
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4745 (L); 22-4746; 23-4005; 23-4006; 23-4020

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD HERRERA CONTRERAS, PABLO VELASCO
BARRERA, HENRY ZELAYA MARTINEZ, DUGLAS RAMIREZ
FERRERA, AND ELMER ZELAYA MARTINEZ

Defendant-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria

The Honorable Rossie D. Alston, Jr., District Judge

BRIEF OF THE UNITED STATES

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State Statutes

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Introduction

Over the span of one month in 2016, members and associates of the Park View Locos Salvatrucha clique of the violent street gang La Mara Salvatrucha, more commonly known as MS-13, kidnapped and murdered two boys, ages 17 and 14, in the same Northern Virginia park. Each victim was stabbed and hacked to death with knives, machetes, and a pickaxe before being buried in a shallow grave. The slayings were as senseless as they were wanton insofar as both victims lost their lives because of their killers' mistaken belief that the boys had affronted the gang.

Over a dozen defendants were indicted for their roles in the murders. Most of them pled guilty, but five defendants—Ronald Herrera Contreras, Pablo Velasco Barrera, Henry Zelaya Martinez, Douglas Ramirez Ferrera, and Elmer Zelaya Martinez—stood trial over an eight-week span in 2022. Ultimately, the jury convicted each of them on all counts, and the district court subsequently sentenced each of them to multiple terms of life imprisonment.

On appeal, the defendants cobble together a smorgasbord of claims in an effort to reverse their convictions. However, they fail to demonstrate that any error occurred, that the district court abused its discretion, or that there was insubstantial evidence to support those convictions. Accordingly, the Court should affirm the judgments below.

Issues Presented

1. Did the district court err by allowing a detective with several years' worth of experience exclusively investigating MS-13 to testify as a gang expert?
2. Did the district court plainly err when it allowed the government to present historical racketeering evidence aimed at establishing the enterprise element of the defendants' Violent Crimes in Aid of Racketeering Act ("VICAR") charges?
3. Did the district court abuse its discretion by admitting a discrete number of highly probative videos and photos offered to demonstrate what befell the victims and who perpetrated the underlying crimes?
4. Does substantial evidence support Pablo Velasco Barrera's convictions for substantive violations of 18 U.S.C. §§ 1959(a) and 1201(a)?
5. Did the district court err by refusing to sever Pablo Velasco Barrera or the counts he faced when all of the defendants were charged with the same eight offenses arising from two related murders?
6. Did the district court abuse its discretion by refusing to give the jury a duress instruction after the defendants failed to make a prima facie showing that any element of that defense could be established?

7. Did the district court abuse its discretion in admitting a handwritten note, recorded immediately after the event it memorialized, under the present-sense-impression exception to the rule against hearsay?

8. Did the district court err by refusing to suppress evidence obtained from Henry Zelaya Martinez incident to his lawful arrest?

9. Did the district court err by refusing to suppress Henry Zelaya Martinez's murder confession after a knowing, intelligent, and voluntary waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)?

10. Did the district court abuse its discretion in declining to give Henry Zelaya Martinez's proposed lesser-included-offense instruction where the uncharged offense is not necessarily a lesser-included version of the charged offense and where the jury could not have rationally convicted Henry Zelaya Martinez of the uncharged offense and not the charged offense?

11. Does the Eighth Amendment prohibit the imposition of a mandatory life sentence on a defendant convicted of kidnapping resulting in death and murder in aid of racketeering activity who was an adult at the time of the offenses?

Statement of the Case

A. MS-13 and the PVLS Clique

La Mara Salvatrucha, more commonly known as MS-13, is a transnational gang with a significant presence in the United States, including in Northern Virginia, but the senior leadership of which primarily resides in El Salvador. JA1304, JA1309, JA1311. MS-13's objective is to control territory through fear generated by the threat of severe violence. JA1349. Brutality is MS-13's hallmark—*e.g.*, to achieve full membership in the gang (a position known as homeboy), one has to be beaten by other gang members for 13 seconds; and to get promoted to the higher ranks in the gang, one has to engage in acts of violence, typically murder. JA1327, JA1369, JA1374, JA1419.

MS-13 is organized into programs and further subdivided into cliques, of which there are hundreds. JA1316–1318. One of those cliques is the Park View Locos Salvatrucha, also known as PVLS. JA1318. During the period relevant to this case, PVLS had a substantial presence in Virginia. JA1318. At that time, to become a homeboy, a member of PVLS had to commit at least two murders. JA1937.

In the summer of 2016, S.A.A.T., who had yet to turn 14, introduced his friend E.E.E.M., then 17 years old, to the PVLS clique in Virginia. JA1599,

JA2066, JA2080, JA4289. S.A.A.T. was a *paro*—the lowest position in the gang—who wanted E.E.E.M. to join MS-13 as well. JA2066–2067.

B. The Murder of E.E.E.M.

In early August, S.A.A.T. noticed that E.E.E.M. had previously posted a photo on his Facebook page depicting a hooded and masked figure standing in a wooded area with the number “666” superimposed above the figure’s head.

JA2073, JA6144. S.A.A.T. forwarded it to Josue Vigil Mejia, a/k/a “Horror” (“Vigil”), a higher ranking member of PVLS in Virginia, figuring that E.E.E.M. might get punished for it. JA2069, JA2073–2075, JA2079, JA2082–2083, JA2430. That photo was then circulated among PVLS members, who determined—based on the photo alone—that E.E.E.M. was actually a member of MS-13’s archrival, the 18th Street gang, simply because six plus six plus six equals 18. JA2069, JA2075.

Vigil showed the photo to one of the leaders of PVLS in the United States, Edenilson Misael Alfaro, a/k/a “Lil Sicario” (“Alfaro”). JA2075. After concluding that the photo was sufficient proof that E.E.E.M. was with 18th Street, Alfaro issued a “green light” for E.E.E.M.—*i.e.*, an order that E.E.E.M. be killed. JA1342–1343, JA2080. Soon thereafter, Vigil, Elmer Zelaya Martinez, a/k/a “Killer” (“Elmer Zelaya”), Henry Zelaya Martinez, a/k/a “Certo” (“Henry Zelaya”), Ronald Herrera Contreras, a/k/a “Speedy” (“Herrera”), Erick Palacios

Ruiz, a/k/a “Cara de Malo” (“Palacios”), Francisco Avila Avalos, a/k/a “Punche” (“Avila”), Pablo Velasco Barrera, a/k/a “Oscuro” (“Velasco”), and Douglas Ramirez Ferrera, a/k/a “Artillero” (“Ramirez”) arranged to have E.E.E.M. lured to a park where they would murder him. JA2084–2086.¹

On August 28, 2016, Palacios sent E.E.E.M. a Facebook message, advising him that a gang meeting would be taking place that night. JA6099. Palacios directed E.E.E.M. to take a bus to Alexandria and to come alone. JA6099-6100. E.E.E.M. did so and was met by Vigil, Palacios, and Avila, all of whom rode a bus to the vicinity of Holmes Run Stream Valley Park (“Holmes Run Park”) in Fairfax County, Virginia. JA2118, JA2126.

The four of them eventually met up with other MS-13 members, including each of the defendants. JA2126–2128, JA3312–3315. Thereafter, in a wooded area in the park at the top of a hill, the group butchered E.E.E.M. with knives, a machete, and a pickaxe. JA2129–2137, JA3316–3322. Some of those who participated in the murder also buried E.E.E.M. in the park that night in the hope that his body—and their crime—would never be discovered. JA2137–2138, JA3322–3323.

¹ Although they were technically members of different cliques, Herrera and Ramirez affiliated with PVLS. JA1977, JA2090, JA2531–2532, JA2534.

For participating in E.E.E.M.'s murder, Velasco was promoted from *paro* to the next rung up on the ladder, known as *observacion*. JA2152, JA2254, JA2842–2843, JA6242. Ramirez was promoted to *chequeo*, the position immediately above *observacion*. JA2152–2153, JA6248. Elmer Zelaya and Henry Zelaya—who are brothers—were promoted to homeboy. JA2149, JA2151–2152, JA2158, JA3333, JA6209, JA6220.² As for Herrera, he sought a promotion to homeboy within his clique, the Western Locos Salvatrucha, but he ultimately remained a *chequeo*. JA2153, JA2180–2181, JA2842, JA6151–6164.

On September 1, 2016, the Fairfax County Police Department (the “FCPD”) initiated a missing-persons investigation for E.E.E.M. after his family reported not seeing him since the evening prior to his death when he stepped outside of his apartment. JA1597–1598, JA3621.

C. The Murder of S.A.A.T.

On the night that E.E.E.M. was murdered, S.A.A.T., who had turned 14 about a week earlier, was in juvenile detention. JA1718, JA1720, JA1730, JA1732–1733, JA2192. When he was released a few weeks later, S.A.A.T. learned

² Alfaro further promoted Elmer Zelaya, who celebrated E.E.E.M.'s murder the day after he was killed, to the position of First Word—*i.e.*, the leader of PVLS in Virginia. JA2190–2191, JA2265, JA4738–4739, JA6240. The responsibility for maintaining discipline within a clique ultimately rests with the First Word, and it is the First Word who is charged with obtaining even higher ranking gang members' permission for the clique to commit murders. JA1327–1328.

that E.E.E.M. was missing and that E.E.E.M.'s family was looking for him. JA1732–1733. S.A.A.T. began to ask questions about E.E.E.M.'s whereabouts. JA2192–2193, JA2611–2613, JA6103–6106. Over Facebook, he even asked Elmer Zelaya whether the gang had given E.E.E.M. a beating for the 666 photo. JA6105. Because of S.A.A.T.'s questions, and because a rumor was circulating that S.A.A.T. had been released from juvenile detention early, Elmer Zelaya, Herrera, and others began to suspect that S.A.A.T. was an informant. JA2193–2196, JA2211–2213, JA2607–2610, JA2880.

Elmer Zelaya and Vigil told Alfaro about their suspicions, and Alfaro in turn authorized a green light for S.A.A.T. for violating MS-13's strict rule prohibiting cooperating with law enforcement. JA1342, JA2213–2216, JA2218, JA2608–2610. Elmer Zelaya and the others decided to kill S.A.A.T. in the same way they had murdered E.E.E.M. JA2219, JA2221, JA2623–2625, JA3662.

On the evening of September 26, 2016, Elmer Zelaya asked S.A.A.T. to come to a gang meeting that night. JA6108. He also instructed S.A.A.T. to delete all of their communications. JA6109. That night, S.A.A.T., garbed in a black jacket and pajama bottoms, traveled from his home to the parking lot of a Target store in Falls Church, Virginia. JA2628, JA2800, JA3102, JA3229, JA3709, JA3714, JA3856. There, he met up with Elmer Zelaya, Herrera, Velasco, Palacios, Avila, Anderson Villatoro Rivera, a/k/a "Escavador" ("Villatoro"), and Moris

Castro Coreas (“Castro”), all of whom had arrived in a large SUV. JA2622, JA2629, JA3091–3092, JA4617. After picking up S.A.A.T., the group drove to Holmes Run Park, where they met up with Henry Zelaya, Ramirez, Yonathan Melgar Martinez, a/k/a “Oso” (“Melgar”), Edwin Orellana Caballero, a/k/a “Dupla,” and two PVLS associates from Maryland, Fredys Baires Abarca, a/k/a “Lil Clandestino” (“Baires”) and Oscar Sorto Romero, a/k/a “Lobito.” JA2630, JA2645–2646, JA2801, JA2905, JA3429–3432, JA6256.

Once inside the park, Elmer Zelaya announced that they were going to have the supposed gang meeting deeper into the woods. JA3434, JA3436–3437. S.A.A.T. followed the group. JA2650, JA3114. About 50 yards from where E.E.E.M. had been killed, while some of the co-conspirators served as lookouts, Herrera grabbed S.A.A.T. by the neck while others began to stab him. JA2669, JA3116, JA3120. At one point, one of the Zelaya brothers slit S.A.A.T.’s throat. JA2663, JA2670–2671, JA3121–3122, JA3128, JA3243, JA6446. Eventually, everyone there, including each of the defendants, stabbed or chopped S.A.A.T. with a knife, a machete, or a pickaxe. JA2664–2665, JA2798, JA2911–2912, JA2918–2920, JA3120–3122, JA3127, JA3442–3443, JA6449–6450. Some of this attack was recorded on a cell phone. JA2668–2669, JA2920–2921, JA3120, JA3444, JA6694. So forceful were some of the blows sustained by S.A.A.T. that

his mandible was completely bisected and the back half of his skull was shattered into over a dozen pieces. JA3892–3893, JA3896–3897.

When they were finished slaughtering him, some of S.A.A.T.’s killers buried his body, though not before Herrera stole S.A.A.T.’s shoes off his feet. JA2665–2666, JA3135–3136, JA6372–6373, JA6422. Within hours, several of the participants, at Elmer Zelaya’s direction, had deleted S.A.A.T. as a friend on Facebook to conceal their connection to him. JA2674–2676, JA3151–1352, JA4335, JA4697–4698, JA4741, JA4787–4788, JA4800, JA5089.

On October 4, 2016, the FCPD initiated a missing-persons investigation for S.A.A.T. JA1717, JA3622. The last time his mother saw him alive, S.A.A.T., who was wearing a pair of multi-colored pajama pants, was going outside to take out the trash. JA1717, JA1743, JA1750–1751, JA6347.

D. The Discovery of the Murder Videos

In November 2016, officers with the Montgomery County Police Department arrested Alfaro, who was wanted for murder in Marin County, California. JA2471–2473, JA2478, JA2491. When he was apprehended, Alfaro was in possession of a cell phone, which was seized. JA2491–JA2492. After obtaining a search warrant, law enforcement officers reviewed data extracted from the cell phone and discovered two videos depicting what appeared to be portions of the same murder. JA2492–2493, JA3623–3625.

In one of the videos found on Alfaro's cell phone, a victim can be seen lying face down on the ground while multiple subjects are striking him with weapons, including a kitchen knife and machetes. JA6695. The victim is wearing plaid boxer shorts and multi-colored pajama pants. JA6695. Based on that information and the fact that the victim appeared to be slight in stature, law enforcement officers suspected that the victim was S.A.A.T. JA3625. At that time, however, they had no leads on where his body might be found. JA4288–4290.

E. The Recovery of the Victims' Remains

On February 13, 2017, Herrera was arrested in connection with an unrelated case. JA3626–3627, JA3634, JA3636–3637, JA6832. While he was in custody, Herrera told the FCPD that he knew where two bodies were buried. JA3636, JA3638, JA3640.

On February 28, 2017, Herrera, who remained in restraints, directed law enforcement officers to Holmes Run Park. JA3640–3641, JA3643–3645, JA3699. At that location, Herrera reported that there were two bodies in hidden graves. JA3696, JA3701. He led officers into the park and eventually up a steep embankment to an area in the woods where there was a depression in the ground, and he said that he believed S.A.A.T.'s body was buried there. JA3647–3654, JA3700–3701. Herrera thought the other body was buried nearby. JA3701–3702.

The next day, local law enforcement and the FBI began conducting a search of the wooded area that would continue through March 3, 2017. JA3745. During the search, they located two sets of human remains within close proximity to one another that were later identified as E.E.E.M. and S.A.A.T. JA3831–3832. Both deaths were ruled homicides. JA3833–3834, JA3852.

For roughly a year thereafter, the FBI pursued an investigation into the murders, building its case through the analysis of local police reports, Facebook records, WhatsApp communications, cell phone extractions, call detail records, cell site location information, Google location history data, and files backed up to the cloud as well as the interviews of numerous witnesses and cooperating defendants. JA4290–4293. Not a shred of evidence suggesting that E.E.E.M. was a *chavala* (*i.e.*, MS-13’s term for a rival gang member) or that S.A.A.T. was an informant was ever developed. JA3662.

F. Procedural History

On February 21, 2019, a federal grand jury returned a second superseding indictment against eleven defendants. JA298. Each of the five defendants who ultimately stood trial faced eight counts—four relating to E.E.E.M.’s murder, and four relating to S.A.A.T.’s murder. Specifically, Counts 1 and 2 charged conspiracy to commit kidnapping and murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5); Counts 3 and 4 charged conspiracy to kidnap,

in violation of 18 U.S.C. § 1201(c); Counts 5 and 6 charged murder in aid of racketeering activity, in violation of 18 U.S.C. §§ 1959(a)(1) and 2; and Counts 7 and 8 charged kidnapping resulting in death, in violation of 18 U.S.C. §§ 1201(a)(1) and 2.

The defendants' trial, which began on May 9, 2022, lasted approximately eight weeks.³ During its case-in-chief, the government called 39 witnesses (including six eyewitnesses⁴ and nine experts) and introduced more than 600 exhibits. None of the defendants testified, and the only witnesses called by the defense were two of the government's law enforcement witnesses, each of whom testified only fleetingly. JA5236–5239, JA5249, JA5254–5255. On July 1, 2022, the jury returned guilty verdicts against all five defendants on all counts. JA5666–5671.

On December 21, 2022, the district court entered judgment for the defendants, all of whom received the same sentence: 120 months on each of Counts 1 and 2, and life imprisonment on each of Counts 3–8, with all of the terms to run concurrently with one another. JA6651–6685. This appeal followed.

³ Prior to trial, the district court ruled on over 130 substantive motions relating to discovery, evidence, and various legal claims.

⁴ The eyewitnesses, each of whom participated in some fashion in at least one of the murders, were cooperating co-defendants Vigil, Castro, Villatoro, Avila, Melgar, and Baires.

Summary of Argument

On appeal, the defendants raise 11 claims, none of which warrants disturbing the jury's verdict.

First, the defendants contend that the district court erred by allowing the government to call an expert on MS-13, which custom this Court has repeatedly blessed. This claim fails, however, because the gang expert was eminently qualified and because, contrary to the defendants' conclusory contention, he did not simply relay testimonial hearsay to the jury.

Second, Velasco posits that the district court erred when it permitted the government to present historical racketeering evidence unrelated to the particular crimes for which he and his co-defendants stood trial. Because the government offered this evidence for the purpose of establishing the enterprise element of the defendants' VICAR charges, however, its admission was proper.

Third, some of the defendants assert that the district court abused its discretion by admitting certain graphic videos and photos in the face of their Rule 403 objections. But the extraordinarily high probative value of this evidence was not substantially outweighed by the risk of unfair prejudice. Accordingly, this claim fails.

Fourth, Velasco argues that the district court erred when it denied his motion for judgment of acquittal on his substantive violations of 18 U.S.C. §§ 1959(a) and

1201(a) based on the insufficiency of the evidence. The jury's verdict was not, however, irrational. Indeed, because there was substantial evidence from which the jury determined that Velasco committed the crimes with which he was charged, this claim is unavailing.

Fifth, Velasco maintains that the district court erred by refusing to grant his severance motions. But in this case, joinder of defendants charged with the same eight offenses arising from two related murders was eminently proper.

Sixth, according to the defendants, it was an abuse of discretion for the district court to deny their proffered jury instruction on duress. Not so. Because the defendants utterly failed to make the requisite showing that such a defense could be legally viable, the district court's declination was appropriate.

Seventh, Velasco says that the district court abused its discretion when it admitted a single handwritten note, transcribed by a cooperating witness immediately after the fact, that summarized incriminating information Velasco revealed during a conversation with the cooperator. Because the district court correctly determined that the prerequisites to admissibility under Rule 803(1) had been satisfied, and given that any error assumed for purposes of discussion was clearly harmless, this argument is unpersuasive.

Eighth, Henry Zelaya argues that the district court erred when it denied his motion to suppress evidence seized incident to his arrest. Because Henry Zelaya's arrest comported with the requirements of the Fourth Amendment, this claim fails.

Ninth, Henry Zelaya argues that the district court erred when it denied his motion to suppress post-arrest statements that he contends were obtained in violation of his Fifth Amendment rights. But those statements followed a knowing, intelligent, and voluntary waiver of his *Miranda* rights. Accordingly, they were not suppressible.

Tenth, Henry Zelaya maintains that the district court abused its discretion by declining to give his proposed lesser-included-offense instruction for aggravated assault with a deadly weapon. Because that offense is not necessarily a lesser included offense of murder, and given that the jury could not rationally have found Henry Zelaya guilty of assault but not murder, this claim fails.

Eleventh, Velasco argues that his mandatory sentences of life imprisonment without the possibility of parole violated the Eighth Amendment's ban on cruel and unusual punishment because 18 U.S.C. §§ 1201(a) and 1959(a)(1) precluded the district court from taking into account his relative youth as a mitigating factor. This argument is foreclosed by established precedent, and fails accordingly.

Argument

The Court should affirm the defendants' convictions and sentences for the reasons appearing below.

I. The district court committed no error in qualifying Sergeant Guzman as an expert on MS-13 and permitting him to testify.

The government's first trial witness was Ricardo Guzman, a sergeant with the Houston Police Department's gang division who also serves on an FBI task force that was created to dismantle transnational street gangs. JA1300–1301. Over the defendants' objections, Sergeant Guzman was qualified as an expert on MS-13, including its history, structure, rules, and activities. JA1307–1308.⁵

On appeal, the defendants make two arguments in support of their claim that the district court erred by admitting Sergeant Guzman's expert testimony. First, the defendants appear to assert that Sergeant Guzman served merely as a conduit for testimonial hearsay, the admission of which supposedly violated their rights under the Confrontation Clause. Second, they maintain that Sergeant Guzman

⁵ That the government tendered Sergeant Guzman as a gang expert was unremarkable given that in complex MS-13 trials, the government routinely uses expert testimony to elucidate aspects of the gang that lie beyond the ken of the average juror. *See, e.g., Montoya v. United States*, No. 1:09-cr-247-CMH, 2013 WL 633586, at *11 (E.D. Va. Feb. 19, 2013) (“Gang experts are frequently employed by the government in prosecutions of MS-13 members.”). Over the years, this Court has repeatedly blessed that practice. *See United States v. Diaz*, Nos. 22-4277, 22-4305, 2023 WL 6366689, at *2 (4th Cir. Sept. 29, 2023) (*per curiam*); JA1177 (collecting cases).

lacked sufficient expertise because he does not hail from the Mid-Atlantic region where the defendants were based. Neither contention establishes reversible error.

A. Sergeant Guzman’s testimony did not contravene the defendants’ right to confront witnesses against them.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment’s Confrontation Clause bars the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Id.* at 53–54. While *Crawford* forbids the introduction of testimonial hearsay as evidence in itself, “it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.” *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). Thus, “[t]he question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” *Id.* When a district court’s evidentiary ruling implicates the Sixth Amendment’s Confrontation Clause, this Court applies *de novo* review. *See United States v. Summers*, 666 F.3d 192, 197 (4th Cir. 2011).

The defendants accuse Sergeant Guzman of having served as nothing more than a conduit for testimonial hearsay, yet they fail to point to a single example in which he relayed such hearsay to the jury. What is more, the defendants ignore

that the bulk of what Sergeant Guzman conveyed to the jury about MS-13 was gleaned from his analysis of *non-testimonial* hearsay. This included: interactions with fellow gang investigators in the United States and abroad; prior work as an undercover officer; conversations with informants; interviews with offenders serving their sentences; review of reports, articles, studies, and briefing materials; and trainings completed in El Salvador. JA1303–1304, JA1390, JA1403–1404. Sergeant Guzman testified (as he had several times previously in his capacity as a court-qualified expert on MS-13) on the basis of his training and his vast experience with and knowledge of MS-13, including, among other things, its history, structure, rules, illicit activities, coded manner of communicating, and slang terminology. JA1306, JA1312, JA1332, JA1346, JA1350–1351.

It is fair to assume that some portion of Sergeant Guzman’s basis of knowledge was peripherally derived from testimonial hearsay—namely, custodial interviews with MS-13 members, of which Sergeant Guzman, who speaks Spanish fluently, estimated he had participated in approximately 100. JA1305. But he never directly referred in his testimony to the content of such an interview or stated with any particularity what he had learned from the interview. The defendants do not argue to the contrary. Instead, they glancingly cite *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008). However, *Mejia*, in addition to not being controlling, is

inapposite. *See United States v. Palacios*, 677 F.3d 234, 244 (4th Cir. 2012) (distinguishing *Mejia*, which “does not alter [this Court’s] analysis”).

In *Mejia*, the defendants, members of MS-13, faced multiple VICAR charges. 545 F.3d at 183. At trial, the government called an officer with the New York State Police to testify about MS-13’s history and structure as well as the gang’s activities on Long Island. *Id.* at 184–85. As a general matter, the Second Circuit took no issue with gang experts testifying about the operations, symbols, jargon, and internal structure of criminal organizations. *Id.* at 190. It is only when “[t]he officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant’s guilt” that utilizing a gang expert butts up against *Crawford*. *Id.* at 190–91.⁶

Several aspects of the gang expert’s testimony in *Mejia* differentiate it from the testimony that Sergeant Guzman provided. For one thing, the gang expert there testified about specific information concerning a drug tax imposed by the gang that he learned from a custodial interview with a member of MS-13 conducted in the course of investigating the very offenses for which the defendants were standing

⁶ The government has omitted internal quotation marks, alterations, and citations throughout this brief, unless otherwise noted. *See United States v. Marshall*, 872 F.3d 213, 217 n.6 (4th Cir. 2017).

trial. *Id.* at 188; *see also id.* at 191 (noting that it is problematic when gang expert “happens to be one of the Government’s own investigators”). By contrast, Sergeant Guzman had nothing to do with the investigation of the defendants in this case or the crimes with which they were charged. JA1337, JA1381.

Further, the gang expert in *Mejia*, in what the Second Circuit found to be an “especially disturbing” portion of his testimony, *id.* at 195, testified that since he had joined the FBI’s Long Island Gang Task Force five years earlier, the Task Force had seized “between 15 and 25” firearms from MS-13 members, and that during that same period, MS-13 had committed “between 18 and 22, 23” murders on Long Island, *id.* at 187. The court found that the gang expert, in so doing, “was acting as a de facto ‘case agent’ in providing this summary information to the jury (the case being the ongoing investigation into MS-13’s activities on Long Island).” *Id.* at 196. Again, by contrast, Sergeant Guzman did not testify about such “highly specific facts” that could otherwise be proven with competent evidence and lay witness testimony, *id.* at 195, nor did he testify about the defendants or any of the particular charges they faced. Thus, whereas the gang expert in *Mejia* simply summarized an investigation done by others that was not part of the record and presented it in the guise of an expert opinion, Sergeant Guzman conveyed to the jury information about MS-13 that resulted from his myriad investigations of the

gang and his synthesis of various source materials consulted over the preceding eight years.

Here, Sergeant Guzman applied his expertise, “derived over many years and from multiple sources to provide an independently formed opinion.” *Palacios*, 677 F.3d at 244. As such, “even if his expert opinion was based, in part, on testimonial hearsay,” there is no violation of the Confrontation Clause. *Id.*; *see also Johnson*, 587 F.3d at 636 (“Where . . . expert witnesses present their own independent judgments, rather than merely transmitting testimonial hearsay, and are then subject to cross-examination, there is no Confrontation Clause violation.”). Accordingly, Sergeant Guzman’s testimony did no violence to the defendants’ Sixth Amendment rights.

B. Sergeant Guzman was qualified to testify as an expert on MS-13.

This Court reviews for abuse of discretion a district court’s decision to admit expert testimony under Rules 702 and 703 of the Federal Rules of Evidence. *See United States v. Wilson*, 484 F.3d 267, 273 (4th Cir. 2007). Such an abuse of discretion only occurs when “the [district] court acted arbitrarily or irrationally[.]” *United States v. Penniegraft*, 641 F.3d 566, 574 (4th Cir. 2011).

The defendants contend that the district court abused its discretion when it qualified Sergeant Guzman as an expert on MS-13 because he “had no direct experience with gang operations in the MidAtlantic region and relied principally

on what he was told or the information he reviewed as part of the case.” Br. 51. None of this is true. Sergeant Guzman testified that he had, in fact, worked on approximately five MS-13 homicide investigations with a nexus to the Washington, D.C., metropolitan area, JA1311–1312, JA1356–1357, and that he was familiar with PVLS from working on his own cases involving that clique, JA1318–1319. Moreover, he at no point testified that he had been given any information or documents to review pertaining to the particulars of the defendants’ case. Sergeant Guzman’s expertise was based on having spent 90% of the preceding eight years focused exclusively on MS-13 and on having traveled to Central America, including to El Salvador, where MS-13 is based, six or seven times in the context of investigations pertaining to or training on MS-13. JA1301–1304. He also testified that he had participated in approximately 25 MS-13-related homicide investigations in his career, including 10 as the lead investigator. JA1305.

The defendants’ gripe thus appears to be the same one they raised before trial—*i.e.*, that Sergeant Guzman was not qualified to testify as an expert on MS-13 in a trial proceeding in Northern Virginia because he does not work in Virginia. The district court was unmoved by this argument, just as this Court should be.

There is no geographic box that must be checked before an expert on MS-13 can be qualified to testify. MS-13, after all, has its tentacles in virtually every state

in this country and in several other nations. JA299, JA1310–1311. Moreover, and more importantly, substantial portions of the second superseding indictment—specifically, paragraphs 2–7 and 11–14—concerned MS-13 broadly conceived and were not clique-specific. JA299–304. That makes sense, given that the racketeering enterprise specifically alleged in Counts 1, 2, 5, and 6 was MS-13, not PVLS in Virginia.

To be sure, the government often uses a local gang expert in MS-13 trials. But that is simply the product of where the majority of a given prosecutor’s or case agent’s contacts are based and the efficiencies that attend working with local witnesses versus those who are farther flung. It is not a consequence of some sort of geographic restriction that the defendants seem to envision. Case in point: in this Circuit, multiple MS-13 defendants’ convictions have been affirmed on appeal following trials in which the government called a Los Angeles Police Department detective as a gang expert. *See United States v. Umana*, 750 F.3d 320, 363 (4th Cir. 2014) (Gregory, J., dissenting) (noting that government had called MS-13 gang expert at trial)⁷; *United States v. Argueta*, 470 F. App’x 176, 178–79 (4th Cir. 2012); *United States v. Ayala*, 601 F.3d 256, 274 (4th Cir. 2010). These decisions

⁷ Before trial, the district court denied the defense’s motion to exclude the testimony of a Los Angeles Police Department detective who the government had noticed as its gang expert. *See United States v. Umana*, No. 3:08CR134–RJC, 2010 WL 1439111, at *1, *3 (W.D.N.C. Apr. 9, 2010).

underscore that the district court did not abuse its discretion in qualifying Sergeant Guzman as a gang expert.

II. The district court did not plainly err in admitting historical racketeering evidence.

To obtain convictions on Counts 1, 2, 5, and 6, each of which charged a violation of VICAR, the government had to establish, among other elements, the existence of an “enterprise” engaged in “racketeering activity,” as those terms are defined in 18 U.S.C. § 1959(b). Nearly a year before trial, the government filed a notice setting forth its intention to put on evidence of historical racketeering acts committed by MS-13 gang members other than the defendants—specifically, the 2013 attempted murder by MS-13 of a gang member known as “Peligroso”; the 2014 murder by MS-13 of Julio Urrutia; and the 2017 murder by MS-13 of Christian Sosa Rivas (together, the “historical racketeering evidence”). SA1. At the time, only Velasco filed a written opposition in which he invoked both the Fifth Amendment and Rule 403 of the Federal Rules of Evidence. SA14. Notably, the district court did not rule on Velasco’s objection before trial. JA1287 (finding that “this objection will be best resolved upon a timely renewed motion during trial”).

At trial, the government called two witnesses in connection with each of the aforementioned racketeering acts: a law enforcement officer who investigated the offense; and a cooperating member of MS-13 who participated in the crime. JA1423–1698, JA1857–1874. In addition to eliciting testimony from them, the

government admitted numerous exhibits through those six witnesses.

Significantly, at no point did any defendant object to either the testimony or the exhibits offered.

Because the district court did not rule on the admissibility of the historical racketeering evidence before trial, and because he failed to make any objection contemporaneously during trial, Velasco forfeited his claim. *Cf. United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996) (“As a general rule, motions in limine may serve to preserve issues that they raise without any need for renewed objections at trial, just so long as the movant has clearly identified the ruling sought *and the trial court has ruled upon it.*” (emphasis added)); *see also, e.g., United States v. Martin*, 657 F. App’x 193, 198 (4th Cir. 2016) (per curiam) (reviewing for plain error where the government’s “pre-trial motion seeking admission of the [defendant’s] prior convictions did not address the manner in which the government intended to prove the convictions, and [the defendant] did not object when the government read the facts of the crimes to the jury”).

It is well-established that unpreserved evidentiary objections are reviewed under the plain-error standard. *See United States v. Cabrera-Beltran*, 660 F.3d 742, 751 (4th Cir. 2011). To clear the “high bar” of plain-error review, *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014), a defendant must show “(1) that the trial court erred, (2) that the error is clear and obvious, and (3) that the

error affected his substantial rights,” *United States v. Hargrove*, 625 F.3d 170, 184 (4th Cir. 2010). When these three conditions are satisfied, this Court has discretion to correct the error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). That discretion should only be exercised, however, if the error seriously affects “the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Here, the district court’s admission of the historical racketeering evidence could hardly have constituted plain error given that courts, including this one, have over the years consistently affirmed the admission of evidence of uncharged crimes, including offenses committed by individuals other than the defendants, to prove the existence of a racketeering enterprise. *See, e.g., United States v. Turcios-Lazo*, 378 F. App’x 341, 342 (4th Cir. 2010) (per curiam); *United States v. Baires*, 254 F. App’x 196, 197–99 (4th Cir. 2007) (per curiam); *United States v. Norton*, 17 F. App’x 98, 100–01 (4th Cir. 2001) (per curiam); *see also United States v. Jones*, 566 F.3d 353, 363 (3d Cir. 2009) (collecting cases).

Even putting these decisions aside, there was no error because the historical racketeering evidence clearly passed Rule 403 muster. It is well-established that when the probative value of evidence is *substantially* outweighed by a danger of, among other things, unfair prejudice or misleading the jury, a court may (but need not necessarily) exclude it. *See Fed. R. Evid. 403*. Though phrased in terms of exclusion, “Rule 403 is a rule of inclusion, generally favoring admissibility,” that

imbues the district court with “wide discretion to determine what evidence is admissible[.]” *United States v. Udeozor*, 515 F.3d 260, 264–65 (4th Cir. 2008); *see also United States v. Bajoghli*, 785 F.3d 957, 966 (4th Cir. 2015) (“Once it is recognized that evidence is probative of an element of the crime charged, the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly.”). Ultimately, Rule 403 judgments are “preeminently the province of the trial courts”; therefore, this Court reviews a district court’s admission of evidence over a Rule 403 objection “under a broadly deferential standard.” *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998); *see also United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990) (“We will not upset such a decision except under the most extraordinary of circumstances, where that discretion has been plainly abused.”).

Here, the historical racketeering evidence was probative in two respects. *First*, it supported the government’s contention that MS-13 constitutes a racketeering enterprise because it helped show the structure, common purposes, continuity, and methods of a “group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1959(b)(2); *see Boyle v. United States*, 556 U.S. 938, 946 (2009); *Baires*, 254 F. App’x at 199. *Second*, the evidence demonstrated that MS-13, as a racketeering enterprise, in fact engaged in racketeering acts—in this case, gang-motivated murder/attempted murder. *Cf. Mejia*, 545 F.3d at 206

(holding that evidence of narcotics trafficking in MS-13 prosecution was “direct evidence of the charged offense” because it tended to prove the enterprise’s engagement in racketeering activity).

On appeal, the defendants maintain that the jury was unable to “fairly distinguish” between the unrelated racketeering acts and evidence presented regarding the offenses charged. Br. 53. According to the defendants, this produced a “spillover effect” that prejudiced them. *Id.* As to both contentions, the defendants are mistaken.

There is nothing in the record substantiating the defendants’ claim that the jury was unable to differentiate between the historical racketeering evidence and the evidence adduced in connection with the kidnappings and murders of E.E.E.M. and S.A.A.T. On the contrary, the record reveals the sheer improbability that the jurors were unable to draw the distinction. None of the historical racketeering acts occurred in the summer or fall of 2016, and none of the individuals involved in the commission or investigation of those crimes had anything to do with the crimes underlying this case. Indeed, counsel for three of the defendants underscored this point when, on cross-examination of the government’s historical racketeering witnesses, they elicited either that their clients had nothing to do with the particular historical racketeering act at issue or that the witness did not know their clients. JA1434, JA1478, JA1569, JA1685, JA1690–1691.

Thus, the defendants fail to credibly suggest, much less show, that the “spillover effect” of which they complain actually existed. Even if it did, though, the defendants would still fall well short of demonstrating that the probative value of the historical racketeering evidence was substantially outweighed by the danger of unfair prejudice. In this context, “unfair prejudice” refers to “prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion[.]” *United States v. Mohr*, 318 F.3d 613, 620 (4th Cir. 2003). To exclude evidence on the ground of unfair prejudice, then, “the district court must be convinced that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.” *United States v. Van Metre*, 150 F.3d 339, 351 (4th Cir. 1998). Where, however, the evidence has probative value and its introduction is not sought for the purpose of inflaming the jury, it is admissible.

Here, the government did not offer the historical racketeering evidence to “subordinate reason to emotion in the factfinding process,” *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997), but rather because it was highly probative for the reasons previously stated. While it is true that a minority of the historical racketeering evidence, both in testimonial and documentary form, was graphic, it was markedly less so than the evidence that the government had to introduce to prove that the defendants kidnapped and murdered E.E.E.M. and S.A.A.T. This

cuts against the defendants' argument. *See United States v. Chavez*, 894 F.3d 593, 604–05 (4th Cir. 2018) (“The prejudicial effect of evidence of uncharged crimes is minimized when the charged crimes are of a similar or more severe nature.”).

Finally, additional protection against any possible prejudice was provided by the district court's limiting instruction to the jury that “[t]he defendants are not on trial for any act or any conduct not specifically charged in the Indictment.”

JA5357. Jurors, of course, “are presumed to understand and follow instructions,” *United States v. Zelaya*, 908 F.3d 920, 930 (4th Cir. 2018), and generally, limiting instructions “obviate any [] prejudice,” *United States v. Powers*, 59 F.3d 1460, 1468 (4th Cir. 1995).

III. The district court did not abuse its discretion when it admitted highly probative videographic and photographic evidence of the murders.

A. Relevant Background

1. Videos

At trial, the district court admitted the two previously described videos that were recovered from Alfaro's cell phone in 2016. Specifically, the district court admitted Government Exhibit (“GEX”) 51-12B and GEX 51-13B, which were versions of the videos in which both the audio and video quality had been enhanced by an expert working out of the FBI Laboratory in Quantico, Virginia. JA4236, JA4238, JA4250–4257. GEX 51-12B, which lasts approximately 52 seconds, depicts a victim lying face down on the ground while multiple subjects

are striking him with weapons, including a kitchen knife and machetes. JA6695. GEX 51-13B, which lasts approximately 17 seconds and was recorded an indeterminate amount of time after the longer video was taken, shows the same victim's mutilated body while one of his killers throws MS-13 gang signs. JA6696. Each video was published to the jury just once during the eight-week trial. JA2921, JA2935.⁸

2. Crime scene photos

The government introduced numerous photos taken during the process of discovering and then excavating the victims' clandestine graves. On appeal, Herrera challenges the admissibility of a subset of these photos—specifically, two photos pertaining to E.E.E.M.'s gravesite, JA5701–5702, and 25 photos pertaining to S.A.A.T.'s gravesite, JA5871–5892, JA5896–5898.

The 27 photos are related to one another insofar as each depicts a scrap of fabric, either protruding from a grave, resting nearby on the forest floor, or lying on top of butcher paper for purposes of being photographed by a crime scene investigator. The photos of E.E.E.M.'s gravesite were introduced because they

⁸ The videos were published in full during the testimony of Melgar. Each video's audio component, without being accompanied by any images, was published a second time through a different cooperating witness, Villatoro, for the purpose of asking him about the identity of individuals who can be heard speaking. JA3125, JA3132.

showed how that area was encountered by law enforcement and, significantly, a scrap of denim protruding from the ground. JA3802–3803. The photos of S.A.A.T.’s gravesite show pieces of fabric coming from articles of clothing the government contended S.A.A.T. was wearing when he was murdered and that could be seen in the aforementioned murder videos—specifically, a black jacket and multi-colored pajama pants.

3. Autopsy photos

During the testimony of Dr. Jocelyn Posthumus, the medical examiner who performed the victims’ autopsies, the government introduced 16 photos of E.E.E.M.’s remains, six of which the district court allowed to be published to the jury, and two photos of S.A.A.T.’s remains, both of which the district court allowed to be published to the jury. JA3796–3798, JA3847–3849, JA3861–3862, JA6035–6050, JA6089–6090. The government also introduced a total of 56 photos that were taken in connection with the autopsies but which featured only the victims’ clothing and personal effects. JA6009–6034, JA6059–6088.

B. Analysis

“A trial court possesses broad discretion in ruling on the admissibility of evidence[.]” *United States v. Hedgepeth*, 418 F.3d 411, 418–19 (4th Cir. 2005). Accordingly, this Court “will not overturn an evidentiary ruling absent an abuse of discretion.” *Id.* at 419. Such an abuse of discretion “occurs only when a trial court

has acted arbitrarily or irrationally in admitting evidence, when a court has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises[.]” *Id.*

1. The district court’s admission of the murder videos, crime scene photos, and autopsy photos was not an abuse of discretion.

The trial in this case was about gang-related murders. The juvenile victims were stabbed and hacked to death before being stuffed into shallow graves. Naturally, some of the evidence of these crimes was disquieting. But that was to be expected, for “murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant[.]” *People v. Pierce*, 595 P.2d 91, 98 (Cal. 1979). No thorough presentation of the evidence in this case could have entirely eliminated that which some find upsetting. Nor should the government in cases like this one strive for such sterility; in a criminal trial, a jury is “entrusted with the weighty obligation to find the facts,” and it is “incompatible with that degree of trust to attempt to ‘protect’ them from the evidence” of the crimes charged. *United States v. Naranjo*, 710 F.2d 1465, 1468–69 (10th Cir. 1983). Equally, “the vicious, brutal nature of a defendant’s conduct” cannot “justify a complete exclusion of evidence tending to show the defendant engaged in those acts.” *United States v. Lujan*, 603 F.3d 850, 858 (10th Cir. 2010). Rule 403, correspondingly, “does not generally require the government to sanitize its case . . .

or to tell its story in a monotone.” *United States v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998).

i. Videos

It is difficult to imagine evidence more probative than the murder videos. There are at least five reasons why that is so, belying the defendants’ eye-popping claim that the videos’ introduction was “simply unnecessary.” Br. 54. *First*, and foremost, the videos, in different ways, placed four of the five trial defendants at the scene of the crime. In one of the videos, an individual wearing a distinctive jacket and a distinctive pair of pants can be seen striking the victim. JA6313. Shortly before he stops doing so, one can hear in the audio accompanying the video another attacker instructing “Pablo” to stop his assault. JA6312. Two of the cooperators, Castro and Villatoro, identified that individual as Velasco. JA2671–2673, JA3126. In that same video, one of the attackers commands his fellow assailants to “give the machete to . . . Certero.” JA6312. “Certero” was Henry Zelaya’s self-admitted gang moniker at the time of the murder. JA6444. Both Melgar and Villatoro testified that the person who can be heard giving orders and instructions to others was Elmer Zelaya. JA2924–2928, JA3024, JA3125. Finally, when the other video opens, an individual can be seen throwing MS-13 gang signs with his bloodied hands. JA6696. The video does not capture that person’s face,

but the evidence established that the person is Herrera. JA3134–3135, JA3348–3349.

Second, the videos corroborated the testimony of numerous government witnesses regarding what happened on the night of September 26, 2016, including where the murder occurred, how it unfolded, what weapons were used to perpetrate it,⁹ and who was there at the scene. *Cf. United States v. Fields*, 483 F.3d 313, 355 (5th Cir. 2007) (ruling that district court properly admitted “shocking” autopsy photos in part to corroborate other testimony); *United States v. Analla*, 975 F.2d 119, 126 (4th Cir. 1992) (upholding admission of photo of victim, who had been shot in head, lying in pool of blood because it corroborated witness’s testimony regarding position of victim’s body).

Third, the videos helped to establish the victim’s identity. That is because they show the victim wearing plaid boxer shorts and multi-colored pajama bottoms. The former is relevant because when his remains were exhumed, S.A.A.T.’s corpse was garbed in distinctive, plaid boxer shorts identical in appearance to those worn by the victim in the murder videos. JA6089. The latter is relevant because the pajama bottoms visible in the murder videos are consistent,

⁹ GEX 51-12B shows a bloody, single-edged kitchen knife resting on the ground near the victim’s body. A knife consistent in appearance with that one was found near the buried remains later identified as S.A.A.T. JA5940–5946.

in terms of their appearance, both with S.A.A.T.'s mother's description of what her son was wearing on the night that he disappeared, JA1750, and with scraps of fabric located near one of the victim's gravesites at the time it was excavated, JA5884–5892.

Fourth, the videos show some of the very events underlying some of the charges for which the defendants stood trial. Thus, the videos permitted the jurors to become witnesses to those crimes with no need to make credibility determinations or rely on witness testimony. *Cf. United States v. Con-ui*, No. 3:13-CR-123, 2017 WL 783437, at *4 (M.D. Pa. Mar. 1, 2017) (“Here, there is no ‘tendency to show’; the [murder] video *shows* the crime charged.”).

Fifth, GEX 51-12B, in which multiple individuals can be seen violently and repeatedly hacking the victim's body, is compelling evidence of the defendants' intent to murder S.A.A.T. or, at a minimum, their intent to aid and abet his murder. *Cf. United States v. Pinke*, 614 F. App'x 651, 652 (4th Cir. 2015) (per curiam) (agreeing that “gruesome” video of prisoner assault passed Rule 403 muster in part because it “tend[ed] to demonstrate that [the defendant] and his codefendants intended to murder the victim”). In this vein, the video, which the assailants must have known was being made given that it was the light from the recording cell phone that illuminated the victim's body, was also probative insofar as it tended to show that S.A.A.T.'s assailants intended their actions to serve as proof to higher-

ranking clique leaders that they had acquitted themselves well enough to justify a promotion. In other words, the videos served as evidence that the defendants committed their crimes with the specific intent required under § 1959(a)—namely, to maintain or increase their position in MS-13. *See, e.g., United States v. Basham*, 561 F.3d 302, 328 (4th Cir. 2009) (declining to exclude statements under Rule 403 was not an abuse of discretion because, “although undoubtedly prejudicial, they were highly probative of [the defendant’s] ability to form the specific intent to cause serious harm”).

Like all evidence that tends to incriminate an accused, the murder videos were undeniably prejudicial to the defendants. Their introduction at trial did not, however, present a genuine danger of *unfair* prejudice. *See Basham*, 561 F.3d at 327 (“Unfair prejudice ‘speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt *on a ground different from proof specific to the offense charged.*’” (emphasis added) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997))). In large measure, that is because the videos, while difficult to watch, depict the commission of some of the heinous crimes with which the defendants were charged. *See United States v. Torrez*, 869 F.3d 291, 302 (4th Cir. 2017) (observing that Rule 403 does not preclude introduction of evidence that “did not involve conduct any more sensational or disturbing than the crimes with which the defendant was charged”).

Moreover, in showing some of the charged crimes taking place, the videos did not capture S.A.A.T. screaming or otherwise exhibiting agony.¹⁰ Indeed, throughout the duration of both brief videos, S.A.A.T. lies motionless, face down on the ground. That does not mean that the images are easy to behold, but the district court “is not required to scrub the trial clean of all evidence that may have an emotional impact.” *United States v. Ganoë*, 538 F.3d 1117, 1124 (9th Cir. 2008). For this reason, in the analogous context of photographic evidence, courts have admitted evidence approximately as unsettling as the short videos at issue here. *See, e.g., Gov’t of V.I. v. Krepps*, 438 F. App’x 86, 88–89 (3d Cir. 2010) (partially mummified and decomposed corpse with hole in back where fatal stab wound was suffered); *United States v. Collins*, 368 F. App’x 517, 521 (5th Cir. 2010) (per curiam) (decapitated and dismembered body); *Fields*, 483 F.3d at 354 (body in advanced state of decomposition and subject to animal predation); *United States v. Tokars*, 95 F.3d 1520, 1529, 1537 (11th Cir. 1996) (gunshot wound to head delivered from distance of approximately one foot); *United States v. Sides*,

¹⁰ The defendants erroneously state that the audio accompanying the videos “depicts the screams of [S.A.A.T.] as he dies.” Br. 53. While the government did introduce a six-second, audio-only clip recorded at the moment the attack on S.A.A.T. commenced, JA6694, the defendants have not challenged the admissibility of that exhibit, GEX 41-4B, on appeal. And even if they had, it passes Rule 403 muster for essentially the same reasons that the murder videos were properly admitted.

944 F.2d 1554, 1563 (10th Cir. 1991) (blindfolded victim’s entrance wounds and blood-stained shirt); *United States v. Brady*, 595 F.2d 359, 361 (6th Cir. 1979) (three deceased victims lying in pools of blood); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) (victim’s corpse clothed in bloody garments and bent forward so as to display exit wound in back of her skull produced by bullet that had exploded in her brain). The logic underlying these decisions supports the government’s position that the murder videos were not unfairly prejudicial.

In arguing to the contrary, the defendants hang their hat on the fact that at one point after the videos had been published, the jury sent out a note stating: “Please warn the jury in advance that a graphic video will be shown before we enter the courtroom.” JA2945. This, the defendants posit, evinces the jurors’ emotional reaction to the videos that they had seen. As an initial matter, the defendants overstate what can be deduced from the note; all the note reflects is that the jury wanted a heads up if they were going to be shown additional videos. But even accepting the defendants’ proposition, the fact that a jury would be affected emotionally by witnessing the murder of a 14-year-old boy is supremely unremarkable—indeed, it would be inhuman not to be disturbed to some degree by such evidence. But as previously articulated, Rule 403 does not demand an antiseptic presentation of the evidence, particularly where, as here, the alleged crimes, and the way in which they were committed, are gruesome. The question is

whether the prejudicial nature of the evidence is so great that it significantly outweighs its incriminating value. In that regard, the videos' introduction is not a close call. *Cf. Con-Ui*, 2017 WL 783437, at *2, 5 (allowing government, during guilt phase of capital trial, to play video depicting correctional officer “as he is kicked down a flight of stairs, his efforts to escape, the infliction of over 200 stab wounds, kicks to the head, and other acts of violence”).

ii. Crime scene photos

The probative value of the 27 photos identified by Herrera, each of which was taken before the victims' bodies were disinterred, was readily apparent. *Cf. United States v. Kilbourne*, 559 F.2d 1263, 1264 (4th Cir. 1977) (affirming admissibility of crime scene photos showing proximity of body to certain items linked to defendant).

Herrera baselessly contends that the government only introduced the photos as “an attempt to have the jury decide the case based on an improper emotional basis.” Br. 58. He also notes that neither he nor any of his co-defendants argued at trial that the victim in the pajama pants was not S.A.A.T. or that S.A.A.T. was not murdered. These points are meritless. It was Herrera and his co-defendants who premeditatedly murdered a teenager wearing pajama bottoms—the government simply took the evidence as it came, and in this particular case, that evidence was probative because it tied together S.A.A.T.'s mother's testimony, the murder

videos, the cooperators' testimony, and the crime scene. While it is true that Herrera never argued the remains were not S.A.A.T.'s, that is entirely beside the point, because it is the government that bears the burden of proving a defendant's guilt beyond a reasonable doubt to the unanimous satisfaction of a jury. Therefore, the government "is entitled to prove its case by evidence of its own choice." *Old Chief*, 519 U.S. at 186; *see also United States v. Savage*, 970 F.3d 217, 305 (3d Cir. 2020) ("Photographs convey a pictorial accuracy and detail that words cannot duplicate nor that advocates can spin."). Of course, before it can be admitted, the government's evidence has to pass the Rule 403 balancing test. But here, Herrera fails to allege credibly, much less demonstrate, that these crime scene photos were substantially more prejudicial than they were probative. Accordingly, the district court did not abuse its discretion in admitting them.

iii. Autopsy photos

Herrera maintains that all of the aforementioned autopsy photos should have been excluded. In so arguing, he misstates how Rule 403 operates, asserting incorrectly that "the test for determining whether a photograph maybe [sic] shown to the jury is whether the photograph's probative value outweighs its possible prejudicial effect." Br. 59. As previously stated, under Rule 403, relevant evidence is admissible unless its probative value is substantially outweighed by the risk of unfair prejudice, undue cumulativeness, and the like.

Here, to be sure, the relatively limited number of autopsy photos that were admitted were not pleasant to view. However, that did not render them inadmissible under Rule 403. *See Fields*, 483 F.3d at 355 (“[A]dmitting gruesome photographs of the victim’s body in a murder case ordinarily does not rise to an abuse of discretion where those photos have nontrivial probative value.”); *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C. Cir. 1998) (“Autopsy photographs can have immense probative value[.]”); *Con-ui*, 2017 WL 783437, at *6 (“Courts routinely admit autopsy photographs, even particularly gruesome ones.”). That is particularly so where, as here, the government carefully selected only the most probative photos and omitted scores of more graphic photos. JA3795.

Several of the photos were selected because they show, without depicting more than is necessary, some of the injuries sustained by the victims.¹¹ Because they substantiated the cause of death and revealed what the defendants did to the victims, these photos were highly probative. *See United States v. Whitfield*, 715 F.2d 145, 147–48 (4th Cir. 1983) (upholding admissibility of photos depicting murder victim’s wounds, regardless of whether defendant could have been

¹¹ Dr. Posthumus testified that she counted 111 stab or chop wounds that were visible in what remained of E.E.E.M.’s soft tissue, JA3844, yet the discrete set of photos from his autopsy that the government introduced showed the jury only a small sample of these wounds.

convicted in their absence).¹² The photos were also probative for three additional reasons.

First, they corroborated the testimony of the cooperating witnesses who participated in the murder. *See Fields*, 483 F.3d at 355 (ruling that district court properly admitted “shocking” autopsy photos in part to corroborate other testimony); *United States v. Frappier*, 807 F.2d 257, 262 (1st Cir. 1986) (holding that admission of autopsy photos was not error where they corroborated cooperating witness’s account of murder); *De Parias*, 805 F.2d at 1453 (pointing out that photos corroborated testimony of government witness whose credibility was central to prosecution’s case).

Second, some autopsy photos needed to be admitted for the purpose of illustrating and contextualizing Dr. Posthumus’s testimony. Indeed, without the aid of any photographic evidence, the jury might well have failed to comprehend her testimony. *See Collins*, 368 F. App’x at 521–22 (upholding admissibility of

¹² Other courts of appeals have upheld the admission of photos that were just as, if not more, unsettling than those that the government introduced here. *See, e.g., United States v. Allen*, 247 F.3d 741, 793 (8th Cir. 2001), *judgment vacated on other grounds*, 536 U.S. 953 (2002); *United States v. Velazquez*, 246 F.3d 204, 210–11 (2d Cir. 2001); *Rezaq*, 134 F.3d at 1138; *United States v. Treas-Wilson*, 3 F.3d 1406, 1410 (10th Cir. 1993); *United States v. Boise*, 916 F.2d 497, 504 (9th Cir. 1990); *United States v. Soundingsides*, 820 F.2d 1232, 1242–43 (10th Cir. 1987); *United States v. De Parias*, 805 F.2d 1447, 1453–54 (11th Cir. 1986); *United States v. Bowers*, 660 F.2d 527, 529–30 (5th Cir. 1981).

autopsy photos, including images of decapitation wound that had become infested with maggot larvae, because they helped jury understand medical examiner's testimony); *see also United States v. Greatwalker*, 356 F.3d 908, 912–13 (8th Cir. 2004); *United States v. Sarracino*, 340 F.3d 1148, 1168 (10th Cir. 2003); *United States v. Davidson*, 122 F.3d 531, 538 (8th Cir. 1997); *Soundingsides*, 820 F.2d at 1243; *Frappier*, 807 F.2d at 262.

Third, the photos—both those of the victims' remains and their clothing items—were probative evidence of the defendants' criminal intent, which of course is an element of the offense of murder. *See* Va. Code § 18.2-31. The photos revealed such intent by demonstrating the degree of harm inflicted by the defendants' choice to use sharpened instruments to attack the victims. *Cf. United States v. Mitchell*, 502 F.3d 931, 968 (9th Cir. 2007) (“Evidence of post-mortem decapitation and dismemberment, thus of photographs depicting it, was relevant to show motive, premeditation, and consciousness of guilt.”); *Allen*, 247 F.3d at 793 (“The [graphic autopsy] photographs were also probative of intent—another aspect of each defendant's culpability—by showing the extent of damage caused by the choice of using hollow point ammunition during the robbery”); *see also United States v. Pepin*, 514 F.3d 193, 208 (2d Cir. 2008) (“[I]t would be odd, indeed, if the very gruesomeness of the killings with which [defendant] has been charged were to disjoint and abbreviate the prosecution's presentation of the case against him, thus

disadvantaging the government in its ability to establish to the jury beyond a reasonable doubt that [defendant] committed an intentional homicide in the first place.”). The same can be said of the exhibits proffered here, which, in demonstrating the cause of the victims’ deaths and evidence of their murderers’ attempts to conceal them, were highly probative of their intent as well as their consciousness of guilt.

While these exhibits were disturbing, their distressing nature was merely a reflection of the brutality of Herrera and the others who killed E.E.E.M. and S.A.A.T. It would have been a perverse deployment of Rule 403, a rule that favors admissibility, to have excluded this evidence, thereby rewarding the killers for the odious character of their crimes. *See Lujan*, 603 F.3d at 858 (“[C]ourts have not allowed defendants to benefit from a Rule 403 exclusion for unfair prejudice simply because their conduct was of a grisly nature.”). Fundamentally, “Rule 403 is not a shield to keep juries from learning details of horrific crimes.” *United States v. Heatherly*, 985 F.3d 254, 266 (3d Cir. 2021). This Court should not allow it to be used as one.

2. Any error in the admission of these pieces of evidence of the murders was plainly harmless.

Trial court errors in the Rule 403 realm are subject to review for harmlessness—*i.e.*, “whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial.”

United States v. Morison, 844 F.2d 1057, 1078 (4th Cir. 1988). Even assuming *arguendo* that the district court erred in admitting some of the aforementioned pieces of videographic and photographic evidence (or, for that matter, all of that evidence), there is no reasonable probability, on the facts of this case, that any such error affected the jury's verdict as to any count in view of the extensive evidence of each defendant's guilt. Accordingly, any such error was harmless and thus inconsequential at this stage.

IV. Velasco's convictions should be affirmed because substantial evidence supported the jury's guilty verdict as to each of them.

The jury found beyond a reasonable doubt that Velasco conspired with others, including each of his co-defendants, to lure E.E.E.M. and S.A.A.T. to a park, murder them, and bury their bodies, all in aid of MS-13, a racketeering enterprise.¹³ By advancing a sufficiency-of-the-evidence challenge, Velasco maintains that the jury's verdict was fundamentally irrational. Not so. The jury

¹³ Velasco is the only defendant who argues that insufficient evidence supported some of his convictions. Br. 61. Where a defendant fails to pursue an argument in his opening brief on appeal, he waives it for appellate review. *See United States v. Boyd*, 55 F.4th 272, 280 (4th Cir. 2022). Thus, Herrera, Elmer Zelaya, Henry Zelaya, and Ramirez, despite having moved for judgment of acquittal below, JA5227–5232, JA5263–5264, have all waived any sufficiency-of-the-evidence claim. But even if they had not, the record overwhelmingly establishes that substantial evidence supported each one of their convictions, too.

inferred from substantial evidence that Velasco committed the aforementioned crimes. Thus, his claim is unavailing.

A. Standard of Review

In seeking to overturn his convictions, Velasco bears “a heavy burden,” *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007), because reversal of a conviction for insufficient evidence is limited to “the rare case where the prosecution’s failure is clear,” *United States v. Haas*, 986 F.3d 467, 477 (4th Cir. 2021). This Court, when reviewing a challenge to the sufficiency of the evidence on a count of conviction, considers *de novo* whether “there is substantial evidence in the record to support [the jury’s verdict].” *United States v. Wilson*, 198 F.3d 467, 470 (4th Cir. 1999). Substantial evidence is “evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005).

In performing its review, the Court “views[s] the evidence in the light most favorable to the prosecution and assume[s] the jury resolved all credibility disputes or judgment calls in the government’s favor.” *United States v. Huskey*, 90 F.4th 651, 2024 WL 100193, at *2 (4th Cir. 2024). The Court will uphold the jury’s verdict if “*any* rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” *United States v. Millender*, 970 F.3d 523, 528 (4th Cir. 2020).

B. Analysis

Velasco contends that there was insufficient evidence for the jury to find him guilty of Counts 5 and 6, charging murder in aid of racketeering activity, because the government failed to prove beyond a reasonable doubt that he committed those crimes to maintain or increase his position in MS-13. More particularly, Velasco argues that he was not “promised any sort of consideration” for his participation in the murders of E.E.E.M. and S.A.A.T., and that the cooperating witnesses who testified at trial were not authorized to grant promotions within the gang, necessarily meaning, he says, that he could not have received a promotion for his involvement in the murders. Velasco also appears to argue that there was insufficient evidence to support his convictions on Counts 7 and 8, charging kidnapping resulting in death, because according to him, neither victim was inveigled. Last, in his bid to have the foregoing convictions vacated, Velasco denounces the government’s cooperating witnesses for lacking credibility. For the reasons articulated below, each of these arguments fails.

1. Ample evidence showed that Velasco participated in the murders to maintain or increase his position in MS-13.

To obtain convictions on Counts 5 and 6, the government had to prove beyond a reasonable doubt that Velasco’s “general purpose” in participating in the

murders of E.E.E.M. and S.A.A.T. was “to maintain or increase his position in the [MS-13] enterprise.” *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994). This burden is satisfied if “the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.” *Zelaya*, 908 F.3d at 927. Thus, a defendant “may be convicted under VICAR even if maintaining or increasing his position in a racketeering enterprise is not his only or primary concern in carrying out [the] violent crime.” *Id.* Notably, “[e]vidence that an enterprise has a policy of retaliatory violence against any who sufficiently antagonized any of its members may support a finding that violence was committed, in part, to maintain or increase position in the enterprise. *United States v. Cousins*, 489 F. App’x 698, 700 (4th Cir. 2012) (per curiam). With these standards in mind, the evidence presented was more than sufficient for a reasonable jury to find that Velasco murdered E.E.E.M. and S.A.A.T. in order to maintain or increase his position in MS-13.

The evidence at trial established that, in the early summer of 2016, Velasco was a *paro* in the PVLS clique. JA1940, JA1949, JA1970, JA2523, JA2598, JA2837, JA3265. After participating in E.E.E.M.’s murder in late August 2016, Velasco was promoted to *observacion*. JA2152, JA2599, JA3163 (telling Villatoro in early September that he is an *observacion*). Then, in late September 2016, after

he participated in S.A.A.T.'s murder, Velasco was promoted from *observacion* to *chequeo* and given the gang monicker "Oscuro." JA2254, JA2282, JA2677, JA2952, JA3154, JA4739 (identifying himself as a *chequeo* in early October communication with Elmer Zelaya).

Moreover, overwhelming evidence at trial established that the defendants, including Velasco, knew that MS-13 requires its members and associates to commit violent acts in order to remain in the gang and move up in rank. MS-13 recruits were indoctrinated in the basic tenets of the gang: *chavalas* and snitches must be killed, and once a green light is issued by gang leadership, the homicide must be carried out. JA2299 ("As a gang, MS-13 can only give *chequeo* to someone who has killed *chavalas*[.]"); JA2606 (cooperating witness testifying that he wanted to kill *chavalas* to move up in the gang); JA2845–2846 (if an MS-13 member encounters a *chavala*, the gang's rules require that the *chavala* be murdered); JA2846 (consequence of cooperating with police is to have "green light [] turned on"—meaning, "to be murdered"); JA3072 ("[W]e were not allowed to cooperate . . . , otherwise, we were rats, snitches, and then they could kill us."). The rules of MS-13 made it so that its members and associates did not need to be explicitly "promised . . . consideration for their participation," Br. 62, in violent acts that resulted in their promotion within the gang's hierarchy before a violent act occurred.

Velasco was well aware of MS-13's expectations. Before the murders of E.E.E.M. and S.A.A.T., he participated in the attempted murder of "Lil Navaja," a gang associate who had been greenlit for not paying dues, failing to attend clique meetings, and disrespecting the gang. JA2032–2064. In other words, although participants in the attempted murder were unable to achieve their mission, Velasco knew what MS-13 did to individuals who disobeyed the gang's rules. Shortly thereafter, he participated in the murder of E.E.E.M. and was rewarded with a promotion to *observacion*. And prior to S.A.A.T.'s murder, Velasco was made aware of PVLS's plan to kill S.A.A.T. at a clique meeting held on September 18, 2016, as proven by evidence admitted from Velasco's Facebook account. JA4785, JA4803–4804, JA6235. Thus, Velasco cannot credibly argue that he engaged in racketeering activity—but *not* for the purpose of maintaining or increasing his position in the gang.

Velasco also argues that neither Vigil nor other gang leaders present at the murders of E.E.E.M. and S.A.A.T. had authority to grant promotions, so Velasco could not have been promoted. He is mistaken. The testimony at trial established that PVLS leadership communicated through the leaders of the Virginia sector of the clique, including Elmer Zelaya, that the murder participants were being promoted in rank. JA2954–2955 (Elmer Zelaya mentioned to those gathered at a clique meeting after E.E.E.M.'s murder that some of them—including Velasco—

would be promoted “because they had participated in the murder”); JA3153 (“We were inside the car [after S.A.A.T.’s murder], and that was when [Elmer Zelaya] started to say who had been promoted. . . . To [Velasco], he gave him *chequeo*.”); JA5052 (agent testimony explaining that photos of PVLS members, including Velasco, with their names and ranks were found on Alfaro’s phone and on a device belonging to Miguel Angel Serrano Medina, a/k/a “Viejo Cabro,” one of the highest ranking members of PVLS in El Salvador, JA1934); JA5052–5056, JA6251–6255, JA6316–JA6323, JA6324–6335.

Because ample evidence proved that Velasco participated in the murders to maintain or increase his position in the gang, his sufficiency claim fails.

2. Overwhelming evidence supported Velasco’s convictions for kidnapping resulting in death.

To obtain convictions on Counts 7 and 8, the government had to prove beyond a reasonable doubt that, among other things, Velasco unlawfully and willfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away the victims. 18 U.S.C. § 1201(a)(1). To “inveigle” or “decoy” means “to lure or entice or lead a person astray by false representations or promises or other deceitful means.” *United States v. Lentz*, 383 F.3d 191, 202 (4th Cir. 2004). That is precisely what happened to E.E.E.M. and S.A.A.T. Their murderers, as part of the conspiracies to kill E.E.E.M. and S.A.A.T., falsely told the victims that PVLS

was going to have a gang meeting on the nights of their deaths as a ruse to lure the victims out from their homes and to forestall any suspicions on their part.

Advancing an argument as bizarre as it is galling, Velasco contends that S.A.A.T. “knowingly, voluntarily, and happily joined the conspiracies that resulted in his death” and that of E.E.E.M. Br. 62. This beggars belief. As previously stated, when PVLS killed E.E.E.M., S.A.A.T. was in juvenile detention, and when he was released, he went about trying to discover what had happened to his friend. Plainly, he did not conspire to kill E.E.E.M. (though even if S.A.A.T. had, Velasco fails to explain how that absolves him of culpability for participating in either murder). As for the notion that a teenager who was tricked into leaving his home and traveling to the wooded area of a park at night could have “happily” joined a conspiracy bent on his own demise, the government is at a loss for words.

Velasco further argues that E.E.E.M. was a “committed gang member,” and as a result, neither victim was “inveigled” for purposes of § 1201(a)(1). Br. 62. This, too, is wrong. That E.E.E.M. and S.A.A.T. associated with PVLS before their deaths is of no consequence. If it were, members and associates of MS-13 would be immune from liability for kidnapping every time their victims happened to be in a gang. Obviously, that is not the law.

The evidence proved that E.E.E.M. and S.A.A.T. were led astray—and ultimately to their deaths—by false representations, and were thus inveigled. As a

result, substantial evidence supported Velasco's convictions for kidnapping resulting in death.

3. In reviewing the sufficiency of the evidence, this Court does not assess witness credibility.

Velasco maintains that the district court "failed to adequately account for the fact that the government's case relied on [] ample amounts of cooperators' testimony," Br. 63, but this claim is dead on arrival. This Court has repeatedly held that it is "not entitled to assess witness credibility and must assume that the jury resolved any conflicting evidence in the prosecution's favor." *United States v. Robinson*, 55 F.4th 390, 404 (4th Cir. 2022); *see also id.* ("Credibility determinations are within the sole province of the jury and are not susceptible to judicial review."). That some of the government's witnesses were former gang members "implicating others in their criminal activity," Br. 63, does not undermine the jury's verdict.

V. The district court appropriately denied Velasco's motions to sever defendants and counts.

Velasco attacks the joinder of offenses and defendants in the second superseding indictment and argues that the district court erred by declining to sever his case. His challenge is meritless.

A. Applicable Legal Standards

The Federal Rules of Criminal Procedure provide that a single charging instrument can allege multiple offenses against a defendant, provided that the offenses “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” Fed. R. Crim. P. 8(a). Rule 8 also permits defendants to be joined in the same action if “they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.” Fed. R. Crim. P. 8(b). Separate offenses are considered to be acts within the same series “if they arise out of a common plan or scheme . . . unified by some substantial identity of facts or participants.” *United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987). This Court has explained that “Rule 8 permits very broad joinder . . . at the pleading stage.” *United States v. Cannady*, 924 F.3d 94, 102 (4th Cir. 2019).

A district court may sever a joint trial “[i]f the joinder of offenses or defendants . . . appears to prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). In general, though, “defendants who are indicted together are tried together.” *Zelaya*, 908 F.3d at 929; *see also United States v. Mir*, 525 F.3d 351, 357 (4th Cir. 2008) (“[J]oinder is the rule rather than the exception[.]”).

The party seeking severance under Rule 14 “bears the burden of demonstrating a strong showing of prejudice.” *United States v. Branch*, 537 F.3d 328, 341 (4th Cir. 2008). A district court should thus grant a severance motion “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Qazah*, 810 F.3d 879, 891 (4th Cir. 2015). That is because “[j]oint trials play a vital role in the criminal justice system,” *Zafiro v. United States*, 506 U.S. 534, 537 (1993), and promote the “dominant judicial concern with judicial economy[,]” *United States v. Parodi*, 703 F.2d 768, 780 (4th Cir. 1983).

When a defendant challenges a conviction by asserting that there has been both misjoinder of offenses and improper denial of a motion to sever, the Court considers each issue in turn. First, the Court “review[s] *de novo* the district court’s refusal to grant defendants’ misjoinder motion to determine if the initial joinder of the offenses and defendants was proper under Fed. R. Crim. P. 8(a) and 8(b) respectively.” *United States v. Mackins*, 315 F.3d 399, 412 (4th Cir. 2003). If joinder was proper, the Court then examines whether “the district court abused its discretion under Fed. R. Crim. P. 14 in denying pre-trial motions to sever.” *Id.* Even if the Court concludes that an abuse of discretion occurred, it will only vacate a defendant’s conviction when there has been a showing of “clear prejudice,”

United States v. Dinkins, 691 F.3d 358, 368 (4th Cir. 2012), not merely when “a separate trial would offer a better chance of acquittal,” *United States v. Shealy*, 641 F.3d 627, 632 (4th Cir. 2011). Unless the defendant can show that a joint trial was “so unfairly prejudicial that a miscarriage of justice would result,” the defendant cannot overcome the presumption that co-defendants should be tried together.

United States v. Williams, 10 F.3d 1070, 1080 (4th Cir. 1993).

B. The second superseding indictment properly joined offenses and defendants.

This case is a paradigmatic example of proper joinder under Rule 8. The second superseding indictment charged the same four offenses in connection with two murders stemming from a common scheme that were mostly committed by the same people, in the same manner, in the same place, and for the same purpose, and all within roughly one month’s time. Each of the salient considerations regarding the propriety of joinder identified by this Court were therefore met. *See United States v. Hawkins*, 776 F.3d 200, 208 (4th Cir. 2015) (whether the offenses are violations of the same statute); *United States v. Ketter*, 456 F. App’x 293, 295 (4th Cir. 2011) (per curiam) (temporal proximity between the alleged offenses); *United States v. Taylor*, 218 F. App’x 249, 251 (4th Cir. 2007) (per curiam) (similarity of the conduct alleged in each offense). Indeed, a sounder example of “a connection or logical relationship” between defendants and charges can scarcely be conceived. *United States v. Haney*, 914 F.2d 602, 606 (4th Cir. 1990). By the time the case

went to trial, the rationale for joinder reached its apogee, given that all five defendants faced the very same charges for their roles in the two related murders. Because of the substantial overlap in the evidence and witnesses upon which the government relied, a joint trial thus unquestionably served Rule 8's purpose of promoting judicial economy. *See Chavez*, 894 F.3d at 605 (“Particularly in cases like this one, where a primary focus of the trial was the interwoven relationships among defendants, separate trials would be repetitive, requiring witnesses to provide the same testimony many times.”).

C. Velasco fails to show clear prejudice resulting from the joint trial.

Velasco argues that each defendant should have been tried separately because (a) the jury might have been confused and found each defendant “guilty by association,” and (b) statements made by co-defendants might have presented issues under *Bruton v. United States*, 391 U.S. 123 (1968). Br. 65–66. Nothing in the record, though, supports Velasco’s conjecture. Moreover, even if the district court had abused its discretion in denying his severance motions, Velasco fails to carry his heavy burden of showing prejudice sufficient to warrant reversal.

“This Court has never held that jury confusion requires severance of defendants properly joined in an indictment.” *United States v. Toliver*, 793 F. App’x 151, 158 (4th Cir. 2010) (per curiam). Indeed, the Court “has found no abuse of discretion when the defendant merely pleads jury confusion between

defendants” rather than demonstrates that a specific trial right was infringed. *Id.* Here, there was abundant evidence supporting the convictions of each defendant. Thus, “[t]his is not a case in which a defendant was convicted simply by innuendo because his associates were plainly guilty.” *United States v. Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992).

Velasco also intimates that joinder with his co-defendants presented a risk of violating *Bruton*, in which the Supreme Court held that the admission of the confession of a defendant at trial was prejudicial error when that confession implicated a co-defendant, thereby contravening the co-defendant’s confrontation rights under the Sixth Amendment. 391 U.S. at 129–31. Yet Velasco concedes that “the government did not offer ‘any statements of co-defendants that reference a defendant by name or otherwise facially implicate a defendant.’” Br. 68. To maintain, as Velasco does, that “any co-defendant’s statements, even if redacted[,] implicated other defendants,” Br. 69, directly contradicts *Bruton* and its progeny, including *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). And in any event, in this case, the district court instructed the jury that it was not to consider a statement made by one defendant in deciding the charges against any other defendant on trial, JA5353, and that each defendant was entitled to have his case determined from evidence as to his own acts, statements, and conduct, JA5359. Thus, even if Velasco had somehow been prejudiced by statements his co-defendants’ made that

did not implicate him, directly or indirectly, the district court's instructions cured any prejudice. *See Zafiro*, 506 U.S. at 539.

VI. The district court did not abuse its discretion by refusing to give the jury a duress instruction.

During the trial, but before it had concluded its case-in-chief, the government preemptively moved to preclude the defendants from asserting a duress defense. JA2356. In so doing, the government also asked the district court to refuse to instruct the jury on that defense. The crux of the government's argument was that there was insufficient evidence, as a matter of law, to allow the defendants to make a "threshold showing," *United States v. Bailey*, 444 U.S. 394, 416 (1980), that each of the four elements of the duress defense, as set forth in *United States v. Crittendon*, 883 F.2d 326 (4th Cir. 1989), could be satisfied.¹⁴

¹⁴ To establish a duress defense, the burden is on the defendant to adduce evidence from which a jury reasonably could conclude that he:

(1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Crittendon, 883 F.2d at 330. Demonstrating each of these four prongs is a "high bar" for defendants to clear. *United States v. Gorham Bey*, 373 F. App'x 394, 397 (4th Cir. 2010).

Later, at the charging conference that preceded jury instructions, the district court heard oral argument from the government and Velasco concerning the provision of a duress instruction. JA5319–5329. At the conclusion thereof, the district court, from the bench, granted the government’s motion, JA5331, which decision it later memorialized in a written order, JA5627. The district court concluded that no defendant, with respect to any count, had made a prima facie showing that any of the *Crittendon* prerequisites could be satisfied.¹⁵

This Court reviews a district court’s decision not to give a particular jury instruction for abuse of discretion. *See United States v. Smith*, 54 F.4th 755, 774 (4th Cir. 2022).

On appeal, the defendants contend that the district court erred for three reasons, none of which is persuasive. *First*, the defendants baldly proclaim: “If there ever was a basic set of facts that lent itself to the issuance of the duress instruction, it would be the facts in this case.” Br. 74. But the record, the district

¹⁵ The district court’s ruling swept broadly, encompassing all of the defendants. However, neither Herrera nor Elmer Zelaya ever proposed a duress instruction or opposed the government’s motion asking the district court not to give such an instruction. Accordingly, as to them, the lack of a duress instruction should be reviewed only for plain error. *See United States v. Lazo*, 816 F. App’x 752, 763–64 (4th Cir. 2020) (per curiam). But because, for the reasons stated above, the district court did not abuse its discretion when it declined to instruct the jury on a duress defense, there was no error, and Herrera and Elmer Zelaya cannot prevail under any standard of review.

court correctly determined, reveals insufficient facts to meet any of the *Crittendon* criteria. For example, “while Defendants may have been fearful of retribution if they refused to participate in the crimes alleged in the Second Superseding Indictment, they failed to show that Defendants or a third party were under a real and specific imminent threat at the time of their alleged acts.” JA5628. Fear of reprisal, the district court accurately stated, does not in itself justify the commission of a crime; rather, “the defendant must show that a real and specific imminent threat existed at the time of the unlawful act.” JA5628 (citing *United States v. King*, 879 F.2d 137, 139 (4th Cir. 1989)). Here, the defendants failed to make that showing, though even if they had, the district court would still have been correct to omit a duress instruction because it found that the defendants “voluntarily made the choice to join MS-13 and travel to the scene of the murders of E.E.E.M. and S.A.A.T., recklessly placing themselves in a situation where they could be forced to engage in criminal conduct, including kidnapping and murder.” JA5628; *cf. Dixon v. United States*, 548 U.S. 1, 5 n.2 (2006) (adopting district court’s articulation of duress elements, including that “the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct”).

Second, the defendants puzzlingly assert that their proposed duress instruction was “not complicated.” Br. 74. Perhaps so, but that is entirely

irrelevant. The straightforwardness of a duress instruction is not one of the factors that must be assessed when determining whether to give it to the jury, and in this case, the clarity of a would-be duress instruction played no role in the district court's analysis.

Third, the defendants maintain that the district court's refusal to give the duress instruction constituted a violation of their due process rights under the Fifth Amendment because the district court effectively "stripped the jury of its power to properly authorize imposition of punishment[.]" Br. 76. Thus, the defendants seem to be arguing that any time a district court declines to give a duress instruction, the defendant's right to due process is contravened. Plainly, that is wrong. This Court has clearly held that where, as here,

there is insufficient evidence, as a matter of law, to support an element of the [duress] defense, the defendant can be precluded from presenting any evidence of duress to the jury or, if some evidence is already presented at trial, the court can refuse to instruct the jury on the duress defense.

United States v. Sarno, 24 F.3d 618, 621 (4th Cir. 1994).

In a case such as this one where the defense of duress is destined to fail as a matter of law, instructing the jury on duress risks confusion and raises "the potential for wasting valuable trial resources." *Bailey*, 444 U.S. at 417. For that reason, this Court has time and time again affirmed district courts' refusal to allow

defendants to put the duress defense before the jury. JA2366–2367 (citing cases).

The Court should do likewise here.

VII. The district court did not abuse its discretion when it admitted a handwritten note as a present sense impression.

While presenting its case-in-chief, the government filed a notice forecasting its intention to move for the admission of four handwritten notes memorializing statements made by Velasco and Ramirez to Jesus Delgado, one of the government’s cooperating witnesses who had yet to testify, while the three were incarcerated together at the Alexandria Adult Detention Center (“ADC”) in 2019. SA20. In its notice, the government articulated why it believed these notes would be admissible under the present-sense-impression exception to the rule against hearsay set forth in Rule 803(1) of the Federal Rules of Evidence. SA20. Only Velasco filed a written opposition. SA16.

Outside of the jury’s presence, the district court conducted a “proffer hearing” to test whether, as to Delgado’s handwritten notes, the government could demonstrate by a preponderance of the evidence the three prerequisites for admissibility under Rule 803(1)—*i.e.*, (1) the declarant must have personally perceived the event described; (2) the statement must be a factual description; and (3) the statement must be made contemporaneously or immediately after the event described. *See United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323 (4th Cir. 1982).

At the proffer hearing, Delgado testified that following his arrest on a drug distribution charge in 2019, he was detained pending indictment at the Alexandria ADC. JA3498. He identified Velasco, Ramirez, Melgar, and Villatoro as inmates who were detained there at the same time and with whom he had multiple conversations. JA3498–3500, JA3531, JA3578. Delgado explained that he routinely took down handwritten notes to memorialize the substance of the conversations he had with these individuals and that he recorded those notes in the privacy of his cell as soon as it was safe for him to do so following the end of the conversation. JA3504–3505; JA3506.¹⁶

Delgado was asked about a handful of specific notes, including one that had been marked for identification purposes as GEX 124-6. JA3511, JA6490. This note was dated October 21, 2019,¹⁷ and it included a timeframe, 5:20 to 5:40, which Delgado testified was when his conversation with Velasco—identified in the note both by his gang moniker, “Oscuro,” and his first name, “Pablo”—began and

¹⁶ Delgado recorded the notes after he pled guilty in August 2019. JA3531–3532. Eventually, Delgado gave the notes to his attorney, who produced copies to the government in May 2022. JA3507–3508, JA3517, JA3545, JA3557. At no point did the government ever instruct Delgado to engage in conversations with Velasco, Ramirez, Melgar, or Villatoro or to take notes on any such conversations. JA3545.

¹⁷ The note says “October 21,” without the year, but Delgado later testified that it was October of 2019. JA3514, JA3572.

ended. JA3511. The note further stated “at my [d]oor,” indicating, Delgado explained, that the conversation occurred at the door to Delgado’s cell. JA3512. Delgado testified that after this particular conversation with Velasco ended, “I went right in my room and wrote this down.” JA3511.

Following Delgado’s testimony at the proffer hearing, the government withdrew its notice of intent to introduce the handwritten notes as substantive evidence with the exception of GEX 124-6. JA3535.¹⁸ As to that single note, the district court, citing this Court’s decision in *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994), found that the government had met its burden and that the note could be admitted pursuant to Rule 803(1). JA3542, JA3545.¹⁹

Thereafter, the jury was brought back in and the government resumed its case-in-chief by calling Delgado. JA3546. During his direct examination covering a range of subjects, Delgado substantively reiterated what he had said during the proffer hearing concerning his conversations with Velasco and Ramirez and his

¹⁸ On appeal, the defendants incorrectly represent that the district court admitted “a limited number of [Delgado’s] notes,” plural. Br. 76.

¹⁹ In so doing, the district court rejected Velasco’s argument, raised in his written opposition to the government’s notice, that Delgado’s notes could not be admitted under Rule 803(1) because they did not describe the alleged crimes underlying the case. The district court agreed with the government that the event that the present sense impression described in this case was Delgado’s conversation with Velasco about the murders, not the murders themselves. JA3542.

practice of memorializing those conversations via handwritten notes. Through Delgado, the government introduced and published GEX 124-6. JA3571–3572. Delgado read the substance of the note to the jury, stating:

Oscuro at my door talking to me about Yonathan not going to help his case. He said he's selfish. Told me -- he told me. I asked him is he sure the weapon won[']t ever get found. He said they buried it, and then he had someone else dig it up and throw it away in the Potomac. Said, no way anybody would ever find it. Pablo said El Toro didn't know where the weapons were and one of the guys that were talking was basically talking or snitching knows, but he had another guy bury the machete and throw it away.

JA3572–3573.²⁰

A. The district court properly admitted GEX 124-6.

In their opening brief, the defendants fail to distinguish who among them is advancing the challenge to GEX 124-6's admissibility. It is clear, though, that Herrera, Elmer Zelaya, and Henry Zelaya have no basis for joining this argument—Delgado was not housed with any of them; his notes do not reference any of them; and none of their counsel adopted either the written or oral arguments made by Velasco's counsel opposing the admission of Delgado's notes under Rule 803(1). While Ramirez stands in a different position, none of his attorneys ever formally objected, in writing or orally, to the admission of any of Delgado's notes

²⁰ Earlier testimony from Delgado established that “Yonathan” and “El Toro” were Melgar and Villatoro, respectively. JA3554–3555.

pursuant to Rule 803(1), nor did any of his attorneys ever formally adopt the written and oral objections made by Velasco. In the end, though, whether Ramirez can be deemed to have joined an objection to the admissibility of Delgado's notes is a moot question, because, as explained, only GEX 124-6 was admitted, and that exhibit in no way incriminated Ramirez. Accordingly, its admission could not possibly have prejudiced him.

For these reasons, the government treats the defendants' argument pertaining to the admission of GEX 124-6 as being advanced solely by Velasco. As previously stated, a trial court's evidentiary rulings are reviewed for abuse of discretion. *See Hedgepeth*, 418 F.3d at 419.

On appeal, Velasco does not take issue with the district court's ruling that the government showed by a preponderance of the evidence that each of the prerequisites to admissibility under Rule 803(1), as set forth in *Portsmouth Paving*, had been established with respect to GEX 124-6. Instead, he argues that the admission of GEX 124-6 constituted an abuse of discretion because Delgado did not need the note to speak to its substance, and because Delgado could have read the text of GEX 124-6 into evidence under Rule 803(5) without admitting the exhibit itself. Both contentions—equally unsupported by a single authority—are unavailing.

Regarding the former, whether the author of a given present sense impression remembers it sufficiently well to testify about it is irrelevant to the question of its admissibility. The entire premise of Rule 803(1) is “the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.” *Navarette v. California*, 572 U.S. 393, 400 (2014). Indeed, the hearsay declarant does not even have to be available to testify for the present sense impression to be admitted, though where, as here, the declarant does testify and subject himself to cross-examination, the reliability of the hearsay has the potential to be enhanced. *See United States v. Ferber*, 966 F. Supp. 90, 97 (D. Mass. 1997). Whether Delgado could have relayed the substance of GEX 124-6 to the jury based on his recollection of the conversation it memorialized simply has no bearing on the exhibit’s admissibility under Rule 803(1).

Similarly, whether Delgado could have read GEX 124-6 into evidence pursuant to the recorded-recollection exception to the rule against hearsay set forth in Rule 803(5) says nothing about the propriety of the exhibit’s admission under Rule 803(1). Putting aside the glaring fact that in either case the jury would have learned what Delgado’s note said, Rule 803 does not contain, as Velasco seems to envision, an order of priority governing which among equally applicable hearsay

exceptions the proponent of evidence must invoke. Whether the government could have admitted the substance of GEX 124-6 through Rule 803(5) (or any other hearsay exception, for that matter) is not germane to whether GEX 124-6 was properly admitted under Rule 803(1). Here, Velasco does not even argue that the admission of GEX 124-6 under Rule 803(1) was improper. Accordingly, his assertion that the district court abused its discretion by allowing that exhibit in fails from the start.

B. Any error in admitting GEX 124-6 was clearly harmless.

Even assuming, for purposes of discussion, that the district court abused its discretion in admitting GEX 124-6, such an error would plainly be harmless given that Delgado was subjected to extensive cross-examination during both the proffer hearing and his testimony before the jury. *Cf. United States v. Perl*, 492 F. App'x 37, 40–41 (11th Cir. 2012) (per curiam) (concluding that any error in admission of notes under Rule 803(1) was harmless given that their author testified and was subject to cross-examination). Moreover, the government only offered GEX 124-6 as evidence of Velasco's consciousness of guilt. In its absence, the jury would still have had a surfeit of evidence, including the testimony of numerous eyewitnesses, one of the murder videos, and myriad communications among members of the gang, from which to conclude that Velasco was guilty beyond a reasonable doubt.

JA3559–3563, JA6697. Thus, GEX 124-6 was merely the proverbial icing on the cake; Velasco’s convictions did not rise and fall on its admission.

VIII. The district court correctly denied Henry Zelaya’s motion to suppress the cell phone seized during his arrest.

The FBI apprehended Henry Zelaya, who was wanted in connection with this case, at his mother’s apartment after she allowed law enforcement officers to come inside and volunteered that he was there. During a search of Henry Zelaya’s person incident to his arrest, agents located a cell phone, which they seized and later, after obtaining a warrant, searched. Henry Zelaya moved to suppress the seizure of his cell phone, arguing that his preceding arrest violated the Fourth Amendment because law enforcement officers had trespassed on his mother’s property, undertaken an unreasonable knock-and-talk at her patio door, and coerced her into consenting to their entry. JA382. Following a six-hour-long evidentiary hearing in which it heard from numerous witnesses, the district court rejected each of Henry Zelaya’s arguments and denied his motion. JA1155–1159.

On appeal, Henry Zelaya simply advances the same arguments that failed to persuade the district court. While a district court’s legal determinations in its denial of a motion to suppress are reviewed *de novo*, this Court reviews a district court’s factual findings in that context for clear error, construing the evidence in the light most favorable to the government. *See United States v. Montieth*, 662 F.3d 660, 664 (4th Cir. 2011). Because no error infected the district court’s ruling,

this Court should affirm the denial of Henry Zelaya's Fourth Amendment-based suppression motion.²¹

A. The district court's determination that the officers conducted a reasonable knock-and-talk was not clearly erroneous.

On November 18, 2018, the FBI sought to execute a warrant for Henry Zelaya's arrest. Starting at approximately 6:00 a.m., the FBI initiated an arrest operation at a house in Woodbridge, Virginia, where law enforcement believed Henry Zelaya would be present. JA579–580, JA591–593, JA607–608, JA646–654. Although multiple people were located inside the residence, Henry Zelaya was not there. JA580, JA608.

Sometime after 7:00 a.m., FBI Special Agent Casey Pixton joined Alexandria Police Department Detective Darryl Ferrer, who had been conducting surveillance at the home of Henry Zelaya's mother, Erlinda Portillo Martinez, who lived in an apartment in Alexandria. JA580, JA595. Eventually, they were joined by FBI Special Agents Carlos Fontanez and Paul Fisher and Immigration and Customs Enforcement ("ICE") task force officers. JA584, JA609. The law

²¹ Although Henry Zelaya does not explicitly argue that he was an overnight guest at his mother's home, and thus that he had a reasonable expectation of privacy there, testimony at the suppression hearing established that Henry Zelaya told agents he had arrived at his mother's home the day before the knock-and-talk. JA627. The government therefore assumed that Henry Zelaya had standing to raise his Fourth Amendment claims, and does so again on appeal.

enforcement officers responded to Portillo's home in the hopes that she might help them locate her son following the unsuccessful arrest operation in Woodbridge.

JA609 ("The goal was to talk to the mother, to do a knock and talk. We knew that she was in communication with [Henry Zelaya,] so our goal was to talk to her to see if she would cooperate and help us locate him."). Notably, agents had not previously seen Henry Zelaya at his mother's apartment building, and they had no reason to believe that he would be there that morning. JA585, JA608–609.²²

Portillo's unit was located on the ground floor of a three-story building. JA581, JA799, JA837. It was "very accessible" from the parking lot via a concrete path that led straight up to a small outdoor patio on to which a sliding glass door and a more conventional front door, black in color and bearing the unit number, opened. JA582–583, JA799, JA831, JA836–838. No fences or walls surrounded the patio entrance. JA583. During prior surveillance of Portillo's apartment building, agents had observed residents of the ground-floor units, including occupants of Portillo's home, using this entrance to enter and exit their residences. JA610–611.²³

²² Because they did not believe that they would encounter Henry Zelaya in Alexandria, the agents had changed out of the tactical gear that they were wearing during the arrest operation in Woodbridge and into plain clothes with their service weapons concealed. JA580, JA585, JA609, JA613.

²³ Both Portillo and the property manager confirmed that the patio entrance was used to go in and out of the home and that other ground-level unit occupants

Agent Fontanez believed that the patio entrance was the “proper entrance” to the home, despite “mail and other deliveries” being made to “the other entrance” inside the building itself. JA1156. Accordingly, he, along with Detective Ferrer and the ICE officers, approached the patio entrance via the aforementioned pathway while Agents Pixton and Fisher went to the other side of the building where they posted up. JA585, JA833. Agent Fontanez knocked two or three times on a small window immediately to the right of the black door bearing the unit number. JA611, JA774, JA799, JA836–837. Although Detective Ferrer and the ICE officers were with him, neither they nor anyone else knocked on any windows or doors. JA611–612. Within about one minute, Portillo came to the door. JA611.

Based on this record, the district court determined that the officers had reasonably concluded that the patio entrance was the “proper entrance” to the apartment. JA1156–1157. There was nothing erroneous, much less clearly so, about this finding. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”). Because the officers

used the same door leading on to their patios for the same purpose. JA743, JA773, JA799.

reasonably believed that the patio entrance was the primary entrance,²⁴ they, just like any private citizen, were entitled to approach it and knock on the door in the interest of speaking with a resident. *See Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001); *see also United States v. Jardines*, 569 U.S. 1, 8–9 (2013) (stating that law enforcement officers may “approach the home by the front path, knock promptly, wait briefly to be received,” and stay should they obtain “an invitation to linger longer”).

Additionally, as the district court correctly noted, JA1157–1158, no ulterior motive animated the officers’ desire to engage in the knock-and-talk. *Cf. Jardines*, 569 U.S. at 9 (observing it would exceed scope of knock-and-talk rule to explore area around home in hopes of discovering incriminating evidence). The officers did not suspect that Henry Zelaya or any contraband was inside the apartment; they merely wanted to ask his mother if she would be willing to discuss his whereabouts. Indeed, if they had actually had reason to believe that Henry Zelaya was in the apartment, there would have been no need to conduct the knock-and-

²⁴ The district court correctly noted that even if the patio entrance were not the “proper entrance,” there are circumstances in which law enforcement officers could reasonably use an alternative entrance for a knock-and-talk. *Cf. United States v. Roberts*, 467 F. App’x 187, 188–89 (4th Cir. 2012) (per curiam) (“As the rear patio connected to an adjoining parking lot along a paved sidewalk, it would be reasonable for members of the public to approach the townhouse through the rear entryway[.]”).

talk; they could have gone right into the apartment without Portillo's permission to execute Henry Zelaya's outstanding arrest warrant. *See Payton v. New York*, 445 U.S. 573, 603 (1980) (“[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”). Because the district court's findings that no trespass occurred and that the knock-and-talk was reasonable were not clearly erroneous, this aspect of Henry Zelaya's argument fails.

B. The district court's determination that Portillo consented to the officers' entry was not clearly erroneous.

When Portillo came to the door, Agent Fontanez, a native Spanish speaker, displayed his credentials to show that he was with the FBI and asked if he could speak with Portillo about her son. JA611–613, JA774. At no point did he demand that she let him or the other officers into her home. During this encounter at the door, Agent Fontanez showed Portillo a photo of Henry Zelaya on his cell phone, but he did not show her a wanted poster or a warrant, and no weapons were displayed. JA612–613. Portillo invited Agent Fontanez and the other officers, none of whom displayed weapons, inside. JA665.

Upon entering the apartment, Agent Fontanez observed two children sleeping on the floor. JA614. Portillo sat on a couch in the living room. JA671. Agent Fontanez sat down next to her, and the two started talking. JA671. During

their conversation, the other law enforcement officers who had entered with Agent Fontanez remained standing in the living room area²⁵; no one walked around the home, opened any doors, or went into any other rooms. JA614. Agent Fontanez specifically “made note that [he was] not immigration” and “had nothing to do with any other issues [the family] might have.” JA669. He explained to Portillo that he had an arrest warrant for her son, Henry Zelaya, in connection with a violent crime and told her that he knew that she had been in communication with him. JA614–615. At that point, Portillo started crying, and after a few moments, whispered, “he’s in the back.” JA615.²⁶

On these facts, the district court correctly found that Portillo had voluntarily consented to the officers’ entry into her home. JA1159.²⁷ To the extent her testimony was at odds with any of the foregoing, the district court outright disregarded her testimony because the court found it was not credible. JA1158–1159. Significantly, in conducting its review, this Court gives particular deference

²⁵ By this point, Agents Pixton and Fisher had received a message that Portillo had allowed law enforcement to enter her home and had joined the other officers inside. JA586, JA611, JA613.

²⁶ The officers proceeded to locate Henry Zelaya in a bathroom and placed him under arrest. JA615–616. On appeal, Henry Zelaya does not challenge any portion of this interaction with the officers.

²⁷ Whether Portillo knew that she could withhold her consent does not control whether her decision to give it was voluntary. *See United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc).

“to a district court’s credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress.” *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008).

Citing no authorities in support, Henry Zelaya contends that even if the invitation to enter that Portillo extended to Agent Fontanez was voluntary, the presence of multiple officers in her apartment, coupled with the allegedly aggressive nature of Agent Fontanez’s questioning, was coercive and exceeded the scope of her consent. He is wrong. For one thing, Portillo consented not just to Agent Fontanez’s entry but also to that of the officers who were with him. JA665 (“[S]he invited *us* inside.” (emphasis added)). Beyond that, Henry Zelaya does not claim, and there is no record evidence to support, that Portillo ever revoked her consent. As such, the district court committed no error in determining that the officers were lawfully inside her home.

C. Any error in the denial of Henry Zelaya’s suppression motion was decidedly harmless.

A district court’s refusal to suppress evidence is subject to review for harmlessness. *See United States v. Blauvelt*, 638 F.3d 281, 290–91 (4th Cir. 2011). Virtually none of the overwhelming evidence of Henry Zelaya’s guilt came from his phone. JA4139–4146, JA5154–5160. Thus, any error in that evidence’s admission was plainly harmless.

IX. The district court appropriately denied Henry Zelaya’s motion to suppress his post-arrest statements.

Following his arrest, Henry Zelaya was interviewed by Agent Fontanez. After answering some routine booking questions, he was administered—and subsequently waived, orally and in writing—his *Miranda* rights, submitted to questioning, and confessed to, among other things, participating in S.A.A.T.’s murder. Henry Zelaya moved to suppress his admissions, which were video and audio recorded, contending that they had been obtained in violation of the Fifth Amendment because his *Miranda* waiver was not knowing, intelligent, and voluntary. JA351. Following the aforementioned, day-long evidentiary hearing, the district court rejected Henry Zelaya’s argument and denied his motion. JA1159–1163.

On appeal, Henry Zelaya essentially accuses the district court of ignoring evidence that, in his view, undermines the finding that his waiver was knowing, intelligent, and voluntary. This Court reviews *de novo* whether a defendant’s statements were involuntary or obtained in violation of *Miranda*, but must accept the district court’s factual findings on the circumstances surrounding the confession absent clear error. *See United States v. Braxton*, 112 F.3d 777, 781 (4th Cir.1997) (en banc).

A. Henry Zelaya's waiver was knowing and intelligent.

To determine whether a defendant knowingly and intelligently waived his *Miranda* rights, a court asks whether, considering the totality of the circumstances, the waiver was made with full awareness of the right being abandoned and the consequences of the decision to relinquish it. *See United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002). Those circumstances include the defendant's intelligence and education, his age, his familiarity with the criminal justice system, and the proximity of the waiver to the giving of the *Miranda* warnings. *See Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1994).

Here, contrary to Henry Zelaya's assertion, the district court considered those factors. Upon reviewing the video of the waiver, the district court sensibly concluded that Henry Zelaya had no trouble understanding Agent Fontanez or the gravity of the moment and did not appear confused. JA1163. The district court also observed that when Henry Zelaya said he had not previously been arrested in the United States, Agent Fontanez explained that defendants enjoy certain rights during custodial interrogation, which he proceeded to read aloud to Henry Zelaya one by one in Spanish. JA1163. As Agent Fontanez did so, Henry Zelaya "listened attentively," nodded along, and said "um hmm" after each right. JA1162. When he finished, Agent Fontanez looked at Henry Zelaya and asked, "Did you

understand them all?” JA6692; JA814. Henry Zelaya nodded affirmatively. JA6692.

While it is true that Agent Fontanez did not read the consent portion of the waiver form out loud, he directed Henry Zelaya to the consent language, asked him to read it, and told him to speak up if he had any questions. JA6692. He then observed Henry Zelaya read the consent language on the form to himself. JA6692. Only after Henry Zelaya had finished reading the consent language, and looked up while nodding, did Agent Fontanez show him where to sign the form. JA6692.

Based on its findings, none of which was clearly erroneous, the district court correctly assessed Henry Zelaya’s waiver to have been made knowingly and intelligently.

B. Henry Zelaya’s waiver was voluntary.

To be voluntary, a *Miranda* waiver must be the result of “free and deliberate choice rather than intimidation, coercion, or deception” on the part of law enforcement. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Thus, “coercive police activity is . . . a necessary predicate to a finding that a waiver of *Miranda* rights is not voluntary.” *Cristobal*, 293 F.3d at 140–41 (finding that waiver was voluntary even when defendant was questioned in hospital after receiving narcotics where there was no evidence that officers exploited his weakened condition with coercive tactics).

Agent Fontanez, who was unarmed, testified that he never threatened Henry Zelaya. JA623, JA633. That is apparent on the video of the interview, which unambiguously shows that Henry Zelaya was not rushed or forced in any way into waiving his rights. JA812–814. It was only after fully satisfying himself that he understood his rights and wished to speak with Agent Fontanez that Henry Zelaya elected to sign the form. JA814–815. Shortly thereafter, he confessed unequivocally and provided details regarding S.A.A.T.’s murder, including who else was there and what weapons were used, without prodding from Agent Fontanez, underscoring that his admissions were the product of his free will, not strong-arming. JA633; JA6444–6450.

Not so fast, says Henry Zelaya. While he might have been forthcoming post-waiver, it was only because Agent Fontanez intimidated and deceived him by “engag[ing] in extensive ‘rapport-building’ questioning before introducing the *Miranda* rights.” Br. 87.²⁸ Henry Zelaya cites no authority supporting the notion that rapport-building necessarily renders a *Miranda* waiver involuntary. But in any case, the record does not support this argument. As the district court appropriately found, Agent Fontanez’s pre-*Miranda* questioning did not qualify as

²⁸ Nothing Henry Zelaya said before waiving his rights was introduced at trial.

interrogation.²⁹ Rather, it consisted merely of background queries subject to the booking exception, JA1161, which “exempts from *Miranda*’s coverage questions to secure the biographical data necessary for booking or pretrial services.”

Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990); see also *United States v. Taylor*, 799 F.2d 126, 128 (4th Cir. 1986) (“[T]he taking of basic personal information . . . is a ministerial duty incident to arrest and custody which does not constitute interrogation . . . [and] does not violate *Miranda*.”).

Henry Zelaya fixates on Agent Fontanez’s questions regarding his birthplace and when and how he illegally crossed the border into the United States, arguing that these questions “explicitly exposed [him] to potential criminal liability.” Br. 87. But place of birth and length of time in one’s city of residence is “standard background information” that is explicitly permitted under the booking exception. *United States v. D’Anjou*, 16 F.3d 604, 608 (4th Cir. 1994). And in any event, Henry Zelaya could not reasonably have believed that following his arrest for participating in two murders, the FBI was questioning him so that they could later prove his immigration status in court.

²⁹ “Interrogation” refers to questioning, as well as other words or actions, that law enforcement officers “should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

Because the district court, after carefully reviewing the evidence, correctly found by a preponderance that Henry Zelaya's *Miranda* waiver was the product of a "free and deliberate choice rather than intimidation, coercion, or deception," *Moran*, 475 U.S. at 421, this Court should affirm the denial of his Fifth Amendment-based suppression motion.

X. The district court did not abuse its discretion when it rejected Henry Zelaya's request to give the jury a lesser-included-offense instruction.

Toward the end of the trial, counsel for Henry Zelaya emailed a proposed lesser-included-offense instruction solely to counsel for the government—*i.e.*, it was not sent to counsel for any of Henry Zelaya's co-defendants, nor was it filed with or otherwise submitted to the district court. JA5299. The following day, the government filed a memorandum opposing the provision of a lesser-included-offense instruction. JA5299. The government included as an exhibit to its brief the document it had received from Henry Zelaya's counsel. JA5303.

In sum, Henry Zelaya wanted the district court to tell the jury that the crime of conspiracy to commit kidnapping and murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5), as charged in Counts 1 and 2 of the indictment, JA305–306, includes the lesser crime of aggravated assault with a deadly weapon, in violation of 18 U.S.C. § 113(a)(3), JA5306. The government objected, arguing that the former offense does not, as it must, necessarily include the latter crime, and that in any event, a lesser-included-offense instruction was

unwarranted based on the evidence adduced by the government during its case-in-chief. JA5299–5301. At the subsequent charging conference, the district court denied Henry Zelaya’s motion from the bench “[f]or the reasons outlined by the government in its argument both in brief and orally in court today[.]” JA5337.

As previously stated, this Court reviews a district court’s decision not to give a particular jury instruction for abuse of discretion. *See Smith*, 54 F.4th at 774. On appeal, Henry Zelaya maintains that the district court’s refusal to give a lesser-included-offense instruction was an abuse of discretion, but his reasoning is unconvincing.

As Henry Zelaya readily concedes, *see* Br. 90, a defendant may only be found guilty of a lesser crime if it is “*necessarily* included in the offense charged.” Fed. R. Crim. P. 31(c)(1) (emphasis added). Yet Henry Zelaya does not even assert, much less demonstrate, that aggravated assault with a deadly weapon is ineluctably a lesser included offense of conspiracy to commit kidnapping and murder in aid of racketeering activity. His reticence is unsurprising given that it is axiomatic that these two offenses have numerous different elements (for example, the object of a conspiracy need not be realized for the agreement to constitute a crime, and both kidnapping and murder can be committed without the use of a deadly weapon). This alone is sufficient to defeat Henry Zelaya’s claim.

Beyond that, Henry Zelaya asserts that so long as the requirements of Rule 31(c) have been met, “[a] lesser included offense instruction is mandated when requested[.]” Br. 90. That is wrong. Criminal defendants are not entitled to a lesser-included-offense instruction as a matter of right. Rather, “to receive a lesser-included offense instruction, the proof of the element that differentiates the two offenses must be sufficiently in dispute that the jury could rationally find the defendant guilty of the lesser offense but not guilty of the greater offense.” *United States v. Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997). To place an element “sufficiently in dispute,” either “the testimony on the distinguishing element must be sharply conflicting, or the conclusion as to the lesser offense must be fairly inferable from the evidence presented.” *Id.*

Here, the evidence presented at trial conclusively proved that the victims were murdered, a fact that Henry Zelaya does not dispute. Further, the evidence established that the murders were premeditated and that Henry Zelaya actively participated in them. The evidence simply did not support an inference, much less a rational one, that Henry Zelaya—or any of his co-defendants—merely assaulted the victims. Accordingly, the district court appropriately denied his request for a lesser-included-offense instruction. *Cf. Chavez*, 894 F.3d at 603 (“[MS-13 defendant] was either guilty of th[e] murder, whether as a principal or an aider/abettor, or he was not. No reasonable jury could have found him guilty of

assault or attempt but not murder. Thus, the district court did not abuse its discretion by refusing to give instructions as to those lesser included offenses.”).

XI. Velasco’s life sentences did not contravene the Eighth Amendment.

Velasco, who was 18 years old when he participated in the kidnapping and murder of E.E.E.M. and S.A.A.T., contends that the four sentences of life without the possibility of parole that the district court was obligated to impose pursuant to 18 U.S.C. §§ 1959(a)(1) and 1201(a)(1) violated his Eighth Amendment right to be free from cruel and unusual punishment. JA6587–6588. The question whether a sentence contravenes the Eighth Amendment is reviewed *de novo*. See *United States v. Said*, 798 F.3d 182, 196 (4th Cir. 2015).

Velasco’s claim that his mandatory life sentences violated the Eighth Amendment is squarely foreclosed by precedent. The Supreme Court has held that mandatory life sentences are unconstitutional as to defendants who committed their crimes as juveniles, see *Miller v. Alabama*, 567 U.S. 460, 470 (2012), but *not* as to defendants, like Velasco, who were adults when they engaged in their offenses. In *Chavez*, this Court held that *Miller* did not render mandatory life sentences unconstitutional where one of the defendants, like Velasco, was 18 years old at the time of the murder in which he participated. 894 F.3d at 609; see also *United States v. Crawley*, 760 F. App’x 241, 244 (4th Cir. 2019) (per curiam) (observing that statutorily required life sentence is *per se* reasonable). That settles the matter.

Conclusion

For the reasons stated, this Court should affirm the defendants' convictions and sentences.

Respectfully submitted,

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/s/

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Statement Regarding Oral Argument

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

Certificate of Compliance

I certify that this brief was written using 14-point Times New Roman typeface and Microsoft Word 2016.

I further certify that this brief does not exceed 20,975 words (and is specifically 20,850 words) as counted by Microsoft Word, excluding the table of contents, table of authorities, signature block, statement regarding oral argument, this certificate, the certificate of service, and any addendum.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

/s/

Alexander E. Blanchard
Assistant United States Attorney

Certificate of Service

I certify that on January 31, 2024, I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all counsel of record.

/s/

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