions of the voir dire and did not object. "Only if there was no waiver can the courtroom closure violate the Sixth Amendment." *United States* v. *Hitt*, 473 F.3d 146, 155 n.8 (5th Cir. 2006); see also *United States* v. *Lee*, 290 F. App'x 977 (9th Cir. 2008) (defendant did not object to for-cause challenges to prospective jurors being held in chambers; no plain error).[14] For this reason, the cases cited by defendants, in which there was an *objection* to the public's exclusion, are inapposite. See Br. App. 46; *Presley*, 130 S. Ct. at 722 (Sixth Amendment violation where public was excluded from the entire voir dire process over defendant's objection); *Waller*, 467 U.S. at 41-43 (defendant objected and finding violation); see also *United States* v. *Agosto-Vega*, 617 F.3d 541, 547 (1st Cir. 2010) ("total exclusion of members of the public * * * from the jury voir dire process," over defendant's objection, violated right to public trial).

---

[14] In *Hitt*, the court also stated that "[w]here a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial." 473 F.3d at 155. The court added that "[t]his principle is not inconsistent with *Waller*, which, unlike the situation here, involved courtroom closure for a suppression hearing *over the defendant's objection*." *Id.* at 155 n.8.

Further, much of the voir dire was held in open court; it was generally only the individual voir dire on biases and hardships that was moved into an adjacent room. The Supreme Court has recognized that some portions of jury selection may be held in private to safeguard a juror's privacy interests. *Press-Enterprise Co.*, 464 U.S. at 511-512. Although the district court did not expressly make the findings noted in *Presley*, it was clear that the court was conducting some of the individual voir dire in private because of the nature of the bias and hardship questions; such practice is not uncommon. See, *e.g.*, *United States* v. *Rivera-Rodriguez*, 617 F.3d 581, 601 (1st Cir. 2010); *United States* v. *Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996); *Jackson*, 13 F. App'x at 583; *United States* v. *Cuchet*, 197 F.3d 1318, 1319 (11th Cir. 1999); *United States* v. *Byers*, 603 F. Supp. 2d 826, 834 (D. Md. 2009).[15]

In any event, it is difficult to see how conducting the bias and hardship voir dire outside the presence of the public, but with counsel present, could have

---

[15] See also *United States* v. *Taveras*, 436 F. Supp. 2d 493, 505 (E.D.N.Y. 2006) (precluding press from voir dire on hardships, stating that "[b]ecause of the private nature of applications for excuse from jury duty on the basis of hardship, the regular practice in this court is to limit presence when the application is being made to the court, counsel, and defendants").

affected the outcome of the case or the fairness of the trial.[16] Indeed, defendants do not even attempt to make that showing, making only the bare assertion that the exclusion of the public was "per se reversible error." Br. App. 46.[17] Moreover, once jury selection was completed, the court asked counsel whether there was any legal cause why the panel should not be sworn, and counsel for each defendant said "no." E.R. 2218-2219. Finally, the evidence of guilt was overwhelming. See, *e.g.*, *United States* v. *Robinson*, 256 F. App'x 911, 912 (9th Cir. 2007) (given

---

[16] Because the biases and hardships questioning of prospective jurors in the adjacent room was interspersed among the general voir dire proceedings that took place in open court, defendants had ample opportunity to consult with their counsel about the questioning and propose questions. Cf. *United States* v. *Feliciano*, 223 F.3d 102, 112 (2d Cir. 2000) (emphasizing defendants' ample opportunity to discuss with counsel matters revealed during voir dire at the bench outside defendants' presence).

[17] Defendants cite *Waller*, which stated that the defendant was not required "to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." 467 U.S. at 49. In that case, however, the court closed a seven-day suppression hearing to the public at the state's request and over the defendant's objection. There is nothing to suggest that the Court's reasoning – and the notion that denial of a public trial is a structural error – applies to cases where the courtroom was not closed to the public and defendant did not object to the manner in which the court questioned prospective jurors on biases and hardships in private (but with counsel present). Cf. *United States* v. *Withers*, Nos. 05-56795 & 08-55096, 2011 WL 6184, at *6 (9th Cir. Jan. 3, 2011). Indeed, that notion is refuted by the cases reviewing the closing of voir dire in the absence of an objection for plain error. See also *Rivera-Rodriguez*, 617 F.3d at 603-605 (ex parte examination of 15 out of 71 prospective jurors was not structural error and, even if error, was not plain error).

"overwhelming evidence of * * * guilt," exclusion of defendant from sidebar conferences during voir dire harmless).

2. The Right To Be Present

A defendant has the right under the Fifth and Sixth Amendments to be present at his trial, including voir dire. See *Gomez* v. *United States*, 490 U.S. 858, 873 (1989); *Gagnon*, 470 U.S. at 526; *United States* v. *Rosales-Rodriguez*, 289 F.3d 1106, 1109 (9th Cir. 2002); Fed. R. Crim. P. 43(a). The right to be present, however, is not absolute. See generally *United States* v. *Veatch*, 674 F.2d 1217, 1225-1226 (9th Cir. 1982). As noted above, hardship requests are often considered in private, and courts have also "rejected arguments that a defendant has a constitutional right to be present during the consideration of hardship requests or similar administrative interactions with prospective jurors." *Hyde* v. *Branker*, No. 5:06-HC-2032-D, 2007 WL 2827411, at *9 (E.D.N.C. Sept. 25, 2007); see also *United States* v. *Greer*, 285 F.3d 158, 167-168 (2d Cir. 2002) ("hardship questioning is not a part of *voir dire* – and thus not a critical stage of the trial during which the parties and counsel must be present"); *United States* v. *Calaway*, 524 F.2d 609, 616 (9th Cir. 1975). Moreover, it is again difficult to see how conducting the bias and hardship voir dire outside the presence of the defendants, but with counsel present, could have affected the outcome of the case or the

fairness of the trial. See *Olajide* v. *United States*, No. 05 Civ. 281 (DC), 2005 WL 1925640, at *4-5 (S.D.N.Y. Aug. 11, 2005) (assuming defendant was not present during hardship voir dire held in the robing room, Sixth Amendment right not violated where there was no request to be present, counsel was present, and defendant had opportunity to consult with counsel before peremptory challenges were exercised). This is particularly true where there is no indication that the procedure adopted by the court deprived defendants of their ability to have meaningful input into jury selection and their defense; defendants exercised numerous peremptory challenges and challenges for cause to prospective jurors; and, after being questioned by the court, voiced no objection to the ultimate jury or how it was selected. Indeed, defendants do not even attempt to make that showing, making only the bare assertion that the error "cannot be harmless." Br. App. 50. Here, the manner in which the district court conducted voir dire did not constitute plain error.

Defendants' other arguments are directed at whether there was a valid waiver of their right to be present. They argue that because they were shackled "they could not possibly have asserted their rights to be present." Br. App. 50. Defendants do not explain, however, how being shackled affected their ability to assert, directly or through counsel, their desire to be present at those portions of the

voir dire conducted in the adjacent room. There is, of course, no connection between being shackled and being able to assert rights or objections to the court.

Defendants also argue that the court never advised them that they had the right to be present, and that this right cannot be waived by counsel but only by the defendants, which they never did. Br. App. 50. But this Court has made clear that the defendant must indicate to the court that he wishes to be present or his right to be present is waived. See *Sherwood*, 98 F.3d at 407; see also *Gagnon*, 470 U.S. at 528 (defendant with knowledge of *in camera* conference must assert right to be present or it is waived). This issue, therefore, turns not on whether anyone (the defendant or counsel) affirmatively waived a right, but rather on the fact that neither the defendants nor counsel, although present and aware of how the voir dire was transpiring, objected and requested that defendants be present. See, *e.g.*, *Cohen* v. *Senkowski*, 290 F.3d 485, 493 (2d Cir. 2002) (because defendant was aware of the pre-screening procedure but did not object or ask to attend, and because his counsel was present, defendant waived his right to be present).

III

THE DISTRICT COURT DID NOT ERR IN ADMITTING STATEMENTS MADE BY CHRISTOPHER BOWSER BEFORE HE WAS MURDERED UNDER THE FORFEITURE BY WRONGDOING DOCTRINE

A. Standard Of Review

Whether testimony violated defendants' Sixth Amendment Confrontation Clause rights is reviewed *de novo*, but even if there is a violation, reversal is not warranted if the error is harmless. See, *e.g.*, *United States* v. *Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004). Whether hearsay testimony was properly admitted under Fed. R. Evid. 804(b)(6) is reviewed for abuse of discretion. See, *e.g.*, *United States* v. *Gray*, 405 F.3d 227, 243 (4th Cir. 2005).

B. Procedural Background

During trial, defendants objected to testimony from several government witnesses concerning out-of-court statements made by Christopher Bowser before he was murdered. See generally E.R. 61-66 (Officer Carrasco); E.R. 2618-2619 (Celeste Shaffer); E.R. 4281-4283, 4296-4304 (Officer Padilla); E.R. 4488-4489 (Angela Cortez).[18] The government argued that these statements were admissible

---

[18] To summarize their testimony: Officer Carrasco testified to what Bowser told him about his assault and robbery by two Hispanic men, and that Bowser said one of them was Martinez and that he had prior run-ins with Martinez on racial

(continued…)

under Fed. R. Evid. 804(b)(6) ("Forfeiture by wrongdoing") because Bowser was killed to make him unavailable to testify. See, *e.g.*, E.R. 64-65. At trial, the court stated that it would "presumptively" allow the testimony, subject to a motion to strike if the government cannot establish that the testimony is admissible. E.R. 65-66. Defendants repeatedly objected to testimony concerning statements made by Bowser. See E.R. 2635, 2657, 2618-2619, 4281-4283, 4296-4304, 4488-4489.[19]

At the close of the government's evidence, defendants moved for a mistrial arguing, in part, that the testimony concerning Bowser's out-of-court statements was inadmissible because there was no showing of who made Bowser unavailable – *i.e.*, that Bowser's murder was not connected to any of the defendants – and that

---

(…continued)

issues. E.R. 3736-3743. Officer Padilla testified about statements Bowser made to him during Padilla's follow-up of the assault (after Bowser decided to press charges against Martinez), including that Bowser said Martinez assaulted him and called him racially derogatory names. E.R. 4363-4371. Shaffer testified that she spoke with Bowser about the Avenues and he said that he had been assaulted by them and called racially derogatory names. E.R. 2617-2620. Cortez testified that Bowser told her that he was getting harassed and called the "N word" by Avenues members and that he knew the Avenues were after him. E.R. 4489-4498.

[19] The court repeated during trial that it was "going to admit the statements attributed to Bowser subject to a motion to strike if the government does not show that they are admissible under an exception to the hearsay rule." E.R. 4489. This was a proper approach to addressing and resolving this evidentiary issue. See, *e.g.*, *United States* v. *Emery*, 186 F.3d 921, 926 (8th Cir. 1999).

given the number of hearsay statements admitted, a motion to strike would be an insufficient remedy. E.R. 5154-5168. The court again deferred ruling. At the close of all the evidence, defendants renewed their motion, arguing that defendants were entitled to a hearing on the issue. E.R. 83-85. The court denied the motion, noting that it would state the reason for its decision at a later time. E.R. 85.

On August 1, 2006, the court stated its reasons for finding Bowser's out-of-court statements admissible. The court stated that that "there was a preponderance of evidence that the defendants Avila and Martinez and others directly engaged in wrongdoing that was intended to and did render Chris Bowser unavailable as a witness." E.R. 6053-6054. The court then listed the evidence supporting that conclusion, which included judicial notice that Avila was convicted in state court of murdering Bowser, and testimony in that state court trial that Martinez ordered Avila to kill Bowser and Avila admitted that he killed Bowser. E.R. 6054-6055.

C. The Testimony In Avila's State Court Trial For The Murder Of Bowser

The district court relied, in part, on testimony relating to Avila's state court trial for the Bowser murder in concluding that Bowser's statements were admissible. In February 2002, in connection with the state court trial, David Elmer Cruz, a former Avenues gang member, testified that Avila confessed to him that he (Avila) and another person killed Bowser, and that "it was a hit ordered by

[Martinez]." E.R. 586, 590. Cruz also testified that Avila said that Martinez wanted Bowser killed because Bowser had told the police that Martinez assaulted him and Bowser might testify against Martinez (E.R. 591), and that Avila's accomplice shot Bowser in the back as he waited at a bus stop (E.R. 586-588).

A month later, Cruz was deported to El Salvador. E.R. 695. In November 2002, while in El Salvador, he made a videotape stating that his prior testimony implicating Avila was false. E.R. 818-821. But in 2003, at Avila's trial, he recanted his recantation, testifying that he was forced at gunpoint to make the videotape. E.R. 819-821. Avila's mother (Ruperta Garcia), however, testified at that trial that she made the video and that Cruz was not coerced into making it, and that she gave it to Avila's attorney. E.R. 948-954.

The transcript of this testimony from Avila's state murder trial was filed with the district court in connection with defendants' motion to take the foreign deposition of Gloria Amaya, Cruz's common law wife, who defendants asserted would provide testimony contradicting Cruz's testimony in the Avila state murder trial. See S.S.E.R. 84-111, 112-126, 139-177; see generally Br. App. 57-61. Defendants' motion became moot when the government indicated that it would not call Cruz as a witness (thereby eliminating defendants' need to use Amaya's testimony to undermine Cruz). See E.R. 4593-4596.

D. Bowser's Statements Were Properly Admitted Under The Forfeiture By Wrongdoing Doctrine

Defendants argue that the testimony of officers Carrasco and Padilla concerning Bowser's statements violated defendants' Confrontation Clause rights and was inadmissible hearsay because Bowser's statements were "testimonial"[20] and the government failed to establish that Bowser was murdered for the purpose of making him unavailable as a witness. Br. App. 68-77. With respect to Shaffer and Cortez, defendants argue that the court erred in admitting Bowser's hearsay statements because the forfeiture by wrongdoing exception did not apply. Br. App. 77-78. Defendants also argue that these errors were not harmless. Br. App. 78-82. These arguments are not correct.

1. Forfeiture By Wrongdoing

Forfeiture by wrongdoing is an exception to both the Confrontation Clause requirements and the hearsay rule. In *Giles* v. *California*, 554 U.S. 353, 361

---

[20] As defendants acknowledge, the Confrontation Clause applies only to "testimonial" statements. Br. App. 64-66; see pages 73-74, *infra*, addressing "testimonial" aspect of the Confrontation Clause. Therefore, they make the preliminary argument with respect to Carrasco's and Padilla's testimony that the statements made by Bowser to the officers were testimonial. Br. App. 67-68. The district court did not address this issue, and we decline to do so here. As set forth below, even assuming Bowser's statements were testimonial, it is clear that the testimony was properly admitted pursuant to the forfeiture by wrongdoing doctrine.

(2008), the Supreme Court affirmed that the principle was an exception to the protections of the Confrontation Clause, and provides that unconfronted testimonial statements are admissible where the defendant engaged in conduct that was intended to and did prevent the witness from testifying. In short, the defendant must have both caused the witness to be absent, and intended to prevent the witness from giving evidence against him. See *Ponce* v. *Felker*, 606 F.3d 596, 599-600 (9th Cir.) (addressing *Giles*), cert. denied, 131 S. Ct. 521 (2010); *United States* v. *Wright*, 536 F.3d 819, 823 (8th Cir. 2008) (noting common law forfeiture by wrongdoing exception to the right of confrontation). Essentially, the rule means that a defendant has waived his right to confront a witness by killing him.

In 1997, the Federal Rules of Evidence were amended to codify the forfeiture by wrongdoing doctrine. Rule 804(b)(6) provides that if the declarant is unavailable, "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," is not excluded by the hearsay rule. To admit a statement against a defendant under this rule, the government must establish that: (1) the defendant "engaged or acquiesced in wrongdoing"; (2) the wrongdoing was "intended to procure the declarant's unavailability"; and (3) the wrongdoing "did

procure the declarant's unavailability."[21] *United States* v. *Scott*, 284 F.3d 758, 762 (7th Cir. 2002). Federal courts construe this doctrine broadly "to effect [its] purpose." *Gray*, 405 F.3d at 242.

Because Rule 804(b)(6) applies to those who "acquiesce[]" in the wrongdoing, it applies to co-conspirators, whose responsibility for procuring the unavailability of the witness can be imputed; such imputed responsibility also applies in the context of the Confrontation Clause, and is coextensive with conspiratorial liability. See, *e.g.*, *United States* v. *Rivera*, 412 F.3d 562, 567 (4th Cir. 2005) (applying rule to person incarcerated at time of murder; court held that "a defendant need only tacitly assent to wrongdoing in order to trigger the Rule's applicability"); *United States* v. *Carson*, 455 F.3d 336, 363-365 (D.C. Cir. 2006) (applying principle where co-conspirator renders witness unavailable); *United States* v. *Cherry*, 217 F.3d 811, 818 (10th Cir. 2000) (applying co-conspirator liability rules to application of Rule 804(b)(6)); *United States* v. *Thompson*, 286 F.3d 950, 963-966 (7th Cir. 2002). Also, the government need not show that

---

[21] Courts generally hold that the government's burden for both the Confrontation Clause and hearsay rule is a preponderance of the evidence. See, *e.g.*, *Beckett* v. *Ford*, 384 F. App'x 435, 447-448 (6th Cir. 2010); *United States* v. *Vallee*, 304 F. App'x 916, 920 (2d Cir. 2008); *Hodges* v. *Attorney General, State of Florida*, 506 F.3d 1337, 1345 n.1 (11th Cir. 2007); see also *Ponce*, 606 F.3d at 602.

defendants intended to procure a witness's unavailability *at any particular trial*, or with respect to any specific subject matter, so long as the defendant "intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial at which the declarant's statements are offered." *Gray*, 405 F.3d at 241; see also *United States* v. *Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001) (rule may apply where declarant is only a potential witness, *i.e.*, "there was no ongoing proceeding in which the declarant was scheduled to testify," and is not limited to particular subject matter) (internal brackets omitted); *United States* v. *Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States* v. *Vallee*, 304 F. App'x 916, 920 (2d Cir. 2008).

2. Bowser's Statements Were Properly Admitted Against All Defendants Under The Forfeiture By Wrongdoing Doctrine

a. The district court correctly concluded, based on the evidence presented at trial, as well as evidence relating to Avila's state court conviction for Bowser's murder, that because Avila and Martinez directly participated in Bowser's murder, and because the murder was a foreseeable consequence of the conspiracy in which all of the defendants participated, the out-of-court statements made by Bowser before he died were admissible under Rule 804(b)(6) against all defendants.

The evidence at trial established the following events leading up to Bowser's murder:

- For at least five years prior to his death, Bowser was repeatedly subjected to racial harassment and assaults, and told to stay out of the Highland Park neighborhood, by Avenues gang members.

- On October 26, 2000, Avila and Martinez assaulted Bowser as he waited for a bus on Figueroa Street in Highland Park. Bowser reported the incident to LAPD officers, but he initially declined to press charges, fearing retaliation.

- Bowser decided to press charges after Martinez drove by and threatened him with a gun. On November 30, 2000, Bowser identified Martinez in a photo array.

- Three days later, on December 3, 2000, Martinez was arrested for the October 26 assault.

- Eight days after Martinez's arrest, on December 11, 2000, Bowser was shot and killed execution style by Avila at the same bus stop where he had previously been attacked.

The government also introduced evidence at trial that established that:

- On December 16, 2000, five days after Bowser's murder, a fellow gang member and co-conspirator (Dusty Chavez) who was in state prison had a telephone conversation with Avila in which Avila admitted that he and Martinez assaulted Bowser in October and called Bowser a "mayate." Avila also stated that Bowser "reported" that he had been assaulted, identified Martinez, and the police "raided" Martinez's residence. Avila then commented about Bowser: "that fool's gone."

- Angela Cortez, the mother of Bowser's child, received a telephone call from Bowser, sometime "about a week" after the December 3 birthday of their daughter, in which Bowser, sounding "anxious" and "uneasy," told

her that he wanted to see his child because the Avenues were after him. A few days later, Bowser was murdered.

- At Avila's state court trial for the Bowser murder, Cruz testified that Avila confessed to him that Avila had participated in Bowser's murder with Martinez. Cruz also testified that Avila said that Martinez, who had been arrested for the October 2000 assault of Bowser, called him from jail to order Bowser's murder. Avila received a sentence enhancement because Bowser was murdered because he had been a witness to a crime.[22]

The court expressly relied upon much of this evidence in finding that there was a preponderance of evidence that "Avila and Martinez and others directly engaged in wrongdoing *that was intended to and did render Chris Bowser unavailable as a witness*." E.R. 6053-6054 (emphasis added).[23] The court then listed the evidence supporting that conclusion, which included: (1) "Bowser complained about being harassed, beaten, and robbed by members of the Avenues including * * * Martinez"; (2) he "was beaten by an individual wearing a blue

---

[22] See *People* v. *Avila*, No. B174161, 2005 WL 2065211, at *1 (Cal. App. 2d Aug. 29, 2005) (noting finding that Bowser was killed intentionally because he had been a witness to a crime); Br. App. 52-53 n.8.

[23] Given this finding, defendants' assertion that the court "made no finding on the question whether Mr. Bowser was killed for the purpose of preventing him from testifying" is wrong, as is their assertion that the court "did not rule clearly at all, but simply concluded that the exception for forfeiture by wrongdoing applied." Br. App. 70-71.

uniform shirt[] and Avila and Martinez wore those shirts at their place of employment"; (3) "Bowser told the police that Martinez had robbed him at a bus stop and that Martinez had been arrested for that assault"; (4) "he told the mother of his child * * * that he wanted to see his child because the Avenues were after him"; (5) "he was killed eight days after he told the police that Martinez had robbed him"; (6) "[h]e was killed execution-style at the same bus stop where he was initially robbed"; (7) "the pattern of shots used in the Bowser murder w[as] virtually identical to the shot pattern used in the Prudhomme murder"[24]; (8) "the testimony in People v. Avila that Martinez had ordered Avila * * * to kill Bowser and that Avila had admitted to Cruz that he killed Bowser"; (9) "judicial notice of the fact that Avila was convicted for murdering Bowser * * * [and] Prudhomme"; and (10) "judicial notice of Martinez's conviction for the robbery of Bowser." E.R. 6504-6505.

Given these findings, and all of the underlying evidence, the court did not err in admitting Bowser's hearsay statements under Rule 804(b)(6); the evidence established that Avila and Martinez engaged in wrongdoing, the wrongdoing was intended to procure Bowser's unavailability, and the wrongdoing did procure

---

[24] See note 4, *supra*, addressing Avila's conviction for the Prudhomme murder.

Bowser's unavailability. Cf. *Gray*, 405 F.3d at 243 (affirming finding that the facts "justif[y] the inference" that the killing was motivated to render decedent unavailable). Moreover, because all of the defendants either directly engaged in the wrongdoing (Avila killing Bowser at Martinez's request), or acquiesced in the foreseeable wrongdoing as part of a conspiracy (for which the Bowser assaults and killing were alleged as an overt act), all defendants forfeited their right to object to the admission of Bowser's statements.[25]

b. Defendants' principal argument is that although Avila was convicted for Bowser's murder, the evidence that Avila did so to prevent him from acting as

---

[25] Courts generally hold, as the government argued below, that the formulation for conspirator liability set forth in *Pinkerton* v. *United States*, 328 U.S. 640 (1946), applies to determining whether the actions of another can be imputed to a defendant in this context. See, *e.g.*, *Cherry*, 217 F.3d at 818; *Thompson*, 286 F.3d at 963-965; *Carson*, 455 F.3d at 364. Under this formulation, a defendant may be liable for the acts of a co-conspirator "that were within the scope and in furtherance of the conspiracy, and were reasonably foreseeable to her." *Thompson*, 286 F.3d at 964. Here, the evidence establishes that Bowser's murder was in the scope of the conspiracy in which all defendants participated – *i.e.*, the conspiracy to assault, intimidate, and sometimes kill African-Americans in Highland Park – and that it was reasonably foreseeable to the co-conspirators. Indeed, Bowser's murder came *after* Wilson's murder, and therefore defendants' prior willingness to murder an African-American supports the finding that the Bowser murder was a foreseeable part of the ongoing conspiracy. Moreover, "[a]ctual knowledge is not required for conspiratorial waiver by misconduct if elements of *Pinkerton* – scope, furtherance, and reasonable foreseeability * * * – are satisfied." *Cherry*, 217 F.3d at 821.

a witness against Martinez came from Cruz in the state trial and he is a "wholly unreliable witness." Br. App. 72-77.[26] Defendants assert that Cruz had various motives to lie; his testimony was inconsistent; although he recanted his video recantation of his state court testimony, Avila's mother (Garcia) testified at the state trial that his video recantation was truthful; and Cruz previously committed perjury. Br. App. 72-77. Defendants therefore argue that Cruz's statements "were simply too unreliable to provide the basis for the admission of hearsay based on the doctrine of forfeiture by wrongdoing." Br. App. 77.

Defendants' argument – tantamount to a collateral attack on the sufficiency of the evidence in Avila's state court conviction – is largely beside the point. The district court's Rule 804(b)(6) finding was not based entirely, or even largely, on Cruz's state court testimony.[27] As outlined above, the court cited considerable

---

[26] Indeed, given that Avila was convicted for Bowser's murder, two elements of the 804(b)(6) inquiry – that Avila engaged in wrongdoing (the murder) and the wrongdoing caused Bowser's unavailability at trial – were established beyond a reasonable doubt.

[27] In any event, although the jury in Avila's state murder trial did not have to determine *the reason* that Avila murdered Bowser, Cruz testified that Avila told him both that he killed Bowser and why he did so. The jury apparently believed Cruz's testimony on the first point, or at least that that testimony was not inconsistent with other evidence of Avila's guilt, and therefore there is a reasonable basis to believe that Cruz was not "wholly unreliable." Moreover,

(continued…)

evidence tying Avila and Martinez to Bowser's murder after Bowser told the police Martinez had assaulted him and the police arrested Martinez. The court could have reasonably inferred from this evidence (and the sequence of events), as well as Avila's statement to a fellow gang member over the telephone five days after Bowser's murder that he and Martinez assaulted Bowser in October and that "that fool's [Bowser] gone," that Bowser was killed for the purpose of ensuring that he would not testify against Martinez. It is not relevant that Bowser may have been murdered to prevent his testimony in state court against Martinez in connection with the robbery, rather than in the underlying trial in this case. See, *e.g.*, *Gray*, 405 F.3d at 241; pages 56-57, *supra.* Nor is it necessary that silencing Bowser be the sole or primary motivation for his murder. See, *e.g.*, *id*. at 242 (defendant need only intend "in part" to procure the declarant's unavailability; also citing cases). In other words, it is of no moment that Bowser's murder may have been motivated by the desire to *both* silence him as a witness, and to carry out the ongoing campaign of violence and intimidation against African-Americans to drive

---

(…continued)

much of Cruz's state court testimony was consistent with other evidence, *e.g.*, that Martinez had assaulted Bowser and was arrested because Bowser told the police about it. E.R. 586. For these reasons, the district court did not abuse its discretion in relying in part on Cruz's testimony to establish Avila's intent.

them out of Highland Park (as charged in the conspiracy count). For these reasons, the district court did not err in admitting Bowser's statements under the forfeiture by wrongdoing exception to the Confrontation Clause and the hearsay rule. [28]

E. Any Error In The Admission Of Bowser's Statements Was Harmless

Defendants argue that the erroneous admission of Bowser's hearsay statements was not harmless. Because there was no error, this argument is beside the point.

In any event, this argument is meritless. Defendants argue that, with respect to Avila, the "bulk of the evidence" tying him to the conspiracy came from officers Carrasco's and Padilla's hearsay statements about what Bowser told them. Br. App. 78-80. But Bowser's statements to Carrasco and Padilla concerned Martinez, not Avila. Moreover, Diaz and Petrie also testified to Avila's involvement in racial assaults and harassment. E.R. 2898-2919, 2998, 2665. The credibility of these

---

[28] Defendants make the same argument – that the government did not show that Avila killed Bowser with the intent to make him unavailable to testify, and therefore did not satisfy Rule 804(b)(6) – with regard to Shaffer's and Cortez's testimony concerning Bowser's statements about the Avenues' racial harassment and racial slurs. Br. App. 77-78. For the same reason that the district court did not err in admitting officers Carrasco's and Padilla's testimony under the forfeiture by wrongdoing rule, it did not err in admitting Shaffer's and Cortez's testimony. See notes 17 & 19, *supra*.

witnesses was determined by the jury in reaching its verdict. Moreover, Avila's statements five days after Bowser's murder that he and Martinez assaulted Bowser, calling Bowser a "mayate," and stating that "that fool's [Bowser] gone," also ties Avila to the conspiracy, as does the testimony that Bowser was beaten by a man wearing a blue uniform and that Avila (and Martinez) wore such a shirt at his nearby place of employment. In short, there was ample evidence other than the hearsay statements implicating Avila in the conspiracy.

Defendants also argue that the Bowser statements were harmful to the other defendants because the evidence against them was primarily based on the testimony of their fellow gang members, Diaz and De La Cruz. Br. App. 80-81. But defendants cannot simply dismiss their testimony as not believable; that is the province of the jury. Further, looking at the evidence as a whole, there was substantial evidence tying Saldana, Martinez, and Cazares to the conspiracy to assault and intimidate African-Americans apart from the testimony of Carrasco, Padilla, Shaffer, and Cortez, and the testimony of Diaz and De La Cruz.[29] Moreover, defendants' argument that neither Cazares nor Saldana was directly

---

[29] See pages 9-26, *supra* (summarizing facts of the Wilson murder and various assaults of African-Americans).

involved in the Bowser murder has little bearing on their guilt for the conspiracy, since there is substantial evidence linking them to the Wilson murder and other assaults. In short, looking at the record as a whole, any error with respect to the admission of the Bowser statements was harmless beyond a reasonable doubt.[30]

IV

THE TESTIMOMY OF THE GOVERNMENT'S EXPERT WITNESS ON THE RACIAL ATTITUDES OF THE AVENUES GANG WAS PROPERLY ADMITTED

A. Standard Of Review

The Court reviews a decision to admit expert testimony for abuse of discretion. See *Masayesva* v. *Hale*, 118 F.3d 1371, 1378 (9th Cir. 1997). Because defendants failed to object to the challenged testimony on Confrontation Clause grounds, that issue is reviewed for plain error. See, *e.g.*, *United States* v. *Jawara*, 474 F.3d 565, 583 (9th Cir. 2007).

---

[30] Defendants also make the bare assertion that "the evidence about two uncharged murders was highly prejudicial in and of itself." Br. App. 81 (referring to the Prudhomme and Bowser murders). It is difficult to see how this assertion relates to their harmless error argument; in any event, it is baseless. The Bowser murder was charged as an overt act in Count I of the indictment, as well as a death resulting from the conspiracy. Further, the jury was specifically instructed that the defendants were on trial "only for the crimes in the indictment, not for any other activities." E.R. 5972.

B. Robert Lopez's Expert Testimony On The Racial Views Of Avenues Gang Members

The government called Robert Lopez, a then 28-year veteran with the Los Angeles Police Department, as an expert concerning the Avenues gang. E.R. 4784-4793. He testified at length concerning his 25 years of working with gangs, 12 of which were working in Highland Park supervising the gang unit, and stated that he worked with, and developed a special expertise with, the Avenues gang. E.R. 4786. He stated that he personally spoke to 300-400 members of the gang, and that during the past 12 years he either investigated or supervised over 500 cases. E.R. 4790-4792. He also testified that he had attended specialized training and seminars on gang activities, and taught gang investigation to another police department. E.R. 4789-4790.

Defendants objected to Lopez's testimony as an expert concerning the Avenues gang, which the court overruled. E.R. 4792. At the same time, the court admonished the jury that "opinion testimony should be judged just like any other testimony. You may accept or reject it, give it as much weight as you think it deserves considering the witness's education and experience, the reasons given for any opinions and all the other evidence in the case." E.R. 4793.

Lopez testified that his unit identified and tracked gang members using "gang intelligence cards," which are used for each person identified as a gang

member and include names, addresses, gang affiliation, and other information. E.R. 4793-4796. He further testified that they kept "gang history books," including one for the Avenues, which contain the history and other information concerning the gang, including its territory and "any kind of identifying graffiti." E.R. 4798. Lopez testified that the Avenues was the largest gang in his area, with about 200-300 members; primarily Hispanic; claimed a specific "territory"; and had smaller groups ("cliques") that were geographically based, including Avenues 43. E.R. 4801-4805. He also testified about slang terms, gang signs, graffiti, and tattoos. E.R. 4811-4815, 4852, 4893-4897.

When the government questioned Lopez about the Avenue's racial attitudes, defendants objected, asserting that it was not a proper subject for expert opinion, was beyond the scope of his expertise, lacked foundation, and was not an area that required an expert witness. E.R. 4860-4862. The United States responded that it did not intend to ask whether "these particular defendants did or did not act with racial motivation in any particular case," and that Lopez's testimony would be based on "his own personal observations as the person who reviewed cases" as well as his own conversations with gang members. E.R. 4862-4863. The court noted that the issue was not whether the gang members "hated black people," but whether they wanted "black people out of their neighborhood." E.R. 4863. The

United States agreed, and stated that it would so focus its questions and also make clear that Lopez was not offering any opinion on whether these particular defendants acted with racial intent on any particular occasion. E.R. 4864-4865.

Lopez then testified that there was an increase in the black population in Highland Park in 1997 or 1998, and that based on his interviews of community and gang members, and his conversation with officers in his gang unit, it was his opinion that Avenues gang members "hated" the increase in the black population because it was changing the makeup of the neighborhood. E.R. 4866-4867. Lopez also testified that they considered the neighborhood to be their own. E.R. 4867-4868. The government then asked:

> Q: [W]hen you talk about the Avenues' attitudes toward black people in the neighborhood, you are not offering any opinion about whether any of these defendants acted with racial intent on any particular occasion; correct?
> A: Correct.
> Q: You are just talking in general terms?
> A: Yes, ma'am.

E.R. 4868. Lopez further testified that between 1995 and 2001 there was an increase in racial graffiti in Highland Park and that in his opinion, based on reading it and its location, Avenues gang members wrote it. E.R. 4869-4870. Defendants extensively cross-examined Lopez on these issues. E.R. 4912-4930, 4939-4944.

C. Lopez's Testimony Was Properly Admitted And Did Not Violate Defendants' Confrontation Clause Rights

Defendants argue that Lopez's testimony that the Avenues gang did not like African-Americans relayed inadmissible hearsay to the jury in violation of Fed. R. Evid. 703 and the Confrontation Clause. Br. App. 86-91. They also assert that this testimony was improper because it merely repeated what others told him and involved "no expertise or methodology." Br. App. 90. These arguments do not accurately reflect Lopez's testimony and are misplaced.

First, "[e]xpert witnesses may rely on inadmissible hearsay in forming their opinions, so long as it is of a type reasonably relied upon by experts in the field." *United States* v. *Zarate-Morales*, 377 F. App'x 696, 698 (9th Cir.), cert. denied, 131 S. Ct. 503 (2010). Indeed, numerous courts have applied this principle in upholding the admission of expert testimony in contexts similar to that presented here. In *United States* v. *Hankey*, 203 F.3d 1160, 1167-1173 (9th Cir. 2000), for example, this Court concluded that a police gang expert with years of experience working with street gangs could testify about defendants' gang affiliations and other gang issues for impeachment purposes. The Court noted that the officer had "communicated and worked undercover with thousands of other gang members," and that "[c]ertainly the officer relied on 'street intelligence' for his opinions about gang memberships and tenets." *Id.* at 1169. "How else," the Court asked, "can

one obtain this encyclopedic knowledge of identifiable gangs? Gangs * * * do not have by-laws, organizational minutes, or any other normal means of identification." *Id.* at 1169-1170. Moreover, the officer "was repeatedly asked the basis for his opinion and fully articulated the basis, demonstrating that the information upon which he relied is of the type normally obtained in his day-to-day police activity." *Ibid.* See also *Zarate-Morales*, 377 F. App'x at 698 ("law enforcement officers testifying as experts may rely on inadmissible hearsay in describing the structure and operations of a criminal organization"); *United States* v. *Wells*, 162 F. App'x 754, 756-757 (9th Cir. 2006) (expert testimony addressing defendant's gang membership and his gang moniker).

This principle is recognized in Fed. R. Evid. 703, which provides that the facts and data on which an expert bases his opinion need not be admissible "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." As the cases cited above make clear, police experts in gang activities regularly and necessarily rely upon "street intelligence" in forming their opinions, as Lopez appropriately did here.

Rule 703 also provides that the underlying facts that are otherwise inadmissible shall not be disclosed to the jury unless the court determines that the probative value outweighs their prejudicial effect. That provision is the crux of

defendants' argument – they assert that Lopez's testimony relayed inadmissible hearsay, rather than expert opinion, to the jury and that the court did not make the required finding for admissibility or give a limiting instruction.

A fair reading of Lopez's testimony, however, including the nature of defendants' objections to it,[31] make clear that that was not the case. Lopez testified that, based on interviews with officers in his gang unit and Avenues gang members, Avenues gang members did not like it that African-Americans were moving into their neighborhood. E.R. 4867-4869. In so testifying, he was not acting as conduit for the statements of others, or parroting hearsay; indeed, Lopez never referred to any particular statements by any particular persons. Rather, in the context of his expertise in gang activities in the Highland Park area, Lopez was testifying that there was an influx of African-Americans in the community and Avenues gang members did not like seeing the makeup up their neighborhood change. That generalized conclusion was a distillation of what he learned from a

---

[31] Defendants, in fact, did not object to this testimony on the basis of hearsay or the Confrontation Clause. Rather, they asserted that the testimony was either not the proper subject of expert opinion, beyond the witness's expertise, or without foundation. See E.R. 4860-4867. Defendants do not make those arguments in this appeal. The one hearsay objection made to this line of questioning was sustained. E.R. 4868.

variety of sources, viewed through the prism of his knowledge gained from his day-to-day work, *i.e.*, that the Avenues were primarily Hispanic, claimed a specific territory, and wrote racial graffiti.[32] Lopez's testimony, therefore, did not run afoul of Rule 703 and the court did not abuse its discretion in admitting it.[33]

There was also no Confrontation Clause violation. The Confrontation Clause applies only to "testimonial" statements. *Michigan* v. *Bryant*, 131 S. Ct. 1143, 1152-1155 (2011); *Crawford* v. *Washington*, 541 U.S. 36 (2004); see also *Davis* v. *Washington*, 547 U.S. 813, 821 (2006); *United States* v. *Tuyet Thi-Bach Nguyen*, 565 F.3d 668, 674 (9th Cir. 2009). Testimonial statements are generally those "statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions as well as statements that were made under circumstances that would lead an objective witness reasonably to believe

---

[32] Defendants cite *United States* v. *Mejia*, 545 F.3d 179 (2d Cir. 2008), where the court was skeptical of "officer experts" testifying on the facts the government must prove at trial, and otherwise substituting expert opinion for factual evidence or acting as a "summary prosecution witness." *Id.* at 188-193. *Mejia*, however, simply reinforces that an expert cannot simply repeat or transmit information he heard or read to the jury, but must testify to his own opinions by applying his experience to, and synthesizing, the inadmissible materials. *Id.* at 197-198.

[33] See also *United States* v. *Steed*, 548 F.3d 961, 975-977 (11th Cir. 2008); *United States* v. *Garcia*, 447 F.3d 1327, 1336-1337 (11th Cir. 2006).

that the statement would be available for use at a later trial." *United States* v. *Orozco-Acosta*, 607 F.3d 1156, 1160 (9th Cir. 2010) (internal quotation marks omitted), cert. denied, 131 S. Ct. 946 (2011); see also *United States* v. *Hunter*, 266 F. App'x 619, 622 (9th Cir. 2008) (statements were clearly not the "functional equivalent of in-court testimony, formalized testimonial materials, or intended for use at a later trial, and are therefore not testimonial") (internal quotation marks omitted); see also *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which Crawford condemned." *Lopez* v. *Jacquez*, No. 1:09-CV-01451, 2010 WL 2650695, at *5 (E.D. Cal. July 1, 2010) (internal quotation marks omitted); see also *United States* v. *Chong*, 178 F. App'x 626, 627-628 (9th Cir. 2005) (expert testimony on Asian organized crime groups, based on information from informants, cooperating witnesses, and other sources, "is not the kind of testimonial evidence precluded by *Crawford*").[34] It follows that defendants have not identified any "testimonial" statements that Lopez disclosed, nor could they.

---

[34] See also *Walker* v. *Clark*, No. CV 08-5587-CJC, 2010 WL 1643580, at

(continued…)

Finally, defendants argue that the admissibility of this testimony was not harmless because Counts One and Two require that defendants acted because of race, and therefore the "racist views of the Avenues was material" to the offense, and the other evidence on this issue came only from Diaz and De La Cruz. Br. App. 91-92. This argument is baseless. Immediately after Lopez's testimony that members of the Avenues gang were not happy with African-Americans moving into their neighborhood, the United States asked – "just to be clear" – whether he was offering any opinion about whether any particular defendant acted with racial intent on any particular occasion, or whether he was just "talking in general terms." E.R. 4869. Lopez answered that he was not offering any opinion about the defendants or particular occasions. E.R. 4869. These questions, as the government told the court at sidebar, were intended to make clear that Lopez was not offering "any opinion on the ultimate issue." E.R. 4865. Moreover, defendants cross-examined Lopez about his conclusions (E.R. 4928, 4940-4941), and attacked his

---

(…continued)

*15 (C.D. Cal. Feb. 18, 2010) ("numerous courts after *Crawford* have held that the admission of otherwise inadmissible evidence offered as a basis for a gang expert's testimony does not violate the Confrontation Clause") (citing cases); *United States* v. *Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) (*Crawford* "did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under [Rule] 703").

testimony in closing argument (E.R. 5782-5783, 5906-5910). Cf. *United States* v. *Leeson*, 453 F.3d 631, 637-638 (4th Cir. 2006). Finally, as the district court recognized, "this stuff that he's testifying to we've already heard, and it's in the record." E.R. 4866. In that regard, there was substantial evidence in the record – other than the testimony of Diaz and De La Cruz – concerning the racial attitudes of the Avenues gang. See, *e.g.*, E.R. 2603-2613, 2642-2643, 2769-2771. Therefore, even if there was error in the admission of Lopez's testimony, it could not likely have affected the fairness of the trial or defendants' substantial rights.[35]

V

ANY ERROR IN THE ADMISSION OF SAL AUDELO'S TESTIMONY CONCERNING HOW HE KNEW THE GUN HE SOLD TO DEFENDANT SALDANA WAS USED IN THE CERDA MURDERS WAS INVITED ERROR AND THEREFORE NOT REVIEWABLE

A. Standard Of Review

Defendants challenge the admission of testimony as hearsay that they intentionally elicited on cross-examination (and therefore did not object to). Therefore, defendants invited any error, and cannot now complain that the

---

[35] Defendants also challenge Lopez's testimony concerning Martinez's and Avila's "extra clout" in the Avenues. See Br. App. 85; E.R. 4854-4855. The objection was for relevance, which the court overruled. For the same reasons discussed above, Lopez's testimony concerning Martinez's and Avila's "extra clout" was properly admitted.

evidence should have been excluded as hearsay or under the Confrontation Clause. See, *e.g.*, *United States* v. *Estrada-Martinez*, 11 F. App'x 725, 727-728 (9th Cir. 2001); *United States* v. *Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); see also *United States* v. *Baker*, 432 F.3d 1189, 1216 (11th Cir. 2005) (a party may not challenge as error a ruling invited by that party; where invited error exists, a court cannot invoke the plain error rule). If not unreviewable invited error, the admission of this testimony is reviewed for plain error.

B. Saul Audelo's Testimony And Defendants' Objection

The United States called Saul Audelo as a witness at trial to tie Saldana to the Wilson murder through the 9 mm weapon used in that murder. See E.R. 3485-3561. Audelo was convicted in state court for the February 21, 1999, murders of Rene and Jaime Cerda (approximately six weeks before the Wilson murder), and was in prison for life without parole.[36] He testified that he had been a member of the White Fence street gang in an area near Highland Park. He also testified that in 1997 he met Saldana in the county jail, and that he later sold some guns to Saldana.

When Audelo was asked "[d]id you sell the gun used in the [Cerda] murders to * * * Saldana," defendants objected, arguing that even though Audelo was

---

[36] See *People* v. *Audelo*, No. B151447, 2002 WL 31895746 (Cal. App. 2d Dec. 31, 2002).

convicted of the Cerda murders, Audelo claims that he did not commit the murders and was not present at the murders. E.R. 3486-3493. Defendants therefore argued that Audelo's testimony would be inadmissible hearsay because the only reason Audelo believed he knew that the gun was used in the Cerda murders was that someone had told him that. E.R. 3494-3495.

The court addressed the issue at sidebar. [redacted]

[37] The transcript of this discussion was filed in this Court in Appellants' Joint Sealed Excerpts of Record.

[redacted]

Subsequently, on direct examination before the jury, Audelo testified that he was convicted for the Cerda murders, had possession of the 9 mm Ruger used in those murders, and sold the gun to Saldana. E.R. 3498-3499. The United States did not ask Audelo any questions about Ramos, what Ramos may have told him, or how he knew that the gun he sold to Saldana had been used in the Cerda murders.

On cross-examination, however, Saldana elicited testimony from Audelo that Audelo had always maintained his innocence in the Cerda murders, was not

present at the murders, and did not see the weapons used in those murders. E.R. 3508-3509. In this regard, Audelo was also asked whether his knowledge that the weapon that he sold to Saldana was used in the Cerda murder "is based on what someone else told you," and Audelo responded yes, "by the shooter himself." E.R. 3509. He also testified that in 2003, after he was convicted for the Cerda murders, he was contacted by FBI agents who told him they were trying to link the gun he sold to Saldana with a recent murder. E.R. 3521. Audelo testified that he was happy to cooperate in the hope that it would help him get out of prison. E.R. 3525, 3542-3545.

Audelo's testimony was followed by Gabriel Rivas, a Los Angeles police detective. Rivas testified that in April 1999 he interviewed Audelo, who admitted owning a 9 mm Ruger and selling it to Saldana. E.R. 3570-3571. Rivas further testified that shortly thereafter, Rivas questioned Saldana, who admitted purchasing a 9 mm Ruger from Audelo.[38] E.R. 3573. Subsequently, Diana Paul, a firearms examiner with the Los Angeles Police Department, testified that the bullets and bullet casings from the Wilson murder were fired from the same gun

---

[38] See Issue IX, *infra* (addressing interview of Saldana at the police station).

used in the Cerda murders, which was a 9 mm Ruger.[39] E.R. 4667-4678, 4756-4757.

C. Any Error In Audelo's Testimony Concerning How He Knew That The Gun He Sold To Saldana Was Used In The Cerda Murders Was Invited Error And Therefore Not Reviewable

1. Invited Error

Defendants suggest that Audelo's testimony – that Audelo learned that the gun he sold Saldana had been used in the Cerda murders from what the "shooter himself" told him – was inadmissible hearsay and violated the Confrontation Clause, and therefore warrants reversal. Br. App. 93-98. But it was defendants who elicited the testimony from Audelo on cross-examination (and did not object to it). E.R. 3510.[40] Therefore, defendants' complaint – that Audelo's testimony about what the Cerda "murderer" told him is hearsay that should not have been admitted – ignores the context of this testimony and, even if error, is invited error and not reviewable. See, *e.g.*, *Perez*, 116 F.3d at 845; *Baker*, 432 F.3d at 1216; see

---

[39] See Issue VII, *infra* (addressing Paul's expert testimony).

[40] Therefore, defendants' assertion that there is "no exception to the hearsay rule that would enable *the government* to introduce Ramos's alleged hearsay statements through Audelo" misrepresents the testimony. Br. App. 95-96 (emphasis added).

also *Ohler* v. *United States*, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."); *Elsayed Mukhtar* v. *California State Univ.*, 299 F.3d 1053, 1063 n.6 (9th Cir. 2002) ("Invited error occurs when the appellant opens the door to objectionable testimony by introducing it."); *Estrada-Martinez*, 11 F. App'x at 727-728 ("[C]ounsel solicited the testimony which he now claims should have been excluded . . .. A defendant cannot have it both ways. This was invited error and therefore not grounds for reversal.") (citation omitted); *United States* v. *Whittington*, 269 F. App'x 388, 409 (5th Cir. 2008) ("If a defendant injects otherwise inadmissible evidence, the defense cannot later object to such invited error.") (citation omitted). [41]

---

[41] The only other explanation for defendants' argument is that they are really objecting to Audelo's testimony at sidebar – when Audelo specifically testified (in response to both the government's and Saldana's questions) to what Ramos told him about the gun. See S.E.R. 3-16. As noted above, however, during subsequent questioning before the jury, the government did not ask Audelo anything about Ramos, what Ramos or anyone else may have told him about the gun, or how he knew the gun he sold Saldana was used in the Cerda murders. Rather, the United States simply asked Audelo whether he was convicted for the Cerda murders, whether he had possession of the gun used in those murders, and whether he sold that gun to Saldana; Audelo answered all questions affirmatively. E.R. 3498. Therefore, if defendants are not challenging testimony that *they elicited* before the jury on cross-examination, they are challenging testimony that was given only at sidebar.

2. Even If Not Invited Error, Admission Of Audelo's Testimony Was Not Plain Error

In any event, the testimony was not plain error. First, defendants purport to be challenging as hearsay Audelo's testimony on cross-examination concerning what Ramos told him about the gun. But Audelo testified only that he did not kill the Cerdas and learned from "the murderer" himself that the gun he sold to Saldana was used in the Cerda murders. E.R. 3509-3510. Therefore, defendants are not challenging the admission of out-of-court statements, they are challenging Audelo's explanation for the basis of his knowledge about the prior use of the gun he sold to Saldana; the colloquy was essentially this: "How do you know the gun you sold was used in the Cerda murders? The murderer told me." See E.R. 3495. The response "the murderer told me" – even construed as "the murderer told me the gun was used in the Cerda murders" – is not hearsay because it is not offered to prove the truth of the underlying statement, *i.e.*, that the gun was used in the Cerda murders, but rather how Audelo may have come to believe that fact. See, *e.g.*, *United States* v. *Guerrero-Damian*, 241 F. App'x 171, 173 (4th Cir. 2007) ("A statement is not hearsay if if is offered to prove knowledge, or show the effect on the listener or the listener's state of mind.") (citation omitted).

Defendants' Confrontation Clause argument fails for an additional reason – Audelo's testimony that he learned from "the murderer himself" that the gun he

sold Saldana was used in the Cerda murders did not introduce a testimonial statement against defendants. Any statement from Ramos to Audelo concerning the gun that may be implicit in that testimony was a statement by one gang member to another concerning the prior use of a gun that the one gang member was selling to the other. As such, it has none of the characteristics the courts have recognized are essential to testimonial statements. See *United States* v. *Hunter*, 266 F. App'x 619, 622 (9th Cir. 2008); cf. *United States* v. *Buelna*, 252 F. App'x 790, 791 (9th Cir. 2007).[42]

In all events, it is difficult to see what defendants were hoping to accomplish with the testimony that they elicited and now object to. Given Paul's ballistics evidence that the 9 mm gun used in the shooting of Wilson's Cadillac was the same gun used in the Cerda murders, the United States was using Audelo's

---

[42] Because the statements were non-testimonial, defendants' Confrontation Clause argument fails regardless whether Ramos was unavailable as a witness. See Br. App. 96-97; *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, * * * the Sixth Amendment demands * * * unavailability and a prior opportunity for cross-examination."). Defendants' also suggest that their Confrontation Clause rights were violated because Audelo testified that he learned what gun was used in the Cerda murders from what witnesses said at his state trial for the Cerda murders, and defendants were not able to cross-examine those witnesses. See Br. App. 99. This argument is also baseless because, again, Audelo was simply testifying to the source of his knowledge, and therefore did not introduce a testimonial statement against defendants.

conviction for the Cerda murders and sale of the gun to Saldana to further link Saldana to Wilson's murder. To this end, Audelo testified on direct that he was convicted for the Cerda murders, had possession of the 9 mm Ruger used in those murders, and sold the gun used in those murders to Saldana. E.R. 3498. This testimony supported the inference that Saldana must have shot at Wilson's car.[43] Defendants then elicited testimony from Audelo that, despite his conviction, he maintains that he was not involved in the Cerda murders and learned that the gun he sold to Saldana was used in those murders only because Cerdas' murderer told him. Now defendants are arguing that Audelo's testimony that he learned about the gun from what "the murderer" told him should not have been admitted. There is no dispute, however, that Audelo sold a gun to Saldana that Audelo believed was used in the Cerda murders. Therefore, even if Audelo was not permitted to testify that the Cerdas' murderer told him the gun Audelo sold to Saldana was used in the Cerda murders, as defendants apparently desired (but as defendants' elicited on

---

[43] In closing argument, the government noted Diaz's and De La Cruz's testimony that Saldana shot at Wilson's car with a 9 mm Ruger he got from a friend in the White Fence gang, and then stated some of the evidence that corroborated this included Audelo's testimony that he was from the White Fence gang and sold Saldana the gun used to murder Cerda. E.R. 5729. The government then noted Paul's testimony that the 9 mm gun that shot at Wilson's Cadillac was the same gun used to kill Cerda. E.R. 5730.

cross-examination), the jury would still have been left with Audelo's direct testimony that he was convicted for the Cerda murder and that he sold the gun used in those murders to Saldana.[44]

Therefore, this tangled evidentiary issue (including defendants intentionally eliciting specific testimony to undermine Audelo's direct testimony, and now challenging the admissibility of the testimony they elicited), even if it had been resolved in defendant's favor, would have gained them nothing. For this reason, even if there was somehow error in the admission of Audelo's testimony, it was not plain error because it could not likely have affected the outcome of the trial. This is also the case because of the other overwhelming evidence directly linking Saldana (and the other defendants) to the Wilson murder.

---

[44] Another interpretation of defendants' argument may be that they wanted to limit Audelo's testimony to the mere fact that he sold a gun to Saldana, and to preclude any testimony about any prior use of the gun. But there is no basis for the exclusion of Audelo's testimony that he was convicted of the Cerda murders, he possessed the gun used in those murders, and sold it to Saldana, and defendants do not challenge that testimony. Indeed, there is evidence in the record from other witnesses that Audelo sold Saldana a 9 mm Ruger, including Saldana's own acknowledgement of that fact to Detective Rivas. See E.R. 3573 (Rivas testimony); Issue IX, *infra*; see also E.R. 3923-3924 (De La Cruz); E.R. 2977-2978 (Diaz).

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RESTRICTING DEFENDANTS' CROSS-EXAMINATION OF CERTAIN GOVERNMENT WITNESSES

A. Standard Of Review

Challenges to restrictions "on the manner or scope of cross-examination" are reviewed for abuse of discretion. *United States* v. *Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); see also *United States* v. *Collins*, 551 F.3d 914, 925 (9th Cir. 2009).

B. The District Court Did Not Improperly Limit Defendants' Cross-Examination Of Government Witnesses

Defendants assert that the district court improperly limited its cross-examination of Jesse Diaz, Jose De La Cruz, Saul Audelo, and Eneida Montano. Br. App. 101-112. As defendants note, the Sixth Amendment's Confrontation Clause "includes the right of effective cross-examination," which is critical to a fair trial because it is the principal means by which the "believability of a witness and the truth of his testimony are tested." *Larson*, 495 F.3d at 1102 (internal quotation marks omitted; citing *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974)). But the Confrontation Clause "does not guarantee unbounded scope in cross-examination," *United States* v. *Lo*, 231 F.3d 471, 482 (9th Cir. 2000), or "cross-examination that is effective in whatever way, and to whatever extent, the defense

might wish," *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). Rather, it guarantees "an *opportunity* for effective cross-examination." *Fensterer*, 474 U.S. at 20. Moreover, the Court "review[s] the limitation on the cross-examination of each witness separately." *Larson*, 495 F.3d at 1103.[45]

Whether limitations on cross-examination violated defendant's Confrontation Clause rights depends on three factors: whether the excluded evidence was relevant; whether the exclusion was prejudicial; and whether the exclusion denied the jury "sufficient information to appraise the biases and motivations of the witness." *United States* v. *Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999). More generally, the Court will find a Confrontation Clause violation "only if the district court abused its discretion in excluding relevant evidence where other legitimate interests do not outweigh [defendant's] interest in presenting * * * [the] evidence." *United States* v. *Sua*, 307 F.3d 1150, 1153 (9th Cir. 2002); *Larson*, 495 F.3d at 1103.

---

[45] For this reason, defendants' argument (Br. App. 101, 113) that the trial court's limitations on cross-examination, "collectively," require a new trial, is misplaced. See also *Delaware* v. *Van Arsdale*, 475 U.S. 673, 680 (1986).

As set forth below, the district court did not improperly limit defendants' cross-examination, and therefore defendants' Confrontation Clause rights were not violated. In any event, if there was any error, it was harmless.

1. Jesse Diaz

Diaz was a cooperating government witness who acted in concert with Saldana, Martinez, and Cazares in the murder of Kenneth Wilson. Defendants challenge three instances in which the court limited their cross-examination.[46]

a. Saldana sought to show that Diaz had a motive to lie about the involvement of Saldana, Cambero, and De La Cruz in the Wilson murder. Br. App. 102-103. Diaz was serving a 20-year state court sentence for attempted murder in connection with the shooting of an off-duty police officer at a Jack-in-the-Box restaurant that occurred two weeks after the Wilson murder. E.R. 3096-3097. Saldana sought to establish that Diaz told the police (Detective Padilla) that he (Diaz) was not the Jack-in-the-Box shooter; Cambero was the shooter and Saldana and De La Cruz were also there; and Diaz believed this conversation with Padilla was private. E.R. 3069-3070, 3073, 3085-3086. Saldana further sought to establish that at a subsequent preliminary hearing (open to the public), Padilla

---

[46] Defendants, collectively, extensively cross-examined De La Cruz over the course of three days. See E.R. 2817-3044, 3066-3184, 3188-3206, 3207- 3321.

stated that Diaz had implicated other Avenues members, *i.e.*, that Padilla "outed" Diaz as a "snitch" against fellow Avenues members, and that therefore Diaz would not be safe in prison and had a reason to cooperate with the government in the Wilson murder and to blame Saldana, Cambero, and De La Cruz. E.R. 3078-3079, 3086.

Here, defendants got what they asked for. The United States did not object to this line of questioning, and Diaz was extensively cross-examined in this regard. E.R. 3083-3088, 3096-3103. Diaz acknowledged that when questioned about the Jack-in-the Box incident by Padilla he implicated the three others, he thought he had done so confidentially, but at a subsequent preliminary hearing in that matter Padilla stated that Diaz had implicated other Avenues members. E.R. 3096-3098. He further acknowledged that "snitches" often have contracts put out for their life, are not safe in prison, seek protective custody, and might get that by cooperating with the government. E.R.3099-3102. He also acknowledged that he had a motive to lie and implicate Saldana, Cambero, and De La Cruz in the Wilson murder because only he (Diaz) took the fall for the Jack-in-the-Box shooting, and that when later interviewed about the Wilson murder he told the detectives that Saldana, Cambero, and De La Cruz were involved in that murder. E.R. 3116-3118,

3126-3128. This testimony makes clear that defendants were able to fully cross-examine Diaz on this matter.[47]

b. Saldana elicited on cross-examination that Diaz was serving a 20-year state court sentence for attempted murder in the Jack-in-the-Box incident, and that he could have been charged with murder in the Wilson murder absent a grant of immunity. E.R. 3127-3129. Diaz was then asked if he knew what the punishment in California was for murder and what it was. The United States objected, which the court sustained without further discussion. E.R. 3130.

Defendants argue that the question was proper because if Diaz knew he faced a longer sentence for the Wilson murder, he had a motive to lie. Br. App. 103-104. Defendants cite *Larson*, where this Court held that the trial court erred in preventing defense counsel from questioning a cooperative witness about the mandatory life sentence without parole he faced (and knew that he faced) absent cooperation with the government. *Larson*, 495 F.3d at 1104-1107. The Court stated that although the witness testified that he was cooperating in the hope that his sentence would be reduced, which "did cast doubt on [his] credibility," it "did

---

[47] Saldana also addressed these points in his closing argument, arguing that because it became public that Diaz "snitched," he needed protection, and decided to "play ball with the police" and implicate defendants in the Wilson murder. E.R. 5763-5766.

not reveal the magnitude of his incentive to testify to the Government's satisfaction." *Id*. at 1105. The Court emphasized that the issue did not turn on the *potential* sentence the codefendant faced, which might have compelled a different result, but rather a sentence "highly relevant to the witness' credibility" because "[i]t is a sentence the witness knows *with certainty* that he will receive unless he satisfies the government with substantial and meaningful cooperation." *Id*. at 1106 & n.12.

Larson is not controlling here. Diaz was already serving a lengthy sentence and the cross-examination made clear that, in exchange for immunity in this case and his testimony in the Wilson murder, he hoped for a reduction in the sentence he was already serving. E.R. 3128-3135. There was no indication at trial, and defendants do not assert, that, as in *Larson*, Diaz was facing a mandatory life sentence and that his only hope in getting such a sentence reduced was his meaningful cooperation with the government.[48] In any event, the Court in *Larson* concluded that the error was harmless, noting that the government's case was

---

[48] Although this Court in *Larson* stated that the district court could not exclude testimony about a *mandatory* minimum sentence the witness *will* receive absent a deal, it stated that a court could exclude the "potential maximum statutory sentence that a cooperating witness *might* receive." 495 F.3d at 1106.

strong, and that because the codefendant was cross-examined about his criminal past and desire for a reduced sentence, and the court instructed the jury that it should view the testimony of cooperating witnesses with greater caution than that of other witnesses, the jury had reason to doubt his credibility. 495 F.3d at 1108.

These factors apply with even greater force here. Diaz was extensively cross-examined over three days about both his reasons for cooperating with the government and his veracity generally, the jury instructions specifically addressed how the jury should consider Diaz's testimony,[49] and the evidence as a whole against the defendants was overwhelming. The court did not abuse its discretion in this instance. Error, if any, would be harmless.

c. Diaz stated that he did not know a Sam Salinas.[50] E.R. 2908, 3149. Subsequently, Saldana questioned Diaz about an alley near the site of the Wilson

---

[49] The jury was instructed: "You have heard the testimony from Jesse Diaz, a witness who has received immunity. Mr. Diaz's testimony was given in exchange for a promise by the government that his testimony will not be used against him in any case. In evaluating Mr. Diaz's testimony, you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it; and you should consider that testimony with greater caution than that of other witnesses." E.R. 5973-5974; see also E.R. 5791 (Saldana closing argument addressing the credibility of Diaz).

[50] Salinas, an Avenues gang member, sold the Cadillac that Wilson was driving when he was murdered to Wilson's nephew's girlfriend. She let Wilson

(continued…)

murder and sought to ask Diaz whether he knew who lived down the alley. E.R. 3156. Saldana believed that Diaz had earlier told Officer Teague during an interview about the Wilson murder that he knew Salinas lived down the alley, and sought to question Diaz about this conversation to impeach him. E.R. 3090-3091, 3156-3158. Saldana referred to the transcript of the interview with Teague, where Diaz described where Wilson's car made a U-turn. E.R. 3156-3158. Diaz stated it was "where the alley's at"; Teague responded "Toward Monte Vista? Where Salinas lives"; Diaz responded "I already know"; and Teague responded "Okay. You know." E.R. 3156-3158 (referring to Def. Exh. 3004 at 25[51]); see Br. App. 104. The United States asserted that this colloquy does not make clear whether Diaz was saying he knew Salinas. The court noted that Diaz had already testified that he did not know Salinas and that the colloquy did not contradict that

---

(…continued)

and his nephew (Julius Williams) drive the car to a club the night of the murder. E.R. 2476-2477, 2517, 4091. Williams testified that he used to see Salinas and his friends down a nearby alley, he got into a heated confrontation with Salinas a few days before the Wilson murder, and on the night of the Wilson murder he noticed some Latino people in a nearby alley when they drove to the club. E.R. 2520-2524, 2545-2546. Williams also testified that he told the police that he thought Salinas was responsible for Wilson's murder. E.R. 2531.

[51] The relevant pages of this transcript are included in the United States' Supplemental Excerpts of Record. See S.S.E.R. 197-200. The transcript was not admitted into evidence.

testimony. E.R. 3156-3158. As a result, the court did not permit Saldana to ask Diaz if he had a conversation with Teague about Sam Salinas. E.R. 3158.

Defendants do not suggest why the court abused its discretion in denying their request to impeach Diaz with his prior statements to Teague. See Br. App. 104-105. In any event, the court reasonably construed Diaz's statement to Teague as not implying that he knew Salinas, and therefore not to be a contradictory statement that could be introduced to impeach Diaz. Moreover, given the extensive scope of defendants' cross-examination of Diaz, and the various evidence introduced to attack his credibility, the court's ruling on this point, even if an abuse of discretion, was harmless.

2. Jose De La Cruz

De La Cruz, like Diaz, was a cooperating government witness who acted in concert with Saldana, Martinez, and Cazares in the murder of Kenneth Wilson. On February 13, 2000, he was arrested for the Wilson murder, interviewed by detectives, and played a tape of Diaz's prior police interview (where Diaz named four people involved in Wilson murder: Saldana, Cambero, Diaz, and De La Cruz) (see E.R. 3847-3849, 2960). He then confessed to his role in the crime and implicated Saldana (as well as Cambero and Diaz). E.R. 3849-3850. De La Cruz was prosecuted and convicted for the Wilson murder in California state court, and

was sentenced to 45 years to life. E.R. 3753. Defendants challenge six areas of cross-examination. Br. App. 105-109.[52]

a. De La Cruz testified on cross-examination that during the February 2000 interview he first told the officers that he did not know what Diaz was talking about on the tape, but then they told him that Saldana had "ratted" him out for the Wilson murder and this was his last chance to come clean. E.R. 4053-4057. Saldana then asked De La Cruz a series of questions directed at whether the reason he cooperated with the government (and implicated Saldana) was because otherwise Saldana would testify against him, to which the government objected as follows:

- Did the officers tell you that if you did not cooperate "you would see Saldana take the stand against you"; objection – hearsay; sustained.

- "Did who would be a witness against you have anything to do with your decision that you needed to go along with the detectives' belief as to what happened that night [the night of the Wilson murder]"; objection – confusing and argumentative; sustained.

- "[D]uring this interview * * * they were trying to convince you that Jesse Diaz, in fact, was telling the truth; isn't that correct"; De La Cruz answered "That's right"; general objection; sustained.

E.R. 4057-4058.

---

[52] Defendants, collectively, extensively cross-examined De La Cruz over the course of two days. See E.R. 3903-4035, 4039-4110, 4114-4262.

Defendants argue that these questions were relevant to motive and not otherwise objectionable. Br. App. 106. De La Cruz testified on cross-examination, however, that he was not motivated to cooperate because they told him Saldana implicated him; did not believe Saldana was implicating him; and did not believe the officers when they said that Diaz has passed a lie detector test. E.R. 4055-4057. De La Cruz also testified that one of the reasons he decided to cooperate with the government was that he knew that, given the federal investigation into the Wilson murder, it was likely his February 2000 statements to the FBI implicating Saldana and others would become public and he would be in danger for being a snitch. E.R. 4050-4052, 3855-3865. Looking at the testimony as a whole, the court's rulings in these instances did not prejudice defendant's ability to cross-examine De La Cruz on his motive for cooperating with the government, a point counsel for Saldana emphasized in closing argument. E.R. 5768-5769.

b. Saldana noted that in 2001 De La Cruz had been arraigned for possession of a shank in prison, and asked De La Cruz whether he had the shank for his personal safety. The government objected on the basis of relevance and Fed. R. Evid. 609 (impeachment by evidence of a conviction of a crime), which, after De La Cruz answered "No," the court sustained. Saldana then asked whether

De La Cruz was concerned for his safety in jail because he had "snitched," and he said that he was not. E.R. 4061.

Defendants argue that the question about the shank was appropriate to impeach De La Cruz's credibility – on whether he was concerned for his safety despite having "snitched" – with a prior inconsistent statement. Br. App. 106. Defendants suggest that they can sequentially ask the same question in several ways, hope for inconsistent answers, and then use one answer as a prior inconsistent statement for a later answer. To the extent defendants are relying on Fed. R. Evid. 801(d)(1)(A) (certain prior inconsistent statements are not hearsay), their argument is misplaced. That rule is directed at the admission of certain prior out-of-court testimony of the declarant as substantive evidence (*i.e.*, as not hearsay) if it was given under oath subject to the penalty of perjury, a situation not presented here.[53] In any event, De La Cruz testified that he was not concerned for his safety, and his answer to the shank question, although stricken, makes clear that absent the court's ruling, his testimony would have been consistent. There is neither error nor harm here.

---

[53] "Hearsay" is defined, in part, as a statement "other than one made by the declarant while testifying at the trial or hearing." Fed. R. Evid. 801(c). Defendants' cross-examination was not seeking to introduce such a statement.

c. Saldana asked De La Cruz whether it was true that before the Wilson murder he "had never killed a black man." E.R. 4093. The court sustained the government's objection without discussion. Defendants argue that the question was relevant to whether there was a conspiracy among De La Cruz's gang members to kill African-Americans. Br. App. 107. The indictment, however, alleged as overt acts the murders of Wilson and Bowser, and also an attempted murder, about which there was extensive evidence at trial. It is therefore difficult to see how a question concerning whether one gang member committed a prior killing of an African-American – even if the answer would have been "no" – is relevant or, conversely, how the failure to be able to ask such a question is prejudicial. Moreover, defendants elicited related testimony that on the night of the Wilson murder it was not his "purpose" to "tag" (write graffiti on) an African-American person's home, and that after the Wilson murder he did not attempt to kill another African-American. E.R. 4093. Here, again, there is neither error nor harm.

d. De La Cruz acknowledged on cross-examination that it was not until November 2003 (*i.e.*, when he spoke to the FBI after he was convicted of the Wilson murder in state court) that he stated that the motivation for killing Wilson was that he was an African-American, and that when he did so the FBI made it

clear to him that they were investigating a case involving racial hatred. E.R. 4093-4094. De La Cruz was then asked: "they [the FBI] told you that they were trying to make a case that Mr. Wilson was killed because –," at which point the government made a hearsay objection, which the court sustained. E.R. 4094. Defendants argue that because De La Cruz testified that the FBI told him they were investigating a racial hate crime, they should have been permitted to ask him whether the FBI told him that the FBI believed Wilson was killed because of race, which was relevant to bias and motive. Br. App. 107-108.

Defendants, however, neither suggest now, nor suggested at trial, the basis on which these hearsay statements should have been admitted. Moreover, it hardly seems clear what this question adds to De La Cruz's answer to the previous question, *i.e.*, that the FBI made it clear to him that they were investigating a racial hate crime. Finally, to the extent defendants are suggesting that because the FBI may have told De La Cruz that they were trying to establish that Wilson's murder was a racial hate crime, De La Cruz had a motive to tell the FBI what they wanted to hear, there is other ample evidence directed at both De La Cruz's reasons to cooperate with the government (*i.e.*, that he wanted a reduced sentence and feared for his safety because he was a "snitch") and that defendants' criminal actions were directed at driving African Americans out of their neighborhood.

e. The government asked De La Cruz how he knew that the van used in the Wilson murder had been stolen, and he responded that "one of the guys in the van" told him. E.R. 3806. On cross-examination, De La Cruz was asked about the night that Wilson was murdered, and whether when he arrived at Martinez's house the van was already there. De La Cruz said it was, and then was asked whether it was true that the van had been "stashed away for a couple of days." The government objected for lack of foundation and hearsay, which the court sustained without further discussion. E.R. 3972.

Defendants argue that the answer to this question would have rebutted the government's theory, and testimony of the owner of the van (Fred Tzi), that the van was stolen sometime after the night of April 17, the day before Wilson's murder. Br. App. 108; E.R. 3467. They further argue that, in turn, this testimony would have supported the theory that "this man's van was not the van used in the murder." Br. App. 108. Defendants do not explain, however, how this issue is relevant to whether or not defendants murdered Wilson, for which there was other overwhelming evidence, both about the shooting itself and the van involved. See, *e.g.*, E.R. 2988, 3464-3467, 3806-3807. Again, defendants have demonstrated neither an abuse of discretion nor prejudice.

f. Martinez questioned De La Cruz concerning the fact that he was charged in state court with Wilson's murder and met with the district attorney to try to work out a deal. E.R. 4106. De La Cruz testified that the district attorney made an offer of the sentence they would be willing to give him if he would plead guilty. When Martinez next asked "what was the offer that they had made," the United States objected (relevance), which the court sustained. E.R. 4106. The following day, Martinez again sought to have admitted the deal the state offered De La Cruz, arguing that "obviously whatever they were offering * * * was not sufficient," and "that may go to his motivation * * * to testify in this case." E.R. 4116.[54] The government responded that the question was irrelevant and that "any motive he has to cooperate now stems from the fact that he was looking at a sentence of 45 to life rather than any terms of any deal that never * * * materialized." E.R. 4117. The court concluded that the deal De La Cruz was offered in state court was not relevant. E.R. 4119-4120.

Defendants now make the bare assertion that they "should have been able to explore the witness's motive and bias on these grounds." Br. App. 109. De La

---

[54] De La Cruz was initially offered a deal by the district attorney. He later met with the district attorney a second time with his attorney to try to get a better deal. The second meeting is at issue here. De La Cruz did not accept a plea deal, went to trial, and was convicted for the Wilson murder. See, *e.g.*, E.R. 4116-4118.

Cruz acknowledged on both direct and cross-examination, however, that he agreed to cooperate with the government in the instant case to try to get his state sentence reduced. E.R. 3862-3868, 4067-4070. He also testified that one of the reasons he decided to cooperate with the government is that he knew that it was likely his statements implicating Saldana and others would become public and he would be in danger for being a snitch. Looking at the testimony as a whole, the defendants extensively cross-examined De La Cruz on his motive for cooperating with the government. Therefore, defendants have demonstrated neither an abuse of discretion nor prejudice.

3. Saul Audelo

Saul Audelo was in prison for the Cerda murders when the FBI questioned him about Saldana, the Wilson murder, and the 9 mm gun. E.R. 3520-3524. As discussed above, Audelo testified for the government that he sold Saldana the 9 mm gun Audelo used in the Cerda murders (that other testimony linked to the Wilson murder). On cross-examination, Saldana asked Audelo about this prison interview with the FBI and elicited testimony that Audelo was in Pelican State Prison 400 miles from home, did not like being in jail, wanted to go home, and hoped that his cooperation might help him go home. Counsel also asked whether the reason he did not like being in Pelican State Prison was "because it's a very

difficult prison to do your time?" The United States objected on relevance grounds, which the court sustained, and there was no further discussion of the issue. E.R. 3524-3525.

Defendants assert, without elaboration, that they should have been permitted to cross-examine Audelo about his conditions of confinement to "flesh out" the reasons he was cooperating. Br. App. 109-110. Saldana, however, did cross-examine Audelo concerning his desire to get out of Pelican State Prison and go home, and his hope that his testimony for the government would help in that regard. E.R. 3525-3526, 3542-3545. Further, Audelo testified that "I don't like being in jail, period." E.R. 3524. Therefore, defendants were able to elicit why Audelo was cooperating with the government, and defendants have shown neither error nor harm in this instance.

4. Eneida Montano

Eneida Montano was Saldana's girlfriend at the time of the Wilson murder. Defendants challenge two areas of their cross-examination.

a. Montano testified on direct that Saldana used the terms "nigger" and "mayate" when he referred to African Americans, and also told a racist joke. E.R. 3617-3618. On cross-examination, however, Montano testified that she did not hear Saldana use the "N-word," but only "mayate." E.R. 3696. Saldana then

asked Montano whether he used the "N- word" as he "was describing how 'Listo' [Diaz] was framing him for Kenneth Wilson's murder." E.R. 3697. The government objected on hearsay and vagueness grounds, which the court sustained. E.R. 3697.[55] During re-direct examination, defendants again raised this issue, stating that their theory of the case was that Diaz was framing Saldana for Wilson's murder, and they sought to use Montano's inconsistent testimony about whether Saldana used the "N-word" to introduce her grand jury testimony that Saldana used the "N-word" when asserting that Diaz framed him for the Wilson murder. The court stated that if Saldana wanted to get on the stand and testify that Listo framed him, he could. E.R. 3712-3716.

Montano was also asked about her grand jury testimony concerning racial jokes Saldana would tell. E.R. 3701. Montano responded that she did not recall that testimony, and counsel for Saldana sought to refresh her recollection with the transcript from her grand jury testimony. E.R. 3701-3702. The United States objected "to the impeachment," which the court sustained, stating that it was

---

[55] This question derived from Montano's November 2005 grand jury testimony, where she testified that Saldana said, in discussing the Wilson murder, that Diaz was trying to frame him for the murder of a "nigger." See Br. App. 110-111 (quoting from the grand jury testimony).

"improper refreshment." E.R. 3702. There was no further discussion of that issue. E.R. 3703-3704.[56]

Defendants appear to argue that they should have been permitted to impeach Montano concerning Saldana's use of the "N-word" by referring to her grand jury testimony that Saldana used the word in stating that Diaz was trying to frame him for the murder of a black man. See Br. App. 110. They cite, however, to Montano's grand jury testimony concerning the telling of racial jokes (E.R. 3701-3702); therefore, it is unclear whether defendants are challenging the court's ruling with regard to the statement that Diaz was framing Saldana, or its ruling about the telling of jokes (as noted, as to the latter, Saldana withdrew that line of questioning). In any event, defendants do not suggest how the court erred in declining to permit them to use the backdoor of impeachment to introduce Montano's grand jury testimony that Saldana said that Diaz was framing him (assuming that is their argument). Moreover, defendants did elicit inconsistent testimony from Montano as to whether Saldana used the "N-word," and were able

---

[56] During a sidebar on recross-examination, the court explained that it sustained the objection because it believed the question in the grand jury transcript concerning jokes referred to what Saldana's friends said, not what Saldana said, and Saldana was now asking Montano what Saldana said. E.R. 3723-3724. After a brief discussion, Saldana withdrew the "entire line" of questioning. E.R. 3724.

to impeach her with her admission that she lied before the grand jury. See E.R. 3701; see also E.R. 3619-3622 (direct testimony admitting false testimony to the grand jury); E.R. 5753 (Saldana closing argument, stating "[s]he admitted that she committed perjury before the Grand Jury").

b. After Montano testified that she did not recall some of her grand jury testimony, Saldana questioned her about her training to be a deputy sheriff to show that she should have been able to remember her prior testimony. When Saldana asked whether "[o]ne of the things you learned is that sometimes you may be called on to testify in front of a jury like this," the United States objected to the "[r]elevance of the whole line of questioning." The court sustained the objection without discussion. E.R. 3703-3705.

Defendants argue that Montano's inability to recall her prior testimony was a legitimate ground for impeachment, and that her "training and her knowledge of the responsibilities of a deputy sheriff testifying in court" was a legitimate area to explore for bias. Br. App. 111-112. Montano was, however, extensively questioned about her false testimony before the grand jury and, even if the question about her law enforcement training was directed at her possible pro-government bias rather than her inability to remember (which is not at all clear from the cross-examination), counsel for Saldana asserted in closing argument that Montano

would say "whatever it took" to ensure that she did not jeopardize her goal of becoming a deputy sheriff, thereby raising the issue of bias. E.R. 5753. In all events, Montano offered supporting testimony to the otherwise overwhelming evidence of defendants' guilt, and any possible error could only have been harmless.

VII

THE TESTIMONY OF THE GOVERNMENT'S FIREARMS EXPERT WAS PROPERLY ADMITTED

A. Standard Of Review

The Court reviews a decision to admit expert testimony for abuse of discretion. See *Masayesva* v. *Hale*, 118 F.3d 1371, 1378 (9th Cir. 1997). Because defendants did not object to the challenged testimony at trial, which would have permitted the court, if it agreed it was improper, to strike the testimony or issue a cautionary instruction, this issue is reviewed for plain error. See, *e.g.*, *United States* v. *Campos*, 217 F.3d 707, 712 (9th Cir. 2000).

B. Diana Paul's Testimony And Defendants' Objections

Prior to trial, defendants filed a motion in limine to exclude expert ballistics testimony comparing the bullet casings found at the Wilson and Cerda murder scenes, and comparing the bullet casings found at the Bowser and Prudhomme murder scenes. S.S.E.R. 1-52; see Br. App. 116-117. Defendants argued that the

proffered testimony – using "toolmark" identification to link spent shell casings to the gun that fired it – was not sufficiently reliable to meet the admissibility requirements for expert testimony.[57] The United States opposed the motion, and the court deferred its decision until trial. E.R. 392-393.

At trial, the United States called Diana Paul as an expert witness in firearms analysis. E.R. 4541-4549. The defendants renewed their objection, also arguing that her testimony was simply a subjective opinion based on personal observation. E.R. 4536-4538. Defendants further asserted that "at the very least, the jury should not be told that these are absolute matches," but only that the marks that she saw "are consistent with each other," and let the jury conclude "whether or not this is adequate for them to determine that this is a match." E.R. 4537; Br. App. 116-117. The court denied the motion, finding that ballistics analysis employed was "reasonably reliable and will likely be helpful to the jury." E.R. 4538. The court stated that to the extent the defendants want to challenge the reliability of her testimony, they will have "an opportunity to cross-examine the witness and, indeed, present their own contrary evidence." E.R. 4538-4539.

---

[57] "Toolmark identification" is a forensic discipline that attempts to match marks left by "tools" (including guns) to the particular tool that made the mark.

Paul, who had testified as a firearms expert more than 200 times, was admitted as an expert in firearms analysis. The court explained to the jury:

> [O]pinion testimony should be judged just like any other testimony. Experts are people who are permitted to state opinions and reasons for their opinions because of their education and experience. You may accept the testimony or reject it and give it as much weight as you think it deserves considering the witness's education and experience and the reasons given for the opinion and all the other evidence in the case.

E.R. 4549.

Paul testified at length about how firearms experts examine guns and bullets and make comparisons to try to determine whether bullets were fired from the same gun. E.R. 4549-4590, 4616-4633. She testified that this determination is based on professional standards, which she follows. E.R. 4624. She further testified that her analysis can lead to one of three conclusions: the two bullets were fired from the same gun; the results are inconclusive because she "cannot reach a conclusion to a scientific certainty"; or "these two bullets could not under any circumstances have been fired from the same gun." E.R. 4627-4630.

Paul testified that some examiners use additional categories, including "probabilities," but that her standards are more conservative because what someone else would call a "probably match," she would call inconclusive. E.R. 4630. She explained that she is "not comfortable * * * reporting something that is

not in my mind to a scientific certainty. I am to report what I determine scientifically." E.R. 4630.

Paul then testified that, based on her examination of the Cerda and Wilson casings and bullets, the casings "were fired from the same firearm," which was a 9 mm Luger. E.R. 4670-4671. She also testified that the bullet from the Cerda case was fired from the same firearm as one of the bullets from the Wilson case. E.R. 4674. With respect to the Bowser and Prudhomme evidence, Paul testified that the casings and bullets were fired "from" or "in" the "same firearm." E.R. 4684-4685, 4687.

Paul was extensively cross-examined about her comparisons, analysis, and the basis for her conclusions. E.R. 4689-4734, 4744-4745, 4759-4764. She was also cross-examined about her level of certainty with respect to her conclusions. For example, Paul was asked how "the absence of a gun to compare two sets of bullets * * * affect[s] the degree of certainty" that the same firearm was used. E.R. 4713-4714. She was also asked whether should could "say with any sort of statistical certainty" that a "firing pin impression" was unique. E.R. 4725; see also E.R. 4708 ("[I]f, in fact, there is even a microscopic difference in the width or either the land or the groove, wouldn't that affect the certainty with regard to the match conclusion that you came to?"), E.R. 4712 (asking whether the number of

Rugers in Southern California in 1999 would "factor into a determination as to [the] certainty that it was not another Ruger or another firearm that could have fired Bullet 27").

On re-direct, the government noted that Paul was asked on cross-examination "whether certain things would affect your level of certainty," and therefore asked Paul "[w]hat is your level of certainty?" E.R. 4758. Paul responded: "I am completely certain. If I was not completely certain, I would have written a report saying it was inconclusive. I would not have said that it was a match, that the two were fired in the same gun." E.R. 4758. Paul was then asked, "when you say certain, that's a scientific certainty?" E.R. 4758. Paul responded "yes," but that does not mean there was a "one hundred percent guaranteed match" because "[t]here is no absolute certainty in science." E.R. 4759.

During closing argument, the United States reviewed the evidence corroborating Diaz's and De La Cruz's testimony that Saldana shot at Wilson's car with a 9 mm gun he purchased from a friend in the White Fence gang. E.R. 5729-5730. After noting Audelo's and Rivas's corroborating testimony, the government stated that "the most important corroboration" was Paul testifying "to a scientific certainty" that the same gun was used in the Wilson and Cerda murders. E.R.

5730.[58] Saldana, at closing, argued that Paul's testimony showed that "it's possible, perhaps even probable," that the same gun was used in the Wilson and Cerda murders. E.R. 5792. Saldana continued: "Who knows if, in fact, the same weapon was used in the two murders. Now she claims she has a match, * * * but what is it based on? Eyeball observation. Any measurements you can look at? Hard evidence? * * * Is there any way to test her reliability in terms of statistical probability? No." E.R. 5792-5793. Saldana further argued that, in any event, evidence about the gun used in the Wilson and Cerda murders is "irrelevant" because "[h]e wasn't there. He didn't use it. He didn't have it." E.R. 5794. The government stated in its rebuttal that although Saldana stated "who knows if the guns matched," Paul explained "all the nooks and crannies of ballistics examination" and answered all the questions posed by the defendants. E.R. 5926-5927. The government added that "[h]ow sure was she? To a scientific certainty." E.R. 5927.

Finally, the jury instructions reminded the jury that they had to decide "which testimony to believe and which testimony not to believe," and that

---

[58] The government, however, described other evidence as "a piece of overwhelming corroboration" and what "might well be the single most important piece of corroboration." E.R. 5730-5731.

"[o]pinion testimony should be judged just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the reasons given for the opinion, and all other evidence in the case." E.R. 5971-5975.

C. Admission Into Evidence Of Paul's Characterization Of Her Conclusions Was Proper And, In Any Event, Not Plain Error

Defendants argue that Paul's testimony on re-direct that her findings were to a "scientific certainty" was improper, prejudicial, and not harmless. Br. App. 119-124. Paul's testimony, however, was neither improper nor, in any event, plain error.

First, taken in context, Paul's testimony concerning her conclusions was not improper. Although there are few cases directly addressing the degree of certainty with which a toolmark examiner may express her conclusions, defendants cite several trial court decisions precluding assertions to a "scientific" or "absolute" certainty.[59] But all cases addressing the admissibility of expert testimony must be

---

[59] See Br. App. 119-122. Defendants cite, *e.g.*, the court's statement in *United States* v. *Monteiro*, 407 F. Supp. 2d 351, 372 (D. Mass. 2006), that "there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty," and therefore the firearms examiner may testify to a "reasonable degree of ballistic certainty." This discussion, however, was in response to examiner's testimony "to the effect that

(continued…)

placed in context, mindful that under Fed. R. Evid. 702 and *Daubert* the focus of expert testimony "is the scientific validity and thus the evidentiary relevance and reliability[] of the principles that underlie a proposed submission," and that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, 594-596 (1993); see also *United States* v. *Davis*, 103 F.3d 660, 674 (8th Cir. 1996) (defendant "was free to challenge the expert's [bullet comparison] conclusions and point out the weaknesses of the analysis to the jury during cross-examination"). As this Court explained in a similar case, the "record was sufficient to permit the trial court to conclude that 'tool mark identification' rests upon a scientific basis and is a reliable and generally accepted procedure. Whether its use in the particular case resulted in a reliable opinion was a different question,

---

(…continued)

they could be 100 percent sure of a match." *Ibid.* See also *United States* v. *Taylor*, 663 F. Supp. 2d 1170, 1180 (D.N.M. 2009) (firearms expert not permitted to testify that his methodology allows him to reach a conclusion "as a matter of scientific certainty," but rather only "within a reasonable degree of certainty"). Other decisions cited by defendants state that the expert may testify to a "reasonable degree of certainty." See, *e.g.*, *United States* v. *Diaz*, No. 05-cr-167, 2007 WL 485967, at *14 (N.D. Cal. Feb. 12, 2007).

to be explored in cross-examination of the expert witness." *United States* v. *Bowers*, 534 F.2d 186, 193-194 (9th Cir. 1976) (footnote omitted).

As noted above, Paul testified that based on her analysis the bullets and casings were fired "from" or "in" the "same firearm." She did so after explaining that her methodology permits only one of three conclusions – essentially, yes, no, or she "cannot reach a conclusion to a scientific certainty." Defendants then cross-examined Paul on the basis for her conclusions and certainty, which opened the door to Paul's testimony on re-direct that she was "completely certain" in her conclusions, otherwise she would "have written a report saying it was inconclusive." E.R. 4758. Paul then acknowledged that she meant certain to a "scientific certainty," but that "did not mean there was a one hundred percent guaranteed match," as "[t]here is no absolute certainty in science." E.R. 4759.

Therefore, Paul's testimony that her conclusions were to a "scientific certainty" followed defendants' questions on cross-examination concerning the basis for, and her level of, certainty and, fairly construed, meant that under her method of analysis there was a match. Indeed, in his closing argument, Saldana similarly – and correctly – characterized her testimony, asserting that Paul's testimony showed that "it's possible, perhaps even probable," that the same gun was used in the Wilson and Cerda murders, but "[w]ho knows if, in fact, the same

weapon was used in the two murders." E.R. 5792-5793. In short, in view of her testimony as a whole, the challenged assertions were not improper.[60]

In any event, these statements could not have affected the outcome or fairness of the proceeding. After challenging the weight that should be afforded Paul's conclusions, Saldana argued at closing that the evidence about the gun used in the Wilson and Cerda murders is "irrelevant" because "[h]e wasn't there." E.R. 5794. Further, as noted above, both prior to Paul's testimony and in its jury instructions the court reminded the jury that it had to decide which testimony to believe, could accept or reject the expert testimony, and could give it as much weight as they thought it deserved in light of all of the evidence in the case. Finally, also as set forth above, there is substantial evidence directly linking

---

[60] To the extent defendants' argument can also be construed to be challenging Paul's testimony in its entirety (*i.e.*, that she should not have been permitted to testify), the district court did not abuse its discretion in admitting the testimony. Expert ballistics testimony addressing whether bullets and casings match other bullets and casings, or match certain weapons, is common and routinely admitted. See, *e.g.*, *United States* v. *Bowers*, 534 F.2d 186, 193 (9th Cir. 1976); see also *United States* v. *Willock*, 682 F. Supp. 2d 512, 535 (D. Md. 2010) ("there is no reported case in which a court has held such testimony inadmissible").

Saldana (and the other defendants) to the Wilson murder, and linking Avila to the Bowser murder. See, *e.g.*, pages 10-14, 62 n.26, 64-65, *supra*.[61]

VIII

18 U.S.C. 245(b)(2)(B), ON ITS FACE AND AS APPLIED IN THIS CASE, IS A VALID EXERCISE OF CONGRESSIONAL POWER

A. Standard Of Review

Questions of law, including the constitutionality of a statute, are reviewed *de novo*. See, *e.g.*, *United States* v. *Carranza*, 289 F.3d 634, 643 (9th Cir. 2002); *United States* v. *Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990).

---

[61] In this regard, defendants make the bare assertion that Paul's testimony was prejudicial because it permitted the jury to link the defendants to two other murders (the Cerda and Prudhomme murders) for which they were not charged, and then make the conclusion that because of their involvement in the uncharged murders, they were responsible for the charged murders. See Br. App. 122, 124. Nothing in the evidence, however, suggests that defendants had anything to do with the Cerda murders. With respect to the Prudhomme murder, defendants do not cite to anything in the record that would give the jury reason to use the evidence to draw the inference they suggest. Defendants also cite *United States* v. *Bradley*, 5 F.3d 1317 (9th Cir. 1993), holding that it was not harmless error to admit evidence of an uncharged homicide. Br. App. 122-123. In *Bradley*, however, the evidence was admitted, over the defendants' objection, under Fed. R. Civ. P. 404(b) (prior bad acts), but this Court found that there "was almost no evidence" linking one of the defendants to the murder and it was "at best[] of dubious value." 5 F.3d at 1320-1321.

B. Section 245(b)(2)(B), As Applied In This Case To The Use Of Public Streets Of Los Angeles, Is Constitutional

18 U.S.C. 245(b)(2)(B) makes it unlawful to use force or threat of force to willfully injure, intimidate, or interfere with any person because of his race and because he was enjoying facilities that were provided or administered by a subdivision of a state. Count Two alleged that Saldana, Martinez, and Cazares violated this statute by shooting and killing Kenneth Wilson because he was an African American and was using the public streets of Los Angeles.

Defendants argue, as they did below, that their conviction on Count Two should be vacated because Section 245(b)(2)(B) is "unconstitutional on its face and as applied in this case – to a murder committed on a public street." Br. App. 125. Asserting that Section 245(b)(2)(B) exceeds Congress's powers under both Section 2 of the Thirteenth Amendment and the Commerce Clause, defendants argue that (1) an act of violence does not impose a "badge or incident of slavery" that can implicate the Thirteenth Amendment (Br. App. 126), and (2) "racially-motivated, gang-related murders on local city streets do not substantially affect commerce," and therefore fall outside the scope of Congress's Commerce Clause powers (Br. App. 139). They also argue that a public street is not a "facility" for purposes of Section 245(b)(2)(B). Br. App. 142.

Defendants concede, however, that this Court has expressly held that Section 245(b)(2)(B) is a valid exercise of Congressional power under both Section 2 of the Thirteenth Amendment and the Commerce Clause; they raise their facial constitutional challenge only "to preserve the issue for later review." Br. App. 126 n.18 (citing *United States* v. *Allen*, 341 F.3d 870 (9th Cir. 2003)). We therefore address only defendants' argument that Section 245(b)(2)(B) is unconstitutional *as applied* in this case, *i.e.*, to a hate crime murder that is motivated by the victim's race and by his use of a public street, and their argument that a street is not a "facility."[62]

---

[62] In *Allen*, this Court first addressed defendants' Commerce Clause argument in light of the then-recent Supreme Court decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000). *Allen*, 341 F.3d at 879-883. The Court concluded that Section 245(b)(2)(B) regulates activities that "substantially affect" interstate commerce; indeed, the section "was enacted as part of a comprehensive federal body of civil rights legislation aimed at eradicating discrimination found to have an adverse impact on interstate commerce." *Id.* at 882-883 (internal quotation marks omitted). In rejecting defendants' Thirteenth Amendment argument, the Court noted that both the Second and Eighth Circuits "have concluded that [Section] 245(b)(2)(B) was a constitutional exercise of the Congress's authority under the Thirteenth Amendment." *Id.* at 883 (citing *United States* v. *Nelson*, 277 F.3d 164 (2d Cir. 2002); *United States* v. *Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)).

1. Congress's Power Under Section 2 Of The Thirteenth Amendment

Defendants' argument that Section 245(b)(2)(B), as applied to a racially-motivated murder on a city street, falls outside Congress's power under Section 2 of the Thirteenth Amendment is not correct, and has been rejected by other courts of appeals that have addressed it. It is also effectively precluded by this Court's decision in *Allen*.

The Supreme Court has interpreted Congress's power under Section 2 broadly, "[f]or that clause clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (quoting *The Civil Rights Cases*, 109 U.S. 3, 28 (1883)). As the Court stated, "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. Moreover, it is well-settled that under Section 2, Congress may reach conduct that is not directly prohibited by Section 1. See, *e.g.*, *Nelson*, 277 F.3d at 181-185 ("Congress may, under its Section Two enforcement power, now reach conduct that is not directly prohibited under Section One"; discussing cases).

As a general matter, the prohibitions of Section 245(b)(2)(B) fall within this enforcement power. The statute makes it a federal crime to willfully injure or interfere with any person "*because* of his race, color, religion, or national origin and *because* he is or has been * * * participating in or enjoying any [public] benefit, service, privilege, program, facility or activity." 18 U.S.C. 245(b)(2)(B) (emphasis added). As this Court has explained, "[t]he language of [Section] 245(b)(2)(B) leaves little doubt that a defendant will be convicted * * * only where he has the specific intent to interfere with a victim's enjoyment of a federally protected right on the basis of the victim's race." *United States* v. *Makowski*, 120 F.3d 1078, 1081 (9th Cir. 1997).

The legislative history of Section 245(b)(2)(B) reveals that the statute was focused on violent crime which interfered with racial minorities' participation in federally protected activities. The first use of the word "because" in Section 245(b)(2)(B) was intended to limit the statute's scope to acts "motivated by the race, color, religion, or national origin of the victim." S. Rep. No. 721, 90th Cong., 1st Sess. 8 (1967). The second "because" was intended to further limit the statute's scope to two types of situations: "[1] interference intended to prevent present or future participation in a described activity by the victim, and [2] interference intended as a reprisal against the victim for having participated in a

described activity." *Ibid.* Defendants acknowledge this "dual-intent" requirement and that, because of these limitations, this section stops well short of creating "a general, undifferentiated federal law of criminal assault." Br. App. 128 (quoting *Nelson*, 277 F.3d at 189).

Congress's determination that this sort of intentional interference with a person based on the person's race and use of a public facility imposed a "badge of slavery" was not irrational.[63] Indeed, in 1968, the same year in which Congress enacted Section 245(b)(2)(B), the Supreme Court held that the prohibition of racial discrimination in the sale and acquisition of real and personal property constituted a valid exercise of Congress's power to enforce the Thirteenth Amendment. *Jones*, 392 U.S. at 439. If Congress could have rationally concluded that segregation and *non-violent* discrimination constituted badges and incidents of slavery in 1968, then Congress could have also rationally concluded that *violent* interference with a person's use of a public facility constituted a badge of slavery. Indeed, the

---

[63] Defendants argue that Congress never mentioned the Thirteenth Amendment when it promulgated Section 245, and therefore that racially motivated homicides are not badges or incidents of slavery. Br. App. 134. The fact that Congress did not expressly invoke its Thirteenth Amendment enforcement authority in enacting Section 245(b)(2)(B), however, is irrelevant. See, *e.g.*, *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). This argument was also rejected in *Nelson*. 277 F.3d at 190-191 & n.26.

Supreme Court has held that Congress's conclusion that violent assault of African-American men on a public highway constituted a badge or incident of slavery prohibited by the Thirteenth Amendment was not irrational. *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971); see also *Bledsoe*, 728 F.2d at 1097 ("interfering with a person's use of a public park because he is black is a badge of slavery"). Moreover, acts of violence or force committed against racial minorities "with the intent to exact retribution for and create dissuasion against their use of public facilities have a long and intimate historical association with slavery and its cognate institutions." *Nelson*, 277 F.3d at 189. Congress was well aware of this association of private violence with slavery when it enacted Section 245(b)(2)(B).[64]

It follows that Section 245(b)(2)(B)'s application to private violence, motivated by the victim's race and because the victim was using a public facility (here, a public street), falls within Congress's power under Section 2 of the Thirteenth Amendment to proscribe conduct that constitutes a badge or incident of slavery. Indeed, the Second Circuit expressly so held in *Nelson*, concluding that Section 245(b)(2)(B), "as applied in the case at bar," *i.e.*, a racially-motivated

---

[64] See, *e.g.*, H.R. Rep. No. 473, 90th Cong., 1st Sess. 3-4 (1967); S. Rep. No. 721, 90th Cong., 1st Sess. 3 (1967).

attack of a Jewish person on a public street administered by the City of New York, was "a constitutional exercise of Congress's power under the Thirteenth Amendment." *Nelson*, 277 F.3d at 191. The Eighth Circuit similarly held that Section 245(b)(2(B) was constitutional as applied to the beating death of an African-American in a city park, *i.e.*, it "does not exceed the scope of the power granted to Congress by the Constitution" because there can be little doubt "that interfering with a person's use of a public park because he is black is a badge of slavery." *Bledsoe*, 728 F.2d at 1097; see also *United States* v. *Sandstrom*, 594 F.3d 634, 659-660 (8th Cir. 2010) (racially motivated murder of an African American while he walked on a public street; court rejects argument that Section 245(b)(2)(B) exceeded Congress's power under the Thirteenth Amendment, citing *Bledsoe*). This Court in *Allen* relied on the "well-reasoned opinions" of both *Nelson* and *Bledsoe* in finding that "the enactment of [Section] 245(b)(2)(B) was constitutional exercise of Congress's authority under the Thirteenth Amendment." *Allen*, 341 F.3d at 884. Therefore, Section 245(b)(2)(B) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment as applied in this case.[65]

---

[65] Indeed, in *Allen* defendants used threats of violence and racial epithets to (continued…)

2. Congress's Power Under The Commerce Clause

Defendants also argue that Section 245(b)(2)(B), as applied, falls outside Congress's Commerce Clause power because "racially-motivated, gang-related murders on local city streets do not substantially affect commerce" and are not activities that are "commercial in nature." Br. App. 139-140 (internal quotation marks omitted). This argument is not correct, and is also effectively precluded by this Court's decision in *Allen*.[66]

In concluding that Section 245(b)(2)(B) was a "constitutional exercise of Congress's Commerce Clause power," the Court in *Allen* explained that this provision "was enacted as part of a comprehensive federal body of civil rights legislation aimed at eradicating discrimination found to have an adverse impact on interstate commerce." *Allen*, 341 F.3d at 882 (internal quotation marks omitted). The Court also noted that the Supreme Court upheld these civil rights laws,

---

(…continued)

drive an African American man and two Hispanic individuals out of a public park "for no reason other than their race." *Allen*, 341 F.3d at 873. In the instant case, defendants used violence, threats of violence, and racial epithets to drive African American individuals out of their neighborhood and its public streets because of their race.

[66] This Court, of course, need not find that Section 245(b)(2)(B), as applied, is within Congress's power under *both* the Thirteenth Amendment and the Commerce Clause. See *Nelson*, 277 F.3d at 191 n.28.

including Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.* (prohibiting discrimination in places of public accommodation), as a valid exercise of the Congress's Commerce Clause power, "even though the legislation regulated local, intrastate activities." *Ibid.* (citing *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964)). The Court stated that Section 245 "is merely the criminal counterpart to Title II and is based on the same findings about the effect of racial discrimination on interstate commerce." *Ibid.* The Court then noted that, in the case before it, there was a racially motivated hate crime in a public park that interfered with the victim's federally-protected civil rights, and that "[i]f civil interference with these federal civil rights affects interstate commerce, then criminal interference with them does so as well." *Id.* at 883. The Court, therefore, although purporting to address a facial challenge to Section 245(b)(2)(B), made clear that the statute is constitutional under the Commerce Clause as applied to racially-motivated violence directed at the victims because they are using a public facility – essentially the same facts as in the instant case.

Defendants do not otherwise suggest how the facts in the instant case render application of Section 245(b)(2)(B) beyond the scope of Congress's Commerce Clause power. Moreover, application of the statute to defendants' conduct in this

case is not undermined by the fact that the race-based murder was not itself commercial or economic activity, or that the crime might not have had a discernable effect on interstate commerce; indeed, there is no "categorical rule against aggregating the effects of any noneconomic activity." *United States* v. *Morrison*, 529 U.S. 598, 613 (2000); see also *United States* v. *Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) ("Congress may regulate to prevent the inhibition or diminution of interstate commerce * * * even when the activity controlled is not itself commercial."). Instead, Congress, in regulating "noneconomic, violent criminal conduct," must be mindful of the Constitution's "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-618. This Court in *Allen* recognized that "Section 245(b)(2)(B) regulates only a specific type of violence; namely, violence that interferes with federal civil rights on the basis of 'race, color, religion or national origin.' This is not merely intrastate violence, but rather, violence that affects civil rights, which are traditionally of federal concern." *Allen*, 341 F.3d at 881; see also *Nelson*, 277 F.3d at 191 n.28 ("[p]rivate violence motivated by a discriminatory animus against members of a race or religion * * * who use public facilities * * * is anything but intrinsically a matter of purely local concern"); *United States* v. *Furrow*, 125 F. Supp. 2d 1178, 1185 (C.D. Cal. 2000) (Section 245 regulates matters that "Congress and the courts have recognized as

'truly national'") (citation omitted). Accordingly, Section 245(b)(2)(B), as applied to a murder motivated both by the victim's race and his use of a public street, is directed at precisely the conduct Congress intended the statute to apply to, and to which Congress has generally recognized substantially affects interstate commerce.

Finally, defendants assert that Congress did not make any congressional findings that a racially motivated murder on a street affects interstate commerce, suggesting that such a failure is fatal to the application of Section 245(b)(2)(B) in this case. Br. App. 142. This argument also fails. First, Congress is not required to address the application of a statute to every possible factual scenario or make "particularized findings in order to legislate." *Perez* v. *United States*, 402 U.S. 146, 156 (1971). Such a requirement would "prohibit Congress from passing broad remedial statutes that protect against methods of discrimination yet to be invented." *Hayden* v. *Pataki*, 449 F.3d 305, 356 (2d Cir. 2006) (en banc) (Parker, J., dissenting). In any event, because the subject matter of Section 245(b)(2)(B) was adopted as a companion to the 1964 Act, congressional findings made in connection with earlier legislation can be relied upon to uphold the new legislation, provided the new legislation does not "plow[] thoroughly new ground or represent[] a sharp break" with the previous related legislation. *United States* v. *Lopez*, 514 U.S. 549, 563 (1995); see also *United States* v. *Lane*, 883 F.2d 1484,

1494 (10th Cir. 1989). Congress had a rational basis for concluding that race-based violence against those using a public facility has, in the aggregate, the same sort of adverse effect on interstate commerce as the denial by the facilities themselves of access to particular minorities. Therefore, the absence of new evidence or findings in the legislative history of Section 245 is of no consequence.

3. Los Angeles's Public Streets Are "Facilities" Within The Meaning Of 18 U.S.C. 245(b)(2)(B)

Defendants argue that a street is not a "facility" within the meaning of Section 245, and therefore the statute cannot be applied to this case. Br. App. 134-135. They also assert that Congress did not intend "to federalize race-related violent crimes occurring on city streets." Br. App. 135. This argument has been rejected – correctly – by every federal court that has addressed it.

First, the plain language of the statute – *i.e.*, requiring that the victim be "participating in or enjoying any benefit, service, privilege, program, *facility* or activity provided or administered by any State or subdivision thereof" – encompasses public streets. 18 U.S.C. 245(b)(2)(B) (emphasis added). Although the term "facility" is not defined, the term "clearly and unambiguously includes city streets within its meaning." *Nelson*, 277 F.3d at 193. The court in *Nelson* noted that the term is defined to mean "something that promotes the ease of any action, operation, transaction, or course of conduct" or "something that * * * is

built, constructed, installed or established to perform some particular function or facilitate some particular end." *Ibid.* (internal quotation marks omitted). The court concluded that because a "city street undoubtedly promotes the ease of travel and transportation within the city and is built and constructed to perform [that] function[,] * * * [i]t therefore unambiguously falls within the clear meaning of the text of [Section] 245(b)(2)(B)." *Ibid.* (internal quotation marks omitted).

Every other federal court to address this issue has reached the same conclusion. See, *e.g.*, *United States* v. *Mungia*, No. 96-10391, 1997 WL 256701 (5th Cir. April 7, 1997) (per curiam); see also *United States* v. *White*, 846 F.2d 678, 697 (11th Cir. 1988) (Dumbauld, J., concurring) (Section 245(b)(2)(B) applies to racially motivated interference with the use of the streets); *United States* v. *Sowa*, 34 F.3d 447, 449 (7th Cir. 1994) (affirming, without discussing "streets" issue, conviction under Section 245 for interference with use city streets); *United States* v. *Three Juveniles*, 886 F. Supp. 934, 945 (D. Mass. 1995).[67] Further, defendants' argument that our reading of the statute would federalize all street

---

[67] In addition, decisions dealing with parks and a lake also support the conclusion that public streets are "facilities" under Section 245. See *United States* v. *Franklin*, 704 F.2d 1183 (10th Cir. 1983) (woman jogging in a city park); *Bledsoe*, 728 F.2d 1094 (public park); *United States* v. *Price*, 464 F.2d 1217 (8th Cir. 1972) (federally-owned lake).

crimes involving minority victims ignores the dual-intent requirement of Section 245, which defendants have acknowledged and serves to limit the reach of the statute. Finally, although not expressly challenged by defendants, we note that the government introduced at trial substantial evidence that the street on which Mr. Wilson was murdered (Avenue 52) is a public street administered by the City of Los Angeles. E.R. 4502-4511, 4520-4533. [68]

IX

THE DISTRICT COURT DID NOT ERR IN DENYING SALDANA'S MOTION TO SUPPRESS STATEMENTS HE MADE TO POLICE WITHOUT BEING GIVEN HIS *MIRANDA* RIGHTS[69]

A. Standard Of Review

A court's decision to admit or suppress statements that may have been made in violation of *Miranda* is reviewed *de novo*. *United States* v. *Brobst*, 558 F.3d 982, 995 (9th Cir. 2009). Whether a person is "in custody" for purposes of *Miranda* is a mixed question of law and fact that is reviewed *de novo*. See, *e.g.*,

---

[68] Defendants also argue that the "rule of lenity requires that the statute be read as being inapplicable here." Br. App. 142 n.23. As noted above, however, the term "facility" plainly includes city streets within its meaning, and Section 245(b)(2)(B) was enacted specifically to address race-based violence against persons using public facilities.

[69] This issue is raised in Saldana's separately filed Supplemental Opening Brief.

United States v. *Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009). The factual findings underlying the district court's decision are reviewed for clear error. *Brobst*, 558 F.3d at 995.

B. Saldana's Statements To The Police

Two months before the Wilson murder, Renee Cerda, a gang member, was murdered. Saul Audelo became a suspect in that murder, and was interviewed by the police (he was later convicted). He denied killing Cerda, but admitted owning a 9 mm Ruger and selling it to Saldana shortly after the Cerda murder.[70] Because detectives investigating the Cerda murder wanted to locate the firearm, they obtained a search warrant for Saldana's residence. See S.S.E.R. 65-67, 78-81.

On May 6, 1999, police officers went to Saldana's residence to execute the search warrant. They did not find the gun, but asked Saldana if he would answer questions at the police station. Saldana agreed. According to Gabriel Rivas, one of the officers who executed the search warrant, at that time he did not suspect Saldana was involved in the Cerda murder (and told Saldana that) and was not investigating Saldana for any crime. S.S.E.R. 79-80.

---

[70] See Issue 5, *supra*.

Saldana was questioned for approximately ten minutes in an interview room. He was not handcuffed and was told he was not under arrest and was free to leave at any time, which Saldana acknowledged he understood. The conversation was recorded without Saldana's knowledge.[71] Saldana admitted to purchasing a 9 mm firearm from Audelo, but said he no longer had the weapon. He was asked to try to locate the weapon and then contact Rivas, which Saldana agreed to do. S.S.E.R. 80-81. Saldana was not given *Miranda* warnings and was not arrested at this time.[72]

Several months later, the police were informed by another gang member that Saldana had participated in the Wilson murder and had used a 9 mm gun he obtained from another gang member. At that time, the officers recognized that Saldana may have incriminated himself in his May 6, 1999, statement to officers

---

[71] The transcript of the audio tape (Gov't Exh. 251) was admitted into evidence during Rivas's testimony. See E.R. 3576-3580; see also S.S.E.R. 53-56 (partial transcript).

[72] According to Saldana's Declaration, he was handcuffed from the time he was confronted by the officers at this residence until he was in the interview room; Rivas, and another officer who was present, did not recall Saldana being handcuffed. See E.R. 119-120; S.S.E.R. 79; E.R. 330, 362-363 (Rivas testimony at suppression hearing); E.R. 479, 489 (Detective William Eagleson). Saldana also stated that at the police station he did not feel free to leave until he was told he could do so. E.R. 120.

that he purchased a 9 mm gun from Audelo. Approximately two years later, ballistics evidence revealed that one of the guns used in the Wilson murder had been used in the Cerda murder. See generally S.S.E.R. 67; Issue VII, *supra*.

Saldana filed a pre-trial motion to suppress the statements he made at the May 6, 1999, interview at the police station on the ground that he was not given his *Miranda* rights. The United States responded that Saldana was neither in "custody" nor subject to "interrogation." S.S.E.R. 60-83. On April 10, 25, and 26, 2006, the court held hearings on the motion, at which Rivas and Saldana testified. E.R. 295-389, 413-442, 469-512. Rivas testified that he made it clear to Saldana that he was not a suspect and that "he was not being looked at in any crime"; Saldana never indicated that he wanted to stop talking and go home; and Saldana was cooperative and did not appear to be scared. E.R. 332-336, 382. Saldana acknowledged that the officers were asking for his help in finding the gun and that the officers told him he was not under arrest; he also testified that he was handcuffed at his residence and in the car on the way to the station, and that he did not feel free to leave the interview. E.R. 413-442.

On July 7, 2006, the day that government called Audelo and Rivas as witnesses at trial, the court denied Saldana's suppression motion, without

elaboration. E.R. 3483.[73] Audelo then testified that he was convicted for the Cerda murder and sold the gun used in that murder to Saldana. See Issue 5, *supra*. Rivas testified that after he executed a search warrant of Saldana's residence he asked Saldana to come to the police station, and Saldana agreed. E.R. 3571-3572. Rivas further testified that he told Saldana that he (Rivas) was investigating the Cerda murder, Saldana was not a suspect or under arrest, Saldana never indicated that he was unwilling to talk to Rivas, and Saldana admitted he purchased a 9 mm Ruger from Audelo. E.R. 3573. The government then introduced into evidence a recording and transcript of part of the May 6 interview. E.R. 3576.

C. Because Saldana Was Not In Custody, The District Court Did Not Err In Denying The Motion To Suppress

Saldana argues that the denial of his motion to suppress should be reversed for two reasons, one procedural and one substantive. First, Saldana argues that the court gave no reason for its denial of the suppression motion, thereby precluding appellate review and requiring a remand, citing *United States* v. *Wright*, 625 F.3d 583, 602-604 (9th Cir. 2010). Saldana Br. 6-7. In *Wright*, the Court reversed the denial of a motion to suppress a confession, stating that the trial court did not make

---

[73] The court stated that it would either "write something or state my reasons later on the record." E.R. 3483. There is no evidence in this record that the court did so.

threshold factual findings "important to determining whether Wright would have felt free to leave," including resolving conflicting testimony on whether Wright asked to call an attorney and was told he was free to leave. *Id.* at 602. The Court noted its earlier holding that a "remand for factual findings is required where it is impossible to determine the basis for the district court's denial of a motion to suppress." *Id.* at 604 (citing *United States* v. *Prieto-Villa*, 910 F.2d 601, 606 (9th Cir. 1990) and Fed. R. Crim. P. 12(d)[74]). In the instant case, however, there were no material factual disputes concerning the circumstances of the interview at the police station. It was not disputed, for example, that Saldana was told he was not under arrest and was free to leave, and that he was not handcuffed at the station. And although Saldana did testify that he did not *feel* free to leave, as discussed below the test for whether a person is "in custody" for *Miranda* purposes is an objective one. For these reasons, the district court's denial of the motion to suppress did not run afoul of either *Wright* or Rule 12(d).[75]

---

[74] Fed. R. Crim. P. 12(d) requires courts resolving pretrial motions that involve "factual issues" to "state its essential findings on the record."

[75] We also note that the principal rationale for the strict application of Rule 12(d) – that the government's case "may turn upon the confession or other evidence that the defendant seeks to suppress" – is inapplicable here, given the extensive evidence of Saldana's participation in the crimes charged and Audelo's

(continued…)

Second, Saldana argues that he was in "custody" when questioned but not given his *Miranda* rights, and therefore his statements should have been suppressed. Saldana Br. 6-12. As Saldana acknowledges, an officer's obligation to administer the *Miranda* warnings attaches only "where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Whether a person is in custody "turns on whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," an inquiry requiring the court to "examine the totality of the circumstances from the perspective of a reasonable person in the suspect's position." *United States* v. *Crawford*, 372 F.3d 1048, 1059 (9th Cir. 2004) (en banc) (internal quotation marks omitted); see *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966) ("custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"). The custody determination is objective and is not based upon the subjective beliefs of the officers or the individual being questioned. *Bassignani*, 575 F.3d at 883; *United*

(…continued)

testimony that he was convicted for the Cerda murder, had possession of the 9 mm Ruger used in the murder, and sold the gun to Saldana. *Prieto-Villa*, 910 F.2d at 609-610 (internal quotation marks omitted).

States v. *Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987) (whether "the officers established a setting from which a reasonable person would believe that he or she was not free to leave"). Relevant factors include "the language used to summon the individual"; the extent to which the person is confronted with "evidence of guilt"; the physical surroundings during the questioning; its duration; and "the degree of pressure applied to detain the individual." *Brobst*, 558 F.3d at 995 (internal quotation marks omitted).

Saldana argues that he was in custody because he was interviewed at a police station in a "law enforcement-dominated situation," and the fact that he stated he understood he was not under arrest did not "sanitize" the interview. Saldana Br. 9-12.[76] The undisputed facts make clear, however, that Saldana came to the police station voluntarily; understood that the officers were asking for his help in finding a gun (used in an unrelated murder); was told that he was not a suspect and not under arrest; was not handcuffed during the interview; and never indicated that he wanted to stop talking or go home. Moreover, Saldana was not

---

[76] Because Saldana's other arguments concern the time period during which his residence was searched, they are not relevant here. See *Crawford*, 372 F.3d at 1060. For the same reason, his reliance on *United States* v. *Kim*, 292 F.3d 969 (9th Cir. 2002) (holding that Kim was in custody while being interrogated at his store during the execution of a search warrant), is misplaced.

confronted with any evidence of his guilt because at that time the officers were not investigating him for any possible wrongdoing. Further, the mere fact that the questioning took place at a police station is not dispositive, see *Mathiason*, 429 U.S. at 495, particularly where he was asked, not ordered to come to the station and speak with officers. See *United States* v. *Kim*, 292 F.3d 969, 974-975 (9th Cir. 2002). Finally, his asserted subjective belief that he was not free to leave is irrelevant but, in any case, belied by the transcript of the interview, which indicates that he knew he was not going to be detained after the interview because he was going to leave and try to track down the gun and then call Rivas later that day to arrange for Rivas to pick it up. S.S.E.R. 54-56. In short, the totality of the circumstances reflect that there was no restraint on Saldana's freedom of movement of a degree associated with a formal arrest, and therefore Saldana was not "in custody" for purposes of the *Miranda* warnings.[77]

---

[77] Cf. *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004); *California* v. *Beheler*, 463 U.S. 1121 (1983) (per curiam); *Mathiason*, 429 U.S. at 494-495; *Crawford*, 372 F.3d at 1059-1060; *Bassignani*, 575 F.3d at 883-887 (all addressing factors supporting conclusion that defendant was not in custody). Moreover, even if Saldana was in custody, his *Miranda* rights were not violated because the interview did not constitute "interrogation." Because the officers had no knowledge of Saldana's involvement in the Wilson murder, and no information that the gun had a role in that crime, they did not intend to elicit incriminating statements from Saldana. See generally *United States* v. *Washington*, 462 F.3d 1124, 1132-1133

(continued…)

X

DEFENDANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE CUMULATIVE EFFECT OF ANY OF THE CLAIMED ERRORS

Finally, defendants argue that the cumulative effect of the trial errors they raise violates their due process rights and warrants reversal. Br. App. 144-145. They offer no further explanation as to why this might be so. Although courts have recognized that, in appropriate cases, the combined effect of errors that individually may be harmless can rise to a level of prejudice violating due process, see Br. App. 144-145 (citing cases), this argument is necessarily predicated on the existence of trial errors. For the reasons set forth above, "[b]ecause the district court committed no error in this case, harmless or otherwise, the cumulative error doctrine does not apply." *United States* v. *Carreno*, 363 F.3d 883, 889 n.2 (9th Cir. 2004), vacated and remanded on other grounds, 543 U.S. 1099 (2005).

In any event, even if this Court were to determine that some of the trial court's rulings were error, no combination of the alleged errors deprived defendants of a fair trial. In making this determination, the Court "must ask whether the aggregated errors so infected the trial with unfairness as to make the

---

(…continued)

(9th Cir. 2006); *United States* v. *Salgado*, 292 F.3d 1169, 1172-1174 (9th Cir. 2002).

resulting conviction a denial of due process." *Jackson* v. *Brown*, 513 F.3d 1057, 1085 (9th Cir. 2008) (internal quotation marks omitted). This inquiry, in turn, largely depends on the strength of the government's case and whether the harmlessness inquiry for each of the claimed errors presents a close question. See, *e.g.*, *United States* v. *Nadler*, 698 F.2d 995, 1002 (9th Cir. 1983); *United States* v. *Levy*, 207 F. App'x 833, 837 (9th Cir. 2006). On both counts, there is no basis to reverse the convictions. Indeed, the government's case could hardly be considered "weak." See, *e.g.*, *United States* v. *Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors."). There was overwhelming evidence of defendants' guilt, not only from other gang members who participated in the crimes, but also from numerous victims of the underlying acts (racial assaults and harassment), weapons experts, and others who linked various defendants to elements of the crimes charged (*i.e.*, to the conspiracy to violate the housing rights of African-Americans, the violation of Wilson's federally protected right to use the streets of Los Angeles, and the use of a firearm). See generally *United States* v. *Nobari*, 574 F.3d 1065, 1082 (9th Cir. 2009) ("errors, even when considered together, were harmless to the defendants' rights to a fair trial, given the overwhelming evidence the prosecution presented against them").

CONCLUSION

For the foregoing reasons, this Court should affirm the convictions and sentences of all four defendants.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Thomas E. Chandler
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that there are no related cases pending in this Court.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

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) contains 32,879 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and is accompanied by a motion for leave to file an oversize brief; 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 Word 2007, in 14-point Times New Roman font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Dated: June 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE (Redacted Version) 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 further certify that all participants in this case are registered CM/ECF users and will be served via the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney