

11-3678

To Be Argued By:
H. GORDON HALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-3678

UNITED STATES OF AMERICA,

Appellee,

-vs-

LARRY CORBETT, aka China Man,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Christopher F. Droney, U.S.D.J.¹) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 1, 2011. Joint Appendix (“JA”)19, JA1689-JA1691. On September 7, 2011, Corbett filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA21, JA1692. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

¹ Judge Droney has since been confirmed and sworn as a judge of this Court.

**Statement of Issues
Presented for Review²**

I. Did the district court commit clear error in finding that Corbett's post-arrest statement, made after the execution of two separate *Miranda* waivers and under circumstances that were neither coercive, nor manipulative, was knowing and voluntary?

II. Did the district court abuse its discretion and commit harmful error in admitting testimony regarding Corbett's possession of a semi-automatic firearm both before and after the murder took place?

III. In articulating its findings of fact in support of the guilty verdict, did the district court clearly err by concluding that the victim was held against his will inside Corbett's vehicle, that the victim was alive when Corbett kidnapped him from in front of his house, and that Corbett took a substantial amount of marijuana from the victim after he entered Corbett's vehicle?

² The government has re-ordered Corbett's four claims and is addressing them in the order in which they arose before the district court.

IV. Does the penalty provision of 18 U.S.C. § 1201(a), which provides for a mandatory sentence of life in prison, violate the Fifth Amendment, the Eighth Amendment or the separation of powers doctrine of the United States Constitution?

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Preliminary Statement

George McPherson was found on a dirt road in a rural section of Greenwich, Connecticut by Greenwich police on the morning of January 14, 2008, having been shot to death. The evidence presented at the bench trial in this case established that, earlier that day, the defendant, Larry Corbett, arranged to meet McPherson at his home in the Bronx to purchase marijuana from

him. Corbett then lured McPherson into Corbett's vehicle, robbed McPherson of a substantial quantity of marijuana, abducted McPherson, participated in shooting him to death, and dumped his body on Sterling Road in Greenwich. Though the district court did not find (and did not have to find) that Corbett fired the fatal shots, the court did find Corbett guilty of kidnapping resulting in death, causing death through the use of a firearm, interfering with interstate commerce through the use of violence, possession of marijuana with intent to distribute, and use of a firearm during and in relation to a narcotics trafficking offense, and, as a result, sentenced him to life plus ten years in prison.

On appeal, Corbett makes four claims: (1) the district court committed clear error in denying Corbett's motion to suppress his post-arrest statement based on its conclusion that he knowingly and voluntarily waived his *Miranda* rights; (2) the district court abused its discretion by admitting evidence that Corbett possessed a semi-automatic handgun both before and after he participated in the murder of McPherson; (3) the district court, in rendering its verdict, relied on facts not in evidence in finding that McPherson was held against his will in Corbett's van,

that McPherson was abducted and killed elsewhere, and that Corbett took a substantial quantity of marijuana from McPherson during the crime; and (4) the mandatory life sentence imposed under 18 U.S.C. § 1201(a) offended the Fifth and Eighth Amendments and the separation of powers doctrine of the United States Constitution.

For the reasons set forth below, none of these claims have merit, and this Court should affirm Corbett's conviction and sentence.

Statement of the Case

On February 2, 2010, a grand jury returned a superseding indictment charging Corbett with kidnapping resulting in death, in violation of 18 U.S.C. §1201(a)(1) (Count One), causing death through the use of a firearm, in violation of 18 U.S.C. §§ 924(c) and 924(j)(1) (Count Two (premeditated murder) and Count Three (felony murder)), interfering with interstate commerce through the use of violence, in violation of 18 U.S.C. § 1951(a) (Count Four), possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) (Count Five), and use of a firearm during and in relation to a narcotics trafficking offense, in violation of

18 U.S.C. § 924(c)(1)(A)(iii) (Count Six). JA6, JA24-JA29.

On June 21, 2010, Corbett filed a motion to suppress his post-arrest statements. JA8. On October 19, 2010, the district court held an evidentiary hearing on the motion. JA10-JA11, JA1443-JA1619. On January 19, 2011, the court issued a written decision denying the motion. JA12, JA1654-JA1669.

On March 14, 2011, Corbett appeared before the district court and waived his right to a jury trial. JA15. On March 15, 2011, with the consent of the government, the court approved the waiver. JA15.

Beginning on March 28, 2011 and continuing intermittently through April 27, 2011, the district court conducted a bench trial in the case, JA16-JA17, JA30-JA1442. On May 31, 2011, the court announced its decision in the case in open court and issued its written memorandum of decision, finding Corbett guilty of Counts One, Three, Four, Five and Six, and not guilty of Count Two. JA1670-JA1688.

On September 1, 2011, the court sentenced Corbett to concurrent prison terms of life on Count One, life on Count Three, 240 months on Count Four and 60 months on Count Five, and a

consecutive prison term of 120 months on Count Six. JA1689-JA1691. The court also sentenced Corbett to five years' supervised release and a \$500 special assessment. JA1689-JA1691. Judgment entered on September 1, 2011. JA19, JA1689-JA1691.

On September 7, 2011, Corbett filed a timely notice of appeal. JA20, JA1692. He is currently serving the sentence imposed by the court.

**Statement of Facts and Proceedings
Relevant to this Appeal³**

Prior to January 14, 2008, Corbett had purchased redistribution quantities of marijuana from George McPherson on at least two occasions, first in November 2007 around Thanksgiving and again in December 2007. Both times, the purchases occurred in McPherson's apartment at

³ On May 31, 2011, the district court rendered its verdict through a written memorandum of decision that made specific factual findings. JA1670-JA1688. On appeal, although Corbett challenges the evidentiary basis for three facts found by the court, he does not otherwise challenge the factual findings. Accordingly, this Statement of Facts and Proceedings is drawn primarily from the court's memorandum of decision.

3180 Tiemann Avenue, Bronx, New York. JA1671.

Corbett arranged another marijuana purchase from McPherson for January 14, 2008, making a number of cellular telephone calls to McPherson beginning on January 8, 2008. The transaction was to involve the sale of approximately 27 pounds of marijuana by McPherson to Corbett for about \$1,000 per pound. JA194, JA247. Corbett intended to travel from Bridgeport, Connecticut to McPherson's apartment in the Bronx to conclude the deal. JA1671. McPherson had concerns about his ability to put together the 27-pound quantity for the transaction because this was a larger amount than he customarily sold. JA1672. Corbett did not actually want to purchase the marijuana, but instead wanted to lure McPherson into bringing the marijuana into an unprotected situation so that Corbett could rob him. JA543-JA547, JA550-JA551.

Shortly before January 14, Corbett contacted Rayshawn Smith, his friend and co-worker, and told Smith that he planned to rob a Jamaican marijuana dealer in the Bronx. JA1672. In his post-arrest statement, Corbett repeatedly referred to McPherson as "Ras," a nickname he said he used for all Jamaicans. EA5. Corbett in-

licated to Smith that Corbett had previously purchased marijuana from the dealer, that he had been inside the dealer's home on multiple occasions, that he had good dealings with the dealer and was comfortable with him, and that he was going to "flash some money" at the dealer and rob him. JA1672. Corbett attempted to enlist Smith to participate in the robbery and offered to pay him out of the proceeds from the crime. JA1672. Corbett called Smith several times on the evening of January 13 and again on the morning of January 14, but Smith did not answer his telephone and did not accompany Corbett to New York that morning. JA1672.

On the morning of January 14, Corbett traveled from Bridgeport to the Bronx in a green Dodge Grand Caravan registered to his wife, planning to kidnap McPherson and rob him of the marijuana which he had arranged to buy. JA1672. Corbett arrived at McPherson's Tiemann Avenue apartment at around 9:00 a.m. JA1672. McPherson met Corbett at the door of his apartment and told Corbett that he did not yet have all of the marijuana for the transaction. JA1672. Corbett left to get breakfast at a nearby diner. JA1672-JA1673. McPherson also left, but returned shortly with a large blue bag containing a substantial amount of marijuana.

JA1672-JA1673. Indeed, according to Noel Fuller, who was with McPherson the evening before the murder, McPherson had spent part of that evening and the next morning trying to assemble the large quantity of marijuana he needed for the transaction with Corbett the next day. JA198, JA209-JA210. Fuller saw McPherson leave his home and return with a large blue bag containing approximately ten pounds of marijuana. JA211, JA262.

At around 10:30 a.m., Corbett called McPherson and asked him to come outside onto Tiemann Avenue to conduct the transaction. JA1673. Fuller was with McPherson when he received the call and observed him leave the apartment with the blue bag of marijuana. JA211. When he asked McPherson what he was doing, McPherson said that he was going outside because “[t]he guy said he’s not coming inside.” JA211. McPherson, a long-time marijuana dealer, usually conducted his sales in his apartment. JA1673. To get McPherson to leave his apartment, Corbett told him that he was going to be robbed by people in a suspicious car parked nearby. JA212, JA1673. McPherson agreed to come out. JA1673. When he left his apartment, Fuller looked out the window and saw Corbett’s green minivan parked outside. JA212. Moments

later, when Fuller looked out the window again, the van was gone, and so was McPherson. JA265.

Corbett was parked in front of McPherson's building, along the nearside curb of Tiemann Avenue, facing away from the dead end at the other end of the street, so that he could make a quick getaway. JA1673. McPherson entered Corbett's van with a large blue bag of marijuana. JA1673. Once inside, Corbett and an unidentified individual (referred to as "X" in the district court's decision) held McPherson against his will and drove away with him. JA1673. X had joined with Corbett in the plan to kidnap and rob McPherson. JA1673. No one on or near Tiemann Avenue reported or indicated that they heard any gunshots or other loud disturbances at or around the time McPherson entered Corbett's vehicle, and no evidence of gunshots on Tiemann Avenue was discovered. JA758, JA850, JA867, JA1673. Fuller himself heard no gunshots, squealing tires, slamming doors or arguing voices around the time of the abduction. JA216-JA217.

Corbett and X drove McPherson against his will from Tiemann Avenue to an unknown location, robbed him of the marijuana he had carried into the van, and killed him with two shots from

a .40 caliber semi-automatic handgun. JA1674. After McPherson was shot and killed, Corbett removed and disposed of McPherson's wallet, cellular telephones and jacket. JA1674. At approximately 11:16 a.m., Corbett backed his minivan onto Sterling Road in Greenwich, pulled McPherson's body from the vehicle, left it on the road and immediately drove away. JA1674. At approximately 11:20 a.m., a nearby homeowner discovered McPherson's body, called 911 and waited in her car until the Greenwich police arrived about three minutes later. JA1674.

Upon arriving, Greenwich police officers found McPherson's body lying face-down on Sterling Road. JA1674. His white long-sleeve shirt was blood-stained and was pulled over his head, and his blue jeans were pulled down about half-way over his buttocks. JA1674. The officers observed two gunshot wounds in the upper right area of his back and determined, at the scene, that he was dead. JA1674.

Following an autopsy on January 15, the Office of the Chief Medical Examiner determined that the cause of McPherson's death was two gunshot wounds to his upper right back which traveled from his back to his front and from his right side to his left side. JA1675. The manner of

death was homicide, and McPherson died “fairly quickly” after being shot. JA1675.

On the evening of January 16, Corbett drove the minivan to Washington, D.C. to get rid of it because it contained a number of blood stains from McPherson’s body. JA1675. Corbett arrived at the Washington residence of Delores Flood, his ex-girlfriend and the mother of his daughter, at approximately 3:00 a.m. on January 17. JA1675. Later that morning, Corbett asked Flood whether she could help him sell the van, but she declined. JA1675.

During the afternoon of January 17, Corbett’s minivan was stolen from a location in Washington, and he reported it stolen to the Washington Metropolitan police. JA1676. The police later recovered the vehicle and ultimately turned it over to the Greenwich police on January 23, 2008. JA1676. They transported the vehicle back to Connecticut and executed a search warrant on it later that same day. JA1676. Forensic examination of the interior of the vehicle revealed extensive blood stains consistent with McPherson’s blood in a number of areas in the van. JA1676.

On January 29, 2008, Greenwich police arrested Corbett in Stamford, Connecticut on a state charge of conspiracy to commit murder. JA1676. After signing a Notice of Rights form on

two separate occasions and knowingly and voluntarily waiving his constitutional rights, Corbett admitted to driving to McPherson's apartment on the morning of January 14 for the purpose of completing a marijuana transaction. JA1676. He also admitted that he drove from the Bronx to Greenwich and dumped McPherson's body on Sterling Road in Greenwich. JA1676. He denied killing McPherson. JA1676.

During April or May 2008, while in the custody of the Connecticut Department of Corrections, and before he was indicted in this case, Corbett was placed in a holding cell with Craig Frasca, who was being held on an unrelated offense. JA1676. While in the holding cell, Corbett admitted to Frasca that he was involved in a drug deal in New York, that he and another person shot and killed the drug dealer over the drugs, and that Corbett dumped the body in Greenwich. JA1676-JA1677.

Prior to the murder, Corbett's minor stepson had observed a semi-automatic handgun in Corbett's dresser within his Bridgeport apartment. JA1677, Evidentiary Appendix ("EA")21.⁴ The

⁴ At trial, in lieu of testimony, the thirteen-year-old child's recorded statement to police, which was provided in the presence of his mother, was admitted as

child had arrived home after school on a particular day when Corbett was not there and gone into the bedroom shared by Corbett and his mother to look for his video game, which Corbett had confiscated as a form of discipline. EA21. The child opened a drawer in a dresser located in the room and found a holstered semi-automatic handgun which he believed was a real firearm. EA21. When asked if he knew the type of gun, the child indicated that it was a semi-automatic “9.” EA21. The child said he knew the difference between a revolver and a semi-automatic handgun because he “play[ed] a lot of ‘Call of Duty.’” After finding the firearm, he ran from the bedroom and did not tell anyone about the gun. EA21.

Then, after the murder, during the morning of January 29, 2008 (which was the day Corbett was arrested), the child observed the same semi-automatic handgun along with a small amount of marijuana in a black bag that Corbett had placed on a table within Corbett’s apartment. JA1677. The child stated that, as Corbett was leaving the residence to go to a nearby convenience store, he left a black bag on a table within

Government Exhibit 157. Evidentiary Appendix (“EA”)21.

the residence. EA21. While Corbett was gone, the child looked into the bag and found the same semi-automatic firearm he had seen in the dresser drawer. EA21. He also saw, in the same bag, a small quantity of marijuana (which, based on the child's description, was about one-eighth of an ounce). EA21. Corbett returned to the residence and then left again with the black bag. EA21.

Finally, the child described an incident which occurred prior to Corbett's arrest, when his mother and Corbett had a fight, and his mother told him to run to a payphone and call the police. EA21. When the child returned to the residence, Corbett had turned off all the lights and told the mother that he had a gun in the house. EA21. The police responded, but did not check the darkened home. EA21.

Summary of Argument

I. The district court properly denied Corbett's motion to suppress his post-arrest statements. Contrary to his claim on appeal, the district court did not clearly err in concluding that the post-arrest statements were knowing and voluntary and not the product of impermissible manipulation. The record established that, before any substantive questioning, Corbett read, initialed, executed and understood a Notice of

Rights form in which he acknowledged his rights to silence and to counsel, and waived them. When he subsequently requested counsel, the detectives ceased all questioning. Thereafter, Corbett unilaterally initiated conversation with one of the detectives, spoke over the telephone to a family member at his own request, and indicated that he was prepared to waive his rights again and submit to an interview. He then read, initialed, executed and understood a second Notice of Rights form, again acknowledging his rights to silence and to counsel, and waived them. Only then did Corbett make a lengthy, complicated, self-serving but, ultimately, internally contradictory and inculpatory statement to the detectives, complete with a hand-written summary and a diagram. There was nothing about Corbett himself, the circumstances of the interview, or the manner or location in which it was conducted to suggest that Corbett's will was in any way overborn.

II. The evidence at trial established that McPherson was killed by two gunshot wounds inflicted by a .40 caliber semi-automatic pistol, which was not recovered by police. In his post-arrest statement, Corbett said that he neither owned, nor possessed a firearm. To rebut this statement and as further evidence of Corbett's

involvement in the crime, the government sought to admit evidence that, during the months preceding the murder, Corbett's stepson saw hidden among Corbett's personal effects a holstered semi-automatic pistol and that, early on January 29, 2008, the day Corbett was arrested for the murder, Corbett placed a bag on a kitchen counter which contained the same semi-automatic pistol and some marijuana. The district court did not abuse its discretion in overruling Corbett's Rule 404(b) objection and admitting the child's recorded statement. The statement was not 404(b) evidence. First, the evidence of Corbett's possession of a semi-automatic pistol before and after the murder was inextricably intertwined with the evidence regarding the weapon-related offenses with which Corbett was charged, and was therefore admissible as intrinsic evidence of these crimes. Second, the evidence helped complete the story of the crimes on trial, as the record established that McPherson was killed by an unrecovered semi-automatic pistol, that McPherson did not carry a handgun, and that Corbett denied possessing any firearms, so that Corbett's possession of a semi-automatic pistol before and shortly after the murder provided a meaningful piece of information on how McPherson was shot and

killed and showed that Corbett had lied to the police about his possession of a firearm.

III. Corbett's claim that the district court made factual findings not supported by the evidence has no merit. Trial testimony, which was properly credited by the court, and the reasonable inferences drawn from that testimony, established that, on the morning he was murdered, McPherson was lured into Corbett's van through a ruse concocted and carried out by Corbett and that, once in the van, McPherson was spirited away from the scene, alive and against his will, so he could be robbed and murdered by Corbett and an unknown accomplice. From the trial testimony, the court reasonably concluded that, by virtue of his suspicious nature and his custom in conducting marijuana transactions, McPherson would not have agreed to be driven away from the area of his apartment to conduct a drug sale. Also, there was no evidence of shots fired or of an altercation in the area of the apartment at the time of the abduction to suggest that McPherson was murdered before he was driven away. Moreover, as Fuller testified, McPherson was planning to sell Corbett 27-pounds of marijuana and had gathered about ten pounds of it the night before the murder. From this testimony, the court reasonably could have concluded

that the large blue bag McPherson brought with him into Corbett's van contained a substantial quantity of marijuana, and that Corbett and his accomplice stole this bag from McPherson when they murdered him.

IV. Where death of the victim results from a violation of 18 U.S.C. §1201(a), that statute's penalty provision mandates a sentence of death or life in prison. Here, the government did not seek the death penalty, so that the mandatory penalty for the crime was life in prison. In mandating a life sentence under these circumstances, Congress has engaged in an entirely appropriate exercise of its authority, and, based on well-settled and binding precedent, has not offended the Fifth Amendment, the Eighth Amendment or the separation of powers doctrine of the Constitution.

Argument

I. The district court's denial of Corbett's motion to suppress his post-arrest statement was proper under the totality of the circumstances.

A. Relevant facts

On June 21, 2010, Corbett filed a motion to suppress his post-arrest statements. JA8. He ar-

gued that the police had violated his constitutional rights by questioning him after he had invoked his right to counsel and by tricking him into trusting them by convincing him that he would be treated fairly as a “Brother Mason.” JA1665. After conducting an evidentiary hearing,⁵ the district court denied the motion in a written memorandum, in which it found pertinent facts as outlined below and as supplemented from the record, not one of which is challenged by Corbett in this appeal.

1. The circumstances of the interrogation.

On January 29, 2008, the Greenwich police secured an arrest warrant for Corbett for the murder of McPherson and took him into custody. JA1446. Upon his arrest, Corbett was transported to the Detective Division office which, due to construction, was temporarily occupying the third floor of a combined police and fire building. JA1448. Detectives Timothy Hilderbrand and Charles Brown, with Officer David Wilson present, interviewed Corbett. JA1448, JA1521-

⁵ At the hearing, the government called as witnesses Detectives Charles Brown and Timothy Hilderbrand, and Officer David Wilson, all of the Greenwich Police Department, and Corbett did not call any witnesses.

JA1526. The interview lasted approximately six to seven hours, starting around 6:30 p.m. on January 29 and ending at approximately 1:00 a.m. on January 30, with Corbett's execution of his written statement. JA1530.

At approximately 6:41 p.m., shortly after he arrived at the office, Corbett was given a rights form which he read aloud, initialed, acknowledged that he understood, and executed. JA1449, JA1660. Corbett's interrogation took place in a "normal office" with a window and a doorway, which measured approximately eight by ten feet and was large enough to contain four desks. JA1449, JA1502-JA1503. Although the building itself was "kind of cramped," the room in which Corbett's questioning took place was not. JA1503. Corbett was not handcuffed during the course of his interrogation, JA1449, and he was provided with food, JA1504, and access to a restroom upon request. JA1523. According to Detective Hilderbrand, his practice was to allow every arrestee, including Corbett, to make as many phone calls "as is needed or requested." JA1588. Corbett was also permitted to speak with his wife, who was present in the building and who was brought to see him. JA1507.

At the time of the interrogation, the officers were aware that Corbett was a convicted felon

and had served jail time. JA1447, JA1539. Based on his experience with the criminal justice system, Corbett was presumably familiar with the substance of the Notice of Rights form that he read aloud, initialed, and signed prior to his interrogation. JA1449, JA1467. Corbett demonstrated that he was clearly literate and capable of understanding his rights, JA1450, in spite of the fact that he did not finish high school. JA1491. Corbett did not appear to be under the influence of alcohol or drugs, JA1450, and seemed emotionally and mentally capable of speaking with the officers. JA1537.

Although he was told that he was arrested for conspiracy to commit murder, Corbett gave the impression that he thought he was brought in due to an incident which occurred at a New Haven dance club where he worked at as a bouncer. JA1535. He cooperated initially, providing biographical information to detectives, but his mood changed dramatically when the police presented him with photographs of the crime scene. JA1458. Corbett became “quiet, sullen, and just sat there staring at the photos.” JA1540. At that time, Corbett pointed to the executed rights form and invoked his right to an attorney, stating, “this form says that I need a lawyer So I guess I need a lawyer, that’s what the form

tells me, I need lawyer.” The officers ceased questioning immediately. JA1459.

At this point, Detective Hilderbrand left the room to get a prisoner property sheet out of a file cabinet. JA1459. Detective Brown waited with Corbett, and Corbett noticed a Masonic ring that Detective Brown was wearing. JA1463. Corbett’s emotions changed dramatically at that moment. JA1497. Alluding to the ring, Corbett informed Detective Brown that his grandfather is also a Mason and a mentor to him. JA1463. He then asked Detective Brown if he could speak to his grandfather. JA1463.

Detective Brown dialed the telephone number Corbett gave him for the grandfather and handed the telephone to Corbett. JA1463. After conversing with his grandfather, Corbett told Detective Brown that his grandfather wanted to speak with Brown. JA1464. Detective Brown obliged and, upon speaking with Corbett’s grandfather, informed him that Corbett was under arrest, what the charges were, what his bond was, and that it was “a serious matter.” JA1465. Detective Brown ended the conversation by assuring Corbett’s grandfather that he would treat Corbett as a “brother Mason,” meaning that he would treat him “with respect, dignity, and honesty.” JA1466. Detective Brown handed the tel-

ephone back to Corbett and overheard him tell his grandfather that he made a bad decision, but “didn’t kill the man.” JA1467.

Immediately after speaking with his grandfather, Corbett independently reinitiated communication with the officers. JA1467, JA1543. He told them that, after having spoken to his grandfather, he was comfortable speaking with them. JA1467, JA1543. At approximately 7:55 p.m., Detective Brown provided Corbett with a second rights form which Corbett read aloud, initialed and executed. JA1660; JA1467-JA1468. The police provided Corbett with this second rights form to “make sure that he understood that he still had the right to have an attorney present if he requested it.” JA1595.

After waiving his *Miranda* rights for a second time, Corbett provided a dubious account of McPherson’s murder in which he denied responsibility for it, but admitted to engaging in a marijuana transaction with the victim and ultimately transporting the victim’s body to Greenwich. JA1469-JA1484. Afterwards, Corbett provided a three-page, handwritten sworn statement, JA1484-JA1485, which he spent approximately two and a half hours carefully writing. JA1486. From the time that Corbett spoke to his grandfather through the rest of the interview,

Corbett never requested counsel, nor did he seek to cease the interview, or ask to speak with his grandfather again. JA1487-JA1488.

2. Corbett's oral and written statements.

Corbett's oral statement was memorialized in a ten-page Greenwich Police report. EA3-EA12. After reading aloud, initialing and executing a second rights form, Corbett stated that, beginning in November 2007, he began buying marijuana from a Jamaican individual in the Bronx and that he had purchased approximately five pounds of marijuana from that source on two occasions over the previous six months. EA4-EA5. Corbett later learned that his source worked for McPherson and, after meeting McPherson, he began to deal directly with him. EA5.

According to Corbett, beginning around January 8, 2008, he began to arrange a marijuana deal with McPherson through a series of telephone calls. EA5. He agreed to purchase 27 pounds of marijuana from McPherson at a price of \$1,000 per pound, and then assembled money from his friends and \$5,000 of his own funds to finance the transaction. EA5.

Corbett told the officers that, on January 14, after contacting McPherson by telephone to con-

firm the transaction, he traveled alone from Bridgeport to the Bronx to pick up the marijuana. EA5. Upon his arrival in the area of McPherson's residence, he noticed a "weird looking small red sedan, which was occupied by three males." EA5. He called McPherson and told him, but McPherson told him not to worry about it. EA5.

When Corbett later arrived at McPherson's apartment, McPherson did not yet have all of the marijuana, so Corbett left the area to have breakfast. A short while later, McPherson called to say that he was ready to conduct the transaction. EA6. When Corbett returned to McPherson's residence, he saw another suspicious vehicle. EA6. He advised McPherson of this by telephone and told him to come outside to complete the drug transaction in Corbett's vehicle. EA6. McPherson then came outside, met with Corbett and entered the van in which Corbett had been sitting. EA6. McPherson sat in the middle row of seats on the driver's side, and Corbett joined him, sitting to his right in the middle row of seats on the passenger side. EA6. McPherson brought with him a black duffle bag containing marijuana, but "a lot less . . . than 25 pounds." EA6.

According to Corbett, as he looked through the bag of marijuana, a vehicle pulled up and parked in front of the van. EA6. At this point, a black male appeared at the driver's side middle door and stated, "Where is my money?" EA6. Corbett stated that he threw the \$25,000 he had to the male. EA7. Corbett said that he then grabbed McPherson by the shoulders and pulled McPherson toward himself. EA7. As this was happening, the intruder at the driver's side door supposedly pulled a gun and fired two or three rounds into the vehicle. EA7. According to Corbett, while the shots were being fired, he and McPherson were "tussling" and fell over the back of the middle seats and into the rear seat area. EA7. He stated that McPherson then went limp, so he left him there, climbed into the driver's seat, and drove the vehicle from the area. EA7. McPherson appeared to be unresponsive, so, at some point, Corbett stopped to check on him and found that he was dead. EA7. Detective Brown drew a diagram from Corbett's description, EA10, which Corbett used to describe the relative seating of himself and McPherson within the vehicle. EA20.

Corbett, not wishing to be associated with the homicide, stripped McPherson's body of his leather jacket and the contents of his pockets,

disposed of these items at an unknown location, and then dumped the body at “the first place that looked ‘deserted.’” EA7. He then left the area as quickly as possible. EA7.

According to Corbett, he returned to Bridgeport and cleaned McPherson’s blood from the van. EA8. He said that, after a few days, he drove the van to Washington, D.C. to celebrate the birthday of his daughter and, while he was there, the van was stolen. EA8. He indicated that the van ended up being wrecked and that he got a ride back to New York from a man whose name he did not know. EA8. Although Corbett denied making any trips to the Bronx following the homicide, surveillance officers observed him driving into the Bronx on January 21, 2008. EA8.

Upon being advised by the officers that his story did not make sense, Corbett apologized and said that he left out part of the story. EA9. He then related that, when the unknown intruder approached the van near McPherson’s residence, the intruder took, not just Corbett’s money, but also the bag of marijuana that McPherson had brought to the van. EA9. He said that, as the intruder began to reach for his gun, Corbett grabbed McPherson and “automatically” patted McPherson’s left side down looking for a gun.

EA9. He stated that he grabbed a gun from McPherson's waist band and that, while he and McPherson struggled, the gun fired and struck McPherson in the left hand.⁶ EA9. Corbett then reaffirmed that, as this was happening, the unknown intruder fired two or three times and then disappeared. EA9. Corbett stated that he then drove his vehicle from the area rapidly, wrapped the gun he had taken from McPherson in McPherson's coat, and dumped the body. EA9. Throughout the interview, Corbett told the police, "I did not kill that man." EA9.

Corbett also stated that the gun he used to shoot McPherson in the hand was a "357 magnum" and told police that his minivan previously had been involved in a shooting. EA11. He said that the bullets found inside McPherson would be different from the one that hit McPherson in the left hand. EA11. He also said that he never owned a gun or bullets, and that there were no guns or bullets at his residence. EA11.

⁶ The medical examiner described finding a "superficial laceration" on the left hand of McPherson noting the presence of no burns or soot in the wound, which he did not describe as a gunshot wound. JA88-JA89, JA118.

Corbett also provided a written statement to detectives. EA17-EA19. This statement was less detailed than his oral statement, but described the anticipated drug transaction in approximately the same way, with McPherson sitting in the middle driver's side seat of the van, with Corbett sitting to McPherson's right on the passenger side, and with McPherson bringing to the van "a bag of weed." EA18. In the written statement, however, Corbett described, not one intruder, but two. EA18. He wrote that one of the two intruders demanded money as he appeared to reach for a gun. EA19. Again, Corbett stated that, as this was happening, he "frisk[ed]" McPherson and took from him a weapon he described as a "revolver." EA19. He then briefly explained his "tussle" with McPherson during which he shot McPherson in the hand, the firing of shots by one of the intruders, and his fleeing the area with a limp McPherson in the back of the van. EA19. He did not mention what happened to the "bag of weed." After he completed the written statement, Corbett signed it in the presence of the detectives and swore to its truth. EA19.

3. The district court's ruling

Based on the factual findings set forth above, the district court concluded that the government

sustained its burden of proving by a preponderance of the evidence that Corbett's waivers of his *Miranda* rights and his inculpatory statements were voluntarily made. Special Appendix ("SPA")9-SPA15.

The court determined that, as a matter of law, Corbett's "experience, background, and education" did not support a finding that he was unaware of the rights that he was waiving. SPA9-10. The court observed that, at the time Corbett waived and made his statements, the officers were aware that Corbett was a convicted felon who had served prison time in New York. SPA10. The court noted that "Corbett's written statement was fairly well-written and coherent," SPA9, and that, although Corbett took more than two hours to write it, the time spent on it was reasonable, as "[a]ny suspect . . . would be deliberate in preparing a detailed written statement, especially when charged with conspiracy to commit murder." SPA9-SPA10.

The court also found that "there is nothing in the record to suggest that conditions of Corbett's interrogation were coercive." SPA10. The office environment in which Corbett was questioned was not unduly coercive, and the interrogation lasted only approximately three hours. SPA10.

In analyzing the conduct of the law enforcement officers, the court concluded that they “did not significantly interfere with the voluntariness of Corbett’s waivers and inculpatory statements.” SPA11. “Corbett was adequately advised of his rights on two separate occasions; the length and nature of the detectives’ questioning was fair; there was no physical or verbal abuse of Corbett; Corbett was not handcuffed at any point during the interrogation; Corbett was given a meal; Corbett had access to water and the restroom upon request; Corbett was permitted to speak with his wife in person; and Corbett was not deprived of any fundamental necessity such as sleep or clothing.” SPA11.

Most importantly, the court concluded that Detective Brown’s assurances to Corbett’s grandfather did not amount to an explicit promise of leniency. “Despite Corbett’s apparent acknowledgement of Detective Brown’s assurance to treat him as a ‘Brother Mason,’ that does not rise to the level of an explicit promise of leniency, such as when a police officer promises to drop a charge against a suspect or recommend leniency in sentencing in exchange for a suspect waiving his right to an attorney.” SPA13.

B. Governing law and standard of review

1. The totality of the circumstances test

In evaluating whether statements were voluntarily provided or obtained by coercion, this Court examines the totality of the circumstances in which they were given. *See Parsad v. Greiner*, 337 F.3d 175, 183 (2d Cir. 2003); *see also Green v. Scully*, 850 F.2d 894, 901 (2d Cir. 1988). More specifically, the Court's inquiry focuses on three sets of circumstances: (1) the characteristics of the accused, (2) the conditions of interrogation, and (3) the conduct of law enforcement officials. *See Greiner*, 337 F.3d at 183. No single one of these criteria controls. *See Green*, 850 F.2d at 901. This Court has explained that "these factors are not to be weighed against one another on a balance scale," rather, "the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect." *Id.* at 902.

The Supreme Court has held that a finding of coercive police activity under the second criterion "is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). In analyzing this factor, courts

consider: (1) the nature of the questioning; (2) whether the defendant was informed of his constitutional rights; (3) whether there was physical mistreatment such as beatings; (4) whether the defendant was restrained in handcuffs for a long period of time; (5) whether the defendant suffered physical deprivation of food, water or sleep; and (6) whether law enforcement engaged in psychologically coercive techniques such as brainwashing or promises of leniency or other benefits. *See Green*, 850 F.2d at 902. However, a mere promise of leniency made by a law enforcement officer does not violate the Fifth Amendment in the absence of the other factors mentioned. *See United States v. Gaines*, 295 F.3d 293, 299 (2d Cir. 2002) (“[V]ague promises of leniency for cooperation are just one factor to be weighed in the overall calculus and generally will not, without more, warrant a finding of coercion.”).

A defendant’s experience and background, together with his or her youth and lack of education or intelligence are also relevant characteristics to consider in determining voluntariness. *See Green*, 850 F.2d at 902. Nonetheless, although the “mental condition” of a defendant is a significant factor in determining an individual’s voluntariness, it does not “by itself and apart

from its relation to official coercion . . . dispose of the inquiry into constitutional ‘voluntariness.’” *Connelly*, 479 U.S. at 164.

In determining whether the conditions of custody contributed to a defendant’s involuntary waiver, a court should consider the place where the interrogation was held, the length of detention, and the presence or absence of counsel. *See Green*, 850 F.2d at 902.

2. Standard of review

The factual findings made by the district court in denying Corbett’s motion to suppress are reviewed for clear error and its conclusions of law are reviewed *de novo*. *See United States v. Worjloh*, 546 F.3d 104, 108 (2d Cir. 2008).

C. Discussion

Corbett attacks the district court’s conclusion that his waivers and statements were knowing and voluntary and claims that the court overlooked evidence that (1) Corbett did not understand the rights he twice waived in writing, (2) the conditions under which Corbett’s interrogation was conducted were substandard and (3) the police manipulated Corbett by praying on the fact that one of the detectives was a Mason. *See Def.’s Br.* at 39-41. Corbett also claims that the

district court improperly relied on *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), in its written decision. The undisputed factual record, however, establishes that the court’s conclusion was sound and was entirely supported by the evidence before it.

1. Corbett understood and voluntarily waived his Miranda rights before freely providing his statements.

The district court properly concluded that Corbett was mentally and emotionally capable of voluntarily waiving his Miranda rights. SPA9-SPA10. Considering Corbett’s prior confrontations with the law, along with his average intelligence, his decision to speak represented an “unfettered exercise of his own will,” *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), and was not a product of coercion.

This Court has stated that a defendant’s criminal history makes him “‘street-wise’ and fully conversant with his rights.” *United States v. Smith*, 574 F.2d 707, 708 (2d Cir. 1978). The questioning officers were aware that Corbett was a convicted felon who had previously served a sentence in New York state prison. SPA10; *see also* JA1446-JA1447. At the time of his sentencing, Corbett had three prior felony convictions

that were part of a substantial criminal record for drugs, assault on a police officer, and attempted murder. JA1647. It was thus reasonable for the district court to infer that Corbett was well acquainted with his rights.

The preponderance of the evidence also shows that Corbett possessed a sufficient mental capacity to intelligently waive his rights. The district court noted that Corbett is literate and was not under the influence of any drugs or alcohol during his interrogation. SPA9. Corbett appeared mentally and emotionally capable of speaking with the officers. JA1537. He was able to read his rights aloud and to acknowledge that he understood them. JA1450-JA1452. *See United States v. Makes Room*, 49 F.3d 410, 415 (8th Cir. 1995) (reasoning that, if a defendant is intelligent enough to invoke his or her rights, he is intelligent enough to understand them). The fact that Corbett waived his rights, then invoked them, then waived them again shows both that he understood them and how to invoke them.

Corbett's limited education is no indication that he did not possess sufficient intelligence to understand and knowingly waive his rights. In fact, this Court has upheld Fifth Amendment waivers exercised by juveniles who, despite their low educational attainment levels and youth,

were still found to have knowingly, intelligently, and voluntarily waived their rights. *See, e.g., United States v. Burrous*, 147 F.3d 111, 116-117 (2d Cir. 1998) (sixteen year-old defendant with limited formal education exercised a waiver that was “both knowing and voluntary, rendering his subsequent statements admissible in his criminal trial”); *United States v. Male Juvenile*, 121 F.3d 34, 40-41 (2d Cir. 1997) (juvenile defendant with a second grade reading comprehension level found to have “knowingly waived his rights”). And while Corbett points to some poor grammar in his written statement as evidence of his lack of education, the district court properly concluded that the statement was “fairly well-written and coherent.” SPA9. Although it took Corbett approximately two and a half hours to write his three-page statement, the district court reasonably noted that it was not unusual for a defendant being charged with conspiracy to commit murder to be “deliberate in preparing a detailed written statement.” SPA10.

Further, although the mental condition of a defendant is a significant factor in determining an individual’s voluntariness, it does not “by itself and apart from its relation to official coercion . . . dispose of the inquiry into constitutional ‘voluntariness.’” *Colorado v. Connelly*, 479 U.S.

157, 164 (1986). As is noted below, no such coercion took place during Corbett's interrogation.

There is simply nothing in the record to suggest, as Corbett has, that "the District Court ignored compelling evidence that Mr. Corbett had intellectual impediments and lacked experience with the intimidating interrogation process." Def.'s Br. at 39.

2. The conditions of Corbett's interrogation were neither substandard nor coercive.

There is nothing in the record to support Corbett's claim that the conditions under which his waivers and statements were given were deficient at all, let alone so "substandard" as to vitiate the knowingness or voluntariness of either.

The interrogation was conducted in a windowed office. JA1449, JA1502-1503. Corbett was not handcuffed at any time during the interview, before or after his waivers or statements. JA1449. He was provided with food, JA1504, and was allowed to use the restroom upon request. JA1523. The detectives conducted the interrogation in an entirely professional manner, never yelling or speaking heatedly. JA1544-JA1545. He was also allowed to speak with his wife, who

was present at the police offices during the interrogation. JA1507.

In short, there is no reason for this Court to overturn the conclusion of the district court regarding the knowingness and voluntariness of the statements or waivers on the basis of the conditions under which Corbett was interrogated.

3. Law enforcement did not engage in coercive conduct that overbore Corbett's exercise of his free will.

There is no evidence that the interrogating law enforcement officers engaged in coercive tactics aimed at inducing Corbett to waive his rights.

There is no improper causal link between Detective Brown's statement that he would treat Corbett as a "brother Mason" and Corbett's decision to waive his constitutional rights, as would be required for a finding of involuntariness. *See Connelly*, 479 U.S. 170 (the voluntariness test is "not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"). Detective Brown's statement was directed to Corbett's grandfather, not to Corbett himself. JA1466. And Corbett told Detective Brown that he "felt comfortable"

enough to resume the interrogation, not after overhearing the statement Brown made to the grandfather, but after Corbett himself spoke directly to the grandfather. JA1502, JA1596.

The statement Brown made to the grandfather was no kind of promise related to or contingent upon Corbett's cooperation or lack thereof, nor did Brown indicate or imply that he would or could provide Corbett with any advantage in the situation in which he found himself. It would have been unreasonable for Corbett or any reasonable person in his position to interpret the detective's remark differently.

Further, Detective Brown's statement that he would treat Corbett as a "brother Mason" did not amount to a promise of leniency, rather, it was an assurance Detective Brown provided to Corbett's grandfather that he would treat Corbett humanely. JA1466. Corbett's trial counsel attempted to extract from Detective Brown on cross-examination a characterization of the statement as an open-ended promise to "protect" Corbett and give him preferential treatment. JA1516. However, as Brown explained to counsel, "[i]f I can offer assistance in protection [to a brother Mason], I certainly will," JA1516, acknowledging that his willingness and ability to assist a brother Mason was not unqualified. The

scope of any assistance he could provide was circumscribed by his duties as a law enforcement officer. As Detective Brown stated at trial, “I protect people for a living.” JA1516.

In no way could Detective Brown’s assurance to the grandfather of fair treatment for Corbett be construed by Corbett, the district court, or this Court as an offer of leniency bearing upon the voluntariness of Corbett’s waiver of his rights or his making statements.

The totality of the circumstances attendant to Corbett’s interview, as memorialized in the record, establishes conclusively that the waivers of his rights and the statements he provided were not coerced or impermissibly extracted from him, and that they were freely, knowingly and voluntarily given.

4. The district court’s consideration of *Berghuis* was appropriate

Finally, Corbett criticizes the district court’s reliance on *Berghuis v. Thompkins* to support its conclusion that “[b]ecause such moral coercion did not principally come from Detective Brown or Detective Hilderbrand, it is of little weight in determining whether Corbett voluntarily waived his rights.” SPA14. Corbett’s criticism is unwarranted. Although the facts of *Berghuis* are not

directly analogous to those in this case, the Supreme Court's decision was relevant to the district court's determination that Corbett was internally motivated to provide the officers with a confession as a result of his "own feelings for his grandfather and the Masonic fraternity." *Id.* As the Supreme Court stated in *Berghuis*, "[t]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" 130 S. Ct. at 2263 (quoting *Connelly*, 479 U.S. at 170).

In *Berghuis*, the defendant was asked if he believed in God and whether he prayed to God to forgive him for committing the crime that he was accused of. *See id.*, 130 S. Ct. at 2257. He replied "yes" to both questions. *Id.* The trial court denied the defendant's motion to suppress the statements, and he was convicted on all counts. *Id.* The Supreme Court concluded that the interrogating officer did not coerce the defendant's confession merely by referring to his religious beliefs, *see id.* at 2263, but rather projected his own faith and sense of morality onto the officer's questions. *Id.* Viewing the totality of the circumstances, the Supreme Court also determined that the defendant understood his rights after reading them, that the conditions of his interro-

gation were inoffensive, and that the officers never threatened or injured him. *See id.* at 2262-63.

Here, the district court followed a similar analysis. After determining that the totality of the circumstances surrounding Corbett's interview did not induce an involuntary waiver of his rights, the court cited *Berghuis* to support its reasoning that a confession is not coerced if a suspect only feels compelled to provide a confession due to his or her own subjective psychological leanings. SPA8-SPA14. Even if Detective Brown was trying to appeal to Corbett's sentiments, it is reasonable to infer from the outcome of *Berghuis* that, if appealing to a suspect's religious beliefs does not amount to official coercion, a conversation about a Masonic fraternity likewise does not.

The district court's decision did not rest or even rely on *Berghuis*. It noted that the Supreme Court had held in other cases that, where moral coercion does not principally emanate from the officials themselves, it is of little weight in determining whether a suspect voluntarily waived his or her rights. *See Connelly*, 479 U.S., at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). At the time of the district court's decision, *Berghuis* was merely the most recent rel-

evant example of the Supreme Court applying the previously established principle. While *Berghuis* bolstered the basis for the district court's denial of Corbett's motion, given the case law on the issue, the outcome would have been the same without the added force of *Berghuis*.

The conclusion of the district court that Corbett's waivers and statements were knowingly and voluntarily made is fully supported by the record of the totality of the circumstances, and the court's denial of Corbett's motion to suppress his post-arrest statements should be affirmed.

II. The district court did not abuse its discretion in admitting evidence that Corbett possessed a semi-automatic firearm both before and after the murder.

A. Relevant facts.

On the third day of trial, the government advised the court and defense counsel of its intention to call as a witness a minor child, and made a brief proffer as to the anticipated nature of the testimony the child would provide. JA520-JA521. Essentially, the child was expected to testify that, on the day of Corbett's arrest, he saw a weapon which the child would associate with Corbett. JA521-JA522. The child would de-

scribe the weapon as a handgun which was not a revolver and state that he had seen it two times: once, prior to the murder, in a dresser drawer in the master bedroom of Corbett's residence, and once, after the murder, in a black bag Corbett had momentarily left on a table in the house. JA522-JA523.

Defense counsel objected to the child being called to testify on the basis that it would be traumatic for the child, the testimony would not be probative of any issue in the case, and the evidence was inadmissible under Fed. R. Evid. 404(b). JA523-JA524. The government responded that a firearms expert would testify that the fatal shots were fired by a semi-automatic handgun which had not been recovered, and that, in his post-arrest statement, Corbett had denied that he had owned, or had access to, a handgun, so that the child's testimony would be direct evidence of Corbett's guilt, not Rule 404(b) evidence. JA528-JA529.

The court directed the government to obtain and provide details of the child's anticipated testimony, and directed the parties to brief the issues, reserving its decision on whether to allow the testimony. JA528. On April 4, 2011, prior to ruling on the admissibility of the child's testimo-

ny, the court listened to a recording of the police's interview with the child. JA1089.

That afternoon, the court ruled that the child's testimony regarding the firearm was admissible. In particular, the court stated that "evidence that the gun found in Mr. Corbett's apartment was similar to the gun used in the charged offenses is relevant under Federal Rules of Evidence 401 and 402." JA1210. The court also found that, "[b]ecause possession of a firearm is an element of a number of the counts in the Superseding Indictment against the defendant, evidence of the defendant possessing a gun around the time of the alleged crimes is 'inextricably intertwined with the evidence regarding the charged offense' and, therefore, the Court finds the evidence does not constitute 404(b) evidence." JA1210. The court then went on to apply the balancing test of Rule 403 noting the similarity between the weapon used to kill McPherson and the one which would be the subject of the testimony, and concluded that "the probative value of [the] anticipated testimony is not substantially outweighed by the danger of unfair prejudice to the defendant or the other factors in Rule 403 and is admissible." JA1211.

At this point, defense counsel suggested, for the benefit of the child, that the recorded inter-

view come into evidence in lieu of the testimony of the child.⁸ The government agreed and, after the court canvassed Corbett directly on the issue to ascertain his knowing assent, the recording was admitted as Government Exhibit 157. JA1211-JA1213, EA21.

B. Governing law and standard of review.

For evidence properly to be admitted at trial, it must be relevant. *See* Fed. R. Evid. 401. “To be relevant, evidence need only tend to prove the government’s case, and evidence that adds context and dimension to the government’s proof of the charges can have that tendency.” *United States v. Gonzalez*, 110 F.3d 936, 941 (2d Cir. 1997). This may be satisfied where the proffered evidence “does not directly establish an element of the offense charged . . . [but] provide[s] background for the events alleged in the indictment.” *United States v. Coonan*, 938 F.2d 1553, 1561

⁸ Had the child provided live testimony, he would have been subject to close questioning, beyond the four corners of his statement, concerning his knowledge of Corbett’s activities so that, on balance, the known statement of the child may well have been preferable to an uncharted live examination.

(2d Cir. 1991) (internal quotation marks omitted).

Evidence of uncharged criminal conduct may be relevant evidence, and not within the ambit of “other crimes, wrongs, or acts” under Fed. R. Evid. 404(b), where the evidence is “inextricably intertwined with the evidence regarding the charged offense.” *United States v. Quinones*, 511 F.3d 289, 309 (2d Cir. 2007) (internal quotation marks omitted); *see also United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). In such a case, “the uncharged crime evidence is necessary to complete the story of the crime on trial, . . . and, thus, appropriately treated as part of the very act charged, or, at least, proof of that act.” *Quinones*, 511 F.3d at 309 (internal quotation marks omitted).

Where evidence is determined to be relevant, it still may be excluded, in the discretion of the trial court, “if its probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403; *see Huddleston v. United States*, 485 U.S.681, 687-88 (1988). Evidence is unfairly prejudicial when “it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.” *United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011) (internal quotation

marks omitted). In reviewing a challenge to the trial court's application of the balancing test in Rule 403, this Court "accord[s] great deference to the district court's assessment of the relevancy and unfair prejudice of proffered evidence, mindful that it sees the witnesses, the parties, . . . and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *Quinones*, 511 F.3d at 310 (internal quotation marks omitted).

A trial court's evidentiary rulings are reviewed deferentially and are reversed only for abuse of discretion. *See id.* at 307. A finding of such abuse can be supported only by a conclusion that the challenged rulings were "arbitrary and irrational." *Id.* (internal quotation marks omitted).

C. Discussion

1. The recorded statement was probative, relevant evidence and was properly admitted as such.

The recorded statement of the minor child was admissible because it constituted intrinsic evidence of the crimes charged in the superseding indictment and therefore was not subject to analysis under Rule 404(b). "Evidence of uncharged criminal activity is not considered other

crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.” *Carboni*, 204 F.3d at 44 (internal quotations omitted).

The recorded statement contained factual material which was “inextricably intertwined with the evidence regarding the charged offense.” *Id.* Possession of a firearm is an element of two of the five counts of the superseding indictment on which Corbett was found guilty. Count Three specifically charged that Corbett “did knowingly and intentionally cause the death of George McPherson *through the use of a firearm*” and Count Six charged that Corbett “did knowingly and intentionally *use and carry a firearm* during and in relation to” a crime of violence and federal drug crime. JA24-JA27 (emphases added).⁷ Corbett’s possession of a semi-

⁷ The Government did not claim at trial, nor did the district court find, that Corbett himself fired the shots that killed McPherson. Rather, the court properly found that the armed robbery and shooting of McPherson was carried out by Corbett and an unknown accomplice. JA1673-JA1674. Given the findings of the court, which are not directly challenged

automatic firearm both before and after the murder of McPherson thus specifically goes to an essential element of these charged offenses – whether he possessed a firearm that could then have been used in relation to the murder and drug crime. *See United States v. Robinson*, 560 F.2d 507, 512 (2d Cir. 1977) (*en banc*) (holding that evidence of possession of a .38 caliber handgun weeks after a robbery in which a .38 caliber handgun was used was relevant because it tended to directly identify the defendant as a participant in the robbery). Corbett’s possession of a firearm directly proximate to the time-frame of the murder is “part of the very act charged.” *United States v. Concepcion*, 983 F.2d 369, 392 (2d Cir. 1992); *see also United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989).

Moreover, the recorded statement was admissible because it was “necessary to complete the story of the crime on trial.” *Carboni*, 204 F.3d at 44. The government’s offer in support of the admission of the child’s statement was that the trial evidence would establish that McPherson was shot and killed by a semi-automatic handgun, JA1091-JA1092, and this is what the evidence ultimately showed. JA97, JA99, JA1394-

here, if Corbett was not the shooter, he was an aider and abettor under 18 U.S.C. § 2.

JA1395, JA1398-JA1399. There was no evidence at trial that the firearm used to kill McPherson was or would ever be recovered. And witnesses who knew McPherson testified that he did not carry a firearm. JA135, JA190.

Finally, the evidence established that, in attempting to distance himself from the murder, Corbett told the police that he never possessed a firearm. EA11. Evidence that Corbett did, in fact, possess a semi-automatic firearm before and shortly after the murder contradicted his denial and was critically relevant to Corbett's consciousness of his guilt. "Exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974).

In admitting the recorded statement, the court conscientiously weighed its probative value against any undue prejudice it may have carried, and determined that the balance favored admission. JA1211. Because the recorded statement was probative and relevant on several different theories, the admission of the statement by the district court was neither arbitrary, nor capricious, nor was it an abuse of the court's discretion. *See Quinones*, 511 F.3d at 307. The court's decision should be affirmed.

2. The recorded statement was also admissible as “opportunity” evidence under Rule 404(b).

Corbett claims that the recording constituted “improper character evidence” and was inadmissible under Rule 404(b). *See* Def.’s Br. at 56-58. The recording was neither offered by the government nor admitted into evidence by the court as such. Even if Corbett is correct in his argument that the admissibility of the recorded statement is governed by Rule 404(b), the statement was properly admitted under that rule, not to show Corbett’s bad character, but to establish his opportunity to commit the crimes charged.

It is well-established that this Court “reviews 404(b) evidence under an inclusionary approach and allows evidence for any purpose other than to show a defendant’s criminal propensity,” *United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007). One such permissible purpose for which Rule 404(b) expressly provides is “opportunity.”

In *Robinson*, 560 F.2d at 513, this Court, sitting *en banc*, held that evidence that the defendant possessed a weapon at the time of his arrest would be admissible under Rule 404(b) because “it tended to show he had the ‘opportunity’ to

commit the bank robbery, since he had access to an instrument similar to that used to commit it.” *Id.*, 560 F.2d at 513. The Court upheld the admission of the evidence even though “the gun was undistinctive and no evidence linked it to the commission of the crime.” *Id.* at 521 (Oakes, J., dissenting). Similarly, in this case, evidence that Corbett possessed a semi-automatic handgun at the time of the murder consistent with the evidence as to the semi-automatic handgun which was the murder weapon is admissible under Rule 404(b) to show that Corbett, or his accomplice, had the opportunity to kill McPherson with it. As is set forth above, prior to admitting the recorded statement, the court conscientiously weighed any undue prejudice inherent in the challenged evidence and determined that it was outweighed by its probative value. JA1211.

3. Harmless error.

In light of the unchallenged factual findings of the district court, even if this Court determines that the district court abused its discretion in admitting the recorded statement, any such error would be harmless. The remaining evidence in the record – the testimony of Noel Fuller regarding McPherson’s silent abduction, the testimony of Rayshawn Smith about Corbett’s plan to rob a Bronx drug dealer the day of

the murder, the testimony of Craig Frasca regarding Corbett's jailhouse confession to him of Corbett's complicity in a drug robbery and murder, and the extensive forensic evidence linking Corbett's van to the crimes – stands by itself as sufficient to sustain the verdicts returned by the district court on Counts One, Three, Four, Five and Six of the superseding indictment. The court's judgment was therefore not substantially affected by any error with respect to the admission of the recorded statement, since the recorded statement was "unimportant in relation to everything else the [factfinder] considered on the issue in question, as revealed in the record." *United States v. Snype*, 441 F.3d 119, 139 (2d Cir. 2006).

III. The factual determinations of the district court regarding the circumstances of McPherson's abduction and the theft of the marijuana he brought to Corbett were not clearly erroneous.

Corbett makes a circumscribed challenge to the sufficiency of the evidence in this case. He argues that the evidence at trial did not support the district court's findings that (1) McPherson was held against his will after he entered Corbett's van; (2) McPherson was alive when he was

driven away in Corbett's van; and (3) McPherson brought a substantial quantity of marijuana into Corbett's van, which Corbett took against McPherson's will. *See* Def.'s Br. at 45-49. None of these claims has merit.

A. Relevant facts

In its memorandum of decision, the district court made detailed factual findings to support its verdict in twenty-one separate paragraphs, the vast majority of which have not been challenged on appeal. As to the particular claim here, the district court made the following findings: (1) Corbett arranged to purchase 27 pounds of marijuana purchase from McPherson at a price of \$1,000 per pound on January 14, 2008, JA1671; (2) shortly before January 14, Corbett contacted Rayshawn Smith, his friend and co-worker, and told Smith that he planned to rob a Jamaican drug dealer in the Bronx, JA1672; (3) Corbett told Smith that he had previously purchased marijuana from the dealer, that he had been inside the dealer's home on multiple occasions, that he had good dealings with the dealer and was comfortable with him, and that he was going to "flash some money" at the dealer and rob him, JA1672; (4) Corbett attempted to enlist Smith to participate in the robbery, with no success, JA1672; (5) on the morning of the murder,

McPherson left the apartment to obtain marijuana, and returned shortly with a large blue bag containing a substantial amount of marijuana, JA1672-JA1673; (6) at around 10:30 a.m., Corbett called McPherson and asked him to come outside onto Tiemann Avenue to conduct the marijuana transaction, JA1673; (7) upon coming outside, McPherson entered Corbett's van with the large blue bag of marijuana; (8) once he was inside Corbett's van, McPherson was held against his will and driven away in the van by Corbett and an unidentified individual, JA1673; and (9) no one in the vicinity reported hearing gunshots or other loud disturbances at or around the time McPherson entered Corbett's van, and the police found no evidence that gunshots were fired on Tiemann Avenue. JA1673.

These factual findings were based on evidence presented during the trial. For example, Rayshawn Smith testified that in January 2008, Corbett contacted him about Corbett's plan to rob a Jamaican marijuana dealer in the Bronx. JA543-JA545, JA550-JA551.

Noel Fuller testified that, on the evening before the murder, McPherson told Fuller that "his boy's coming down from Connecticut to get some things." JA194. He told Fuller that the antici-

pated transaction was to involve 27 pounds of marijuana. JA247.

Fuller also testified that, on the morning of the murder, McPherson was in possession of a blue plastic bag, JA211, which was “good-sized, not little . . . [a] good sized. Like ten pound. Not a little bag.” JA262. Fuller never saw how much marijuana was in the bag, but it seemed to him to contain “like maybe about ten or such pounds. It’s not 27 pounds. It’s a little package on his shoulder, maybe 10 or 9 pounds he has.” JA249. He stated that, “I never have time to look but I know it’s marijuana. I know marijuana.” JA263.

Finally, Fuller testified that, on the morning of the murder, when McPherson accepted a brief telephone call and prepared to leave his apartment with the bag of marijuana, McPherson told Fuller that “he’s going outside. The guy said he’s not coming inside.” JA211. Fuller was concerned because he had “never seen [McPherson] go outside to do business.” JA212. After McPherson left the apartment, Fuller looked out the window and saw Corbett’s green van parked in front of the apartment. JA212. Less than a minute, or at most four or five minutes later, Fuller looked out again, and the van was gone. JA224, JA265. Although Fuller never saw McPherson enter the van, he stated that he knew “he’s inside the van .

. . . You couldn't do business like that in the open street. You have to go to closed place, you know." JA250, JA221. During this period, Fuller stated that he did not hear gunshots, squealing tires, slamming doors or arguing voices. JA216-17.

Moreover, according to officer testimony, after the murder, the police canvassed the area and looked for shell casings, bullet holes or other evidence of weapons discharge, and found none. JA758, JA867. Similarly, the neighbors and people in the area advised the police that they did not hear gunshots. JA850.

B. Governing law and standard of review.

In reviewing a claim of insufficiency of the evidence, the standard of review is exactly the same regardless whether the verdict was rendered by a jury or by a judge after a bench trial. *See United States v. Mazza-Alaluf*, 621 F.3d 205, 209 (2d Cir.), *cert. denied*, 131 S. Ct. 583 (2010); *see also United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000). This Court engages in *de novo* review where a defendant challenges the sufficiency of the evidence, *see Mazza-Alaluf*, 621 F.3d at 208, and in such a case, the defendant mounting the challenge bears a "heavy burden." *See United States v. Archer*, 671 F.3d 149, 160 (2d Cir. 2011); *United States v. Mercado*, 573

F.3d 138, 140 (2d Cir. 2009). This Court will employ a “clearly erroneous” standard, *see, e.g., Mazza-Alaluf*, 621 F.3d at 208, and will affirm “if ‘after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (“A reviewing court may set aside the [factfinder’s] verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the [factfinder].”).

All permissible inferences must be drawn in the government’s favor. *See Archer*, 671 F.3d at 160; *see also United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011), *petition for cert. filed*, No. 12-531 (2012). “Under this stern standard, a court . . . may not usurp the role of the [factfinder] by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the [factfinder].” *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (internal quotation marks omitted). “[I]t is the task of the [factfinder], not the court, to choose among competing inferences

that can be drawn from the evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *see also United States v. Torres*, 604 F.3d 58, 67 (2d Cir. 2010).

“[T]he law draws no distinction between direct and circumstantial evidence,” and “[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable.” *MacPherson*, 424 F.3d at 190; *see Kozeny*, 667 F.3d at 139. “The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter . . . because it is the task of the [factfinder], not the court, to choose among competing inferences.” *MacPherson*, 424 F.3d at 190 (internal quotation marks omitted). In this regard, the government is not “required to preclude every reasonable hypothesis [that] is consistent with innocence.” *Archer*, 671 F.3d at 160 (quoting *United States v. Chang An-Lo*, 851 F.2d 547, 554 (2d Cir. 2008)).

C. Discussion.

1. McPherson was alive when Corbett’s van left the area, and he was held in the van against his will.

Corbett asserts on appeal that the district court clearly erred in its findings that, once

McPherson entered Corbett's van on the morning of his murder, he was held against his will and that he was alive when Corbett drove him from the scene. He further argues that the court relied on these facts in finding him guilty of Count One (kidnapping resulting in death) and Count Four (Hobbs Act robbery), so that the guilty verdicts on these counts must fail. The trial testimony of Fuller, Smith, and the detectives investigating the murder, together with inferences reasonably drawn from that testimony, decisively support the court's factual findings and its verdicts on Counts One and Four.

“[T]he involuntariness of seizure and detention . . . is the very essence of the crime of kidnapping.” *Chatwin v. United States*, 326 U.S. 455, 464 (1946). “The very nature of the crime of kidnapping requires that the kidnapper use some means of force – actual or threatened, physical or mental – in each elemental stage of the crime, so that the victim is taken, held and transported against his or her will.” *United States v. Macklin*, 671 F.2d 60, 64 (2d Cir. 1982). “[T]he transportation of a victim begins when he or she is willfully moved from the place of [his] abduction.” *United States v. Singh*, 483 F.3d 489, 494 (2d Cir. 2007) (internal quotation marks omitted).

Here, Smith testified that Corbett planned to rob a Jamaican marijuana dealer whom he knew in the Bronx. JA543-JA545, JA550-JA551. Fuller testified that McPherson, a Bronx marijuana dealer known to Corbett, planned to sell Corbett 27 pounds of marijuana on January 14, 2008. JA194, JA247. The court credited this testimony and reasonably concluded that all of McPherson's actions as to the transaction described by Fuller were motivated by his belief that he was meeting Corbett for the sole purpose of selling him a substantial quantity of marijuana. Based on this testimony and the reasonable inferences drawn from it, it was an act of common sense, and far from clear error, for the court to conclude that McPherson had been "inveigled and decoyed," 18 U.S.C. § 1201(a), by Corbett from his apartment and into the van with a substantial amount of marijuana so that Corbett could rob him of it. Given that, on review, all inferences are to be drawn in the government's favor, *see Archer*, 671 F.3d at 160, and that it was for the district court to choose among competing inferences, *see Torres*, 604 F.3d at 67, it can hardly be said that no rational factfinder could have found as the court did. *See United States v. Gaskin*, 364 F.3d 438, 459-60 (2d Cir. 2004).

Since the evidence supported the court's view that Corbett's purpose in luring McPherson into the van was to rob him, another reasonable inference available from the record is that, to the extent McPherson remained in Corbett's van when it left the area, he did so either against his will, understanding at that point that he was to be robbed, or that he remained under the false impression, given to him by Corbett, that he was still in the middle of a marijuana sale. Either way, his continued presence in the van smacked of "the involuntariness of seizure and detention which is the very essence of the crime of kidnapping." *Chatwin*, 326 U.S. at 464.

With respect to the issue of whether McPherson was alive when Corbett's vehicle drove away, there was ample evidence to support this finding. According to the Connecticut Medical Examiner's Office, McPherson was shot to death and died quickly after the fatal wounds were inflicted. JA1675. And, though Fuller was worried about McPherson when McPherson went to meet Corbett, JA212, and focused enough on the situation to look out the window shortly after the van drove away, he heard no gunshots, squealing tires, slamming doors or loud arguments. JA216-JA217. Following the murder, police canvassing the area found no shell casings, bullet

holes or other evidence of gunfire, JA758, JA867, or reports from people in the area that they heard gunshots during the relevant time. JA850.

Corbett asserts that “the only evidence in the record is that Mr. McPherson ‘succumbed immediately’ upon being shot and that the shooting happened while Mr. McPherson was in Mr. Corbett’s van on Tiemann Avenue,” and concludes that the government therefore failed to prove that he was alive and unwillingly seized. *See* Def.’s Br. at 46. In making this argument, he discounts completely the testimony recounted above and relies entirely on one or more of the multiple versions of the murder contained in Corbett’s self-serving and internally contradictory post-arrest statement. EA3-EA12, EA17-EA19. But the court, as the factfinder, is entitled to make credibility findings and determine what weight to give particular evidence. *See United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974) (stating that the task of a judge at a criminal bench trial is “to determine credibility, weigh the evidence, and draw justifiable inferences of fact.”).

Moreover, although certain portions of Corbett’s statement were consistent with other evidence (Corbett had McPherson bringing a large bag of marijuana to his van, and entering the

van under the impression that he was about to conduct a drug transaction with Corbett, EA6, EA18), some portions were not. For example, Corbett explained in his oral statement that, after McPherson entered the van, Corbett entered as well, and that McPherson was sitting in the middle row on the driver's side, with Corbett sitting to McPherson's right on the passenger side. He claimed that an unknown assailant approached the van from the driver's side, to McPherson's left, and fired into the van, hitting McPherson. EA6, EA20. The medical examiner testified, however, that the fatal bullets entered McPherson's back, not from his left side, which would have been toward the driver's side of the van, but from his right side, where Corbett was sitting. JA92-JA96. In total, Corbett offered three different versions of the shooting. EA6-EA7, EA8-EA9, EA19. As a result, the court properly concluded that "Corbett's statements concerning the claimed shootout" were not credible. SPA23, n.7.

"[W]hen a trial judge's finding is based on his decision to credit the testimony of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear

error.” *MacDraw, Inc. v. The CIT Group Equipment Financing*, 157 F.3d 956, 962 (2d Cir. 1998) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). Corbett’s statement was neither coherent nor facially plausible; the testimony of Fuller, Smith and the detectives was both, and was neither internally inconsistent nor contradicted by extrinsic evidence. The findings of the district court were not clearly erroneous, and should be affirmed.

2. McPherson brought a substantial quantity of marijuana into Corbett’s van which Corbett took against McPherson’s will.

Corbett claims that there was no evidence that he obtained a bag containing a substantial quantity of marijuana from McPherson. He further argues that the court relied on this disputed fact in finding him guilty of Counts Three (felony murder), Four (Hobbs Act robbery), Five (possession with intent to distribute marijuana) and Six (using a firearm in relation to a drug trafficking crime). His argument ignores the trial testimony described above. Smith testified that Corbett planned to rob a Jamaican marijuana dealer in the Bronx on January 14. JA543-JA545, JA550-JA551. Fuller testified that McPherson believed he was to conduct a 27-pound marijuana trans-

action with Corbett, JA247, made attempts to obtain this quantity of marijuana shortly before the transaction and carried into Corbett's van a large blue bag containing approximately 10 pounds of marijuana. JA249. Corbett himself admitted in his post-arrest statement that McPherson brought into his vehicle a "black duffle bag" containing a quantity of marijuana, if "a lot less . . . than 25 pounds." EA6. And, though there was no bag of marijuana recovered after the murder, Delores Flood testified that, when Corbett visited her some days after the murder, he arrived with a black duffle bag. JA392. Accordingly, the government established that McPherson met with Corbett in front of his apartment to sell Corbett marijuana, brought into Corbett's vehicle a bag containing several pounds of marijuana and was robbed of that bag by Corbett and his accomplice.

Corbett relies on the fact that Fuller made statements to the police shortly after the murder which conflicted with his trial testimony as to whether McPherson carried a bag of marijuana out to Corbett. *See* Def.'s Br. at 47. But Fuller's trial testimony was unequivocal, and the district court, having heard this testimony and observed Fuller's demeanor, properly credited that testimony.

Corbett also cites to his written, post-arrest statement, in which he “confirms that he never saw what was in the bag that Mr. McPherson brought into the van, nor did he ever maintain any control over that bag.” Def.’s Br. at 48. But Corbett made several conflicting post-arrest statements. In one of three versions of the shooting, he claimed an unknown assailant who shot McPherson also took the “bag of weed,” EA8, but he omitted this detail from his other two versions of the shooting. EA3-EA12, EA17-EA19. In the end, the district court discredited these statements and instead credited the testimony by Smith and Fuller, which, taken together, described a plan by Corbett to rob McPherson of a significant quantity of marijuana. Despite the fact the police never actually recovered McPherson’s marijuana, there was ample evidence to support the district court’s reasonable inference that Corbett and an accomplice met with McPherson on January 14, 2008, lured him into their car, robbed him of a substantial quantity of marijuana and shot him to death.

IV. The mandatory life sentence imposed under 18 U.S.C. § 1201(a)(1) is constitutional.

Finally, Corbett challenges the constitutionality of the life sentence imposed on him by the

district court pursuant to 18 U.S.C. § 1201(a)(1). First, he claims that, because a life sentence was effectively mandatory, given the court's finding of guilt under the statute and the Government's decision not to seek the death penalty, the statute violates the due process clause of the Fifth Amendment and the Eighth Amendment in that it fails to allow for an individualized sentencing determination. *See* Def.'s Br. at 49-52.⁸ Second, Corbett asserts that, in promulgating the penalty section of the statute, Congress has usurped the sentencing power of federal judges, in violation of the doctrine of separation of powers. *See id.* at 52-54. Because both prongs of Corbett's at-

⁸ Although Corbett cites the Fifth Amendment in his argument, the thrust of his claim seems to be that the statute is unconstitutional because it removes the district court's ability to engage in an individualized sentencing assessment which is analyzed by the Supreme Court as an Eighth Amendment claim. *See Harmelin v. Michigan*, 508 U.S. 957 (1991). To the extent that the government has misread his claim and he is articulating a separate argument under the Fifth Amendment, it fails because the Supreme Court has held that mandatory minimum sentences do not violate due process and that Congress may limit a court's authority at sentencing by enacting statutes with mandatory minimum penalties. *See Chapman v. United States*, 550 U.S. 453, 467 (1991).

tack on the statute are effectively considered and precluded under applicable and binding caselaw, his claim must fail.

A. Relevant facts and proceedings

Sentencing occurred on August 30, 2011. In reciting the penalty applicable to Count One, the court indicated that Corbett faced a mandatory sentence of life imprisonment. JA1633. The presentence investigation report (“PSR”) likewise recited that the guideline and statutorily mandated sentence for Count One was life in prison. PSR ¶ 62.

Defense counsel objected to the mandatory life sentence for Count One and argued that it violated the Fifth Amendment, the Eighth Amendment and the separation of powers doctrine because Congress had usurped the court’s power to conduct an individualized sentencing. JA1631, JA1639. The court specifically and conscientiously rejected each of the arguments raised by the defense in this regard. JA1644-JA1646.

As to the Fifth Amendment challenge, the court relied on *Chapman v. United States*, 500 U.S. 453 (1991), which held that “Congress has the power to define criminal punishments without giving the courts any sentencing discretion.”

JA1644. As to the Eighth Amendment challenge, the court, citing *Rummel v. Estelle*, 445 U.S. 263 (1980), held that, “[e]ither as a principal or aider or abettor, Corbett knowingly and intentionally shot and killed McPherson through the use of a firearm after kidnapping and robbing him,” and that “[a] mandatory term of life imprisonment is not grossly disproportionate to such a crime.” JA1645. As to the separation of powers argument, the court relied on case law from this Circuit to conclude that the mandatory sentence provided for under 18 U.S.C. § 1201(a) does not conflict with the provisions of 18 U.S.C. § 3553(a) because “that very general statute cannot be understood to authorize courts to sentence below minimums specifically prescribed by Congress.” JA1645.

B. Discussion.

1. The Eighth Amendment challenge

Corbett’s Eighth Amendment challenge to his sentence fails under binding Supreme Court precedent. In *Harmelin v. Michigan*, 501 U.S. 957, 994-995 (1991), the Court ruled that a defendant’s mandatory sentence of life in prison without parole, despite being imposed without any consideration of mitigating factors, did not constitute a violation of the Eighth Amendment.

In the plurality opinion, the Court stated that “the Eighth Amendment does not require strict proportionality between crime and sentence.” *Id.* at 1001. Rather, “it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.* Citing the “qualitative difference” between death and all other sentences, the Court rejected the defendant’s contention that the Eighth Amendment requires a sentencing scheme “whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencing court may impose after hearing evidence in mitigation and aggravation.” *Id.* at 994-995. The Court stated that, although mandatory penalties may be cruel, they are not unusual “in the constitutional sense.” *Id.* at 994. The Court explained, “There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is ‘mandatory.’” *Id.* at 995.

The defendant in *Harmelin* challenged his life sentence on grounds similar to those Corbett has raised. Corbett argues that the “constitutional imperative” of individualized sentencing “should be extended to sentences of life in prison with no possibility of release.” Def.’s Br. at 51. In *Harmelin*, the defendant claimed that his life sen-

tence violated the Eighth Amendment because the sentencing judge was required to impose it “without taking into account the particularized circumstances of the crime and of the criminal.” *Id.* at 961-962. But the Court rejected that challenge. *See id.* at 994-997.

Corbett’s contention that “standards of decency” have evolved to require overturning *Harmelin* and declaring life-without-parole sentences unconstitutional is countered by the Court’s present-day jurisprudence. *See* Def.’s Brief at 52. In *Miller v. Alabama*, 132 S. Ct. 2455, 2459 (2012), the Court recently stated that its decision to bar the imposition of mandatory life sentences on juvenile defendants did not overrule *Harmelin*. The Court referred to such an argument as “myopic” and stated, “since *Harmelin*, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children.” *Id.*

Moreover, in *Harmelin*, the defendant, a first-time offender, was convicted of possessing 672.5 grams of cocaine and was sentenced to a mandatory term of life in prison without the possibility of parole under Michigan state law for a crime that would have called for a term of barely ten years under the Sentencing Guidelines. *Id.* at 1008, 1011, 1026. Corbett, however, was convict-

ed of, *inter alia*, kidnapping resulting in death and felony murder through the use of a firearm. Given that the Supreme Court has affirmed the constitutionality of a mandatory life sentence for a first time offender in a drug case, Corbett's sentence certainly does not fit into the category of "extreme examples that no rational person, in no time or place, could accept." *Id.*, 501 U.S. at 985. Corbett was a repeat offender with prior convictions for drug sale, assault on a police officer, and attempted murder, JA1647, who was being sentenced for murder.

This Court is bound by the decision in *Harmelin*, and, therefore, Corbett's Eighth Amendment claim must fail.

2. The separation of powers challenge.

Corbett claims that, "in completely removing a sentencing judge's discretion, Congress has unconstitutionally usurped the sentencing power of federal judges." Def.'s Br. at 53. He maintains that "[b]y enacting 18 U.S.C. § 1201, Congress has supplanted the judiciary and taken over the role of sentencing judge." *Id.* The Supreme Court has rejected this claim, however, and has explicitly stated that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991). Indeed,

in *Harmelin*, the Court strongly rejected the notion that a sentence’s mandatory nature renders it unconstitutional, stating that “arguments for and against particular sentencing schemes are for legislatures to resolve.” *Id.*, 501 U.S. at 1007.

This Court has likewise rejected similar arguments in the context of mandatory sentencing. For example, in *United States v. Gonzalez*, 682 F.3d 201 (2d Cir.), *cert. denied*, 2012 WL 4373293 (2012), the Court held that the three strikes provision of 18 U.S.C. § 3559(c)(1) did not violate the separation of powers doctrine because, “[w]hile the three branches of government must remain entirely free from the control of coercive influence, direct or indirect, of either of the others, . . . a degree of overlapping responsibility and a duty of interdependence is both expected and necessary.” *Id.* at 204 (internal quotation marks and brackets omitted). And in *United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008), the Court rejected a similar challenge to the second offender enhancement in 21 U.S.C. § 851, stating that “[h]istorically, federal sentencing – the function of determining the scope and extent of punishment – never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government.” *Id.* at 670.

The same reasoning applies here. Corbett’s mandatory life sentence does not result from any “coercive influence” of Congress over the judiciary branch and, therefore, does not violate the separation of powers doctrine.⁹

⁹ It bears note that the district court imposed a non-mandatory sentence of life on Count Three, and the defendant does not challenge that sentence, so that any alleged constitutional infirmity as to the sentence on Count One did not impact the court’s overall sentence. *Cf. Quinones*, 511 F.3d at 323 (refusing to grant *Crosby* remand on several counts of conviction because defendants faced a valid life sentence on a separate count).

Conclusion

For the foregoing reasons, the Court should affirm the judgment of conviction.

Dated: November 13, 2012

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, somewhat stylized font.

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 15,450 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification. On November 9, 2012, the government filed a motion for leave to submit an oversized brief of 15,500 words, and that motion is pending with the Court.

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, flowing style.

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