

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANILO VELASQUEZ—PETITIONER

VS.

UNITED STATES OF AMERICA—RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
(vol. 1 of 1)

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NOT FOR PUBLICATION

FILED

AUG 16 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 22-10104

Plaintiff-Appellee,

D.C. No.

v.

3:08-cr-00730-WHA-33

DANILO ARTURO VELASQUEZ,

MEMORANDUM*

Defendant-Appellant.

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

Submitted August 14, 2023**
San Francisco, California

Before: CALLAHAN and BADE, Circuit Judges, and ANTOON, *** District Judge.

Danilo Arturo Velasquez appeals the district court's judgment reimposing a life sentence after vacatur of one of Velasquez's four convictions on RICO-related

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

charges. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in all respects.

1. “We review for abuse of discretion a district court’s denial of a motion to unseal, reversing only if the denial was ‘illogical, implausible, or without support in inferences that may be drawn from the facts in the record.’” *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020) (footnote and citations omitted) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)). Here, the district court acted well within its discretion when it denied Velasquez’s request for “attorney’s eyes only” access to the sealed resentencing transcript of a codefendant after weighing counsel’s asserted need for the transcript against the reasons the transcript was sealed.¹ And having conducted an *in camera* review of the sealed transcript as requested by Velasquez, we find that any error in denying access was indeed harmless.

2. “We review the substantive reasonableness of a sentence imposed by the district court ‘under an abuse-of-discretion standard,’ ‘and will provide relief only in rare cases.’” *United States v. Wilson*, 8 F.4th 970, 977 (9th Cir. 2021) (per curiam) (citations omitted) (first quoting *Gall v. United States*, 552 U.S. 38, 51 (2007); and then quoting *United States v. Ressam*, 679 F.3d 1069, 1088 (9th Cir.

¹ We would reach the same conclusion under Velasquez’s proposed “special need” standard.

2012) (en banc)). Velasquez argues that the reimposed life sentence is substantively unreasonable because it resulted in an unwarranted disparity between his sentence and those of several of his coparticipants. We find no abuse of discretion. The district court duly considered Velasquez's sentencing-disparity argument and found it unpersuasive after rationally and meaningfully evaluating the 18 U.S.C. § 3553(a) factors, including the unique characteristics of Velasquez and his coparticipants and the nature and circumstances of their conduct. The court did not penalize Velasquez for exercising his Fifth Amendment right to trial and appeal rather than entering a guilty plea like some of his coparticipants.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 30 2023

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANILO ARTURO VELASQUEZ,

Defendant-Appellant.

No. 22-10104

D.C. No.

3:08-cr-00730-WHA-33

Northern District of California,
San Francisco

ORDER

Before: CALLAHAN and BADE, Circuit Judges, and ANTOON,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Callahan and Judge Bade vote to deny the petition for rehearing en banc and Judge Antoon so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA)	CA # 22-10104
)	
Plaintiff/Appellee)	DC # 08-cr-730-WHA-33
)	
v.)	
)	
DANILO VELASQUEZ,)	
)	
Defendant/Appellant.)	
)	

**PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC***

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WILLIAM H. ALSUP
United States District Judge

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I. INTRODUCTION AND RULE 35 STATEMENT

On February 19, 2009, five MS-13 members got in two cars to hunt for rival gang members. Appellant Danilo Velasquez (“Velasquez”), a clique co-leader with Giovanni Hernandez, rode with Jaime Balam in a car driven by Luis Herrera. Hernandez and Wilson Villalta rode in another car.

Believing they had found their targets, Velasquez and Balam got out and shot into a car. One young man was killed, two others were seriously wounded, and one narrowly escaped injury. None was a gang member. Balam fired the fatal shots. 3-ER-364-365.¹

Velasquez was convicted of RICO conspiracy, lesser conspiracy charges, and a firearm use enhancement under 18 U.S.C. § 924(c). He was sentenced to discretionary life plus ten years for the firearm enhancement. In 2020, under *United States v. Davis*, 139 S.Ct. 2319 (2019), the district court granted Velasquez’s motion under 28 U.S.C. § 2255 to vacate his conviction and sentence on the firearm enhancement. It ordered a full resentencing and ultimately imposed the same sentences.

This petition concerns Jaime Balam, the other shooter. Balam had the good luck to be deported before the government realized his involvement. 3-ER-365-366. Seven years after the crime, the government agreed to a 27 ½

¹ ER=Excerpts of Record in five volumes; PSR=Presentence Report filed under seal and related sentencing memoranda previously filed under seal.

year sentence in a plea agreement.² The government justified this leniency because Balam had minimized its litigation risks and brought closure to the victim's family. 3-ER-369.

While a defendant's acceptance of responsibility is relevant to sentencing, he has no duty to ensure the government the conviction it wants. Similarly, a defendant has no duty to bring closure to the victim's family. That is not a sentencing factor under 18 U.S.C. § 3553(a). Nonetheless, expediency and entitlement have been recurring themes in these cases.

The challenged sentence is grounded in assumptions that conflict with both the statute and case law from the Supreme Court, this circuit, and other circuits. This Court should grant panel rehearing and/or *en banc* review on the related questions of whether, given the considerations that informed Balam's sentence, reimposition of Velasquez's discretionary life sentence created an unwarranted disparity under 18 U.S.C. § 3553(a)(6) and punished Velasquez for going to trial.

II. STATEMENT OF FACTS

Velasquez and Hernandez became coleaders of MS-13's 20th Street clique in October 2008 when the prior leader was arrested. Velasquez had

² As for the non-shooting participants, Villalta cooperated. Hernandez and Herrera pled at various points. Both received sentences substantially less than life.

been a member of the clique since approximately January 2005. PSR-30-31.

Balam was “jumped in” to the gang in 2008. 3-ER-364.

Five murders were committed by MS-13 members in 2008 before Velasquez became co-leader. Velasquez was not present at any of these killings. PSR-33-34. There is no evidence Balam was either.

Apart from the February 19, 2009 shooting, Velasquez was the driver in a February 13, 2009 incident where two men were shot. PSR-32-33. Evidence of his ordering another shooting on March 2, 2009 was conflicting. PSR-33; 3-ER-432-433.

The shooting may have been Balam’s first violent crime. 3-ER-368. If it was, he jumped in head first. Herrera told Villalta afterwards, “Tweety’s (Balam’s) got respect now.” 3-ER-424.

III. ARGUMENT

A. The Continuing Sentencing Disparity Between Velasquez’s and Fellow Shooter Jaime Balam’s Sentence was Substantively Unreasonable, Punished Velasquez for Going to Trial, and was Grounded in Impermissible Considerations under Section 3553(a)(1) such as the Failure to Minimize the Government’s Litigation Risks and the Duty to Provide Closure to Victims’ Families.

1. Standard of Review

The U.S. Sentencing Guidelines are advisory only. *United States v. Booker*, 543 U.S. 220 (2005). A sentence is reviewable for substantive

“unreasonableness” in light of the sentencing factors set out at 18 U.S.C. § 3553(a). *Id.* at 261; *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). A court of appeals *may* apply a presumption of reasonableness to a Guidelines sentence. *Rita v. United States*, 551 U.S. 338, 345, 350 (2007). However, this Court has declined to endorse such a presumption. *United States v. Carty, supra*, 520 F.3d at 994.

Sentences within a properly calculated Guidelines range may be reversed as unreasonable. *United States v. Plouffe*, 445 F.3d 1126, 1129-1131 (9th Cir. 2006). Even a sentence below the advisory Guideline range can be set aside as unreasonable. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Review for substantive reasonableness is highly deferential. *United States v. Ressam*, 679 F.3d 1069, 1088 (9th Cir. 2012) (en banc). It is not so deferential, however, that review for unreasonableness is “a dead letter.” *Id.* at 1088, fn. 9 (citation omitted).

2. Procedural Background: Denigration of the Right to Trial in Velasquez’s and Balam’s Cases.

When Velasquez was first sentenced in February 2012, the following exchange occurred:

“THE COURT: Why do you say that if one wants to take their chances on getting an acquittal at trial and not accepting responsibility and they go to trial and lose, why should that

person be treated the same way as somebody who pled guilty, gave up the chance for an acquittal, gave up the chance for an appeal?

MS. SCHWARTZ: . . . I don't believe that exercising your right at trial should be a basis for differentiating two defendants based on their degree of culpability.

THE COURT: Maybe you don't believe that, but what do the Guidelines say about that?" 2-ER-290-291."

When, four years later, Balam's case was resolved, the government wrote,

"Two final points bear note. First, by entering his guilty pleas in timely fashion . . . Balam has resolved the case and allowed the government—and the victims—to avoid the litigation hazards associated with trying the case for a second time and after a hiatus exceeding five years. Second, this resolution offers to the surviving victims and to the Frias family (who were consulted prior to the government's entry into the plea agreement) an opportunity for closure that avoids the pain of a second trial." 3-ER-369.³

At Velasquez's resentencing, the district court insisted it was not punishing Velasquez for going to trial, but that anyone who goes to trial runs the risk of a bad picture being painted. 1-ER-60-61. It never explained how the picture painted of Velasquez was worse, then or now, than the picture painted of Balam. 1-ER-10-70.

³ In recommending leniency, the government never said that Balam had dropped out of the gang while awaiting trial or had agreed to cooperate. 3-ER-362-369.

3. The Merits

A defendant may not be punished more harshly for exercising his constitutional rights to trial and appeal. *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); *United States v. Jackson*, 390 U.S. 570, 581 (1968); *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982). A court may grant lenient treatment to defendants who plead guilty. However, it must be understood that the norm is exercise of the right to jury trial. *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992). “A sentence imposed upon a defendant who stands trial is that norm; it is not an enhancement above the norm as a cost of standing trial.” *Ibid.*

At Velasquez’s first sentencing hearing, the district court asked if the Guidelines had an answer to defense counsel’s argument about unwarranted disparity. They do. The “discounts” for pleading guilty are embodied in the Guidelines governing acceptance of responsibility. *Ibid.* Acceptance is worth a three-level decrease in offense level. USSG § 3E1.1(a)-(b). At the high end of the sentencing table, that translates to a reduced sentencing range of approximately seven and a half to nine and a half years, not the half a lifetime that separates Velasquez’s sentence from Balam’s.

The implicit assumption in the outcome here is that the government is presumptively entitled to the convictions it wants. The district court’s initial

criticism of the defendant who “wants to take their chances on getting an acquittal” denigrates the presumption of innocence and the requirement of proof beyond a reasonable doubt. It implies that going to trial where others have pled guilty is a “Hail Mary” and that an acquittal in that scenario would mean something went wrong.

The government’s remarks in its sentencing papers in Balam’s case were to the same effect. The government believed Balam was guilty but harbored doubts about proving it. Balam gave them a gift. However, neither Balam nor Velasquez had an obligation to help the government “avoid the litigation hazards” it would face in securing a conviction. It was perfectly appropriate for Velasquez to believe in his own innocence or just put the government to its proof and think that the jury would not believe the self-interested liars and criminals who were its principal witnesses.

The disparity between Velasquez’s and Balam’s sentence rests on another inappropriate consideration: the notion that Velasquez had a moral obligation to provide closure to the victims by pleading guilty. There is no authority for that.

18 U.S.C. § 3553(a) provides:

“Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular

sentence to be imposed, shall consider

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced;

....

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.”

The statute speaks of restitution to victims. It does not speak of pleading guilty to provide closure to victims.

Both Velasquez’s initial sentencing and Balam’s sentencing were grounded in erroneous assumptions about what a criminal defendant who sees his codefendants pleading out owes to the government and to the victims. The district court’s failure at Velasquez’s resentencing to bring his sentence in line with Balam’s cemented these fallacies and perpetuated an unreasonable disparity. Velasquez is entitled to resentencing.

IV. CONCLUSION

For the foregoing reasons, panel rehearing and/or *en banc* review should be granted.

Respectfully submitted,

Dated: September 29, 2022

/s/Steven S. Lubliner
STEVEN S. LUBLINER
Attorney for Appellant
Danilo Velasquez

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form11instructions.pdf>

9th Cir. Case Number(s) 22-10104

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

Prepared in a format, typeface, and type style that complies with Fed. R. App.

P. 32(a)(4)-(6) and contains the following number of words: 1,948

(Petitions and responses must not exceed 4,200 words)

OR

In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Steven S. Lubliner

Date 09/29/2023

(use "s/[typed name]" to sign electronically-filed documents)

FILED

AUG 31 2023

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANILO ARTURO VELASQUEZ,

Defendant-Appellant.

No. 22-10104

D.C. No.

3:08-cr-00730-WHA-33

Northern District of California,
San Francisco

ORDER

Before: CALLAHAN and BADE, Circuit Judges, and ANTOON,* District Judge.

Defendant-Appellant Danilo Arturo Velasquez's motion for an extension of time to file a petition for rehearing or rehearing en banc to September 29, 2023, Dkt. 70, is **GRANTED**.

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
Northern District of California

UNITED STATES OF AMERICA

v.

Danilo Velasquez
 a/k/a "Triste"

) **AMENDED JUDGMENT IN A CRIMINAL CASE**

)
) USDC Case Number: CR-8-00730-033 WHA
) BOP Case Number: DCAN38CR00730-033
) USM Number: 14341-111
) Defendant's Attorney: Steven Lubliner (Appointed)

Date of Original Judgment: 2/16/2012

(or Date of Last Amended Judgment)

THE DEFENDANT:

pleaded guilty to count(s): _____

pleaded nolo contendere to count(s): _____ which was accepted by the court.

was found guilty on counts: One, Two, Three, and Four of the Third Superseding Indictment after a plea of not guilty; however, the conviction as to Count Four was vacated by the Court.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Racketeering Conspiracy	September 24, 2009	One
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Murder in Aid of Racketeering	September 24, 2009	Two
18 U.S.C. § 1959(a)(6)	Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering	September 24, 2009	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s): _____

Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must 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.

4/19/2022

Date of Imposition of Judgment



Signature of Judge

The Honorable William Alsup
 Senior United States District Judge

Name & Title of Judge

4/22/2022

Date

AO 245C (Rev. AO 09/19-CAN 12/19) Amended Judgment in Criminal Case

DEFENDANT: Danilo Velasquez

CASE NUMBER: CR-8-00730-033 WHA

Judgment - Page 2 of 8

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Life imprisonment. This term consists of terms of life on Count One, 120 months on Count Two, and 36 months on Count Three, all such terms to be served concurrently.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

The Court makes the following recommendations to the Bureau of Prisons:

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

The defendant shall surrender to the United States Marshal for this district:

at _____ am/pm on _____ (no later than 2:00 pm).

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

at _____ am/pm on _____ (no later than 2:00 pm).

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

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: Danilo Velasquez
 CASE NUMBER: CR-8-00730-033 WHA

SUPERVISED RELEASE

If released from imprisonment, the defendant shall be on supervised release for a term of: Five years. This term consists of five years on Count One, three years on Count Two, and one year on Count Three, all such terms to run concurrently.

The court imposes a five-year term of supervised release. However, if released from imprisonment, the defendant will likely be deported and will not be in the United States to be supervised. At all times, the defendant shall comply with the rules and regulations of the Bureau of Immigration and Customs Enforcement and, if deported, shall not reenter the United States without the express consent of the Secretary of the Department of Homeland Security.

If the defendant is deported, and within five years of release from imprisonment returns to this country, legally or illegally, the defendant shall be subject to the conditions of supervised release and shall report to the nearest probation office within 72 hours of reentry. If the defendant for some reason is not deported and remains in this country, the defendant shall be subject to the conditions of supervised release and shall report to the nearest probation office within 72 hours of release from imprisonment.

MANDATORY CONDITIONS OF SUPERVISION

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance.
- 3) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
- 4) You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
- 5) You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
- 6) You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
- 7) You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Danilo Velasquez
 CASE NUMBER: CR-8-00730-033 WHA

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court, and bring about improvements in your conduct and condition.

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of RELEASE, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must follow the instructions of the probation officer related to the conditions of supervision.
- 5) You must answer truthfully the questions asked by your probation officer.
- 6) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with, for example), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 7) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by these and the special conditions of your supervision that he or she observes in plain view.
- 8) You must work at least part-time (defined as 20 hours per week) at a lawful type of employment unless excused from doing so by the probation officer for schooling, training, community service or other acceptable activities. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 9) You must not communicate or interact with someone you know is engaged in criminal activity. You must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.
- 10) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

If the probation officer determines that you pose a risk to a third party, the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk. (check if applicable)

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision upon a finding of a violation of probation or supervised release.

(Signed) _____
 Defendant

 Date

 U.S. Probation Officer/Designated Witness

 Date

SPECIAL CONDITIONS OF SUPERVISION

1. You must at all times either have full-time employment, full-time training for employment, or full-time job search, or some combination thereof, unless otherwise excused by probation.
2. You must pay any restitution and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
3. You must participate in a mental health treatment program, and you must pay for part or all of the cost of treatment, as directed by the probation officer. You must adhere to a copayment schedule as determined by the probation officer.
4. You must not knowingly participate in gang activity, must not associate with any member of the MS-13 gang, and must not wear the clothing, colors, or insignia of the MS-13 gang.
5. You must not have contact with any codefendant in this case.
6. You must not be found in any area frequented by gangs, as designated by the probation officer, except as the probation officer, or the Court, may allow.
7. Unless directed in writing otherwise, you must check your voice mail and/or answering machine on a daily basis to determine if any instructions were left by the probation officer. You must follow all such instructions, including but not limited to drug testing.
8. You must not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons and must not be present in a vehicle where you know any firearm or ammunition is present.
9. You must cooperate in the collection of DNA as directed by the probation officer.
10. You must submit your person, residence, office, vehicle, or any property under your control, including any computers, cell phones, and other electronic devices, to a search. Such a search must be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation. You must warn any residents that the premises may be subject to searches.

DEFENDANT: Danilo Velasquez

CASE NUMBER: CR-8-00730-033 WHA

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$300	Waived	\$21,650	N/A	N/A

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Moises Frias, Sr.	\$21,650	\$21,650	100%
TOTALS	\$21,650	\$21,650	

Restitution amount ordered pursuant to plea agreement \$ _____.

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine/restitution.

the interest requirement is waived for the fine/restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Danilo Velasquez
CASE NUMBER: CR-8-00730-033 WHA

SCHEDULE OF PAYMENTS

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

- A Lump sum payment of _____ due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, or E, and/or F below); or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

It is further ordered that the defendant shall pay to the United States a special assessment of \$300. Payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102. During imprisonment, payment of criminal monetary penalties are due at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

It is further ordered that the defendant shall pay restitution to Moises Frias, Sr., in the amount of \$21,650, to be due immediately. During imprisonment, payment of restitution is due at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Notwithstanding any payment schedule set by the court, the United States Attorney's Office may pursue collection through all available means in accordance with 18 U.S.C. §§ 3613 and 3664(m). The restitution payments shall be made to the Clerk of U.S. District Court, Attention: Financial Unit, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

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.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
CR 12-00625-001 WHA	\$21,650	\$21,650	Moises Frias, Sr.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s): _____

* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

AO 245C (Rev. AO 09/19-CAN 12/19) Amended Judgment in Criminal Case

DEFENDANT: Danilo Velasquez

Judgment - Page 8 of 8

CASE NUMBER: CR-8-00730-033 WHA

The defendant shall forfeit the defendant's interest in the following property to the United States:

The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, **but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.**

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

San Francisco, California
Tuesday, April 19, 2022

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

STEPHANIE M. HINDS
UNITED STATES ATTORNEY
450 Golden Gate Avenue, 11th Floor
San Francisco, California 94102
ANDREW M. SCOBLE
ASSISTANT UNITED STATES ATTORNEY

For Defendant:

LAW OFFICES OF STEVEN S. LUBLINER
P.O. Box 750639
Petaluma, California 94975
BY: STEVEN S. LUBLINER, ATTORNEY AT LAW

Also Present:

Melissa Moy, U.S. Probation
Carol Rhine-Medina, Spanish Interpreter
Salina Frias
Juan Frias

REPORTED BY: Ana Dub, RMR, RDR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official United States Reporter

1 **Tuesday - April 19, 2022**

2:26 p.m.

2 **P R O C E E D I N G S**3 **---oo---**

4 (Defendant present, in custody.)

5 **THE CLERK:** Now calling Criminal Case 08-730-33, U.S.A.
6 versus Danilo Velasquez.7 Will counsel please state your appearances for the record,
8 starting with the Government.9 **MR. SCOBLE:** Andrew Scoble for the United States. Good
10 afternoon.11 **MR. LUBLINER:** Good afternoon, Your Honor. Steven
12 Lubliner for defendant, Danilo Velasquez, who is present in
13 custody and being assisted by the Spanish language interpreter.14 **PROBATION OFFICER MOY:** Good afternoon. Melissa Moy with
15 U.S. Probation.16 **THE COURT:** All right. Welcome to everyone.

17 And our --

18 **THE INTERPRETER:** Carol Rhine-Medina, certified Spanish
19 interpreter. I've been sworn, Your Honor, in this case.20 **THE COURT:** Thank you very much.21 Is your equipment working? Or, no, you don't even have
22 equipment?23 **THE INTERPRETER:** We propose to proceed without
24 equipment --25 **THE COURT:** That's perfectly okay.

1 **THE INTERPRETER:** -- unless there is any reason to.

2 I have it ready.

3 **THE COURT:** All right. Great. Thank you.

4 All right. We're here for resentencing after remand on
5 the *Davis* point. And there's been a lot of briefing in
6 proceedings before this.

7 Help me on this part. Let me start first with
8 the Government. What issues do I need to decide with respect
9 to the criminal history, offense level, and the guideline
10 range? Lay out what those issues are.

11 **MR. SCOBLE:** I don't believe there's any issue.

12 With respect to criminal history, the parties agree that
13 Mr. Velasquez is a Criminal History I.

14 With respect to the guidelines calculations, there are a
15 number of disagreements; but I think it may be fair to say --
16 I'll let Mr. Lubliner weigh in on this. I think we're in
17 agreement that at the end of the day, Mr. Velasquez will still
18 be a Level 43 guideline. So --

19 **THE COURT:** I understand that part, but -- well, then let
20 me ask Mr. Lubliner.

21 Do you want me to make findings with respect to any issue
22 concerning the offense level?

23 **MR. LUBLINER:** Well, yes, we do, Your Honor.

24 **THE COURT:** List out what those issues are so I can make
25 sure I cover them all.

1 **MR. LUBLINER:** Well, the issues here are more or less the
2 same as they were last week in Carcamo:

3 First, the appropriate burden of proof to apply in making
4 findings on relevant conduct, whether it's preponderance or
5 clear and convincing evidence;

6 The issue of whether it was appropriate to use the
7 guideline for the offense level for first degree murder rather
8 than second degree murder in calculating the offense level on
9 Count One;

10 The evidence supporting attributing the crimes in
11 2008 -- there were five murders in 2008 that occurred when
12 Mr. Velasquez, it's undisputed, was not a leader -- whether
13 those are supported by the evidence;

14 The issue of whether the leadership bump is supported by
15 the evidence;

16 And the ultimate issue is the ultimate sentence under
17 the 3553(a) factors with -- my key focus is going to be on
18 avoiding unwarranted disparities.

19 I do agree with Mr. Scoble that at the end of the day, at
20 least on the numbers, assuming we get what we want, it's still
21 going to be an advisory life sentence. It's just not going to
22 be an advisory life sentence that's reduced artificially from
23 something in the 50s and with the ten years tacked on from the
24 count that's the Count Four that's no longer -- that no longer
25 attaches.

1 **THE COURT:** Well, now, I will give you your chance to be
2 heard on the burden of proof, but I did make a ruling on that
3 last week on the other case.

4 Is there anything more you want to say on that point?

5 **MR. LUBLINER:** The only thing I want to say on that point
6 is, I think the *Barragan* case that the Government cites to
7 distinguish from the other cases, like *Lonich*, where they focus
8 on the effect on the offense level and so on, seizing on the
9 conspiracy element, I think *Barragan* relies on cases where the
10 issue was drug quantity and loss, dollar amounts of loss and a
11 Ponzi scheme.

12 And it just strikes me as kind of a "know it when you see
13 it" sort of issue; that to say that in a RICO conspiracy, when
14 you're attributing murders to people, that using -- it's almost
15 like using "murder" as an adjective -- This was a murderous
16 conspiracy -- and so everybody can be on the hook for all these
17 discrete crimes that in a normal situation, you'd expect them
18 to be prosecuted for.

19 It's especially unusual to say that a crime that the
20 defendant is accused of actually committing is just something
21 adjectival that says: This is what kind of a conspiracy it is.
22 Mr. Velasquez killed somebody, or he was with people who killed
23 somebody.

24 And that's why I think *Lonich* and the predecessor cases
25 are a better fit than *Barragan* and the conspiracy, loss, drug

1 quantity kinds of cases.

2 THE COURT: Any response by the Government?

3 MR. SCOBLE: Yes. I think *Lonich* is actually maybe the
4 most persuasive case for the Government's point of view here,
5 for the Government's position. That case, *Lonich*, discussed
6 *Barragan*, so it was clearly aware of the *Barragan* holding with
7 respect to a RICO conspiracy, but also went through a
8 discussion of the various factors that the Ninth Circuit now
9 uses in its standard for determining whether clear and
10 convincing is going to be required as opposed to preponderance.

11 And they did point out in the discussion of *Barragan* that
12 among the considerations that they found -- the panel found
13 persuasive was the finding of guilt by a jury and then, in
14 particular, whether the defendant had an opportunity and a
15 motive to challenge the evidence in question.

16 That caught my eye today as I was rereading *Lonich*
17 because, in this particular case, as the Court will recall,
18 Mr. Velasquez sat through a long trial which focused primarily
19 on the hunt and murder and attempted murders that resulted on
20 February 19th, 2009.

21 So I believe the Court's -- the Court's ruling in the
22 Carcamo resentencing hearing is correct. I think -- I think
23 that preponderance of the evidence is the appropriate standard
24 here.

25 And I noted that in *Lonich*, the Court pointed out that

1 there have been cases where preponderance was still acceptable
2 as the -- as the standard, even though the guideline level went
3 up in one case 17 and, in another, I believe it was 22, so a
4 substantial increase in the offense level.

5 I would add, though, that with respect, especially, to the
6 February 19th, 2009, murder and attempted murders, which
7 themselves pegged the guideline level at 49 -- at 47, I should
8 say, just the first degree murder for the Moises Frias Jr.
9 murder, that is clearly supported, in the Government's view, by
10 clear and convincing evidence far more than preponderance.

11 I think preponderance is there, certainly, for the five
12 murders from 2008, which were especially the focus in the
13 rehearing for Marvin Carcamo.

14 I think they're less impactful here, frankly. I think
15 they are justified. That was our position all along. I think
16 the Court appropriately found them to be relevant conduct. But
17 now we're getting off into reasonable foreseeability, and we
18 can argue that separately.

19 **THE COURT:** All right. The burden of proof in this
20 instance is preponderance of the evidence.

21 All right. Now, the next issue is first degree versus
22 second degree. Summarize, please, for me what that issue is.

23 **MR. LUBLINER:** VICAR murder can be second degree murder.

24 One would naturally expect and appropriately expect a case
25 to be prosecuted and tried on the theory that the Government

1 now asserts should dictate the guidelines. First degree
2 murder, it wasn't.

3 I kind of feel, again, almost emotionally on this issue,
4 that this reminds me of how the Court dealt with an early
5 pretrial issue on the Government's entitlement and request for
6 a *Pinkerton* instruction on the theory of: Oh, everybody's good
7 for everything. All the homies -- one of the homies out there
8 did this, that, or the other thing.

9 And the Court denied the *Pinkerton* instruction, saying it
10 wasn't sufficiently -- the request wasn't sufficiently
11 narrowed, it was late in the trial, and there were other
12 reasons.

13 And to me, in a case like this, to attribute -- to just
14 say that the first degree murder guideline has to apply here
15 when the case seems to have been tried on a first degree murder
16 theory, except not instructed on a first degree murder theory,
17 not charged in the Indictment on a first degree murder theory,
18 not presented to the jury on a first degree murder theory, and
19 not reflected in the verdict on a first degree murder theory.

20 So, again, to say that first degree murder is all of a
21 sudden an adjectival aspect of a broad conspiracy case that
22 puts Mr. Velasquez at the highest guideline level just strikes
23 me as wrong.

24 **THE COURT:** Your turn.

25 **MR. SCOBLE:** To the extent that the complaint there

1 focuses on notice, we did put in our response papers -- pointed
2 out that in the third Superseding Indictment, which was the
3 Indictment on which the trial went forward, not only is
4 Mr. Velasquez specifically named in the special sentencing
5 factor for conspiracy to commit first degree murder, in those
6 terms, but he was also explicitly listed in the overt acts that
7 described the February 19th, 2009, hunt. So he was named in
8 the hunt that led to the murder.

9 Now, more basically, the Probation Office recommended, and
10 the Court correctly adopted the recommendation, that the
11 racketeering guidelines, 3E1.1 -- 2E1.1, rather, direct
12 the Court to look at the underlying offense which most closely
13 matches what the actual racketeering activity was in this case.
14 So it is the Court's call for that for sentencing purposes.

15 **THE COURT:** Is relevant conduct --

16 **MR. SCOBLE:** Yes.

17 **THE COURT:** -- as opposed to something the jury found?

18 **MR. SCOBLE:** Correct.

19 The jury did find that Danilo Velasquez was guilty of RICO
20 conspiracy; and in a special sentencing verdict, they did find
21 that the Government had proved beyond a reasonable doubt that
22 murder and conspiracy to commit murder were objects of that
23 racketeering conspiracy. So those were jury findings.

24 But beyond that, that does not specifically address
25 counsel's question. Well, should it be first degree? Should

1 it be second degree?

2 THE COURT: That comes up under the guidelines?

3 MR. SCOBLE: Yes.

4 THE COURT: How does it come up under the guidelines?

5 MR. SCOBLE: Under the guidelines, 2E1.1 says you need to
6 look at the underlying activity.

7 So the question here is: What is the underlying activity
8 that best fits what happened on February 19th, 2009?

9 The evidence was ample that it was a deliberate,
10 premeditated hunt. It was -- if that wasn't first degree
11 murder, I'm not sure what would be.

12 The evidence was clear that Mr. Velasquez initiated the
13 hunt; he went on it; he directed it while it was underway,
14 because it wasn't immediately successful. They didn't find any
15 victims immediately. They had to travel a little bit. In
16 fact, they traveled from San Francisco into Daly City.

17 As we pointed out in our papers, there were other people
18 along, at least two cars at the end, for the hunt. One of them
19 had Villalta and Hernandez in it, and the other had Velasquez
20 as a passenger, armed; Balam as a passenger, armed; and then
21 Luis Herrera as the driver.

22 Velasquez directed the hunt. He initiated it; he directed
23 it; and he helped finish it, because I think it's fair to say
24 the evidence was really clear after trial, some of it
25 circumstantial, but a good circumstantial case that buttressed

1 what Villalta testified to, which is that although he wasn't
2 there for the actual shooting, he was along with all the events
3 leading up to it and he was there afterwards when he and
4 Hernandez called and were told by Velasquez "It's over." "It's
5 done," I think was the word, "Go home."

6 And then there were eyewitnesses who testified. Nobody
7 could identify Balam or Velasquez as the shooters, but the
8 testimony they gave made clear that there were two shooters,
9 one on each side; one was taller, one was shorter, one had long
10 hair.

11 And then the ballistics evidence showed that two weapons
12 were used, a Lorcin .380, which was seized about two weeks
13 later, and then a 9 millimeter Cobray. And the Government put
14 on evidence that forensic testing showed that one bullet, one
15 9 millimeter bullet removed from one of the victims who
16 survived was matched to the Cobray, which it was our theory was
17 the TEC-9 used by Mr. Velasquez. The .380 Lorcin was matched
18 to the bullets that killed Moises Frias Jr.

19 So two gunmen, two weapons, one leader, and a hunt, which
20 is first degree murder.

21 **THE COURT:** Any response?

22 **MR. LUBLINER:** It's fine to recite all the evidence in
23 this case. That doesn't take away from the fact that it
24 strikes me as bizarre and inappropriate to have first degree
25 murder findings made in a jury trial ultimately by the judge,

1 by a much lower standard of proof, simply as an incident to a
2 large conspiracy.

3 **THE COURT:** All right. Well, the Court finds -- if it's
4 even needed, but I understand why you're arguing over it. I'm
5 going to make findings again with respect to relevant conduct.

6 This is a separate issue than from what the jury finds.
7 The jury found murder, but didn't distinguish between first
8 degree and second degree.

9 But it was first degree, without any question; and this
10 would be true if the standard was proof beyond a reasonable
11 doubt, much less clear and convincing, much less preponderance
12 of the evidence.

13 Mr. Velasquez was one of the two individuals who got out
14 of the car. This was after they chased various -- not
15 "chased," but they went around looking for someone to kill from
16 a rival gang. And they finally wound up at the BART Station in
17 Daly City where in front of them are some young men in a car,
18 not gang members but they were innocently mistaken -- not
19 "innocently mistaken," but taken for gang members, rival gang
20 members.

21 So your client and Balam -- Balam?

22 **MR. SCOBLE:** Balam, B-a-l-a-m.

23 **THE COURT:** -- Balam got out of the car -- Herrera was
24 driving -- got out of the car with two weapons and just
25 unloaded the weapons into the car.

1 Velasquez was the one who was the leader and the one who
2 had ordered and managed the hunt. If that wasn't premeditated,
3 nothing was premeditated. He intended to kill. It was just
4 by -- if it turns out that his bullet only wounded somebody who
5 managed to survive, then that was an act of God. Nevertheless,
6 his intention was to kill, to end a human life; and if that's
7 not first degree murder, nothing is.

8 So you lose on that one. That one, you can appeal.

9 All right. What's the next issue that I have to decide?

10 **MR. LUBLINER:** The next --

11 **THE COURT:** Why do I even need to get into the five
12 murders in 2008? Is that even necessary in light of what
13 happened in 2019 -- I'm sorry -- on February 19th?

14 **MR. LUBLINER:** It all affects the offense level, which was
15 very high and then artificially reduced to 43, which is still
16 advisory life. It's still a basis for potential prejudicial --

17 **THE COURT:** All right. Let's hear the argument. Go
18 ahead. What?

19 **MR. LUBLINER:** All right. Foreseeability of the five
20 homicides in 2008. There is no Wilson Villalta or anybody else
21 linking Mr. Velasquez to any of these events. One of them
22 happened while he was in the hospital.

23 I would encourage the Court to look at what the
24 Presentence Report did, and still does, with respect to a
25 couple of incidents in early March of 2009.

1 March 2nd and March 4th, which are referred to in the
2 Presentence Report, they are both hunts.

3 The March 2nd hunt, Villalta didn't remember who organized
4 it. It was probably Luis Herrera.

5 March 4th hunt was something that Luis Herrera organized
6 himself, and that's when he and Villalta and a couple others
7 were arrested and they had the murder weapon in the back of the
8 car in a tissue box, I think.

9 So these events are noted in the Presentence Report, and
10 they occurred during Mr. Velasquez's period of alleged
11 leadership, or co-leadership, with Giovanni Hernandez; but
12 nonetheless, they are not attributed to Mr. Velasquez.

13 And the PSR could have conceivably said, "Oh, this is a
14 conspiracy. We'll attribute it to him because he was a
15 leader." It doesn't do that.

16 And I think the mistake the Presentence Report made is not
17 backing up as well to the 2008 period, when Mr. Velasquez was
18 not a leader, and not attributing those events to him as well.

19 **THE COURT:** Go ahead.

20 **MR. SCOBLE:** I think my response to that is, the PSR --
21 well, the Probation Office correctly recognized that no
22 leadership enhancement should be given to anything that
23 happened in 2008. That's the correct way to handle that.

24 The leadership enhancement does apply for Racketeering
25 Acts 6 through 11, as they're laid out in the PSR, because the

1 evidence showed that beginning in late 2008, Villalta's
2 testimony was at about Christmastime 2008 he recalled coming
3 home and finding out that the new leader was "Triste," Danilo
4 Velasquez.

5 And certainly, the actions that were put in front of the
6 jury in February, and I'm talking about February 13th, 2009,
7 there was a hunt which resulted in the wounding of two Norteños
8 at 24th and Capp Street. So that's February 13th. Where there
9 was trial testimony, I believe I attached relevant pages to
10 the -- to my declaration that went in to the Court, testimony
11 that linked Velasquez to that, even though he may not have been
12 personally present.

13 And then similarly, the February 19th, which really is
14 probably the single most important thing to be arguing about
15 anyway, he was clearly the leader there.

16 And then there were events in March. It is true that on
17 March 4th, the event where a traffic stop resulted in the
18 arrest of Luis Herrera and three others, and that's where the
19 Lorcin .380 was actually seized by SFPD. So the evidence
20 indicated that that was a hunt in progress that the police
21 fortunately cut off at the pass.

22 That appears to have been organized by Herrera -- that was
23 Villalta's testimony -- and that Herrera wanted -- Herrera had
24 a gun, organized it because his two friends had been beaten up
25 by Norteños and he wanted to retaliate.

1 So we're not alleging that Velasquez ordered that hunt.
2 That does not mean he was not the clique leader at the time.
3 Frankly, we suggested to the Probation Office that the
4 March 4th event should be also attributed to the leadership of
5 Danilo Velasquez.

6 It's a little bit like what the Court found with Marvin
7 Carcamo. He set in process a system, a policy; and if others
8 implemented it, then it doesn't absolve him from
9 responsibility. Now, that's straight off into reasonable
10 foreseeability, I understand.

11 Going back to Velasquez and his leadership, the evidence
12 was there was one leader. If counsel wants to say that because
13 Luis Herrera made a cocking gun sign at a cooperator or a
14 suspected cooperator that Velasquez and Herrera and two others
15 were going to harass, he can make that argument. That does not
16 make Velasquez not the leader and Luis Herrera the leader.

17 Frankly, I -- well, one could buy into counsel's argument that
18 that indicates that Luis Herrera was making judgments that only
19 a leader would feel comfortable making. He can say that. That
20 doesn't make it so.

21 The testimony at trial was Velasquez was the leader. He
22 had some help as a leader with Hernandez, which is why I
23 pointed out in my declaration, it was important that in the
24 February 19th hunt, according to Villalta who's in the car with
25 Hernandez as his passenger, they're calling into Velasquez for

1 directions.

2 "What should we do?"

3 "It's done. Go home."

4 It's not either of them calling the shots. They're not
5 saying, "Okay. We're going to do this next" or "We're going to
6 do that" or "You do this; you do that." That was Velasquez
7 doing that.

8 So the evidence that came in at trial was that Danilo
9 Velasquez was the leader beginning in late 2008, and he was
10 absolutely the leader running things in January and February of
11 2009.

12 There were a number of newcomers in the group. There were
13 way more than four or five. They were listed as -- actually,
14 I believe it's in Exhibit A or B to my declaration. There was
15 a letter that I sent to the probation officer back in 2012
16 summarizing what the evidence showed, and I pointed out the
17 trial testimony of who was considered to be in the gang as
18 newcomers as of February of 2009. There were, I think it was
19 eight or nine. It was certainly more than four or five.

20 So the short answer is yes, the leadership enhancement is
21 appropriate for the Acts 6 through 9 -- or 6 through 11, which
22 are in January and February of 2009. It's not appropriate for
23 the 2008 conduct, and the Probation Office didn't recommend
24 that it be applied to them.

25 **THE COURT:** Well, but do we, in your view, need to make

1 any attribution of the five murders that took place in 2008 to
2 the defendant?

3 **MR. SCOBLE:** I think it is correct to do so. I mean,
4 I think it is relevant conduct that is reasonably foreseeable
5 to Velasquez, because the proof at trial showed that he had
6 joined the gang at least as of October 21st, 2005, when he
7 self-identified as "Little Triste" to a Gang Task Force officer
8 who encountered him, Velasquez, in company with gang members
9 monikers "Slow," "Dreamer," "Stranger," "Popeye" and "Spanky,"
10 who all identified themselves as MS members. So that's October
11 of 2005.

12 He was -- the evidence at his trial, Mr. Velasquez's
13 trial, showed that he was identified on rosters as "Triste" in
14 2006, 2007.

15 There was evidence that he attended a secretly recorded
16 "misa," a gang meeting, at Sutro Park in August 2007. It was
17 run by "Cyco" and "Peloncito," so Guevara and Carcamo.

18 **THE COURT:** At our trial that involved Mr. Velasquez, did
19 those five murders in 2008 even come up?

20 **MR. SCOBLE:** There was proof about them in Velasquez's
21 trial, yes. Yes, we put on proof on those; much, much more
22 abbreviated than in the five-month trial.

23 **THE COURT:** Okay.

24 **MR. SCOBLE:** But, yes, we had much of that evidence -- it
25 went in in the early part of the case. Much of it was

1 uncontested by the defendants who were in trial.

2 **THE COURT:** All right. Mr. Lubliner.

3 **MR. LUBLINER:** Just focusing on 2008 right now, I think we
4 jumped into leadership a bit. I believe the defense evidence,
5 generally speaking, was Mr. Velasquez worked a full-time job;
6 yes, that he was -- apparently had presence at some MS-13
7 meetings. I don't know that that's a basis for saying that he
8 knew, chapter and verse, every last thing that was going on or
9 understood things that were going to happen.

10 And I would encourage, again, the Court to take the
11 approach the PSR takes, which is -- with the March incidents,
12 which is to say: Oh, we're not going to attribute that to him.
13 Even though he was a leader, doesn't look like he had anything
14 to do with it, and he didn't have anything to do with anything
15 that happened in 2008.

16 **THE COURT:** He was a member of the gang, wasn't he, in
17 2008?

18 **MR. LUBLINER:** He was a member of the gang. There's this
19 assumption that he was -- had been jumped in in 2005. That's
20 an assumption. It was never actually testified to by anyone
21 who witnessed that. So it's hard to say the depth of his
22 membership at that point.

23 **THE COURT:** All right. The Court finds that with respect
24 to the leadership role --

25 **MR. LUBLINER:** No, Your Honor.

1 **THE COURT:** Oh, you've got more?

2 **MR. LUBLINER:** Well, I was --

3 **THE COURT:** Go ahead. I don't want to cut you off. I
4 thought you'd finished.

5 **MR. LUBLINER:** No. I will have more on leadership. I
6 just thought foreseeability of 2008 was a discrete issue.

7 **THE COURT:** All right. We'll treat it that way.

8 But go ahead. Before I rule on that, go ahead with your
9 argument on leadership.

10 **MR. LUBLINER:** Well, on leadership, I would urge the court
11 to consider the source, primarily, and the fact that there were
12 lots of leaders.

13 The source is Wilson Villalta, self-interested
14 cooperator -- like, I guess, inevitably, any self-interested
15 cooperator is -- facing an advisory life sentence himself, I
16 imagine, and a source who kept having his lies and his
17 convenient omissions and "Oh, yeah, I forgot to mention my
18 involvement in this way and my involvement in that way, and I
19 forgot to mention this, and I forgot to mention that." And
20 then, I think eventually, he made up the presence of a third
21 party who supposedly witnessed a jail conversation he had with
22 Herrera. So he is an untrustworthy informant.

23 The Government itself can't make up its mind how many
24 leaders there were. In the Indictment, it says Velasquez and
25 Giovanni Hernandez. In the Presentence Report, it says

1 Velasquez and Giovanni Hernandez.

2 Villalta says, "March 2nd, I don't know who ordered that."

3 Maybe there was somebody else who ordered that.

4 The Government says, "Oh, forget Hernandez. The evidence
5 doesn't show that he was a leader at the end of the day. He
6 took orders from Velasquez."

7 Okay. Well, look at the evidence. The evidence shows
8 Luis Herrera was a leader.

9 So there were almost so many leaders that it doesn't
10 necessarily make sense to say that there was -- that there were
11 any leaders in any meaningful way here.

12 **THE COURT:** All right. Anything more?

13 **MR. SCOBLE:** Just, I would point out that there were
14 typically two leaders. The example that I was just giving of
15 the "misa," where Danilo Velasquez was secretly recorded giving
16 a report to the group, the meeting was led by "Cyco" and
17 "Peloncito," so Guevara and Carcamo.

18 It was -- I think it was pretty common in the evidence
19 that came in in the first two trials before this Court that
20 there was not necessarily a single person. But I think it is
21 fair to say that the evidence presented at Mr. Velasquez's
22 trial showed that he exercised a leadership role. Whether or
23 not Hernandez was helping him, and to the extent that he was
24 helping him, regardless of all that, Velasquez still was
25 exercising a leadership role, which is what, I believe, the

1 guidelines require for the Court to impose the four-level bump.

2 **THE COURT:** All right. Here is the ruling.

3 With respect to the period from December of '08 through at
4 least the end of February of '09, it's clear and convincing
5 that the defendant was a leader in the MS-13 gang in
6 San Francisco. That's number one.

7 Number two, with respect to the period 2008, when he was
8 not a leader but, nevertheless, he was a member of the gang and
9 it was reasonably foreseeable that murders of the type that did
10 occur in rampant style during the course of 2008 were
11 foreseeable by him and someone in his position, and so those
12 can be attributed to him through his membership in the gang.

13 All right. Those are the rulings.

14 Now, with those rulings, where does the offense level come
15 out?

16 **MR. SCOBLE:** The offense level will be, as is calculated
17 in the updated PSR, 52, but it caps out at 43. So we're back
18 at a 43.

19 **THE COURT:** All right. 43/I will be the offense level.

20 And the guideline range is discretionary life; correct?

21 **MR. SCOBLE:** Correct.

22 **THE COURT:** All right. So at this point, I want to -- we
23 have victims here; correct?

24 **MR. SCOBLE:** We do.

25 **THE COURT:** I'd like to give the victims an opportunity to

1 be heard.

2 I need to give you a heads-up that at some point before
3 the hearing is over, I will need to take a 15-minute break, and
4 then we will go as late as necessary today in order to finish.

5 All right. But let's hear from the victims first. Would
6 you introduce the first victim that you wish to speak today.

7 **MR. SCOBLE:** I will. And we have Salina Frias, who is the
8 sister of the murder victim Moises Frias Jr.

9 **THE COURT:** All right. Welcome to the Court.

10 **MS. FRIAS:** Hi.

11 **THE COURT:** Are you fully vaccinated?

12 **MS. FRIAS:** Yes, I am.

13 **THE COURT:** You can take your mask off, if you wish. You
14 can leave it on. It's up to you.

15 **MS. FRIAS:** I'm good like that.

16 **THE COURT:** Okay. Speak slowly so we can hear every word,
17 and say your name again.

18 **MS. FRIAS:** My name is Salina Frias.

19 **THE COURT:** Please go ahead.

20 **MS. FRIAS:** I'm speaking on behalf of my family and I.
21 I'm Moises Frias Jr.'s sister.

22 My brother was taken away from us too soon. The tragedy
23 struck on February 19, 2009. That night, our lives changed
24 forever. Never in my life I imagined my family and I would
25 ever go through this.

1 **THE COURT:** A little slower, please.

2 **MS. FRIAS:** It's been hard -- it's been hard moving
3 forward with our lives. It left us vulnerable and scared to
4 face life without him.

5 I was the most affected one out of the family and still
6 is. Till this day, I still deal with bad anxiety due to losing
7 my older brother.

8 He was only 21 years old, with a whole life ahead of him.
9 He was full of life, always with a great sense of humor. He
10 was a hardworking man.

11 My brother was an innocent person who did no harm to the
12 community. And for his life to be taken away due to mistaken
13 identity, that upsets me.

14 It's been 13 years since this tragedy happened, and I find
15 it crazy how I'm still here again, standing, after ten years --

16 **THE INTERPRETER:** Could you repeat that, please?

17 **MS. FRIAS:** It's been 13 years since this tragedy
18 happened, and I find it crazy how I'm here again, standing,
19 after ten years, for a new resentencing.

20 I think no criminal should have time taken off from the
21 original sentencing. These criminals don't deserve to appeal
22 about lowering their sentencing. It's not fair at all. It
23 shouldn't be an option. These laws are ridiculous and unfair.

24 It sickens me how people can be so cruel to take an
25 innocent life away over a stupid color. Criminals like these

1 need to stay in jail and rot in there. We can't have these
2 criminals in the streets committing crimes. It's not fair for
3 any families to suffer from a loss like this.

4 Today and for the rest of our lives I'll be mourning my
5 brother's loss. So I hope you take into consideration my point
6 of view, because it hasn't been easy. I miss my brother every
7 day. Even though the sentence can't bring my brother back, but
8 it will for sure keep these criminals from committing crimes
9 again. So I hope you take into consideration, because it's not
10 fair at all.

11 It's, why they should have had an option to even appeal?
12 That shouldn't be no fucking option.

13 And I'm going to say something in Spanish for him so he
14 can understand me.

15 (Ms. Frias speaking Spanish to Defendant.)

16 **THE COURT:** Wait. The court --

17 **MS. FRIAS:** In my words --

18 **THE COURT:** What did you say just?

19 **MS. FRIAS:** Okay. I'm going to translate it.

20 **THE INTERPRETER:** Or the interpreter could interpret it,
21 if you --

22 **THE COURT:** Here's what we'll do. She will give her
23 interpretation first, and you interpret what you think she just
24 said. And then if you think her interpretation is incorrect,
25 I'll let you tell us.

1 All right. So you go first.

2 **MS. FRIAS:** So I said: Look, look at me. You chose why
3 you're here. He knew what he did that day. He has no right to
4 appeal. So rot in jail.

5 **THE COURT:** All right. Do you believe that's an accurate
6 translation? I'm asking you.

7 **THE INTERPRETER:** Yes. Yes, I do. Yes, I do.

8 **THE COURT:** All right. Okay. All right. Thank you.

9 Okay. And the court reporter should note at the point
10 where she was speaking Spanish, all you need to do is say:
11 Speaking Spanish to Defendant. Okay? Thank you.

12 **MS. FRIAS:** Thank you.

13 **THE COURT:** Does any other victim wish to be heard?

14 **MR. SCOBLE:** Your Honor, there is one more member of the
15 victim's family, Juan Frias, an uncle.

16 **THE COURT:** All right. Welcome to the Court.

17 **MR. FRIAS:** Hi, Your Honor. How you doing?

18 **THE COURT:** Fine. Thank you.

19 **MR. FRIAS:** I thought you retired already.

20 **THE COURT:** What?

21 **MR. FRIAS:** I thought you retired already.

22 **THE COURT:** Not quite, but I'm semiretired.

23 **MR. FRIAS:** I'm Juan Frias. I am the uncle.

24 And my niece said it with so much passion and fire that
25 I'm going to just reiterate everything that was said here.

1 I appreciate all the time everybody had to do all the work
2 here. But he was part of the homies, like the --

3 **THE COURT:** When you say "he was," who do you mean?

4 **MR. FRIAS:** I mean, as the --

5 **THE COURT:** You mean the deceased, or do you mean the
6 defendant?

7 **MR. FRIAS:** No. As the defendant was saying, he was part
8 of the homies; he was part of the homies.

9 He's a waste of life, this guy right here. I feel like
10 I'm wasting my time even being here right now, like, repeating
11 our case when my nephew got killed. I mean, it's devastated
12 our entire family already. It changed everybody's life, like,
13 forever in our life.

14 And now, and for us to be here and see my niece, which
15 she's been having anxiety issues all her life after this. She
16 doesn't sleep good. She's been having issues just physically
17 and mentally all her life now. And my brother too.

18 And for me to be here and watch this piece of crap, which
19 I've always said, I wish I could take him in the back myself
20 and take care of him myself. Excuse my French. It's a waste.
21 I'm sorry to say this.

22 So there should be no reduction of nothing of any sort for
23 killing somebody in life. Like, why is that? Is that because
24 it's a waste of taxpayer money, his being in prison, or because
25 of laws? I think just it's a waste of time. I mean, I think

1 he should be, like, no reduction at all, whatsoever. If you
2 ask me -- I'm sorry. If you ask me, I think you should
3 probably even add more years just for us being here right now
4 and wasting our time.

5 So there should be nothing at all for you.

6 And I wish I got to take him in the back myself and take
7 care of him myself, like, personally.

8 **THE COURT:** All right. Is that it?

9 **MR. FRIAS:** I'm done. And thank you for your time. I
10 appreciate everything like that. It's all the hard work you
11 guys done. And I appreciate your time as well.

12 **THE COURT:** Thank you. You're welcome to stay, of course.

13 **MR. FRIAS:** Thank you for your time. I appreciate it.

14 **THE COURT:** Any other victims wish to be heard?

15 **MR. SCOBLE:** No, Your Honor.

16 **THE COURT:** All right. I don't need to take my break
17 quite yet.

18 We will now turn to the 3553 factors, and we'll let
19 Mr. Lubliner go first.

20 So please take your time and make your argument.

21 **MR. LUBLINER:** Thank you, Your Honor.

22 Alluding to what we just heard, obviously, I'm
23 sympathetic. I've known people -- and I would never come here
24 and suggest Mr. Velasquez deserves a new sentence because of
25 the passage of time and time heals all wounds or anything like

1 that. I've known friends and family members who have lost
2 children, young children, adult children, lost them to illness,
3 lost them to accident, to negligence, and to crime; and it
4 affects everyone forever and people never get over it. So that
5 is not going to be part of the case.

6 Unwarranted disparity is part of the case because
7 everything that we've heard and everything we might think about
8 Mr. Velasquez or anybody else in MS-13 could be said about the
9 four people who are not here today, two of whom are already,
10 I think, walking the streets.

11 There were two cars. There were five men. They were all
12 committed to the same criminal ends.

13 One of them went to trial, exercised his Sixth Amendment
14 constitutional right to trial, and he got the discretionary
15 life sentence. He's going to die in prison.

16 We have the four others.

17 We have Jaime Balam, or Balam, who fired the fatal shots,
18 27-and-a-half-year sentence. He'll be out -- he was a young
19 man -- I guess, in his mid-40s. And his principal virtue is
20 that he had the good luck of being deported before one hand
21 knew what the other hand was doing, that he was wanted in this
22 case, and it took some time to get him back; and then it took,
23 I think, four years to settle the case.

24 Giovanni Hernandez, alleged as the co-leader. Presentence
25 Report says co-leader. Drove the other car. A light deal for

1 him, I think 180 months. No attribution of murder in his deal.
2 No leadership in his deal. He got 2255 relief, just as
3 Mr. Velasquez did. No opposition. No discussion of let's keep
4 the original sentence in place. We'll just jigger the numbers
5 a little. No. Out with time served. He's been out for two
6 years now.

7 Wilson Villalta, the principal cooperator, pointed out the
8 victim's car as the car with loud music. "Go get 'em." He's
9 out. At least I assume he's out.

10 Mr. Velasquez -- oh, excuse me.

11 Luis Herrera drove the car with the shooters, was a
12 shooter six days before that. Went in young. He gets out with
13 half his life to live. And I'll have more to say about him,
14 though I know the Government disagrees.

15 And, again, Mr. Velasquez exercises his constitutional
16 right to trial, and he's the only one out of the five on that
17 terrible day who is going to die in prison, principally for the
18 sin of going to trial.

19 Now, I want to say more about Luis Herrera. I do believe
20 there were three leaders working MS-13, at least around the
21 early part of 2009.

22 I do believe it's significant that the story that somehow
23 got floated around that Herrera just thought about joining the
24 gang when he was 18 out of some bizarre humiliation is not
25 true.

1 He was a gang member in 2007. He was "Killer," the
2 Sureño, in 2007, whether or not he was in MS-13. In 2007, he
3 was a young gang member with an older brother gang member, and
4 he called himself "Killer," and he was allowed to call himself
5 "Killer," apparently.

6 Supposedly he's jumped in at the end of 2008.

7 January 2009, there he is with Mr. Velasquez and a couple
8 of others with Espinal, the cooperator.

9 "What's the matter? Where you been?"

10 And it's a threatening confrontation, I acknowledge that.
11 And Luis Herrera makes a sign with his hand like a gun as this
12 is what should be done with Espinal. And that's the kind of
13 judgment and dispensation a leader dispenses. It is not
14 something a newbie does, I don't think.

15 February 13th, he's a shooter. I think being a shooter is
16 a leadership role.

17 February 19th, he's driving the lead car with
18 Mr. Velasquez and Mr. Balam under the prosecution's theory of
19 the evidence. I think that's a leadership role.

20 March 2nd, probably he's the unknown person that Villalta
21 couldn't remember who ordered the hunt. Nothing to do with
22 Mr. Velasquez. That's a leadership role.

23 Same thing on March 4th. Again, driving -- and
24 the Government agrees with that. Mr. Velasquez had nothing to
25 do with that. Driving around with the murder gun and Villalta,

1 nothing to do with Mr. Velasquez. That's a leadership role.

2 After the killing on February 19th, after the incident on
3 February 19th, he says to Villalta, "Tweetie's got respect
4 now." And it's a little unclear in the transcript whether
5 Mr. Velasquez is there or if Herrera is talking about
6 Mr. Velasquez as well having earned respect.

7 And in reviewing for this case, I realized I missed one.

8 On February 13th, when Herrera had been a shooter with
9 another gang member named "Happy," Herrera told Villalta,
10 "'Happy' let his hair down tonight," meaning "Happy" had been a
11 shooter; he'd made his bones, however you want to rephrase it.
12 He's got respect now too, and that's the kind of thing a leader
13 says.

14 Now, I know the Government wants to dismiss the notion
15 that, oh, he's a leader, as if he's just saying something; but
16 one thing that's striking about MS-13, I think, compared to
17 other gangs that this Court might be familiar with is that it's
18 very hierarch- -- excuse me -- it's very hierarchical; it's
19 very organized. There are meetings. Books are kept, dues are
20 paid. There are chains of leadership.

21 This Court heard a lot about, in the main trial with
22 Carcamo and the others, about regional management, for want of
23 a better word, coming to Pas- -- coming from Pasadena to see
24 what's going on. Orders were given from prisons.

25 Villalta asked if he could have done it as a drive-by.

1 "Oh, no, we can't do it as a drive-by; the prisons say
2 no."

3 Orders come to the prisons from Central America. So it's
4 very hierarchical.

5 And even in a gang that's not as hierarchical as this,
6 it's common to hear evidence: Hey, if you were in the
7 neighborhood, could you just claim the gang? Hell, no. That
8 would get you killed.

9 So the notion that Luis Herrera at age 18 is going around
10 saying these things and doing these things and calling these
11 shots without being as much as or more of a leader than
12 Mr. Velasquez is contrary to the evidence and intuition and
13 logic. But he will get out with a spring in his step as a
14 young man, as will Jaime Balam. Hernandez is out. Villalta is
15 out.

16 Mr. Velasquez, the only one of this horrible bunch who did
17 these horrible things that were proven at trial who's going to
18 die in prison, and that is an unreasonable, unwarranted
19 disparity. It is not justified by the fact that it saved
20 the Government from having to go to trial; having to link
21 Hernandez in this trial that would have happened anyway; having
22 to see Herrera through from the halfway point in the midst of
23 the cooperators to the end; to have to prosecute Balam after
24 they made the mistake and try the whole thing over again. It's
25 not justified by any of that.

1 The cases we cite say trial is the norm. Prosecutors are
2 paid to try cases. The Sixth Amendment guarantees the
3 defendant the right to insist on a jury trial and all the
4 rights that come with it.

5 There may be some substantive, hard-to-measure value of
6 acceptance of responsibility that can be part of a plea
7 agreement; but at the end of the day, really, the first measure
8 of what acceptance of responsibility is worth is the Sentencing
9 Guidelines where you get the three-level reduction.

10 And in cases like this, with a high end that's not stuck
11 at life, Sentencing Guideline reduction for acceptance of
12 responsibility is worth seven and a half to nine and a half
13 years. Dropping down from a 42 to a 39 or a 41 to a 38 is not
14 worth half a lifetime. It's not worth half a lifetime because
15 the Government didn't have to be forced to be put to his proof,
16 as the Constitution and ordinary process of the case law says
17 it's supposed to be.

18 So every bad thing you might want to say about
19 Mr. Velasquez, based on the evidence that was heard and
20 believed at trial, can also be said about the other four men,
21 all of whom get half a lifetime or more to live again.

22 Mr. Velasquez does not.

23 Now, there is evidence, I would submit, of rehabilitation.
24 Some of it essentially came preloaded. We heard the defense
25 witnesses at trial. We heard Mr. Velasquez has a good work

1 ethic. He has a good helper ethic. He helps the people around
2 him. He helped the people that he rented space from.

3 And we see that he's still the same person in the
4 declaration that Rosa Avalos signed. He's still a human being.
5 He's still the same person that she doted on when he lived with
6 her.

7 Mr. Velasquez has not had a perfect record in prison. We
8 acknowledge that. He has done things that I think are not
9 worth nothing.

10 He takes his art classes, and he actually -- and
11 initially, my thought was: Oh, art. What's art worth? Then
12 he showed me a piece he's been working on, yesterday. And I
13 know this is not the first time you've seen a defendant's
14 artwork in one of these proceedings. It is detailed oriented,
15 it is meticulous, and it shows a measure of discipline.

16 Mr. Velasquez got his COVID vaccine in prison. Again, we
17 should think that's a small thing, but they have been having
18 problems at the jail with inmates refusing vaccination.
19 They've been having problems at the jail with staff refusing
20 vaccination. Mr. Velasquez got his vaccination. That is,
21 these days, a sign of good citizenship, if somewhat of a small
22 thing.

23 Mr. Velasquez has been learning English. He showed me
24 yesterday two new certificates from his English As a Second
25 Language program, one from just two weeks ago this month.

1 English is a valuable skill in this world and helps you get
2 along as a normal person in this country and other parts of the
3 world. I understand that Mr. Velasquez is probably going to be
4 deported; but again, that bespeaks diligence and that bespeaks
5 a measure of humanity.

6 His family back home has taken an interest in him. His
7 brother found him. They've reconnected. They talk about
8 family. The family back home cares about him. About damn
9 time, I might say.

10 There were issues about his language facility at the
11 original trial. After being a child who only spoke an Indian
12 dialect, Mr. Velasquez speaks good Spanish; and he will
13 succeed, with his work ethic and his linguistic ability and his
14 discipline, in a developed area of Guatemala that he could well
15 be deported to without having to go back to the troubled
16 regions of his childhood.

17 So he deserves to be punished, and I've told Mr. Velasquez
18 that he's, best-case scenario, still going to have to do a
19 substantial amount of time. But he deserves the same chance at
20 life, at half a life or something maybe close to it, that
21 this Court has given everybody else, either initially or
22 recently, and he shouldn't just lose that chance just because
23 he went to trial.

24 **THE COURT:** All right. We're going to take a 15-minute
25 break at this time. The court reporter probably appreciates

1 that. And we'll resume about 3:30. Okay?

2 All right. Thank you.

3 **MR. LUBLINER:** Thank you, Your Honor.

4 **MR. SCOBLE:** Thank you, Your Honor.

5 **THE CLERK:** Court is in recess.

6 (Recess taken at 3:20 p.m.)

7 (Proceedings resumed at 3:38 p.m.)

8 **THE COURT:** Mr. Scoble?

9 **MR. SCOBLE:** Let me start with one point that I want to
10 make very clearly.

11 Danilo Velasquez was not sentenced to life for exercising
12 his right to trial. He was sentenced to life based on the
13 evidence that came out from his trial, as recited in the PSR,
14 and under -- and then as calculated under the Sentencing
15 Guidelines.

16 So it is true he was not charged with, and so he was never
17 convicted of, VICAR murder. I don't know how relevant that is
18 to this resentencing, but it is -- it's a true point.

19 However, what does count is that based on the evidence at
20 trial, as recited in the PSR, he was in the life guideline
21 range and actually was fairly high in it. His numbers were
22 actually -- he was at a 52 that essentially has to drop down to
23 a 43. Certainly, he had the benefit of having no criminal
24 history. That's true.

25 **THE COURT:** Having what?

1 **MR. SCOBLE:** Having no criminal history. He was a
2 Criminal History Category I. He was then and he is now. That
3 has remained unchanged.

4 Many of the same factors that have now been recited to
5 Your Honor today as 3553(a) factors were actually all present
6 back in 2012 when the Court first sentenced Mr. Velasquez.

7 I would like to offer a different perspective from
8 counsel's which is, this is a *Davis* resentencing; so clearly,
9 Mr. Velasquez is entitled to have a ten-year reduction in his
10 sentence, no question. The conviction and the sentence on
11 Count Four have to go. The Government conceded that with the
12 Ninth Circuit.

13 So then it comes back to this Court under the "sentencing
14 package" doctrine. And the question is: All right. We have
15 what we knew from the original sentencing, February 15th, 2012.
16 What has this defendant done in the meantime?

17 The Government agreed that under *Pepper*, Mr. Velasquez has
18 every right to come back before the Court and say: You should
19 take this into account. You should take that into account.

20 However, I would submit to the Court that any reduction
21 from the life sentence should be based on something
22 articulable. It should be based on 3553 factors that are
23 different today than they were in 2012.

24 So there is, in that sense, a double vision of time. For
25 most of us, life's gone on. We had our trial. We felt

1 strongly about whatever we felt about back then. Mr. Velasquez
2 was sentenced. He went off to prison. We went on with our
3 lives.

4 The Frias family did not. In that sense, they're stuck in
5 time. They are stuck with the loss of Moises Frias Jr. And I
6 raise that because counsel has said, "Well, of course we
7 recognize the tragedy to the family." Yes, that's true; but I
8 don't believe it resonates with him, or his client, the way it
9 does with the victims. And in that sense, I am here to
10 represent their interest.

11 I'm very pleased that they took the time to come here. I
12 know that Mr. Frias, the father, Moises Frias Sr., wanted to
13 come. He's in Mexico. I spoke with him several days ago, and
14 he said, "I can't make it."

15 For what it's worth, I'll pass on to the Court that he
16 expressed his hope that Mr. Velasquez gets sentenced to life
17 again. Not really any different there from what his brother,
18 Juan Frias, or his daughter, Salina Frias, has asked the Court.

19 So 3553(a) factors. What are the relevant new things that
20 have happened? The Court will recall, I attached to
21 the Government's first sentencing papers the complete
22 transcript from the sentencing hearing back in 2012; and
23 the Court went through very clearly under 3553(a) and
24 articulated the factors on which it was basing the decision to
25 sentence Danilo Velasquez to life in prison. It was

1 discretionary, but the Court was very emphatic.

2 And among those were the need to protect -- to protect the
3 public, the need to promote respect for the law, and the need
4 to create deterrence, both specific for Mr. Velasquez but also
5 general. I would submit those are the same today. Those
6 factors remain as valid today as they did back then.

7 The defendant mostly seems to rely on the factor of
8 avoiding unwarranted disparity among similarly situated
9 defendants, and he's mentioned, in particular, the people who
10 were along on the hunt. The hunt --

11 **THE COURT:** Say that last part.

12 **MR. SCOBLE:** He mentions particularly the people who were
13 with him on the hunt on February 19th.

14 **THE COURT:** Okay.

15 **MR. SCOBLE:** I submit that the record shows they are not
16 similarly situated.

17 Mr. Velasquez got life in prison not for going to trial,
18 but he got life in prison because his record with the gang was
19 so much worse.

20 It was worse than Jaime Balam, who was extradited from
21 Mexico and did ultimately plead guilty and not go to trial,
22 that's true, and was sentenced to 27 1/2 years. That's far
23 less than life, true. But the evidence was that he was much
24 younger; he was not a leader in the gang; and he didn't have
25 anywhere close to the record of violence with the gang that

1 Mr. Velasquez did.

2 The trial for Mr. Velasquez and the recounting in the PSR
3 show a number of violent acts with the gang or contacts in
4 which he expresses his association with the gang between 2005
5 and essentially the day he was arrested in July of 2009, when a
6 search warrant was conducted and the officers, as came out at
7 trial, seized -- found and seized a .357 revolver from under
8 the cot that was his sleeping cot, as well as ammunition in
9 .357 caliber and I think it was .38 Special. It was a
10 different caliber.

11 They also executed a search warrant on his truck and
12 seized five knives and a lead -- or a metal pipe. That was in
13 July of 2009.

14 So my point is, there was, between 2005 and 2009, a much
15 more clearly documented record of involvement in MS-13. That's
16 why, in part -- in part, why the Government believes that the
17 2008 murders are appropriate -- are quite appropriately
18 attributed to him.

19 One of them occurred on March 29th, 2008. That was the Ng
20 and Joldic murder. That murder, the Court may recall, was in
21 retaliation for a shooting that had happened some hours earlier
22 in which Danilo Velasquez was shot by a gang rival just outside
23 the Mission Playground Rec Center, which the evidence at trial
24 showed was sort of the headquarters for MS 20th Street. So
25 that's March of 2009, he gets shot. He's not shooting

1 somebody, but he's getting shot.

2 However, the evidence also showed that preceding here,
3 he'd been at the "misa" that I referenced earlier where he
4 talked about rats and having devoted gang money to buying a
5 gun, at least one gun. He was involved in an assault on two
6 Norteños in February of 2008. He was stopped with other gang
7 members on March 22nd, 2008, and he had a butterfly knife
8 hidden in his shoe.

9 Shot outside -- less than a week later, shot outside
10 Mission Rec. The next day, gang member "Spooky" murders
11 Phillip Ng and Ernad Joldic, thinking that they're rivals when
12 they're not.

13 He is then, according to the trial evidence, Villalta,
14 with the group "Slow" and "Candil" and "Triste," discussing
15 retaliation for the shooting of a gang member's father that had
16 happened earlier, or had been shot at, "Pistolita."

17 **THE INTERPRETER:** Mr. Scoble, could you repeat what you
18 just said.

19 **MR. SCOBLE:** In July of 2008, according to the trial
20 testimony of Villalta, Mr. Velasquez was with gang members
21 "Slow" and "Candil," at a point where "Slow" was the street
22 leader, not "Triste" and "Candil," discussing retaliation after
23 "Pistolita"'s -- gang member "Pistolita"'s father had been shot
24 at, and encouraging young gang members to go out and retaliate.
25 That is what directly led, the Government submitted and

1 I believe the evidence showed, led to the stabbing to death of
2 Ivan Miranda.

3 So the murders in 2008 were part and parcel of the gang's
4 activities, and that was part and parcel of Danilo Velasquez's
5 life back then.

6 Then he -- after the takedown where numerous members were
7 arrested in October of 2008, Mr. Velasquez became the street
8 leader. The criminal activity didn't stop. He perpetuated the
9 same activities.

10 February 13th, shooting at 24th and Capp.

11 February 19th, the murderous hunt that he initiated,
12 directed, led, and became a triggerman in.

13 Another shooting several days later -- several weeks
14 later, March 2nd, at Holly Park.

15 Herrera and Villalta getting arrested on March 4th and the
16 Lorcin is seized in San Francisco. And the reason I bring that
17 up is, at Mr. Velasquez's trial, the Government included as
18 exhibits the transcripts of jail calls in Spanish, jail calls
19 by Villalta and Herrera to Danilo Velasquez, as well as to gang
20 members "Shy Boy" and "Candil," in which they were reporting
21 what had happened, including the seizure of weapons.

22 And one of the questions that came up was "Whatever
23 happened to Suzi?" which, there was testimony, was code for the
24 Uzi, which is what they called the Cobray 9 millimeter, the
25 TEC-9, the weapon that the evidence showed Mr. Velasquez used

1 in the hunt on February 19th, 2009.

2 And then, as I said, he gets arrested on July 8th of 2009.

3 My point is that he had a record before the Court that was
4 much clearer, much deeper and longer than Balam, who was a
5 youngster; Herrera, who was a youngster.

6 "Candil" I'll call out as something separate. He is
7 different in the sense that he was willing to plead guilty and
8 accept responsibility early in the case. He did that and dealt
9 himself out of the case early on.

10 So if Mr. Velasquez wants to complain that he's not
11 getting the same benefit that Hernandez did, well, he also
12 could have pled out early, if he'd wanted to. That's different
13 from getting punished for going to trial.

14 There is not a constitutional right to a plea agreement,
15 but that doesn't mean that the Government can't afford
16 defendants better deals if they are willing to plead guilty,
17 especially if they accept responsibility. And they get even
18 better deals, ultimately, if they agree to cooperate with
19 the Government. So there are procedures out there.

20 And I feel that -- I'm not going to depend on this
21 heavily; but I do want to point out that, with respect to
22 rehabilitation for Mr. Velasquez, I'm not aware of any evidence
23 that he's dropped out of the gang. I -- I know that BOP does
24 have procedures that are available if defendants trust them and
25 if they want to avail themselves of them. So there are

1 procedures that are available.

2 But more importantly on rehabilitation, I wanted to point
3 to a detail. In one sense, it's a small detail, but I think
4 it's a telling detail. Danilo Velasquez was ordered by
5 the Court to pay restitution to the father of the murder
6 victim. Now, he went into custody -- he went into BOP custody
7 back in 2012. In his papers, he pointed with pride to his work
8 record in BOP. But as the BOP records, some of which I
9 attached in my declaration, show, Mr. Velasquez in some
10 quarters refused to participate in the Inmate Financial
11 Responsibility Program. And at the end of the day, between his
12 starting in custody in, let's call it, 2013 and recently, he's
13 paid \$125 in restitution.

14 Now, part of the explanation is inmates are required by
15 BOP to make the money go first to pay off special assessment.
16 But in the case of Mr. Velasquez, he didn't even pay that off.
17 He's paid \$200 of the special assessment, total.

18 So \$200 towards the special assessment of originally 400;
19 it should be only 300 this time around because Count Four will
20 be vacated. Not full special assessment. That timed out at
21 five years, so 2017. And then between then and now, \$125.

22 Again, it's not a big deal; and it's academic, in a sense;
23 but it is -- I submit it speaks volumes about his attitude to
24 the case and to the subject of rehabilitation.

25 Respect for the law. I would say respect for the law, I'm

1 going to use a strong word, but it is one I want to use today.
2 It requires imposing the same sentence. I don't ask it
3 lightly. Nobody likes to see people sentenced to life. Nobody
4 does. But at a certain point, we do things -- we do things
5 sometimes in court that are hard. And I do think that the
6 3553(a) factors here warrant the same sentence, less
7 Count Four, that Mr. Velasquez had.

8 I'll submit on that.

9 **THE COURT:** All right. Would Mr. Velasquez like to make
10 an allocution?

11 **THE DEFENDANT:** Yes, I do.

12 **THE COURT:** All right. Ms. Medina, you should use the
13 microphone, and you interpret it as he speaks. Thank you.

14 **THE DEFENDANT:** The first thing is I feel discriminated
15 for all the points that you guys have given to me.

16 And, secondly, I want to speak to the families, but in
17 Spanish.

18 **THE COURT:** Wait a minute. Wait, wait, wait. Wait a
19 second.

20 Ms. Medina, I'm going to ask you, is it okay -- I'm going
21 to let him do this, but I'm going to ask her to translate what
22 he said. All right?

23 Okay. All right. So do it one sentence at a time so that
24 she can translate. All right? Go ahead.

25 **THE DEFENDANT:** Excuse me. I'm not -- I'm not a gang

1 member. I'm not a leader. I'm just an indigenous person who
2 doesn't even know Spanish. I'm a descendant of Rigoberta
3 Menchú.

4 And I truthfully regret this. I'm not that person who --
5 who hurt your beloved son. I understand the suffering that
6 you're going through. I'm very sorry. And I suffer in this
7 place. I pray for you so that you can have a better life and
8 have some compassion for me.

9 I'm always asking Juan Kadonka (phonetic) to make me
10 strong and to keep me safe.

11 I hope that -- thank you. Thank you for listening, and I
12 hope that one day you will be able to understand me. I'm not
13 that bad person that they're talking about.

14 Thank you, and excuse me.

15 I want to get the chance to appeal. So I want to file a
16 2255. I think I do have the right to do that.

17 **THE COURT:** Is that it?

18 (Defendant speaking in foreign language.)

19 **THE INTERPRETER:** The interpreter is not familiar with
20 that language.

21 **THE COURT:** What?

22 **THE INTERPRETER:** The interpreter does not know the
23 indigenous language that Mr. Velasquez used.

24 **THE COURT:** Well, you need to speak Spanish.

25 **THE DEFENDANT:** That's my religion.

1 **THE COURT:** All right. Has he finished his allocution?

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** All right. Thank you.

4 All right. Submitted?

5 **MR. SCOBLE:** Submitted.

6 **MR. LUBLINER:** May I respond to some of the Government's
7 points? Or...

8 **THE COURT:** Okay. Please go ahead.

9 **MR. LUBLINER:** Taking them in reverse order, I'm surprised
10 that the Government brings up the issue of victim restitution,
11 non-payment of assessments. I can find numbers of quotes in
12 cases about how these revenue-raising assessments are just
13 traps for poor people to be violated on one thing or another.

14 Victim restitution, we don't challenge that order. We
15 didn't challenge it then; don't challenge it now.

16 The Government did not --

17 **THE COURT:** Has he paid any of it?

18 **MR. LUBLINER:** He hasn't paid it -- he has not paid much
19 towards victim restitution. I have --

20 **THE COURT:** Has he paid anything?

21 **MR. LUBLINER:** 100-something.

22 **MR. SCOBLE:** 125.

23 **THE COURT:** All right.

24 **MR. LUBLINER:** I have no idea what Jaime Balam has paid to
25 victim restitution or if the plea deal was conditioned on his

1 predisposition to pay restitution.

2 I know what Hernandez and Herrera have paid toward victim
3 restitution, it's zero, because the Government didn't insist
4 that they do it.

5 In the Herrera case especially, the Government brought up
6 victim restitution as sort of a necessary afterthought that
7 the Court kind of had to deal with, even though they told the
8 family that it was unlikely to bear fruit at all because,
9 obviously, this is a poor man with nothing and he's going to
10 prison for a very long time. Then the Government stipulated:
11 Let's not have that victim restitution hearing after all. And
12 so there's no victim restitution award against Luis Herrera.

13 I asked Herrera's counsel why that happened, and he did
14 not remember. Maybe the Government has a good reason for why
15 that didn't happen. But at the end of the day, Luis Herrera,
16 who drove the car and was, from my vantage point, a leader in
17 the gang, is not ordered to pay restitution to the Frias family
18 or anybody else, with the Government's blessing.

19 I have no dispute with how the Government characterizes
20 what happened on February 19th.

21 I submit, again, that these people are the same, and
22 the Government's opening statement in the joint trial with Luis
23 Herrera establishes its view that Mr. Velasquez was the same as
24 Luis Herrera: 18 at the time of the crime; 19, 20 at the time
25 of the crime.

1 And the Government says, "So you have been introduced to
2 Luis Herrera. Let me introduce you to 'Killer,'" the name his
3 defendant chose to be called on the streets of San Francisco by
4 his MS-13 teammates.

5 Herrera became a member of the 20th Street clique much
6 later than "Triste," for when numbers were down in October of
7 2008, MS needed more soldiers and Defendant Herrera stepped up
8 and assumed that role. And he attended the gang's meetings.
9 He paid the gang's dues. He went out and collected taxes,
10 forcefully extorted people operating in the Mission District,
11 and he took part in several hunts and shootings and quickly
12 graduated to exactly what MS-13 expects of its members, of its
13 soldiers. He graduated to murder.

14 And the Government was prepared to see that 18-year-old
15 man in the same light as Mr. Velasquez and seek a life sentence
16 against him, I think initially a mandatory life sentence
17 against him, but certainly a discretionary life sentence
18 against him under the guidelines.

19 Everything that the Government can say about Mr. Velasquez
20 in relation to the central event of his trial, the 2009
21 homicide at the BART Station, can be said about Herrera and
22 Hernandez and Balam and Villalta, who pointed out the car.

23 The issue is not that the Government -- the Government's
24 power to enter into plea agreements. The issue is maintaining
25 some perspective in what it then asks in the way of a sentence

1 for defendants who exercise their constitutional right to go to
2 trial, and have some perspective on what it has cut deals for
3 to ease its caseload with equally culpable people and what it
4 then ultimately asks of people who went to trial.

5 Now, if you look at the opening brief on Mr. Velasquez's
6 appeal, appellate counsel cited a number of remarks this Court
7 made in accepting -- or imposing sentence on the people like
8 Herrera and Hernandez and so on, and a key part was saving
9 the Government the burden of a trial, and that is
10 inappropriate.

11 And for all the reasons that I've cited, these people are
12 similarly situated. It is a critical goal of sentence --
13 Section 3553(a) to avoid unwarranted sentencing disparities.
14 The fact that the ten-year consecutive sentence goes is nice,
15 but it is not the drama of this proceeding. This proceeding
16 is -- excuse me. This proceeding is about the life sentence.
17 And there is no reason that Mr. Velasquez is the only one of
18 these five badly intentioned men who is serving one.

19 **THE COURT:** Is that it?

20 **MR. LUBLINER:** Yes, Your Honor. Thank you.

21 **THE COURT:** All right. Thank you.

22 Okay. The Court's responsibility is to select the lowest
23 sentence that will carry out the sentencing factors of
24 Section 3553.

25 I want to also say that, as a general proposition, I agree

1 that no one should be punished for exercising a constitutional
2 right, including the right to go to trial.

3 Nevertheless, when someone does exercise the right to go
4 to trial, I have learned in this job over 22 years that
5 sometimes it helps the defendant because the Court becomes
6 immersed in the facts of the case, and sometimes it severely
7 hurts the defendant because the Court becomes immersed in the
8 facts of the case. It works both ways.

9 So someone who exercises their right to go to trial, that
10 is their right, and they should not be punished just for that.
11 But the Court cannot ignore what it learns in the course of a
12 trial about heinous and murderous conduct by a defendant. It's
13 not the same as reading a PSR. It is listening to the
14 witnesses on the stand, getting the benefit of direct and
15 cross-examination, and being immersed in the facts of the case.

16 Also, when someone pleads guilty, they do -- under the
17 guidelines, they get acceptance of responsibility, and that
18 gets factored into the calculation of the guideline range. So
19 that is a factor that the guidelines require us to take into
20 account.

21 Now, the guideline range here is greater than 43/I; so it
22 reduces down to 43 -- it maxes out at 43/I. And the guideline
23 range is up to life. It's discretionary. It's not a mandatory
24 life sentence.

25 Here are the factors that -- some of the factors that I

1 want to emphasize.

2 I tend to agree completely with the Government's
3 presentation of the facts of the case, but some of them I want
4 to stress.

5 One is that the defendant was a member of the MS-13
6 20th Street clique during the most vicious part of its regime
7 and reign of terror in the Mission District starting much
8 earlier than 2008. But 2008 was when the five or six murders
9 occurred, and he was a member during that time and was an older
10 member at that time.

11 And then we come to the end of 2008, when he became the
12 leader. We go to the BART Station in February of 2009. And
13 this is where the facts and the Court being immersed in the
14 facts of the case hurts the defendant. He was riding in the
15 car. He ordered and led the expedition to go on the hunt.
16 They pulled up behind the vehicle in which the victims were
17 riding; they were stopped at a stoplight. And he and one other
18 got out of the car and shot the car full of bullets, killing
19 one man, seriously wounding another, and then jumped back in
20 their car and ran off.

21 I'm not doing justice to how heinous that event was, how
22 premeditated, deliberate, hateful, disregard of human life,
23 danger to the community, danger to -- I cannot say enough to
24 show how evil that conduct was.

25 I believe that today he is still the same man. You have

1 not convinced me to the contrary, Mr. Lubliner. He is still a
2 serious, severe danger to the community.

3 Here's another thing I would like to emphasize. During
4 his time in prison, he has done very little, if anything, to
5 show that he has reformed himself or that he is a different man
6 or that he has dropped out of the gang or repudiated the gang.
7 None of that has been shown.

8 He did not accept responsibility. Even in his allocution
9 today, he did not accept responsibility. He said vague words
10 about he was sorry for the loss of the family. That's well and
11 good. But he accepted no responsibility and says he wants to
12 take a 2255.

13 **MR. LUBLINER:** Okay.

14 **THE COURT:** No, you don't get to say. I'm now giving my
15 statement. I've listened carefully. There's no more
16 arguments.

17 He has a disciplinary history in prison that tells me he's
18 a dangerous man today.

19 Now we come to the issue of disparity. There is no
20 disparity. This is a made-up gimmick by defense counsel. I
21 have lived with this case since 2008, I believe.
22 34 defendants, and every single one of them I have tried to
23 sentence to the right sentence, meaning the lowest sentence
24 that the 3553 factors would support. Every one of the cases is
25 a little different and sometimes drastically different.

1 And you cannot just say, "Okay. Because Herrera got X,
2 then so-and-so gets Y or gets the same sentence." You have to
3 take into account the individual circumstances.

4 Mr. Herrera was ten years younger than the defendant at
5 the time of these events. Mr. Herrera did not jump out of the
6 car and pull the trigger at the time of the February BART
7 incident. "Incident" is the wrong word. "Heinous murder" is
8 the right word.

9 They made -- accepted responsibility and made peace with
10 the Government, and your client did not. That is also a major
11 factor.

12 We have to have respect for the law. It sounds trite.
13 But there are some crimes and some criminals that are so
14 heinous that life in prison is the right answer. It is. And
15 this is the right answer in this case. It was the right answer
16 back when the sentence was first imposed, and it is the right
17 answer today, and nothing has changed.

18 There are two things that arguably could be changed. One
19 is that he might have demonstrated a repudiation of the gang
20 and a rehabilitation in prison, and that would have meant a lot
21 to me. He has not done that. He's made a weak stab in that
22 direction, but it is not a convincing case.

23 The second thing is there could have been disparities
24 among the other defendants. And if those disparities had been
25 clear-cut to me, that would have been troubling and I might

1 have reduced the sentence. But that has not occurred. The
2 disparities have not occurred.

3 And I want to say this. It is impossible for a sentencing
4 judge to slice and dice a case and do what Mr. Lubliner wants
5 me to do, which is to go down every other defendant or at least
6 six or seven other defendants and slice and dice the facts of
7 their case and to justify why one gets life and the others
8 don't. I don't have to do that.

9 But what I do have to do is explain that I have considered
10 the disparities. I've considered every one of these persons.
11 I believe their individual cases are vastly different than
12 Mr. Velasquez's situation. And I am sentencing Mr. Velasquez
13 in accordance with the sentence he deserves under Section 3553,
14 which is life in prison. That is the sentence.

15 Now, do you want me to -- I'm going to read the judgment,
16 though I -- but do I need to read all of the supervised release
17 conditions again, or can I just incorporate them by reference?

18 **MR. LUBLINER:** They've been read to him before; so
19 the Court can just incorporate them.

20 **THE COURT:** All right. Before I go any further, is
21 there any -- yes?

22 **PROBATION OFFICER MOY:** Your Honor, I would just note that
23 the only changes to the conditions are just updated language to
24 the current versions of those conditions, as well as the ICE
25 condition was removed as that is now included in the --

1 **THE COURT:** All right. Then I'm going to read them all.
2 You're confusing me. I'm just going to read it the way --
3 all right.

4 I'm not sure I've got the current one or the old one,
5 but -- all right.

6 Pursuant to the Sentencing Reform Act, it's the judgment
7 of the Court that Danilo Velasquez is hereby committed to the
8 custody of the Bureau of Prisons for a term of life
9 imprisonment. This term consists of terms of life on
10 Count One, 120 months on Count Two, and 36 months on
11 Count Three, all concurrent.

12 The Court also imposes a five-year term of supervised
13 release. This term consists of five years on Count One, three
14 years on Two, one year on Three, all concurrent. However, if
15 released from imprisonment, the defendant will likely be
16 deported, and will not be in the U.S.A. to be supervised.

17 At all times, he shall comply with the rules and
18 regulations of the Bureau of Immigration and
19 Customs Enforcement and, if deported, shall not reenter the
20 U.S.A. without the express consent of the secretary of
21 the Department of Homeland Security.

22 If the defendant is deported and within five years of
23 release from imprisonment returns to this country, legally or
24 not, he shall be subject to the conditions of supervised
25 release and report to the nearest Probation Office within

1 72 hours of reentry.

2 If the defendant, for some reason, is not deported and
3 remains in this country, the defendant shall be subject to the
4 conditions of supervised release and shall report to the
5 nearest Probation Office within 72 hours of release from
6 imprisonment.

7 In either event, the following special conditions shall
8 apply:

9 One, you must at all times have full-time employment,
10 full-time training for employment, or full-time job search.

11 Two, you must pay the restitution and special assessment.

12 Three, you must participate in a mental health program and
13 pay your fair share.

14 Four, you must not knowingly participate in gang activity,
15 must not associate with any member of the MS-13 gang, and must
16 not wear the clothing, colors, or insignia of the MS-13 gang.

17 Five, you must not have contact with any co-defendant in
18 this case.

19 Six, you must not be found in any area frequented by
20 gangs.

21 Seven, unless directed in writing otherwise, you must
22 check your voice mail or answering machine every day and follow
23 all instructions left by Probation.

24 Next, you must not own or possess any firearms,
25 ammunition, destructive devices or other dangerous weapons and

1 must not be present in a vehicle where you know any firearm or
2 ammunition is present.

3 Next, you must cooperate in the collection of DNA as
4 directed by the probation officer.

5 Next, you must submit your person, residence, office,
6 vehicle, or any property under your control, including any
7 computers, cell phones, or other electronic devices, to a
8 search. Such a search must be conducted by U.S. Probation at a
9 reasonable time and reasonable manner based upon reasonable
10 suspicion of contraband or evidence of a violation of a
11 condition of release. Failure to submit to such a search may
12 be grounds for revocation.

13 It is further ordered that defendant pay to the U.S.A. a
14 special assessment of \$300. Payment shall be made to the
15 Clerk of the Court. This can be worked off through the Inmate
16 Responsibility Program. The Court notes that defendant has
17 paid \$200 towards the special assessment.

18 The Court finds the defendant does not have the ability to
19 pay the fine; so that's waived.

20 It is further ordered, once again, that defendant pay
21 restitution to Moises Frias Sr. in the amount of \$21,650, due
22 now. During imprisonment, this can be worked off through the
23 Inmate Responsibility Program at the rate of not less than
24 \$25 per quarter. Restitution payment shall be made to the
25 Clerk of the U.S. District Court, attention Financial Unit,

1 450 Golden Gate Avenue, Box 36060, San Francisco, California
2 94102.

3 Any reason why the form of judgment should not be entered
4 as stated?

5 **MR. SCOBLE:** Your Honor, one point I'd like to add.

6 The restitution obligation to Moises Frias Sr. should be
7 made joint and several, in the same amount, with Jaime Balam,
8 who has also been convicted by this Court in connection with
9 that same --

10 **THE COURT:** All right. So ordered.

11 Any other objections --

12 **MR. SCOBLE:** No, Your Honor.

13 **MR. LUBLINER:** No, Your Honor.

14 **THE COURT:** -- to the form of the order?

15 All right. Now, did I make all the findings that
16 the Government feels I should make?

17 **MR. SCOBLE:** I believe so.

18 **THE COURT:** All right. Then at this point, then, is there
19 anything else to do today?

20 **MR. LUBLINER:** Not here. No, sir.

21 **THE COURT:** All right. In that connection, there's a
22 14-day period from entry of judgment to take any appeal. I
23 give you that advisement.

24 And I think we are done for now. The judgment will be
25 entered very soon, maybe even today.

MR. SCOBLE: Thank you, Your Honor.

THE COURT: Okay? All right. We're done.

Thank you.

MR. LUBLINER: Thank you, Your Honor.

(Proceedings adjourned at 4:22 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, June 24, 2022

Ana Dub

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
Official United States Reporter

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 08-00730 WHA

v.

DANILO VELASQUEZ,
Defendant.

**ORDER RE MOTION TO VACATE
UNDER 28 U.S.C § 2255**

In this MS-13 case, a jury convicted offender Danilo Velasquez of conspiracy to engage in a racketeering enterprise under 18 U.S.C. § 1962(d) (Count 1), conspiracy to commit murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) (Count 2), conspiracy to commit assault with a dangerous weapon in aid of racketeering under 18 U.S.C. § 1959(a)(6) (Count 3), and carrying, brandishing, or discharging a firearm in aid of a crime of violence under 18 U.S.C. § 924 (c)(1)(A) (Count 4). In February 2012, defendant was sentenced to concurrent sentences on Counts 1 to 3, consisting of life on Count 1, 120 months on Count 2, and 36 months on Count 3, as well as a consecutive sentence of 120 months on Count 4.

Velasquez now moves to vacate, correct, or set aside his sentence pursuant to Section 2255 of Title 28 of the United States Code. He argues his conviction under Count 4 cannot stand under *United States v. Davis*. 139 S. Ct. 2319 (2019).

United States District Court
Northern District of California

1 To provide context, Section 924(c)(3) defines "crime of violence" as a felony that:

2 (A) has as an element the use, attempted use, or threatened
3 use of physical force against the person or property of
another, or

4 (B) that by its nature, involves a substantial risk that
5 physical force against the person or property of another
may be used in the course of committing the offense.

6 In *Davis*, the Supreme Court found the definition of violence under the section's residual
7 clause (i.e. subsection B) to be unconstitutionally vague. 139 S. Ct. at 2319. In effect, this
8 means Section 924(c) convictions based on predicate offenses under the residual clause are
9 illegal. Here, defendant was sentenced under Count 4, which was based on the predicate
10 offense of RICO conspiracy under the residual clause. Thus, pursuant to the holding in *Davis*
11 as well as the government's agreement that Count 4 should be vacated, offender Velasquez's
12 Section 2255 motion is **GRANTED** to the extent that resentencing will occur.

13 The sentencing package doctrine will be applied and defendant will be resentenced on all
14 remaining counts of his conviction. Probation is **ORDERED** to prepare an updated
15 Presentence Investigation Report and disclose it to the parties by **SEPTEMBER 15**. The report
16 shall be filed on **OCTOBER 6 AT NOON**. The parties' new sentencing memoranda are due
17 by **OCTOBER 13 AT NOON**. The resentencing hearing is **SET FOR OCTOBER 20 AT 2**
18 **P.M.**

19
20 **IT IS SO ORDERED.**

21
22 Dated: July 7, 2020.

23
24 
25 WILLIAM ALSUP
26 UNITED STATES DISTRICT JUDGE
27
28

UNITED STATES DISTRICT COURT
Northern District of California

UNITED STATES OF AMERICA

v.

Jaime Rafael Balam

) AMENDED JUDGMENT IN A CRIMINAL CASE

)

) USDC Case Number: CR-12-00625-001 WHA

) BOP Case Number: DCAN312CR00625-001

) USM Number: 20349-111

) Defendant's Attorney: Richard Alan Tamor (Appointed)

Date of Original Judgment: 11/8/2016

Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
 Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
 Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
 Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
 Other: _____

Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
 Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
 Modification of Imposed Term of Imprisonment for Retroactive
 Direct Motion to District Court Pursuant 28 U.S.C. § 2255 or G18 U.S.C. § 3559(C)(7)
 Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

pleaded guilty to counts: One through Three, and Five through Ten of the Indictment.
 pleaded nolo contendere to count(s): _____ which was accepted by the court.
 was found guilty on count(s): _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1962(d)	Racketeering Conspiracy	2/19/09	1
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Murder in Aid of Racketeering Activity	2/19/09	2
18 U.S.C. § 1959(a)(6)	Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering Activity	2/19/09	3
18 U.S.C. §§ 1959(a)(5) & 2	Attempted Murder in Aid of Racketeering Activity	2/19/09	5-7
18 U.S.C. §§ 924(j)(1) & 2	Use of a Firearm in Furtherance of Crime of Violence, Resulting in Death	2/19/09	8
18 U.S.C. §§ 924(c)(1)(A) & 2	Use of a Firearm in a Crime of Violence	2/19/09	9
18 U.S.C. § 922(g)(5)	Firearm Possession by a Prohibited Person	2/19/09	10

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.

The defendant has been found not guilty on count(s): _____
 Count Four is dismissed on the motion of the United States.

It is ordered that the defendant must 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.

11/8/2016

Date of Imposition of Judgment



Signature of Judge

The Honorable William Alsup

United States District Judge

Name & Title of Judge

November 29, 2016

Date

DEFENDANT: Jaime Rafael Balam
CASE NUMBER: CR-12-00625-001 WHA

Judgment - Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 330 months. This term consists of terms of 210 months on Counts One and Eight, 36 months on Count Three, 120 months on Counts Two, Five through Seven, and Ten, and 120 months on Count Nine. All counts to be served concurrently, but for Count Nine, a term of 120 months, which shall be served consecutive to the remaining Counts.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

The Court makes the following recommendations to the Bureau of Prisons:
Enter text

The defendant is remanded to the custody of the United States Marshal. The appearance bond is hereby exonerated.

The defendant shall surrender to the United States Marshal for this district:

at _____ am/pm on _____ (no later than 2:00 pm).

as notified by the United States Marshal.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

at _____ am/pm on _____ (no later than 2:00 pm).

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

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

BRIAN J. STRETCH (CABN 163973)
United States Attorney

BARBARA J. VALLIERE (DCBN 439353)
Acting Chief, Criminal Division

ANDREW M. SCOBLE (CABN 124940)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7249
FAX: (415) 436-7234
Email: andrew.scoble@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,) NO. CR 12-0625 WHA
Plaintiff,) UNITED STATES' SENTENCING
v.) MEMORANDUM
JAIME BALAM,) Sent. Hrg.: November 1, 2016
Defendant.) Time: 2:00 p.m.
) Courtroom: Eight (19th Floor)

INTRODUCTION

Pursuant to the parties' written plea agreement, and in conformity with the Sentencing Recommendation of the United States Probation Office, the government respectfully requests that the Court sentence Jaime Balam as follows: a term of imprisonment of **twenty-seven and one-half years (330 months)**; five years of supervised release, with the conditions as specified by the U.S. Probation Office (and including the expanded search condition set forth in Paragraph 8 of the plea agreement; a total of \$900 in special assessments; and restitution of \$21,650 (to be owed jointly and severally with Danilo Velasquez, and reduced by any payments already made by Velasquez). The defendant has already agreed, as a provision of his written plea agreement, that he abandons all interest in the Lorcin

.380-cal. semi-automatic firearm (serial number 132371) which he has admitted using on February 19, 2009 attack.¹

This recommendation comports with that set forth in the Presentence Report (PSR). *See* PSR, Sentencing Recommendation. The PSR recommends, as does the government, that the Court grant a variance in imposing the sentence. Further, as the PSR Sentencing Recommendation indicates, the Court should impose all sentences to run concurrently, in amounts that acknowledge the applicable statutory maximums, with the exception of the 120-month sentence for Count 9, which must be consecutive.

Specifically, on August 16, 2016, the defendant entered guilty pleas to Counts One, Two, Three, Five through Seven, Eight, Nine, and Ten of the indictment, which charged him, respectively, with: (1) racketeering conspiracy, in violation of 18 U.S.C. § 1962(d); (2) conspiracy to commit murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(5); (3) conspiracy to commit assault with a dangerous weapon in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(6); (4) three counts of attempted murder in aid of racketeering activity, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1959(a)(5) and 2; (5) using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and causing death thereby, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(j)(1) and 2; (6) using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2; and (7) knowingly possessing a firearm and ammunition while being an alien illegally in the United States, in violation of 18 U.S.C. § 922(g)(5).

Pursuant to the parties' written plea agreement, the government will move at sentencing to dismiss Count Four of the indictment. That count charged a violation of 18 U.S.C. §§ 1959(a)(1) and 2 (murder in aid of racketeering; aiding and abetting), and carries a mandatory sentence of life in prison.

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¹ For this reason, the government does not seek a forfeiture judgment as part of the criminal sentence.

THE OFFENSE CONDUCT

A. Overview

The principal charges against Jaime Balam involve a shooting in front of the Daly City BART Station on February 19, 2009. On that day, Balam and other members of the 20th Street clique of *La Mara Salvatrucha* (or “MS-13”), followed a car containing four young men. Two of the MS-13 gang members, Danilo Velasquez and Jaime Balam, fired at the four victims. The shooters believed – in error – that they were firing upon gang rivals.

The government presented evidence of the February 19, 2009 Daly City BART Station shooting at the 2011 trial of defendants Danilo Velasquez and Luis Herrera. Defendant Luis Herrera pleaded guilty to various racketeering-related charges pursuant to a written plea agreement after the start of that trial. In November 2011, the federal jury returned verdicts of guilty on all four counts against defendant Velasquez. Then, based on evidence developed for presentation at that trial, the government pursued an investigation of Jaime Balam, ultimately obtaining a ten-count indictment from a federal grand jury in August 2012. He was arrested in Mexico in October 2013, and was extradited to the United States in February 2015. He entered his guilty pleas on August 16, 2016.

Jaime Balam was “jumped in” to the 20th Street clique of *La Mara Salvatrucha* in 2008 (hereafter “20th Street”). With membership came the obligation to perform *jale* (“work”) on behalf of the gang. *Jales* often took the form of acts of violence designed to protect and enhance MS-13 and 20th Street’s territorial claims and reputation. Many of the acts of violence committed by 20th Street members were directed at known members of the rival *Norteño* street gang, which also operates in San Francisco and the San Francisco Bay Area.

On February 19, 2009, members of 20th Street agreed to join their street leader Danilo Velasquez in a “hunt” for rival *Norteño* gang members. Gang member Luis Herrera drove a stolen Honda with defendant Balam and street leader Velasquez in the passenger seats. Velasquez was armed with a Cobray Tec-9 M-11 semi-automatic pistol; Balam was armed with a .380-caliber Lorcin semi-automatic pistol (SN 132371). Two other gang members followed in a second stolen Honda.

The 20th Street gang members focused on a car containing four young Hispanic males. Velasquez and his fellow gang members believed that the four were rival *Norteño* gang members. In

fact, the four victims were not gang members, but rather four high school friends on a regular Thursday evening outing for dinner and drinks.² As it happened, two of them wore white ball caps with piping in red, the color claimed by *Norteños*, and the four friends were playing loud hip hop music in their car.

Velasquez and his co-conspirators, including defendant Balam, began following their victims' car in the Excelsior District of San Francisco, which 20th Street members consider *Norteño* territory. When traffic stopped at a light in front of the Daly City BART Station, street leader Velasquez and defendant Balam jumped out of the car driven by Herrera, walked up to flank the car in which Moises Frias, Jr. was riding, and poured in gun fire from just outside the rear passenger windows. Frias, the left rear passenger, received multiple gunshot wounds from Balam's firearm and died shortly afterwards. The vehicle driver was shot in the neck, and the bullet ricocheted off his collarbone and lodged in the right side of his chest (where it remains). The right front passenger suffered four gunshot wounds in the neck, chest, and right arm, including a bullet lodged between his jugular vein and carotid artery. That victim's brother, seated next to Frias, miraculously escaped injury, but the ball cap he wore was pierced (and some of his hair clipped off) by a bullet fired from Velasquez's firearm.

After the shooting, Velasquez and Balam returned to the stolen Honda and Herrera drove off toward San Francisco. San Francisco Police found the Honda abandoned the following day in the Castro District of San Francisco. The firearm used by Balam was recovered by San Francisco Police officers on March 5, 2009 during a traffic stop effected in the Mission District of San Francisco; gang member Luis Herrera was one of the occupants of that car, and the officers learned that the gang members and associates in the car were engaged in a "hunt" for rivals to shoot. The firearm used by Velasquez was turned in to police by the mother of a juvenile in San Francisco about eight months later.

The defendant, Jaime Balam, was arrested in San Francisco within approximately one week of the shooting incident. Before his involvement in the shooting was known, he was deported to Mexico.

² Murder victim Moises Frias, Jr. was a San Francisco City College student supporting himself by working at the local water district. The right front passenger was a University of California, Berkeley graduate and an AT&T engineer. That passenger's brother, seated next to Moises Frias on the right side of the rear seat, was a law student at Hastings Law School. The driver was a Bank of America employee.

Following the 2011 trial of Danilo Velasquez and Luis Herrera, on August 21, 2012, a federal grand jury indicted Jaime Balam for, among other things, his involvement in the MS-13 racketeering enterprise and the February 19, 2009 murder and attempted murders. He was ultimately extradited to the Northern District of California.

On August 16, 2016, the defendant entered pleas of guilty to all but one count of the pending indictment.

B. Defendant Balam's Factual Admissions

In his written plea agreement, defendant Jaime Balam admitted the following:

- a. At all times relevant to this matter, an enterprise known as *La Mara Salvatrucha* (also known as MS-13) existed. MS-13 is an international gang that has members and operates in, among other places, El Salvador, Mexico, Honduras, and the United States. MS-13 members are a group of individuals associated in fact who are engaged in, and the activities of which affect, interstate and foreign commerce. MS-13 constitutes an ongoing organization whose members function as a continuing unit for a common purpose of achieving the objectives of the enterprise. Among other crimes, MS-13 members are involved in murder, robbery, robbery of individuals who traffic in narcotics, other acts of violence, theft of vehicles, extortion affecting interstate commerce, narcotics trafficking, and witness tampering.
- b. Since at least in or about 2008, I was a member of MS-13 in the San Francisco Bay Area. I agreed with others to conduct and to participate in the conduct of the affairs of MS-13 through a pattern of racketeering activity. I agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of MS-13, including acts involving murder. To maintain and increase my position in MS-13, I agreed that a member of MS-13 would kill members of rival gangs (for instance, gang members called Norteños) and others who defied or betrayed MS-13, such as individuals who cooperated with law enforcement against the gang.
- c. On or about February 19, 2009, other MS-13 members (including Danilo Velasquez or "Triste" and Luis Herrera or "Killer") and I went hunting for Norteños in the southeastern part of San Francisco and the northeastern part of Daly City. "Hunting" meant looking for Norteños to kill. Luis Herrera drove a stolen Honda automobile during the hunt, while Velasquez and I rode as passengers in the car. In the vicinity of the Daly City BART Station, the three of us spotted a car stopped in traffic in which four apparent Norteños were riding. We stopped one or two vehicles behind the suspected Norteños' car, and Velasquez and I got out armed with guns. I had a Lorcin .380-caliber semiautomatic handgun (Serial Number 132371) with approximately seven rounds of CBC .380-caliber AUTO ammunition. Velasquez and I approached the suspected Norteños' car on foot from behind, and when we got close to it, we both opened fire at the suspected Norteños inside the car. After we shot the suspected Norteños, we got back into the car and Luis Herrera drove away. Velasquez, Herrera and I later abandoned the stolen Honda in San

Francisco. Although I did not know the identities of the victims in the car, I stipulate that the shots that Velasquez and I fired killed Moises Frias and gravely wounded two other men in the car. I committed this crime to maintain and increase my position within MS-13.

d. On or about February 19, 2009, I was an alien illegally and unlawfully in the United States. I stipulate that the Lorcini .380-caliber pistol I knowingly possessed, and the seven rounds of ammunition with which it was loaded, had all been manufactured outside California and so traveled across state lines in interstate commerce.

DISCUSSION

A. Applicable Law

Title 18, United States Code, Section 3553(a) directs the district court to consider a number of factors in determining the appropriate sentence to impose. In this case, these factors indicate that the sentence set forth in the parties' written plea agreement is sufficient, but not greater than necessary, to achieve the goals of sentencing. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). The key factors here are the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 2553(a)(1)), the need to afford adequate deterrence to criminal conduct (*id.* § 3553(a)(2)(B)), and the need to protect the public from further crimes of the defendant (*id.* § 3553(a)(2)(C)).

Although the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), has rendered the Sentencing Guidelines advisory, the Guidelines still remain the "starting point and initial bench-mark" for sentencing, *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (internal quotation marks and citation omitted); *see Carty*, 520 F.3d at 991. While there is no presumption of reasonableness for a Guidelines-range sentence, if a district judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991-92 (citing *Gall v. United States*, 552 U.S. 38, 50 (2007)); *see also United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011) ("district court must start with the recommended Guidelines sentence, adjust upward or downward from that point, and justify the extent of the departure from the Guidelines sentence"). As the Supreme Court recognized in *Gall*, "a major departure should be supported by a more significant justification than a minor one." 552 U.S. at 50. Finally, "[a]s a general rule, the preponderance of the

evidence standard is the appropriate standard for factual findings used for sentencing.” *United States v. Armstead*, 552 F.3d 769, 777-78 (9th Cir. 2008); *see, e.g.*, *United States v. Treadwell*, 593 F.3d 990, 1001 (9th Cir. 2010).

B. Sentencing the Defendant to the Agreed Upon Sentence Would Vindicate the Interests Set Forth in 18 U.S.C. § 3553(a)

The government agrees with the calculations and the recommendation set forth in the Presentence Report (PSR). As is set forth in the PSR, the sentence contained in the written plea agreement would be sufficient, but not greater than necessary, to achieve the goals of sentencing under 18 U.S.C. § 3553(a). The government believes that a variance from the advisory Guidelines range of 360 months to life is warranted by the factors identified in the PSR, especially the fact that this defendant had no known criminal history of violence prior to February 19, 2009, and in fact lived a seemingly law-abiding life. A sentence of 330 months should suffice to protect the public at large, to reflect the seriousness of the offense, and to provide a just punishment while avoiding unwarranted sentence disparities among defendants convicted of similar conduct.

The sentence includes an extremely lengthy term of imprisonment – 27½ years. That is more than the defendant’s years of age at present. While it is true that this sentence is shorter than those imposed on Danilo Velasquez (life sentence, following trial) and Luis Herrera (35 years, pursuant to plea agreement after the start of trial), it must be noted that the February 19, 2009 murder and attempted murders, terrible as they were, appear to represent the sole instance of violence perpetrated by Jaime Balam. As the Court will recall, the offense conduct of both Danilo Velasquez and Luis Herrera included other examples of *jales* in which they engaged. Moreover, as noted in the PSR, Danilo Velasquez was the street leader of the 20th Street clique who organized the particular “hunt” for rivals on February 19, 2009 which led to the fatal shooting in front of the Daly City BART Station.

Moreover, the 27½-year sentence which the government respectfully requests for defendant Balam is in line with the 27-year sentences received by each of three defendants in *United States v. Davie Jimmy Mejia-Sensente, et al.*, CR 11-293 CRB. That case involved three MS-13 members who met an apparent gang rival on a bus and agreed to murder him at the end of the bus line in Daly City. One defendant got off the bus before the end of the line, but handed over the murder weapon to his

fellow gang members, who then followed the victim off the bus at the end of the line, caught up to him, and took turns firing the handgun at point blank range, fatally wounding him. All three defendants entered guilty pleas; each received a 27-year sentence.

Two final points bear note. First, by entering his guilty pleas in timely fashion, before filing any pretrial motions and well before the April 2017 trial date, defendant Jaime Balam has resolved the case and allowed the government – and the victims – to avoid the litigation hazards associated with trying the case for a second time and after a hiatus exceeding five years. Second, this resolution offers to the surviving victims and to the Frias family (who were consulted prior to the government's entry into the plea agreement) an opportunity for closure that avoids the pain of a second trial.

CONCLUSION

For the reasons set forth above, the government respectfully requests that the Court sentence Jaime Balam to: a total term of imprisonment of **twenty-seven and one-half years (330 months)**³; five years of supervised release, with the conditions as specified by the U.S. Probation Office (and including the expanded search condition set forth in Paragraph 8 of the plea agreement; a total of \$900 in special assessments; and restitution of \$21,650 (to be owed jointly and severally with Danilo Velasquez, and reduced by any payments already made by Velasquez).

Dated: October 19, 2016

BRIAN J. STRETCH
United States Attorney

/s/

By: ANDREW M. SCOBLE
Assistant United States Attorney

³ As the PSR recommends, the total sentence of 330 months should include a variance, and should be imposed as follows, in order to account for statutory maximums: Counts 1 and 8 (210 months, concurrent); Counts 2, 5-7, and 10 (120 months concurrent); count 3 (36 months, concurrent); Count 9 (120 months, consecutive to all other counts).

United States District Court
Northern District of California

UNITED STATES OF AMERICA

v.
DANILO VELASQUEZ,
 a/k/a "Triste"

JUDGMENT IN A CRIMINAL CASE

USDC Case Number: CR-08-00730-033 WHA
 BOP Case Number: DCAN308CR000730-033
 USM Number: 14341-111
 Defendant's Attorney: Jennifer Schwartz

THE DEFENDANT:

pleaded guilty to count(s): ____.
 pleaded nolo contendere to count(s) ____ which was accepted by the court.
 was found guilty on counts One, Two, Three, and Four of the Third Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
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See next page.

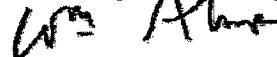
The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) ____.
 Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant must 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 any material changes in economic circumstances.

February 15, 2012

Date of Imposition of Judgment



Signature of Judicial Officer

Honorable William Alsup, U.S. District Judge

Name & Title of Judicial Officer

February 16, 2012

Date

DEFENDANT:

Judgment - Page 2 of 8

CASE NUMBER:

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. § 1962(d)	Racketeering Conspiracy	September 24, 2009	One
18 U.S.C. § 1959(a)(5)	Conspiracy to Commit Murder in Aid of Racketeering	September 24, 2009	Two
18 U.S.C. § 1959(a)(6)	Conspiracy to Commit Assault With a Dangerous Weapon in Aid of Racketeering	September 24, 2009	Three
18 U.S.C. §§ 924(c) and 2	Use/Possession of Firearm in Furtherance of Crime of Violence	September 24, 2009	Four

DEFENDANT: DANILO VELASQUEZ
CASE NUMBER: CR-08-00730-033 WHA

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life imprisonment.

This term consists of terms of life on Count One, 120 months on Count Two, 36 months on Count Three, and 120 months on Count Four. All such terms to run concurrently, except for Count Four, a term of 120 months, which shall be served consecutively to the remaining counts

[] The Court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal. The appearance bond is hereby exonerated.

[] The defendant shall surrender to the United States Marshal for this district.

[] at __ [] am [] pm on __.

[] as notified by the United States Marshal.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] before 2:00 pm on __.

[] as notified by the United States Marshal.

[] as notified by the Probation or Pretrial Services Office.

The appearance bond shall be deemed exonerated upon the surrender of the defendant.

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: DANILO VELASQUEZ
 CASE NUMBER: CR-08-00730-033 WHA

SUPERVISED RELEASE

If for some unforeseen reason the defendant is released from imprisonment, the defendant shall be on supervised release for a term of five years.

This term consists of term of five years on each of Counts One and Four, three years on Count Two, and one year on Count Three, all such terms to run concurrently.

The defendant must 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 two periodic drug tests thereafter.

- The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions in this judgment.

STANDARD CONDITIONS

- 1) The defendant shall not leave the judicial district without permission of the court or probation officer;
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 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 dependants 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 controlled substance or any paraphernalia related to any controlled 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 or a special agent of a law enforcement agency without the permission of the Court; and
- 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: DANILO VELASQUEZ
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SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall comply with the rules and regulations of the U.S. Immigration and Customs Enforcement and, if deported, not reenter the United States without the express consent of the Secretary of the Department of Homeland Security. Upon any reentry into the United States during the period of court ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.
- 2) The defendant shall pay any restitution and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
- 3) The defendant shall participate in a mental health treatment program, and shall pay for his fair share of the cost of treatment, as directed by the probation officer. The defendant shall adhere to a co-payment schedule as determined by the probation officer.
- 4) The defendant shall at all times either have full-time employment, full-time training for employment, or full-time job search, or some combination thereof, unless otherwise excused by probation.
- 5) The defendant shall submit his person, residence, office, vehicle, or any property under his control to a search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.
- 6) The defendant shall not associate with any member of the MS-13 gang. The defendant shall have no connection whatsoever with the MS-13 or any other gang. If he is found to be in the company of such individuals or wearing the clothing, colors, or insignia of the MS-13, or any other gang, the court will presume that the association was for the purpose of participating in gang activities.
- 7) The defendant shall not be found in any area frequented by gangs, as designated by the probation officer, except as the probation officer, or the Court, may allow.
- 8) The defendant shall not have contact with any codefendant in this case.
- 9) The defendant shall not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons and shall not be present in a vehicle where the defendant knows any firearm or ammunition is present.
- 10) Unless directed in writing otherwise, the defendant shall check his voice mail and/or answering machine on a daily basis to determine if any instructions were left by the probation officer.
- 11) The defendant shall cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: DANILO VELASQUEZ
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 7.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
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Totals:	\$ 400	\$ 0	\$ 21,650
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The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Moises Frias, Sr.	\$21,650	\$21,650	100%
<u>Totals:</u>	<u>\$ 21,650</u>	<u>\$ 21,650</u>	

Restitution amount ordered pursuant to plea agreement \$ ___.

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DANILO VELASQUEZ
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SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$22,050 due immediately, balance due
 not later than ___, or
 in accordance with () C, () D, () E, () F () G or () H below; or

B Payment to begin immediately (may be combined with () C, () D, or () F below); or

C Payment in equal (e.g. weekly, monthly, quarterly) installments of \$ ___ over a period of ___ (e.g., months or years), to commence ___ (e.g., 30 or 60 days) after the date of this judgment; or

D. Payment in equal (e.g. weekly, monthly, quarterly) installments of \$ ___ over a period of ___ (e.g., months or years), to commence ___ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

G. In Custody special instructions:

Payment of criminal monetary penalties is due during imprisonment at the rate of not less than \$25.00 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102

H. Out of Custody special instructions:

It is further ordered that the defendant shall pay to the United States a special assessment of \$ ___ and a fine of \$ ___ which shall be due immediately. If incarcerated, payment of criminal monetary payment is due during imprisonment and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal

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.

DEFENDANT: DANILO VELASQUEZ
 CASE NUMBER: CR-08-00730-033 WHA

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.

Joint and Several

Defendant and co-defendant Names	Case Numbers (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee (if appropriate)

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

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.

1 after he arrived.

2 And, secondly, I think it's a little bit disingenuous
3 for the government to so -- to so adamantly try to
4 differentiate my client from Mr. Herrera because their whole
5 philosophical attitude towards this case is that these bad
6 events went down and people are equally responsible. That Luis
7 Herrera, in allocution on a 35-year plea deal, named my client
8 as the triggerman and himself as the driver was potentially
9 just very convenient to Luis Herrera.

10 The point is that even from the government's
11 philosophical standpoint, they should be equally responsible,
12 whether one is the trigger man or the driver. That's been
13 their --

14 **THE COURT:** Why do you say that if one wants to take
15 their chances on getting an acquittal at trial and not
16 accepting responsibility and they go to trial and lose, why
17 should that person be treated the same way as somebody who pled
18 guilty, gave up the chance for an acquittal, gave up the chance
19 for an appeal?

20 **MS. SCHWARTZ:** Well, because I think those are
21 actually minor aspects of the situation. Luis Herrera decided
22 to plea in the middle of trial, so he did exercise his right to
23 trial.

24 I think my client had a difficult time understanding
25 what he was charged with. And whether or not -- you know, what

1 exactly he was being charged with and what he was at risk.

2 I don't believe that exercising your right at trial
3 should be a basis for differentiating two defendants based on
4 their degree of culpability.

5 **THE COURT:** Maybe you don't believe that, but what do
6 the guidelines say about that?

7 **MS. SCHWARTZ:** Well, according to the government and
8 the probation officer, the guidelines puts them in the exact
9 same situation. That's my point. I don't think there is a big
10 difference between these two defendants in terms of the acts
11 that they took.

12 Also, your Honor, the government has harped on the
13 fact that my client's background is self reported. I think
14 that's a little bit unfair. There is really very little
15 ability for -- you know, we were able to get three expert
16 witnesses. The Court was generous about that. I don't think
17 that there was any likelihood that an investigator was going to
18 be able to go to Guatemala and start researching a family
19 history of my client. That just wasn't a realistic option in
20 this case.

21 And I think, at least my understanding from cocounsel
22 is that that was not happening for anybody. So, you know, that
23 didn't happen. We did our best to establish with two -- with
24 three expert witnesses what my client's background was -- is
25 and I would add that although Dr. Perry made a finding of

E-filing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR 08-0730 WHA

Plaintiff,

v.

DANILO VELASQUEZ.

Defendant.

SPECIAL VERDICT FORM

United States District Court
For the Northern District of CaliforniaCOUNT ONE

1A. Has the government proven defendant Danilo Velasquez guilty beyond a reasonable doubt of conspiring to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. 1962(d), as alleged in Count One?

YES, GUILTY NO, NOT GUILTY

X*Please answer the following question only if you answered "Yes, Guilty" in Question 1A:*

1B. Has the government further proven beyond a reasonable doubt that defendant Danilo Velasquez knowingly and intentionally agreed and understood that the pattern of racketeering activity would include any of the following offenses? If the government has so proven one or more such acts, write "Yes" in the space(s) indicated. If not, then write "No" in the appropriate space(s).

MURDER CONSPIRACY TO COMMIT MURDER

YESYESCOUNT TWO

2. Has the government proven defendant Danilo Velasquez guilty beyond a reasonable doubt of conspiring to commit murder in aid of racketeering in violation of 18 U.S.C. 1959(a)(5), as charged in Count Two?

YES, GUILTY NO, NOT GUILTY

XCOUNT THREE

3. Has the government proven defendant Danilo Velasquez guilty beyond a reasonable doubt of conspiring to commit assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. 1959(a)(6), as charged in Count Three?

YES, GUILTY NO, NOT GUILTY

X*Please answer the following question only if you answered "Yes, Guilty" to Question 1A, 2, or 3:*COUNT FOUR

4. Has the government proven beyond a reasonable doubt that defendant Danilo Velasquez knowingly possessed a firearm in furtherance of Counts One, Two or Three in violation of 18 U.S.C. 924(c), as charged in Count Four?

YES, GUILTY NO, NOT GUILTY

XDATED: 11/29/11 FOREPERSON SIGNATURE: K. Janis

Villalta - Cross / Horowitz

1 **"A.** Because that's what we did.

2 **"Q.** Had anyone given you an order to
3 hunt that night?

4 **"A.** I don't remember.

5 **"Q.** Okay. Was there a hunt in the
6 same area just before that, a day or
7 two before that?

8 **"A.** Yes."

9 Stopping at line 19.

10 So the hunt on March 2nd, that wasn't ordered by
11 anybody, as you testified yesterday; is that correct?

12 **MR. HALL:** Objection, misstates the evidence.

13 **BY MR. HOROWITZ:**

14 **Q.** Do you remember who ordered that hunt on March 2nd?

15 **A.** I don't remember.

16 **Q.** Okay.

17 And then, so you have March 4th when you were
18 hunting and you got arrested, right?

19 **A.** Yes.

20 **Q.** And that one you did on your own, not at the order of
21 anybody; is that true?

22 **A.** Yes.

23 **Q.** Okay.

24 Then on March 2nd you just testified you don't
25 remember anybody who ordered that; is that correct?

United States District Court
Northern District of California

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,) U.S.C.A. No.: 22-10104
Appellee,) U.S.D.C.No.: CR-08-00730-WHA-33
vs.) ORDER RE: CJA APPOINTMENT
DANILO VELASQUEZ,) OF AND AUTHORITY TO PAY
Appellant.) COURT APPOINTED COUNSEL
ON APPEAL

The individual named above as appellant, having testified under oath or having otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and, because the interests of justice so require, the Court finds that the individual is indigent, therefore:

IT IS ORDERED that the attorney whose name and contact information are listed below is appointed to represent the above appellant.

Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
(707)789-0516
sslubliner@comcast.net

Appointing Judge: Hon. Judge William Alsup

5/4/2022 4/25/2022
Date of Order Nunc Pro Tunc Date

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,) CR-08-00730-WHA -33
Plaintiff,)
vs.) ORDER RE: CJA APPOINTMENT
DANILO VELASQUEZ,) OF AND AUTHORITY TO PAY
Defendant.) COURT APPOINTED COUNSEL

The individual named above as defendant, having testified under oath or having otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and, because the interests of justice so require, the Court finds that the individual is indigent, therefore;

IT IS ORDERED that the attorney whose name and contact information are listed below is appointed to represent the above defendant, solely for the limited purpose of petitioning the Court for sentencing relief in light of the United States v. Davis, 588 U.S. __, 139 S. Ct. 2319.

Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
(707)789-0516
sslubliner@comcast.net

John
Appointing Judge Mag. Judge J.

February 11, 2020

Date of Order

2/7/2020
Nunc Pro Tunc Date