NO. _____

In The
Supreme Court of the United States

LELIS EZEQUIEL TREMINIO-TOBAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fifth Amendment Due Process right to present a defense requires the trial court to instruct the jury that it has a duty to acquit any defendant who proves an affirmative defense?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings appear in the caption on the cover page.

STATEMENT OF RELATED CASES

The following proceedings are directly related to this petition:

United States v. Treminio-Tobar, No. 18-4447, United States Court of Appeals for the Fourth Circuit, judgment entered May 28, 2020;[1] *Petition For Rehearing and Rehearing En Banc* denied on August 3, 2020.[2]

United States v. Treminio-Tobar, No. 1:16-cr-00209-LO, United States District Court for the Eastern District of Virginia, Alexandria Division, judgment entered March 5, 2018.[3]

[1] Cert Appendix at 36a
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PETITION FOR WRIT OF CERTIORARI

Petitioner Lelis Treminio-Tobar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

One would think that some questions answer themselves. This case presents one of them: does the Fifth Amendment Due Process right to present a defense require the court to tell the jury that a proven affirmative defense is a complete defense, requiring the defendant's acquittal? Or, put another way, does it violate Due Process to instruct a jury only on the elements of an affirmative defense, without also telling the jury that it has a legal duty to acquit any defendant who proves that defense?

The answer to this question is so obvious that every court to consider it, federal or state, has said "yes"- instructing on the elements of an affirmative defense without more is not enough; Due Process also requires the trial court to instruct the jury that it must acquit any defendant who proves an affirmative defense. Indeed, without such an instruction, how is a lay jury to know its duty in this regard and understand it? The Due Process right to present an affirmative defense would be no more than an empty vessel if the jury were told the elements of an affirmative defense but were not also directed to acquit if those elements are proven. This is as obvious an error as instructing the jury that a defendant enjoys a "presumption of innocence" but then failing to tell them that this presumption alone is sufficient to raise a reasonable doubt requiring the defendant's acquittal.

This is a legal norm so embedded in our structural Due Process history and jurisprudence that each of the pattern affirmative defense instructions cited to the Panel arising from the various Courts of Appeal also direct the jury to acquit any defendant who proves an affirmative defense, irrespective of the government satisfying its burden of proof.

And yet, remarkably, the Fourth Circuit answered this question with a "no". Despite the complete absence of legal authority, persuasion or suggestion, the Fourth Circuit held that a jury does *not* have to be told it has a constitutional duty to acquit if the affirmative defense is proven; in the Fourth Circuit, simply instructing the jury on the elements of the affirmative defense is constitutionally sufficient.

According to the Panel, the missing verdict-directing language in the affirmative defense instruction in this case- language deemed constitutionally indispensable by every other authority to consider the question- was of no moment because "the district court repeatedly instructed the jury that Appellants were entitled to the presumption of innocence, that the burden is always upon the prosecution to prove guilt beyond a reasonable doubt, that the burden never shifts to a defendant, and that, if the jury—after careful and impartial consideration of all the evidence in the case—has a reasonable doubt that a defendant is guilty of a charge, it must acquit."[4] In reaching this conclusion, the Fourth Circuit did not identify any precedent- from this Court or any other- which has held or even suggested that "reasonable doubt" and "presumption of innocence" instructions are sufficient unto

[4] Cert Appendix at 19a

themselves in criminal cases involving an affirmative defense. To the contrary, every court to address the adequacy of "reasonable doubt" instructions in overcoming the alleged error has concluded that these instructions do *not* cure the error because "reasonable doubt" instructions are not interchangeable with, or substitutes for, proper affirmative defense instructions. In short, in relying upon the efficacy of "presumption of innocence" and "reasonable doubt" instructions, the Panel relied upon a rationale that has been discredited by every single court to consider it.

This is, of course, the only constitutionally appropriate conclusion. "Reasonable doubt" instructions address a fundamentally different theory of defense than do affirmative defense instructions: the former being centered on negating an element of an offense while the latter exculpates the defendant *even when the government proves each of the elements beyond a reasonable doubt*. *See Dixon v. United States*, 548 U.S. 1, 7 (2006)(*emphasis added*)(duress does not negate a defendant's criminal state of mind as an element of the offense; instead, it allows the defendant to 'avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present). *See also Smart v. Leeke*, 873 F.2d 1558, 1575 n. 22 (4th Cir. 1989) ("[A]n affirmative defense does not negate an element of a crime; . . . it . . . excuses punishment for a crime the elements of which have been established and admitted"). "Reasonable doubt" and "affirmative" defenses are therefore at odds with each other and often mutually exclusive, which is why Due Process mandates that juries be told, in no uncertain terms, that a proven affirmative defense overcomes and supersedes a coincident finding that the government has also

proven its case by proof beyond a reasonable doubt. Without such verdict-directing language, juries have no idea how to balance these two findings, one against the other, effectively rendering the Due Process right to present a defense meaningless.

By any standard, the Panel's decision is manifestly—and dangerously—wrong. There can be no question that, because of the faulty instruction, the jury was blind to its duty to acquit a defendant who proves an affirmative defense. Further, the Panel's conclusion regarding the efficacy of "reasonable doubt" and "presumption of innocence" instructions is fundamentally at odds with every court to consider this precise question, flies in the face of this Court's holdings on the essential Due Process right to present a defense, and violates a long standing and historical legal norm.

And unlike the typical case involving incorrect jury instructions, this decision will have severely harmful consequences for defendants well beyond Petitioner himself. By finding that there is no meaningful difference between a "reasonable doubt" defense and an "affirmative" defense, the Fourth Circuit has essentially eliminated affirmative defenses *in toto*, be they duress, necessity, self-defense or insanity. This gutting of the Due Process right to present a defense is an outcome the Founders, who fought a revolution in part to insure Due Process, would have shuddered to imagine.

This Court's intervention is urgently needed. The Court should grant certiorari and say what should have been obvious: the Due Process right to present an affirmative defense requires an instruction to the jury that a proven affirmative defense is a complete defense, requiring acquittal, even in those instances when the

government has otherwise proven the elements of the underlying offense by proof beyond a reasonable doubt. The decision below should not be allowed to stand.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit appears at Cert Appendix 1a. The Fourth Circuit's Order denying rehearing and rehearing *en banc* is not reported.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Fourth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. The Panel issued its opinion and judgment on May 28, 2020 and denied the *Petition For Rehearing and Rehearing En Banc* on August 3, 2020. This Court's order of March 19, 2020 extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Factual background

It is no secret that recently arrived young people from Central America are particularly vulnerable to MS-13 recruitment: they are culturally and socially adrift; live in fringe communities; are frequently unaccompanied by competent adult supervison; have difficulty with the language; have an inherrent distrust of the police; and are often in the country illegally or without status.[5]

Petitioner Lelis Treminio-Tobar is one such young person. Lelis came to the United States from La Union el Tejar, El Salvador at the age of 17 in order to escape the gang violence destroying his community and his country.[6] He illegally crossed the border in Texas, requested asylum, and was held in an immigration detention center until being released to the custody of his brother Giovanni in Alexandria, Virginia.[7]

After arriving in Alexandria, Lelis did his best to assimiliate and was making good progress; despite speaking little English, he enrolled himself in high school, began studying English, and began working full-time as a dishwasher.[8] All of this progress started to unravel, however, when MS-13 targeted Lelis for recruitment.[9]

Lelis, who had travelled more than 3800 miles to escape MS-13, did not join MS-13. Rather, he escaped again, abruptly moving out of Giovanni's house in Alexandria and into his brother Paulino's house in Arlington.[10]

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[5] JA at 1444-47, 3526, 3533-34
[6] JA at 3395-96
[7] JA at 3398
[8] JA at 3399- 3401
[9] JA at 3402-03
[10] JA at 3404

It took some time but MS-13 ultimately tracked Lelis down in Arlington.[11] To send the proper message, the local MS-13 leader took him to an isolated lake in Leesburg, Virginia where a group of waiting MS-13 members surrounded him, robbed him, and attacked him by kicking and punching him repeately in the head, face and groin. They then showed Lelis videos of decapitated dead bodies and made it clear he would be next if he didn't join the gang.[12] Lelis' "forced recruitment" into MS-13 had officially begun.[13]

Lelis still refused. This time he left Virginia entirely, moving to Maryland to live with his sister Luz.[14] MS-13 again tracked him down, this time driving him to a lonely and isolated area off a back road in West Virginia in the middle of the night where other MS-13 gang members intended to murder a rival gang member.[15] Once isolated, they surrounded Lelis and told him, in no uncertain terms, that if he did not participate, they would murder him as well.[16] Lelis tried to escape the situation one last time, but had nowhere to go and nowhere to hide.[17] In fear for his life and with no other options, Lelis half-heartedly participated by holding the victim down and pretending to stab him.[18]

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[11] JA at 3405

[12] JA at 2582, 2586

[13] JA at 1452, 3524, 3536-37

[14] JA at 3415-16

[15] JA at 3432

[16] JA at 3540-41. The practice of forcing someone to take part in a criminal act in order to cement them to the gang- thereby leaving them no means to escape and no means by which to contact the police- is an old and practiced technique, handed down from MS-13 leadership to all its clique leaders.

[17] JA at 3433

[18] JA at 3435, 3439

B. Procedural background

1. Trial

Lelis was charged with, *inter alia*, Kidnapping Resulting in Death.[19] He testified in his own defense and described to the jury in detail how he acted only under the threat of his own murder.[20] At the conclusion of the trial, the trial court found the evidence supported an instruction on duress and each party submitted a proposed instruction. Defense counsel submitted the pattern jury instruction on "Coercion or Duress" from *O'Malley, Grenig and Lee's Federal Jury Practice and Instructions*, the instructions routinely relied upon by district court judges in the Eastern District of Virginia.[21] Indeed, the same district court judge had given this exact instruction in a terrorism related trial only a few weeks prior to the trial in this matter.[22]

The *O'Malley* instruction includes the following verdict-directing language which reads, as is relevant:

> *If you find that a Defendant at the time and place of the offenses charged acted as a result of coercion or duress as just explained, then it is your duty to find him not guilty of those charges.*[23]

The government proffered its own "Coercion or Duress" instruction, but it was an instruction in name only. While it did purport to instruct the jury on the elements

[19] JA at 76
[20] Petitioner's testimony begins at JA 3394.
[21] JA at 3342
[22] JA at 3627-29, 3342
[23] JA at 3342

of the duress defense, it did not include any language instructing the jury of its duty acquit if it found those affirmative defense elements proven.[24]

The trial court opted to give the government's instruction, over repeated objections from defense counsel. As the record reveals, Counsel objected so frequently to the government's instruction that the trial court admonished them (albeit in a good-natured way) to stop objecting, informing Counsel "Your objection is preserved."[25] Accordingly, trial counsel obeyed the trial court's directive and ceased objecting to the instruction.

Lelis' Closing Argument focused exclusively on the idea that he was not a member of MS-13; had done all he could to avoid being a member of MS-13; that MS-13 leadership had targeted him for recruitment; and that his participation in the events of May 21, 2016 came under duress and the real fear that he himself would be murdered if he did not participate.[26]

On March 5, 2018, after deliberating 5 days, the jury returned guilty verdicts for all defendants on all counts.

On June 22, 2018, the trial court sentenced 19-year-old Lelis to, *inter alia*, Life in Prison Without the Possibility of Parole, as required by statute.[27]

2. Appeals

The Fourth Circuit affirmed the conviction, in a decision that is both bewildering and factually inaccurate. The Panel first found that Counsel had

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[24] JA at 3346
[25] JA at 3831-32
[26] JA at 4005-53
[27] JA at 4553

somehow failed to properly preserve their objection to the government's duress instruction and, as a result, only reviewed for "plain error." The Panel reached this conclusion despite the trial court's specific directive that trial counsel stop objecting because "Your objection is preserved."[28]

Once in this review posture, the Panel concluded the trial court did not commit "plain error" when it failed to properly instruct the jury on its duty to acquit a defendant who proves duress because the "reasonable doubt" and "presumption of innocence" jury instructions sufficiently informed the jury of this affirmative obligation. The Fourth Circuit reached this conclusion, in part, because it found the law on the sufficiency of "reasonable doubt" instructions in affirmative defense cases to be "largely undecided."[29] How the Panel reached this conclusion is a mystery, given that the case law universally finds reversible error when a trial court fails to inform the jury on its obligation to acquit a defendant who proves an affirmative defense.

Petitioner sought rehearing and rehearing *en banc*, pointing out, among other things, that the trial court had, in fact, preserved Counsels' objection and, in any event, there was no authority- of any kind or description- supporting the Panel's conclusions. Indeed, all the authority went in the exact *opposite* direction.

The Panel did not address any of these arguments, summarily denying the *Petition for rehearing and rehearing en banc.*

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[28] JA at 3831-32

[29] Cert Appendix at 19a n.3

REASONS FOR GRANTING THE PETITION

The Panel's decision is wrong, anomalous, a complete outlier and is a split with established law.

In the first instance, the Panel improperly reviewed this issue for "plain error" after finding that Counsel failed to properly object. The Panel came to this conclusion despite Counsels' repeated objections to the government's instruction; the filing of their own instruction that specifically included language directing the jury to acquit if it found Petitioner acted as a result of duress; and Counsels' acquiescence and submission to the trial court's admonition to cease objecting only after being told, in the trial court's words, "Your objection is preserved."[30] Perplexingly, when the Panel found that trial counsel failed to contemporaneously object to the government's instruction, it completely ignored the exchange between Counsel and the trial court on the impropriety of continued objections; there is literally no mention anywhere in the Panel opinion of the trial court explicitly preserving Counsels' objection.

Moreover, whatever relevance the contemporaneous objection rule has to this case must be usurped by the trial court's admonitions to Counsel that it had ruled and didn't want to hear any more objections. It simply cannot be the case that Counsel must defy the trial court in order to satisfy the rule's dictates. When Counsel submits their own instruction, repeatedly objects in open court, is admonished to cease objecting, and then stops objecting after being instructed "Your objection is

[30] JA at 3831-32

preserved", Counsel must be able to rely on the finding that the objection is, in fact, preserved.

But even under "plain error" review, it is utterly clear that a jury must be instructed that a proven affirmative defense operates as a complete defense, requiring acquittal. The Panel identified no decision of this Court, or indeed any court, that has ever suggested otherwise. Further, when confronted with the plethora of cases holding that this Due Process error requires reversal, the Panel chose to neither address nor distinguish these cases and their holdings from the instant case; it chose to simply ignore them. Instead, in finding no error, the Panel relied upon the efficacy of "presumption of innocence" and "reasonable doubt" instructions, a rationale that has been discredited by every single court to consider it.

At bottom, the Panel's decision involves questions of exceptional importance bearing on the fundamental Due Process right to present a defense; is an outlier; reaches a holding in direct conflict with every other court to consider this precise question; is at odds with holdings from the Fourth Circuit and this Court; is directly contrary to a holding from the Ninth Circuit, the only other federal circuit to consider this question; and offends a heretofore unquestioned precept of the Due Process right to present a defense. Any of these reasons, standing alone, is sufficient to warrant granting the writ.

I. The Panel's Decision Is Manifestly Incorrect, In Direct Conflict With a Sister Circuit, In Direct Conflict With Every Other Authority, And Has No Support Of Any Kind Within The Law

As is often the case in situations in which an error is obvious on its face, there is a dearth of case law or persuasive authority directly on point. However, all the case law and persuasive authority that does exist universally concludes that verdict-directing language in affirmative defense instructions is constitutionally indispensable to the Due Process right to present a defense.

A. Federal Case Law Holds That Verdict-Directing Language Must Be Included In Affirmative Defense Instructions

United States ex rel. Collins v. Blodgett, 513 F. Supp. 1056, 1061 (D.Mont. 1981), a federal case directly on point, holds that a defendant is denied Due Process and must be given a new trial when affirmative defense instructions do not affirmatively instruct the jury that such a defense operates as a complete defense requiring an acquittal. *Blodgett* recognized that Due Process mandates the jury must be told of its obligation to acquit if it concludes the defendant acted with legal justification, even when the jury also concludes the government has proven the elements of the offense by proof beyond a reasonable doubt. This is the essence of the Due Process right to present an affirmative defense. *See Dixon supra*, 548 U.S. at 7; *see also Washington v. Texas*, 388 U.S. 14, 19 (1967)(the right to present a defense "is a fundamental element of due process of law").

Blodgett further holds that instructions on "reasonable doubt" are no remedy because the jury is never instructed as to "the necessity of acquittal if the defense is

accepted as true" even when the jury simultaneously finds the elements of the offense proven beyond a reasonable doubt.[31] *Id.*

Accordingly, the *Blodgett* court vacated the challenged conviction, holding that the missing verdict-directing language in the affirmative defense instructions "so infected the entire trial that the resulting conviction violated due process." *Id.*

Blodgett is directly on point to the instant case and is consistent with other holdings from this Court and the Fourth Circuit. Yet, somehow, the Panel completely ignored it and failed to address its reasoning or holding in even the most cursory fashion.

B. Federal Pattern Jury Instructions Establish That A Jury Must Be Instructed On Its Duty To Acquit a Defendant Who Proves Duress

The relevant portions of the following pattern jury instructions from the various Courts of Appeal distinctly direct juries to acquit any defendant who proves duress.

3rd Circuit Pattern Jury Instruction 8.03 Duress:

> If you find that the government proved *(name)* committed the offense*(s)* charged and you also find that *(name)* proved that *(he) (she)* was acting under duress *[was coerced], then you must find (name) not guilty of the charge(s).*

4th Circuit Pattern Jury Instruction Coercion or Duress (cited above):

> If you find that a Defendant at the time and place of the offenses charged acted as a result of coercion or duress as just explained, *then it is your duty to find him not guilty of those charges.*

[31] *Blodgett* is, of course, in complete harmony with *Smart v. Leeke supra* ("[A]n affirmative defense does not negate an element of a crime; . . . it . . . excuses punishment for a crime the elements of which have been established and admitted.")

6th Circuit Pattern Jury Instruction 6.05 COERCION/DURESS

> If the defendant proves by a preponderance the defendant [was coerced, or forced, to commit the crime] *then you must find the defendant not guilty*.

8th Circuit Pattern Jury Instruction 3.09 COERCION/DURESS

> If all of these elements have been proved beyond a reasonable doubt, you must find the defendant guilty, unless you also find that the defendant was coerced at the time of the crime . . . *in which case [he] [she] must be found not guilty by reason of coercion.*

9th Circuit Pattern Jury Instruction Duress, Coercion or Compulsion

> If you find (defendant acted under [duress] [coercion] [compulsion] at the time of the crime), *you must find the defendant not guilty*.

11th Circuit Pattern Jury Instruction S16 Duress and Coercion

> If you find that the Defendant has proven each of these elements by a preponderance of the evidence, *you must find the Defendant not guilty*.

Again, the Panel's decision does not address these pattern duress instructions in even the most rudimentary manner.

The Fifth Circuit's pattern instruction on duress, *1.38 JUSTIFICATION, DURESS, OR COERCION*, (not cited to the Panel) identifies duress elements identical to those given to the jury in the instant case but critically includes language telling the jury that proof of those elements means that *"The defendant's actions were justified, and therefore he [she] is not guilty . . .".* This language is, of course, noticeably absent from the instruction given in this case.

Finally, while the Seventh Circuit has no pattern duress instruction, per se, it does have a pattern insanity defense instruction, 6.02 INSANITY, which reads, as is relevant: *You must find the defendant not guilty by reason of insanity if you find that he has proven by clear and convincing evidence . . .*

The message, then, is crystal clear: a jury must be informed of its obligation to acquit if it concludes the defendant acted with legal justification, even if it also concludes the government has proven the elements of the offense by proof beyond a reasonable doubt. This is the essence of the Due Process right to present an affirmative defense.

C. The State Court Decisions Uniformly Hold That Verdict-Directing Language Must Be Included In Affirmative Defense Instructions

In a kidnapping and murder case reminiscent of the instant case, the North Carolina Supreme Court in *State v. Strickland*, 298 S.E.2d 645 (N.C. 1983) reversed a conviction on direct appeal precisely because the jury was not instructed that an affirmative defense is a complete defense requiring an acquittal. In finding a violation of Due Process, that court opined:

> "We cannot, with certainty, determine whether the jury's rejection of defendant's defense of duress was based upon a disbelief of his evidence or its failure to understand that duress was a complete defense to the kidnapping charge. Had the jury understood that duress, if proven, would be a complete defense to the kidnapping charges, the result might reasonably have been different. Thus, we conclude, defendant has met his burden of showing that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial."

Strickland at 661.

Unsurprisingly, every other state court to consider this precise question has reached the identical conclusion. *See State v. Evans*, 172 W.Va. 810, 815 (1983) ("it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty); *State v. Hmidan,* 17161, 1999 WL 318366, at *3 (Ohio Ct. App. May 7, 1999)(the trial court erred when it "failed to inform the jury that it must find the Defendant not guilty if it finds that he proved his affirmative defense. The omission left the jury uninformed as to how proof of the affirmative defense operates in relation to the verdict which that proof requires."); *State v. Thomas*, 170 Ohio App. 3d 727 (2007)(conviction reversed because the jury was not properly instructed that a defendant claiming an affirmative defense is "entitled to a not-guilty finding.")

Nowhere, in any part of its decision, does the Panel even acknowledge *Strickland* or any of the other cited decisions.

D. Considering The Instructions As Whole, As Required, Compounds Rather Than Cures The Problem

Finally, this language from the Panel opinion is particularly puzzling:

> "Contrary to Appellants' arguments, however, we have repeatedly held that jury instructions must be reviewed 'as a whole and in the context of the trial,' and we will affirm so long as the instructions were "not misleading and contained an adequate statement of the law to guide the jury's determination[.]"[32]

We, the Appellant/Petitioner, never made this argument. In fact, in our Reply Brief to the Fourth Circuit, we specifically cited to *Cupp v. Naughten*, 414 U.S. 141,

[32] Cert Appendix at 18a

146-47 (1973) as a reason for overturning the conviction.[33] *Cupp* holds that instructions cannot be considered in isolation but must be considered in the context of the overall charge. Considering all the instructions together, however, compounded the problem in this case (rather than remedying it) because the jury was unavoidably left with the impression that it could find Petitioner guilty *even if it also found his duress claim to be valid and proven.*[34] *See also Blodgett* at 1060. This is our entire point. In short, we did not argue contrary to *Cupp*; rather, we embraced *Cupp* and its holding as supporting our claim for relief.

II. The Fourth Circuit Severely Misapplied the Plain Error Doctrine

The Panel found that Counsel had failed to properly preserve their (repeated) objections to the affirmative defense instruction and, as a result, only reviewed for "plain error." As noted above, the Panel reached this conclusion despite the trial court's specific directive to trial counsel to cease objecting because "Your objection is preserved."[35]

Even worse, the Panel found no "plain error" based on an analysis that is fundamentally misguided.

Rule 52(b) of the Federal Rules of Criminal Procedure reads that "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This Rule is intended to ensure that litigants have "a means for the prompt redress of miscarriages of justice," and it applies when the error was

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[33] Reply Brief at 10

[34] *Id.*

[35] JA at 3831-32

"so 'plain' that the trial court and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982).

To succeed under "plain error" review, Petitioner must show that an error (1) occurred; (2) was plain; (3) affected his substantial rights; and (4) seriously affected the fairness, integrity or public reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Petitioner satisfies all four prongs of this test.

1. The Error Occurred

There is no dispute: the affirmative defense instruction erroneously lacked the necessary verdict-directing language regarding the jury's duty to acquit Petitioner if it found he acted under duress. The government only argues that Petitioner forfeited this claim by failing to contemporaneously object before the district court.

2. The Error Was "Plain"

An error is "plain" if it is not "subject to reasonable dispute." *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009) (citing *Olano* at 734). As set forth above, the necessity of verdict-directing language in affirmative defense instructions is not subject to reasonable dispute. Every single court to address this precise issue- both federal and state- has found this language constitutionally indispensable to the Due Process right to present a defense.

Moreover, the government in its Brief to the Panel acknowledged the error was "plain," if only by implication:

> The Court has also noted that "[p]lain error may arise …when our sister circuits have uniformly taken a position on an issue that has never been squarely presented to this Court.*" United States v. Carthorne*, 726 F.3d 503, 516 (4th Cir. 2013). None of these criteria are met here: *defendants have presented no federal case law finding erroneous an affirmative defense instruction that lacks defendant's purportedly necessary language* (emphasis added).[36]

We did, in fact, present a federal case from a sister circuit reversing a conviction upon finding erroneous an affirmative defense instruction that lacked the necessary verdict-directing language. *Blodgett supra* from the federal district court of Montana unequivocally holds that a defendant is denied Due Process and must be given a new trial when affirmative defense instructions do not affirmatively instruct the jury that such a defense operates as a complete defense requiring an acquittal.[37]

In short, the Panel's conclusion that this issue is, at best, "largely undecided" is unexplainable.[38] We directed the Panel to no fewer than five federal and state cases and seven pattern jury instructions from the various Courts of Appeal that directly support our claim. The government, for its part, directed the Panel to exactly zero. In no sense is the law on this issue "largely undecided"; to the contrary, every single

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[36] Brief of the United States at 65

[37] The *Blodgett* court set aside the conviction because "... the failure to instruct rendered the trial so fundamentally unfair as to deny the defendant due process." *Id.* (citing *United States ex rel. Collins v. Crist*, 473 F. Supp. 1354, 1357 (D.Mont. 1979)). This standard of review is among the stricter and least forgiving and is similar, if not more demanding, than "plain error" review.

[38] Cert Appendix at 19a n.3

court to decide this issue has found a Due Process violation and vacated the underlying conviction. Every. Single. Court.

However, even if that were somehow not the case, the Panel's conclusion would still be manifestly wrong. This Court has repeatedly instructed lower courts that they need not identify "a case directly on point" to find that the law is clearly established. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Sometimes, general rules apply "with obvious clarity" to "eas[y] cases." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (internal quotation marks omitted). *See also In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009)("[E]ven absent binding case law, however, an error can be plain if it violates an 'absolutely clear' legal norm"; *United States v. Spruill*, 292 F.3d 207, 215 n.10 (5th Cir. 2002)(noting that "[t]he fact that the particular factual and legal scenario here presented does not appear to have been addressed in any other reported opinion does not preclude the asserted error in this respect from being sufficiently clear or plain to authorize vacation of the conviction on direct appeal."); *United States v. Evans*, 155 F.3d 245, 252 (3d Cir. 1998) ("Neither the absence of circuit precedent nor the lack of consideration of the issue by another court prevents the clearly erroneous application of statutory law from being plain error.").

This is one such easy case: the most basic principle of the Due Process right to present an affirmative defense is the right to have the jury directly instructed that a proven affirmative defense is a complete defense, requiring acquittal. No court has ever found otherwise.

In short, this constitutional requirement is not reasonably in dispute; the Panel's finding is directly contrary to a holding from a sister circuit and every other court to consider the question, without exception; and the error violated an absolutely clear legal norm the trial court and prosecutor were derelict in countenancing, even assuming Counsels' contemporaneous objection did not timely assist in detecting it. *See Frady supra* at 163. The error is, by any definition, "plain."

3. The Error Is Structural

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court divided constitutional errors into two classes. The first constitutional error, "trial error," "occur[s] during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id*. at 307–08 (internal quotation marks omitted). The second class of constitutional error, "structural defects," "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at 309–310. *See also Neder v. United States*, 527 U.S. 1, 7–9 (1999). Structural errors, therefore, require reversal because, unlike normal trial errors, their consequences "are necessarily unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

In *Weaver v. Massachusetts*, this Court explained that the "purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." 137 S. Ct. 1899,

1907 (2017). The *Weaver* Court further observed that an error can be deemed structural even if the error does not lead to fundamental unfairness in *every* case. *Weaver*, 137 S. Ct. at 1908 (emphasis added).

There can be no question that this faulty affirmative defense instruction was no mere trial error that occurred during the presentation of the evidence to the jury. The evidence, as the record reveals, was largely undisputed and the framework of Petitioner's entire defense was that he acted with legal justification. The basic constitutional Due Process right to present this affirmative defense to the jury must, by necessity, include the right to a jury properly instructed on its obligation to acquit if it finds the defense proven, even when the underlying offense has also been proven.

In *Sullivan v. Louisiana,* the case most closely on point, this Court held that an erroneous definition of "reasonable doubt" vitiated all of the jury's findings because one could only speculate about what a properly charged jury might have done. 508 U.S. 275, 280 (1993). The erroneous affirmative defense instruction in this case is of the same order of magnitude as the error in *Sullivan* because the right to present a defense, like the right to a jury verdict of guilt beyond a reasonable doubt, reflects "a profound judgment about the way in which law should be enforced and justice administered." 508 U.S. at 281.

There can be no question that, because of the faulty instruction, the jury was blind to its duty to acquit a defendant who proves an affirmative defense. As a result, the jury had no idea how to assess Petitioner's defense in relation to the government's burden of proof. *See State v. Strickland supra.* In the end, just as in *Sullivan*,

prejudice must be presumed because this structural error leaves the Court in a position of only speculating as to what a properly charged jury might have done. *See also Weaver supra* at 1911.

4. Even If Not Structural, The Error Nevertheless Affected Petitioner's Substantial Rights

To make this showing, Petitioner need only show a reasonable probability that, but for the error, the outcome of the proceeding would have been different. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 83 & n.9 (2004) (to establish an effect on substantial rights for purposes of plain-error review, defendant must normally show a reasonable probability that, but for the error, the outcome of the proceeding would have been different).

Significantly, "the reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez* at 83 n.9 (citation omitted).

As noted above, three things are abundantly clear from a review of the record: Petitioner's entire defense framework focused on the affirmative defense of duress; he presented extensive evidence establishing that he had, in fact, acted under duress; and the jury had no idea that duress, if proven, excused his culpability and required an acquittal. Had the jury understood a valid duress defense requires an acquittal, there is at least a reasonable probability that Petitioner would have been acquitted.

5. The error seriously affected the fairness, integrity or public reputation of the judicial proceedings

Courts should exercise their discretion to correct a plain error "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 736 (citation omitted); *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks omitted). In cases applying this fourth criterion, this Court suggested in *United States v. Marcus* that an error that significantly affects the jury's verdict impugns the "fairness," "integrity," or "public reputation" of the judicial process. 560 U.S. 258, 265-66 (2010)(citing *Johnson* at 467; *United States v. Cotton*, 535 U.S. 625, 633 (2002).

In the same vein, the Fifth Circuit has found that particularly clear errors favor exercising the fourth-prong discretion. *See United States v. Martinez-Cruz*, 539 Fed. Appx. 560, 564 (5th Cir. 2013); *United States v. Hernandez*, 690 F.3d 613, 622 (5th Cir. 2012).

Both circumstances are present in the instant case. The integrity of the judicial system in criminal cases hinges on the Fifth Amendment Due Process right to present a defense. *See Washington v. Texas supra* (the right to present a defense "is a fundamental element of due process of law"). Indeed, what does the right to present an affirmative defense even mean if the jury does not understand that a proven affirmative defense is a legally recognized defense requiring acquittal?

It bears repeating that Petitioner's entire defense was predicated on admitting his conduct while seeking legal absolution- yet the jury deliberated on his fate having no idea it was legally obligated to provide that absolution if it found he acted under

duress. This error is clear, obvious, fundamentally unfair, and represents a failure of the system in the starkest terms.

III. The Court Should Grant Certiorari or Summarily Reverse

This Court's intervention is urgently warranted and at a minimum should grant certiorari. The decision below is manifestly incorrect, at odds with the decisions of every other court or authority to consider the question, and likely to spawn dramatic and widespread negative consequences.

The Fourth Circuit clearly erred by finding that "presumption of innocence" and "reasonable doubt" instructions are interchangeable with, or substitutes for, proper affirmative defense instructions. As noted above, "reasonable doubt" and "presumption of innocence" instructions address fundamentally different theories of defense than do affirmative defense instructions: the former being centered on negating an element of an offense while the latter exculpates the defendant *even when the government proves each of the elements beyond a reasonable doubt*. Ignoring all of this, the Panel simply held that "reasonable doubt" and "presumption of innocence" are constitutionally sufficient in cases involving an affirmative defense, a rationale that has been discredited by every single court to consider it. This, then, is a decision that eviscerates all affirmative defenses for all defendants, not just for Lelis.

This case also cleanly presents the question at issue: whether criminal defendants have a constitutional right to have their juries instructed that proof of an affirmative defense operates as a complete defense, requiring an acquittal. Resolving this question does not rely on any factual details specific to this case and will have

universal application to every defendant raising a legally recognized justification defense.

Finally, this Court should not be dissuaded from granting the writ because the Panel buried this decision in an unpublished opinion involving MS-13. Lelis, who wanted no part of MS-13 but is now destined to spend the rest of his young life in prison, deserves better from the law. And be assured, some judge, somewhere, is going to read the Panel's opinion and be influenced by it, despite the *pro forma* admonition that the opinion has no binding effect. This error is simply too grievous to wait for another case at another time.

CONCLUSION

The petition for a writ of certiorari should be granted.

/s/ Christopher B. Amolsch
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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4447

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DUBLAS ARISTIDES LAZO, a/k/a Caballo,

Defendant.

No. 18-4449

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LELIS EZEQUIEL TREMINIO-TOBAR, a/k/a Scooby, a/k/a Decente,

Defendant - Appellant.

No. 18-4495

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL OSWALDO FLORES-MARAVILLA, a/k/a Impaciente, a/k/a Flaco,

Defendant - Appellant.

No. 18-4496

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN CARLOS GUADRON-RODRIGUEZ,

Defendant - Appellant.

No. 18-4509

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRES ALEXANDER VELASQUEZ GUEVARA, a/k/a Pechada,

Defendant - Appellant.

No. 18-4512

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS JOSE BENITEZ PEREIRA, a/k/a Negro,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:16-cr-00209-LO-4; 1:16-cr-00209-LO-5; 1:16-cr-00209-LO-7; 1:16-cr-00209-LO-2; 1:16-cr-00209-LO-8; 1:16-cr-00209-LO-6)

Submitted: April 22, 2020 Decided: May 28, 2020

Before THACKER, HARRIS, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Paul B. Vangellow, Falls Church, Virginia; Andrew M. Stewart, DENNIS, STEWART & KRISCHER, PLLC, Arlington, Virginia; Robert L. Jenkins, Jr., BYNUM & JENKINS, PLLC, Alexandria, Virginia; Christopher B. Amolsch, Reston, Virginia; Frank Salvato, Alexandria, Virginia; Joseph R. Conte, LAW OFFICE OF J.R. CONTE, Washington, D.C.; Vernida R. Chaney, CHANEY LAW FIRM, PLLC, Fairfax, Virginia; Pleasant S. Brodnax, III, Washington, D.C.; Charles J. Soschin, LAW OFFICE OF C.J. SOSCHIN, Washington, D.C.; Lavonda N. Graham-Williams, Alexandria, Virginia, for Appellants. G. Zachary Terwilliger, United States Attorney, Daniel T. Young, Assistant United States Attorney, Aidan Taft Grano, Assistant United States Attorney, Patricia T. Giles, Assistant United States Attorney, Morris R. Parker, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated cases, five members of La Mara Salvatrucha (MS-13) and one non-member appeal from their respective criminal judgments after a jury convicted Appellants of various charges related to their early 2016 participation in and support of MS-13. Juan Carlos Guadron-Rodriguez was convicted of conspiracy to use interstate facilities in aid of extortion, as well as substantive extortion counts, in violation of 18 U.S.C. §§ 371, 1952(a)(3) (2018); Andres Alexander Velasquez Guevara was convicted of conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(a)(1) (2018); and Carlos Jose Benitez Pereira, Lelis Ezequiel Treminio-Tobar, Daniel Oswaldo Flores-Maravilla, and Dublas Aristides Lazo were convicted of conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c) (2018), conspiracy to commit kidnapping and murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (2018); and kidnapping resulting in death, in violation of 18 U.S.C. §§ 2, 1201(a)(1) (2018).

The conspiracy and substantive charges against Appellants stem from two MS-13 schemes. First, several MS-13 members extorted Johnny Reyes by repeatedly making him pay "rent" to the gang, in one instance holding a gun to his head and threatening his life if he did not make the required payments. Second, members of the gang kidnapped and murdered a rival gang member, Carlos Otero-Henriquez, by luring him into a vehicle under

the false pretense of taking him to a party. But instead of a party, they drove him to a remote area and stabbed him 51 times before dumping his mutilated body into a ravine.[1]

Guadron-Rodriguez and Velasquez Guevara assign error to the joinder of and the district court's refusal to sever the counts against them from the counts with which they were not charged. All Appellants assert the court erred when it refused to authorize a jury questionnaire or allow counsel to conduct individualized voir dire. Appellants also assign error to: (1) the court's refusal to admit evidence they insist established that Otero-Henriquez was not "inveigled" as required under the federal kidnapping statute; (2) the propriety of the court's jury instructions regarding the elements necessary to establish a violation of § 1952(a)(3) and the duress affirmative defense; and (3) the court's denial of a motion for mistrial and subsequent refusal to provide a curative instruction to the jury. Treminio-Tobar and Benitez Pereira assert that their life sentences violate the Eighth Amendment, Guadron-Rodriguez assigns error to the court's rejection of his objections to his Sentencing Guidelines range calculation, and Velasquez Guevara asserts that his life sentence is substantively unreasonable. Finding no error, we affirm.

I. Severance and Joinder

Velasquez Guevara asserts that, because he was only charged with conspiracy to commit kidnapping, the charges pertaining to the Reyes extortion were improperly joined

[1] Others charged in these indictments entered guilty pleas before trial: Manuel Antonio Centeno pled guilty to kidnapping resulting in death; Wilmar Javier Viera-Gonzalez pled guilty to charges of interstate facilities use conspiracy and kidnapping resulting in death; and Shannon Marie Sanchez pled guilty to being an accessory after-the-fact, in violation of 18 U.S.C. § 3 (2018).

in the same indictment. Guadron-Rodriguez similarly asserts that because he was only charged with the Reyes extortion counts, the counts related to kidnapping and murder were improperly joined and, alternatively, should have been severed by the district court.

The joinder of multiple offenses is proper under Fed. R. Crim. P. 8(a) if the offenses are: (1) of the same or similar character; (2) based on the same act or transaction; or (3) part of a common scheme or plan. *See United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976). 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 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). We recently observed that "Rule 8 permits very broad joinder at the pleading stage.'" *United States v. Cannady*, 924 F.3d 94, 102 (4th Cir. 2019) (internal quotation marks, ellipses, and brackets omitted).

Even if offenses are properly joined, however, severance is appropriate if the defendant establishes that he would be prejudiced by the joinder. *See* Fed. R. Crim. P. 14(a). A defendant moving to sever counts in an indictment has the burden of demonstrating a "strong showing of prejudice," however, and "it is not enough to simply show that joinder makes for a more difficult defense." *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984). "The fact that a separate trial might offer a better chance of acquittal is not a sufficient ground for severance." *Id.* Accordingly, a district court should 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).

"We review 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 [Rule] 8(a) and 8(b) respectively." *United States v. Mackins*, 315 F.3d 399, 412 (4th Cir. 2003). If joinder was improper, we review the error for harmlessness and will "reverse unless the misjoinder resulted in no actual prejudice to the defendants because it had no substantial and injurious effect or influence in determining the jury's verdict." *Id.* (internal quotation marks and brackets omitted). If we determine that joinder was proper, we then examine whether "the district court abused its discretion under [Rule] 14 in denying [the] pre-trial motion[] to sever." *Id.* Even if we conclude that an abuse of discretion occurred, we will only vacate a defendant's conviction when there has been a showing of "clear prejudice[.]" *United States v. Zelaya*, 908 F.3d 920, 929 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 855 (2019).

Appellants' arguments to the contrary, the extortion, kidnapping, and murder charges in the indictment arose from the same "common scheme"—i.e., the effort to promote MS-13 and to gain status within the gang by extortion and violence. The indictment alleged that all individuals charged were members and associates of the MS-13 Virginia Locos Salvatrucha ("VLS") clique and that, as members and associates, all were required to use violence, threats of violence, and intimidation to support the gang and to

protect the power, reputation, and territory of the gang. The indictment also alleged that members were expected to obtain money through illegal means, including extortion.

The extortion conspiracy count linked the violent and pecuniary aspects of the gang's activities by alleging that Guadron-Rodriguez and others conspired to extort money by threatening violence and death to Reyes and his family. And the conspiracy to commit murder and kidnapping in aid of racketeering count alleged that MS-13 works to promote and enhance itself and the activities of its members and associates by committing crimes, including, but not limited to, murder, and that the gang confronts and retaliates against rival gangs through violence, threats of violence, and intimidation.[2]

The joinder of charges related to the gang's extortion, kidnapping, and murder was thus consistent with cases where a single indictment has charged codefendants with offenses relating to a single overarching drug- and or gang-related enterprise. *See, e.g.*, *United States v. Mouzone*, 687 F.3d 207, 219 (4th Cir. 2012) (affirming joinder of RICO and drug distribution counts, albeit against a single defendant, where "the government presented ample evidence showing that selling drugs was an activity in which [gang] members engaged to support the gang and rise in its ranks").

Even if the district court abused its discretion when it denied Guadron-Rodriguez's and Velasquez Guevara's motions to sever the charges against them, neither Appellant has

[2] While Appellants also challenge the indictment's inclusion of the unlawful reentry charge against Centeno, Centeno was not tried alongside Appellants. Because the Government presented no evidence regarding this offense at trial, Appellants were not prejudiced by inclusion of the reentry count. *See Goldman*, 750 F.2d at 1225.

shown "clear prejudice" to justify vacating their convictions. Velasquez Guevara claims that because he did not directly participate in Otero-Henriquez's murder, it was prejudicial for him to be tried for conspiring to commit kidnapping alongside the individuals who actually conducted the kidnapping and murder. But Velasquez Guevara knowingly lured Otero-Henriquez to his death and his lack of active participation rendered him no less culpable than his coconspirators. *See, e.g., United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012) (affirming the denial of a severance motion even where the evidence at trial involved murders with which not all defendants were charged because all defendants were charged with at least one murder and there was not a significant enough difference in their "degrees of culpability" to raise the specter of prejudice).

Guadron-Rodriguez, who was charged only in connection with the extortion scheme, argues that he should have been severed from the kidnapping and murder scheme. Without a severance, he claims, there was a risk of impermissible spillover prejudice. But the district court recognized the possibility of spillover prejudice in denying Guadron-Rodriguez's severance motion, acknowledging that Guadron-Rodriguez faced the most concrete possibility of being prejudiced by the testimony relating to the homicide. The court nonetheless concluded that all aspects of the case, including the extortion of Reyes, arose from one overarching conspiracy by members of this MS-13 clique.

The district court also reasoned that the jury would have no difficulty identifying the separate charges against each individual, and especially Guadron-Rodriguez, and that its instructions focusing the jury on the individual culpability and the consideration they must make as to each count as to each defendant would sufficiently protect him. We find

that the court's observations are fully supported by the record. *See United States v. Chong Lam*, 677 F.3d 190, 204 (4th Cir. 2012) (recognizing that "juries are presumed to follow their instructions") (internal quotation marks and citations omitted); *accord Mouzone*, 687 F.3d 207 at 219 (declining to find prejudice where "the district court instructed the jury to weigh the evidence as to each count individually").

Because joinder was not improper, and in light of Velasquez Guevara's and Guadron-Rodriguez's failure to meet the demanding burden of demonstrating a "strong showing" that they were prejudiced by the joinder so as to require severance, we discern no reversible error stemming from the district court's refusal to sever the charges against those Appellants.

II. Voir Dire

Appellants assert that the district court conducted an inadequate voir dire and erroneously denied their motions for authorization of a jury questionnaire and for individualized voir dire. Alleging that the President had recently condemned all who claimed membership in MS-13 and conflated illegal immigrants of Hispanic origin with MS-13 membership, Appellants insist potential jurors may have concluded that mere membership in MS-13 made them guilty. Thus, seating an impartial jury required, according to Appellants, using a jury questionnaire and individual voir dire .

"Voir dire plays an essential role in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury, in that it enables the court to select an impartial jury and assists counsel in exercising peremptory challenges." *United States v. Jeffery*, 631 F.3d 669, 673 (4th Cir. 2011) (internal quotation marks and citations omitted). "Despite

its importance, however, the adequacy of voir dire is not easily subject to appellate review." *Id.* (internal quotation marks and citations omitted). This is so because "[j]ury selection . . . is particularly within the province of the trial judge" and "[n]o hard-and-fast formula dictates the necessary depth or breadth of voir dire." *Skilling v. United States*, 561 U.S. 358, 386 (2010) (internal quotation marks and citations omitted).

In fact, "[t]he Supreme Court has not required specific voir dire questions except in very limited circumstances—capital cases and cases where racial or ethnic issues are inextricably bound up with the conduct of the trial such that inquiry into racial or ethnic prejudice of the jurors is constitutionally mandated[.]" *Jeffery*, 631 F.3d at 673 (internal quotation marks and citations omitted). "In non-capital cases . . . with no issues of racial or ethnic prejudice, the district court need not pursue a specific line of questioning on voir dire, provided the voir dire as a whole is reasonably sufficient to uncover bias or partiality in the venire." *Id.* at 673-74 (internal quotation marks and citations omitted).

Because "[t]he conduct of voir dire necessarily is committed to the sound discretion of the trial court[,]" *United States v. Lancaster*, 96 F.3d 734, 738 (4th Cir. 1996) (en banc), we review for abuse of discretion, *see United States v. Caro*, 597 F.3d 608, 613 (4th Cir. 2010). "A district court abuses its discretion . . . if the voir dire does not provide a reasonable assurance that prejudice would be discovered if present." *Lancaster*, 96 F.3d at 740 (internal quotation marks and citations omitted). Discretion is also abused when a voir dire procedure renders a "defendant's trial fundamentally unfair." *Skilling*, 561 U.S. at 387 n.20 (internal quotation marks and citations omitted).

Appellants have not established that the district court abused its broad discretion by failing to allow the questionnaire to be submitted to the jury and refusing counsel-directed voir dire. This case was not a capital case. Although Appellants suggest that racial or ethnic issues existed, the district court—when it orally denied the motions—assured defense counsel it would be necessary to ask about recent publicity and that it would be obtaining questions from defense counsel and the Government. The district court's own questioning took great efforts to root out potential biases during its voir dire. The court explained to the potential jurors that the case involved violent acts, including murder. And it asked several standard questions designed to root out potential bias against criminal defendants or in favor of law enforcement witnesses, including probing the potential jurors' ties to law enforcement, experience as crime victims, exposure to the criminal justice system, and involvement or experience with gangs or gang members. The district court then individually questioned venire members who answered "yes" to these questions, including asking crime victims about the race or ethnicity of their respective offenders and whether that particular juror could remain impartial.

The court next explained to the potential jurors that the case involved the MS-13 street gang and that it was critical that any jurors chosen to serve be able to adjudicate the case without bias. After acknowledging that most of the potential jurors had likely heard or read about gang violence in their area, including MS-13 gang activities, the court referenced the President's State of the Union Address in which the President mentioned gang violence. The court explained, however, that nothing they heard or read about had anything to do with the defendants in the case before them and that the court was certain

everyone could recognize that merely associating with a gang is not a crime. Indeed, the district court warned of the dangers of racial prejudice and national origin bias, admonished that it would be inappropriate to decide the case based on an opinion about immigration, and explained that it would be necessary to decide the case impartially despite the violent acts charged in the indictment. After so explaining, the district court asked whether any panel members felt that they could not decide the case fairly. It also asked the defense attorneys if they had any additional proposed questions, explaining that it had considered the proffered questionnaire in formulating its voir dire but asking whether there were any others counsel wanted the court to ask. *See Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (noting the district court's broad discretion in conducting voir dire and concluding that the court may limit counsel's participation to the submission of additional questions); *see also United States v. Skilling*, 561 U.S. 358, 372-73 (2010) (discussing the trial judge's rejection of the need for questioning by counsel because of the pretrial publicity and noting the trial judge's explanation that jurors provide more forthcoming responses to judge-led questioning).

In fact, two potential jurors later expressed concern about their respective biases, which demonstrates that the court's questioning was effective in identifying the potential for bias about which Appellants complain. Voir dire is a process by which the parties learn about prospective jurors so as to exercise challenges in an intelligent manner. *United States v. Brown*, 799 F.2d 134, 135 (4th Cir. 1986). Thus, while a voir dire that impairs a defendant's ability to exercise his challenges intelligently is grounds for reversal, *see United States v. Rucker*, 557 F.2d 1046, 1048 (4th Cir. 1977), the district court's voir dire

in this case consisted of questions aimed at rooting out any biases that Appellants' proposed questionnaire sought to discover. We, therefore, discern no abuse of discretion in the way the court conducted, or the substance of, the court's voir dire.

III. Evidence Exclusion

The Appellants convicted of kidnapping and murder assign error to the district court's exclusion of certain evidence they argue would have demonstrated that Otero-Henriquez willfully engaged with MS-13 on the night he was killed. Because the Government was required to establish that Otero-Henriquez was somehow tricked or "inveigle[d]" into boarding the vehicle the night he was murdered, evidence that Otero-Henriquez knowingly entered the vehicle to investigate whether the occupants were responsible for threats and other activities directed towards him and another gang should have been admitted. We review a district court's evidentiary rulings for an abuse of discretion and will only overturn a ruling that is arbitrary and irrational. *United States v. Farrell*, 921 F.3d 116, 143 (4th Cir.), *cert. denied*, 140 S. Ct. 269 (2019). Even if there is error, "we will not vacate a conviction if an error was harmless." *United States v. Sutherland*, 921 F.3d 421, 429 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020). We discern no reversible error in the challenged evidentiary rulings.

The federal kidnapping statute under which several of the Appellants were convicted provides that "[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward . . . when . . . the person is willfully transported in interstate . . . shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment."

18 U.S.C. § 1201. The district court thus correctly instructed the jury that, to convict Appellants of violating this statute, the Government had to prove that: (i) Appellants unlawfully and willfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away another person; (ii) the person was willfully transported in interstate commerce; (iii) Appellants held that person for ransom, reward, or other benefit or reason; and (iv) the person's death resulted. The court also correctly explained that to "inveigle" or "decoy" means to lure, or entice, or to lead a person astray by false representations, or promises, or other deceitful means.

While the parties do not dispute the validity of the district court's jury instructions on the elements necessary to establish the kidnapping violation, they debate whether Otero-Henriquez's state of mind was relevant. But the evidence presented at trial overwhelmingly established that Otero-Henriquez was brought to a particular location on May 21, 2016, and then transported to the location of his murder under the false pretense that he would be going to a party where girls would be present. And it was under those false pretenses that Otero-Henriquez agreed to accompany Appellants that evening, no matter if he also intended to gather information about the rival gang. As this court has held, "a kidnapping victim who accepted a ride from someone who misled her into believing that she would be taken to her desired destination was 'inveigled' or 'decoyed' within the meaning of the federal kidnapping statute." *United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983). We therefore discern no abuse of discretion in the district court's decision to exclude the evidence.

IV. Jury Instructions

Treminio-Tobar, Benitez Pereira, and Flores-Maravilla assign reversible error to the substance of the district court's jury instruction on the duress affirmative defense. Guadron-Rodriguez also assigns reversible error to the district court's jury instruction setting forth the elements that the Government had to establish before the jury could find him guilty of violating 18 U.S.C. § 1952(a)(3) ("the Travel Act"). A district court's "decision to give (or not to give) a jury instruction . . . [is generally] reviewed for abuse of discretion." *United States v. Russell*, 971 F.2d 1098, 1107 (4th Cir. 1992). A jury instruction is not erroneous if, "in light of the whole record, [it] adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir.) (internal quotation marks and citations omitted), *cert. denied*, 139 S. Ct. 130 (2018). Thus, in reviewing a challenge to jury instructions, "we do not view a single instruction in isolation[,]" but instead "consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Blankenship*, 846 F.3d 663, 670-71 (4th Cir. 2017) (internal quotation marks and citations omitted).

A. Duress Affirmative Defense

At trial, Treminio-Tobar, Benitez Pereira, and Flores-Maravilla predicated their defenses on their assertion that they participated in the charged conduct under duress or coercion. Appellants thus proposed a duress jury instruction, which they obtained from *O'Malley, Grenig and Lee's Federal Jury Practice and Instructions* ("the *O'Malley* instruction"). The Government objected to any instruction being given but argued that, if

one was to be given, it should reflect all elements of the defense in accordance with this Court's decision in *United States v. Perrin*, 45 F.3d 869 (4th Cir. 1995) ("the *Perrin* instruction"). The district court acknowledged that, while it may have given the *O'Malley* instruction in the past, it believed the Government's proposed instruction clearly reflected language beyond that identified in *O'Malley*.

Appellants now assert that the duress instruction given by the district court was faulty as a matter of law and deprived them of a fair trial because the instruction: (1) lacked necessary verdict-directing language informing the jury that it had to find defendants not guilty if they determined defendants acted under duress when they committed the alleged offenses; and (2) failed to define "reckless" and "reasonable legal alternative[,]" which were included in the court's instruction. Although Appellants generally objected to the district court's use of the *Perrin* instruction, they failed to make the district court aware that they believed the instruction was faulty because it lacked verdict-directing language and contained undefined terms. The Federal Rules of Criminal Procedure state that "[a] party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). The Rule also provides that "[f]ailure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." *Id.*

Thus, "[a] party wishing to preserve an exception to a jury instruction must state distinctly the matter to which he objects and the grounds of his objection." *United States v. Nicolaou*, 180 F.3d 565, 569 (4th Cir. 1999) (internal quotation marks, brackets, and

citations omitted). If a party objects that it believes certain language pertaining to one element of a crime should be included in a particular instruction, for example, that party does not preserve an argument later raised on appeal that different language should also have been included regarding that element. *Id.* Accordingly, we review the propriety of the district court's decision to issue the *Perrin* instruction for plain error. *Id.*

To establish the district court committed plain error in giving the *Perrin* instruction, Appellants are required to establish that: "(1) there was error; (2) the error was plain; and (3) the error affected [their] substantial rights." *United States v. Cowden*, 882 F.3d 464, 475 (4th Cir. 2018). Even if Appellants make the required showing, however, "we may exercise our discretion to correct the error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks, brackets, and citations omitted). We discern no plain error by the district court.

1. Verdict-Directing Language

Appellants concede that we have not yet ruled that verdict-directing language is an essential component of an affirmative defense instruction and necessary to ensure due process. Contrary to Appellants' arguments, however, we have repeatedly held that jury instructions must be reviewed "as a whole and in the context of the trial," and we will affirm so long as the instructions were "not misleading and contained an adequate statement of the law to guide the jury's determination[.]" *United States v. Scott*, 424 F.3d 431, 436 (4th Cir. 2005); *see United States v. McQueen*, 445 F.3d 757, 759 (4th Cir. 2006) ("Jury instructions are reviewed to determine whether, taken as a whole, the instructions fairly state the controlling law.") (internal quotation marks and citations omitted).

Accordingly, we will not "view a single instruction in isolation[,]" but instead consider the instructions "taken as a whole and in the context of the entire charge[.]" *United States v. Raza*, 876 F.3d 604, 614 (4th Cir. 2017) (internal quotation marks and citations omitted).

During its charge to the jury, the district court repeatedly instructed the jury that Appellants were entitled to the presumption of innocence, that the burden is always upon the prosecution to prove guilt beyond a reasonable doubt, that the burden never shifts to a defendant, and that, if the jury—after careful and impartial consideration of all the evidence in the case—has a reasonable doubt that a defendant is guilty of a charge, it must acquit. Notably, the court's instructions repeated the reasonable doubt standard and duty to acquit language multiple times. And, as to the duress instruction, the court correctly informed the jury that the defendants only needed to establish the justification defense by a preponderance of evidence and that coercion or duress may provide a legal justification or excuse for the charged offense. Viewing the district court's jury instructions in their totality, we conclude that the jury was well aware it should acquit if it found Appellants acted under duress.[3]

2. "Recklessly" and "Reasonable Legal Alternative"

We also discern no plain error in the district court's failure to include language

[3] Even if we were to conclude that the omission of verdict-directing language was error, any error would not be "plain." *See United States v. Ellis*, 326 F.3d 593, 598 (4th Cir. 2003) (holding that "any alleged error . . . cannot be 'plain'" where the legal issues before the court were, "at best, largely undecided"); *see also United States v. Harris*, 890 F.3d 480, 491 (4th Cir. 2018) ("At a minimum, courts of appeals cannot correct an error pursuant to plain error review unless the error is clear under current law." (internal quotation marks, brackets, and citations omitted)).

defining "recklessly" and "reasonable legal alternative" in the duress instruction. This court has repeatedly confirmed that district courts receive "much discretion to fashion the charge." *Id*. at 614. Nor is it a per se rule that all terms in jury instructions be expressly defined. *United States v. Walton*, 207 F.3d 694, 696-99 (4th Cir. 2000) (en banc) (recognizing that "[t]here is no constitutional requirement to define reasonable doubt to a jury" and that even "[t]he Supreme Court has never required trial courts to define the term").

Moreover, we find that, in this case, the meaning of the terms "recklessly" and "reasonable legal alternative" made sense in context. The second element of the *Perrin* instruction explained that a defendant has to prove that he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct. Because the standard instructs the jury to assess the situation in which the defendant placed himself, the jury necessarily had to evaluate whether that defendant's choices were made either knowing or disregarding a likelihood that he would then be forced to engage in criminal conduct. Similarly, the plain meaning of "reasonable legal alternative" is evident to jurors applying common sense as they debate the facts during deliberation. *See id.* at 699 (observing that definitions involving reasonableness "cannot be divorced from [their] specific context" and should be left to the jury).

In any event, we find that the district court's failure to define these terms did not affect Appellants' substantial rights. Appellants have never proffered a definition for either term from any authority of this Court or the Supreme Court. Without an established definition, Appellants cannot demonstrate that the jury understood—and therefore

applied—"recklessness" or "reasonable[ness]" standards that were less favorable than the law required. And, in the absence of such caselaw, Appellants cannot establish that any error was both plain and affected their substantial rights. Moreover, the Government presented the jury with overwhelming evidence that Appellants knowingly, not just recklessly, placed themselves in the vehicle on the night Otero-Henriquez was murdered. And, while the Government argued to the jury that Appellants had actual knowledge of Otero-Henriquez's impending murder, defense counsel for Treminio-Tobar and Benitez Pereira both focused on their clients' alleged lack of knowledge during their respective closing arguments and mentioned that the jury could not convict those individuals merely by virtue of their association with MS-13. We find that counsels' focus regarding whether Appellants knowingly and voluntarily placed themselves in the criminal situation and whether they were able to escape from it, when viewed in conjunction with the overwhelming evidence that Appellants were well aware of the gang's intentions and yet continued participating in the gang's activities, shows that Appellants cannot establish that the jury would have acquitted them had the district court defined "recklessly" and "reasonable legal alternative."

B. Travel Act

The Travel Act makes it unlawful for anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful

activity[.]" 18 U.S.C. § 1952(a). During argument regarding jury instructions, counsel for Guadron-Rodriguez confirmed that she wished to argue during closing that there was no use of interstate facilities to support a Travel Act conviction because the Government presented no evidence that Guadron-Rodriguez's extortion phone calls to Reyes took place between people in different states. Counsel also objected to the Government's proposed jury instruction to the extent that it indicated that the "facilities in interstate commerce" underlying the Travel Act charges were cellular telephones. The district court noted counsel's exception but indicated that it would give the Government's instruction.

Guadron-Rodriguez assigns error to the court's ruling on appeal and insists that his convictions for using interstate facilities in aid of extortion must be vacated. Primarily relying on two Sixth Circuit cases and this Court's decision in *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), Guadron-Rodriguez insists that the Travel Act was not enacted to proscribe purely intrastate activities, such as his conduct in this case. In *LeFaivre*, however, we rejected the appellants' argument that the Travel Act should be narrowly construed and, thus, its reach limited. *Id.* at 1293 ("Assuming for the moment that the post-*Rewis* decisions relied upon by appellants were correctly decided, we believe each can be readily explained by factors having nothing to do with a narrow or restricted reading of the Travel Act."); *see Rewis v. United States*, 401 U.S. 808, 811 (1971) (recognizing that, while "[l]egislative history of the [Travel] Act is limited, [it] does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another"). We then held that, "when the ordinary meaning of the Travel Act clearly covers an activity, we

will not read into the Act any requirement that travel in interstate commerce or use of facilities in interstate commerce be a 'substantial' or an 'integral' part of the activity." *LeFaivre*, 507 F.2d at 1296-97.

In discussing prior caselaw under the Travel Act, however, we observed that the Seventh Circuit had taken issue with one of our prior decisions because "'it suggest[ed] that [a] check need not actually travel interstate.'" *Id.* at 1291 n.5 (citing *United States v. Isaacs*, 493 F.2d 1124, 1149 (7th Cir. 1974)). We then observed that, in *Isaacs*, the Seventh Circuit "pointed out that the statute explicitly requires some actual use of an interstate facility for the purpose of interstate travel or an interstate transaction, rather than merely the use of an interstate facility for an intra-state purpose." *Id.* And we "acknowledge[d] the ambiguity[] and agree[d] that there must be some utilization of a facility in an interstate transaction to invoke the Travel Act." *Id.*

Although the above-mentioned statement from *LeFaivre* does lend some support to Guadron-Rodriguez's argument that making purely intrastate cellular telephone calls may not be punishable under the Travel Act, the Government correctly observes that our statement—which was in a footnote—had nothing to do with our ultimate decision and, thus, was mere dicta having no binding effect on this court. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993) (recognizing that, in determining whether a statement from a prior decision is binding, courts must "distinguish an opinion's holding from its dicta"); *United States v. Pasquantino*, 336 F.3d 321, 328-29 (4th Cir. 2003) (en banc) (noting that certain statements that are "not necessary to decide the case" are "pure and simple dicta, and, therefore, cannot serve as a source of binding

authority in American jurisprudence") (internal quotation marks and citations omitted). No subsequent decision from this court has cited this language, let alone as a binding statement of law.

And contrary to Guadron-Rodriguez's argument and the cited Sixth Circuit decisions, most cases since *LeFaivre* have held—or at least suggested—that the Travel Act applies to the type of "intrastate" conduct at issue here so long as an instrument of interstate commerce is utilized. *See Perrin v. United States*, 444 U.S. 37, 39, 49 (1979) (noting, after repeating the language of § 1952, that the "indictment charged that Perrin and his codefendants *used the facilities of interstate commerce* for the purpose of promoting a commercial bribery scheme" and distinguishing its prior decision in *Rewis* by pointing out that "[t]here was no evidence that Rewis had *employed interstate facilities* to conduct his numbers operation") (emphasis added); *United States v. Halloran*, 821 F.3d 321, 342 (2d Cir. 2016) (holding that purely intrastate telephone calls trigger § 1952); *United States v. Nader*, 542 F.3d 713, 718-20 (9th Cir. 2008) (same); *United States v. Baker*, 82 F.3d 273, 275-76 (8th Cir. 1996) (holding that intrastate withdrawal from interstate ATM network triggers § 1952); *United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir. 1994) (holding that intrastate use of the federal mail triggers § 1952); *United States v. Riccardelli*, 794 F.2d 829, 832-34 (2d Cir. 1986) (same); *see also United States v. Nardello*, 393 U.S. 286, 293 (1969) (holding that § 1952 "imposes penalties upon any individual crossing state lines *or using interstate facilities* for any of the statutorily enumerated offenses") (emphasis added).

A similar line of precedent, interpreting materially identical language, exists for the Travel Act's murder-for-hire provision. *See* 18 U.S.C. § 1958 (2018). When Congress initially enacted the statute, the substantive criminal prohibition referred to the use of a facility "in" interstate commerce (like § 1952), while subsection (b) of the statute defined only a facility "of" interstate commerce. *See Nader*, 542 F.3d at 720 (describing legislative history of § 1958). As a matter of plain meaning, the Fifth Circuit found that the prepositional phrase "in interstate commerce" modified "facility," and not "use," and that "intrastate use of interstate facilities" both satisfied the statute and cohered with Congress' Commerce Clause authority. *United States v. Marek*, 238 F.3d 310, 316-17 (5th Cir. 2001) (en banc). That court rejected any meaningful distinction between a facility "in" interstate commerce and one "of" interstate commerce, concluding that the Travel Act—which includes § 1952—was intended to reach intrastate uses of interstate instrumentalities. *Id.* at 319-20. Both the Second and Seventh Circuits later adopted *Marek*'s reasoning and concluded that Congress intended to use "in" and "of" interchangeably in the Travel Act to reach intrastate activity. *See United States v. Perez*, 414 F.3d 302, 303-05 (2d Cir. 2005); *United States v. Richeson*, 338 F.3d 653, 660 (7th Cir. 2003).

Even before *Marek*, however, this Court held that § 1958 required only the use of an "interstate telephone service or other commerce facilit[y] with the requisite intent." *United States v. Coates*, 949 F.2d 104, 105 (4th Cir. 1991). And we approvingly cited the reasoning in *Marek* and *Baker* and concluded that Congress has the power under the Commerce Clause to reach purely intrastate activities involving interstate instrumentalities. *See United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 250-52 (4th Cir.

2001), *overruled in part on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Given the vast weight of out-of-circuit authority finding that § 1952(a) covers intrastate use of interstate facilities, and the extensive circuit and out-of-circuit authority at least indirectly supporting the accuracy of the § 1952(a)-related authority, we affirm Guadron-Rodriguez's Travel Act convictions.

V. Motion for Mistrial

Appellants assert that it was error for the district court to deny their motion for a mistrial after the Government informed the jury during its closing argument that MS-13 members cannot claim that they acted out of duress. According to Appellants, the First Amendment guarantees the right to freely associate with others, including gangs, so the Government's comments—and the district court's refusal to provide a curative instruction regarding the comments—violated that right and deprived them of a fair trial.

"We review a district court's denial of a motion for mistrial for abuse of discretion" and will "reverse only under the most extraordinary of circumstances." *Zelaya*, 908 F.3d at 929 (internal quotation marks and citations omitted). When a motion for a mistrial arises from a claim of prosecutorial misconduct during closing argument, the test for reversible error has two components: "first, the defendant must show that the prosecutor's remarks or conduct were improper and, second, the defendant must show that such remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial." *United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002).

In assessing whether reversible error occurred, relevant factors include:

> (1) the degree to which the prosecutor's remarks had a tendency to mislead the jury and to prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the defendant; (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters; (5) whether the prosecutor's remarks were invited by improper conduct of defense counsel; and (6) whether curative instructions were given to the jury.

Id. at 186. "These factors are examined in the context of the entire trial, and no one factor is dispositive." *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010). Moreover, the remedy of a new trial "is reserved for the most egregious cases[.]" *United States v. Dudley*, 941 F.2d 260, 264 (4th Cir. 1991). We discern no error in the court's refusal to grant the motion for a mistrial.

After the court instructed the jury that, to make out a duress defense, Appellants had to show, in part, that they did not recklessly place themselves in a situation where they would be forced to engage in criminal conduct, the Government described in its closing argument how the jury heard numerous witnesses testify about MS-13's open and notorious reputation for violence and murder, particularly against rival gang members. The Government also noted the absence of evidence that Appellants were unaware of that fact, were somehow unaware of the fact that MS-13 was a violent gang, and were somehow unaware that joining MS-13 meant that they were going to be committing crimes. The Government then concluded its argument on this point by suggesting that, "[b]ecause none of [the defendants] can prove to you that they were unaware that joining MS-13 meant they might have to commit crimes, any justification or duress defense fails for that reason alone." J.A. 3963.

We find that the Government's remarks were not misleading but were merely its spin on why Appellants could not establish an element of the duress affirmative defense; to wit: they did not "recklessly place [themselves] in a situation where [they] would be forced to engage in criminal conduct." In addition, the challenged statements spanned only two of nearly 65 transcript pages containing the Government's closing argument and nearly 40 pages containing its rebuttal argument and, thus, the remarks were not extensive. Moreover, the Government's evidence of Appellants' guilt was overwhelming, and there is nothing in the record to suggest that the Government's comments were deliberately placed before the jury to divert its attention to extraneous matters. Finally, although the district court did not provide a curative instruction after the Government's closing argument, the district court previously instructed the jury that association with MS-13 and its members, standing alone, is not criminal. These instructions addressed the very concern Appellants raised in their mistrial motion, and we discern no error in the court's refusal to provide a curative instruction. After considering all of these factors, we conclude that the Government's remarks during closing "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Scheetz*, 293 F.3d at 186 (internal quotation marks and citations omitted).

VI. Sentencing

Some Appellants also challenge their sentences on appeal. Citing *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), Treminio-Tobar and Benitez Pereira assert that their life sentences violate the Eighth Amendment. Guadron-Rodriguez asserts that the district court erroneously calculated his Guidelines

range. Velasquez Guevara essentially asserts that his life sentence was unjustified and unwarranted.

"We review a sentence for reasonableness 'under a deferential abuse-of-discretion standard[,]'" *United States v. McCoy*, 804 F.3d 349, 351 (4th Cir. 2015) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)), and review unpreserved, non-structural sentencing errors for plain error, *see United States v. Lynn*, 592 F.3d 572, 575-76 (4th Cir. 2010). When reviewing a sentence for reasonableness, we must consider both the procedural and substantive reasonableness of the sentence. *See Gall*, 552 U.S. at 51. First, this court must assess whether the district court properly calculated the advisory Guidelines range, considered the 18 U.S.C. § 3553(a) (2018) factors, analyzed any arguments presented by the parties, and sufficiently explained the selected sentence. *See Gall*, 552 U.S. at 49-51; *Lynn*, 592 F.3d at 575-76.

Assuming no procedural error is found, "[a]ny sentence that is within or below a properly calculated Guidelines range is presumptively reasonable[,]" *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014), and "[t]hat presumption can only be rebutted by showing that the sentence is unreasonable when measured against the . . . § 3553(a) factors[,]" *United States v. Vinson*, 852 F.3d 333, 357-58 (4th Cir. 2017) (internal quotation marks and citations omitted). "[B]ecause district courts are in a superior position to find facts and judge their import, all sentencing decisions—whether inside, just outside, or significantly outside the Guidelines range—are entitled to due deference." *United States v. Spencer*, 848 F.3d 324, 327 (4th Cir. 2017) (internal quotation marks and citations omitted).

A. Constitutionality

Treminio-Tobar and Benitez Pereira challenge the constitutionality of their life sentences by summarily asserting that the mandatory sentence prevented the district court from being able to make a proportionality determination by considering important mitigating factors like their roles in the offense, any non-history of violent criminal behavior, and critical factors pertaining to youth. Appellants further assert that their age was an especially important consideration because the Supreme Court has held that age holds a special place in Eighth Amendment jurisprudence.

Contrary to Appellants' argument, however, the Supreme Court has held that life sentences do not require individualized consideration under the Eighth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991). Admittedly, the Supreme Court has cautioned that "[a]n offender's age is relevant to the Eighth Amendment," *Graham*, 560 U.S. at 76, and that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age[,]" *Miller*, 567 U.S. at 476. But Treminio-Tobar was 19 years old at the time of Otero-Henriquez's murder, and Benitez Pereira was 20 years of age at that time. Because neither Appellant was a juvenile at the time of Otero-Henriquez's murder, their mandatory life sentences do not violate the Eighth Amendment. *See United States v. Chavez*, 894 F.3d 593, 609 (4th Cir. 2018) (holding that *Miller* did not render mandatory life sentences unconstitutional where defendants were 18 and 19 at the time they committed their crimes), *cert. denied*, 139 S. Ct. 278 (2018). We thus reject Treminio-Tobar's and Benitez Pereira's challenge to their sentences.

B. Procedural Reasonableness

Guadron-Rodriguez asserts that the court erroneously failed to apply a three-level mitigating role adjustment to his offense level, under the U.S. Sentencing Guidelines ("USSG") § 3B1.2 (2016), and then erroneously increased his offense level, under USSG § 2B3.2(b)(1) (2016), because the crimes of which he was convicted involved the threat of death, bodily injury, or kidnapping, and under USSG § 2B3.2(b)(3)(A)(iii) (2016), because he brandished or possessed a firearm during the crimes of which he was convicted. Because both assignments of error pertain to the district court's factual findings, and since Guadron-Rodriguez raised these objections in the district court, we review the court's sentencing decisions for clear error. *See, e.g.*, *United States v. Kiulin*, 360 F.3d 456, 463 (4th Cir. 2004) (recognizing that this Court reviews for clear error a district court's decision regarding a defendant's role in the offense).

Although a criminal defendant may receive a two-level reduction for playing a "minor" role in a conspiracy, *see* USSG § 3B1.2, the reduction may only be made when the defendant is a participant "who is less culpable than most other participants, but whose role could not be described as minimal." *See* USSG § 3B1.2 cmt. n.5. The defendant has the burden of showing by a preponderance of the evidence that he played a mitigating role in the offense. *United States v. Akinkoye*, 185 F.3d 192, 202 (4th Cir. 1999).

Guadron-Rodriguez insists that he was the least culpable in the gang's scheme to extort Reyes and, therefore, should have received the benefit of the reduction. In deciding whether a defendant played a minor or minimal role, however, "[t]he critical inquiry is . . . not just whether the defendant has done fewer 'bad acts' than his co-defendants, but

whether the defendant's conduct is material or essential to committing the offense." *United States v. Pratt*, 239 F.3d 640, 646 (4th Cir. 2001) (internal quotation marks and citations omitted). Accordingly, Guadron-Rodriguez being "the least culpable[,]" in and of itself, did not justify application of the adjustment.

Guadron-Rodriguez also insists that his participation in the extortion conspiracy was limited because his only role was to retrieve "rent" from Reyes as directed by Viera-Gonzalez. According to Guadron-Rodriguez, he was not the decisionmaker, did not plan the conspiracy, and held very little information about the conspiracy. But the district court expressly found that Guadron-Rodriguez was not a minor player but an equal participant in the conspiracy. According to the district court, Guadron-Rodriguez was the person who met with Reyes on three of four occasions and set up the final extortion payment. The court also found that Guadron-Rodriguez was fully aware of the whole extortion scheme and even sent the money that he received to gang leaders in El Salvador. We find that the district court's conclusion that Guadron-Rodriguez was a primary and significant player in the extortion scheme is fully supported by the record and, thus, discern no clear error in the district court's refusal to apply the two-level minor role adjustment.

Although Guadron-Rodriguez insists that his offense level should not have been enhanced because he did not know Viera-Gonzalez would point a gun at Reyes or lodge threats for money, we also discern no clear error in the court's decision to enhance the offense level based on threats of violence or firearm possession. Having been presented with evidence that the crimes of which Guadron-Rodriguez was convicted involved the threat of violence and, in at least one situation, the brandishing of a firearm by his

codefendant, we find that the district court correctly rejected Guadron-Rodriguez's role enhancement objections. Because the district court's findings are "plausible in light of the record viewed in its entirety[,]" we discern no clear error by the district court. *United States v. Robinson*, 744 F.3d 293, 300 (4th Cir. 2014) (internal quotation marks and citations omitted).

C. Substantive Reasonableness

Velasquez Guevara asserts that his life sentence is substantively unreasonable because he was not a member of MS-13, was only indicted for conspiracy to commit kidnapping, played no role in the actual killing of Otero-Henriquez or the gang's extortion scheme, and—although his nonmandatory Guidelines range was life in prison—he did not face a statutory mandatory life sentence like some of his codefendants. Despite Velasquez Guevara's attempts to minimize his involvement in Otero-Henriquez's murder, Velasquez Guevara was just as responsible for the murder as his codefendants. In fact, it was Velasquez Guevara who initially—and without prompting from the gang—befriended Otero-Henriquez, notified the gang about Otero-Henriquez and his involvement in a rival gang, and agreed to lure—and did lure—Otero-Henriquez to a particular location so that he could be murdered.

Moreover, in imposing Velasquez Guevara's sentence, the district court expressly observed that it believed Velasquez Guevara's trial testimony to be inherently incredible, felt that he minimized his own involvement in an attempt to exonerate himself, and that the evidence established that he knew and understood the MS-13 rules completely. After listening to Velasquez Guevara's allocution, in which he professed ignorance of the gang's

intent to kill Otero-Henriquez, the court indicated that it did not believe Velasquez Guevara and that Velasquez Guevara knew from day one what it meant to bring Otero-Henriquez to the gang and, thus, he put the murder plot in motion. The court concluded that Velasquez Guevara was as responsible for Otero-Henriquez's death as every other member of the group that actually stabbed him. We will not second-guess the court's credibility determinations, which were made after observing Velasquez Guevara's demeanor. *See United States v. Thompson*, 554 F.3d 450, 452 (4th Cir. 2009) ("[W]hen a district court's factual finding is based upon assessments of witness credibility, such finding is deserving of the highest degree of appellate deference.") (internal quotation marks and citations omitted).

Although Velasquez Guevara suggests that a lesser sentence was warranted because, despite his Guidelines range, his statute of conviction allowed for "any term of years or for life[,]" *see* 18 U.S.C. § 1201(c), nothing in the district court's imposition of a life sentence suggests that it was unaware of the nonmandatory nature of Velasquez Guevara's Guidelines range, and Velasquez Guevara does not suggest that the court relied on an impermissible sentencing factor when it imposed the life sentence. We thus apply the presumption of reasonableness to the within-Guidelines sentence. *See Zelaya*, 908 F.3d at 930; *see also United States v. Morace*, 594 F.3d 340, 346 (4th Cir. 2010) (recognizing that, even if this Court would have imposed a different sentence, this fact alone will not justify vacatur of the district court's sentence).

Based on the foregoing, we affirm the criminal judgments against Appellants. We dispense with oral argument because the facts and legal contentions are adequately

presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: May 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4447 (L)
(1:16-cr-00209-LO-4)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DUBLAS ARISTIDES LAZO, a/k/a Caballo

Defendant - Appellant

No. 18-4449
(1:16-cr-00209-LO-5)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LELIS EZEQUIEL TREMINIO-TOBAR, a/k/a Scooby, a/k/a Decente

Defendant - Appellant

No. 18-4495
(1:16-cr-00209-LO-7)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DANIEL OSWALDO FLORES-MARAVILLA, a/k/a Impaciente, a/k/a Flaco

Defendant - Appellant

No. 18-4496
(1:16-cr-00209-LO-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JUAN CARLOS GUADRON-RODRIGUEZ

Defendant - Appellant

No. 18-4509
(1:16-cr-00209-LO-8)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ANDRES ALEXANDER VELASQUEZ GUEVARA, a/k/a Pechada

Defendant - Appellant

No. 18-4512
(1:16-cr-00209-LO-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CARLOS JOSE BENITEZ PEREIRA, a/k/a Negro

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgments of the district court are affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA
v.

Case Number: 1:16CR00209

LELIS EZEQUIEL TREMINIO-TOBAR
Aka Scooby, Decente
Defendant.

USM Number: 90654-083
Defendant's Attorney: Christopher Amolsch, Esq.

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts Six, Seven and Eight after a plea of not guilty.

Accordingly, the defendant is adjudicated guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. §1201(c)	Conspiracy to Commit Kidnapping	Felony	May 24, 2016	Six
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Kidnapping and Murder in Aid of Racketeering	Felony	May 24, 2016	Seven
18 U.S.C. § 1201(a)(1) and 2	Kidnapping Resulting in Death	Felony	May 21, 2016	Eight

As pronounced on June 22nd, 2018, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Signed this 22nd day of June, 2018.

Liam O'Grady
United States District Judge

Defendant's Name: TREMINIO-TOBAR, LELIS EZEQUIEL
Case Number: 1:16CR00209

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE with credit for time served. This term of imprisonment consists of a term of LIFE on Counts SIX AND EIGHT and a term of ONE HUNDRED-TWENTY (120) MONTHS on Count Seven; all counts to be served concurrently to each other.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Defendant's Name: TREMINIO-TOBAR, LELIS EZEQUIEL
Case Number: 1:16CR00209

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS. This term consists of a term of FIVE (5) YEARS on Counts SIX AND EIGHT and a term of THREE (3) YEARS on Count Seven, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of Supervised Release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant's Name: TREMINIO-TOBAR, LELIS EZEQUIEL
Case Number: 1:16CR00209

SPECIAL CONDITIONS OF SUPERVISION

While on Supervised Release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1. The defendant shall pay any outstanding restitution balance at a monthly rate of no less than $150.00 beginning 60 days after the defendant's release, until paid in full.

2. The defendant shall provide the probation officer with any requested financial information.

3. The defendant shall have no contact with known gang members and shall not frequent places where gang activity is known to take place.

4. The defendant shall cooperate with immigration officials in his deportation and if deported, shall not return to the United States during the term of supervised release, or thereafter, unless he receives express permission from the Secretary of Homeland Security and the U.S. Attorney General.

Defendant's Name: TREMINIO-TOBAR, LELIS EZEQUIEL
Case Number: 1:16CR00209

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

Count	Assessment	Fine	Restitution
Six	$100.00	$0.00	$16,100.00 (total for all counts)
Seven	$100.00	$0.00	$0.00
Eight	$100.00	$0.00	$0.00
TOTALS:	**$300.00**	**$0.00**	**$16,100.00**

FINES

No fines have been imposed in this case.

RESTITUTION

See attached Restitution Judgment filed on June 22nd, 2018

The defendant is jointly and severally liable for restitution with the following co-defendants: Juan Carlos Guadron-Rodriguez (002), Lelis Ezequiel Treminio-Tobar (005), Carlos Jose Benitez Pereira (006), Daniel Oswaldo Flores-Maravilla (007), and Andres Alexander Velasquez Guevara (008), docket no. 1:16CR209.

Defendant's Name: TREMINIO-TOBAR, LELIS EZEQUIEL
Case Number: 1:16CR00209

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessment shall be due in full immediately.

Interest on the restitution is waived. On any unpaid balance, the defendant shall pay to the Clerk at least $100.00 per month or 25 percent of net income, whichever is greater, beginning 60 days from the inception of supervised release. The court reserves the option to alter this amount, depending upon defendant's financial circumstances at the time of supervised release.

The defendant is jointly and severally liable for restitution with the following co-defendants: Juan Carlos Guadron-Rodriguez (002), Lelis Ezequiel Treminio-Tobar (005), Carlos Jose Benitez Pereira (006), Daniel Oswaldo Flores-Maravilla (007), and Andres Alexander Velasquez Guevara (008), docket no. 1:16CR209.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

FILED: August 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4449
(1:16-cr-00209-LO-5)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LELIS EZEQUIEL TREMINIO-TOBAR, a/k/a Scooby, a/k/a Decente

Defendant - Appellant

No. 18-4496
(1:16-cr-00209-LO-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JUAN CARLOS GUADRON-RODRIGUEZ

Defendant - Appellant

No. 18-4509
(1:16-cr-00209-LO-8)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ANDRES ALEXANDER VELASQUEZ GUEVARA, a/k/a Pechada

Defendant - Appellant

O R D E R

The court denies the petitions for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petitions for rehearing en banc.

Entered at the direction of the panel: Judge Thacker, Judge Harris, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk