No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Carlos Caro, Petitioner,

vs.

United States of America, Respondent.

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

CAPITAL CASE

"At the heart of this collateral challenge to a capital sentence is a single question: should the jury have been allowed to hear the truth about how Carlos David Caro could be incarcerated before deciding if he was too dangerous to remain alive?" *United States v. Caro*, 733 Fed. Appx. 651, 663 (4th Cir. 2018) (unpublished) (Gregory, C.J., dissenting in part).

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****CAPITAL CASE****

QUESTIONS PRESENTED FOR REVIEW

The key sentencing determination for a federal prison murder was whether Carlos Caro would be dangerous in the future if not sentenced to death, a determination this Court has held requires accuracy and reliability. *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994). The district court denied Caro's pretrial request for actual BOP data that would demonstrate median lengths of stays at ADX Florence, Colorado, where dangerous inmates are held before being "stepped down" to less secure institutions. Sentencing was reduced to a battle of dueling experts who provided only anecdotal evidence, a retired warden opining Caro could only be held at ADX Florence for three years, which testimony the Government seized upon in asking the jury to impose a sentence of death. A defense risk assessment expert testified that many ADX Florence inmates have been held in excess of five years and some, much longer. The questions presented:

> Whether the Fourth Circuit erred in ruling Caro was procedurally barred from raising a § 2255 claim that the Government's suppression of available exculpatory BOP data on lengths and conditions of confinement at ADX Florence violated *Brady,* where Caro raised on direct appeal claims that the trial court violated his right to disclosure of the BOP data under Rules 16 and 17 of the Federal Rules of Criminal Procedure but he could only speculate that the BOP data still suppressed by the Government was sufficiently material to violate *Brady*; and,
>
> Whether the Fourth Circuit erred in finding Caro could not meet the favorability and materiality prongs of *Brady* where mere fragments of data Caro unearthed in unrelated civil litigation and from other non-BOP sources in the § 2255 proceedings, which the Government concedes were favorable to Caro, showed that, at the time of Caro's trial, 63 inmates at ADX Florence had served longer than five years, 25 served longer than ten years, and one served 27 years without being "stepped down" to a less secure institution.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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The Fourth Circuit affirmed Carlos Caro's conviction for murder and imposition of the death penalty on direct appeal on March 17, 2010. Opinion, *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) (Appendix A). The United States District Court for the Western District of Virginia denied the Defendant's Motion for Collateral Relief Pursuant to 28 U.S.C. § 2255. Opinion, *United States v. Caro*, U.S.D.C. No. 1:06CR00001 (May 4, 2015) (Appendix B). In the judgment that constitutes the basis of the present Petition for Writ of Certiorari, the Fourth Circuit affirmed the denial of § 2255 relief on May 8, 2018. Opinion, *United States v. Caro*, 733 Fed. Appx. 651 (2018) (unpublished) (Appendix C). The Fourth Circuit denied rehearing and rehearing *en banc* in an Order of July 6, 2018. Order, *United States v. Caro*, Fourth Cir. No. 16-1, Doc. 84 (Jul. 6, 2018) (Appendix D).

STATEMENT OF JURISDICTION

Carlos Caro was convicted of murder by a jury in the United States District Court for the Western District of Virginia and sentenced to death. After his conviction and death sentence were affirmed on direct appeal, *see United States v. Caro,* 597 F.3d 608 (4th Cir. 2010) (Appx. A), he petitioned for federal collateral relief pursuant to 28 U.S.C. § 2255. The district court filed an Opinion in which it denied relief without an evidentiary hearing, Appx. B, but concurrently with that Opinion filed a Certificate of Appealability as to Claim Seven in the § 2255 motion. *United States v. Caro*, U.S.D.C. No. 1:06CR00001, Doc. 810 (May 4, 2015). The Fourth Circuit affirmed the denial of relief on Claim Seven on May 8, 2018, *see United States v. Caro*, 733 Fed. Appx. 651 (4th Cir. 2018), and denied rehearing on July 6, 2018. Order, *United States v. Caro*, Fourth Cir. No. 16-1, Doc. 84. On September 27, 2018, this Court granted Caro's request for extension of time of 46 days, to and including November 19, 2018, in which to file the Petition for Writ of

Certiorari. *Caro v. United States*, U.S.S.Ct. No. 18A322. This Court's jurisdiction over the Petition for Writ of Certiorari lies pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law * * *

28 U.S.C. § 2255

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records conclusively show that the petitioner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto * * *

STATEMENT OF THE CASE

A. Procedural History.

On January 3, 2006, a grand jury indicted Carlos Caro for the deliberate, willful, malicious and premeditated murder of inmate Roberto Sandoval, his cellmate at USP-Lee on December 17, 2003. Joint Appendix ("JA") 1.[1] The jury returned a verdict on February 1, 2007, in which it found Caro guilty of premeditated murder. *See* Tr., Feb. 1, 2007, at 68.

[1] JA references are to the Joint Appendix filed in the § 2255 appeal, Fourth Circuit No. 16-1, Docs. 32-1 through 32-5.

The eligibility phase of the bifurcated capital sentencing hearing took place on February 5, 2007. JA 151 *et seq.* The parties stipulated to Caro's prior federal criminal history. JA 163. Pursuant to the Federal Death Penalty Act, the jury found that Caro was 18 years old or older and that he had killed Sandoval intentionally. JA 186. The jury further found two statutory aggravating factors under 18 U.S.C. § 3592 (10), (12): 1) Caro had one conviction for a drug offense for which he could have received a sentence of five years in prison; and 2) Caro had two convictions for drug possession for which he could have received more than one year in prison. JA 186-87.

On February 13, 2007, the jury returned a special verdict in which it sentenced Caro to death. JA 1009 (transcript); JA 880 (special verdict). On March 30, 2007, the court formally sentenced Caro to death. JA 1017.

On March 17, 2010, this Court affirmed the conviction and death sentence on direct appeal, over the partial dissent of then-Circuit Judge Roger Gregory. *See United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) (Appx. A-19-26). The Court denied a Petition for Rehearing and Rehearing *En Banc* on September 7, 2010. *United States v. Caro*, Fourth Cir. No. 7-5, Dkt. 152. On January 10, 2011, Caro filed a Petition for Writ of Certiorari, *Caro v. United States*, U.S.S.Ct. No. 10-8356, which was denied on January 9, 2012.

On January 8, 2013, Caro filed under seal a timely Defendant's Motion for Collateral Relief Pursuant to 28 U.S.C. § 2255. *See United States v. Caro*, W.D.Va. No. 1:06CR00001-JPJ, Dkt. 781 (future trial court citations to items not included in the Joint Appendix are to "Dist. Ct." and docket number). On March 22, 2013, the court ordered the redacted § 2255 Motion filed, Dist. Ct. Dkt. 789, and Caro filed the § 2255 Motion. JA 1020. On June 11, 2013, the Government filed the United States' Motion to Dismiss in Response to Petitioner's Motion for Relief Pursuant to Title 28, United States Code, Section 2255. JA 1347. ("Motion to Dismiss"). The court granted

the Motion to Dismiss in an Opinion of May 4, 2015, JA 1889, and issued a separate Certificate of Appealability ("COA") as to Claim Seven. JA 1984.

Caro filed a timely "Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure Rule 59(e)" on June 1, 2015. JA 1985. The district court denied the Rule 59(e) motion in an Opinion and Order of November 6, 2015. JA 2015. Caro filed a timely Notice of Appeal on January 4, 2016. JA 2019.

On May 8, 2018, a panel majority of the Fourth Circuit affirmed the denial of § 2255 relief, over Chief Judge Gregory's dissent. *See United States v. Caro*, 733 Fed. Appx. 651 (4th Cir. 2018) (Appx. C). On July 6, 2018, the Fourth Circuit denied panel and *en banc* rehearing. Appx. D.

On September 27, 2018, this Court granted Caro's request for extension of time to and including November 19, 2018. *See* Letter, U.S.S.Ct. No. 18A322 (Sept. 27, 2018).

B. Statement of Relevant Facts.

On direct appeal, the Fourth Circuit found that at about 6:40 p.m. on December 17, 2003, a prison guard discovered inmate Roberto Sandoval strangled to death inside his cell in the Special Housing Unit at United States Penitentiary Lee in Jonesville, Virginia. He lay dead with a towel knotted around his neck. His cellmate Caro had been the only other person inside the locked cell. Caro explained that "[Sandoval] called me mother fucker, that whore, that's why I fucked him up." Appx. A-1. Another inmate testified to seeing Caro standing behind Sandoval and apparently choking him. *Id.* at 2. The jury returned a verdict of guilty to premeditated murder on February 1, 2007. *See* Tr., Feb. 1, 2007, at 68.

1. Eligibility Phase of Capital Sentencing.

The eligibility phase of the bifurcated capital sentencing hearing took place on February 5, 2007. JA 151 *et seq.* The parties stipulated to Caro's prior federal criminal history. JA 163.

Pursuant to the Federal Death Penalty Statute, 18 U.S.C. § 3592 (10), (12), the jury found that Caro was 18 years old or older and that he had killed Sandoval intentionally, and further found two statutory aggravating factors: 1) Caro had one conviction for a drug offense for which he could have received a sentence of five years in prison; and 2) Caro had two convictions for drug possession for which he could have received more than one year in prison. JA 186-87. As the Fourth Circuit panel majority conceded, the convictions were for "nonviolent drug offenses." Appx. A at 9, for which Caro had been sentenced to 30 years in prison. Appx. A at 2.

2. Selection Phase of Capital Sentencing

On January 11, 2006, the Government filed a Notice of Intent to Seek the Death Penalty. JA 4. The Notice indicated that the Government would introduce evidence of non-statutory aggravating circumstances to show Caro's future dangerousness, including that he attempted to murder another USP-Lee inmate, Ricardo Benavidez, by stabbing him August 29, 2003; a July 11, 2002, gang-based assault on inmates at a federal prison in Oakdale, Louisiana; and, evidence concerning the security of BOP facilities to which Caro would be sent were the jury to not sentence him to death. JA 5-6.

a. Defense Requests for Discovery and *Brady* Material.

Prior to trial, Caro sought records relative to the security of BOP facilities and the length of time the BOP could hold him in the supermax prison in Florence, Colorado, ADX Florence, to lessen the impact of his criminal history in the future dangerousness calculus. Caro filed motions for discovery and to serve subpoenas on the BOP's director and the warden of ADX Florence pursuant to Federal Rules of Criminal Procedure 16(a)(1)(E) and 17(c), respectively. Appx. A-6. Caro filed a Motion for Exculpatory Evidence pursuant to *Brady*, JA 8, and a later Motion for Exculpatory Evidence Related to Penalty Phase Information, in which he detailed in thirteen

distinct paragraphs the specific BOP records sought. JA 15, 19-20. In support of the latter motion, Caro filed the Declaration and Affidavit of Mark Cunningham, Ph.D., a risk assessment expert, in which he explained that "[v]iolence risk assessment, a particular area of research and knowledge within psychology, also fundamentally relies on the accumulation of group data that are often applied to a given individual." JA 24, 29 ¶ 15. Such risk is "always a function of context," to wit, that it is "a function of the conditions of incarceration." JA 33 ¶ 21. In capital sentencing, where the Government asserts that a defendant will commit acts of violence if not sentenced to death there exists the "corollary that the Federal Bureau of Prisons is unable to safely contain this defendant, and thus a penalty of death is a reasonable preventive measure." JA 33 ¶ 22. "Informing the jury of the capabilities of BOP to bring higher levels of security to bear would appear to be the only evidence that might respond to this implicit corollary assertion regarding a particular inmate." *Id.*

At a hearing on November 3, 2006, defense counsel indicated that Dr. Cunningham requested the additional BOP records, including those pertaining to "group data" that are the subject of the *Brady* claim at issue here. *See* Tr., Nov. 3, 2006, at 10, 15. The Government stated that it would produce at sentencing BOP data on the average length of stay for an inmate at ADX Florence and its expert would testify that "unless there's someone like Moussaoui or the FBI agent who sold secrets to the Soviets, you don't stay there forever." *Id.* at 29. With regard to the Government's argument that the production would be burdensome, the magistrate judge indicated that the BOP lawyer involved in that day's proceedings stated she did not know whether the data requested by Caro existed. *Id.* at 37, 45.

In a Memorandum Opinion of November 8, 2006, JA 56-58, and in its Order of the same date, JA 62-63, the magistrate judge ordered the production of nine of Caro's requests for inmate

and incident information for ADX Florence and the BOP presented in the Motion for Exculpatory Evidence Related to Penalty Phase Information. The order included production of records on median lengths of stay since ADX Florence opened in 1994 and "[d]ata showing how many inmates who were admitted to Florence ADMAX in 1994 or 1995 continue to be confined there." JA 56-57.

The Government objected to the magistrate judge's order. JA 65. The district court reversed the magistrate judge's order for the Government to produce the BOP *Brady* material on the basis that Caro merely hoped it would support Dr. Cunningham's opinion but the court saw no indication that it would and, therefore, the requested BOP evidence was not material. The court also ruled that the information requested was not material to Caro's defense, as required by Rule 16(a)(1)(E)(ii), and, therefore, denied discovery of the information. JA 149-50. The court further ruled that a subpoena *duces tecum* cannot substitute for the limited discovery allowed in a federal criminal case and denied the Rule 17(c) request for subpoenas. JA 150.

b. Non-statutory Future Dangerousness Evidence at the Selection Phase.

The Government produced two witnesses to describe an assault on USP-Lee inmate Ricardo Benavidez on August 29, 2003. USP-Lee recreation specialist Kevin Dye witnessed Caro and other inmates stab Benavidez at a prison movie. JA 381-83, 386. Officer David Mrad, a USP-Lee intelligence officer, testified that a prison video showed Caro and Juan Moreno-Marquez stabbing Benavidez, that Benavidez was stabbed 29 times, and that each placed a shank, described as having been fashioned from plexiglass, in the vicinity of the rec room TV. JA 397. Caro, Moreno-Marquez and Benavidez were members of the Texas Syndicate. JA 398. The parties stipulated that Caro was convicted of conspiracy to commit murder in the Benavidez case and was sentenced to 327 months in prison. JA 255-56.

Operations Lieutenant John Blaze at FCI-Oakdale, Louisiana, testified to an incident on July 11, 2002, in which Caro and other Texas Syndicate members assaulted incoming inmates who were members of another gang. JA 302. Security officer John Gordon testified that, several weeks prior to the arrival of the other gang members at Oakdale, he spoke with Caro, who had identified himself as the head of the Texas Syndicate at Oakdale, in order to maintain calm when the new inmates arrived. JA 318. Gordon testified that Caro stated that the Texas Syndicate would "do what it had to do" when the new gang members arrived, and, afterward, Caro stated that he did not care if he were prosecuted because "I have 30 years to do." JA 321.

c. Caro's Defense Against Future Dangerousness in Mitigation.

James Aiken, a prison security consultant who spent a career as a corrections official in South Carolina and Indiana, testified that ADX Florence has the ability to control Caro for the rest of his life. JA 448. Aiken testified that he reviewed Caro's criminal history and visited ADX Florence in anticipation of his testimony. JA 437. He testified that a "security envelope" exists to monitor all of an inmate's behavior and communication in order to eliminate dangerous communications. JA 443.

Dr. Cunningham testified to his experience as a clinical and forensic psychologist and sentencing consultant with 29 years of experience in assessing prison security and violence. JA 663. He reviewed files on Caro prepared by the BOP or the Government with respect to the incident at Oakdale in 2002, the Benavidez stabbing, and the Sandoval murder. JA 681-82. He described Caro's having been single-celled since Sandoval's death at USP-Lee, ADX Florence, and the Lee County Jail while awaiting trial, and levels of security within BOP facilities. JA 682. He described BOP's capacity for moving inmates to a more secure housing unit or single cell, or to ADX Florence as placements offering greater security for inmates for whom treatment,

discipline or greater security within another institution is not sufficient to control a violent inmate. JA 683-84. He described the ADX Florence as the most secure prison within the BOP system. JA 685. Within it he described a "control unit" as a prison-within-the-prison, a unit that holds inmates who have committed "particularly serious acts of violence" in the BOP who "may require longer term placement in a highly restricted status." JA 685.

Dr. Cunningham testified that BOP records show that Caro has never tried to escape and has never assaulted correctional officers or staff. JA 698. Mr. Aiken testified that in ADX Florence's history, only two murders have occurred, and those occurred during use of a now-discontinued reintegration program that allowed contact between inmates prior to their transfers to less secure facilities. JA 428-29. That low number is despite the fact to which Dr. Cunningham testified that 32% of the 490 inmates housed at ADX Florence have killed another inmate in prison. JA 699. In the other 18 U.S. Penitentiaries, there are between three and six murders per year in an inmate population of 25,000. JA 699.

Dr. Cunningham testified that he had only "limited information on average length of stay at ADX." JA 700. He requested from the BOP and DOJ "specific statistical information on length of stay at ADX, and range of stay in the facility as a whole, and also on the control unit, and [has] not been provided that." JA 700. During a recent tour of ADX Florence, a senior official told him the average stay by an inmate was five years before being moved to another facility as part of a "step-down" program that prepares inmates for release. JA 701. The official said five inmates had been at ADX Florence for 12 years since the prison opened in 1994. Dr. Cunningham described a 2005 murder of an inmate in general population by two other inmates, one of only two murders to have ever occurred at ADX Florence, as having occurred in a recreation yard that allowed 12 inmates to exercise at a time, but the policy was changed so that now general population

inmates do not exercise alone. JA 706. Dr. Cunningham described Special Administrative Measures ("SAMs") that may be applied to eliminate contact visits and all inmate communications, if necessary for security, except for those with counsel of record. JA 720. He described the security built into the physical plant and practices to curtail access to metal and Plexiglass from which weapons may be fashioned. JA 725-30.

On cross-examination, Dr. Cunningham acknowledged that there was a high risk that Caro would commit acts of violence if left at large in a U.S. penitentiary and the risk could last five to ten years, but that risk can be minimized with appropriate placement within the BOP. JA 763-64. While Dr. Cunningham agreed that another life sentence would not deter Caro, he did believe that the security that attaches to that life sentence could go a long way toward preventing him from committing another violent crime. JA 775.

During cross-examination, JA 792, Dr. Cunningham testified he was denied BOP data concerning the rates of violence, placements, lengths of stay, security levels, and disciplinary records of 47 inmates of those who killed while in BOP custody, whom he listed in his second affidavit filed in the court, JA 137-38. In response to the Government's questions about prison killings committed by inmates Bruce Pierce and David Fleming, Dr. Cunningham again testified that data concerning the inmates was not disclosed to him. JA 793-95. When asked to concede that few of the 47 inmates who committed homicides in BOP facilities actually did so at ADX Florence, and that they killed while being held in less secure BOP facilities, Dr. Cunningham again testified he was not provided the requested data and could not comprehend why the DOJ would balk at providing information that "could best illuminate these proceedings." JA 797.

In rebuttal, the Government called Gregory Hershberger, who retired from the BOP after 26 years as a warden, including at ADX Florence, and as a financial officer. JA 824. He testified

that inmates are not permanently assigned to ADX Florence and it is anticipated that they will return to "an open population." JA 835. He testified that the policy at ADX Florence is to work inmates through a program for a minimum of three years before dispersing them to other institutions. JA 837-38. Mr. Hershberger testified that the "step-down" program contemplates 12 months in general population, 12 months in immediate, and 12 months in transition before being placed outside the ADX at a pre-transfer unit before release to another USP. JA 842. Mr. Hershberger testified that, like general population, the purpose of the control unit is to return inmates to "an open population institution." JA 843. Mr. Hershberger testified that BOP could not guarantee that Caro could not communicate with associates outside the prison, either directly or through proxies, including by sending coded messages. JA 851.

d. Closing Argument and Verdict.

The Government focused its argument on Caro's history and future dangerousness. JA 909 *et seq.* The Government argued that BOP cannot control Caro because all prior efforts have failed; even if he is sentenced to the Control Unit or General Population at ADX Florence, he will be stepped-down to another prison; his stay at ADX Florence, according to Warden Hershberger, would be three years; and "we know . . . he's not going to stay there." JA 923-24. The Government argued again in rebuttal that the warden testified that Caro would leave ADX Florence in three years. JA 979.

The jury returned a special verdict in which it sentenced Caro to death. JA 1009 (transcript); JA 880 (special verdict).

3. Direct Appeal Claims Related to Suppression of BOP Evidence.

In his direct appeal brief, Caro claimed the trial court erred in denying him access to the BOP data pursuant to Rules 16(a)(1)(E) and 17(c) of the Federal Rules of Criminal Procedure.

United States v. Caro, Fourth Cir. No. 7-5, Doc. at 66. Within the context of the Rule 16 argument, Caro asserted the following in a footnote:

> Because Rule 16 and *Brady* both require the disclosure of exculpatory evidence, this claim also alleges a violation of *Brady*'s constitutional commands. To the extent that the Court finds that the non-disclosure error does not warrant reversal of the death sentence, Appellant requests a remand for a hearing to determine whether the information requested from BOP was *Brady* material.

Id. n. 45.

Caro failed to set forth this Court's three-part test for a *Brady* violation, *see Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), or a circuit analog such as *Monroe v. Angelone*, 323 F.3d 286, 299-300 (4th Cir. 2003). At no point in the Fourth Circuit briefing did Caro suggest he possessed any evidence with which to support a claim of *Brady* favorability or materiality. In addition, the second sentence in Footnote 45 asked the Fourth Circuit to remand to the trial court "to determine whether the information requested from BOP was *Brady* material," as Caro had requested earlier in the district court. Again, the BOP data was critical to Dr. Cunningham's risk assessment calculation and whether Caro could be held for a substantial period in the secure environment of ADX Florence, which would impeach Warden Hershberger's testimony and undermine the Government's argument that Caro's future dangerousness was the primary basis for the jury to impose a sentence of death.

Nonetheless, the Fourth Circuit treated Footnote 45 as if it raised a *Brady* claim. *See* Appx. A-8-9. The court affirmed the district court's denial of the production of BOP data, ruling that "[b]ecause Caro can only speculate as to what the requested information might reveal, he cannot satisfy *Brady's* requirement of showing that the requested evidence would be 'favorable to the accused.'". *See* Appx. A-8 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

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4. The *Brady* Claim in the § 2255 Motion.

The "speculation" caused by the Government's suppression ended, at least in part, when the matter reached the § 2255 proceedings. Caro attached to the § 2255 Motion an affidavit from Jeanne Dvorak of a New Mexico law firm who, in November 2010, sent a survey questionnaire that reached 129 of the 470 inmates then housed at ADX Florence seeking information about the number of consecutive years each inmate had been housed there or housed in combination at ADX Florence and its predecessor, USP-Marion, Illinois. JA 1338. Of these 129 questionnaires sent to ADX Florence, 14 were returned unanswered, indicating that these prisoners were under SAMs and, thus, BOP had limited their correspondence such that they could not respond to the survey, and 69 were completed and returned. Of these 69 inmates, 43 claimed they had been in ADX-Florence, which opened in 1994, or ADX-Florence and USP-Marion, for eight or more consecutive years. Indeed, 22 of these inmates had been at ADX-Florence/USP-Marion for over 13 years. JA 1331-34.

Applying this data to 2007 when Warden Hershberger testified in aggravation and the Government was claiming that BOP policies prevented it from housing Caro at ADX Florence for more than three years, at least 43 inmates currently housed at ADX Florence had been at ADX Florence or ADX Florence/USP-Marion for more than five years. The longest stay, as of the date of Caro's trial, was 27 years, JA 1342, and 22 inmates had been there for at least 10 or more years. Former BOP official Mark Bezy who retired in 2006, averred explicitly that he disagreed with Warden Hershberger's prediction that inmates would not be held at ADX Florence more than three to five years, recalling three inmates who had been held in USP-Marion and ADX Florence for more than 18 years. JA 1220 ¶ 4. He averred inmates could be held indefinitely for security reasons. JA 1225 ¶ 28.

In response to the Government's Motion to Dismiss, FPD Investigator Susan Richardson began with Ms. Dvorak's earlier survey questionnaires and compiled additional data from subpoenas issued in a lawsuit involving the BOP in New York, a FOIA request, the BOP inmate locator website, the website of Federal Death Penalty Resource Counsel, PACER, and internet searches for inmates, to support the *Brady* claim in the § 2255 Motion. JA 1750 ¶ 3. She acknowledged that her research was "incomplete and under-represented the total number of inmates who have been designated to ADX Florence for more than three years" and failed to account for inmates who were held in the Control Unit at USP-Marion prior to the opening of ADX Florence. JA 1751 ¶¶ 5, 6.

Nevertheless, Ms. Richardson concluded that at least 126 inmates had been held at ADX Florence for more than five years and 155 inmates had been held there for more than three years. JA 1751-52 ¶ 7. As her tables show, at the time of Caro's trial, 25 inmates had been held there for more than ten years, 63 for more than five years, and 79 for more than three years. JA 1752 ¶ 8; JA 1754-60. Of the 54 inmates held at ADX Florence in 2007 for murders committed within a BOP facility, JA 1761-66, apart from the two that were identified at trial as having committed a homicide at ADX Florence in 2005 before a reintegration program was discontinued, JA 446 (Mr. Aiken), JA 706 (Dr. Cunningham), Ms. Richardson was unable to find another inmate who had been indicted for homicide since his designation to ADX Florence. JA 1753 ¶ 10. All of the inmates convicted of BOP murders who received life sentences and were sent to ADX Florence following a jury trial, except for a mentally ill inmate who received life after a death sentence was vacated and was not permitted to be housed there, have never left ADX Florence. JA 1167-68. All five inmates who were convicted of murders prior to Caro's trial had already spent at least three years at ADX Florence by the time of Caro's trial. JA 923. Due to the incompleteness of

the records described above, Caro moved, prior to the district court's dismissal of his § 2255 Motion, for discovery of the BOP records pursuant to Rule 6 of the Rules Governing Section 2255 Cases, JA 1788-93, but the motion was rendered moot when the court denied relief. JA 1960.

In its Opinion of May 4, 2015, the district court identified two issues for decision: 1) "whether Caro is attempting to relitigate the *Brady* claim raised on appeal and rejected by the Fourth Circuit"; and, 2) materiality under *Brady*. Appx. B-69. The court cited *United States v. Linder*, 552 F.3d 393, 396 (4th Cir. 2009), and *Boeckenhaupt v. United States*, 537 F.2d 1182, 1193 (4th Cir. 1976), for the proposition that "a § 2255 motion is not a vehicle for relitigating claims already decided by the appellate court." *Id.* Although the court described Claim Seven as "the same *Brady* claim raised at trial," it acknowledged that Caro now attached "some newly developed, sample statistics extrapolated from raw data he has located on his own since the appeal, that are favorable to his position on future dangerousness." *Id.* The court said the "recast version of the claim is still seeking the same data for the same reasons." *Id.* The court concluded:

> Caro makes no showing that he could not have collected and presented similar evidence when he raised the original *Brady* claim. Had he done so, such evidence would have been part of the record – for me to consider in reviewing the magistrate judge's ruling and for the court of appeals to consider. Caro's claim here is no different in substance from the claim he lost on appeal, and therefore, is barred.

Id. at 69-70 (citing *Boeckenhaupt*, 537 F.2d. at 1183). In a footnote, the court rejected Caro's argument that *Bousley v. United* States, 523 U.S. 614, 621-22 (1998), erected an exception to procedural default that allows consideration of the *Brady* claim where the direct appeal record did not fully support the claim. *Id.* n. 12. The court concluded that Caro was asking it to "reverse the Fourth Circuit's ruling on that claim, based on a type of evidence that was not made part of the trial record only because Caro did not then make the effort to do so. Such relitigation of an already decided claim, using newly acquired ammunition, is barred." *Id.* (citing *Boeckenhaupt*, 537 F.2d

at 1183). The court further ruled that "Caro's new statistics do not meet the materiality standard under *Brady*." *Id.* at 70.

5. The § 2255 Appeal.

The same Fourth Circuit panel majority that affirmed the conviction and death sentence on direct appeal affirmed the denial of § 2255 relief, summarizing the two bases for decision thusly:

> First, we hold that the *Brady* claim alleged in Caro's § 2255 motion is procedurally barred because Caro raised an identical claim on direct appeal. Alternatively, we hold that Caro's *Brady* claim lacks merit because Caro did not show that the requested BOP data would have been favorable or material.

App. C-6.

On the other hand, Chief Judge Gregory would have found the *Brady* claim meritorious and granted relief:

> Viewing Caro's § 2255 petition in light of the full record, his *Brady* challenge is both procedurally sound and meritorious, Because we cannot have "fully considered" a *Brady* claim when the defendant presents new evidence on collateral review, Caro is not barred by the *Boeckenhaupt* doctrine and is free to bring his claims now. And because he has demonstrated that the suppressed data is favorable and material, he has made out a *Brady* violation. Because the majority holds otherwise, I respectfully dissent in part.

Appx. C-9-10.

The *Brady* claim raised in the § 2255 motion was not identical to the discovery claims raised on direct appeal, as the panel majority ruled, for the reasons stated by Chief Judge Gregory in his partial dissent. *See* C-15-19. That Caro failed to show the suppressed BOP data was "favorable" for *Brady* purposes is belied by the Government's concession in its Fourth Circuit brief that "in the course of his habeas proceedings, Caro presented some statistical evidence extrapolated from raw data he located independently, *that appears to favor his position on future dangerousness*." *See* Brief of Appellee, *United States v. Caro*, Fourth Cir. No. 16-1, Doc. 74 at

40 (emphasis added). It was favorable to Caro for the reasons stated in the Chief Judge's dissent. *See* Appx. C-15-22.

The Government's milquetoast argument against *Brady* materiality and the disingenuousness of the panel majority's conclusion that there would have been no difference in the jury's death verdict if Warden Hershberger testified to lengths of prisoner stays at ADX Florence that spanned five to 27 years, as opposed to the three years to which he did testify, are treated in the Chief Judge's partial dissent, where he concludes that the disclosure of the suppressed BOP evidence on length and conditions of confinement at ADX Florence would have placed the case "in such a different light as to undermine confidence in the outcome." C-20 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). That is so because Dr. Cunningham would have been able "to testify about what the BOP *actually does* with high risk inmates, rather than what it aspires to do . . . Rather than rely on expert witnesses, the BOP data would have conclusively shown that the Government can – and routinely does – keep dangerous inmates at Florence ADMAX securely and for far longer than the aspirational three year step down program suggests." Appx. C-20-21 (emphasis in original).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Relief was denied on claim brought pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in Carlos Caro's motion for collateral relief pursuant to 28 U.S.C. § 2255 in the United States District Court for the Western District of Virginia. Appx. B. The district court filed a Certificate of Appealability as to the *Brady claim*. The Fourth Circuit affirmed the denial of relief on the *Brady* claim in an unpublished opinion. *See* Appx. C. The Fourth Circuit filed an order in which it denied rehearing and rehearing *en banc*. *See* Appx. D. This Petition challenges the Fourth Circuit's opinion in which it affirmed the district court's denial of the *Brady* claim.

REASONS FOR GRANTING THE WRIT

The present Petition offers the perfect vehicle to the Court to address an important question of federal capital sentencing law that has not been settled by this Court but, due to its significance, requires resolution: whether the jury's consideration of an accused's future dangerousness should be made to depend on *anecdotal evidence* of the BOP's aspirations for how long it would incapacitate a dangerous inmate at ADX Florence or whether available *empirical data* should be produced to the defense as to length and conditions of inmate stays at ADX Florence. In addition, the Petition should be granted because the Fourth Circuit's decision to preclude merits review of Caro's *Brady* claim, which was based on the Government's suppression of BOP data respecting length of stays and conditions at ADX Florence, is based on a misapplication of this Court's precedents as to the propriety of considering in a collateral proceeding claims that depend on facts *dehors* the record that made it impossible for a court to fully consider the claim on direct appeal.

A. The Government's continuing suppression of BOP data, which the Court has not previously addressed, has national implications.

Chief Judge Gregory asserted: "At the heart of this collateral challenge to a capital sentence is a single question: should the jury have been allowed to hear the truth about how Carlos David Caro could be incarcerated before deciding if he was too dangerous to remain alive." Appx. C-9. The "truth," within Chief Judge Gregory's contemplation, is accurate and reliable *empirical* data in possession of the BOP, rather than *anecdotal* testimony of partisans, as to how long an inmate with Caro's background may be held at ADX Florence, the federal prison system's highest security prison, to which Caro would have been assigned had the jury sentenced him to life in prison without the possibility of parole instead of death.

This question has national significance because Warden Hershberger, the Government's paid expert on future dangerousness at Caro's capital sentencing hearing, has testified for the Government to the three-year step-down in other federal capital sentencing hearings, including in the Fifth Circuit,[2] and will doubtless be retained by the Government to so testify again. Testimony of so-called experts that is based on anecdotal experience instead of the actual data in the possession of the BOP has apparently become a cottage industry handsomely funded by the United States Treasury.

Moreover, the failure of the courts to order the BOP data produced has yielded inconsistent opinions about how long ADX Florence could hold an inmate. Hershberger's testimony here, and in *Ebron* and *Snaar*, is inconsistent with anecdotal testimony from yet another BOP officer who testified for the Government in a capital sentencing hearing in the Eastern District of Virginia:

> The worst you could do to his guy is send him to ADX. But I think at the maximum, they will sit on him for five years, and they are going to release him back to another institution.

See Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, *United States v. Hager*, E.D. Va. No. 1:05-cr-00264-TSE (Apr. 27, 2015), Doc. 529, Claim II, par. 31 (testimony of USP Pollock CO Davison).

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[2] *See* Defendant Joseph Ebron's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, *United States v. Ebron*, E.D. Tex. Dist. Ct. No. 1:14-cv-00539-MAC-KFG (Oct. 27, 2014), Doc. 2 at 133 (Hershberger testified that, after Ebron completed his term at ADX Florence's control unit, "there is an expectation that in three years, assuming good behavior and everything goes well, that [he] will be returned to a regular institution") (quoting from RT, 5/15/09 at 660); RT, *United States v. Snaar*, E.D. Tex. Dist. Ct. No. 1:09-cr-00015-MAC-KFG (May 20, 2010), at 1377 (Hershberger testified that after prisoners leaves the Control Unit, the goal is to keep them at ADX Florence for three years).

Certiorari should be granted for the additional significant reason that at least one capital defendant's defense team received the ADX Florence data when the federal district court in Colorado ordered the Government to produce the same BOP records requested here in another federal capital prosecution. In *United States v. Watland*, D. Colo. No. 1:11-cr-38-JLK (D. Colo.), the petitioner first requested *Brady* material that included *inter alia*:

> 72. Any and all documents relating to the ability of USP-ADMAX (ADX) to safely and securely house BOP inmates who have been convicted of committing murder in prison.

Watland, Doc. 101 (D. Colo. June 1, 2011), at 29. The motion was granted. *See* Courtroom Minutes, *Watland*, Doc. 157 (Aug. 9, 2011). Later, in anticipation of an evidentiary hearing, the petitioner requested with respect to all inmates convicted of prison murders, "No. 157: Documents memorializing the inmate's housing history at ADX." *See* Mr. Watland's Motion for Discovery in Connection with Evidentiary Hearing Regarding the General Unreliability of Future Dangerousness as an Aggravator, *Watland*, Doc. 983 (June 5, 2013), at 5. The district court granted that request as well. *See* Minute Order, *Watland*, Doc. 1029 (July 3, 2013) (text entry).[3] Thus, whether one obtains the BOP data on length and conditions of stays at ADX Florence with which to rebut the aggravating circumstance of future dangerousness depends on the geographic location of the trial.

Those charged with federal capital offenses, such as Caro, Ebron, Snaar and Watland, should not be made to depend on the trial court's proclivities to learn whether he will be able to support his expert on the question of future dangerousness and undermine the likes of Warden

[3] After the data was ordered disclosed, the Government agreed to withdraw the Notice of Intention to Seek the Death Penalty in exchange for a guilty plea to a life term. *See Watland*, Doc. 1542 (D. Colo. Feb. 5, 2014) (plea agreement).

Hershberger with empirical BOP data on length of stays and conditions at ADX Florence.[4] The suppressed BOP data clearly supports the favorability and materiality prongs of *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

B. The Court Should Grant Certiorari Because the Fourth Circuit Panel Majority Erected a Procedural Bar to Consideration of Caro's *Brady* Claim on Federal Collateral Review That Conflicts with This Court's Precedents.

Throughout its modern death penalty jurisprudence, this Court has held that the Eighth Amendment requires a heightened standard for reliability in determining that death is the appropriate punishment in a specific case. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality). Eighth Amendment reliability therefore requires the provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). That requirement can be no more important than where the prosecution posits the theory that a defendant will be dangerous in the future if he is not sentenced to death. *See Simmons*, 512 U.S. at 162. The Supreme Court "has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons*, 512 U.S. at 162 (citing *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *California v. Ramos*, 463 U.S. 992, 1003 n. 17 (1983)). The Court has stated that a prediction of future dangerousness constitutes not only aggravating

[4] That a court's proclivities play a significant role was made clear in *Caro*, where the magistrate judge ordered the Government to produce the BOP data Caro requested, JA 56-57, only to have the district court sustain the Government's objection to the disclosure. *See* JA 150.

evidence at capital sentencing, but, "[l]ikewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1985).

In his Appellant's Brief on direct appeal, Caro argued that the district court erred in denying him pretrial discovery of BOP data under Rules 16(a)(1)(E) and 17(c) of the Federal Rules of Criminal Procedure with respect to the average of lengths of incarcerations and conditions at ADX Florence, precisely because a determination of how long BOP would hold Caro at ADX Florence was critical to his risk assessment expert's opinion on Caro's future dangerousness. *See* Appellant's Brief, Fourth Circuit Case No. 7-5, Doc. 89 at 60-76. Caro's direct appellate counsel argued in footnote 45 that the district court should order the Government to produce the BOP data at a hearing and that the suppressed data on length of stays and conditions at ADX Florence, should it exist, would implicate *Brady* as well as Rule 16 because both require production of exculpatory information.

Although Caro did not plead the elements of a *Brady* claim on direct appeal, the Fourth Circuit denied a *Brady* claim, ruling that Caro "can only speculate as to what the requested material might reveal" and that he could not establish that the suppressed BOP data would be "favorable" as *Brady* requires. Appx. A-8. In support of the later § 2255 motion, Caro's counsel finally unearthed "some of the suppressed BOP data" or "fragments," as they were referred to by Chief Judge Gregory in his partial dissent (Appx. C-40, 52), on lengths and conditions of incarcerations at ADX Florence that demonstrated that the BOP data suppressed by the Government at capital sentencing was both favorable to Caro and material.

/ /

1. The Fourth Circuit's procedural ruling on direct appeal that Caro could not prove *Brady* favorability, which was the result of the Government's suppression of the requested BOP data, did not bar his raising a supported *Brady* claim in the § 2255 motion.

As Chief Judge Gregory noted in his partial dissent, "a *Brady* claim by definition involves an assertion that the Government has *suppressed* (willfully or inadvertently) materially favorable evidence at trial . . . And because the Government has suppressed the evidence at trial, a *Brady* claim also necessarily means that the evidence is not part of the trial record to which a court of appeals is limited on direct appeal." Appx. C-16 (citing *Monroe v. Angelone*, 323 F.3d 286-299-300 (4th Cir. 2003) (emphasis in original)). The Chief Judge continued:

> In this way, *Brady* claims resemble ineffective assistance of counsel (IAC) claims, which also almost always turn on facts outside the trial record. *United States v. Massaro*, 538 U.S. 500, 503 (2003), Because of their unique posture, the Supreme Court has held that IAC claims can proceed on collateral challenge without fear of procedural default, a doctrine that ordinarily bars collateral review of claims not raised on direct appeal. *Id.* Like the *Boeckenhaupt* rule and other rules of procedure, the procedural default rule is a judge-created rule intended to '"induce litigants to present their contentions to the right tribunal at the right time,'" to "conserve judicial resources," and "to respect the law's important interest in the finality of judgments. *Id.* (quoting *Guinan v. United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring). Because a trial record is "often incomplete or inadequate" for litigating IAC claims, barring them from collateral review would risk preemptively eliminating meritorious claims and would waste judicial resources. *Id.* at 506-08.
>
> The same is true with *Brady* claims.

Appx. C-16. The Chief Judge noted that the Fourth Circuit had never used *Boekenhaupt* to bar collateral review of any *Brady* claim and had, in fact, ruled that only *Brady* claims could be revisited on collateral review after they have been unsuccessful on direct appeal. *Id.* (quoting *United States v. LaRouche*, 4 F.3d 987 (Table), at *3 (4th Cir. 1993) (per curiam)). "This reticence to apply *Boeckenhaupt* to *Brady* claims indicates our acknowledgment that a defendant's inability to locate pretrial what the Government has suppressed – and the appellate court's subsequent

review of that insufficient trial record – should not bar the defendant, upon discovering that evidence post-trial, from raising it in a collateral challenge." *Id.*

Notwithstanding "the central purpose of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")," 28 U.S.C. § 2241 *et seq.*, which the panel majority described as reducing "delays in the execution of state and federal criminal sentences, particularly in capital cases," Appx. C-2 (citation omitted), its opinion sounds a false alarm when it states that it can discern no rationale under the AEDPA for a rule "that would impose no limit on serial, marginally reformulated *Brady* claims based on evidence petitioner could have, but chose not to, proffer on direct appeal." Appx. C-7. The absence of a procedural bar, under these circumstances, does not threaten to permit "serial marginally reformulated *Brady* claims." One bite of the apple would have been sufficient. The Government's disclosure of the exculpatory BOP data to Caro prior to trial, or even its production to the district court for *in camera* inspection, would have allowed the district court to fully consider whether the data was discoverable under Rule 16 or was required to be disclosed under *Brady*. The Government's suppression meant then, as it continues to mean now, that Caro could not have brought a fully supported *Brady* claim on direct appeal. What he did bring was, at most, a *Brady* claim in name only.

The elements that establish a violation of Rule 16 discovery or Rule 17 authorization to serve a subpoena are not coextensive with the three-part test for establishing a *Brady* claim under Supreme Court or Fourth Circuit precedent. Rule 16(a)(1)(E) and 17(c) allege trial court error, while Caro's *Brady* claim in the § 2255 motion alleged:

> *The Government* violated Mr. Caro's constitutional rights under *Brady v. Maryland* by withholding material exculpatory and impeachment evidence that the BOP has housed many inmates at ADX-Florence and its predecessor prison, USP-Marion, for more than three years,

JA 1168 (emphasis supplied).

Furthermore, Caro's *Brady* claim was not fully considered on direct appeal because the Government's suppression of BOP data resulted in the court denying relief on procedural grounds and not on the merits. In *Sanders v. United States*, 373 U.S. 1, 17 (1963), this Court ruled that pre-AEDPA abuse of the writ principles did not operate to bar consideration of a claim if the "same ground was earlier presented but not adjudicated on the merits." Abuse of the writ principles are applicable to this post-AEDPA matter, as this Court observed that the AEDPA is largely a codification of those principles. *See Boumediene v. Bush*, 553 U.S. 723, 774 (2008). The *Sanders* Court decided under what circumstances a claim brought without factual support in an initial § 2255 motion may be brought, with factual support, in a subsequent § 2255 motion. The Court ruled that where a first motion "was denied because it stated only bald legal conclusions with no supporting factual allegations," "a denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient." *Id.* at 17.

As Chief Judge Gregory noted, no Fourth Circuit decision, published or unpublished, had ever held that a *Brady* claim could not be brought in a collateral proceeding. Appx. C-46. That assessment would also be true of this Court's precedents. In the Chief Judge's view, Caro's *Brady* claim was not, and could not, be "fully considered" on direct appeal where the evidence that supported it was suppressed by the Government. Appx. A-44 (citing *Boeckenhaupt*, 537 F.2d at 1183).

2. Alternatively, there is no procedural bar because the suppressed ADX Florence data was not reasonably available on direct appeal.

Even if the panel majority was correct as a matter of law, to wit, that a prisoner may bring a *Brady* claim in a § 2255 motion, but only where the new material exculpatory evidence was not

"previously available" or "could not reasonably have been included in the direct appeal record," the panel majority erred here by making that determination without the benefit of an evidentiary hearing. Appx. C-18-19. The panel majority states that "Caro could have reasonably proffered the new statistics to support his *Brady* claim at trial and on direct appeal because those figures were compiled from public sources that he could have accessed at any time." Appx. C-19. That comment presupposes that broad fields of inmate data for ADX Florence are available that allow a simple global search of former and present inmates. That is not true. In addition, with regard to the questionnaires sent by Jeanne Dvorak at a New Mexico law firm after Caro's direct appeal, the panel majority states that "[n]othing in the record suggests that [Caro's] attorneys were prevented from mailing the same questionnaires" and that "[a]n absence of diligence does not render the data previously unavailable." *Id.* at 20. It is clear that the panel majority, in the absence of facts developed as they should have been at an evidentiary hearing, merely guessed at how available the data actually was.

Chief Judge Gregory could only touch on the challenge Caro's team faced in seeking the relevant data:

> [FPD Investigator Susan] Richardson compiled data from: the Dvorak affidavit; documents produced by the Government in response to a 2010 subpoena issued to the BOP in *United States v. Basciano*, No. 05-cr-60 (E.D.N.Y.); the BOP Inmate Locator; PACER; the Federal Death Penalty Resource Counsel website; documents received pursuant to a FOIA request; and internet searches for articles. She included tables listing the name of each inmate, when they entered Florence ADMAX, how many years they had been there, and, if they had committed a homicide in the BOP, details about the homicide.

Appx. C-412 (citing Richardson's 2013 Declaration, JA 1750).

Investigator Richardson, in a 2018 declaration attached to the Caro's Petition for Rehearing and for Rehearing *En Banc*, Fourth Cir. No. 16-1, Doc. 82 at 86-91, Appx. B, which is attached

here as Appendix E, explained just how onerous the task was of gathering the ADX Florence inmate data that supported her Tables that were attached, along with her 2013 declaration, to Caro's response to the Government's motion to dismiss:

> 3. In order to prepare the tables it was first necessary to obtain inmate names. The Bureau of Prisons' Inmate Locator requires that a name or inmate register number be used in order to search. There is no option to search by facility. The limited search feature created an obstacle to locating inmates housed at ADX-Florence. Obtaining inmate names was incredibly important to being able to obtain data on length of confinement at ADX-Florence.

Appx. E, ¶ 3. Ms. Richardson meticulously searched the internet for articles and documentaries on ADX Florence, including lawsuits and conditions, in order to find names of inmates. She further searched Wikipedia which, for 2007, led to the names of only 16 "notable" inmates of a population at ADX Florence that, since its opening in 1994, has housed more than 400 inmates at a time. *Id.* at ¶ 5. The page listing 60 notable inmates was not created until 2012. *Id.* Other sources upon which she relied did not even become available until at or after the time of Caro's trial. *Id.* at ¶ 6 (Federal Death Penalty Resource Counsel data charts prepared 2011-13); ¶ 7 (*Basciano* civil litigation for which BOP subpoenas were issued; data provided in 2010-11); ¶ 8 (Dvorak declaration in 2011); ¶ 9 (civil suits available on PACER filed after 2006).

Apart from logistical difficulties, there simply was insufficient time prior to trial to gather the *Brady* fragments that supported a § 2255 motion. That investigation took 30 months to complete from the date of § 2255 counsel's appointment to the filing of the motion. Yet, the district court appointed trial counsel for Caro on January 3, 2005, and jury selection would begin on January 22, 2007, little more than 24 months after counsel's appointment. *See United States v. Caro*, Dist. Ct. No. 1:06-CR1, Docs. 4, 5. Trial counsel's efforts to develop data as extensive as the BOP's with respect to length and conditions of incarcerations at ADX Florence necessarily

would have delayed the trial and incurred the hostility of the trial court. In discussing defense and Government suggestions that they would need pretrial delay to retain mental health experts, the court stated:

> This case has been set for a long time at this time. There are practical problems. For example, we have put off construction in this courthouse because of this case, and so that that construction now will make this courtroom unavailable for a long period of time, and it was set after the case. My schedule has been rearranged for this case.
>
> * * *
>
> We need to decide this question, obviously, as soon as possible because of everybody's trial preparation and schedule. But as I've indicated, I'm, I certainly have a reluctance to continue the case. This is the type of case that needs to be decided with all deliberate speed. And, too, there are other institutional factors that I've indicated with the court that make it imperative that we try to resolve this case as soon as possible.

RT, June 23, 2006, at 5, 7.

Moreover, the defense should have been reasonably confident that the BOP data would have been made available in discovery. The defense risk assessment expert, Dr. Mark Cunningham, testified that information on "assaultive conduct" in ADX Florence's Control Unit between 1994 and 2001 was produced in a past case with which he was familiar. Appx. C-12 (citing JA 738). Moreover, the magistrate judge understood the significance of the BOP data and ordered it produced, JA 49, only to have the district court reverse that decision on November 20, 2006, JA 144, a mere eight weeks before trial.

3. The Fourth Circuit's procedural bar is inconsistent with the treatment of similar claims in § 2254 proceedings.

In *Danforth v. Minnesota*, 552 U.S. 264, 281 (2008), this Court stated that "[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions." *See Flanagan v. Johnson*, 154 F.3d 196, 200

n. 2 (5th Cir. 1998) (". . . § 2254 and § 2255 actions themselves are quite similar and that the statutes should be read in pari materia, where not obviously inconsistent") (citation omitted); *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) ("Because both § 2254 and § 2255 give rise to collateral proceedings with similar purposes, and because finality in criminal convictions is an important consideration in both types of proceedings, we agree with the Ninth Circuit that the logic behind *Brecht* [*v. Abrahamson*, 507 U.S. 619, 622-23 (1993)] also is applicable in § 2255 cases.").

In his partial dissent, the Chief Judge cited a decision of this Court as precedent for the proposition that "even a *Brady* claim that was adjudicated on the merits in state court should be considered on the merits in federal court if the defendant presents new favorable evidence." Appx. C-17. In *Banks v. Dretke*, 540 U.S. 668, 690 (2004), a *Brady* claim "failed in state court for lack of evidence," which resulted in a procedural default ruling in federal court. However, this Court ruled that if the petitioner were to establish "cause" for his failure to "develop the facts in state-court proceedings and actual prejudice resulting from that failure," the procedural default is excused and the federal court can reach the merits of the claim. *Id.* Where the petitioner demonstrates that "his failure to develop facts in state-court proceedings was the State's suppression of relevant evidence" and he can show *Brady* materiality, the default is excused and he is entitled to a merits ruling on the *Brady* claim. *Id.*

Caro is on all fours with *Banks* except that the Government's suppression occurred in federal court in a capital prosecution. Extending *Banks* to the § 2255 context, Caro was entitled to merits review of his *Brady* claim that was supported with the fragments of new evidence of lengths and conditions of stays at ADX Florence developed since the district court sustained the

Government's objection to the magistrate judge's order in which she ordered the BOP data produced.

Given the Court's announced preference to harmonize § 2254 and § 2255 and to treat petitioners under the respective provisions similarly, the Fourth Circuit's ruling that Caro procedurally defaulted the *Brady* claim is simply untenable and causes needless friction between how the respective collateral petitioners should be treated.

CONCLUSION

This Court should grant Carlos Caro's Petition and order disclosure of the suppressed BOP data on length and conditions of stays at ADX Florence, in order to bring truth in federal capital sentencing rather than allowing juries to determine the all-important question of an accused's future dangerousness based on anecdotal evidence and aspirations instead of available empirical data. The Government's suppression of BOP data violated the Due Process Clause of the Fifth Amendment and *Brady*, and resulted in an inaccurate and unreliable capital sentencing outcome that violated Caro's right to be free from cruel and unusual punishment under the Eighth Amendment. The Court should also grant the Petition because the Fourth Circuit has improperly constrained the use of § 2255 to bring a federal constitutional claim that was based on facts *dehors* the record in a manner that conflicts with this Court's prior decisions. Finally, the Court should grant certiorari on the ancillary question whether an evidentiary hearing was required, consistent with § 2255(b), before the district court and Fourth Circuit could determine whether the suppressed BOP data was material for *Brady* purposes where Caro could only unearth fragments of data on length and conditions of stays at ADX Florence, and whether Caro lacked diligence in unearthing non-BOP data prior to trial or on direct appeal.

Respectfully submitted this 19th day of November, 2018.

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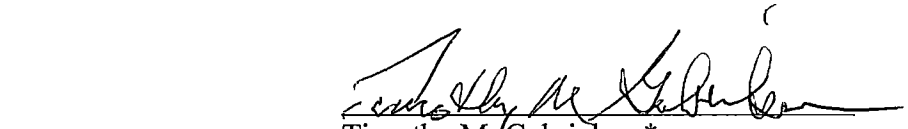

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