No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

UNITED STATES OF AMERICA, Respondent,

v.

DANILO VELASQUEZ, *Petitioner*.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

MARY E. POUGIALES
448 Ignacio Boulevard, # 191
Novato, CA 94949
(415) 847-6379

Counsel of record for Petitioner

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

UNITED STATES OF AMERICA, *Respondent,*

v.

DANILO VELASQUEZ, *Petitioner*.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Title 18, United States Code § 3006A(d)(7) and Rule 39 of this Court, Petitioner Danilo Velasquez asks leave to file the attached Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit without prepayment of fees and costs and to proceed *in forma pauperis*. Petitioner was represented by counsel pursuant to Title 18, United States Code, §3006A(b), (d)(7) on appeal to the Ninth Circuit Court of Appeals.

Dated: March 4, 2019

MARY E. POUGIALES
448 Ignacio Boulevard, # 191
Novato, CA 94949

Counsel of record for Petitioner

QUESTIONS PRESENTED

Did the Ninth Circuit fail to protect petitioner's fundamental due process right to present his complete defense when it approved the district court's exclusion of relevant, highly probative and admissible expert testimony that was critical to petitioner's sole defense, diminished capacity?

Did the Ninth Circuit disregard this Court's clear precedent and violate petitioner's Due Process rights when it affirmed the imposition of a severe life sentence that was based in part on petitioner's exercise of his constitutional right to trial and to appeal his conviction?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Danilo Velasquez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the district court and the imposition of a life sentence upon his conviction for multiple RICO-related conspiracy charges.. He was convicted November 29, 2011, and was sentenced to life in prison on February 15, 2012.

OPINION BELOW[1]

The Ninth Circuit Court of Appeals issued a brief unpublished decision on December 17, 2018, affirming petitioner's conviction and sentence. App. B. The Ninth Circuit denied petitioner's timely filed Petition for Rehearing *En Banc* on January 22, 3019. App. A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

[1] "App" refers to the Appendices attached to this Petition.

CONSTITUTIONAL and STATUTORY PROVISIONS

> No person shall be . . . deprived of life, liberty, or property, without due process of law[.]
>
> United States Constitution, Am. 5.

STATEMENT OF THE CASE

The Charges

Petitioner was charged with 23 co-defendants in a Third Superseding Indictment filed September 24, 2009, in Counts One through Four, as follows: Racketeering Conspiracy (18 U.S.C.§1962(d)); Conspiracy to Commit Murder in Aid of Racketeering (18 U.S.C. §1959(a)(5)); Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering (18 U.S.C. § 1959(a)(6)); and Use/ Possession of Firearm in Furtherance of Crime of Violence (18 U.S.C. §924(c)(1)(A) and (2)). ER 209. A jury found him guilty on all counts. ER 105-106, 476; RT JT 1. He was sentenced to life in prison, and is now serving that term in the custody of Bureau of Prisons. ER 107, 483.

The panel Memorandum decision affirming his conviction and sentence was filed December 17, 2018.

The Evidence

Petitioner concedes that the organization known as La Mara Salvatrucha (MS-13) is a RICO enterprise.[2] But the evidence against him was so weak in regards to the requisite mental state elements of RICO conspiracies that, had the due process error he claims not occurred, the Government could not have obtained those convictions.

Proof of the essential mental state elements depended on the testimony of a single uncorroborated and highly unreliable informant, Wilson Villalta. Villalta was arrested with codefendant Luis Herrera in possession of the firearm used two days earlier to shoot an innocent civilian, one week earlier to shoot two other men, and two weeks earlier to commit a murder outside the Daly City BART station, that murder being the centerpiece of the Government's case against petitioner. RT JT 1903,1906,

---

[2] MS-13 is an international Sureño gang; "20th Street," its San Francisco "clique," claims a portion of the Mission District as its turf. RT JT 964, 967, 972. It is steeped in violence. Members must be "jumped in," a violent initiation ritual where they are beaten. RT JT 983- 984. They cannot leave; if they try, they will be killed. RT JT 986, 988. The enterprise funds itself through the criminal activities of its members, and its primary business is to wage war against Norteño gang members, either on sight or on hunts to find them. RT JT 968, 973-975, 984, 986, 993, 994, 1004,1006, 1138, 1155, 1535, 1537. The more "work" a member does, witnessed and vouched for by other members, the more respect he earns. RT JT 1006.

1907, 2301, 2306-2308, 2336-2337, 2371-2373, 2384-2385, 2418-2419. Witnesses saw two gunmen emerge from a car in front of the BART station and shoot a volley of bullets into the car in front of them but no one could identify the shooters. RT JT 444-445, 484, 487, 530, 698, 738-740 745, 748, 750, 845, 1265. Police found gunshot residue on the abandoned stolen car used in the shooting, and inside found the DNA and the latent fingerprint of two other codefendants. RT JT 671, 672, 816, 824-825, 2671-2672. No physical evidence tied petitioner to the car, the gun, or the shooting. Cell site analysis tracked several phones during the relevant time period to and from the BART station and to the site of the abandoned car, including phones linked to Villalta, Luis Herrera's brother, another suspected gang member, and petitioner. RT JT 2636-2638, 2645, 2649-2651, 2654, 2661-2662, 2727.2661.

Villlalta fingered Luis Herrera for the first shooting, petitioner for the second, and both of them for the BART shooting. Villalta was the only witness, and provided the only evidence, identifying petitioner as the leader of MS-13's 20th Street clique and as the organizer of hunts for Norteños, including the hunt that led to the BART shooting. RT JT 1895, 1897, 1900, 1913, 1914, 1916-1919, 1951, 1953, 1957-1959, 1968.

After Villalta and Herrera were arrested, they were incarcerated in the same jail where, according to Villalta, Herrera told him as they watched a TV program about the Daly City shooting, that he, Herrera, participated in the hunt, and that petitioner, using an Uzi, and another gang member were the shooters. RT JT 1977. Villalta persuaded another inmate to lie to the grand jury by testifying that he was present when Herrera allegedly made these statements. RT JT 1980, 1985, 1986.

The jury also heard extensive testimony about six cold-blooded murders for which petitioner had absolutely no involvement, solely because they were charged as RICO conspiracy predicate offenses.

In his defense, as relevant here, petitioner proffered the opinion testimony of two experts, one a clinical psychologist, the other an expert in Guatemalan culture and society. In combination, they (and the Government's own rebuttal expert) agreed that petitioner suffered from post-traumatic stress disorder, either on-going or during relevant periods charged in the indictment, as well as major depression with psychotic features on a recurrent basis. All agreed that he attempted suicide twice, once in 2005 and once in 2006, at the very time that he was alleged to have joined MS-13. RT JT 2741. Uncontested mental commitment records confirmed that his suicide

attempts were accompanied by auditory hallucinations directing him to kill himself, and that he required anti-psychotic medication to function. RT JT 2741, 2749, 2751, 2756-2757, 2759, 2761, 2786, 2790, 3056, 3095.

Dr. Gretchen White, petitioner's expert in clinical psychology, concluded that petitioner's acute experience of post-traumatic stress disorder (PTSD) resulted from brutalizing childhood trauma, the effects of which continued into his present life but was no longer acute. RT JT 2741, 2789. Dr. White could not evaluate the accuracy of petitioner's reported childhood history – growing up as a denigrated ethnic Mayan in a remote area of the Guatemala highlands in the late 20th century – without a cultural context because the events he reported were so shocking to her. RT JT 2779. She relied, therefore, on the report of a cultural anthropologist, Dr. Allan Burns, a proffered defense expert rejected by the district court. His report, along with the assessment of a neuropsychologist, allowed Dr. White to conclude that petitioner was neither delusional nor mentally retarded, and that as a young boy he had been beaten by his fathers and brothers, raped at a young age, had witnessed people being tortured, and been attacked by what he believed were monkeys in the jungle. RT JT 2748, 2751, 2752, 2753-2754.

Other witnesses confirmed that petitioner arrived alone in San Francisco in the early 1990's as a young teenager and was homeless for some time. RT JT 2816, 2817, 2822, 2823, 2828. By 2001 he had rented a small space with a cot in a San Francisco home where he lived for five years. RT JT 2842- 2844, 2861-2865. He did not speak Spanish – his native language was Mam, a Mayan language – but eventually he learned enough to speak rudimentary Spanish. RT JT 2767, 2850. He maintained steady employment as a construction worker from 7 a.m. to 6 p.m. daily. RT JT 2845, 2846, 2849, 2850. One resident described petitioner when he moved out in 2006 (the year he attempted suicide for the second time) as being "sad" and barely communicating. RT JT 2870, 2872.

THE NINTH CIRCUIT UNPUBLISHED PANEL DECISION

The panel's four-page Memorandum decision in this complex case was cursory and conclusory, rejecting petitioner's claims in their entirety. App. B.

As to the exclusion of relevant expert testimony in support of petitioner's diminished capacity defense, the panel found no abuse of discretion and no Due Process violation on three bases: first, the district court "permissibly balanced the probative value of the proposed testimony

against its potential for prejudice" under Fed.R.Evid. Rule 403[3]; second, the district court permissibly found that the defense experts were "simply transmit[ting] hearsay to the jury," the probative value of which "in helping the jury evaluate the opinions" was substantially outweighed by its prejudicial effect under Rule 703; and, third, because the experts reached conclusions about mens rea that, if admitted, would "necessarily compel the conclusion" that defendant lacked the requisite mental state, in violation of Rule 704.[4]

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[3] All future Rule references are to the Federal Rules of Evidence.

[4] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." F.R.E. Rule 403

"An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." F.R.E. Rule 703

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

As to the severe life sentence, the panel concluded that petitioner had not been penalized for exercising his constitutional right to trial and appeal.

REASONS FOR GRANTING THE PETITION

This Petition presents an important question of federal law pursuant to Supreme Court Rule 10 (c) that affects all similarly-situated defendants whose sole defense at trial depends upon the testimony and opinions of an expert witness. At present, the district court is permitted to exercise broad discretion reviewable only for trial, not for constitutional, error to exclude such testimony even when its exclusion deprives the defendant of his only defense at trial, as occurred here. Here, that broad discretion exercised with no cautionary guidance from this Court, necessarily but needlessly sacrificed the fair trial to which petitioner was entitled, resulting in manifest injustice.

Fundamental fairness, therefore, calls for this Court to grant *certiorari* in order to provide clear guidance to the lower courts in order to that such evidentiary rulings on expert testimony that also implicates a defendant's fundamental Due Process right to present his complete defense, are fair and consistent throughout the federal courts. At present, such guidance is insufficient to protect a defendant's Due Process right to a fair trial. The Ninth Circuit has articulated sensible guidelines – improperly ignored at

petitioner's trial and in his appeal – that petitioner urges this Court to adopt as a national standard whenever the effect of an evidentiary ruling excluding relevant defense expert opinions prevents a defendant from presenting his complete, sole defense.

In addition, this petition should be granted because the Ninth Circuit failed to apply this Court's long-standing precedent that it is "patently unconstitutional" to do as the district court did here, imposing an unjustifiably severe life sentence based in significant part on petitioner's exercise of his constitutional rights to trial and to appeal. *North Carolina v. Pearce*,395 U.S. 711, 723 (1969), quoting with approval *United States v. Jackson*, 390 U.S. 570, 581 (1968).

Without this Court's grant of review, this prosecution will end with petitioner condemned to live and die in prison knowing that his conviction was obtained following a trial at which he was not allowed to educate his jury through relevant expert testimony about the factual basis for his defense of diminished capacity, and knowing that his sentence was based on unconstitutional criteria. Either result is the consequence of manifest injustice.

ARGUMENT

I. Petitioner was denied his Due Process right to present his complete defense of diminished capacity when the relevant and highly probative expert opinion of a cultural anthropologist was excluded at his trial.

This Court has for decades protected "the right [of an accused] to present his own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Few rights are more fundamental. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). It is an essential attribute of the adversary system itself. *Taylor v. Illinois*, 484 U.S. 400, 407 (1988).

In this case, petitioner's sole defense of diminished capacity was eviscerated by the district court's exclusion of critical evidence of the observations and opinions of a cultural anthropologist, Dr. Allan Burns. Each of us receives in our upbringing a profound cultural and social imprint. Petitioner was denied his right to inform his jury of how that imprint, incomprehensible to anyone raised in the secure civil order and established societal structure of the United States, formed and limited his frame of reference, behavior, and mental state. Dr. Burns' knowledge and observation as a cultural expert could have provided information critical to the jury's ability to evaluate whether petitioner's world view might be the cause of his

conduct, and might have prevented him from forming required mental states. *Dang Vang v. Toyed*, 944 F.2d 476, 481, 482 (9th Cir. 1991.

Petitioner's sole defense to the multiple RICO conspiracy charges he faced was that the combined effect of his (1) undisputed history of mental illness with (2) the savagery of his debilitating and traumatic childhood in the isolated Guatemalan mountains[5], and (3) the lack of any social or cultural support system in his teenaged years, so diminished his mental capacity as to render him incapable of forming the intents required under the RICO conspiracy statutes.[6] Dr. Burns could have (1) informed the jury of the source and cause of the symptoms of the mental disorders; (2) permitted them to fully and fairly assess the accuracy, legitimacy, and believability of the psychological expert's diagnoses; and (3) allowed them to fairly determine the extent to which the brutalizing circumstances of petitioner's

[5] Petitioner's Guatemalan passport identified the remote region of the country in which he was born. RT JT 1321-1322.

[6] These included that he "knowingly and intentionally" joined MS-13 knowing of "its essential purpose and intending to facilitate it"; agreed to participate while "aware of the essential nature and scope" of MS-13; agreed that murder would be part of the "activity taken in furtherance of the RICO conspiracy"; specifically agreed to commit murder and assault with a dangerous weapon "in aid of racketeering; and "ha[d] in mind" as a "substantial purpose" "to gain entrance to or to maintain or increase his position in the enterprise." RT JT 3294-3295, 3301-3302, 3307-3310.

upbringing during Guatemala's notorious and brutal civil war (a war that targeted his Mayan population), as well as the cultural imprint of his isolated childhood community could have impacted or even prevented his ability to acquire a frame of reference large enough to encompass the MS-13 organization.

But the district court excluded all such evidence, including the related conclusions of clinical psychologist Dr. Gretchen White that petitioner exhibited "passivity, fearfulness, low social status and single strand relationships"; that "[h]e perceives the world much as a six or seven year old child might" due to his life experiences; that his "severe cultural dislocation, low level of education, ignorance about American culture and societal values" could be the cause of his conceded mental disorders; that a typical symptom of petitioner's diagnosed mental illnesses is "a very limited grasp of [one's] role in events"; and that, "as [a] clinically recognized consequence of his psychological conditions – [such a person would be] extremely susceptible to coercion and intimidation." ER 160, 164, 166, 167.

Dr. White was barred also from testifying to her professional reliance on Dr. Burns' unchallenged and impressive expertise concerning the individualized imprint on petitioner of his Mayan upbringing in the isolated

highlands of Guatemala during the traumatizing onslaught there of the Guatemalan civil war that targeted the Mayan population for torture and genocide. His jury was never allowed to learn that petitioner's "familiarity with social structures . . . that expand beyond individual actions is low"; and that he is "without the linguistic or conceptual tools to understand fully or react to institutions or groups of people beyond the individual level and which could be compared to those of a small child." ER 175-176.

Of course, petitioner's right to present his defense is not absolute. *Taylor, supra* at p. 410. It can be limited by rules that exclude evidence, but only if those rules do not "infring[e] upon a weighty interest of the accused," and "are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319 (2006); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010).

In this case, the district court and the Ninth Circuit relied broadly upon Rules 403 and 704(d) to justify the exclusion. Petitioner urges this Court now to grant certiorari to consider whether district courts should be required to conduct a more careful and explicit balancing test when, as here, a trial court's discretion to exclude evidence under otherwise valid evidentiary rules risks violating the Constitution's Due Process protections.

Petitioner suggests the following guidelines should be mandated in such situations:

> [T]he court should consider the probative value of the evidence on the central issue; its reliability; whether it is capable of evaluation by the trier of fact; whether it is the sole evidence on the issue or merely cumulative; and whether it constitutes a major part of the attempted defense. . . A court must also consider the purpose of the rule; its importance, how well the rule implements its purpose, and how well the purpose applies to the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable or prejudicial evidence.
>
> *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985)

Here, of course, the probative value was high on issues central to proof of the charged crimes; the expert testimony was reliable, and well within the jury's ability to evaluate; and it was the entirety of the defense. The evidence did not run afoul of Rule 704(d) because it came well shy of asserting an ultimate fact, instead describing causes and symptoms of petitioner's diagnosable, observable behavior. and cultural and traumatic experiences specific to petitioner that contributed to his diminished capacity.

Fundamental fairness thus requires a more focused inquiry when, as here, "'(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical element of the government's case.'" is at issue. *United States v. Haischer*, 780 F.3d 1277, 1283 (9th Cir. 2015), quoting *United States v.*

Evans, 728 F3d 953, 967 (9th Cir. 2013).

Rule 403 leads to no different result, especially because its "major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000)(quoting *United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983). It provides "an extraordinary remedy to be used sparingly," with caution, and only when the danger of unfair prejudice "substantially outweigh[s]" probative value. *Haischer*, *supra*, 780 F3d pp. 1281-1282.

The case against petitioner might well have failed entirely once the jury heard the information and opinion of the cultural expert, and the extent to which the defense psychologist relied on it to form her own medically valid conclusions. Given the chance to credit these opinions, the jury could well – and rightfully – have found petitioner mentally incapable of comprehending the existence and scope of, or knowingly and intentionally agreeing to join MS-13, or of forming the motive and purpose to advance within its rank, or of any of the other multiple requisite mental states. It could well have concluded, for instance, that self-promotion was simply outside his shrunken and fear-filled world view, and that the Government's

informant was fabricating a leadership role for petitioner that petitioner's social, sultural, organizational, mental, emotional, psychological, and even linguistic capacities rendered impossible. In short, they could well have acquitted him, and been justified in doing so had petitioner been permitted to present his fulsome diminished capacity defense.

II. The panel failed to follow this Court's controlling precedent when it approved the severe life sentence imposed on petitioner despite proof in the record that it was based in substantial part on petitioner's exercise of his constitutional right to trial and to appeal his conviction.

The record here confirms that the sentencing court penalized petitioner for exercising his constitutional rights to trial and to appeal, an action that is "patently unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969), quoting with approval *United States v. Jackson*, 390 U.S. 570, 581 (1968). The district court's own words prove the violation:

> THE COURT: Why do you say that if one wants to take their chances on getting an acquittal at trial and not accepting responsibility and they go to trial and lose, why should that person be treated the same way as somebody who pled guilty, gave up the chance for an acquittal, gave up the chance for an appeal?
>
> MS. SCHWARTZ: . . . Luis Herrera decided to plea in the middle of trial, so he did exercise his right to trial. . . I don't believe that exercising your right at trial should be a basis for differentiating two defendants based on their degree of culpability.

> THE COURT: Maybe you don't believe that, but what do the guidelines say about that?
>
> MS. SCHWARTZ: Well, according to the government and the probation officer, the guidelines puts them in the exact same situation. That's my point. I don't think there is a big difference between these two defendants in terms of the acts that they took.
>
> ER 48-49; RT 4/4/2012: 48-49. (Emphasis added.)

> Should he been given a discount because a different defendant in the same crime [Herrera] pled guilty, accepted responsibility, made an allocution, explained what had happened, gave up all of his rights to appeal? Is it really logical to argue that this defendant is like that defendant? No. [Velasquez] says he wants to appeal. He wants to work for the day that he gets a complete acquittal. Fine. He's got the right to try to do that, but in the meantime there is no way he is like Luis Herrera who got 35 years. This defendant deserves life in prison.
>
> ER 55; RT 4/4/2012: 55. (Emphasis added.)

The Government consistently viewed petitioner and Luis Herrera as deserving of identical punishment, but at sentencing claimed for the first time that they were "hardly of the same culpability." ER 42, 46; RT 4/4/2012: 42, 46. Yet Herrera was charged with the actual, substantive murder; petitioner only with the general RICO conspiracies.

The district court openly factored in the same unconstitutional considerations also in sentencing codefendants Cesar Alvarado and Walter

Chincilla-Linar, both convicted in the brutal murder of 14-year-old Ivan Miranda: "[I]f these defendants had gone to trial . . . they would be looking at maybe 60 years to life in prison. But they did not go to trial. They accepted responsibility for their actions, and have entered into an agreement not to take any appeal[.]" ER 206-207; RT 2/8/2011: 20-21. (Emphasis added.

CONCLUSION

For these reasons, Danilo Velasquez respectfully requests that this Court grant his petition for *certiorari* to review the merits of his claim that he was wrongly denied his Fifth Amendment right to a fair trial, to present his defense, and to be free from punishment for exercising his constitutional right.

Dated: March 4, 2019

Respectfully submitted,

_____

MARY E. POUGIALES
Counsel for Petitioner Velasquez

A P P E N D I X

INDEX TO APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANILO VELASQUEZ, Defendant-Appellant.	No. 12-10099 D.C. No. 3:08-cr-00730-WHA-33 Northern District of California, San Francisco ORDER

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing en banc is DENIED.

APPENDIX B

FILED

DEC 17 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANILO VELASQUEZ, Defendant-Appellant.	No. 12-10099 D.C. No. 3:08-cr-00730-WHA-33 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted December 4, 2018
Seattle, Washington

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

Defendant Danilo Velasquez appeals his convictions for (1) racketeering conspiracy, in violation of 18 U.S.C. § 1962(d); (2) conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5); (3) conspiracy to commit assault with a deadly weapon in aid of racketeering, in violation of 18

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 1959(a)(6); and (4) use and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and § 2. We affirm.

1. The district court did not abuse its discretion by excluding the "cultural defense" testimony offered by the "cultural" and the "diminished capacity" experts. See United States v. Christian, 749 F.3d 806, 810 (9th Cir. 2014) (reviewing the exclusion of expert testimony for abuse of discretion). The court permissibly balanced the probative value of the proposed testimony against its potential for unfair prejudice and permissibly excluded it under Federal Rule of Evidence 403. United States v. Anderson, 741 F.3d 938, 950 (9th Cir. 2013).

2. Nor did the district court abuse its discretion by limiting the "diminished capacity" expert's testimony. First, the district court permissibly precluded the expert from "simply transmit[ting] hearsay to the jury." The district court permissibly balanced the probative value of the information against its potential for unfair prejudice and permissibly excluded it under Rule 703. See Fed. R. Evid. 703 (stating that otherwise inadmissible information can be disclosed to the jury "only if [its] probative value in helping the jury evaluate the opinion substantially outweighs [its] prejudicial effect").

Second, the district court also permissibly precluded the expert from testifying that Defendant "did not have the requisite mental state to knowingly and

intentionally join or participate in the charged conspiracies and/or criminal enterprise" under Federal Rule of Evidence 704(b). The district court properly drew the line between testimony regarding mental illness and conclusions about mens rea. See United States v. Morales, 108 F.3d 1031, 1037 (9th Cir. 1997) (en banc) (holding that Rule 704(b) prohibits an expert witness in a criminal case from "stat[ing] an opinion or draw[ing] an inference which would necessarily compel the conclusion" that defendant lacked the requisite mental state).

These exclusions did not violate Defendant's Sixth Amendment right to present a diminished capacity defense. See United States v. Perkins, 937 F.2d 1397, 1401 (9th Cir. 1991) (holding that the defendant "cannot transform the exclusion of this evidence into constitutional error by arguing that he was deprived of his right to present a defense. The right to present a defense is clearly fundamental, but '. . . the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973))).

3. The district court did not plainly err by admitting the co-conspirator's statement. See United States v. Gomez-Norena, 908 F.2d 497, 500 (9th Cir. 1990) (reviewing an unpreserved evidentiary issue for plain error). The statement was

properly admitted as nonhearsay pursuant to Rule 801(d)(2)(E) because it directly furthered the conspiracy by ensuring that Defendant received credit for his "work." See United States v. Tamman, 782 F.3d 543, 553 (9th Cir. 2015) ("Statements made to keep coconspirators abreast of an ongoing conspiracy's activities satisfy the 'in furtherance of' requirement."). Additionally, because "statements in furtherance of a conspiracy" are "not testimonial," the co-conspirator's statement does not implicate the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 56, 68–69 (2004)

4. The sentencing court did not abuse its discretion or violate Defendant's Fifth Amendment rights by sentencing Defendant to life in prison. See Gall v. United States, 552 U.S. 38, 49 (2007) (reviewing all sentencing decisions for abuse of discretion). The sentence was procedurally correct: the district court properly considered the 18 U.S.C. § 3553(a) factors and determined that Defendant deserved life in prison. United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). The sentence was substantively reasonable: the district court considered all the factors and testimony and reasonably concluded that a variance was not warranted. United States v. Ressam, 679 F.3d 1069, 1089 (9th Cir. 2012) (en banc).

Additionally, Defendant was not penalized for exercising his Fifth Amendment right to trial and appeal. Defendant was not similarly situated to a co-defendant who pleaded guilty and received a shorter sentence, because other factors underlay the court's sentencing decision. United States v. Carter, 560 F.3d 1107, 1121 (9th Cir. 2009).

AFFIRMED.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

UNITED STATES OF AMERICA, Respondent,

v.

DANILO VELASQUEZ, *Petitioner*.

PROOF OF SERVICE

I, Mary E. Pougiales, do swear and declare that on this date, March 5, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF *CERTIORARI* on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The name and addresses of these served are as follows:

Solicitor General Noel Francisco
Office of the Solicitor General
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

MARY E. POUGIALES
448 Ignacio Boulevard, # 191
Novato, CA 94949
(415) 847-6379

Counsel of record for Petitioner