597 F.3d 608
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Carlos David CARO, Defendant-Appellant.

No. 07-5.
|
Argued Oct. 30, 2009.
|
Decided March 17, 2010.

Synopsis

Background: After rulings on various pretrial motions, 442 F.Supp.2d 296 and 461 F.Supp.2d 478, defendant was convicted in the United States District Court for the Western District of Virginia, James P. Jones, Chief Judge, 483 F.Supp.2d 513, and sentenced to death. Defendant appealed.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

district court's decision not to adopt defendant's proposed voir dire question was not an abuse of discretion, and

because defendant could only speculate as to what the requested information might reveal, he could not satisfy *Brady*'s requirement of showing that the requested evidence would be favorable to him.

Affirmed.

Gregory, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***609 ARGUED:** Denise Charlotte Barrett, Office of the Federal Public Defender, Baltimore, Maryland, for Appellant. David E. Hollar, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:** Sarah S. Gannett, Assistant Federal Public Defender, Federal Community Defender's Office, Philadelphia, Pennsylvania, for Appellant. Julia Campbell Dudley, United States Attorney, Anthony P. Giorno, Assistant United States Attorney, Office of the United States Attorney, Roanoke, Virginia, for Appellee.

Before GREGORY, SHEDD, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge DUNCAN wrote the majority opinion, in which Judge SHEDD concurred. Judge GREGORY wrote a dissenting opinion.

OPINION

DUNCAN, Circuit Judge:

This appeal arises from a death sentence imposed under the Federal Death Penalty ***610** Act (the "FDPA"), 18 U.S.C. §§ 3591-98, following a conviction for murder in violation of 18 U.S.C. § 1111. Appellant Carlos David Caro challenges the district court's voir dire; denial of motions under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Federal Rules of Criminal Procedure 16(a)(1)(E) and 17(c); refusal to give Caro's proposed mercy instruction; and various decisions concerning admissibility. Caro also argues that the jury instruction and government's argument about lack of remorse violated his Fifth Amendment privilege against self-incrimination, that the government's closing argument violated the Due Process Clause, and that 18 U.S.C. § 3592(c)(10) and (12) violate the Eighth Amendment. For the reasons stated below, we affirm.

I. Background

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 (the "SHU") at United States Penitentiary Lee ("USP 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 later explained, "[Sandoval] called me mother fucker, that whore, that's why I fucked him up." J.A. 781.

A.

Caro comes from a poor neighborhood in Falfurrias, Texas, where he lived with his siblings and an abusive, alcoholic father. While still young, Caro began helping his uncles transport illegal drugs into the United States. He was later convicted of possession of marijuana with intent to distribute in April 1988, conspiracy to possess over one hundred kilograms of marijuana with intent to distribute in January 1994, and possession of cocaine with intent to distribute in November 2001.[1] Following his third conviction, Caro was sentenced to thirty years imprisonment.

In prison, Caro became a leader in the Texas Syndicate, a violent prison gang. In that role, Caro was involved in two violent incidents prior to Sandoval's murder. In the summer of 2002 at Federal Correctional Institute Oakdale ("FCI Oakdale"), a prison official asked Caro to maintain the peace because members of another gang were scheduled to arrive. Caro responded that "the Texas Syndicate were going to do what they had to do." J.A. 908. Soon after, Caro and fellow Texas Syndicate members violently attacked the new arrivals. Taking responsibility, Caro commented: "I don't give a fuck if they send me to the United States Penitentiary. My brothers follow orders. They know what they're getting into. It doesn't even matter if we're prosecuted. I have 30 years to do. I certainly don't care about myself." J.A. 911.

Following the FCI Oakdale incident, the Bureau of Prisons (the "BOP") transferred Caro to USP Lee, a more secure facility. There, in August 2003, Caro and another inmate violently attacked fellow Texas Syndicate member Ricardo Benavidez. Using "shanks," i.e., homemade knives, they stabbed Benavidez twenty-nine times. Five other Texas Syndicate members stood nearby with identical shanks.[2] In November 2003, after pleading guilty to conspiracy to commit homicide, Caro was sentenced to another twenty-seven years ***611** imprisonment. He was then transferred to the SHU at USP Lee.

Sandoval's murder occurred only weeks later. Sandoval was placed in Caro's cell at around 9:00 p.m. on December 16, 2003. The next day, Sandoval and Caro were served breakfast in their cell at 6:10 a.m. They later took one hour of recreation outside and were last observed by prison staff at 6:17 p.m.[3] Soon after, inmate Sean Bullock, whose cell faced Caro's, noticed Caro standing behind Sandoval and apparently choking him. Bullock watched them fall to the ground and assumed they were tussling. At about 6:40 p.m., a prison guard came to deliver mail. Caro yelled to him several times, "Come get this piece of shit out of here," and pointed at Sandoval lying by the door. J.A. 676. Peering inside the cell, the guard observed Sandoval lying motionless with blood on him and a towel knotted around his neck. Blood was also splattered against the wall.

Other guards quickly arrived and handcuffed Caro. When asked whether Sandoval was still breathing, Caro responded: "No. At this time he's stinking up the room, get him out." J.A. 684. Caro later received *Miranda* warnings and was interviewed. He denied that Sandoval's murder had any connection to the Texas Syndicate. Instead, Caro explained that he had eaten Sandoval's breakfast that morning; that Sandoval had awakened, cursed him, and threatened to eat Caro's breakfast the next morning; and that Caro, using a towel tied with one overhand knot, had later strangled Sandoval for four or five minutes until he stopped breathing.

The next day Caro taunted a prison guard, grinning and calling out, "When [are] you ... going [to] assign [me] a new cellie?" J.A. 601. Several days later, again grinning, Caro requested fellow inmate Ortiz for his next "cellie." J.A. 680.

Caro later mentioned Sandoval in two telephone conversations and a letter. The letter stated, "I killed a guy two weeks ago ... [f]or being a fool." J.A. 790. Caro told his wife, laughing, "[Sandoval] called me a mother fucker." J.A. 782. Caro also assured her, "But I'm all right." J.A. 783. Finally, Caro told another Texas Syndicate member Roel Rivas, "I also have a death," and explained, "It's because they gave me a cell mate and he disrespected me, so I took him down." J.A. 785. When Rivas proposed claiming self-defense, Caro said, "That is what I'm going to do.... That is what I'm going for." J.A. 786-87.

B.

On January 3, 2006, Caro was charged in an indictment with first-degree murder in violation of 18 U.S.C. § 1111 for the killing of Sandoval. Soon after, pursuant to § 3593(a), the government filed a notice of intent to seek the death penalty under the FDPA. This statute established a procedure whereby a jury can decide

whether to impose the death penalty after considering aggravating and mitigating factors properly alleged and proved during a sentencing hearing.[4] The FDPA requires ***612** consideration of specific aggravating factors ("statutory aggravating factors") but also allows the government to allege other aggravating factors ("non-statutory aggravating factors").

Following a jury trial, Caro was convicted of premeditated murder in violation of § 1111. The same jury decided Caro's sentence under the FDPA. His sentencing hearing was divided into two phases, an "eligibility" phase and a "selection" phase. The first phase involved determining whether Caro had committed a capital offense under § 3591 and whether the government had proved at least one statutory aggravating factor beyond a reasonable doubt, together making Caro eligible for the death penalty. The second phase involved determining the mitigating and non-statutory aggravating factors and selecting either a death sentence or life imprisonment.

During the eligibility phase, the jury decided that Caro was eligible for the death penalty because § 3591 covered his offense of premeditated murder under § 1111, and two statutory aggravating factors had been proved beyond a reasonable doubt. These factors were (1) that Caro was previously convicted of two offenses involving distribution of illegal drugs committed on different occasions and punishable by imprisonment for over one year, 18 U.S.C. § 3592(c)(10), and (2) that Caro was previously convicted of a federal drug offense punishable by five or more years, 18 U.S.C. § 3592(c)(12).

During the selection phase, the jury heard information and argument about the existence of mitigating factors, the existence of non-statutory aggravating factors, and whether aggravating factors sufficiently outweighed mitigating factors to justify a death sentence.[5] The government had alleged three non-statutory aggravating factors: (1) the impact of Caro's offense on Sandoval's friends and family; (2) Caro's future dangerousness to other people, including inmates; and (3) that Caro "has not expressed remorse for his violent acts, including (but not limited to) the murder of Sandoval, the stabbing of Benavidez and the gang-based assault in Oakdale." J.A. 57.

After closing arguments, the jury found that each alleged non-statutory aggravating factor had been proved beyond a reasonable doubt. The jury also found unanimously that twelve mitigating factors had ***613** been proved.[6] Some jurors found that four other mitigating factors had also been proved.[7] After considering whether the aggravating factors sufficiently outweighed the mitigating factors, the jury imposed the death penalty. This appeal followed.

Caro now challenges (1) the district court's voir dire process; (2) the denial of motions under *Brady* and Federal Rules of Criminal Procedure 16(a)(1)(E) and 17(c); (3) the constitutionality of § 3592(c)(10) and (12), the statutory aggravating factors that made Caro eligible for the death penalty; (4) the government's closing argument during the selection phase; (5) the district court's jury instruction and the government's argument concerning lack of remorse; (6) the rejection of Caro's proposed mercy instruction; and (7) decisions about whether to admit testimony offered under Federal Rule of Evidence 608(a), certain information about Sandoval, and Caro's offer to plead guilty. We consider each matter in turn.

II. Voir Dire

We begin by considering Caro's challenge to the voir dire conducted by the district court. We review voir dire for abuse of discretion. *See Ristaino v. Ross,* 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); *United States v. Brown,* 799 F.2d 134, 135-36 (4th Cir.1986).

A.

Prior to Caro's trial, the district court summoned one hundred fifty prospective jurors to the courthouse in groups of fifty. The government and Caro proposed questions for them, but the court determined what questions would be asked. Voir dire then occurred in two phases. First, prospective jurors completed written questionnaires. Second, the court divided them into groups of ten and questioned them orally. When a prospective juror's response was unsatisfactory, the court recalled him individually and asked follow-up questions.

To inform prospective jurors about the case, the written questionnaire stated, "The defendant, Carlos David Caro, is accused of murdering Roberto Sandoval in the United States Prison." J.A. 156. It continued, "Are your feelings

about the death penalty such that you would always vote for a sentence of death as a punishment for someone convicted of a death penalty eligible offense, regardless of the facts and circumstances?" J.A. 161-62 (emphasis omitted). When prospective jurors convened for oral voir dire, the district court explained, "The defendant is charged with the first degree murder of Roberto Sandoval while both of them were inmates at the United States Penitentiary." J.A. 464.

For the oral voir dire, Caro proposed two questions that the district court declined to ask. Question fourteen of his ***614** proposed questions read: "Do you feel that anyone convicted of intentional and pre-meditated murder deserves to get the death penalty? If not, what kind of case does or does not deserve the death penalty?" J.A. 429. Instead, the court asked the following questions or some close variation: "[W]ould you automatically vote to impose the death penalty?.... In other words, would you consider life in prison without possibility of release, depending on the circumstances?" J.A. 502-03. The court also informed the parties: "I will consider in appropriate circumstances additional questions along the line that the defendant has suggested if I find it appropriate." J.A. 458. The court thus asked two seated jurors whether they could consider a life sentence for someone convicted of pre-meditated murder.

Question twenty-two of Caro's proposed questions read: "Do you believe that factors in a defendant's background, such as mental health issues, family background, childhood abuse or neglect, or a history of drug or alcohol abuse would be important factors for a juror to consider in determining whether to impose the death penalty ...?" J.A. 430. The court declined to ask this proposed question, and instead explained: "If the case ... goes to the penalty phase, then the jury would hear evidence in aggravation and mitigation; that is, evidence about circumstances that favor the death penalty, and circumstances that suggest that the death penalty would not be appropriate." J.A. 484.

B.

To enforce the Sixth Amendment's guarantee of an impartial jury, district courts must conduct "adequate voir dire" to enable them "to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Rosales-Lopez v. United States,* 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) (emphasis omitted). Because "[a]ny juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law," the Supreme Court has held that "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." *Morgan v. Illinois,* 504 U.S. 719, 735-36, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). However, "federal judges [are] accorded ample discretion in determining how best to conduct the voir dire." *Rosales-Lopez,* 451 U.S. at 189, 101 S.Ct. 1629; *see United States v. Barber,* 80 F.3d 964, 967 (4th Cir.1996) (noting that voir dire "must be committed to the good judgment of the trial judge whose immediate perceptions determine what questions are appropriate for ferreting out relevant prejudices" (internal quotations omitted)).

Caro contends that the district court failed to satisfy *Morgan* because, although prospective jurors were asked whether they would automatically impose a life or death sentence for "a death penalty eligible offense" or "first degree murder," they were not asked this question regarding "intentional and pre-meditated murder." In other words, Caro believes the voir dire was inadequate because prospective jurors were never told that "death penalty eligible offense" or "first degree murder" meant "intentional and pre-meditated murder." Caro also contends that, because prospective jurors were never told that information regarding Caro's personal background could be considered mitigating, the court's voir dire could not weed out prospective jurors who would refuse to consider any mitigating information about ***615** his troubled personal background. [8]

United States v. Tipton, 90 F.3d 861 (4th Cir.1996), addressed similar issues. There, the district court asked prospective jurors, "Do you have strong feelings in favor of the death penalty?" *Id.* at 878. To those who failed to answer "no" unequivocally, the court then asked whether "[they] would always vote to impose the death penalty in every case where a defendant is found guilty of a capital offense." *Id.* We found this questioning satisfactory.

We explained that *Morgan* established "the right, grounded in the Sixth Amendment, to a voir dire adequate to assure a defendant a jury all of whose members are able impartially to follow the court's instructions

and evaluate the evidence," that is, "the right to an inquiry sufficient to ensure-within the limits of reason and practicality-a jury none of whose members would unwaveringly impose death after a finding of guilt and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law." *Tipton,* 90 F.3d at 878 (internal quotations omitted). We then added: "Just how an inquiry adequate for this specific purpose should be conducted is committed to the discretion of the district courts." *Id.* However, we also pointed out, "Obviously, the most direct way to get at the possibility that a prospective juror would always impose death following conviction is to put that very 'reverse-*Witherspoon*' question directly to him," i.e., to ask whether the person would be irrevocably committed to voting for the death penalty regardless of the facts and circumstances. [9] *Id.*

Here, the district court asked, "Are your feelings about the death penalty such that you would always vote for a sentence of death as a punishment for someone convicted of a death penalty eligible offense, regardless of the facts and circumstances?" J.A. 161-62 (emphasis omitted). This is precisely the type of "reverse-*Witherspoon* " question that *Tipton* approved. Because this question, standing alone, adequately enabled the district court to weed out prospective jurors irrevocably committed to imposing the death penalty, the district court's decision not to adopt Caro's proposed question fourteen was not an abuse of discretion. *See also Oken v. Corcoran,* 220 F.3d 259, 266 n. 4 (4th Cir.2000) ("We ... reject the suggestion that the trial court was required to ask potential jurors whether they would automatically impose the death penalty in rape-murder cases because ... *Morgan* ***616** does not require crime-specific voir dire questions.").

For the same reason, the district court's failure to adopt Caro's proposed question twenty-two about mitigation also was not an abuse of discretion. The above "reverse-*Witherspoon* " question adequately enabled the district court to weed out prospective jurors who would not consider mitigating evidence relating to Caro's personal background. The mere conjecture that more detailed questioning would have elicited information useful to Caro does not suggest that the district court erred. *See Tipton,* 90 F.3d at 878 (affirming the district court's decision not to make "inquiries into the prospective jurors' willingness to consider factors such as a defendant's 'deprived, poor background,' 'emotional, physical abuse,' 'young age,' 'limited intelligence,' and 'brain disfunction' "). "The undoubted fact that such detailed questioning might have been somehow helpful to [Caro] in exercising peremptory challenges does not suffice to show abuse of the district court's broad discretion in conducting the requisite inquiry." *Id.* at 879.

III. Discovery

Next we review the district court's denial of Caro's motions under *Brady* and Federal Rules of Criminal Procedure 16(a)(1)(E) and 17(c). Because no factual findings were made, we review the *Brady* decision de novo. [10] *See United States v. Mejia,* 82 F.3d 1032, 1036 (11th Cir.1996) (reviewing a *Brady* decision de novo); *United States v. Kennedy,* 890 F.2d 1056, 1058 (9th Cir.1989) (same). We review the decision under Rule 16(a)(1)(E) for abuse of discretion. *United States v. Afrifa,* No. 95-5753, 1996 WL 370180, at *1 (4th Cir. July 3, 1996); *see United States v. Fletcher,* 74 F.3d 49, 54 (4th Cir.1996) (noting that Rule 16 "plac [es] the decision regarding pre-trial disclosure of witness lists within the sound discretion of the trial court"). And we also review the decision under Rule 17(c) for abuse of discretion. *United States v. Fowler,* 932 F.2d 306, 311 (4th Cir.1991).

A.

Under 18 U.S.C. § 3593(c) the government alleged a non-statutory aggravating factor of future dangerousness. In response, Caro hired risk-assessment expert Mark Cunningham to testify that Caro would be unlikely to endanger anyone during a life sentence because the BOP would adequately secure Caro in the Control Unit at the Administrative Maximum United States Penitentiary in Florence, Colorado ("Florence ADMAX"), the BOP's most secure facility, [11] until concluding that Caro was no longer dangerous. In turn, the government planned to have former warden of Florence ADMAX Gregory Hershberger testify that Florence ADMAX could not fully secure Caro and that the BOP would likely transfer him to another facility about three years after his arrival.

To inform Cunningham's testimony, Caro requested information from BOP records ***617** relating to whether inmates like Caro are housed at Florence ADMAX,

how well Florence ADMAX prevents violence, and when inmates like Caro normally are transferred from Florence ADMAX to other facilities with less security. Specifically, Caro requested the following:

> A. Data showing median length of stay, range of length of stay and standard deviation of the distribution of length of stay at Florence ADMAX for all inmates since it was opened in 1994 to the present time;
>
> B. Data showing how many inmates who were admitted to Florence ADMAX in 1994 or 1995 continue to be confined there, broken down by offense conduct that caused them to be transferred to Florence ADMAX;
>
> C. Movement sheets from the central inmate file on every inmate who has killed another inmate within the Bureau of Prisons, ("BOP"), within the last 20 years;
>
> D. Investigative reports on all inmate homicides within the BOP within the last 20 years including any "after action reports" indicating any operational or institutional changes in response to each killing and any final memoranda from Special Investigative Services to the Warden of each institution regarding each killing;
>
> E. Regarding each inmate involved in an inmate killing within the BOP within the last 20 years, the respective inmate's "Chronological Disciplinary Record" and Inmate History ADM-REL and/or movement Sheets within the Bureau of Prisons;
>
> F. Records on any assaultive conduct by an inmate in the "Control Unit" at Florence ADMAX from November 1994 to present date, showing the inmate involved, inmate number of the inmate involved, date of occurrence and description of the conduct, and the staff member victim of each assault;
>
> G. Names, prison numbers, assignment rationale and tenures of all inmates in the Control Unit at Florence ADMAX since opening in 1994 to present date showing date assigned, the reason assigned and date exiting the Control Unit to lesser security or release from BOP;
>
> H. Disciplinary Incident Reports on all inmates in the Control Unit at Florence ADMAX from 1994 to present date showing inmate name, number, date of offense and details of disciplinary incident; and
>
> I. Correctional Services Significant Incidents Data on levels and frequency of violence at each security level at Florence ADMAX by year from 2001 through 2006.

J.A. 396-97.

After the government denied this request, Caro filed various motions. Two motions requested subpoenas *duces tecum* under Rule 17(c) compelling the BOP's director and Florence ADMAX's warden to produce the information. Another motion requested a court order compelling the government to produce the information under Rule 16(a)(1)(E). The final motion requested a court order compelling the government to produce the information under *Brady*.

Following an evidentiary hearing,[12] a magistrate judge concluded that Rule 16(a)(1)(E) and *Brady* did require the government to produce the information that Caro had requested. The court emphasized ***618** that, "despite ... [its] inquiries at the November 3 hearing, the government ha[d] produced no evidence through affidavit or otherwise as to its argument that production of the documents and information requested would be burdensome to the BOP." J.A. 290.

The government objected to this order. On November 20, 2006, the district court denied all four motions. It reasoned that the information requested was immaterial to Caro's defense. *See United States v. Caro*, 461 F.Supp.2d 478, 481 (W.D.Va.2006). However, the court commented:

> I point out, however, that I do so in light of the government's representation that it does not intend to introduce any of the requested data in its own case. Otherwise, Rule 16 might very well require its prior disclosure to the defendant. Accordingly, absent proper disclosure, the government may not rely on specific instances of inmate violence (other than the defendant's own) in seeking to prove his future dangerousness.

Id. at 481-82. Although Caro's requested information was withheld, Cunningham visited Florence ADMAX, spoke with BOP personnel, and received information not

covered by Caro's initial request, including Caro's inmate file and Florence ADMAX's official policies.

During Caro's sentencing hearing, the government, anticipating Cunningham's testimony, offered evidence that Florence ADMAX could not fully secure Caro. This evidence included descriptions of specific instances of violence by inmates other than Caro. For example, Daniel Olsen, a code breaker for the government, testified about an inmate at Florence ADMAX who sent a coded message ordering a homicide. Former warden Hershberger testified that inmates killed two guards at the United States Penitentiary in Marion, Illinois, the predecessor to Florence ADMAX. He also testified that Florence ADMAX inmates lashed out against prison staff, using any weapons they could find. Finally, Hershberger asserted that "no system that the Bureau of Prisons has been able to devise to control the inmates is completely failsafe." J.A. 1341. He indicated that the BOP could not guarantee that someone like Caro would never make a weapon or send a coded message to fellow gang members.

Hershberger further described the "step down" program at Florence ADMAX designed to channel inmates back into general prison populations at other facilities. Hershberger stated that this could be done in three years; Cunningham testified that the average was five years. Hershberger further explained that inmates sentenced to death are housed at Federal Correctional Complex Terre Haute, which has very high security, and are never transferred to other facilities.

By contrast, Cunningham testified that Caro would not likely endanger anyone while serving a life sentence because, given his personal characteristics, the BOP would probably house him at Florence ADMAX until he stopped being dangerous. Cunningham admitted, however, that "for the next five to ten years [Caro] would pose a significant risk if at large in a U.S. penitentiary." J.A. 1268.

On cross-examination, the government questioned Cunningham using the affidavit he submitted for Caro's discovery motions. This affidavit listed forty-seven inmates who committed homicide in prison and argued that Caro needed more information about these inmates to prepare his defense. The government asked whether Cunningham knew those inmates' current locations. Defense counsel objected, saying the government had withheld this information, but the district court overruled the objection. Using the Inmate Locator ***619** on the BOP's public website, the government then showed that, for example, Bruce Pierce had committed homicide in prison and been transferred away from Florence ADMAX. Cunningham admitted this but chafed:

> The critical issue is what happened to him between the time he was guilty of the killing, and ... now that he's at Lewisburg[,] ... where did he go for how long, why did they decide to put him in Lewisburg, at what level of Lewisburg is he in with what disciplinary history. So just to put his name up and show where he is is misleading, at best, in the face of the data that I requested from you that would have fully informed this issue for me and for the jury.

J.A. 1298. The government then made the same point for another inmate, David Fleming, and implied that other inmates listed in Cunningham's affidavit also had been transferred away from Florence ADMAX.

During their closing arguments, both sides debated whether the BOP would adequately secure Caro during a life sentence. The jury ultimately found unanimously that the government had proved Caro's future dangerousness beyond a reasonable doubt; only nine jurors found that during a life sentence Caro would be "incarcerated in a secure federal institution." J.A. 1460. Caro now challenges the district court's denial of his motions under *Brady* and Rules 17(c) and 16(a)(1)(E). *See Caro,* 461 F.Supp.2d at 481.

B.

We first review the district court's denial of Caro's motion under *Brady.* In *Brady,* the Supreme Court announced that the Due Process Clause requires the government to disclose "evidence favorable to an accused upon request ... where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. 1194. Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* We have often noted that *Brady* requests cannot be used as discovery devices. As the Supreme Court remarked, "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

The district court denied Caro's motion under *Brady* because Caro failed to establish that the information requested would be favorable to him. We agree. Because 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." *Brady,* 373 U.S. at 87, 83 S.Ct. 1194; *see United States v. Agurs,* 427 U.S. 97, 109-10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

C.

We next review the denial of Caro's motions requesting Rule 17(c) subpoenas. Rule 17(c) "implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor." ***620** *In re Martin Marietta Corp.,* 856 F.2d 619, 621 (4th Cir.1988). Rule 17(c) lets a defendant subpoena information, but provides that "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed.R.Crim.P. 17(c)(2). The Supreme Court has held that a Rule 17(c) subpoena is "unreasonable or oppressive" unless the party requesting it demonstrates:

> (1) that the documents are evidentiary and relevent [sic]; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 699-700, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Accordingly, a defendant seeking a Rule 17(c) subpoena "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id.* at 700, 94 S.Ct. 3090. We have emphasized that "Rule 17(c) ... is not a discovery device." *Fowler,* 932 F.2d at 311 (citing *Bowman Dairy Co. v. United States,* 341 U.S. 214, 220, 71 S.Ct. 675, 95 L.Ed. 879 (1951)).

The district court denied Caro's motions for Rule 17(c) subpoenas because "a Rule 17 subpoena *duces tecum* cannot substitute for the limited discovery otherwise permitted in criminal cases and the hope of obtaining favorable evidence does not justify the issuance of such a subpoena." *Caro,* 461 F.Supp.2d at 481. This decision was not an abuse of discretion. Caro can only speculate as to what the requested information would have shown. Moreover, his requested Rule 17(c) subpoenas cast a wide net that betokens a "general 'fishing expedition,' " *Nixon,* 418 U.S. at 700, 94 S.Ct. 3090, and they merely duplicate Caro's discovery motion under Rule 16(a)(1)(E).

D.

Finally, we consider the district court's denial of Caro's motion under Rule 16(a)(1)(E). Rule 16 differs from *Brady,* which rests upon due process considerations, and provides the minimum amount of pretrial discovery granted in criminal cases. *See United States v. Baker,* 453 F.3d 419, 424 (7th Cir.2006) ("Rule 16 ... is broader than *Brady.*"); *United States v. Conder,* 423 F.2d 904, 911 (6th Cir.1970) ("We are ... of the view that the disclosure required by Rule 16 is much broader than that required by the due process standards of *Brady* "). Setting out the discovery to which defendants are entitled, section (a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

Fed.R.Crim.P. 16(a)(1)(E). The government does not dispute that the information requested by Caro is "within the government's possession, custody, or control," [13] ***621** and Caro does not assert that subsection (ii) or (iii) applies. [14] *Id.* Therefore, we focus on subsection (i).

Under subsection (i), the government must make available to the defendant any requested items that are "material to preparing the defense." Fed.R.Crim.P. 16(a)(1)(E)(i). For the defendant to show materiality under this rule, "[t]here must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *United States v. Ross,* 511 F.2d 757, 763 (5th Cir.1975), *cert. denied,* 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54. [15] "[E]vidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v. Lloyd,* 992 F.2d 348, 351 (D.C.Cir.1993) (citations and internal quotations omitted).

The district court denied Caro's motion upon finding no indication that the information requested by Caro would support Cunningham's testimony. The information was relevant to future dangerousness and might have allowed Cunningham to formulate scientifically more reliable opinions about Caro and to test various government allegations, e.g., that gang membership made Caro more dangerous. However, Caro presented no facts whatsoever indicating that the information would have actually helped prove his defense. *See United States v. Mandel,* 914 F.2d 1215, 1219 (9th Cir.1990) ("Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense."). No one can say, for example, whether Cunningham's more reliable opinions would have actually favored Caro or whether Cunningham would have found any government allegations unsupported. For this reason, the district court did not ***622** abuse its discretion by finding that the requested information was not "material to preparing the defense." Fed.R.Crim.P. 16(a)(1)(E)(i).

IV. Statutory Aggravating Factors

We next consider Caro's constitutional challenge to 18 U.S.C. § 3592(c)(10) and (12), the statutory aggravating factors that made him eligible for the death penalty. Caro preserved this challenge below by unsuccessfully moving to strike. "We review de novo a properly preserved constitutional claim." *United States v. Hall,* 551 F.3d 257, 266 (4th Cir.2009).

As we have noted, the government had to establish at least one statutory aggravating factor to make Caro eligible for the death penalty. Moreover, the jury had to consider all aggravating and mitigating factors in determining whether imposing a death sentence was justified. For homicide defendants, the FDPA enumerates sixteen statutory aggravating factors. *See* 18 U.S.C. § 3592(c). During the eligibility phase of Caro's sentencing hearing, the jury found that the following two had been proved beyond a reasonable doubt:

(10) Conviction for two felony drug offenses.-The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

* *

(12) Conviction for serious Federal drug offenses.-The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

18 U.S.C. § 3592(c)(10), (12). Both aggravating factors were based on Caro's previous convictions for nonviolent drug offenses. Caro had stipulated to being convicted of possession with intent to distribute marijuana in 1988, conspiracy to possess with intent

to distribute marijuana in 1994, and possession with intent to distribute cocaine in 2001. He had stipulated that these offenses met § 3592(c)(10) and (12). Having unsuccessfully moved to strike, Caro now argues that these two statutory aggravating factors violate the Eighth Amendment because they are not "rationally relate[d] to the question who should live or die." Appellant's Br. at 130.

The Eighth Amendment requires that a capital sentencing scheme must limit "[c]apital punishment ... to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons,* 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (internal quotations omitted). The FDPA establishes various safeguards intended to meet this standard. Among them are the following:

- § 3591 authorizes the death penalty only for certain crimes;
- § 3593(e) requires that at least one statutory aggravating factor be established before a death sentence may be considered;
- § 3592(a) mandates consideration of mitigating factors when selecting a death sentence; and
- § 3595(c) calls for reconsidering any death sentence influenced by arbitrary factors, resulting from insufficient evidence, or involving legal error not harmless beyond a reasonable doubt.

***623** Regarding the second safeguard, i.e., that at least one statutory aggravating factor must be established before a death sentence may be considered, the Supreme Court has said that "each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman,*" *Zant v. Stephens,* 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), which reversed death sentences because Georgia had "permit [ted] this unique penalty to be so wantonly and so freakishly imposed," *Furman v. Georgia,* 408 U.S. 238, 310, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). *See Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). Specifically, the Court articulated two requirements: "an aggravating circumstance [1] must genuinely narrow the class of persons eligible for the death penalty and [2] must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant;* 462 U.S. at 877, 103 S.Ct. 2733. *See, e.g., id.* at 879, 103 S.Ct. 2733 (approving the aggravating factors of having "escaped from lawful confinement" and having "a prior record of conviction for a capital felony" because they "adequately differentiate this case in an objective, evenhanded, and substantively rational way from ... murder cases in which the death penalty may not be imposed"); *Godfrey v. Georgia,* 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing a death sentence because the narrowing factor did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder").

Caro argues that § 3592(c)(10) and (12) do not satisfy these two requirements. We find his argument unpersuasive. Regarding the first requirement, the Supreme Court explained that "the [aggravating] circumstance may not apply to every defendant convicted of [the offense]; it must apply only to a subclass of defendants." *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Section 3592(c)(10) and (12) clearly meet this forgiving standard. Although some drug offenses are quite common, not all homicide defendants have prior convictions that satisfy § 3592(c)(10) or (12). Furthermore, these aggravating factors differ markedly from ones the Supreme Court has invalidated for not genuinely narrowing the class of defendants eligible for the death penalty. *See Godfrey,* 446 U.S. at 428-29, 100 S.Ct. 1759 (reviewing the factor, "that the offense was outrageously or wantonly vile, horrible and inhuman," and concluding that "[a] person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman" (internal quotations omitted)); *Maynard v. Cartwright,* 486 U.S. 356, 363-64, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (reviewing the factor, "especially heinous, atrocious, or cruel," and concluding that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is especially heinous" (internal quotations omitted)).

Regarding the second requirement, one can hardly dispute the congressional wisdom that recidivism justifies harsher sentencing. Defendants with significant criminal ***624** histories demonstrate unwillingness or inability to follow the law. This justifies imposing harsher sentences to provide increased retribution and deterrence. Prior convictions are thus properly and routinely considered in federal sentencing. *See Almendarez-Torres v. United States,* 523 U.S. 224, 230, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) ("[P]rior commission of a serious crime ... is as typical a sentencing factor as one might imagine."). Moreover, the felony drug offenses described by § 3592(c)(10) and (12) are serious indeed, however common may be their commission. *See City of Indianapolis v. Edmond,* 531 U.S. 32, 42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) ("There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude."). Although Caro's prior convictions satisfying § 3592(c)(10) and (12) might be considered "nonviolent" by themselves, illegal drugs have long and justifiably been associated with violence. *See United States v. Green,* 436 F.3d 449, 459 (4th Cir.2006) (noting that Congress "made the policy determination that recidivism for drug dealing, without more, is especially dangerous"); *United States v. Ward,* 171 F.3d 188, 195 (4th Cir.1999) ("Guns are tools of the drug trade."). Therefore, we find that these statutory aggravating factors reasonably justify imposing a more severe sentence on Caro compared to others.

For the reasons stated above, we conclude that § 3592(c)(10) and (12) do not violate the Eighth Amendment.[16] In so concluding, we follow the only other circuit to have considered this issue. *See United States v. Bolden,* 545 F.3d 609, 616-17 (8th Cir.2008) (upholding § 3592(c)(10)).

V. Closing Argument

We next consider Caro's challenge to the government's closing argument during the selection phase. Caro asserts that various remarks by the government violated the Fifth Amendment's Due Process Clause. In assessing alleged prosecutorial misconduct, we ask "whether the [misconduct] so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotations omitted). To prove reversible error, the defendant must show (1) "that the prosecutor's remarks or conduct were improper" and (2) "that such remarks or conduct prejudicially ***625** affected his substantial rights so as to deprive him of a fair trial." *United States v. Scheetz,* 293 F.3d 175, 185 (4th Cir.2002).

A.

The government's closing argument during the selection phase stressed that only a death sentence could "control" Caro. Particularly, the government indicated that a death sentence should be imposed because the BOP would not secure Caro adequately to prevent future violence. The government argued, "[E]very time the Bureau of Prisons has attempted to control Carlos Caro, to, to bring whatever pressure they had to bear, whatever security they had to bear on him, ... he has defeated those attempts." J.A. 1395. It added, "[C]an he be controlled in the Bureau of Prisons? I suspect the answer to that question is no.... The reason he can't be controlled is because the system is not failsafe." J.A. 1399. Responding to Cunningham's testimony that during a life sentence Caro would be incapacitated at Florence ADMAX until the BOP found him no longer dangerous, the government remarked: "[W]hat about this classification system that the BOP has? The question is can we rely on the BOP to send Caro to a place where he won't kill? ... [W]e know that the system for classification is not failsafe." J.A. 1401-02.

The government later asserted, "There is simply nothing the Bureau of Prisons can do to deter [Caro]," but explained, "There is one thing that we can do." J.A. 1404. The government continued, "[W]hat is the way that we can deter Carlos Caro? When I say we, this is something I can't do, the judge can't do it, because the question of the death penalty, ladies and gentlemen, is left exclusively to you, the jury. It's your decision." J.A. 1404. The government concluded:

> So, ladies and gentlemen, we now come to you. You're it. I'm the United States Attorney, powerless to control Caro. United States District Judge, federal judge, powerless to do it. The law allows one last option, and that is you. And only you. Judge Jones will do what you say. You go back there and find

> a unanimous verdict for life, that's what he will impose. You find death, that's what he'll do. The authority and the responsibility for the control of Carlos David Caro is in your hands. We have done all we can do. And so we come to you.

J.A. 1438-39.

B.

Caro's principal challenge here relates to the government's argument that only a death sentence could control Caro.[17] Although we find this argument troubling for the reasons discussed below, we cannot conclude that Caro suffered such prejudice as to warrant reversal.

***626** The FDPA created an analytical framework for considering the death penalty clearly designed to minimize arbitrariness. The Supreme Court explained that the decision whether to select the death penalty should involve "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant,* 462 U.S. at 879, 103 S.Ct. 2733 (emphasis omitted). The suggestion that the BOP would not secure Caro adequately to prevent future violence implicates policy and resource considerations that are quite different. *See Tucker v. Kemp,* 762 F.2d 1496, 1508 (11th Cir.1985) (en banc) ("Neither the future diligence of an appellate court nor the possibility of future incompetence of corrections and parole personnel should be invoked to alter the jury's perception of its role at capital sentencing."). Moreover, calling upon the jury to "control" Caro gives them a role more akin to law enforcement than to impartial arbitration between the defendant and government. *See United States v. Young,* 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) ("The prosecutor was ... in error to try to exhort the jury to 'do its job'; that kind of pressure ... has no place in the administration of criminal justice.").

Our concerns notwithstanding, on these facts we cannot find such prejudice as to warrant reversal. We reach that conclusion based on various factors we have found relevant when assessing prejudice:

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

Scheetz, 293 F.3d at 186.

The government's comments about the jury's role were isolated and not extensive. More significantly, regarding the government's comments about whether the BOP would adequately secure Caro to prevent future dangerousness, Caro's own argument opened the door. Caro's expert Cunningham acknowledged that Caro remained dangerous, but testified that Caro would not endanger anyone because the BOP would incapacitate him at Florence ADMAX.[18] This plainly invited the government to respond that, actually, the BOP would not secure Caro adequately to prevent future violence.

Furthermore, the district court's instructions counterbalanced any improper comments. The court stated that the jury should "make a unique, individualized judgment about the justification for and appropriateness of the death penalty...." Trial Tr. 105, Doc. 687, June 19, 2004. The court also cautioned, "I remind you that the statements, questions, and arguments of counsel are not evidence." Trial Tr. 102.

Finally, each alleged non-statutory aggravating factor was well supported by the record. Most notably, Caro's previous violent conduct, his statements evincing indifference to punishment, and Cunningham's own admission about Caro's future dangerousness certainly sufficed to establish the non-statutory aggravating factor of future dangerousness. Therefore, we cannot say that the government's closing argument ***627** "prejudicially

affected [Caro's] substantial rights so as to deprive him of a fair trial." *Scheetz,* 293 F.3d at 185.

VI. Lack of Remorse

We next consider Caro's Fifth Amendment claim regarding lack of remorse. Caro argues that the government and district court violated his Fifth Amendment privilege against self-incrimination by having the jury consider Caro's failure to speak words of remorse. The government admits referring to Caro's silence during closing argument but contends that the Fifth Amendment permitted using silence to prove the non-statutory aggravating factor of lack of remorse. "We review de novo a properly preserved constitutional claim." *Hall,* 551 F.3d at 266. Given the court's cautionary instruction and overwhelming information showing Caro's lack of remorse, we conclude that any error would have been harmless under 18 U.S.C. § 3595(c)(2).

A.

The government's notice of intent to seek the death penalty under the FDPA asserted a non-statutory aggravating factor of lack of remorse. Cases in which the government has properly established this non-statutory aggravating factor have generally involved affirmative words or conduct. *See, e.g., United States v. Basham,* 561 F.3d 302, 334 (4th Cir.2009) (deeming evidence of drug use and sexual encounters during a crime spree highly probative of lack of remorse); *Emmett v. Kelly,* 474 F.3d 154, 170 (4th Cir.2007) (holding that a statement, made in response to police questioning about a murder, that the victim "was 'an asshole' who 'wouldn't loan me no money' " showed lack of remorse). Here, however, the government alleged that "Carlos David Caro *has not expressed remorse* for his violent acts, including (but not limited to) the murder of Sandoval, the stabbing of Benavidez and the gang-based assault in Oakdale." J.A. 57 (emphasis added).

Caro objected and moved to strike the government's allegation, arguing that "[e]vidence of lack of remorse must be more than mere silence on the part of the defendant and must not implicate his constitutional right to remain silent." J.A. 75. Caro also objected to the district court's proposed jury instruction, which referred to the government's allegation but cautioned, "[M]ere silence, alone, by the defendant should not be considered as proof of lack of remorse." J.A. 1449. Caro proposed the following alternative:

> The government has alleged as a non-statutory aggravating factor that Carlos David Caro has not expressed remorse for the killing of Roberto Sandoval.... To find this aggravating factor, the government must prove beyond a reasonable doubt that Carlos David Caro, by his words or his actions, indicated a pervading and continuing lack of remorse for the killing of Roberto Sandoval. Mere silence on his part or the absence of an affirmative expression of remorse on his part may never be the basis of a lack of remorse because Carlos David Caro has a Constitutional right to remain silent which cannot be used against him for any purpose.

J.A. 459. The district court declined to give this proposed instruction. The court also overruled Caro's objection and denied his motion to strike, reasoning that the government intended to prove Caro's lack of remorse "by his actions and statements, not by mere silence." *United States v. Caro,* No. 06-1, 2006 WL 1594185, at *7 (W.D.Va. June 2, 2006).

The government's closing argument during the selection phase addressed this issue. ***628** The government pointed out Caro's failure to apologize:

> We talk about lack of remorse as being an aggravator. You know, a lot of times we do things, and you sit around and you say, "Gee, boy, I shouldn't have done that. I'm sorry I did that." All of us do things like that. We, many times we apologize to our family members, our friends, and say "Gee, what was I thinking? I didn't mean to do that." Have we seen any remorse at all from Carlos Caro with regard to any of the bad stuff that he's ever done? No.

J.A. 1397. The government also mentioned Caro's callous remarks following Sandoval's death; Cunningham's testimony, "Well, I'm assuming Carlos Caro has no remorse," J.A. 1398; and Caro's January 2004 letter to

Gomez showing more concern about Caro's standing among Texas Syndicate members than about Benavidez's suffering. The government also mentioned Caro's failure to apologize to Gomez for killing Sandoval.

At the close of argument, the district court gave the following jury instruction:

> C, lack of remorse. The Government has alleged that Carlos David Caro has not expressed remorse for his violent acts, including the murder of Roberto Sandoval, the stabbing and attempted murder of Ricardo Benavidez, and the gang based assault at Oakdale. Remember that the defendant has a constitutional right to remain silent, and mere silence, alone, by the defendant should not be considered as proof of lack of remorse.

J.A. 1448-49. The court later cautioned: "The defendant did not testify. The law gives him that right.... Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed in arriving at your decision." Trial Tr. 115-16.

The verdict form stated: "Do you, the jury, unanimously find that the government has proven beyond a reasonable doubt that the defendant has not expressed remorse for killing Roberto Sandoval?" J.A. 1459. Beside this question, the foreperson checked a blank labeled "Yes." J.A. 1459.

B.

The Fifth Amendment privilege against self-incrimination guarantees every criminal defendant "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence.' " *Estelle v. Smith,* 451 U.S. 454, 468, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (quoting *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). Thus it "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *see Miranda v. Arizona,* 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (noting that a prosecutor may not "use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation").

The Supreme Court has recognized that the Fifth Amendment applies during sentencing hearings. *See Mitchell v. United States,* 526 U.S. 314, 327, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *see also Estelle,* 451 U.S. at 463, 101 S.Ct. 1866 (applying the Fifth Amendment to capital sentencing). In *Mitchell,* the defendant pleaded guilty to distributing cocaine but during her plea colloquy refused to admit the quantity involved. Following a sentencing hearing where her codefendants testified about how much cocaine the defendant usually distributed each week, the district ***629** court found that she had distributed enough kilograms to mandate a minimum sentence of ten years. In making this finding, the court expressly considered the defendant's refusal to testify. Finding error, the Supreme Court concluded that "[b]y holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Mitchell,* 526 U.S. at 330, 119 S.Ct. 1307.

Importantly, *Mitchell* avoided the issue of whether a defendant's silence may be considered regarding a non-statutory aggravating factor of lack of remorse. The Court stated: "Whether silence bears upon the determination of a lack of remorse ... is a separate question. It is not before us, and we express no view on it." *Id.* Furthermore, our sister circuits are divided over whether the Fifth Amendment prohibits using silence to show lack of remorse inviting a harsher sentence. *Compare United States v. Mikos,* 539 F.3d 706, 718 (7th Cir.2008) (holding that during a capital sentencing a defendant's silence may be considered regarding lack of remorse), *with Lesko v. Lehman,* 925 F.2d 1527, 1544-45 (3d Cir.1991) (holding that during a capital sentencing a defendant's failure to apologize may not be considered regarding lack of remorse), *United States v. Roman,* 371 F.Supp.2d 36, 50 (D.P.R.2005) (holding that during a capital sentencing lack of remorse may not be proved using "information that has a substantial possibility of encroaching on the defendants' constitutional right to remain silent"), *and United States v. Cooper,* 91 F.Supp.2d 90, 112-13 (D.D.C.2000) (barring the inference of lack of remorse from a defendant's "unwillingness to acknowledge in his post-arrest statements that he is blameworthy for

the crimes to which he admitted" (internal quotations omitted)). Despite *Mitchell* having reserved the question of whether silence bears upon lack of remorse, that decision may resolve the question we face today when read in conjunction with *Estelle.* [19]

Sentencing involves findings about (1) circumstances of criminal conduct and (2) ***630** characteristics of the defendant. *See* 18 U.S.C. § 3553(a)(1) (requiring a sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"); *Zant,* 462 U.S. at 879, 103 S.Ct. 2733 (requiring that a selection decision during capital sentencing be "an individualized determination on the basis of the character of the individual and the circumstances of the crime" (emphasis omitted)). Following *Griffin* and its progeny, *Mitchell* held that a defendant's silence cannot be considered "in determining the facts of the offense at the sentencing hearing," 526 U.S. at 330, 119 S.Ct. 1307, but the Court avoided mentioning whether silence could be considered regarding the defendant's character. For this reason, the government argues that *Mitchell* permits considering silence regarding the non-statutory aggravating factor of lack of remorse, which relates to character.

This argument, however, is in tension with *Estelle.* There, the Supreme Court found that the Fifth Amendment prohibited using a defendant's unwarned statements to prove the non-statutory aggravating factor of future dangerousness. *See Estelle,* 451 U.S. at 468, 101 S.Ct. 1866. Future dangerousness and lack of remorse are similar factors that pertain to character rather than to circumstances of criminal conduct. [20] Accordingly, at least for the purpose of capital sentencing, *Estelle* belies any supposed distinction created by *Mitchell* between circumstances of criminal conduct and characteristics of the defendant. *See also Mitchell,* 526 U.S. at 340, 119 S.Ct. 1307 (Scalia, J., dissenting) (finding "no logical basis for drawing such a line within the sentencing phase" (emphasis omitted)). *Estelle* might have been distinguishable as involving unwarned statements rather than silence, but *Mitchell* itself forecloses that argument. *See Mitchell,* 526 U.S. at 329, 119 S.Ct. 1307 ("Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence...."). Thus, *Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the non-statutory aggravating factor of lack of remorse. [21]

Although we recognize *Estelle* and *Mitchell*'s guidance, we ultimately find that any error would have been harmless. *See* 18 U.S.C. § 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless."). Any prejudice Caro suffered was greatly mitigated by the district court's cautionary jury instruction. The court stated, "Remember that the defendant has a constitutional right to remain silent, and mere silence, alone, by the defendant should not be considered as proof ***631** of lack of remorse." J.A. 1449. This indicated that silence could never be considered regarding the non-statutory aggravating factor of lack of remorse, and "we presume that a properly instructed jury has acted in a manner consistent with the instruction[ ]." *United States v. Alerre,* 430 F.3d 681, 692 (4th Cir.2005); *see also Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (recognizing "the almost invariable assumption of the law that jurors follow their instructions").

Furthermore, Caro's affirmative conduct displaying lack of remorse was significant and telling. Just after killing Sandoval, Caro yelled, "Come get this piece of shit out of here." J.A. 676. When asked whether Sandoval was breathing, Caro replied: "No. At this time he's stinking up the room, get him out." J.A. 684. He also explained, "[Sandoval] called me a mother fucker, that whore, that's why I fucked him up." J.A. 781. And Caro boasted, "I killed a guy two weeks ago ... [f]or being a fool." J.A. 790. In short, Caro exhibited lack of remorse quite clearly until deciding to plead not guilty and claim self-defense. Even without considering Caro's silence, the jury could not reasonably have reached another conclusion regarding lack of remorse.

VII. Mercy Instruction

Next we review the district court's failure to give Caro's proposed jury instruction about mercy. *See United States v. Caro,* 483 F.Supp.2d 513, 517-18 (W.D.Va.2007). "We review the district court's decision to give or refuse to give a jury instruction for abuse of discretion." *United*

States v. Passaro, 577 F.3d 207, 221 (4th Cir.2009). "A district court commits reversible error in refusing to provide a proffered jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *Id.* (internal quotation omitted). "Moreover, we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *Id.* (internal quotations omitted).

A.

Caro requested the following jury instruction, indicating that mercy alone could justify a life sentence:

> [W]hatever findings you make with respect to the aggravating and mitigating factors, you are never required to impose a sentence of death. For example, there may be something about this case or about Carlos David Caro that one or more of you are not able to identify as a special mitigating factor, but that nevertheless creates a reasonable doubt about the need for Carlos David Caro's death. In such a case, the jury should render a decision against a death sentence. Moreover, even when a sentence of death is fully supported by the evidence, Congress has nevertheless given each of you the discretion to temper justice with mercy. Any one of you is free to decide that a death sentence should not be imposed in this case for any reason that you see fit. You will not have to explain the reason. Indeed, I am specifically required by law to advise you that you have this broad discretion.

J.A. 461.

The district court rejected Caro's proposal. It found the "proposed mercy instruction ... improper because it would have told the jury that it could base its determination on factors not specified in ***632** the FDPA." *Caro,* 483 F.Supp.2d at 517-18. The court explained that, although the jury could exercise mercy while weighing sentencing factors, it could not find a death sentence "justified" under 18 U.S.C. § 3591 and thereafter fail to recommend a death sentence. *Id.* at 518.

Instead of Caro's proposed instruction, the district court gave the following jury instruction:

> Whatever findings you make with respect to aggravating and mitigating factors, the result of the weighing process is never decided in advance. For that reason, a jury is never required to impose a sentence of death. At this last stage of your deliberation ... it is up to you to decide whether, for any proper reason established by the evidence, you choose not to impose such a sentence on the defendant.
>
> What constitutes sufficient justification for [a] sentence of death in this case is exclusively left to you. Your role is to be the conscience of the community in making a moral judgment about the worth of an individual life balanced against the societal value of what the Government contends is deserved punishment for the defendant's offense. Whatever aggravating and mitigating factors are found, a jury is never required to conclude the weighing process in favor of a sentence of death, but your decision must be a reasoned one, free from the influence of passion, prejudice, or arbitrary consideration.

J.A. 1442-43, 1451.

B.

Caro challenges the district court's failure to give his proposed mercy instruction. The issue turns on how the decision whether to select the death penalty rather than a life sentence should be made according to 18 U.S.C. §§ 3591 and 3593(e). Section 3591 provides that an eligible defendant "shall be sentenced to death if, after consideration of the factors set forth in section 3592 ... [,] it is determined that imposition of a sentence of death is justified." 18 U.S.C. § 3591. Section 3593(e) elaborates as follows:

> [T]he jury ... shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote .... shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

18 U.S.C. § 3593(e). Caro argues that § 3593(e)'s two-sentence structure creates a two-step process whereby (1) the death penalty might be found justified, with aggravating factors sufficiently outweighing mitigating factors, but (2) the jury might nonetheless impose a lesser sentence out of mercy. Conversely, the district court interpreted §§ 3591 and 3593(e) together to mean that, once the death penalty has been found justified because aggravating factors sufficiently outweigh mitigating factors, the death penalty must be imposed.

We find Caro's interpretation unpersuasive. First, the opening clause of § 3593(e)'s second sentence, namely, "Based on *this* consideration," refers back to the preceding sentence and thereby implies that when selecting a sentence the jury may consider only whether the death penalty is justified. 18 U.S.C. § 3593(e) (emphasis added). Second, § 3591 states plainly that an eligible defendant "shall be sentenced to death if ... it is determined ***633** that imposition of a sentence of death is justified," 18 U.S.C. § 3591, and we are obliged to read §§ 3591 and 3593(e) in harmony, *see Smith v. United States,* 508 U.S. 223, 233, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."); *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) (noting "the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context" (citations omitted)). *See United States v. Allen,* 247 F.3d 741, 780-81 (8th Cir.2001) (interpreting § 3593(e) the same way based on § 3591), *vacated on other grounds,* 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002). Because Caro's proposed instruction was legally incorrect, the district court's refusal to give that instruction was not an abuse of discretion.

VIII. Admissibility

Next we review decisions about whether to admit testimony offered under Federal Rule of Evidence 608(a), certain information about Sandoval, and Caro's offer to plead guilty. "We review evidentiary rulings of the district court for abuse of discretion." *Basham,* 561 F.3d at 325.

Decisions to admit or exclude information during an FDPA sentencing hearing are not governed by normal rules of evidence. Instead, the FDPA provides that a "defendant may present any information relevant to a mitigating factor" and that "[i]formation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). We still review for abuse of discretion. *See United States v. Johnson,* 223 F.3d 665, 674 (7th Cir.2000).

A.

First we review the admission of certain testimony during Caro's murder trial. Sean Bullock occupied the cell directly across from Caro's cell when Sandoval was killed. During trial, Bullock testified about that event as follows: "Well, I'm standing in my door ... and I seen out of my rear view someone like being choked. I looked ... and I seen Caro standing behind the guy." J.A. 707. Bullock also noted seeing "an orange towel" around Sandoval's neck. J.A. 707. Finally, Bullock described several occasions where he assisted prison guards by providing information about other inmates. Cross-examination showed that Bullock used aliases, had prior convictions, and testified with much greater detail than his earlier statements. In response, the government tried to rehabilitate Bullock by calling prison guard Gregory Bondurant. After explaining that Bullock had been a confidential informant, Bondurant testified: "In my opinion [Bullock] was truthful in the dealings he had with me." J.A. 779. Caro objected to Bondurant's testimony but never objected to Bullock's testimony.

Caro now challenges the district court's admission of Bondurant's testimony. Federal Rule of Evidence 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked....

Fed.R.Evid. 608(a). However, Rule 608(b) provides in part: "Specific instances of the ***634** conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, ... may not be proved by extrinsic evidence." Fed.R.Evid. 608(b).

Because Bullock's character for truthfulness was clearly attacked during cross-examination, no one contests that Bondurant's opinion testimony about Bullock's character was admissible under Rule 608(a). Caro asserts, however, that Bondurant's testimony that Bullock had been a confidential informant violated Rule 608(b). The district court did not abuse its discretion by rejecting this argument. Bondurant was allowed to provide a foundation for his opinion testimony by explaining his relationship with Bullock, *see United States v. Murray*, 103 F.3d 310, 322 (3d Cir.1997) (holding that "testimony that ... Brown [had been] a confidential informant on 'numerous occasions' ... was necessary to establish ... a basis on which to offer ... opinion as to Brown's character for truthfulness"), and Bondurant's statement that Bullock had been a confidential informant did nothing more.[22]

B.

We next review the exclusion of certain information about Sandoval. Caro has suggested that Sandoval might have targeted him and intentionally provoked a scuffle. Anticipating this argument, the government moved in limine to exclude evidence that Sandoval was placed in the SHU after being found carrying a shank. The district court denied the motion, reasoning that such evidence could be relevant to Sandoval's alleged "motive for being placed in the prison's Special Housing Unit where he would likely be celled together with [Caro]." J.A. 550. Notwithstanding, the court warned that Caro "might not be able to lay a proper foundation for the relevancy of this evidence." J.A. 550-51. Caro waited until the sentencing hearing to offer information about why Sandoval was placed in the SHU. The district court excluded this information, however, because Caro had laid no foundation for its relevance.

Because this decision was made during the sentencing hearing, we apply 18 U.S.C. § 3593(c) rather than normal rules of evidence. Although usually more generous than normal evidentiary rules, § 3593(c) likewise requires that information be relevant to some mitigating or aggravating factor. We agree that Caro never laid any foundation for his theory that Sandoval was following a plan to gain access to Caro. Caro points to nothing in the record to support this theory, and we could find nothing. Moreover, the information offered does not appear relevant to any sentencing factor. We thus conclude that the district court's exclusion of that information was not an abuse of discretion.

C.

Finally, we review the exclusion of Caro's offer to plead guilty. Hoping to rebut the alleged non-statutory factor of lack of remorse, Caro sought to present at sentencing a letter he had written to the government offering to plead guilty. Caro explained, "[W]e would like ... for the jury to know that Mr. Caro was willing to accept responsibility for his conduct, and accept a life sentence." J.A. 1313. The government objected under Federal Rule of Evidence 410.[23] The district court then ***635** excluded the letter as irrelevant and "for the reasons stated by the Government." J.A. 1314.

Caro contends that the district court erred for two separate reasons. First, he argues that the letter was admissible under § 3593(c) because it supported the mitigating factor of acceptance of responsibility. *See* 18 U.S.C. § 3593(c) ("The defendant may present any information relevant to a mitigating factor."). He claims to have proceeded to trial only because the government rejected his offer. Second, Caro argues that his due process "right of fair rebuttal" required admitting the letter to

rebut the alleged non-statutory aggravating factor of lack of remorse. *See Skipper v. South Carolina,* 476 U.S. 1, 5 n. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) ("Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty ... the defendant [must] be afforded an opportunity to introduce evidence on this point ... [given] the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." (internal quotations omitted)).

The government responds by arguing that a failed plea negotiation does not show acceptance of responsibility or rebut alleged lack of remorse. Caro's letter offering to plead guilty requested a promise not to seek the death penalty. Because Caro's letter was calculated to persuade the government not to seek the death penalty, rather than expressing unqualified remorse, we cannot agree with Caro's argument that the letter shows acceptance of responsibility. Therefore, we cannot say that the district court abused its discretion or violated due process by excluding it as irrelevant.[24] *See Owens v. Guida,* 549 F.3d 399, 420 (6th Cir.2008) (indicating that a conditional plea offer does not show acceptance of responsibility).

IX. Cumulative Error

Finally, Caro argues that cumulative error warrants reversal. *See Chambers v. Mississippi,* 410 U.S. 284, 302-03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (finding that exclusion of critical evidence coupled with inability to cross-examine violated due process by denying a fair trial). "Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Basham,* 561 F.3d at 330 (internal quotations omitted). "To satisfy this requirement, such errors must so fatally infect the trial that they violated the trial's fundamental fairness." *Id.* (internal quotations omitted).

***636** Although we recognized several possible errors, they were not widespread or prejudicial enough to have fatally infected Caro's trial or sentencing hearing. The proceeding below adhered to fundamental fairness. Each aggravating factor determined by the jury was well supported by the record. Finally, we cannot see how cumulative error could have caused the jury to weigh sentencing factors any differently.

For the reasons explained above, we

AFFIRM.

GREGORY, Circuit Judge, dissenting:

Today the majority blesses with constitutional imprimatur a death sentence that could only have been imposed after the jury found that Carlos Caro had previously been convicted of relatively minor, nonviolent drug offenses. If his sentence is ultimately carried out, Caro might well be the first, and as yet only, defendant executed after a jury found him death-eligible solely due to this type of nonviolent conduct. To reach this result, the majority applies the wrong test for deciding whether eligibility factors sufficiently narrow the class of defendants who can be executed and renders an important step in capital jurisprudence virtually useless. In doing so, my colleagues uphold statutory provisions that distinguish those who live from those who die in a wholly arbitrary and capricious way. I respectfully dissent.[1]

I.

At the outset, it is important to be clear about what conduct the eligibility factors in 18 U.S.C. §§ 3592(c)(10) and (12) cover and how those subsections apply to Caro. Subsection ten provides that a convicted murderer is eligible for death if that defendant "has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance." § 3592(c)(10). Subsection twelve makes a convicted murderer death-eligible if "[t]he defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed." § 3592(c)(12). Titles II and III, as amended, prescribe five-or-more years in prison for, among other things, simple possession of "a mixture or substance which contains cocaine base," 21 U.S.C. § 844(a), and distribution of controlled substances, including possession with intent to distribute, § 841.

It is clear from the statute's structure that Congress intended to target relatively minor drug offenders for death-eligibility, and not simply the worst of the worst. Congress could have crafted eligibility factors that covered the worst offenders-those, for example, who operate through violence and intimidation, drug kingpins, and those who target children and schools-in fact, Congress did so in other parts of the FDPA. *See* 18 U.S.C. § 3591(b)(1) (authorizing death for a defendant who was part of a "continuing criminal enterprise" to distribute drugs), § 3591(b)(2) (authorizing death for the leader of a drug conspiracy who kills or attempts to kill a public officer, juror, or witness to further the conspiracy), § 3592(c)(13) (authorizing death for murder defendants who were part of a continuing enterprise to distribute drugs to minors). But in subsections ten and twelve, ***637** Congress opted to target offenders at the bottom of the drug-offender ladder: individuals convicted of crimes carrying prison sentences as low as one year; street-level distributors, drug mules, and even some possessors.

Caro was precisely this kind of low-level, nonviolent offender. He was a drug mule, recruited by his father and uncles at a young age to smuggle drugs across the border from Mexico, who in the process was twice convicted of possession with intent to distribute marijuana and once of possession with intent to distribute cocaine. Caro was by no means a high-ranking member of a drug conspiracy and by all accounts was never violent before going to prison. Under the FDPA, however, Caro's drug history is sufficient to make him eligible for death in the absence of any other aggravating factor relating to his character or crime. This is unacceptable under the Eighth Amendment and the majority is wrong to find otherwise.

II.

The majority first errs by fundamentally misconstruing the nature and purpose of statutory eligibility factors in the death penalty schema. It claims that eligibility factors are constitutional so long as they do not apply to every murder defendant and so long as they are supported by some conceivable legislative goal. Maj. Op. at 623-24. By substituting rational basis review for the appropriate Eighth Amendment analysis, the majority glosses over the very serious way in which the eligibility factors challenged by Caro fail to narrow the class of death-eligible offenders in the way required by the Constitution.

Under the Eighth Amendment, only the government's interest in deterring and punishing violence implicates its interest in imposing the death penalty. Consequently, to perform their constitutionally required narrowing function, eligibility factors must limit the jury's focus to the defendant's violent conduct. Because the factors challenged here plainly do not do so, they cannot be the basis for Caro's death sentence.

A.

By now it is axiomatic in capital jurisprudence that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Godfrey v. Georgia,* 446 U.S. 420, 427-28, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality) (quoting *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Statutory eligibility factors "play a constitutionally necessary function" in this process by "circumscrib[ing] the class of persons eligible for the death penalty." *Zant v. Stephens,* 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

In order for eligibility factors to serve this constitutional function, they must "adequately differentiate ... in an objective, even-handed, and substantively rational way" those whom a jury may consider for death and those whom it may not. *Id.* at 879, 103 S.Ct. 2733; *see Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (aggravating factors must distinguish defendant sentenced to death from others convicted of murder in a "principled" way); *Lowenfield v. Phelps,* 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (eligibility factors are "a means of genuinely narrowing the class of death-eligible persons"); *Godfrey,* 446 U.S. at 433, 100 S.Ct. 1759 (invalidating death sentence based upon eligibility factor where "[t]here is no principled way to ***638** distinguish this case, in which the death penalty was imposed, from the many cases in which it was not").

The Supreme Court has helped illustrate the narrowing process, and statutory eligibility factors' role within it,

by describing it as a pyramid. *See Zant,* 462 U.S. at 870-71, 103 S.Ct. 2733; *Walton v. Arizona,* 497 U.S. 639, 716-18, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Stevens, J., dissenting). At the first point above the base of this pyramid lies the specific category of crimes for which the legislature, and subsequently the jury, may prescribe death. *Zant,* 462 U.S. at 871, 103 S.Ct. 2733. As the law stands today, this category is limited to murder or other crimes that result in the death of the victim. *Kennedy v. Louisiana,* --- U.S. ----, 128 S.Ct. 2641, 2665, 171 L.Ed.2d 525 (2008) ("Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use ... for crimes that take the life of the victim."). At the pyramid's apex is the particular crime for which a jury ultimately sentences a defendant to die. *Zant,* 462 U.S. at 871, 103 S.Ct. 2733. In order to move from the base to the apex, however, a defendant must pass through the eligibility plane.

In that eligibility plane, a jury must decide whether legislatively prescribed factors exist that separate murderers generally from death-eligible murderers. *Id.* Importantly, where a jury convicts a defendant of murder but does not convict him of special circumstances or aggravating factors in conjunction with that murder, then that defendant does not move from the base to the apex and therefore cannot be constitutionally executed. *Id.* at 878, 103 S.Ct. 2733 (aggravating factors, which move the defendant from the base to the second plane, are "constitutionally necessary"); *see Arave,* 507 U.S. at 474, 113 S.Ct. 1534 (aggravating factors are constitutionally infirm if they apply "to *every* defendant eligible for the death penalty" (emphasis in original)).

B.

Properly framed, the question raised by Caro's appeal is whether the two aggravating factors found by the jury are constitutionally sufficient to move him from the base to the apex, or whether the aggravators so fail to distinguish him from other defendants that they are not constitutionally significant. *See Zant,* 462 U.S. at 879, 103 S.Ct. 2733. The factors here fail to sufficiently distinguish Caro from the general offender population because they do not involve violence.

A review of Supreme Court jurisprudence illustrates why only the nature or extent of a defendant's violent conduct can be a basis for moving him up the death penalty pyramid. We know, for instance, that because the death penalty is a punishment different in-kind in its severity and finality from other punishments, it is warranted only to the extent that it punishes conduct that is itself fundamentally distinct from other crimes-hence the aphorism "death is different." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gregg,* 428 U.S. at 187, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia,* 408 U.S. 238, 287-88, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Brennan, J., concurring), 306 (Stewart, J., concurring) (1972). How the death penalty is imposed must be tailored to the unique penological goals that justify the state's extraordinary power to take human life in the first instance.

When the state renounces a defendant's humanity by putting him to death, *Furman,* 408 U.S. at 306, 92 S.Ct. 2726 (Stewart, J., concurring), it does so only to deter potential defendants from renouncing that ***639** humanity in others and to express appropriate moral outrage at the disrespect the condemned defendant has shown towards human life by extinguishing it, *e.g., Kennedy,* 128 S.Ct. at 2661-62; *Gregg,* 428 U.S. at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.). Only violence-specifically that which results in another's death-implicates the state's interest in imposing capital punishment in the first instance. *Kennedy,* 128 S.Ct. at 2661-62. It follows that if the state's interest in imposing death is implicated initially by violence, then the constitutionally required narrowing function used to select the most deserving to receive that sentence must focus on the relative severity of that violent crime or past conduct. In other words, for the state's interest to be sufficient to impose death-to move from the base at which the interest is first implicated to the apex where the interest is sufficiently acute-the condemned's conduct must be sufficiently aggravated by concurrent or past violence. Eligibility factors must focus on this interest in order to narrow the jury's discretion in a genuine and "substantively rational way." *Zant,* 462 U.S. at 879, 103 S.Ct. 2733.

This is clear when considering those aggravators that distinguish offenders by the nature of their specific offense, as opposed to the factors here that focus on the defendant's past conduct or behavior. The former must show that the defendant used violence in a particularly horrible way that is not typical even to murder. *See id.*

at 877; *Godfrey,* 446 U.S. at 433, 100 S.Ct. 1759. The resulting eligibility factors distinguish murderers based on whether their violent acts were committed for particularly abhorrent reasons, *e.g.,* § 3592(c)(8) (murder committed for pecuniary gain), whether those acts were committed in a particularly horrible way, *e.g.,* § 3592(c)(6) ("especially heinous, cruel, or depraved" conduct), § 3592(c)(5) (grave risk of danger to multiple victims), or whether those acts targeted individuals who deserve added protection from violence, *e.g.,* § 3592(c)(11) (vulnerable victims), § 3592(c)(14)(D) (law enforcement officials and police officers). Each of these categories distinguish defendants on the basis of their violent conduct, and not external factors-like whether the defendant unrelatedly had a bag of cocaine in his car at the time of the murder or whether the defendant was contemporaneously delinquent in filing his tax returns-that have no bearing on the defendant's culpability for capital punishment purposes.

The same logic applies to aggravators that distinguish death-eligible defendants based on their prior conduct. Prior-conduct eligibility factors must show that a murder defendant is more violent than other murder defendants in order to justify imposing death on that defendant. Otherwise, that eligibility cannot be said to distinguish defendants in a "substantively rational" way. *Zant,* 462 U.S. at 879, 103 S.Ct. 2733.

This rule is most consistent with how the states and federal government generally use prior-conduct factors to distinguish defendants. The most common prior-conduct aggravators in death penalty statutes are prior convictions for murder or other violent felonies.[2] Indeed, the other aggravators in the FDPA that relate to a defendant's history and character all involve prior convictions for violent crimes. 18 U.S.C. § 3592(c)(2) (prior conviction for violent felony involving a firearm), (3) (prior conviction for crime that resulted in death of another person), (4) (prior conviction of serious offense resulting in death or ***640** serious bodily injury). Except when it comes to drug offenses, the states and federal government agree that prior, nonviolent conduct is insufficient to make a murder defendant death-eligible. It is this rule, not its exception embraced by the majority today, which comports with the Eighth Amendment.

C.

Rather than revamp the entire capital-sentencing structure developed by the Supreme Court over the last four decades, I would find that Caro's death sentence violates the Eighth Amendment because the eligibility factors under which the jury sentenced him fail to narrow the class of offenders eligible for death in a "principled" or "substantively rational" way. *See Arave,* 507 U.S. at 474, 113 S.Ct. 1534; *Zant,* 462 U.S. at 879, 103 S.Ct. 2733. Caro was a low-level drug mule, convicted of possession with intent to distribute marijuana and cocaine. These convictions do not distinguish him from other murderers in a constitutionally-significant way because they do not implicate the state's qualitatively different interest in taking human life to deter future violence or impose retribution for escalating violence resulting in murder. *See Kennedy,* 128 S.Ct. at 2661-62; *Gregg,* 428 U.S. at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.). The government's interest in punishing minor drug offenders is different in-kind from its interest in punishing the most violent and heinous murderers and therefore does not usefully distinguish Caro from other murderers. The same would be true were Caro or any other defendant made death-eligible for tax evasion, wire fraud, or driving while under the influence; none of this prior, nonviolent conduct would implicate the government's interest in the death penalty and therefore would not constitutionally narrow the class of death-eligible offenders.

The majority disagrees. Instead of holding that any eligibility factor relating to a defendant's history or prior conduct must involve violence, the majority subjects the factors at issue here to rational basis review. Maj. Op. at 623-24. But rational basis scrutiny has no bearing on whether or not a statutory provision complies with the Eighth Amendment. As the Supreme Court recently explained:

> [R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the

> guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

District of Columbia v. Heller, --- U.S. ----, 128 S.Ct. 2783, 2818 n. 27, 171 L.Ed.2d 637 (2008) (internal citations omitted). Rational basis, therefore, cannot be used to evaluate whether a statutory provision complies with the specific proscription against cruel and unusual punishment. [3]

***641** In holding otherwise, the majority effectively avoids the Eighth Amendment problem by pretending that Eighth Amendment standards do not apply. Rather than require the government to show that the FDPA suitably narrows a jury's discretion in a way that advances capital punishment's legitimate goals, the majority demands that Caro rebut every reason for these eligibility factors that is conceivably related to a legislative goal, no matter how attenuated from the limited interests that justify the state's executing a human being. The majority recognizes the Eighth Amendment requirement that eligibility factors genuinely and substantively narrow death-eligible defendants, but it robs this requirement of meaning by declaring that any factor is sufficient so long as there is some plausible legislative consideration behind it. This renders the Eighth Amendment rhetoric without content. [4]

In practice, the rule proposed by the majority today transforms the pyramid created by the Supreme Court into a rhombus, in which eligibility factors serve no narrowing function whatever. Though it concedes that the eligibility factors here do not involve violence, the majority insists that they survive its limited, deferential review because drug offenses are "associated with violence." Maj. Op. at 624. It is hardly clear what it means to be associated with violence, but whatever it does mean, the associated-with-violence test cannot be a genuinely narrowing construct in practice. Among the many factors considered by those in the psychiatric and public-health fields to be "associated with violence" are: fire-setting, truancy, family conflict, recent humiliation, history of bullying or being bullied, poverty, unstructured time, and community disorganization. [5] How can the majority reasonably ***642** argue that any of the above factors could serve as statutory eligibility factors? If the majority admits, which it must, that eligibility factors must perform at least some narrowing function, surely its associated-with-violence test must fail.

Likewise, the majority claims that the eligibility factors before us today are justified by the government's interest in punishing recidivists. Who could doubt, the majority asks, that Congress could reasonably decide that repeat offenders deserve harsher treatment than first-timers? Maj. Op. at 623-24. This very question, though, conflates the government's general interest in deterring socially detrimental conduct with its interest in deterring death-eligible conduct. Recidivism in the abstract of course justifies escalating punishment. But the "death is different" principle underlying all capital jurisprudence illustrates that conduct must be different in kind, not just degree in order to trigger the government's interest in putting a defendant to death. *See, e.g., Lockett,* 438 U.S. at 604, 98 S.Ct. 2954. This is precisely why we are charged with analyzing death penalty claims under the Eighth Amendment and not generalized rational basis review. Nonviolent drug recidivists, like all other nonviolent, repeat offenders do not meet that Eighth Amendment criterion.

III.

Because the majority applies a test that in no way narrows the class of death-eligible offenders, the result is a sentence reached without properly distinguishing Caro from all other murderers. But of all the non-violent offenses the government could have chosen to distinguish death-eligible defendants, drug offenses create perhaps the greatest risk that a defendant will be executed arbitrarily.

A.

It has long been settled that a death penalty provision that applies to a vast offender population but is applied inconsistently or sparingly violates the proscription against cruel and unusual punishment. *E.g., Godfrey,* 446 U.S. at 433, 100 S.Ct. 1759 (plurality); *Furman,* 408 U.S. at 249, 92 S.Ct. 2726 (Douglas, J., concurring), 276 (Brennan, J., concurring), 309 (Stewart, J., concurring), 312 (White, J., concurring), 366 (Marshall, J., concurring). This is so largely because when the government selects so few offenders from such a large pool for execution, it cannot further its legitimate penological interests; instead

it merely inflicts gratuitous pain and suffering. *See Gregg,* 428 U.S. at 183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 1551, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring).

According to a Department of Justice report, 54 percent of federal inmates in 2007 were in prison for nonviolent drug offenses[6]-by far the highest percentage ***643** of offenders in any category.[7] That same report also found that nearly 20 percent of inmates in state prison were also there for drug crimes,[8] of which 60 percent were low-level and nonviolent.[9]

Of all the nonviolent offenses Congress could have made death eligible, it is clear, then, that it targeted the class of offenses with the largest number of offenders. And when these reports are viewed in conjunction with the 8.6 million people who reported using crack cocaine as of 2007,[10] and the number of persons convicted of applicable drug offenses who are no longer in prison, the eligibility factors used to make Caro death-eligible potentially apply to several million people. This makes subsections ten and twelve functionally catchall provisions, which a prosecutor can choose to use or not use arbitrarily and in a way that leads to "standardless sentencing discretion." *See Godfrey,* 446 U.S. at 428, 100 S.Ct. 1759 (internal quotation marks and alterations omitted).

Even if they could theoretically be applied reasonably, courts and juries use the factors so rarely that they gravely risk doing so arbitrarily in practice. The government cites to one case in which an appellate court previously upheld a death sentence under subsection (c)(10). *See United States v. Bolden,* 545 F.3d 609, 617 (8th Cir.2008). I am aware of only one other case in which a defendant was sentenced to die after a jury found him death-eligible under the provisions challenged by Caro. *See United States v. Higgs,* 353 F.3d 281, 295 (4th Cir.2003). In both *Bolden* and *Higgs,* however, the jury also found that the defendants were eligible under other provisions, and not just because of prior nonviolent drug offenses. That, to the best of my knowledge, makes Caro the only defendant who was deemed death eligible *only* under one or both of these FDPA provisions.

The result is the same when considering any analogous state law provisions. By my count, only two states, Louisiana and New Hampshire, have provisions that arguably apply as broadly as the FDPA's;[11] yet I am aware of no case in which either of those states' courts considered a death sentence for an offender who was selected for death eligibility because of a prior nonviolent drug conviction.

The government, therefore, cannot claim that executing Caro will further its legitimate interests in deterrence or retribution. *See Kennedy,* 128 S.Ct. at 2649-50. Low-***644** level drug offenders are so rarely selected for death and ultimately executed for their prior offenses alone that the FDPA cannot be said to deter them from murder. *See Furman,* 408 U.S. at 311, 92 S.Ct. 2726 (White, J., concurring). Likewise, murderers are so infrequently and inconsistently selected to die on the bases asserted here that it is "very doubtful that any existing general need for retribution would be measurably satisfied" by Caro's execution. *Id.* Executing Caro would therefore be "the pointless and needless execution of life with only marginal contributions to any discernible social or public purposes." *Id.* It would consequently be irreconcilable with the Eighth Amendment.

B.

The inherent arbitrariness in subsections ten and twelve is exacerbated by the way in which they can work to prevent a jury from giving meaningful consideration to relevant, mitigating evidence. Our justice system, reflecting broader concerns of society at-large, takes an often ambivalent view of minor drug offenders; one that recognizes their criminality but simultaneously accepts their own victimhood. Because drug offenses can so often be part-and-parcel of otherwise mitigating circumstances, making these offenses eligibility factors limits a defendant's ability to present mitigating evidence and increases the likelihood of an arbitrary sentence.

Not only must a capital defendant be allowed to present mitigating evidence at his sentencing, but the jury must be able to give meaningful effect to that evidence. *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 262, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007); *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Courts must closely scrutinize evidence that can be used as a "two-

edged sword" against a capital defendant, i.e., mitigating evidence that a jury might also consider aggravating, to ensure that juries can give appropriately mitigating weight to that evidence. *Abdul-Kabir,* 550 U.S. at 255, 127 S.Ct. 1654; *Roper v. Simmons,* 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (abolishing death penalty for juveniles, in part because juries might inappropriately consider youth an aggravating, rather than a mitigating factor); *Atkins,* 536 U.S. at 320, 122 S.Ct. 2242 (creating a bright-line rule barring execution of mentally retarded, in part because of the risk that juries would consider evidence of mental retardation aggravating, not mitigating).

A defendant's history of drug abuse is classic mitigating evidence, which the Supreme Court has held a jury must be able to consider and give effect to when sentencing a defendant. *E.g., Cone v. Bell,* --- U.S. ----, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009). Likewise, evidence that a defendant was induced into criminal behavior at a young age by close relatives is precisely the type of "troubled childhood" evidence to which jurors must be allowed to give meaningful, mitigating effect. *See Abdul-Kabir,* 550 U.S. at 262, 127 S.Ct. 1654. Indeed, the FDPA itself acknowledges specifically that juveniles induced into drug trafficking by adults are victims who are presumably less blameworthy for their conduct. *See* § 3592(d)(7) (making it an aggravating factor to use minors in drug trafficking).

Jurors in Caro's case could not be expected to give meaningful effect to Caro's drug use and troubled background because they were forced to consider both as the reasons he should be death-eligible in the first place. The record reveals that Caro ***645** was a cocaine addict [12] and that he dropped out of school to become a drug mule at his father and uncles' behest. Caro's attorneys were therefore faced with a modern Sophie's Choice: either forcefully present this evidence, thereby emphasizing to the jurors the basis for which they selected Caro for death-eligibility, or hardly mention the evidence at all to avoid further aggravating Caro's crime in the jurors' eyes.

It is rare, indeed, that an attorney's decision not to present or emphasize mitigating evidence can truly be characterized as a strategic choice. But here it is not surprising that Caro's lawyers opted to focus on Caro's future dangerousness to the jury, rather than his drug addiction or his early introduction to drug smuggling by his father and uncles. Even if his lawyers had emphasized it, at best, the jury could not be expected to give any meaningful effect to the same evidence that aggravated Caro's crime to death-eligible murder. At worst the evidence would have only reinforced their initial finding that Caro was worthy of the ultimate punishment. Caro's sentence quite possibly was "imposed in spite of factors which may [have] call [ed] for a less severe penalty," *Lockett,* 438 U.S. at 605, 98 S.Ct. 2954, because the FDPA prevented the jury from considering relevant, mitigating evidence. The risk that the resulting sentence was imposed arbitrarily "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

IV.

Today's decision comes on the heels of an interesting report regarding the state of capital punishment in this country, and particularly in our circuit. According to the report, the number of death sentences handed down nationally over the past year has decreased to the lowest level since the Supreme Court reinstated capital punishment in 1976. [13] This is particularly true in Virginia, which traditionally uses the death penalty more than all-but-one other state in the union. [14]

Among the reasons suggested for this phenomenon are the response to recent Supreme Court decisions prohibiting executions for certain offender classes, jurors' concerns about executing innocent people, and legislative and prosecutorial concerns about overusing the death penalty in the current economic climate. [15] Ironically, one of the reasons given for the reduction of death sentences in Virginia is that prosecutors are increasingly not seeking death for drug-related murders-apparently because they do not view these offenders as the worst of the worst. [16] This reduction in prosecutors' pursuing death sentences and juries' imposing them has not correlated with a similar reduction in executions, nor has it hampered the states' ability to execute the most heinous offenders. [17]

All of which suggests that the decades-long dialogue between courts and the political branches about capital punishment is finally starting to achieve a constitutionally-necessary equilibrium; one that accommodates ***646** the government's interest in punishing murderers and the Constitution's command that the government not do so arbitrarily. As the

judiciary has tried to implement the Eighth Amendment's proscription against cruel and unusual punishment by requiring that death sentences be imposed only after a process that selects, in a non-arbitrary way, the worst-of-the-worst offenders, the political branches have responded by recalibrating their notion of which offenders are death eligible and proceeding accordingly. The apparent upshot is that those charged with the awesome power of seeking and imposing death have sought to limit that power to those most deserving, and in so doing, have made the death penalty more effective and efficient, even as they have limited the class of offenders to whom it may be applied. [18]

This decision threatens to undermine that constitutionally necessary equilibrium. Carlos Caro's death sentence was imposed because he had previously committed relatively minor, nonviolent drug crimes. Of all similarly situated defendants, it appears that only Caro now faces the prospect of being executed after being chosen because of factors so completely divorced from the state's legitimate penological interests in taking human life. Whatever Caro's prior conduct says about his character, under the Eighth Amendment, it cannot serve as the sole reason for his death eligibility as compared to other defendants. Even the government's attorney had to allow at oral argument that Caro's sentence seemed "anachronistic" in light of evolving death penalty jurisprudence. Yet the majority disagrees.

Justice Stewart spoke in *Furman* of the way in which some "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309, 92 S.Ct. 2726 (Stewart, J., concurring). Thirty-eight years later, I can think of no more apt way to describe Caro's sentence. The FDPA provisions that prescribe such a random and unprincipled sentence do not withstand Eighth Amendment scrutiny. Had the majority applied that level of scrutiny, I have little doubt that it would have reached the same conclusion. I respectfully dissent.

All Citations

597 F.3d 608

Footnotes

1 These convictions were for violations of Title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971.

2 In January 2004, Caro sent a letter to one Gomez requesting that Caro, Benavidez, and others who had been involved remain in good standing within the Texas Syndicate.

3 Inmates housed in the SHU at USP Lee spend twenty-three hours per day in their cell and are allowed one hour of recreation outside per day.

4 The FDPA provides that a defendant convicted of any offense listed in § 3591 "shall be sentenced to death" if the sentencing body determines that "imposition of a sentence of death is justified" after considering the factors listed in § 3592. 18 U.S.C. § 3591. Specifically, the sentencing body must consider "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593(e).

Regarding the sentencing factors, § 3592(a) lists eight mitigating factors that must be considered, including a catch-all factor covering any relevant mitigating circumstance. Conversely, § 3592(c) lists sixteen aggravating factors that must be considered for a homicide offense, assuming notice has been given, and adds that "any other aggravating factor for which notice has been given" may be considered. 18 U.S.C. § 3592(c). A defendant has the "burden of establishing the existence of any mitigating factor ... by a preponderance of the information," whereas the government has the "burden of establishing the existence of any aggravating factor ... beyond a reasonable doubt." 18 U.S.C. § 3593(c). Because a death sentence cannot be imposed unless at least one statutory aggravating factor has been proved, statutory aggravating factors are determined before any alleged mitigating or non-statutory aggravating factors are considered.

5 We use the term "information" rather than "evidence" to conform to the FDPA's language and because here the Federal Rules of Evidence are inapplicable. *See* 18 U.S.C. § 3593(c) (allowing presentation of most information relevant to sentencing factors and providing that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury").

6 The jury found that Caro (1) was exposed to domestic violence growing up, (2) was not encouraged in school, (3) came from an impoverished community, (4) was well-behaved growing up, (5) failed to reach high school after needing special education, (6) was shy and respectful compared to his brothers, (7) was brought into illegal drug trafficking by his uncles, (8) never abused his wife or daughter, (9) was not violent or aggressive until his thirty-year prison sentence, (10) has never attacked prison staff, (11) has never tried to escape, and (12) has been securely detained since December 18, 2003.

7 One juror voted that Caro's father had a corrupting influence, five voted that Caro's execution would grieve his family, eight voted that Caro's life benefited his family, and nine voted that during a life sentence Caro would be "incarcerated in a secure federal institution." J.A. 1460.

8 Caro also claims that the district court erred by not questioning prospective jurors individually. Because he never raised this issue below, we review for plain error. *See United States v. Rolle,* 204 F.3d 133, 138 (4th Cir.2000). We conclude that the court did not err because the Constitution does not require individual questioning of prospective jurors. *See Mu'Min v. Virginia,* 500 U.S. 415, 431-32, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (finding no error where a trial court denied a motion for individual questioning, questioned prospective jurors in small groups, and asked follow-up questions of prospective jurors who showed possible bias); *United States v. Bakker,* 925 F.2d 728, 734 (4th Cir.1991) ("[I]t is well established that a trial judge may question prospective jurors collectively rather than individually.... This is especially true where ... the trial court provides for individual questioning of a juror whose initial responses prove less than satisfactory....").

9 *Tipton* was referring to *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), where the Supreme Court found that excluding a juror who was "irrevocably committed to ... vote against the death penalty regardless of the facts and circumstances" does not violate the Sixth Amendment. *Id.* at 523, 88 S.Ct. 1770. Thus, a "reverse-*Witherspoon* " question asks prospective jurors whether they are irrevocably committed to voting for the death penalty.

10 We reviewed for clear error in *United States v. Trevino,* 89 F.3d 187, 190 (4th Cir.1996), but there the district court had reviewed the requested material *in camera* before denying the defendant's motion to compel. The court's findings were thus factual rather than purely legal.

11 Called the "Alcatraz of the Rockies," Florence ADMAX houses the BOP's most dangerous inmates. *See* Dan Eggen, *New Home is "Alcatraz of the Rockies,"* Wash. Post, May 5, 2006, at A6. Guinness World Records has dubbed Florence ADMAX the most secure prison in the world. *Guinness World Records 2001* 53 (Mint Publishers, Inc. 2001); *see Scarver v. Litscher,* 434 F.3d 972, 974 (7th Cir.2006) (calling Florence ADMAX "the most secure prison in the federal system").

12 During this hearing, the government represented that "it d[id] not intend to use any of the documents sought in the Discovery Motions in its case-in-chief during either the guilt or the penalty phase of this case." J.A. 289.

13 We note that certain discovery requests that Caro made may fall outside Rule 16 because they apparently call for data processing. For example, Caro requested "[d]ata showing median length of stay, range of length of stay and standard deviation of the distribution of length of stay at Florence ADMAX." J.A. 396. Assuming that here Caro requests statistical analysis, the government would not have been obliged to comply under Rule 16, which requires only that "the government must permit the defendant to inspect and to copy or photograph" requested items. Fed.R.Crim.P. 16(a)(1)(E). However, the government never raised this argument.

14 When asked during oral argument whether Caro asserted any claim arising from the government having violated the district court's order that it "may not rely on specific instances of inmate violence (other than the defendant's own) in seeking to prove his future dangerousness," *Caro,* 461 F.Supp.2d at 482, counsel for Caro stated that she noted the government's misconduct merely to bolster her argument about subsection (i). Regardless of whether subsection (ii) would apply, we cannot grant relief that Caro plainly failed to request.

15 Although we have not adopted this *Ross* standard in any published opinion, we have in two unpublished opinions. *See United States v. Farah,* No. 06-4712, 2007 WL 2309749, at *4 (4th Cir. Aug.14, 2007); *United States v. Kirk,* No. 88-5095, 1989 WL 64139, at *2 (4th Cir. June 2, 1989). Numerous other circuits also follow *Ross. See Baker,* 453 F.3d at 425; *United States v. Jordan,* 316 F.3d 1215, 1251 (11th Cir.2003); *United States v. Marshall,* 132 F.3d 63, 68 (D.C.Cir.1998); *United States v. Stevens,* 985 F.2d 1175, 1180 (2d Cir.1993); *United States v. Marshall,* 532 F.2d 1279, 1285 (9th Cir.1976); *United States v. Scott,* No. 92-6272, 1993 WL 411596, at *3 (10th Cir. Oct.8, 1993); *see also United States v. RMI Co.,* 599 F.2d 1183, 1188 (3d Cir.1979) (noting the *Ross* standard in another context). Like our sister circuits, we believe *Ross* provides an adequate formula for applying Rule 16. Having said that, we stress that "materiality" in Rule 16(a)(1)(E)(i) differs from "materiality" under *Brady,* which is grounded in the Due Process Clause.

16 The dissent presupposes that each statutory aggravating factor standing alone must narrow the class of persons eligible for the death penalty to include only those who deserve a death sentence. Specifically, the dissent invokes the "pyramid" metaphor *Zant* adopted to describe Georgia's capital sentencing scheme, "with the death penalty applying only to those

few cases which are contained in the space just beneath the apex," 462 U.S. at 871, 103 S.Ct. 2733 (internal quotations omitted), and concludes that "the question raised by Caro's appeal is whether the two [statutory] aggravating factors found by the jury are constitutionally sufficient to move him from the base to the apex...." Dis. Op. at 638. Existing Supreme Court precedent does not impose such a requirement. A capital sentencing scheme as a whole must limit "[c]apital punishment ... to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper,* 543 U.S. at 568, 125 S.Ct. 1183 (internal quotations omitted). However, it does not follow that a statutory aggravating factor alone must satisfy that requirement. (Indeed, the FDPA contains various safeguards intended to satisfy that requirement when taken together.) Instead, the Supreme Court stated that a statutory aggravating factor need only "genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877, 103 S.Ct. 2733. For the reasons stated above, § 3592(c)(10) and (12) plainly satisfy this standard.

17 Caro makes other challenges that are unpersuasive, but only one merits discussion. He challenges the government's argument that a life sentence would send bad messages. The government stated that a life sentence would tell the Texas Syndicate, "[Y]ou can kill and it's okay," J.A. 1436; would tell prison staff and inmates, "It's open season because in this community there's no punishment for murder," J.A. 1436; and would tell Sandoval's parents "that their son's life was meaningless," J.A. 1435. Because the decision whether to impose the death penalty should involve "an individualized determination on the basis of the character of the individual and the circumstances of the crime," *Zant,* 462 U.S. at 879, 103 S.Ct. 2733 (emphasis omitted), the government's comments about messages sent to anyone other than Caro might have been improper. Regardless whether we found them improper, however, these comments did not prejudice Caro enough to violate the Due Process Clause because they were isolated and unlikely to mislead the jury. *See Scheetz,* 293 F.3d at 175.

18 Cunningham admitted, "[I]n the general population of a U.S. penitentiary, there is a very high risk that Mr. Caro would seriously injure someone else." J.A. 1267.

19 The government maintains that we should follow two Seventh Circuit decisions. In *Burr v. Pollard,* the court reasoned that "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse ... [which] is properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation ... and deterrence...." 546 F.3d 828, 832 (7th Cir.2008). This rationale overlooks the implications of remaining silent. Because remorse implies consciousness of guilt, speaking words of remorse for conduct prevents a defendant from later denying that conduct. Likewise, choosing to deny guilt prevents a defendant from speaking words of remorse for the charged offense. Exercising one's Fifth Amendment right to remain silent therefore entails failure to speak words of remorse. Accordingly, penalizing a capital defendant for failure to articulate remorse burdens his Fifth Amendment privilege against self-incrimination.

In *United States v. Mikos,* the court later reasoned that sentencing courts routinely consider silence in determining failure to accept responsibility under Section 3E1.1 of the United States Sentencing Guidelines, providing a sentencing discount for acceptance of responsibility. 539 F.3d at 718. But we previously held that withholding a sentencing discount under section 3E1.1, unlike a sentence enhancement, does not penalize the defendant for remaining silent. *See United States v. Gordon,* 895 F.2d 932, 936-37 (4th Cir.1990) ("[F]or section 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal conduct.... However, a defendant is not penalized for failing to accept responsibility. Rather, acceptance of responsibility is a mitigating factor available under appropriate circumstances." (citations omitted)).

20 The government originally alleged lack of remorse as one of three considerations supporting the non-statutory aggravating factor of future dangerousness. The record does not make clear when lack of remorse became its own non-statutory aggravating factor, but the jury instruction treats them separately.

21 Furthermore, *Mitchell* reasoned that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." 526 U.S. at 330, 119 S.Ct. 1307. This reasoning applies *a fortiori* to the non-statutory aggravating factor of lack of remorse. *See* 18 U.S.C. § 3593(c) ("The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt.").

22 Caro argues that testimony giving details about Bullock's assistance to prison officials violated Rule 608(b). Such testimony, however, came not from Bondurant but from Bullock himself. And Caro never objected to Bullock's testimony.

23 Rule 410 provides that, with two exceptions, "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is "not ... admissible against the defendant who made the plea or was a participant in the plea discussions." Fed.R.Evid. 410(4).

24 In addition, Caro challenges the district court's denial of his motion for allocution (unsworn testimony without cross-examination) prior to sentencing. Caro moved for allocution under Federal Rule of Criminal Procedure 32, the Due Process Clause of the Fifth Amendment, and the Sixth Amendment. We have said that neither Rule 32 nor the Constitution provides a "right to make an unsworn statement of remorse before the jury which was not subject to cross examination" during a capital sentencing. *United States v. Barnette,* 211 F.3d 803, 820 (4th Cir.2000). Accordingly, the decision of whether to allow the allocution fell within the district court's discretion. Because the court could reasonably have concluded that such information would be unduly prejudicial, confusing, or misleading under § 3593(c), we see no abuse of discretion.

1 My dissent is limited to the judgment and the majority's holding in Part IV that the eligibility factors in this case pass Eighth Amendment scrutiny. I concur with the rest of the Court's analysis.

2 *See* The Death Penalty Information Center, *Aggravating Factors for Capital Punishment by State* (2009), http://www.deathpenaltyinfo.org/ aggravating-factors-capital-punishment-state.

3 The majority apparently confuses the Eighth Amendment's requirement to review death sentences for arbitrariness with rational basis review. Maj. Op. at 624. This is a clear mistake.

Rational basis is a term of art; a method by which courts review almost all state action to ensure that there is at least some conceivable, non-discriminatory or rational purpose for that action. *See United States v. Carolene Products Co.,* 304 U.S. 144, 152-53, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). The Eighth Amendment's arbitrary-and-capricious review is quite different. When reviewing a death sentence under the Eighth Amendment, a court looks to whether the sentence was imposed under conditions that create a substantial risk that the decision to execute a defendant was reached arbitrarily and capriciously. *Gregg,* 428 U.S. at 189, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.). Essentially, rational basis review is the opposite of arbitrary-and-capricious review. The former assumes that the government is acting appropriately and will accept almost any explanation to support that assumption. *See Carolene Products,* 304 U.S. at 153, 58 S.Ct. 778. The latter places the burden on the state to show that where it decides to take a human being's life, it has reached that decision in the most scrupulous and principled way possible. *See Kennedy,* 128 S.Ct. at 2665 ("In most cases justice is not better served by terminating the life of the perpetrator rather than confining him"); *Gregg,* 428 U.S. at 189, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.).

4 The majority's unabashed embrace of this position is startling. It admits, as it must, that in order to comply with the Eighth Amendment, statutory aggravating factors must "genuinely narrow the class of persons eligible for the death penalty," but in the same paragraph chastises me for "presuppos[ing] that each statutory aggravating factor standing alone must narrow the class of persons eligible for the death penalty to include only those who deserve a death sentence." Maj. Op. at 624 n. 16 (internal citations and quotation marks omitted). The logical inconsistency in this statement is obvious. If the Supreme Court says that aggravating factors must genuinely narrow the class of offenders eligible for the death penalty, it is hardly a great presupposition to conclude that the factors, themselves, must narrow in accordance with the Eighth Amendment. The majority can insist all it wants that the aggravating factors here "plainly" satisfy the ad hoc standard it invents today, but it cannot pretend that its standard is derived from the Eighth Amendment or flows from the decisions of the Supreme Court.

5 New York State Office of Mental Health, *Violence Prevention: Risk Factors,* http://www.omh.state.ny.us/omhweb/sv/risk.htm. *See* Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World,* 24 Cardozo L.Rev. 1845, 1867-68 (2003) (listing mental illness, family dysfunction, poverty, and living in high crime or urban areas as potential risk factors for violence and then explaining that the presence of a risk factor does little to predict whether or not an individual with that risk factor will actually be violent in the future).

6 The Report does not explicitly state that the drug offenders are nonviolent; however, the report does distinguish miscellaneous, violent offenders from drug offenders and organizes the statistics by most serious offenses, illustrating that the drug offenders were very likely nonviolent.

7 Heather C. West & William J. Sabol, *Prisoners in 2007* App. 12 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf.

8 *Id.* at App. 11.

9 Marc Mauer & Ryan S. King, *A 25 Year Quagmire: The War on Drugs and its Impact on American Society 2 (2007), available at* http://www. sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

10 National Institute of Drug Abuse, *NIDA InfoFacts: Crack and Cocaine 4* (2009), http://www.drugabuse.gov/pdf/infofacts/Cocaine09.pdf.

11 N.H.Rev.Stat. Ann. § 630:1 (2009); La.Code Crim. Proc. Ann. art. 905.4(A)(11) (2009). The one case of which I am aware in which the Louisiana Supreme Court interpreted its provision, it did so only in the context of a capital defendant who killed during the course of a drug deal and not a defendant who was made death-eligible for a past offense. *See Louisiana v. Neal,* 796 So.2d 649, 661 (La.2001).

Furthermore, Florida authorizes a defendant's prior drug conviction, carrying a sentence of more than one year, to be used as a statutory aggravator, but only if the defendant's underlying capital conviction was for drug trafficking. Fla. Stat. Ann. § 921.142(6)(b) (LexisNexis 2009). This provision is almost surely unconstitutional in light of the Supreme Court's decision in *Kennedy. See* 128 S.Ct. at 2665.

12 It does not appear in the record whether Caro was addicted to cocaine powder or cocaine base.

13 Robert Barnes & Maria Glod, *Number of Death Sentences Falls to a Historic Low,* Wash. Post, Dec. 18, 2009, *available at* http://www. washingtonpost.com/wp-dyn/content/article/2009/12/17/ AR2009121704299.html.

14 *Id.*

15 *Id.*

16 *Id.*

17 *See id.*

18 Despite the dramatic reduction in death sentences in Virginia, the last person executed in the Commonwealth was put to death within six years of his sentence and conviction. Josh White & Maria Glod, *Muhammad Executed for Sniper Killing,* Wash. Post, Nov. 11, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/10/ AR 2009111001396.html. Conversely, since the Supreme Court reinstated capital punishment, the average condemned inmate has spent over a decade on death row before the sentence has been implemented. *See* The Death Penalty Information Center, *Time on Death Row,* http://www.deathpenaltyinfo. org/time-death-row.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:06CR00001
	)	
v.	)	**OPINION**
	)	
CARLOS DAVID CARO,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendant.	)	

Anthony P. Giorno, Acting United States Attorney, and Jean B. Hudson, Assistant United States Attorney, Roanoke and Charlottesville, Virginia, for United States; Dale A. Baich and Robin C. Konrad, Assistant Federal Public Defenders, Office of the Federal Public Defender, Phoenix, Arizona, and Fay F. Spence and Brian J. Beck, Assistant Federal Public Defenders, Roanoke and Abingdon, Virginia, for Defendant.

TABLE OF CONTENTS

A jury in this court convicted Carlos David Caro of the 2003 pre-meditated murder of his federal prison cellmate, Roberto Sandoval, and fixed his punishment at death. After an unsuccessful direct appeal, Caro now seeks relief from his conviction and sentence pursuant to 28 U.S.C. § 2255.

Caro's § 2255 motion raises 16 claims asserting that his conviction and sentence were unconstitutionally obtained. Among these claims, Caro contends that his trial counsel was ineffective at both the guilt and penalty phases, that his appellate counsel was ineffective on direct appeal, and that the government violated his Fifth Amendment due process rights by delaying indictment in this case until after it had negotiated a plea agreement in a separate case involving a conspiracy to murder another inmate. Caro also brings claims of juror and government misconduct, asserts systemic challenges to the death penalty, and asserts cumulative error. The United States has filed a Motion to Dismiss. Following briefing and oral argument, and after careful review of the record, I find

that Caro's claims are without legal merit. I accordingly find that the United States' Motion to Dismiss must be granted.

I. BACKGROUND.

Carlos David Caro was born into poverty in the south Texas town of Falfurrias in 1967. He grew up with three brothers, a mother, and a violent, alcoholic father. His maternal uncles introduced him at a young age to the illegal drug trade, eventually resulting in a series of federal drug convictions. He was convicted of possession of marijuana with intent to distribute and sentenced to 24 months custody in 1988, at age 21, when he and his brother were caught near the border transporting 66 pounds of marijuana. In 1992 he was found to have violated the terms of his post-imprisonment supervision and sentenced to an additional six months incarceration.

In 1994 Caro was convicted of conspiracy to possess marijuana with intent to distribute after he was found with 185 pounds of marijuana. He was sentenced to 71 months of imprisonment. Finally, in 2001 at age 34, he was convicted of possession of five kilograms of cocaine with intent to distribute and sentenced to 360 months custody, to run consecutively to a previously imposed 18-month supervised release revocation sentence.

While incarcerated, Caro became a member of a violent prison gang called the Texas Syndicate. In 2002, at the Federal Correctional Institution in Oakdale,

Louisiana, Caro participated in an attack on newly arriving inmates who were members of a rival gang. Prison official John Gordon had talked to Caro about avoiding conflict with the new inmates about three weeks before the incident occurred, but Caro "responded that the Texas Syndicate were going to do what they had to do." (Trial Tr. 168, Feb. 05, 2007, ECF No. 678.) After the incident, Caro admitted his involvement and stated, "I don't give a fuck if they send me to the United States Penitentiary. My brothers follow orders. They know what they're getting into. It doesn't even matter if we're prosecuted. I have 30 years to do. I certainly don't care about myself." (*Id.* at 171.)

Caro was subsequently transferred by the Bureau of Prisons ("BOP") from FCI Oakdale to the United States Penitentiary Lee County ("USP Lee"), a high security prison located in this judicial district. On August 29, 2003, he participated in another violent attack by members of the Texas Syndicate. Caro and Juan Moreno-Marquez, a fellow inmate and gang member, ambushed inmate Ricardo Benavidez in a recreation area of the prison and stabbed him multiple times with shanks before officers could intervene. Five other Texas Syndicate members were nearby and also armed with shanks, but had been denied admittance to the recreation area where the attack took place. Caro pleaded guilty in this court to conspiracy to commit murder and was sentenced on November 1, 2004, to 327 months imprisonment, to run consecutively to his other sentences.

The murder that is the subject of this case occurred only a few months after the attempted murder of Benavidez. After the Benavidez incident, Caro was placed in USP Lee's Special Housing Unit ("SHU"), the segregation area of the prison.[1] On December 16, 2003, inmate Roberto Sandoval was assigned to Caro's cell in the SHU.

Caro initially stated that he was "not accepting a cellmate." (Trial Tr. 101, Jan. 29, 2007, ECF No. 668.) However, he approved Sandoval as a cellmate later in the evening on December 16, 2003, stating, "That's fine. We're brothers. Done some time together." (*Id.* at 116.) Sandoval was placed in Caro's cell at approximately 9:00 p.m.

On December 17, 2003, Caro and Sandoval were served breakfast in their cell at approximately 6:10 a.m. They took recreation outside that evening, and were last observed in their cell by prison staff during rounds at approximately 6:17 p.m. No problems between the two were reported.

Shortly thereafter, at 6:40 p.m., a correctional officer came by on rounds. Caro called out, "[G]et this piece of shit out of here." (Trial Tr. 19, Jan. 30, 2007,

[1] "Special Housing Units (SHUs) are housing units in Bureau institutions where inmates are securely separated from the general inmate population, and may be housed either alone or with other inmates. Special housing units help ensure the safety, security, and orderly operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population." 28 C.F.R. § 541.21.

ECF No. 670.) Caro pointed at Sandoval, who was lying next to the cell door motionless, with blood visible and a towel tied with one overhand knot around his neck. Other officers arrived and handcuffed Caro. When asked whether Sandoval was still breathing, Caro replied, "No. At this time he's stinking up the room, get him out." (*Id.* at 47.)

Caro later was interviewed by FBI Special Agent Douglas Fender, after having been advised of his *Miranda* rights. Caro stated that he had killed Sandoval because he had eaten Sandoval's breakfast that morning, and Sandoval had cursed him and threatened to eat his breakfast the following day. Agent Fender asked Caro whether Sandoval's murder had something to do with the Texas Syndicate. Caro denied that it did, and when Agent Fender continued this line of questioning, Caro stated to the guards, "Get me out of here." (Trial Tr. 26, Jan. 31, 2007, ECF No. 674.)

Caro later made multiple statements about Sandoval's death. The day after Sandoval's death, Caro smiled and asked when an officer was "going to assign him a new cellie." (Trial Tr. 75, Jan. 29, 2007, ECF No. 668.) In a letter, Caro wrote, "You know, I killed a guy two weeks ago." At the end of this sentence, he used a Spanish word that when translated suggests that he killed Sandoval "[f]or being a fool." (Trial Tr. 58, Jan. 31, 2007, ECF No. 674.) He also stated to his wife in a telephone call that "[Sandoval] called me a mother fucker, that whore, that's why I

fucked him up." (*Id.* at 49.) He later reassured her, "But I'm all right." (*Id.* at 51.) Finally, Caro discussed the murder with Roel Rivas, another member of the Texas Syndicate. He told Rivas on the phone, "And I also have a death," explaining, "It's because they gave me a cell mate and he disrespected me, so I took him down." (*Id.* at 53.) When Rivas proposed claiming self-defense, Caro said, "That is what I'm going to do." (*Id.* at 54.)

On December 30, 2004, the United States Attorney for this district sent a target letter to Caro related to Sandoval's murder, and contemporaneously requested that the court appoint counsel for him. On January 27, 2005, the court appointed James Simmons of Nashville, Tennessee, as lead counsel and Stephen J. Kalista, a member of the bar of this court, as co-counsel. In preparation for a meeting with the Attorney General's Capital Case Review Committee ("CCRC"), the court authorized counsel to retain a mitigation specialist, a private investigator, a neuropsychologist, and a psychiatrist. The meeting with the CCRC took place on June 6, 2005.

Following the CCRC meeting, the Attorney General authorized the United States Attorney for this district to seek the death penalty against Caro. On January 3, 2006, an Indictment was returned in this court charging Caro with first-degree murder within the territorial jurisdiction of the United States for the killing of

Sandoval, in violation of 18 U.S.C. §§ 7, 1111. Shortly thereafter, pursuant to 18 U.S.C. § 3593, the government filed its notice of intent to seek the death penalty.

Caro was tried in this court in Abingdon, Virginia, beginning January 22, 2007. Jury selection lasted five days. The guilt/innocence phase of the trial began on January 29. The government presented evidence suggesting that Caro had strangled Sandoval from behind with a towel. Inmate Sean Bullock, who had been in the cell across from Caro's, testified that he had seen Caro behind Sandoval, and watched them fall to the floor. The defense did not call any witnesses, conceding that Caro had killed Sandoval, but arguing that the killing had not been premeditated. In a verdict returned on February 1, 2007, the jury found Caro guilty of first degree murder.

The separate sentencing phase of the trial began on February 5, and lasted for six days. The jury was first asked to determine whether Caro was eligible for the death penalty. In addition to finding that Caro had committed a capital offense covered under 18 U.S.C. § 3591, the jury found that the government had established the existence of two statutory aggravating factors beyond a reasonable doubt: (1) that Caro had been previously convicted of two offenses punishable by a term of imprisonment of more than one year, committed on different occasions, and involving the distribution of a controlled substance, 18 U.S.C. § 3592(c)(10), and (2) that Caro had been previously convicted of a federal drug offense

punishable by a term of imprisonment of five or more years, 18 U.S.C. § 3592(c)(12).

Following the death penalty eligibility verdict came the final phase of the trial, where the jury heard evidence on mitigating factors and non-statutory aggravating factors to determine whether to select a sentence of either death or life imprisonment. The government presented 12 witnesses and alleged three non-statutory aggravating factors: (1) the impact on Sandoval's friends and family, (2) Caro's future dangerousness, and (3) Caro's lack of remorse. The defense presented eight witnesses, including six individuals from Caro's past, and two experts who opined that the BOP had the ability to safely house Caro if he received a life sentence. The defense asserted 22 mitigating factors.

In its verdict returned on February 13, 2007, the jury unanimously found that 12 mitigating factors proposed by the defense had been proved. It determined that Caro was (1) exposed to repeated instances of domestic violence growing up, (2) raised in a home where education was not valued, (3) raised in an impoverished community, (4) well-behaved growing up, (5) a special education recipient who did not complete the ninth grade, (6) shy and respectful compared to his brothers, (7) brought into illegal drug trafficking by his maternal uncles, (8) not physically abusive toward his wife or daughter, (9) not violent or aggressive until he received his 30-year sentence for drug trafficking, (10) not violent toward prison staff, (11)

not an inmate who attempted escape from any correctional officer or from any correctional facility, and (12) securely housed throughout his incarceration. Some jurors found that four additional mitigating factors had been proved. The jury also found that the government's three non-statutory factors had been proved beyond a reasonable doubt. After assessing whether the aggravating factors sufficiently outweighed the mitigating factors, the jury unanimously determined that Caro should be sentenced to death for the murder of Sandoval.

No post verdict motions were filed, and the mandated sentence of death was imposed by the court on March 30, 2007.

A Notice of Appeal was timely filed. Nearly three years later, on March 17, 2010, after briefing and argument, the court of appeals issued a detailed opinion that addressed each of Caro's challenges and affirmed the conviction and sentence. *United States v. Caro*, 597 F.3d 608, *reh'g denied*, 614 F.3d 101 (4th Cir. 2010). The court of appeals held that this court's refusal to offer certain voir dire questions proposed by Caro was not an abuse of discretion. It also affirmed the denial of discovery motions under *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rules of Criminal Procedure 16(a)(1)(E) and 17(c). It held that (1) denial of a *Brady* motion was appropriate as Caro failed to establish that the requested information would be favorable to him, (2) denial of a motion under Rule 17(c) was not an abuse of discretion since Caro could only speculate as to the contents of

the requested information, and (3) denial of a motion under Rule 16(a)(1)(E) was not an abuse of discretion since Caro did not present facts indicating whether the requested information would have actually helped prove his defense.

The court of appeals addressed several additional challenges. It held that the government's closing argument did not cause prejudice warranting reversal. It determined that the jury instruction and the government's argument concerning lack of remorse did not violate Caro's Fifth Amendment privilege against self-incrimination, since given this court's cautionary instruction and evidence showing Caro's lack of remorse, any error would have been harmless under 18 U.S.C. § 3595(c)(2). It held that the statutory aggravating factors in § 3592(c)(10) and (12) did not violate the Eighth Amendment. It ruled that the decision not to give Caro's proposed mercy instruction was not an abuse of discretion given that the proposed instruction was legally incorrect. Finally, it held that various decisions by this court concerning the admissibility of testimony were not abuses of discretion.

On May 11, 2011, following the Fourth Circuit's affirmance, this court granted a motion to appoint the Federal Public Defenders for the District of Arizona and the Western District of Virginia to represent Caro in connection with post-conviction remedies, conditioned upon a denial of certiorari. [2] On January 9,

[2] The Federal Public Defender for the District of Arizona has a Capital Habeas Unit, with extensive experience in federal capital habeas cases. *See, e.g., Ryan v. Gonzales*, 133 S. Ct. 696 (2013) (representing habeas petitioner).

2012, the Supreme Court denied Caro's petition for a writ of certiorari. *Caro v. United States*, 132 S. Ct. 996 (2012).

Through his appointed counsel, Caro filed a Motion for Collateral Relief Pursuant to 28 U.S.C. § 2255 on January 8, 2013.[3] In response, the United States filed a Motion to Dismiss. Caro subsequently filed a Response in Opposition to the United States' Motion to Dismiss. Caro also filed a First Motion for Leave to Conduct Discovery and Preliminary Request for an Evidentiary Hearing and Expansion of the Record. On November 25, 2013, oral arguments were held on

---

[3] I find that Caro's § 2255 motion was timely filed. A person convicted of a federal offense has one year to file a § 2255 motion, starting from the latest of the following dates:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Where a federal prisoner has filed a petition for a writ of certiorari with the Supreme Court, the date on which the judgment of conviction becomes final is the day that the Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003).

the discovery motion and on the United States' Motion to Dismiss. The issues have been fully briefed and are now ripe for disposition.

Through present counsel, Caro also filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 in Case No. 2:03CR10115, related to the stabbing of Ricardo Benavidez. In that motion, Caro challenged the validity of his guilty plea to conspiracy to commit murder under 18 U.S.C. § 1117, alleging ineffective assistance of counsel. The United States filed a Motion to Dismiss, asserting that the § 2255 motion was untimely filed. I have addressed and denied this § 2255 motion in a separate Opinion and Order entered this day, but I will recount the relevant underlying facts here as follows.

In Case No. 2:03CR10115, a Superseding Indictment was returned on December 11, 2003, charging Caro and six other inmates with conspiracy to commit murder and unlawful possession of a weapon, arising from the August 29, 2003, stabbing of Benavidez. Caro and his codefendant Juan Moreno-Marquez, the only inmates who actually stabbed Benavidez, were also charged with assault with the intent to commit murder.

Pursuant to a plea agreement, Caro pleaded guilty to conspiracy to commit murder, while his codefendants, including Moreno-Marquez, pleaded guilty to possession of a weapon, also pursuant to plea agreements. Caro's Plea Agreement provided that the other charges against Moreno-Marquez would be dismissed, and

Moreno-Marquez was thereafter sentenced to 57 months imprisonment. On November 1, 2004, Caro was sentenced to 327 months imprisonment, to run consecutively to his current sentence. Caro did not appeal.

Caro's attorney in the Benavidez matter, Louis Dene, has submitted a declaration stating that he had advised Caro that the Plea Agreement provided him no real benefit. (Mot. Collateral Relief Ex. 3 ¶ 5, ECF No. 790-3.) Caro responded that "'he wasn't going anywhere,' so the long sentence did not matter to him." (*Id.* at ¶ 6.) Dene then went forward with the Plea Agreement, which benefited Moreno-Marquez and which Dene understood to have been proposed by Moreno-Marquez, Caro's fellow Texas Syndicate member. Dene did not advise Caro to reject the Plea Agreement. Dene was aware that the government intended to proceed with a death penalty case against Caro for Sandoval's murder, but did not advise Caro that any conviction and sentence in the Benavidez assault could be used against him in the death penalty case. (*Id.*)

The government listed Caro's conspiracy to murder Benavidez as an aggravating factor in its Notice of Intent to Seek the Death Penalty. In addition, the government pointed out during the penalty phase of the trial that Caro's prior federal prison sentences, totaling more than 57 years, constituted a life sentence for him. Based on that fact, the government argued, Caro would receive no punishment in the capital case unless death was imposed.

II. STANDARDS OF REVIEW.

In his present Motion for Collateral Relief, Caro asserts 16 claims, the majority of which incorporate multiple subclaims. In support of these claims, Caro relies on the trial record and an appendix of additional evidence. Before addressing these claims, I will outline the legal principles governing his petition.

My review of Caro's application is largely governed by 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Section 2255 provides:

> 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.

Id. § 2255(a). Rule 4(b) of the Rules Governing § 2255 Proceedings provides that the courts must promptly review the § 2255 petition along with "any attached exhibits, and the record of prior proceedings" to determine if the petitioner is entitled to any relief. If the court concludes that the petitioner is not entitled to relief, it must dismiss the petition. Otherwise, it must direct the United States Attorney to file a response. An evidentiary hearing is required "[u]nless the motion and the files and records of the case conclusively show that the prisoner is

entitled to no relief." 28 U.S.C. § 2255(b). In the case at hand, I have considered the record and relevant authority to determine whether an evidentiary hearing is necessary. I find that the record clearly shows that the petitioner is not entitled to relief, and that an evidentiary hearing is not needed.

An issue already considered and decided on direct appeal cannot be relitigated in a § 2255 motion. *See United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009) ("Linder may not circumvent a proper ruling on his *Booker* challenge on direct appeal by re-raising the same challenge in a § 2255 motion."); *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (holding that issues previously decided on direct appeal may not be raised on collateral review).

A collateral attack under § 2255 is also not a substitute for direct appeal. Claims regarding trial or sentencing errors that could have been, but were not, raised on direct appeal are barred from review under § 2255, unless the petitioner shows both cause for the default and actual prejudice, or demonstrates actual innocence. *Bousley v. United States*, 523 U.S. 614, 622 (1998) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." (internal citations and quotation marks omitted)).

Cause for procedural default "requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Grounds for cause include "government interference or the reasonable unavailability of the factual basis for the claim." *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). Attorney error can also serve as cause for default, but only if it amounts to a violation of the right to effective assistance of counsel. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Prejudice requires a showing that "there is a reasonable probability that his conviction or sentence would have been different." *Strickler v. Greene*, 527 U.S. 263, 296 (1999).

Procedural default does not apply to claims of ineffective assistance of counsel or claims that rely on extra-record evidence. *See Massaro v. United States*, 538 U.S. 500, 503 (2003) ("[T]here is no procedural default for failure to raise an ineffective-assistance claim on direct appeal."); *Bousley*, 523 U.S. at 622 (recognizing an exception to procedural default for claims that cannot be presented without further factual development). Extra-record evidence is narrowly defined; not every piece of evidence introduced by the petitioner constitutes extra-record evidence. *Id.* (holding that there was no proper extra-record evidence because the factual basis for the claim could have been developed "fully and completely addressed on direct review based on the record created."). Procedural default is an

affirmative defense in the habeas context. *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999) ("[T]he issue of procedural default generally is an affirmative defense that the [government] must plead in order to press the defense thereafter."). Under some circumstances, however, a district court may raise the issue of procedural default sua sponte, despite the government's failure to present the defense. *See id.* at 261-62. Before deciding whether to exercise its discretion, "'the court should consider whether justice requires that the habeas petitioner be afforded with notice and a reasonable opportunity to present briefing and argument opposing dismissal.'" *Id.* at 262 (quoting *Magouirk v. Phillips*, 144 F.3d 348, 360 (5th Cir. 1998)).

Several of Caro's claims assert ineffective assistance of counsel. To prove that counsel's representation was constitutionally defective, a petitioner must show both (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, the petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. *Id.* at 688. The petitioner must overcome a strong presumption that counsel's performance was within the range of competence demanded from attorneys defending criminal cases. *Id.* at 688-89.

To show prejudice, the petitioner must demonstrate a "reasonable probability" that but for counsel's errors, the outcome would have been different. *Id.* at 694-95. If it is clear that the petitioner has not satisfied one prong of the *Strickland* test, the court need not inquire whether he has satisfied the other prong. *Id.* at 697. In a § 2255 motion, the petitioner bears the burden of proving his claims by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

III. ANALYSIS.

A. CLAIM I: STRATEGIC DELAY OF THE INDICTMENT.

In his first claim, Caro alleges that the government violated his Fifth Amendment due process rights by "deliberately and tactically delaying the indictment of the capital case until after the government had negotiated a disproportionate plea agreement in the Benavidez assault." (Mot. Collateral Relief 20, ECF No. 790.) He argues that the delay impaired his defense and enabled the government to argue that death would be the only effective punishment since he was already serving a de facto life sentence.

This claim is procedurally defaulted, because its factual basis was available to counsel at the time of direct appeal. *Bousley*, 523 U.S. at 622. The terms of Caro's and his codefendants' guilty pleas in the Benavidez assault, the date of Sandoval's murder, and the dates the United States Attorney sent the target letter

and obtained the Indictment for Sandoval's murder were all available to counsel. I find no cause preventing counsel from raising this claim and must dismiss it.[4]

Even assuming Caro could establish cause and prejudice to overcome the procedural default, he still would not be entitled to relief. To establish a due process violation due to a pre-indictment delay, a petitioner must prove that the delay caused him actual prejudice. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). If actual prejudice is proved, the court must balance that prejudice against the government's justification for the delay. *Id.* In conducting this balancing test, the court must determine whether the government's actions violate "fundamental conceptions of justice or the community's sense of fair play and decency."[5] *Id.* (internal quotation marks and citations omitted).

In *United States v. Lovasco*, 431 U.S. 783 (1977), the respondent was indicted more than 18 months after the offenses were alleged to have occurred. *Id.* at 784. The respondent argued that he had suffered prejudice because he had lost the testimony of two material witnesses due to the delay. *Id.* at 785-86. The Court

[4] Because this claim, like all of Caro's claims, is the subject of the government's Motion to Dismiss, Caro has had an opportunity to respond and assert arguments opposing dismissal.

[5] While many circuits require the defendant to prove improper prosecutorial motive in pre-indictment delay due process analysis, the Fourth Circuit does not. *See Howell,* 904 F.2d at 895. The Fourth Circuit has recognized that it has adopted a minority position in this regard, but nonetheless has not overruled *Howell. See Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996).

held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796. The government asserted that the delay was due to efforts to identify additional defendants, and the Court reasoned, "We must assume that these statements by counsel have been made in good faith. In light of this explanation, it follows that compelling respondent to stand trial would not be fundamentally unfair." *Id.* at 796.

The situation at hand is similar. Sandoval was murdered on December 17, 2003. The government sent a target letter to Caro on December 30, 2004, and obtained the Indictment on January 3, 2006. While Caro argues that the pre-indictment delay was due to the government's desire to obtain a strategic advantage through an ability to argue that Caro was already serving a life sentence due to previous convictions, it is clear that as the government contends, the time between the offense and the Indictment was due to the need to investigate and adhere to the death-penalty guidelines of the Department of Justice. Any delay in the Indictment against Caro does not offend "fundamental conceptions of justice or the community's sense of fair play and decency." *See Howell*, 904 F.2d at 895 (internal quotation marks and citations omitted). "Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a

criminal prosecution." *United States v. Marion*, 404 U.S. 307, 324-25 (1971). Neither the year that passed between Sandoval's murder and the target letter nor the two years that passed between Sandoval's murder and the return of the Indictment justify vacating or setting aside Caro's conviction and sentence.

B. CLAIM II: DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE DEATH CERTIFICATION STAGE.

In his second claim, Caro argues that his Sixth Amendment rights were violated because he was deprived of effective assistance of counsel at the "death-certification stage of the case." (Mot. Collateral Relief 26, ECF No. 790.)

Under the Sixth Amendment, a defendant has the right to the presence of counsel at all "critical stages" of the proceedings. *United States v. Wade*, 388 U.S. 218, 227 (1967). A court is required to

> scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.

Id. The "death-certification stage" to which Caro refers concerns the pre-indictment period during which the Department of Justice conducted internal proceedings in order to determine whether to seek the death penalty. Although Caro had counsel during this period, he had no constitutional right to counsel.

The process by which the Department of Justice decides to seek the death penalty is a confidential administrative process, and the final decision is made by

the Attorney General. U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-10.050, 1998 WL 1745001 (2014). The Department normally affords defense counsel "an opportunity to present evidence and argument in mitigation" before making a final decision. *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 WL 1453527, at *1 n.5 (W.D. Tenn. Apr. 14, 2014). In Caro's case, this internal process was conducted after he received a target letter, but before the Indictment was issued against him.

The government has the prosecutorial discretion to seek the death penalty. *See* 18 U.S.C. § 3593(a) (discussing notice requirements for government attorneys seeking the death penalty); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))). A defendant has no right to counsel during the stage where the government decides what charges to file and what sentence to seek, as the process is internal and administrative. *See United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990) ("[T]he internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party."); *United States v. Le*, 306 F. Supp. 2d 589, 592 (E.D. Va. 2004) ("[I]nternal

DOJ guidelines do not create any substantive or procedural rights for a defendant.").[6] This process is precursory, when the defendant has yet to be confronted. As the court explained in *United States v. McVeigh*, 944 F. Supp. 1478, 1483-84 (D. Colo. 1996):

> [T]he decision to seek the death penalty under the Act is a matter of prosecutorial discretion. The Protocol did not create any individual right or entitlement subject to the due process protections applicable to an adjudicative or quasi-adjudicative governmental action.
>
> . . . .
>
> The constitutional protections of the life and liberty of a defendant are provided by the sentencing hearing following trial of the charges in the indictment.

Because Caro had no right to counsel during the death-certification phase, he is not entitled to relief on this claim.

C. CLAIM III: JUROR MISCONDUCT.

Caro asserts in his third claim that juror misconduct violated his Fifth Amendment right to due process and his Sixth Amendment right to an impartial jury. He asserts that Juror No. 62 and Juror No. 32 provided factually inaccurate

---

[6] The defendant cites *United States v. Pena-Gonzalez*, 62 F. Supp. 2d 358 (D.P.R. 1999), for the proposition that the right to counsel attaches at the death certification stage. *Id.* at 363-64. The court in *Pena-Gonzalez* reached its decision by analogizing the death certification process to an adult certification hearing, which is presided over by a judge. *Id.* at 363. However, the death certification process is not presided over by a judge and is a completely internal procedure of the Department of Justice. *See United States v. Shakir*, 113 F. Supp. 2d 1182, 1188 (M.D. Tenn. 2000) (criticizing rationale of *Pena-Gonzalez*); *United States v. Torres Gomez*, 62 F. Supp. 2d 402, 405-06 (D.P.R 1999) (same).

answers about their attitudes toward the death penalty during voir dire. He contends that Juror No. 32 also lied about his ability to follow the instructions of the court during the penalty phase, because the juror allegedly stated after the conclusion of the trial that he decided to vote for the death penalty as soon as he decided that Caro was guilty.

The government argues that this claim is procedurally defaulted, but Caro contends that it relies on evidence outside the record. He includes an affidavit from Juror No. 62. It states:

> 2. It was obvious from the evidence that Carlos Caro was guilty of first-degree murder. I am now, and was at the time of the trial, strongly in favor of the death penalty in cases where evidence of guilt is obvious.
>
> 3. There is nothing that the defense offered, or could have offered, that would have changed my mind about the sentence because Caro committed the crime.

(Mot. Collateral Relief Ex. 32, ECF No. 790-32.) Caro also includes a summary of statements allegedly made by Juror No. 32:

> After trial, however, [Juror No. 32] stated that the evidence was "conclusive" that Carlos Caro was guilty of first-degree murder, and once he reached that conclusion, he had made up his mind about the death penalty, noting that the Bible states "An eye for an eye." After trial he also said nothing the defense could have offered would have changed his mind.

(Mot. Collateral Relief 42, ECF No. 790.) These two sources constitute Caro's extra-record evidence.

After careful consideration of the record and the party's arguments, I find that this claim is without merit. Both the juror affidavit and the alleged juror statements concern internal mental processes, and are inappropriate for this court to consider.

Unless in conflict with the Rules Governing § 2255 Proceedings, the Federal Rules of Evidence apply to § 2255 proceedings. *See* Fed. R. Evid. 1101(a) ("These rules apply to proceedings before . . . United States district courts"), 1101(b) ("These rules apply in . . . civil cases and proceedings"), and 1101(e) ("A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules."). Accordingly, Rule 606(b) applies to the situation at hand. *See Fullwood v. Lee*, 290 F.3d 663, 679-80 (4th Cir. 2002) (applying Rule 606(b) to capital habeas proceedings); *Bacon v. Lee*, 225 F.3d 470, 485 (same); *Stockton v. Virginia*, 852 F.2d 740, 743-44 (same). Rule 606(b) states:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1). Caro does not assert that any exception to Rule 606(b) applies. *See* Fed. R. Evid. 606(b)(2) (listing extraneous prejudicial information,

outside influence, or a mistake in entering the verdict on the verdict form as exceptions).

Though a criminal defendant enjoys the right to trial by an impartial jury, "the Sixth Amendment does not require that all evidence introduced by the defendant tending to impeach the jury's verdict be considered by the courts." *Robinson v. Polk*, 438 F.3d 350, 358-60 (4th Cir. 2006) (citing *Tanner v. United States*, 483 U.S. 107, 117 (1987)). "In order to protect the finality and integrity of verdicts and to guard against the harassment of jurors, a party seeking to invalidate a verdict may not rely upon evidence of 'a juror's mental process in connection with the verdict.'" *Fullwood*, 290 F.3d at 679-80 (quoting *United States v. Cheek*, 94 F.3d 136, 143 (4th Cir. 1996)). I cannot consider the affidavit or alleged statements which Caro puts forth in support of this claim.

To the extent that Caro seeks to assert a claim of juror deceit under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), his claim fails. Under *McDonough*, in order to receive federal habeas corpus relief on a claim of juror deceit on jury questionnaires or during voir dire, the petitioner "must first demonstrate that a juror failed to answer honestly a material question . . . and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. However, *McDonough* applies to instances of deceit that can be proved through objective facts that can be obtained through

sources other than the juror.[7] *See United States v. Fulks*, 454 F.3d 410, 431 (4th Cir. 2006) (applying test where juror failed to disclose her husband's murder in a timely manner); *Conaway v. Polk*, 453 F.3d 567, 585 (4th Cir. 2006) (applying test where juror failed to disclose that he was double first cousins with the petitioner's codefendant); *Conner v. Polk*, 407 F.3d 198, 204-05 (4th Cir. 2005) (applying test where juror who had covered petitioner's first trial for a newspaper denied that she

---

[7] Although the Fourth Circuit did address a juror's belief in *Jones v. Cooper*, 311 F.3d. 306, 310 (4th Cir. 2002), that does not necessitate consideration of the juror statements asserted here. *Jones v. Cooper* concerned a multipart *McDonough* claim based on an affidavit prepared by an investigator.

> [The] investigator reported that the challenged juror stated that several of her relatives had been subjected to arrests or jury trials; that she had gone to the Fast Fare the day after the murder and robbery; that she had strong, religiously-motived views in favor of the death penalty; and that she knew that appellant had previously received a death sentence.

Id. at 311 (citation and alternation omitted). The third part of the affidavit concerned the juror's belief "'that the Bible mandates imposition of the death penalty in every case of first degree murder.'" *Id.* at 312 (citation omitted). With regard to this belief, the court held: "It cannot be inferred from any statement in the affidavit that the juror could not disregard her personal feelings about the death penalty or apply the law as written, or that the juror lied when she stated that she could be a fair juror." *Id.* This alleged belief obviously could not have been verified by objective facts that did not depend on the juror's own assessment of her beliefs and mental processes. However, this one basis for the *McDonough* claim in *Jones v. Cooper* does not mean that courts should consider similar arguments about jurors' internal thought processes in subsequent cases. In *McNeill v. Polk*, 476 F.3d 206 (4th Cir. 2007), the court suggested that this portion of the opinion was dicta, stating that because the state court quashed the juror affidavit based on an unspecified state rule of evidence, it "implicitly accepted the affidavit and rejected the petitioner's claims on the merits." *Id.* at 213. The court "did not question whether the state court's [evidentiary] ruling was proper." *Id.* Thus, *Jones v. Cooper* does not preclude use of Rule 606(b) when analyzing claims of juror deceit.

had firsthand knowledge of the facts of the crime). In contrast, Caro seeks to prove that the jurors were deceitful through their own statements.

Finally, to the extent that Caro seeks to assert a violation of *Morgan v. Illinois*, 504 U.S. 719 (1992), his claim also fails. *Morgan* held that "If even one such juror [who would automatically vote for the death penalty in every case] is empaneled and the death sentence is imposed, the [government] is disentitled to execute the sentence." *Id.* at 729. *Morgan* concerned the adequacy of voir dire, and held that "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Id.* In the case at hand, Caro was afforded extensive opportunity to investigate all prospective jurors during voir dire. Juror No. 62 and Juror No. 32 were questioned about their beliefs regarding the death penalty in juror questionnaires and during voir dire before being selected for the jury. Caro has not alleged inadequate voir dire proceedings, and his reliance on *Morgan* does not salvage his juror misconduct claim.

D. Claim IV: Ineffective Assistance of Counsel During Guilt/Innocence Phase.

Caro asserts five grounds for ineffective assistance of counsel during the guilt/innocence phase of the trial. He argues that prejudicial error resulted from trial counsel's failure to (1) develop a cohesive theory of defense, (2) adequately investigate and impeach government witness Sean Bullock, (3) adequately investigate and present evidence of the BOP's negligence regarding the decision to

place Sandoval in Caro's cell, and (4) adequately investigate and present evidence in support of self defense, second-degree murder, or manslaughter. Finally, he argues that even if these deficiencies are individually insufficient to demonstrate prejudice, they do so when considered cumulatively. For the reasons stated below, I will deny relief on Caro's claim of ineffective assistance of counsel during the guilt/innocence phase.

1. *Cohesive Theory of Defense.*

At trial, Caro's counsel argued that he killed Sandoval "in hot blood." (Trial Tr. 43, Jan. 29, 2007, ECF No. 668.) They argued that first-degree murder was not appropriate because there was conflict between the two men at breakfast, they were confined in a small cell, and "this was a case of a pot boiling over." (*Id.*)

Caro now claims that his trial counsel was ineffective for failing to develop a cohesive theory of defense to be presented during the guilt/innocence phase and brought out during the penalty phase. He argues that trial counsel could have claimed that he killed Sandoval, a Texas Syndicate member, because he feared retribution for assaulting Benavidez, a Texas Syndicate leader. He also argues that trial counsel could have presented evidence that he suffers from a brain impairment and anxiety disorder, that their theory of a hot-blooded killing failed to account for the time between Sandoval's death and the breakfast dispute, and that their theory

did nothing to mitigate his post-offense statements or the government's positions on his gang leadership and future dangerousness.

It is clear that Caro's trial counsel was faced with the difficult task of developing a theory around a conceded killing and recorded statements that did not suggest remorse. Caro stated that his impetus for killing Sandoval was that Sandoval disrespected him. (*See* Trial Tr. 49, 53, Jan. 31, 2007, ECF No. 674 (stating that he killed Sandoval because Sandoval tried to call him a "mother fucker" and "disrespected" him).) Trial counsel had to consider how a jury might interpret these statements, and develop a theory of the case that they felt would be most convincing in light of the evidence they could present and the evidence they could expect from the government. Considering the circumstances of the case, trial counsel's theory was not unreasonable.

Caro, with the benefit of hindsight, suggests alternative arguments and points to perceived weaknesses. His critiques do not overcome the presumption that trial counsel's decisions fell within the bounds of reasonable professional judgment. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. Caro has not demonstrated that trial counsel's theory of a hot-blooded killing was an unreasonable strategic decision.

2. *Impeachment of Sean Bullock.*

Caro claims that trial counsel was ineffective for failing to adequately investigate and impeach the government's eyewitness, Sean Bullock, and failing to present the testimony of Bullock's cellmate, Joseph Bland. He argues that trial counsel overlooked Bland as a potential witness after Bullock stated in his grand jury testimony that he had a cellmate. Caro contends that trial counsel failed to pursue the issue after Bullock testified at trial that he had a cellmate, but could not recall his cellmate's name on cross examination. He also argues that trial counsel failed to adequately cross-examine Bullock on inconsistencies between his trial testimony and previous statements. Caro claims that trial counsel's failure to impeach Bullock prejudiced him because Bullock's testimony was the only evidence that supported the government's proposition that he had ambushed Sandoval from behind.[8]

With regard to Caro's claim that trial counsel was ineffective for failing to impeach Bullock, I find that Caro has failed to show that counsel's representation fell below an objective standard of reasonableness. "Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel." *Tucker v.*

[8] Caro also seeks to support this subclaim with two juror affidavits. These affidavits will not be considered pursuant to Federal Rule of Evidence 606(b). *See Fullwood*, 290 F.3d at 679-80.

Ozmint, 350 F.3d 433, 444 (4th Cir. 2003). However, there remains "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. In this situation, trial counsel did investigate and pursue several methods of impeachment. They sought to impeach Bullock with inconsistencies in his testimony at trial, his grand jury testimony, and his mass interview form. They questioned him about facets of his background, including his use of false identities. They tried to elicit a hope that he would receive benefits for his testimony, and they questioned him about why he did not tell his cellmate what he saw. There is no indication that trial counsel's efforts to impeach Bullock were unreasonable.

With regard to Caro's claim that trial counsel was ineffective for overlooking Bland as a potential witness and failing to introduce his testimony, I find that Caro has not established prejudice. It is not clear that Bland's testimony would have changed the jury's assessment of Bullock's credibility. Bland's affidavit states that he and Bullock had been playing cards on the bed for at least 30 minutes before officers opened the door to Sandoval's cell. (Mot. Collateral Relief Ex. 2, ¶ 5, ECF No. 790-2.) He states that he and Bullock were unaware of what happened until Sandoval was removed from the cell, and that Bullock "was not standing by the door prior to inmate Sandoval being removed from cell 123." (*Id.* ¶ 6.) However, Bullock testified that did not tell his cellmate about what he

saw. Bullock did not say he was standing at the door when Sandoval was removed from his cell. Rather, he stated that he was at that location earlier when he observed Caro with an orange towel around Sandoval's neck. The jury would have had to assess the credibility of both men, and there is nothing to suggest that they would have believed Bland over Bullock. Caro has not demonstrated a reasonable probability that the outcome of the guilt/innocence phase would have been different but for this alleged deficiency.

3. *Prison Culture and Cell Placement.*

Caro argues that trial counsel was ineffective for failing to adequately investigate and present evidence of prison culture in order to demonstrate that the BOP was negligent in placing Sandoval in his cell. He contends that a prison culture expert might have testified that the refusal of Sandoval as a cellmate could have been a sign that he feared retribution from the Texas Syndicate. Caro argues that such an expert could have opined that the BOP should have housed him separately from other Texas Syndicate members, and that Sandoval's request to be placed in the same cell could have been a challenge to him. It is asserted that a prison culture expert could have laid a foundation for the fact that Sandoval was placed in the SHU for possession of a weapon, and explained the significance of that. Caro contends that the prison's gang intelligence officers should have been consulted before he was given a cellmate. He also argues that the officer who

witnessed his refusal to take a cellmate violated standard operating procedures by failing to record it in the SHU log book.

None of these arguments undermine confidence in the jury's verdict of first-degree murder. Caro has not established prejudice. As Caro admitted to killing Sandoval and was the only possible perpetrator, the primary issue during the guilt/innocence phase was that of premeditation. The government introduced significant evidence in support of premeditation, including Bullock's testimony, Caro's proffered reasons for killing Sandoval, and the time that passed between their dispute and Sandoval's death. Caro must demonstrate a reasonable probability that counsel's deficiencies undermined the outcome of the trial, and he has not done so. Even if trial counsel had provided testimony from a prison culture expert, there was extensive alternative evidence to support a finding of premeditation.

4. *Self Defense, Second-Degree Murder, or Manslaughter.*

Caro argues that trial counsel was ineffective for failing to adequately investigate and present evidence in support of self defense, second-degree murder, or manslaughter. He asserts that trial counsel should have presented a theory of self defense based on fear of retribution. He argues that trial counsel should have utilized a prison culture expert to explain the context of his post-offense statements and the impropriety of Sandoval's request to be placed in the same cell. Caro

argues that trial counsel was ineffective for raising the question of why Sandoval wanted in the cell, but failing to answer it. He claims that these deficiencies present a reasonable probability that a juror would have concluded that he acted in response to a real or perceived threat, and not with premeditation.

While Caro argues that trial counsel should have presented a fear of retribution theory which might have supported a conviction for a lesser crime, such a theory does not easily accord with Caro's post-offense statements regarding Sandoval's killing. (*See, e.g.*, Trial Tr. 53, Jan. 31, 2007, ECF No. 674 ("[T]hey gave me a cell mate and he disrespected me, so I took him down.").) Caro stated that he killed Sandoval because Sandoval disrespected him; he never stated that he was in fear of Sandoval.

Even if trial counsel had presented testimony from a prison culture expert that Caro's post-offense statements were due to a need for bravado but his actions were in self defense, a reasonable juror still could have concluded from Caro's statements that the killing was premeditated. Reading Caro's post-offense statements as a guise of bravado "is quite strained . . . and is not supported by the [post-offense statements] as a whole." *Pruett v. Thompson*, 996 F.2d 1560, 1571 (4th Cir. 1993). For example, Caro stated on the phone to his wife, "[Sandoval] tried to call me mother fucker, that whore, that's why I fucked him up." (Trial Tr. 49, Jan. 31, 2007, ECF No. 674.) A need to maintain a facade of toughness around

prison inmates and correctional officers would not explain this statement to his wife.

Additionally, the fact that trial counsel alluded to Sandoval's motivation for wanting to be in Caro's cell, but did not introduce evidence to answer that question, does not establish ineffective assistance of counsel. *See Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994) ("In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is virtually unchallengeable.") (internal quotation marks and citation omitted)), *overruled on other grounds by O'Dell v. Netherland,* 95 F.3d 1214 (1996).

5. *Cumulative Error.*

Caro argues that "[e]ven if a single deficiency in counsel's performance does not result in prejudice, the cumulative impact of all failures resulted in . . . an unfair trial." (Mot. Collateral Relief 61, ECF No. 790.) This contention must fail. I have found each of Caro's subclaims of ineffective assistance of counsel during the guilt/innocence phase without merit. Counsel's acts or omissions "'that are not unconstitutional individually cannot be added together to create a constitutional violation.'" *Fisher v. Angelone*, 163 F.3d 835, 853 (4th Cir. 1998) (quoting *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996)). These claims do not collectively establish a right to collateral relief.

E. CLAIM V: *BRADY* VIOLATIONS CONCERNING BULLOCK.

In his fifth claim, Caro argues that the government violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by withholding material exculpatory and impeachment evidence and misleading defense counsel. He argues that the government misrepresented the fact that Bullock had a cellmate at the time of the offense, and failed to provide a mass interview report for Bland even though it asserted that all SHU inmates had been interviewed.

While the government argues that this claim is procedurally barred, Caro asserts that it relies on extra-record evidence — Bland's declaration. Assuming that Bland's declaration constitutes appropriate extra-record evidence to overcome procedural default, this claim still must be dismissed.

In order to prove a *Brady* violation, a defendant must demonstrate that the government failed to provide the defendant with material exculpatory evidence. Specifically, the defendant must prove: (1) there was evidence favorable to the accused, (2) the government suppressed it, and (3) the defendant suffered prejudice. *Strickler*, 527 U.S. at 281-82. Additionally, "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990).

Trial counsel had information from which to infer that Bullock had a cellmate. The government disclosed the SHU daily logs for December 17-20, 2003, and a SHU roster for December 20, 2003. The daily log for December 19, 2003, showed that Bland was moved from cell 146 (Bullock's cell) that day. Additionally, the government produced Bullock's grand jury testimony, which referenced his cellmate, one month before trial. Whether the government "never overtly corrected [trial counsel's] misconception," (Mot. Collateral Relief 64, ECF No. 790), is irrelevant. The government is not required to illuminate facts in this manner for the defense. Caro has failed to establish a *Brady* violation.

F. CLAIM VI: INEFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE.

In his sixth claim, Caro argues that he was deprived of effective assistance of counsel during the penalty phase of the trial in violation of his Sixth Amendment rights. He asserts 12 grounds for ineffective assistance of counsel, which are addressed individually below.

1. *Failure to Challenge Delay of Indictment.*

Caro alleges that trial counsel was ineffective for failing to challenge the government's delay in obtaining the Indictment for Sandoval's murder until after a conviction had been obtained for the Benavidez assault. This subclaim builds on Caro's allegations in Claim I. He now argues that trial counsel should have

pursued a pretrial remedy that would have prevented the government from arguing that the Benavidez assault was an aggravating factor in support of death.

2. Failure to Develop A Compelling Mitigation Story.

Caro contends that his trial counsel failed to adequately investigate, develop, and present a compelling mitigation story about his life. It is well settled that defense counsel must conduct a reasonable investigation into mitigating evidence to be presented during the penalty phase, and that failure to present mitigating evidence cannot be justified as a tactical decision unless the duty to investigate has been fulfilled. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). In this case, there is no indication that trial counsel failed to conduct a reasonable investigation into Caro's background.

Trial counsel hired many experts to investigate Caro's background, and received mixed results. They hired a mitigation specialist whom they eventually had to replace. They hired a fact investigator, two experts to opine on future dangerousness, a neuropsychologist, a neurologist, and a psychiatrist.

Trial counsel also presented mitigating evidence during the penalty phase. They alleged 22 mitigating factors, and put on eight witnesses over the course of three days. In addition to hearing from two future dangerousness experts, the jury also heard testimony from three of Caro's aunts, Caro's wife, a former teacher, and a cousin.

As a result of trial counsel's efforts, the jury unanimously found that 12 mitigating factors had been proved. Caro argues that his trial counsel should have done more to develop a compelling mitigation story, but he has failed to demonstrate how their conduct fell below prevailing professional norms. Due to trial counsel's efforts, many elements of Caro's past were given weight as mitigating factors. While Caro asserts numerous deficiencies of trial counsel, their overall efforts during the penalty phase were not objectively unreasonable. Caro's subclaim is without merit, and his specific allegations of deficiency, addressed below, are without merit.

Caro argues that trial counsel should have obtained more than two mental health experts, and points to the fact that a child psychiatrist and neonatologist were not retained despite the mitigation specialist's recommendation to do so.

Caro has not demonstrated that his trial counsel acted unreasonably in the number and type of experts they obtained. Trial counsel developed mitigation evidence under time and financial constraints. They could not investigate every possible lead, and had to make professional judgments about what leads were likely to be the most fruitful. Caro has not established that helpful testimony could have been elicited from the additional experts he mentions. *See Bassette v. Thompson*, 915 F.2d 932, 940-41 (4th Cir. 1990) ("He claims that his counsel conducted an inadequate investigation to discover persons who would testify in his

favor, but he does not advise us of what an adequate investigation would have revealed or what these witnesses might have said, if they had been called to testify.").

Caro next challenges trial counsel's reliance on Keith Caruso, M.D. First, he argues that trial counsel should have sought another psychiatrist after Dr. Caruso opined that his testimony would not be helpful to the defense. Second, he argues that trial counsel should have obtained another psychiatrist after they discovered that Dr. Caruso's research work in medical school would likely compromise his credibility as an expert witness.

Trial counsel did not provide ineffective assistance because they failed to find a psychiatrist whose testimony was favorable to Caro. Trial counsel's performance should not be evaluated based on a qualified expert's unfavorable conclusions or testimony. *See Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (rejecting an inmate's claim that trial counsel should have pursued mental health defenses where a mental health report indicated that the inmate was competent to stand trial); *Roach v. Martin*, 757 F.2d 1463, 1477 (4th Cir. 1985) (holding that trial counsel was not ineffective for failing to explore an insanity defense after a psychiatrist found him sane). Trial counsel was also not ineffective in failing to obtain another psychiatrist less susceptible to impeachment than Dr. Caruso. Caro

has not shown prejudice on this argument, considering that trial counsel chose a strategy where no evidence from a psychiatrist was presented.

Caro argues that his trial counsel was ineffective in failing to call mental health experts during the penalty phase. He argues that his trial counsel should have reviewed the report of the government's experts before making such a decision. He claims that even if the government's experts had presented testimony harmful to Caro, at least one of the government's experts could have been impeached. He also argues that trial counsel should have presented the neuropsychologist's diagnosis that he had Cognitive Disorder NOS.

The decision to forego mental health evidence was not unreasonable. Trial counsel was not permitted to view the government's experts' report until after they gave notice of intent to present mental health evidence, and trial counsel had reason to believe that the testimony of the government's expert might be unfavorable to Caro. In contrast, only one expert available to testify for the defense, neuropsychologist D. Malcolm Spica, Ph.D., had a professional opinion favorable to Caro. Trial counsel could have decided that Dr. Spica's testimony would not be beneficial enough to overcome harmful testimony from the government's testifying expert. *See Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991) (finding reasonable a decision not to call a psychiatrist when damaging findings could have been brought out on cross-examination).

Caro argues that trial counsel was ineffective for failing to obtain a mental health expert to explain the effects of Caro's childhood trauma. Several mitigating factors concerning Caro's childhood were found by the jury. Additionally, several relatives testified about negative aspects of Caro's childhood, such as the violent nature of his father. There is not a reasonable likelihood that the testimony of a mental health expert on Caro's childhood trauma would have changed the outcome of the penalty phase.

Caro argues that trial counsel was ineffective in failing to call his brothers, Jose and Noe, to testify during the penalty phase. However, both brothers have criminal histories, and trial counsel's decision was not unreasonable. Whether to call a witness "necessitate[s] the weighing of risks and returns that is an intrinsic part of defense counsel's choice of strategy." *Goins v. Angelone*, 52 F. Supp. 2d 638, 661 (E.D. Va. 1999). While Caro's brothers could have presented mitigating evidence about their troubled childhood and their abusive father, trial counsel might have felt that their testimony would be undermined by their previous convictions.

Caro argues that trial counsel was ineffective in presenting the testimony of his cousin, Laura Perez, who testified about a positive aspect of Caro's childhood, his loving grandparents. Caro has not established ineffective assistance of counsel merely because he points to a witness who gave testimony that was damaging as

well as helpful. Trial counsel made a strategic decision regarding the value of Perez's testimony, and no evidence suggests that the decision was unreasonable.

Finally, Caro argues that trial counsel was ineffective in making prejudicial remarks during their opening and closing statements, including stating that Caro took the easy way out by choosing the drug trade and admitting that Caro was not a good father. These statements cannot be construed as objectively unreasonable. Both are grounded in fact — Caro joined the drug trade at a young age, and was frequently apart from his wife and child. Trial counsel could have made a strategic decision to address these topics in an attempt to reduce the sting of their impact on the jury.

Caro asserts many arguments in support of his claim that his trial counsel failed to develop a compelling mitigation story. However, for each argument he has failed to demonstrate prejudice or objectively unreasonable professional conduct.

3. *Failure to Challenge Government's Evidence that Caro was a Gang Leader.*

Caro argues that trial counsel was ineffective for failing to investigate prison culture, and failing to subject the government's evidence concerning Caro's leadership position in the Texas Syndicate to meaningful adversarial testing. He specifically points to trial counsel's failure to challenge the testimony of John Gordon.

At trial, the government presented testimony from John Gordon, a Special Investigative Service Lieutenant at FCI Oakdale in 2002, during the time when Caro was involved in assaults on newly arriving inmates who were members of a rival gang. Gordon testified that he had told known Texas Syndicate members that he wanted to meet with their leader, and that in response to this request, Caro showed up and told Gordon that the "Texas Syndicate were going to do what they had to do." (Trial Tr. 168, Feb. 05, 2007, ECF No. 678.) The assaults occurred shortly thereafter, and Caro later told Gordon that the Texas Syndicate was responsible for the assaults and that his brothers follow orders. (*Id.* at 171-72.) Based on these interactions, Gordon concluded that Caro was a leader of the Texas Syndicate. (*See id.* at 171-174.)

Caro argues that trial counsel was ineffective for failing to present rebuttal evidence that Caro was not a gang leader at the time of the 2002 assault at FCI-Oakdale. He claims that trial counsel could have discredited Gordon by introducing evidence that he relied on the erroneous assumption that the Texas Syndicate would have sent their actual leader to the meeting, and by introducing evidence that his request of Caro during their initial meeting to reveal the identity of other gang members was naïve.

Trial counsel's performance was not objectively unreasonable. Trial counsel properly anticipated that the government would argue that Caro was a gang leader,

and made efforts to exclude that evidence through motions in limine. The government's evidence was that when Gordon requested to meet with a Texas Syndicate leader, Caro showed up, and that after the assault occurred, Caro took responsibility for it. Even if trial counsel had presented expert testimony in line with Caro's arguments, the jury still had plenty of evidence from which to reasonably conclude that Caro was a leader of the Texas Syndicate. The impeachment methods now suggested by Caro do not necessarily undermine Gordon's testimony. There is not a reasonable probability that the result of the penalty hearing would have been different had such evidence been introduced.

4. *Failure to Challenge Government's Evidence Regarding BOP's Ability to Control Improper Inmate Communications.*

Caro argues that trial counsel failed to adequately investigate relevant facts and law regarding the BOP's ability to control improper inmate communications, and failed to subject the government's evidence to meaningful adversary testing.

At trial, the government presented testimony from a former BOP warden, Gregory Hershberger, that Caro would likely have future access to telephone, visitors, and mail services. (Trial Tr. 185-86, 191-92, Feb. 12, 2007, ECF No. 686.) Hershberger also testified that Caro might be able to communicate with gang members through phone and letters, although the BOP would try to prevent it. (*Id.*)

Caro argues that trial counsel was ineffective for not establishing that the

BOP does have the authority and ability to control his communications. He argues that trial counsel could have introduced evidence about Special Administrative Measures, which allow the government to construct individualized conditions of confinement, or BOP program statements, which describe the authority of prison officials to curb inmate communication methods. *See, e.g.*, 28 C.F.R. § 501.3 (Prevention of acts of violence and terrorism); U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement No. P5264.08 (1/24/2008), *available at* http://www.bop.gov/policy/progstat/5264_008.pdf (telephone restrictions), *id.* at 5267.08 (5/11/2006), *available at* http://www.bop.gov/policy/progstat/5267_008 .pdf (visitors). Caro argues that without knowing about BOP tools for preventing improper communications, the jury was left to believe that the BOP could not control his future communications.

At trial, Hershberger testified that Caro's visitation, telephone, and commissary rights "can't just arbitrarily be taken from him." (Trial Tr. 202-03, Feb. 12, 2007, ECF No. 686.) He also testified that while the BOP staff would try to prevent inmates like Caro from sending out coded messages, he did not think they could guarantee it. (*Id.* at 191.) A jury could reasonably conclude from Hershberger's testimony that while BOP officials may make efforts to curb an inmate's communications, they cannot do so without reason, nor can they guarantee success. Caro has not established that but for trial counsel's failure to

present evidence on the BOP's mechanisms for controlling inmate communications, the result of the penalty phase would have been different. I find that Caro has not suffered prejudice, and is not entitled to relief on this subclaim.

5. *Failure to Present Evidence on Prison Culture and Statements of Remorse.*

Caro argues that trial counsel failed to adequately investigate and present mitigating evidence on prison culture and statements of remorse.

At trial, the government argued that Caro lacked remorse, and presented as evidence Caro's several post-offense statements previously described. Caro argues that trial counsel should have presented evidence on prison culture in order to mitigate the effects of these statements. He contends that these statements could have been due to a desire to present an image of strength in order to prevent attacks on his person, and that remorse could have been viewed by other inmates as a sign of weakness. Because the jury found beyond a reasonable doubt that Caro had not expressed remorse for killing Sandoval, Caro argues that trial counsel's failure to present evidence on his statements in the context of prison culture was prejudicial.

I find that Caro has not established prejudice. Even if trial counsel had presented evidence that Caro's statements were due to a need for bravado, the jury had enough evidence from which to conclude that Caro did not demonstrate remorse. Additionally, evidence on prison culture would have been irrelevant to some of Caro's post-offense statements. As previously noted, an inmate's need to

maintain an air of bravado in prison would not account for Caro's statement to his wife that, "[Sandoval] tried to call me mother fucker, that whore, that's why I fucked him up." (Trial Tr. 49, Jan. 31, 2007, ECF No. 674.)

6. *Failure to Challenge Conviction for Conspiracy to Commit Murder Related to Benavidez Assault.*

Caro argues that trial counsel was ineffective for failing to adequately investigate his prior conviction for conspiracy to commit murder, and for failing to file a collateral challenge to that conviction. He argues that the attorney who represented him in the separate Benavidez assault prosecution was ineffective for failing to advise him that a guilty plea for conspiracy to murder likely would be used against him as an aggravating factor in the Sandoval case. He argues that had he gone to trial instead of accepting a guilty plea, a jury might have found him not guilty because the victim was uncooperative and the video footage of the stabbing was of low quality.

Building on these assertions, Caro next claims that his trial counsel in this matter was ineffective for failing to file a collateral challenge to the Benavidez conviction and sentence. He argues that trial counsel should have known that the Benavidez conviction was prejudicial because it was his only conviction for a significant crime of violence. He points out that his three previous drug trafficking convictions did not involve violence. He contends that because the conviction for conspiracy to commit murder was used as an aggravating factor, the government

was able to present him as a violent inmate already facing prison for the rest of his life, who, without the death penalty, would receive no punishment for his crime. He argues that trial counsel also failed in their duty to investigate. He claims that they did not interview his prior attorney or obtain copies of the discovery in the Benavidez matter.

At issue is the performance of trial counsel in this matter, not the performance of Caro's prior attorney. Caro has failed to show that his trial counsel acted unreasonably in failing to challenge the prior conviction, interview prior counsel, and obtain discovery for the prior matter. "[A] petitioner has no Sixth Amendment right to counsel in order to mount a collateral challenge to his conviction." *United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013). It follows that trial counsel was not ineffective for failing to file a collateral challenge to an earlier conviction. It certainly is within the bounds of professional norms to focus on the case at hand rather than attempting to challenge and reinvestigate prior convictions. Furthermore, trial counsel was not ignorant of the Benavidez assault. Trial counsel contacted Caro's prior counsel, talked to him, and collected a portion of his files to review. Caro's prior conviction for conspiracy to commit murder was only one element of a complex murder trial. Trial counsel acted reasonably in researching this prior conviction, but devoting the majority of their attention to the case at hand.

7. *Failure to Present Skipper Evidence.*

Caro argues that trial counsel was ineffective for failing to present mitigating evidence in accordance with *Skipper v. South Carolina*, 476 U.S. 1 (1986), which held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Id.* at 4 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)).

Caro presents three arguments. He first argues that trial counsel was ineffective for failing to introduce evidence that his plea in the Benavidez assault was a "selfless act" done to benefit Moreno-Marquez, a fellow inmate who was able to plead guilty to a lesser charge and went from facing 27 years to facing a maximum of five years imprisonment. (Mot. Collateral Relief 129, ECF No. 790.) He next contends that trial counsel was ineffective for failing to introduce evidence from a prison psychologist who reported that Caro was primarily violent with other members of the Texas Syndicate, and that some prison staff members had described him as a good inmate. Finally, he argues that trial counsel was ineffective for failing to introduce evidence of Caro's concern for the well-being of others, referring to a time when Caro reported that another inmate was experiencing psychological distress.

That trial counsel did not present evidence on these three topics does not render their assistance ineffective. Caro's claim does not concern evidence that the

court determined was irrelevant and inadmissible, as in *Skipper*, but rather concerns evidence that trial counsel chose not to present. *See* 476 U.S. at 3. Trial counsel may have made a strategic decision to exclude this evidence. They may have thought that a jury might not consider the circumstances of Caro's plea to be a mitigating factor. While trial counsel could have argued that Caro's plea was a selfless act that enabled Moreno-Marquez to leave prison sooner, the government could have highlighted the gang connection between the two men. The government could have pointed out that Caro's plea was designed to benefit a violent inmate who was videotaped stabbing an unarmed man. Similarly, trial counsel may have decided not to present evidence from the prison psychologist's report because it addressed both positive and negative aspects of Caro's behavior. The reason for deciding not to introduce Caro's comment about another inmate's psychological distress is less obvious, but the decision was not unreasonable or in violation of professional norms. Caro has not demonstrated that his right to effective assistance of counsel was violated.

8. *Failure to Present Evidence of BOP Negligence Regarding Decision to Place Sandoval in Caro's Cell.*

Caro argues that trial counsel was ineffective for failing to argue and present evidence during the penalty phase that the BOP was negligent in placing Sandoval in Caro's cell. He relies on the same assertions that he made in Claim IV(C). He asserts that the BOP should have housed Caro separately from other Texas

Syndicate members after the Benavidez assault, that the BOP should have recognized that Caro might face retribution from the Texas Syndicate for the Benavidez assault, that Sandoval's request to be placed in the same cell as Caro might have been a challenge to Caro, that the BOP should have recognized the significance of Sandoval being placed in the SHU because he was caught with a weapon, that gang intelligence officers should have been consulted before Caro was given a cellmate, and that Caro's initial refusal to take a cellmate should have been documented in a log book.

Caro has not established that trial counsel's failure to argue that the BOP was negligent in placing Sandoval in his cell constituted ineffective assistance of counsel. Even if his trial counsel had introduced evidence supporting all of the arguments he proposes, the jury still could have decided that the death penalty was appropriate. The jury could have rejected the arguments that the BOP was negligent and that Caro feared retribution, and instead decided, based on the government's case and Caro's own statements, that Caro killed Sandoval due to their dispute over breakfast. Or, the jury could have concluded that the BOP was negligent in placing Sandoval in Caro's cell, but that the balance of aggravating and mitigating factors still warranted the death penalty. Because there is not a reasonable probability that this evidence would have changed the outcome of the penalty phase, this claim fails.

9. *Failure to Object to Government's Evidence on Specific Instances of Violence by Persons Other than Caro.*

Prior to trial, I directed that "absent proper disclosure, the government may not rely on specific instances of inmate violence (other than the defendant's own) in seeking to prove his future dangerousness." *United States v. Caro,* 461 F. Supp. 2d 478, 482 (W.D. Va. 2006). Caro claims that his trial counsel was ineffective for failing to adequately object to the government's evidence on specific acts of violence from inmates other than Caro.

Caro first argues that his trial counsel was ineffective for failing to adequately object to government witness Daniel Olson's testimony that inmates in the Aryan Brotherhood used a coded letter to order the deaths of two African-American inmates. Caro's trial counsel made a hearsay objection, but did not argue that this was "specific instances" evidence that violated the court's order. (Trial Tr. 34-37, Feb. 06, 2007, ECF No. 683.)

Caro next argues that trial counsel failed to adequately object when the government asked defense expert Mark Cunningham on cross examination about the facts of other defendants' cases. He asserts that the government asked irrelevant and prejudicial questions about whether Dr. Cunningham had testified in the trial of a defendant who was a member of al-Qaeda. (Trial Tr. 87-88, Feb. 12, 2007, ECF No. 686.) Caro also argues that trial counsel failed to object when the

government questioned Dr. Cunningham during cross-examination about three terrorists who managed to send coded letters from ADX-Florence.

Finally, Caro argues that trial counsel failed to object when government witness Mark Hershberger testified that 20 years earlier, an inmate at USP Marion had murdered two correctional officers and wounded two others.

Caro has failed to establish prejudice. First, some of this evidence might have been admitted even if trial counsel had objected as Caro suggests. Dr. Cunningham's answers during cross-examination might have been admissible as bearing on his credibility and bias. Similarly, Hershberger and Olsen, the other two witnesses whose testimony is in question, were offered as rebuttal witnesses to Dr. Cunningham. Second, even without the specific-acts evidence in question, the jury had an abundance of evidence from which to conclude that Caro would be a future danger, most notably Caro's own statements and past violence.

10. *Failure to Object to Improper Arguments During Government's Closing.*

Caro argues that his trial counsel was ineffective for failing to object to the government's improper arguments during closing.

He argues that trial counsel should have objected to the government's argument that the jury should control Caro by imposing the death penalty and that if Caro did not receive the death penalty then there would be no punishment for Sandoval's death. The Fourth Circuit addressed these arguments on appeal and

concluded that while they were improper, they did not prejudice Caro. Because no prejudice resulted, these arguments fail to establish ineffective assistance of counsel.[9]

Caro also asserts that his trial counsel should have objected to the government's minimization of the jury's responsibility in the capital sentencing process. However, this claim is based on a misreading of the trial transcript. Caro argues that the government minimized the act of putting a defendant to death by arguing that "it's the law." (Mot. Collateral Relief 158, ECF No. 790.) However, the prosecutor actually said, "It's not the law." The prosecutor stated:

> The last thing I would like to talk about is the law. Mr. Kalista talks about and uses words like kill. You will not hear Judge Jones use that term. The job is not to kill anyone. It's not the law. You'll be asked to make one judgment, and it's this: Is the death penalty for Carlos Caro justified?

(Trial Tr. 98, Feb. 13, 2007, ECF No. 687.) In rebuttal, Caro asserts that his claim stands despite his initial misreading of the transcript, because the government also downplayed the jury's responsibility by arguing that other juries have sentenced people to death. He refers to an earlier portion of the government's closing, where the government stated, "If it is your decision that Carlos David Caro should be

[9] Caro argues that he has presented additional facts and arguments, and that accordingly, the Fourth Circuit's conclusion must be reweighed. Caro's additional facts and arguments for this claim consist of his briefs and a supporting juror affidavit. The juror affidavit will not be considered pursuant to Federal Rule of Evidence 606(b). *See Fullwood*, 290 F.3d at 679-80.

sentenced to death, if in fact the weighing process justifies the death sentence, you would not be the first jury to come to that conclusion. It's something that other juries have done." (*Id.* at 17-18.)

Caro's argument does not create a reasonable probability that the outcome of the trial would have been different. The fact that some juries have voted for the death penalty is common knowledge, and trial counsel's failure to object to either of the government's statements did not constitute an unreasonable professional decision. More egregious conduct is required before counsel's failure to object will constitute ineffective assistance. *See Hodge v. Hurley*, 426 F.3d 368, 386-87 (6th Cir. 2005) (finding ineffective assistance where counsel failed to object to prosecutor's false, unsupported, and misleading statements during closing); *Driscoll v. Delo*, 71 F.3d 701, 711 (8th Cir. 1995) (finding ineffective assistance where counsel failed to object when prosecutor referred to judge as 13th juror and stated that the jury's sentence of death would be a mere recommendation to the judge).

11. *Failure to Move to Strike Sleeping Juror.*

Caro argues that his trial counsel was ineffective for failing to move to strike Juror No. 33 after discussions occurred about whether the juror was sleeping, and after the juror informed a court security officer that he was experiencing anxiety problems. Caro asserts that this was not a reasonable strategy decision since trial

counsel had rated the first alternate more favorably than Juror No. 33. Caro also argues that the continued presence of Juror No. 33 infringed his right to a fair trial.

Caro cannot show that trial counsel's decision not to move to remove the juror was unreasonable. A juror is properly dismissed where the juror's sleeping "makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial." *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000). "However, a court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle a sleeping juror." *United States v. Johnson*, 409 F. App'x 688, 692 (4th Cir. 2011) (unpublished) (quoting *Freitag*, 230 F.3d at 1023 (citations omitted).) There is no clear evidence that Juror No. 33 was sleeping. Neither the lawyers nor I thought that the juror was inattentive to the degree that he needed to be removed. When Juror No. 33 was questioned by me, he stated that he was staying awake and paying attention. (Trial Tr. 66-68, Feb. 7, 2007, ECF No. 684.) I find that Caro has failed to show that his attorneys were ineffective for failing to seek Juror No. 33's removal, or that his right to a fair trial was compromised.

Even if trial counsel had moved to replace this juror, Caro cannot show prejudice on this claim. I likely would not have granted the motion because the evidence supporting removal was weak in light of my first-hand knowledge of the

circumstances. Caro has not demonstrated either prong of the *Strickland* test, and his claim fails.

12. *Cumulative Error.*

Finally, Caro argues that deficiencies of counsel during the penalty phase prejudiced him cumulatively. None of these claims individually warrant granting Caro's Motion for Collateral Relief, nor do they do so collectively. *Fisher*, 163 F.3d at 852-53.

G. CLAIM VII: *BRADY* VIOLATIONS CONCERNING FUTURE DANGEROUSNESS.

During the penalty phase, the government alleged future dangerousness as a non-statutory aggravating factor. The government presented evidence that Caro held a leadership position in a violent gang, and that Caro would only temporarily be at the BOP's most secure facility. In his seventh claim, Caro argues that the government violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by withholding material exculpatory and impeachment evidence on these topics. He also argues that the government misled the jury regarding his future dangerousness. His claims are individually addressed below.

1. *BOP Housing Information.*

In this *Brady* claim, Caro argues that the government withheld material, exculpatory, and impeachment evidence that the BOP had often housed inmates in its most secure prison, Administrative Maximum United States Penitentiary in

Florence, Colorado ("Florence ADMAX"), for more than three years. Caro moves to engage in discovery to obtain BOP data, expand the record, and conduct a hearing on this evidence and its potential impact on his sentence. I find, however, that because Caro raised this same *Brady* claim on direct appeal, he is barred from relitigating it under § 2255. *Linder*, 552 F.3d at 396 (finding that defendant "may not circumvent a proper ruling on his [claim] on direct appeal by re-raising the same challenge in a § 2255 motion."). I also find that the BOP information Caro claims the government should have disclosed does not qualify as *Brady* evidence. *See Strickler*, 527 U.S. at 281 ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

Prior to trial, Caro filed four separate discovery motions for BOP data and records on inmates housed at Florence ADMAX. The motions sought the same information on different grounds, including data showing inmates' length of stay since the prison opened in 1994. Two of the motions sought subpoenas duces tecum directed to the director of the BOP and the warden of Florence ADMAX pursuant to Rule 17 of the Federal Rules of Criminal Procedure (ECF Nos. 273 & 274). Another motion sought an order from the court requiring the government to produce the information under Federal Rule of Criminal Procedure 16(a)(1)(E) (ECF No. 308), and the final motion sought an order from the court to produce the

information as exculpatory within the meaning of *Brady* (ECF No. 307). The motions were referred to the magistrate judge, who granted the motion based on *Brady* and denied the other motions. *See United States v. Caro*, No. 1:06cr00001, 2006 WL 3251738, at *4-*5 (W.D. Va. Nov. 8, 2006) (Sargent, J.). The parties filed objections to the magistrate judge's order. I sustained the government's objections on the ground that the defense had not demonstrated that the requested evidence was material as defined under *Brady*. *Caro*, 461 F. Supp. 2d at 481. The Fourth Circuit affirmed this ruling on Caro's direct appeal. *Caro*, 597 F.3d at 619.

Some time after Caro murdered Sandoval, he was transferred from USP Lee to Florence ADMAX. Caro presented evidence about Florence ADMAX from Mark Cunningham, Ph.D., a psychologist and expert in prison violence and security measures within the BOP.[10] He explained that at Florence ADMAX, inmates, even in so-called "general population," are confined in single cells, 23 hours per day, with shackled movement and single-person exercise. Dr. Cunningham described in great detail the intense security restrictions imposed upon inmates in this prison. He testified that in his opinion, the BOP had an available level of security that could house Caro so that "the likelihood of serious violence is very low." (Trial Tr. 82, Feb. 12, 2007, ECF No. 686.)

[10] Dr. Cunningham is a frequent defense future-dangerousness expert in capital cases. *See, e.g, United States v. Umana*, 750 F.3d 320, 354 (4th Cir. 2014); *United States v. Hager*, 721 F.3d 167, 196 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014).

Importantly, Cunningham also testified that "for most of the inmates that are there . . . it's not intended to be a permanent placement," the idea being that "you could modify this person sufficiently, or get their attention sufficiently that they could be returned to a lower level of security at some point." (Trial Tr. 39-40, Feb. 12, 2007, ECF No. 686.) He explained that the prison has a so-called step-down program that has a minimum period of three years before an inmate can be reassigned to another facility, with an average transfer period of five years. On the other hand, he pointed that there are inmates at Florence ADMAX for whom there is no foreseeable plan of a lower level of security, such as "Al Qaeda terrorists," the Unabomber Ted Kaczynski, and prison gang leaders. (*Id.* at 40.)

In rebuttal, the government presented testimony from Gregory Hershberger, a retired former warden at Florence ADMAX and long-time BOP employee. He also described the three-year step-down program. Hershberger testified that Caro would always present a danger within the BOP system. He agreed with the prosecutor's assertion that "no system that the Bureau of Prisons has been able to devise to control the inmates is completely failsafe." (*Id.* at 190.)

Relying on the testimony of these experts, the government argued to the jury that Caro would likely leave Florence ADMAX as soon as three years after he entered the facility. (Trial Tr. 35, Feb. 13, 2007, ECF No. 687 ("[H]e may initially go to ADMAX, but he will be moved out to the USP on a three year program.").)

In his § 2255 motion, Caro asserts that at the time of his trial, the government had exclusive access to data showing that in actuality, the BOP often did not meet its goal of moving inmates out of Florence ADMAX in three years through the step-down program. He claims that the government committed a *Brady* violation by failing to disclose BOP data on this topic and misrepresenting to the jury that if sentenced to life in prison, BOP officials could not protect staff and other inmates from Caro's violence for more than three to five years.

Even without the requested access to BOP data about inmates' terms at Florence ADMAX, Caro has developed evidence on the topic that he presents in support of his § 2255 motion. Caro has submitted an informal survey conducted by a law firm in New Mexico in November 2010. (Mot. Collateral Relief Ex. 48, ECF No. 790-48.) The survey sought information on the number of consecutive years that each inmate at Florence ADMAX had spent there. Of the 129 questionnaires sent, 14 were returned unanswered with indications that the prisoners were under special administrative measures and could not respond. Sixty-nine were returned. (*Id.* at 1, ¶ 3.) The survey suggests that in 2007, at least 30 inmates had been housed at Florence ADMAX for five or more years. (*Id.* at Ex. A, 1-4.) The survey also suggests that 43 inmates had been at Florence ADMAX, or United States Penitentiary Marion, the most secure BOP institution before Florence ADMAX was built, for eight or more consecutive years. (*Id.* at 1,

¶ 4.)

Caro has also presented new evidence in his response to the government's Motion to Dismiss.[11] The evidence is a collection of data from various sources, some of which were not available at the time of Caro's trial. This rough compilation of data suggests that at least 126 inmates have been at Florence ADMAX for more than five years, and at least 155 inmates have been at Florence ADMAX for more than three years. (Pet'r's Opp'n Mot. Dismiss Ex. 72 ¶ 7, ECF No. 797-1.) It also suggests that inmates who have been at Florence ADMAX for more than three years comprise almost thirty percent of the current population. (*Id.*) Caro argues that this data likely does not fully represent the number of inmates who have been continuously housed at Florence ADMAX for more than three years.

The new evidence also suggests that there are at least 54 inmates who have been accused or convicted of committing a homicide within a BOP facility who have been designated to Florence ADMAX. (*Id.* at ¶ 9.) Allegedly, these 54 inmates have continuously remained at Florence ADMAX since their initial

[11] The evidence presented is a collection of various sources. It includes the Dvorak Affidavit (*Id.* Ex. 48); documents produced by the government in response to a 2010 subpoena issued to the BOP in *United States v. Vincent Basciano*, 1:05-CR-060 (E.D.N.Y.); the Bureau of Prisons Inmate Locator and federal court PACER websites; the Federal Death Penalty Resource Counsel website; documents received pursuant to a FOIA request in this case; and internet searches for articles containing names of inmates known to be housed at Florence ADMAX. (Pet'r's Opp'n Mot. Dismiss Ex. 72 ¶ 3, ECF No. 797-1.)

placement there. (*Id.*) The new evidence suggests that in 2007, at least 14 of these inmates had been incarcerated at Florence ADMAX for more than three years. (*Id.*)

Finally, Caro has located 10 cases where a defendant committed a homicide within a BOP facility, but ended up with a life sentence. (*Id.* at ¶ 11.) Allegedly, nine of these defendants have been at Florence ADMAX since the imposition of their life sentences.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Failure to disclose because the evidence is in possession of another government department is no defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Id.* at 437. The government's constitutional duty to disclose is triggered only when a "reasonable probability" arises that the undisclosed evidence would result in a different outcome—or in other words, when the "government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

I must first decide whether Caro is attempting to relitigate the *Brady* claim that was raised on appeal and rejected by the Fourth Circuit. It is well established that a § 2255 motion is not a vehicle for relitigating claims already decided by the appellate court. *See Linder*, 552 F.3d at 396; *Boeckenhaupt*, 537 F.2d at 1183 (holding that issues previously decided on direct appeal may not be raised on collateral review).

The record is clear that Caro raised this same *Brady* claim at trial and again on appeal. Now, as he did then, Caro is seeking access to BOP data on inmates from which he can build statistics about how long inmates are confined at Florence ADMAX. His current version of the claim presents 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. Nevertheless, this recast version of the claim is still seeking the same data for the same reasons. Caro makes no showing that he could not have collected and presented similar evidence when he raised his original *Brady* claim. Had he done so, such evidence would have been a part of the record — for me to consider in reviewing the

magistrate judge's ruling and for the court of appeals to consider.[12] Caro's legal claim here is no different in substance from the claim that he lost on appeal, and therefore, it is barred. *Boeckenhaupt*, 537 F.2d at 1183.

In any event, Caro's new statistics do not meet the materiality standard under *Brady*. The same element that was missing at trial and on appeal is still missing now — a likelihood that additional BOP data would boil down into statistics that undermine confidence in the jury's verdict on future dangerousness. *See United States v. Agurs*, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

When deciding the appropriate punishment for a defendant who has been convicted of capital murder, jurors are directed to weigh the aggravating and

---

[12] Caro asserts that his § 2255 *Brady* claim falls within an exception to the procedural default rule because it relies on evidence that could not have been presented on appeal without further factual development. *See Bousley*, 523 U.S. at 622 (quoting *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam) (holding that an issue was appropriately raised in a habeas where "the facts [relied on are] '*dehors* the record and their effect on the judgment was not open to consideration and review on appeal'")). I cannot find that Caro's claim falls within this exception. Rather, I find it clear that Caro is now raising the same *Brady* claim that he raised in earlier proceedings. He is, in effect, asking me 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. *Boeckenhaupt*, 537 F.2d at 1183.

mitigating circumstances presented in the case. *See* 18 U.S.C. §3593(d). In Caro's case, jurors unanimously found each alleged aggravating factor, including Caro's lack of remorse and his record of violence against other inmates. They also found 12 of the 22 mitigating factors that Caro had proposed, including the fact that the BOP had securely confined Caro since Sandoval's death in December of 2003. In addition, some jurors found that four other mitigating factors had been established beyond a reasonable doubt, including the mitigating factor that, if not sentenced to death, Caro would be incarcerated in a secure federal institution for the rest of his life.

Both Caro and the government presented expert testimony about BOP mechanisms to maintain security over dangerous inmates like Caro which indicated that inmates could remain at Florence ADMAX for more than three years. Caro's expert witness, Dr. Cunningham, testified that senior staff at Florence ADMAX had estimated that it takes an average of five years for any inmate to complete the step-down program. He also testified that staff had told him about several inmates who had been incarcerated there continuously since the facility opened in 1994. (Trial Tr. 40-41, Feb. 12, 2007, ECF No. 686.) Cunningham further testified that, based on his research, a federal inmate who had killed another inmate would be maintained at Florence ADMAX for six years before BOP officials even considered an alternate placement. The government's

expert witness, Dr. Hershberger, also conceded that in special cases, inmates sometimes remained at Florence ADMAX for years.

The new facts that Caro presents with his § 2255 claim merely reiterate these facts adduced at trial, indicating that inmates often take more than three years to complete the step-down program to earn transfer to a less restrictive placement. Caro's new evidence does not contradict the government's central argument on this issue, which was that Caro could not be permanently assigned to the ADMAX facility. As Cunningham admitted, Florence ADMAX is not intended to be a permanent placement for any inmate, because the goal of the BOP is that exposure to the restrictive environment at Florence ADMAX and its rehabilitative programs would modify an inmate sufficiently to allow his safe transfer to less restrictive housing.

After review of the evidence that the jury heard on this one mitigating factor, I find no plausible reason to believe that the additional, undisclosed BOP data now presented would have persuaded jurors that the mitigating factors outweighed the aggravating factors, such that Caro should not be sentenced to death. Thus, I conclude that the government did not commit a *Brady* violation by failing to disclose the BOP data Caro seeks. For the same reason, I cannot find that the interests of justice require discovery, expansion of the record, or an evidentiary hearing on this matter, and will deny Caro's requests in this regard.

2. *Information on Caro's Status as a Gang Leader.*

Caro next argues that the government withheld material exculpatory evidence that Caro was not the leader of the Texas Syndicate at USP Lee and that he might be in bad standing with the Texas Syndicate.

Caro argues that the government should have disclosed three pieces of evidence. The first piece of evidence is the grand jury testimony of a gang intelligence officer at USP Lee. The officer testified that intelligence information had suggested that Benavidez was the leader of the Texas Syndicate at USP Lee before he was assaulted, and that Francisco Tijerina was the leader of the Texas Syndicate at USP Lee at the time of the officer's testimony in 2003. (Mot. Collateral Relief Ex. 28, 14-15, ECF No. 790-28.) The second piece of evidence is an internal BOP memo dated one week after Sandoval's death. The memo states that an inmate told a prison official that a group had decided that whoever had killed Sandoval would face trouble. (*Id.* at Ex. 58.) The third piece of evidence is an internal BOP transportation report from 2006. The report states that Caro "is believed to be in 'bad standing'" with the Texas Syndicate. (*Id.* at Ex. 59.)

Caro argues that these three documents are material because the government argued that he was, or might still be, a leader of the Texas Syndicate. (Pet'r's Opp'n Mot. Dismiss 126.) During the sentencing phase of the trial, the prosecutor stated several times that Caro was a leader of the Texas Syndicate. (*See, e.g.*, Trial

Tr. 21-22, Feb. 13, 2007, ECF No. 687.) The prosecutor also specifically referenced Caro's role in the Benavidez assault at USP Lee, stating, "Whether he's a leader, whether he's an enforcer, don't know. But he was a player." (*Id.* at 96.)

As discussed above, to demonstrate a *Brady* violation, Caro must prove that the undisclosed evidence was "(1) favorable to him either because it is exculpatory, or because it is impeaching; (2) material to the defense, *i.e.,* prejudice must have ensued; and (3) that the prosecution had materials and failed to disclose them." *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (internal quotation marks and citation omitted).

The government argues that there is not a reasonable probability that the disclosure of these three documents would have changed the sentencing outcome. (Gov.'s Mot. Dismiss 89, ECF No. 791.) I agree. Caro has failed to demonstrate prejudice, or that this evidence is exculpatory or impeaching.

These three pieces of evidence primarily concern BOP assessments of Caro's position in the Texas Syndicate, and are not authoritative assessments of Caro's gang standing. Additionally, evidence was presented on the uncertain nature of Caro's status in the Texas Syndicate after the assault on Benavidez at USP Lee.

Jacoba Guzman, a technician in the Special Investigative Supervisor's Office of the Bureau of Prisons, translated a letter concerning the Benavidez

assault that law enforcement had intercepted. (Trial Tr. 16, Feb. 6, 2007, ECF No. 683.) The letter was addressed to a Mr. Gomez. Guzman testified that the letter was likely intended for Nick Gomez, the leader of the Texas Syndicate outside of prison. (*Id.* at 17.) The letter was signed by several inmates, including Caro, whose name was signed first. (*Id.* at 18-19.) The letter stated in part:

> With all respect and moving to the purpose of the present it's necessary sincerely to clear without a doubt the matter that's been placed on the procedure in respect to blank Benavidez . . . . At this moment it's asked and let be clear [sic] that everything is good or clear with this person. Therefore, there is no or doesn't exist any testification against one or any brothers of ours Texas Syndicate [sic].

(*Id.* at 21.)

In addition to introducing this letter, the government referred to the uncertainty of Caro's status in the Texas Syndicate during their closing arguments:

> And after the Benavidez stabbing, what does he do? He sends out letters to this Mr. Gomez who, according to Jackie Guzman, was like the godfather of the Texas Syndicate. . . . [He said] [w]e didn't know we weren't supposed to take orders from Tijerina, and please let me back in good standing with the gang.

(Trial Tr. 28, Feb. 13, 2007, ECF No. 687.) It thus appears that evidence and argument that Caro might be in bad standing with the Texas Syndicate were presented during the penalty phase, and that Caro had personal knowledge that he might be in bad standing with the Texas Syndicate. *See United States v. Roane*, 378 F.3d 382, 402 (4th Cir. 2004) ("[I]nformation actually known by the defendant falls outside the ambit of the *Brady* rule.").

In light of all evidence presented during the penalty phase, there is not a reasonable probability that this evidence was material, exculpatory or impeachment evidence that would have changed the outcome.

3. *Cumulative Violation.*

Caro argues that the government's cumulative failures to produce exculpatory and impeachment evidence violated his constitutional rights. He argues that the government misled the jury with regard to his gang association and the BOP's ability to safely house him for more than three years, and that the government's cumulative errors prejudiced him.

However, I find that the items of evidence that Caro claims were withheld in violation of *Brady* are not material when considered cumulatively. "[T]his evidence, even viewed cumulatively, does not place [the petitioner's] trial in such a different light that confidence in the verdict is undermined." *Richardson v. Branker*, 668 F.3d 128, 149 (4th Cir. 2012).

4. *Eighth Amendment Violation.*

Caro argues that his death sentence violates the Eighth Amendment because misleading evidence led to the finding that he presented a future danger. He states that his claim relies on the evidence and arguments presented in other claims, specifically Claims VI, VII, and X. Insofar as these claims have been found to be without merit, this claim is also without merit.

H. CLAIM VIII: MINIMIZATION OF JURY'S RESPONSIBILITY.

Caro argues that the government violated the Eighth Amendment by minimizing the jury's responsibility.

Caldwell v. Mississippi, 472 U.S. 320, 333 (1985), states in relevant part: "The uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." A *Caldwell* violation occurs when a sentencer "has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Sawyer v. Smith*, 497 U.S. 227, 233 (1990).

Caro argues that the government made two statements during its closing argument that diminished the jury's responsibility. First, the government stated:

> If it is your decision that Carlos David Caro should be sentenced to death, if in fact the weighing process justifies the death sentence, you would not be the first jury to come to that conclusion. It's something that other juries have done.

(Trial Tr. 17, Feb. 13, 2007, ECF No. 687.) Second, the government stated:

> The last thing I would like to talk about is the law. Mr. Kalista talks about and uses words like kill. You will not hear Judge Jones use that term. The job is not to kill anyone. It's not the law.

(*Id.* at 98.)

As the government points out, this claim is procedurally defaulted. It rests on facts and law that were available to counsel at the time of appeal. A sentencing

error that could have been raised on direct appeal, but was not, is barred from review under § 2255 unless the petitioner shows both cause for the default and actual prejudice. *Bousley*, 523 U.S. at 622. Prejudice requires a showing that "there is a reasonable probability that his conviction or sentence would have been different . . . ." *Strickler*, 527 U.S. at 264. In this instance, prejudice has not been demonstrated.

Caro's first argument is that the government sent a message to the jury that it did not need to feel responsible for causing the death of Caro because other juries have done so. (Mot. Collateral Relief 159, ECF No. 790.) I do not find that the government's statements created the perception that the responsibility for determining the appropriateness of a death sentence rested elsewhere. The reasonable interpretation of the government's remarks was that other juries have imposed the death sentence in other capital cases. Additionally, this statement was preceded by a discussion of the jury's responsibility to weigh aggravating and mitigating factors. (Trial Tr. 16-17, Feb. 13, 2007, ECF No. 687.)

Caro's second argument is based upon a typographical error. He incorrectly quoted the transcript as stating, "The job is not to kill anyone. It's the law." (Mot. Collateral Relief 158, ECF No. 790.) I do not find that the government's actual statement, quoted above, created the perception that the responsibility for determining the appropriateness of a death sentence rested elsewhere. This

statement was followed by a discussion of the jury's responsibility to weigh aggravating and mitigating factors. (Trial Tr. 98, Feb. 13, 2007, ECF No. 687.)

This claim has been procedurally defaulted, and because prejudice has not been demonstrated, Caro cannot overcome the procedural default.[13]

I. CLAIM IX: INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

In his ninth claim, Caro argues that he was deprived of his constitutional right to effective assistance of counsel on direct appeal. He argues that appellate counsel was ineffective in failing to raise five claims. First, he argues that appellate counsel failed to challenge the court's refusal to instruct the jury that aggravating factors must outweigh mitigating factors sufficiently and beyond a reasonable doubt. Second, he argues that appellate counsel failed to challenge the exclusion for cause of qualified jurors with misgivings as to the death penalty. Third, he argues that appellate counsel failed to raise an argument regarding trial counsel's failure to object to the introduction of specific instances of violence committed by persons other than Caro. Fourth, he argues that appellate counsel failed to raise the claim that the government violated Caro's constitutional rights by minimizing the jury's responsibility. Fifth and finally, Caro argues that

[13] Caro asserts that he can overcome this claim's procedural default by establishing ineffective assistance of counsel. However, this argument is without merit because establishing ineffective assistance of counsel also requires a showing of prejudice. *See infra* Claim IX.D.

appellate counsel failed to raise systemic challenges to the death penalty. These arguments are individually addressed below.

1. *Failure to Challenge Refused Instruction.*

Caro argues that appellate counsel was ineffective in failing to challenge the court's refusal to instruct the jury that aggravating factors must outweigh mitigating factors sufficiently and beyond a reasonable doubt. He asserts that this violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

At trial, Caro requested an instruction stating that "the government must prove beyond a reasonable doubt that the aggravating factors sufficiently outweigh the mitigating factors in order to justify the death penalty." (Def.'s Resp. Regarding Proposed Jury Instructions 1, ECF No. 611.) I declined to give that proposed instruction. (*See* Final Jury Instructions Sentencing Hr'g. Part 2, ECF No. 640.)

At trial, the court instructed the jury to consider the aggravating factors separately, and to decide for each if they unanimously agreed that the government had proved it beyond a reasonable doubt. (*Id.* Instruction No. 6, 9.) The court also told the jurors to determine whether the aggravating factors that they unanimously found to exist sufficiently outweighed any mitigating factors that they individually found to exist. (*Id.* Instruction No. 8, 13.)

Caro argues that although the court instructed the jury to determine whether the government had proved the aggravating factors beyond a reasonable doubt, the court failed to instruct the jury that the reasonable doubt standard must also apply to the weighing of aggravating and mitigating factors. Caro points to two out-of-circuit cases that were decided after trial, but before appellate counsel filed their opening brief. He argues that these two cases, *United States v. Fell*, 531 F.3d 197 (2d Cir. 2008), and *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007), approved the "beyond a reasonable doubt" language as applied by his proposed instruction.

As Caro concedes, after the filing of the 2255 motion, the Fourth Circuit rejected his argument. *United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013), *cert. denied*, 135 S. Ct. 46 (2104); *United States v. Hager*, 721 F.3d 167, 206-07 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014). In any event, appellate counsel was not ineffective in failing to raise this claim. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that appellate counsel has no duty to raise every colorable claim and is entitled to exercise professional judgment). The FDPA does not set forth a reasonable doubt standard in the portion of the statute that deals with weighing aggravating and mitigating factors. (*See* 18 U.S.C. § 3593(e).) *Fell* and *Sampson* are persuasive authority only, and do not hold that juries must be instructed that aggravating factors outweigh mitigating factors

beyond a reasonable doubt. *See Fell*, 531 F.3d at 233-34 (finding no constitutional error where three of the non-statutory aggravating factors had some overlapping factual predicate, especially where the jury was charged with making a qualitative assessment of the aggravating and mitigating evidence as a whole).

Indeed, in *Sampson*, the First Circuit addressed a district court instruction that said jurors could impose the death penalty if the aggravating factors "slightly outweigh[ed]" the mitigating factors, but then later said that the prosecution had to convince them "beyond a reasonable doubt that the aggravating factor or factors sufficiently outweigh the mitigating factors to make death the appropriate penalty in [the] case." 486 F.3d at 33. The court reasoned:

> There are only two possibilities: either the jurors eschewed the reasonable doubt standard vis-à-vis the weighing process (which, as we have held, would have comported fully with the law) or they applied the reasonable doubt standard (which would have *benefitted* Sampson by imposing a more onerous burden on the government).

Id. This case does not hold that an instruction such as the one proposed by Caro is required under the law, but rather states that such an instruction imposes a higher standard than that required by law. *See also Tuilaepa v. California*, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

Additionally, the other cases cited by Caro do not address this issue and thus do not support his argument. *See Apprendi v. New Jersey*, 530 U.S. 466, 490

(2000) (holding that any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that a sentencing judge, sitting without a jury, cannot find an aggravating circumstance necessary for imposition of the death penalty).

That appellate counsel did not present this argument does not render their assistance ineffective. To show deficient performance under *Strickland*, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. 466 U.S. at 688. Appellate counsel's conduct did not fall below an objective standard of reasonableness, which is clearly demonstrated by the lack of case law supporting Caro's argument.

2. *Failure to Challenge Exclusion for Cause of Qualified Jurors with Misgivings as to the Death Penalty.*

Caro next argues that appellate counsel was ineffective for failing to challenge the exclusion for cause of qualified jurors with misgivings as to the death penalty. He argues that he ended up with a death-leaning jury because Jurors #40 and #57, who had concerns about the death penalty, were questioned in a manner that resulted in their disqualification, even though they had indicated that they were willing to follow the law. He argues that while appellate counsel made general

arguments regarding the overall voir dire process, they were ineffective in failing to also challenge the particular voir dire and exclusion of Jurors #40 and #57.

As to this claim, Caro has failed to demonstrate deficient performance.

Because they are tasked with identifying relevant prejudices, district courts have discretion concerning what questions are asked during voir dire. *Rosales-Lopez v. United States*, 451 U.S. 182, 188-89 (1981); *United States v. Barber*, 80 F.3d 964, 967 (4th Cir. 1996). "[A] juror should be excluded for cause if his 'views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Fulks*, 454 F.3d at 427 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

During voir dire, Juror #40 expressed an inability to impose the death penalty,[14] as did Juror #57.[15] The exclusion for cause of jurors who indicate an

---

[14] During voir dire, Juror #40 answered as follows:

> THE COURT: Well, I know, and again, there's no right or wrong answer here. I just need to know what you believe, and so you need to tell me honestly. I mean, either way is, is fine. People have beliefs both ways. Some people believe that they could vote to impose the death penalty, some people believe that they could not. And I just need to know what your position is.
>
> JUROR NUMBER FORTY: I guess if it all come down to it - -
>
> THE COURT: That you could not.
>
> JUROR NUMBER FORTY: No, if it all come down to it.

(Trial Tr. 136-37, Jan. 22, 2007, ECF No. 693.)

unwillingness to consider the death penalty as a potential punishment has been routinely upheld. *See, e.g.*, *United States v. Jackson*, 327 F.3d 273, 296 (4th Cir. 2003) (finding that the district court did not act improperly in excluding a juror who indicated that he could not sign his name to a verdict sheet which would require the court to impose the death penalty). The exclusion of Jurors #40 and #57 based on the answers that they provided during voir dire was not unusual, and appellate counsel was not ineffective in failing to challenge this on appeal. The law affords a strong presumption that counsel's performance was within the range of competence demanded from attorneys defending criminal cases. *Strickland*, 466

---

[15] During voir dire, Juror #57 answered as follows:

> THE COURT: Well, are you telling me that if you were a juror in this case and the defendant were found guilty that you could not vote for the death penalty?
>
> PROSPECTIVE JUROR: Yes, sir.
>
> THE COURT: Is that what you're saying?
>
> PROSPECTIVE JUROR: I could not vote for it.
>
> THE COURT: All right. No matter what the circumstances?
>
> PROSPECTIVE JUROR: No.
>
> THE COURT: Your mind would be in essence closed to the death penalty, is that what you're saying? Is that right?
>
> PROSPECTIVE JUROR: Yes, sir.

(Trial Tr. 57-58, Jan. 23, 2007, ECF No. 672.)

U.S. at 688-89. In the case at hand, there is no indication that appellate counsel's performance fell below an objective standard of reasonableness, or even departed from usual practice.

3. *Failure to Challenge Trial Counsel's Failure to Object to Specific Instances of Violence Committed by Persons Other Than Caro.*

Caro argues that appellate counsel rendered ineffective assistance of counsel for failing to raise a claim regarding trial counsel's failure to object to specific instances of violence committed by inmates other than Caro, in violation of the trial court's order. He notes that the Fourth Circuit stated that it could not grant relief as to the use of specific instances of violence by persons other than Caro when that claim was never raised on appeal. *See Caro*, 597 F.3d at 621 n.14. He argues that the Fourth Circuit's opinion establishes the prejudicial impact of appellate counsel's failure to raise this claim, and establishes that the government's use of evidence of specific instances of violence by persons other than Caro was error because it violated the district court's ruling. He also argues that the government's use of this evidence violated the Eighth Amendment, because it constituted aggravation evidence that was not "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

Caro has failed to prove prejudice under *Strickland*, because he has failed to demonstrate a "reasonable probability" that but for counsel's errors, the outcome of the penalty phase would have been different. 466 U.S. at 694-95.

At trial, the government presented evidence of specific instances of violence committed by other inmates. Witness Olson testified that an inmate at Florence ADMAX who was a member of the Aryan Brotherhood had sent a coded message that had resulted in the death of two other inmates. (Trial Tr. 27-30, Feb. 6, 2007, ECF No. 683.) Former warden Hershberger testified that an inmate had killed two guards at USP Marion, the predecessor to Florence ADMAX. (Trial Tr. 188, Feb. 12, 2007, ECF No. 686.)

The Fourth Circuit's discussion of this evidence does not establish prejudice. The Fourth Circuit mentioned trial counsel's failure to challenge this evidence in its opinion:

> When asked during oral argument whether Caro asserted any claim arising from the government having violated the district court's order that it "may not rely on specific instances of inmate violence (other than the defendant's own) in seeking to prove his future dangerousness," counsel for Caro stated that she noted the government's misconduct merely to bolster her argument about subsection (i). Regardless of whether subsection (ii) would apply, we cannot grant relief that Caro plainly failed to request.

Caro, 597 F.3d at 621 n. 14 (internal citation omitted). The Fourth Circuit discussed this evidence in the context of Federal Rule of Criminal Procedure 16, which concerns documents and objects that (i) are "material to preparing the

defense;" or (ii) "the government intends to use . . . in its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(E)(i)-(ii). The rule does not address rebuttal evidence.

Similarly, the order banning use of evidence of specific instances of violence by inmates other than Caro did not address rebuttal evidence, but rather concerned evidence that the government intended to use in its case in chief. *See Caro*, 461 F. Supp. 2d at 481-82 ("For these reasons, I will sustain the government's objection to the magistrate judge's order and deny the defendant's objection . . . . I do so in light of the government's representation that it does not intend to introduce any of the requested data in its own case." (internal citations omitted).) Hershberger and Olsen were offered as rebuttal witnesses to defendant's expert Cunningham.[16] The Fourth Circuit's discussion of their testimony and Rule 16(a)(1)(E) does not establish prejudice sufficient to prove Caro's ineffective assistance of counsel claim.

Caro premises his ineffective assistance of counsel claim on appellate counsel's failure to challenge trial counsel's failure to challenge the introduction of specific acts evidence in violation of the court's order, but Caro has not demonstrated a violation of the court's order. Furthermore, Caro has failed in his attempts to establish prejudice. There is not a reasonable likelihood that the

[16] Although Olson's testimony preceded Cunningham's, it still was presented as rebuttal testimony. See discussion concerning the admission of Olson's testimony on the matter of the coded letter at Trial Tr. at 27-31, Feb. 6, 2007, ECF No. 683.

outcome of the penalty phase would have been different but for the introduction of this evidence. The government offered other evidence that could have served as a basis for the jury's finding that Caro constituted a future danger — for example, Caro's record of gang involvement and violence against other inmates. There is no indication that the totality of the evidence presented on Caro's future dangerousness "was merely speculative or that it was constitutionally infirm." *United States v. Hager*, 721 F.3d 167, 200 (4th Cir. 2013). Accordingly, this claim is without merit.

To the extent that Caro asserts a claim under the Eighth Amendment, this claim also fails. The evidence in question was introduced in rebuttal, and extensive evidence specific to Caro was presented to the jury. The jury found that the parties had proved three non-statutory aggravating factors and twelve mitigating factors. The jury weighed the aggravating and mitigating factors before delivering a death verdict, and made "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879. That specific acts evidence was introduced in rebuttal at trial does not mean that the jury failed to make an individualized determination.

4. *Failure to Raise Claim That Government Improperly Minimized Jury's Responsibility.*

Caro argues that appellate counsel was ineffective in failing to claim that the government violated the Eighth Amendment by minimizing the jury's responsibility.

The underlying claim that the government violated the Eighth Amendment by minimizing the jury's responsibility (Claim VIII) has been procedurally defaulted and is without merit. As discussed above, Caro has not shown that the government's challenged statements misrepresented or minimized the jurors' role in determining the appropriateness of a death sentence. Accordingly, Caro cannot establish that counsel's representation was deficient or prejudicial, and this claim fails under *Strickland.*

5. *Failure to Raise Systemic Challenges to the Death Penalty.*

Caro argues that appellate counsel was ineffective in failing to raise systemic challenges to the death penalty. He argues that appellate counsel should have raised the arguments that he asserts in Claims X through XV, which are discussed hereafter.

Caro cannot establish that appellate counsel was ineffective for failing to raise these arguments. To show prejudice under *Strickland*, the petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." 466 U.S. at 694. As discussed below, Claims X through XV seek to overturn clearly established law concerning the death penalty. Accordingly, these claims are without merit, and no prejudice occurred from appellate counsel's failure to raise them.

J. CLAIMS X-XV: SYSTEMIC CHALLENGES TO DEATH PENALTY.

In Claims X through XV, Caro asserts systemic challenges to the death penalty. In Claim X, he argues that the use of future dangerousness as an aggravating factor violated his right to a non-arbitrary sentencing process under the Eighth Amendment and 18 U.S.C. § 3595(C)(2)(A). In Claim XI, he argues that the FDPA is unconstitutional due to the absence of a principled basis for distinguishing between cases where the death penalty is imposed and cases where it is not. In Claim XII, he asserts that his sentence should be vacated because the death penalty was imposed "on both the invidious basis of race and the irrational basis of geography ." (Mot. Collateral Relief 186, ECF No. 790.) In Claim XIII, he asserts that the death sentence is a categorically cruel and unusual punishment that violates the Eighth Amendment. In Claim XIV, he claims that the death sentence violates international law, namely the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights ("ICCPR"). Finally, in Claim XV, he argues that the FDPA precludes plain error review, and is thus unconstitutional.

Claims X through XV have been procedurally defaulted, because they concern alleged errors which could have been raised on direct review, but were not.[17] *See Bousley*, 523 U.S. at 622. Caro has not shown any "external impediment preventing counsel from constructing or raising" these claims on direct appeal," *Murray*, 477 U.S. at 492, or "a reasonable probability that his conviction or sentence would have been different" if counsel had raised any of these claims. *Strickler*, 527 U.S. at 264.

Caro has not demonstrated cause and prejudice for failing to raise any of these claims on direct appeal. It is clear from the record that these claims rely on facts and law that were available to counsel at the time of appeal. The case summaries and statistical studies that Caro has put forth are not new evidence and do not constitute "exceptionally clear proof" of discriminatory purpose.

---

[17] The government explicitly argues that Claim X and Claim XV are procedurally defaulted. Caro argues that he can overcome the procedural default due to ineffective assistance of appellate counsel in failing to raise these claims. As discussed in Claim IX E, this argument is without merit, because Caro has failed to establish prejudice.

The government moved to dismiss Claims XI through XIV, but did not explicitly argue that they were procedurally defaulted. However, these claims are appropriate for sua sponte application of procedural default. *See, e.g.*, *Yeatts*, 166 F.3d at 261. A finding that these claims are procedurally defaulted furthers interests in the finality of the judgment, judicial efficiency, and conservation of judicial resources. *See Hines v. United States*, 971 F.2d 506, 509 (10th Cir. 1992). These interests are particularly furthered due to the fact that Caro is raising systemic challenges to the death penalty, a punishment which has been repeatedly upheld under federal law. Caro received notice that the government had moved to dismiss these claims, and had opportunity to respond. Thus, I find that sua sponte application of procedural default is warranted under the circumstances of this case.

McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987) (discussing problems with using statistical studies to challenge the imposition of a death sentence). *See also Bell v. Ozmint*, 332 F.3d 229, 239 (4th Cir. 2003) (discussing "very exacting standards for entitlement to constitutional relief based on statistical evidence" (internal quotation marks and citation omitted)). Furthermore, these claims can be fully and completely addressed based on the existing record in this case. *See Bousley*, 523 U.S. at 622.

Additionally, Claims X through XV seek to overturn well-established case law, and are without merit. *See, e.g.*, *Jones v. United States*, 527 U.S. 373, 389 (1999) (reviewing claims challenging a sentence imposed under the FDPA for plain error); *McCleskey*, 481 U.S. at 292 (rejecting use of statistical study as sufficient proof of discrimination in equal protection claim challenging capital sentencing decision); *United States v. Lighty*, 616 F.3d 321, 370 (4th Cir. 2010) (affirming that death penalty is not per se cruel and unusual punishment under the Eighth Amendment); *United States v. Caro*, 614 F.3d 101, 101-02 (4th Cir. 2010) (affirming constitutionality of FDPA and recognizing its purpose of eliminating arbitrariness in capital sentencing); *United States v. Basham*, 561 F.3d 302, 331 (4th Cir. 2009) (recognizing future dangerousness as a legitimate non-statutory aggravating factor in capital proceedings); *Sampson*, 486 F.3d at 25 (rejecting Fifth and Eighth Amendment claims that the FDPA is unconstitutional due to racial and

geographical discrimination); *Dutton v. Warden, FCI Estill*, 37 F. App'x 51, 53 (4th Cir. 2002) (unpublished) (holding that treaties such as the ICCPR that are not self-executing and have not had implementing legislation passed by Congress do not create private causes of action in U.S. courts). Caro has failed to establish that he is entitled to relief on these claims.

K. CLAIM XVI: CUMULATIVE ERROR.

In his final claim, Caro asserts that his claims establish prejudicial error when considered cumulatively. This claim is without merit. Cumulative error seldom supports reversal:

> Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. Generally, however, if a court determines that none of a defendant's claims warrant reversal individually, it will decline to employ the unusual remedy of reversing for cumulative error. To satisfy this requirement, such errors must so fatally infect the trial that they violated the trial's fundamental fairness. When none of the individual rulings work any cognizable harm, it necessarily follows that the cumulative error doctrine finds no foothold.

Basham, 561 F.3d at 330 (internal alterations, citations, and quotation marks omitted). Insofar as I have found Caro's claims meritless individually, I also find that Caro's claims, when considered cumulatively, do not violate his trial's fundamental fairness.

V. CONCLUSION.

For the reasons stated above, the government's Motion to Dismiss (ECF No. 791) will be GRANTED and the defendant's Motion for Collateral Relief Pursuant to 28 U.S.C. § 2255 (ECF No. 781) and the defendant's First Motion for Leave to Conduct Discovery and Preliminary Request for an Evidentiary Hearing and Expansion of the Record (ECF No. 800) will be DENIED. A separate Final Order will be entered herewith.

DATED: May 4, 2015

/s/ James P. Jones
United States District Judge

733 Fed.Appx. 651
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Carlos David CARO, Defendant–Appellant.

No. 16-1
|
Argued: September 14, 2017
|
Decided: May 8, 2018

Synopsis

Background: Following affirmance of defendant's conviction for first-degree murder and death sentence on direct appeal, 597 F.3d 608, the United States District Court for the Western District of Virginia, James P. Jones, J., 102 F.Supp.3d 813, denied defendant's postconviction motion to vacate, set aside, or correct sentence. Defendant appealed.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

defendant's trial counsel was not ineffective in failing to proffer mental-health testimony;

Brady claim was procedurally barred;

requested evidence was not favorable to defendant; and

requested evidence was not material.

Affirmed.

Gregory, Chief Judge, filed dissenting opinion.

*652 Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James P. Jones, District Judge. (1:06-cr-00001-JPJ-1; 1:13-cv-80553-JPJ)

Affirmed by unpublished opinion. Judge Duncan wrote the opinion, in which Senior Judge Shedd joined. Chief Judge Gregory wrote a separate opinion dissenting in part.

Attorneys and Law Firms

ARGUED: Timothy Michael Gabrielsen, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Tucson, Arizona, for Appellant. Anthony Paul Giorno, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. ON BRIEF: Jon M. Sands, Federal Public Defender, District of Arizona, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Tucson, Arizona; Fay F. Spence, First Assistant Federal Public Defender, Roanoke, Virginia, Brian J. Beck, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Abingdon, Virginia, for Appellant. Rick A. Mountcastle, Acting United States Attorney, Roanoke, Virginia, Jean B. Hudson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

Before GREGORY, Chief Judge, DUNCAN, Circuit Judge, and SHEDD, Senior Circuit Judge.

Opinion

DUNCAN, Circuit Judge:

A jury convicted Petitioner-Appellant Carlos David Caro of first-degree murder and sentenced him to death. Following a direct appeal, in which this court affirmed his conviction and sentence, Caro filed a 28 U.S.C. § 2255 Motion for Collateral Relief ("§ 2255 motion") challenging his death sentence on several grounds. The district court denied Caro's § 2255 motion but granted him permission to appeal *653 whether the government violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding Bureau of Prisons ("BOP") data on the amount of time that inmates are housed at U.S. Penitentiary, Administrative Maximum Facility ("Florence ADMAX"). [1] The key legal issue in this appeal is whether Caro can relitigate a subsequent, duplicative *Brady* claim on the basis of data that was available to him at the time the first claim was made. Because there is no

legal basis for Caro's position, we affirm the denial of his § 2255 motion.

In summary, Caro's *Brady* claim fails for at least two independent reasons. First, it is procedurally barred because this court previously denied the same claim on direct appeal. Under *Brady*, the government must disclose evidence that is (1) "*favorable* to [the] accused" *and* (2) "*material* either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (emphases added). This court rejected Caro's *Brady* claim on direct appeal because he failed to demonstrate that the requested data was favorable. *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010). Caro's § 2255 motion raises the same alleged *Brady* violation except that it includes previously available statistics, left out of the direct appeal record, from which to argue that the requested BOP data would be favorable. Additional, previously available statistics are insufficient to distinguish the *Brady* claim raised in Caro's § 2255 motion from the claim we denied on direct appeal.

As we explain below, the dissent's argument to the contrary fails as a matter of law. The dissent argues that a *Brady* claim is only procedurally barred "if it is made with *exactly* the same evidence and *exactly* the same arguments raised on direct appeal." *Infra* at 975. But it cites no precedent for this proposition and we have found none. In fact, the weight of Supreme Court precedent indicates that previously available evidence is insufficient to revive a claim that was denied on direct appeal, unless that evidence could not reasonably have been included in the direct appeal record. *See Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *see also Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). We are therefore unwilling to create out of whole cloth authority so fundamentally at odds with the central purpose of the Antiterrorism and Effective Death Penalty Act ("AEDPA")—partially codified at § 2255—which is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003).

Even if Caro's *Brady* claim were not procedurally barred, however, it is unavailing. Caro provides no indication that the requested BOP data would have been favorable. Nor does he satisfy *Brady*'s materiality requirement that there was a "reasonable probability" of a different sentence if the BOP data had been disclosed, *see* ***654** *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), because, at best, the requested data would reiterate undisputed information that the jury found unpersuasive.

I.

We begin with a history of Caro's criminal career, which culminated in the murder of Roberto Sandoval. Next, we discuss the penalty phase of Caro's murder trial because the evidence adduced during the penalty phase and its effect on the jury's decision to impose the death penalty are crucial to our *Brady* analysis. Finally, we recount the procedural history of this case, which is the basis for our conclusion that the *Brady* claim in Caro's § 2255 motion is procedurally barred.

A.

Caro was recruited to the drug trade at a young age and has spent most of his adult life incarcerated as a result. When he was twenty-one years old, Caro was convicted of possession of marijuana with intent to distribute and received a twenty-four-month prison sentence. Upon his release, Caro reentered the drug trade. He was promptly arrested and convicted for a second time of possession of marijuana with intent to distribute. The court sentenced Caro to seventy-one months in prison. After completing this sentence, Caro was arrested with five kilograms of cocaine. In 2001, thirty-four-year-old Caro was convicted of his third drug-related offense and sentenced to 360 months imprisonment.

Since then, Caro has become increasingly violent and repeatedly defied the BOP's efforts to securely house him. In 2002, Caro was incarcerated at the low-security Federal Correctional Institution in Oakdale, Louisiana ("FCI Oakdale"), where he became a leader in one of the most violent prison gangs: the Texas Syndicate.[2] When members of a rival gang were transferred to FCI Oakdale, the prison staff asked Caro to maintain the peace, but he refused to cooperate. Instead, Caro led an attack against the newcomers, beating one of the rival gang members so severely that he was hospitalized. His clothes and boots covered with blood, Caro boasted to

the guards: "I don't give a fuck if they send me to the United States Penitentiary. My brothers follow orders. They know what they're getting into. It doesn't even matter if we're prosecuted. I have [thirty] years to do. I certainly don't care about myself." J.A. 321.

Shortly after this attack, the BOP transferred Caro to the high-security U.S. Penitentiary in Lee County, Virginia ("USP Lee"). The additional security, however, did not deter Caro from injuring another inmate. In August 2003, Caro and another ***655** member of the Texas Syndicate stabbed a prisoner twenty-nine times with homemade knives. Caro pleaded guilty to conspiracy to commit homicide and was sentenced to twenty-seven years in prison.

Caro was subsequently transferred to USP Lee's secure housing unit. On December 16, 2003, Sandoval was placed in Caro's cell. The next day, Caro ate Sandoval's breakfast. When Sandoval objected, Caro wrapped a wet towel around Sandoval's neck and strangled him to death. After he killed Sandoval, Caro yelled to a passing guard: "[G]et this piece of shit out of here." *United States v. Caro*, 102 F.Supp.3d 813, 824 (W.D. Va. 2015). The guard asked Caro if Sandoval was alive and Caro responded, "No. At this time he's stinking up the room, get him out." *Id.* The BOP transferred Caro to Florence ADMAX pending his trial for Sandoval's murder.

B.

On February 1, 2007, a jury convicted Caro of first-degree murder for killing Sandoval. The trial advanced to the penalty phase, which proceeded in two stages. First, the jury determined that Caro was eligible to receive the death penalty under 18 U.S.C. § 3591. Second, the jury found that the aggravating factors established at trial sufficiently outweighed the mitigating factors to justify a death sentence.

1.

Section 3591 provides that the death penalty is only available for defendants who have been convicted of a capital offense and for whom the government has proven at least one of the statutory aggravating factors provided in 18 U.S.C. § 3592(c). Here, the jury found that Caro was eligible for the death penalty because first-degree murder is a capital offense and the government proved two statutory aggravating factors: (1) Caro was previously convicted of two offenses involving distribution of illegal drugs committed on different occasions and punishable by imprisonment for over one year, *see* 18 U.S.C. § 3592(c)(10); and (2) Caro was previously convicted of a federal drug offense punishable by five or more years, *see* 18 U.S.C. § 3592(c)(12).

2.

In the second stage of the penalty phase, the jury was asked to determine whether the aggravating factors of Caro's case—including ones not provided by statute—sufficiently outweighed the mitigating factors to justify a death sentence. The government alleged three non-statutory aggravating factors. At issue here is the government's allegation that Caro would pose a danger to inmates and BOP staff if he was sentenced to life in prison. To counter the government's future-dangerousness factor, Caro alleged that he would spend the rest of his life in a secure institution and would grow less violent with age.

The second stage of the penalty phase progressed in four parts that are significant to this appeal: (a) a discovery dispute over BOP statistics regarding the average length of time inmates spend at Florence ADMAX; (b) testimony from Caro's expert witness that the BOP could prevent Caro from assaulting other inmates and prison staff; (c) testimony from the government's witness that the BOP could not guarantee that inmates and guards would be safe from Caro; and (d) the jury's determination that the balance of aggravating factors to mitigating factors justified imposition of the death penalty.

a.

The defense hired Dr. Mark Cunningham to testify that the BOP could prevent ***656** Caro from hurting other inmates and prison staff by housing him at Florence ADMAX until he aged out of violence. To prepare Cunningham's testimony, Caro requested data on the "median length of stay, [ ] range of length of stay, and [ ] standard deviation of the distribution of length of stay at Florence ADMAX for all inmates since it was opened in 1994 to the present time." J.A. 19. After the government

failed to voluntarily disclose the requested information, Caro moved to compel disclosure.

At first, a magistrate judge determined that *Brady* required the government to disclose the requested information. But the government successfully appealed this ruling to the district court. It argued that *Brady* did not compel disclosure because there was no indication that the requested data existed and, even if it did exist, there was no indication that the data would be favorable to Caro. In a supporting affidavit, Tomas J. Gomez, the Unit Manager at Florence ADMAX, stated that BOP "does not maintain rosters that would allow the defendants to identify every single inmate who was housed at a particular institution during the relevant time period, nor does the computer system allow such rosters to be retrieved after 30 days." J.A. 113. In other words, the BOP does not maintain a database of all the inmates ever housed at a particular institution. Instead, it keeps an up-to-date list of the inmates currently housed at each institution.

The district court reversed the magistrate judge's ruling because Caro failed to demonstrate that the requested BOP data would be favorable. The court explained, "While [Caro] obviously hopes ... the information requested here will support [Cunningham's] opinion, there is no indication ... that it will do so...." J.A. 149.

b.

Caro nevertheless called Cunningham as an expert witness in prison violence and prison security measures. Cunningham testified that Caro would be unable to assault another BOP inmate or guard if sentenced to life in prison because the BOP would incarcerate him at Florence ADMAX, where strict security measures would virtually eliminate Caro's contact with other people. Cunningham stated that at Florence ADMAX inmates spend twenty-three hours per day in solitary confinement and the remaining hour in outdoor pens that allow communication between the inmates but prevent physical contact. He also explained that Caro would be restrained during any interaction with BOP staff. Specifically, Cunningham testified that inmates at Florence ADMAX never leave their cells without a two-guard escort. One officer holds the inmate's handcuffs while the other carries a baton in case the inmate turns violent.

Cunningham explained that his opinion on Caro's future dangerousness was based on his belief that the BOP could prevent Caro from assaulting other people through restrictive security measures, not on an assessment that Caro would voluntarily refrain from violence. In fact, Cunningham stated that "in a U.S. penitentiary [Caro posed a] grave risk of serious violence" and would continue to pose that risk for "five to ten years ... *and perhaps much further out.*" J.A. 764 (emphasis added).

Cunningham predicted that the BOP would keep Caro at Florence ADMAX until Caro ceased to exhibit violent tendencies, no matter how long this took. He based his prediction on anecdotal examples of particularly dangerous inmates, such as Al Qaeda terrorists and the "Unabomber" Theodore Kaczynski, whom the BOP assigned to Florence ADMAX without the expectation that they would be transferred ***657** back to a less secure institution in the foreseeable future. Cunningham nevertheless acknowledged that, according to policy, the BOP did not permanently assign inmates to Florence ADMAX and aimed to transfer inmates to less secure facilities through a "step-down" program, which took an average of five years to complete.

Finally, Cunningham testified that security breaches allowing an inmate to assault another prisoner or guard occur at every BOP facility, including Florence ADMAX. He acknowledged that in 2005 two Florence ADMAX inmates beat another prisoner to death. One month later, a second inmate was murdered. He also acknowledged that security failures at USP Lee had permitted Caro to communicate with members of the Texas Syndicate in code. Caro might exploit this failure to order fellow gang members to carry out assaults on his behalf, even though the restrictive measures at Florence ADMAX prevented him from committing the acts himself.

c.

On rebuttal, the government called Gregory Hershberger, who formerly served as the warden of Florence ADMAX. Hershberger testified that Florence ADMAX "is designed to house those individuals who can't function in open [U.S.] penitentiary settings.... [But] they still go to [Florence ADMAX with] the expectation [ ] that they will

return to an open population after a period of time." J.A. 834–35.

He then explained the process for reintegrating inmates into a U.S. penitentiary. Inmates that are assigned to Florence ADMAX are typically placed in the facility's general population unit. If an inmate does not have any disciplinary problems for twelve months, he is moved to the immediate unit and then to the transitional unit. Once he completes a year in each unit without any disciplinary issues, the inmate is transferred back to a U.S. penitentiary. According to Hershberger, the step-down program takes at least three years to complete. [3]

Hershberger also testified that especially dangerous inmates are not placed directly into the step-down program. Instead, they are assigned to Florence ADMAX's control unit. These inmates are evaluated monthly until the prison staff determines that they can be safely transferred to the general population. Hershberger emphasized, however, that the control unit and the general population unit share the same goal: "to return the inmate to an open population [in a U.S. penitentiary]." J.A. 843–44.

Hershberger also stated that, even if Caro were placed in the control unit, he would have regular contact with prison staff at Florence ADMAX and access to materials from which to fashion homemade weapons. Finally, Hershberger told the jury that potential security lapses might allow Caro to send coded messages instructing his associates in the Texas Syndicate to carry out murders on his behalf.

***658** d.

After considering all of the evidence, including the future-dangerousness testimony recounted above, the jury sentenced Caro to death. It unanimously found that Caro was "likely to commit acts of violence against other inmates or staff within the federal prison system if imprisoned for life without possibility of release." J.A. 881. Moreover, no juror found that Caro was "less likely, as he age[d], to engage in violent behavior." J.A. 885.

C.

On direct appeal, Caro challenged his conviction and sentence on several grounds. In relevant part, Caro challenged the district court's denial of his motions to compel disclosure of the BOP data arguing that the district court's ruling was "a violation of *Brady*'s constitutional commands." Appellant's Opening Br. at 66 n.45, *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010). On March 17, 2010, this court denied the *Brady* claim because Caro could only speculate as to what the requested information might reveal and, thus, could not show that the undisclosed data was favorable to his case. *Caro*, 597 F.3d at 619. After disposing of his other grounds for appeal, the court affirmed Caro's conviction and death sentence.

The dissent objected to Caro's death sentence, arguing that the statutory aggravating factors provided by § 3592(c)(10) and § 3592(c)(12) were unconstitutional because they target nonviolent drug offenders. But the dissent "concur[red] with the rest of the Court's analysis," *id.* at 636 n.1 (Gregory, J., dissenting), including our rejection of Caro's *Brady* claim.

D.

Caro then filed the § 2255 Motion for Collateral Review that is the subject of this appeal. Once again, Caro argued that the government violated his right to due process under *Brady* by withholding BOP data on the length of time that inmates spend at Florence ADMAX before they are assigned to a less secure facility. However, the § 2255 motion included statistics—absent from the direct appeal record—that identified 155 inmates who spent more than three years at Florence ADMAX, sixty-three inmates who spent more than five years there and twenty-five inmates who spent over ten years there.

These statistics, or at least similar ones, were available to Caro during his trial and direct appeal, because they were compiled from *publicly available* sources, such as an informal survey sent to Florence ADMAX inmates, the BOP's inmate locator website, PACER, the Federal Death Penalty Resource Counsel website, documents received from a Freedom of Information Act request, and internet searches of newspaper articles containing names of inmates known to be at Florence ADMAX. In his § 2255 motion, Caro argued that these figures were evidence of favorability because they demonstrated that the requested

BOP data would have supported Cunningham's testimony that Caro would remain at Florence ADMAX until he aged out of violence, regardless of how long that took.

Without holding an evidentiary hearing, the district court dismissed Caro's § 2255 motion on two alternative grounds. First, it determined that Caro's claim was procedurally barred because a petitioner cannot relitigate issues on collateral review that were previously decided on direct appeal. Additional evidence supporting the same claim does not make the claim new.

Alternatively, the district court dismissed Caro's *Brady* claim on the merits, holding that the requested BOP data did not create a "reasonable probability" of a ***659** different sentence because that data was cumulative of testimony proffered by both sides that inmates routinely spend more than the average five years at Florence ADMAX. The district court also found that the requested data would not have affected the jury's future dangerousness determination because the jury found that Caro would remain dangerous for the rest of his life and there was no indication that the requested BOP data would show that, contrary to BOP policy, Caro would be permanently assigned to Florence ADMAX. This appeal followed.

II.

We review de novo the district court's legal conclusion that the *Brady* claim alleged in Caro's § 2255 motion was procedurally barred. *See United States v. Linder*, 552 F.3d 391, 395 (4th Cir. 2009). The district court's determination that the undisclosed BOP data was not material to Caro's punishment raises a mixed question of law and fact that we also review de novo. *See Summers v. Dretke*, 431 F.3d 861, 878 (5th Cir. 2005). Because the district court denied the § 2255 motion without an evidentiary hearing, we review the facts in the light most favorable to Caro. *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007) (citing *United States v. Nicholson*, 475 F.3d 241, 248 (4th Cir. 2007)).

As explained below, we affirm the district court on alternative grounds. 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 be favorable or material.

A.

To begin, the *Brady* claim raised in Caro's § 2255 motion is procedurally barred. It is well-settled that a petitioner cannot "circumvent a proper ruling ... on direct appeal by re-raising the same challenge in a § 2255 motion." *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) (internal quotation marks omitted) (quoting *Linder*, 552 F.3d at 396). Because Caro's § 2255 motion raised the same *Brady* claim we previously rejected on direct appeal, we are compelled to hold that Caro is barred from relitigating that claim.

On direct appeal, Caro argued that the district court's denial of his motion to compel disclosure of BOP data regarding the length of time inmates are housed at Florence ADMAX was "a violation of *Brady*'s constitutional commands." Appellant's Opening Br. at 66 n.45, United States v. Caro, 597 F.3d 608 (4th Cir. 2010). We rejected this argument.[4] *Caro*, 597 F.3d at 619. In his § 2255 motion, Caro raised the same claim arguing that "the Government violated [his] constitutional rights under ***660** *Brady* ... by withholding material exculpatory and impeachment evidence that the BOP has housed many inmates at [Florence ADMAX] and its predecessor prison ... for more than three years." J.A. 1168.

Caro's § 2255 motion includes statistics that were absent from the direct appeal record, but this additional information does not suffice to make the *Brady* claim raised in his § 2255 motion different from the claim we rejected on direct appeal. The presentation of additional, previously available evidence to support the same claim is insufficient to make an old claim new. *See Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996) (holding that a court may not amend a judgment to account for additional evidence if the movant fails to provide a legitimate justification for not presenting the evidence during the earlier proceeding); *see also* Restatement (Second) of Judgments § 25, cmt. b ("A mere shift in the evidence ... will not suffice to make a new claim avoiding the preclusive effect of the judgment").

A different rule would contravene Supreme Court precedent and AEDPA's purpose. In *Sanders v. United*

States, the Supreme Court held that a petitioner is entitled to an evidentiary hearing on a second or successive § 2255 motion if he demonstrates that "the evidentiary hearing on the prior [motion] was not full and fair." *Sanders*, 373 U.S. at 17, 83 S.Ct. 1068. The Court explained that the criteria for what constitutes a full and fair hearing was set out in *Townsend v. Sain*, which stated that "newly discovered evidence" could provide the basis for a new hearing if the evidence "could not reasonably have been presented to the [previous] trier of facts." *See id.* at 13, 83 S.Ct. 1068 (citing *Townsend*, 372 U.S. at 317, 83 S.Ct. 745). The same rule applies to cases like Caro's, where "the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier § 2255 proceeding." *See Davis*, 417 U.S. at 342, 94 S.Ct. 2298; *see also Withrow v. Williams*, 507 U.S. 680, 721, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (Scalia, J., concurring in part and concurring in judgment) ("[A] prior opportunity for full and fair litigation is normally dispositive of a federal prisoner's habeas claim. If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations."). Together, these cases establish that evidence proffered for the first time on collateral review is insufficient to overcome the procedural bar against relitigating claims that were denied on direct appeal, unless that evidence could not reasonably have been included in the direct appeal record. *See United States v. Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979) ("[I]n the absence of newly discovered evidence that could not reasonably have been presented at the original trial ... a § 2255 petitioner may not relitigate issues that were adjudicated at his original trial and on direct appeal."); *see also Morgan v. United States*, 438 F.2d 291, 293 (5th Cir. 1971) ("Where newly-discovered evidence is alleged [in support of a § 2255 motion], it must be such as could not reasonably have been presented to the trier of facts."). In addition, allowing a petitioner to endlessly revive old claims based on evidence that he could have previously proffered but chose not to, would obstruct the central purpose of AEDPA "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *See Woodford*, 538 U.S. at 206, 123 S.Ct. 1398.

In this case, Caro could have reasonably proffered the new statistics to support his *Brady* claim at trial or on direct appeal because those figures were compiled from public sources that he could have accessed at any time. The statistics are consequently ***661** insufficient to overcome the procedural bar at issue.

The dissent disagrees with our conclusion for two main reasons. First, it posits that a § 2255 *Brady* claim is not procedurally barred unless it "is made with *exactly* the same evidence and *exactly* the same arguments raised on direct appeal." *Infra* at ——. According to the dissent, it should not matter whether the newly proffered evidence was previously available to the petitioner. The dissent, however, cites no precedent for its proposed rule and we have found none. Nor can we discern a rationale under 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.

Second, the dissent takes issue with our conclusion that the newly proffered evidence supporting Caro's § 2255 motion was previously available because some of that evidence was collected after Caro's direct appeal. In particular, the dissent cites a survey that Jeanne Dvorak conducted by mailing questionnaires to the inmates at Florence ADMAX several months after Caro's direct appeal was decided. The dissent's argument that Dvorak's survey was previously unavailable is beside the point. The underlying data was available to Caro during his direct appeal. Nothing in the record suggests that his attorneys were prevented from mailing similar questionnaires. An absence of diligence does not render the data previously unavailable.

B.

Even if Caro's *Brady* claim were not procedurally barred, it would fail on the merits. Under *Brady*, the prosecution's failure to disclose evidence upon request violates due process if the requested evidence is (1) "favorable to [the] accused" and (2) "material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. Caro's *Brady* claim clears neither hurdle.

1.

First, there is no indication that the requested BOP evidence would be favorable to Caro. At trial, Caro sought to prove that he would not assault another inmate or

member of the BOP staff if he were sentenced to life in prison because the BOP would house him at Florence ADMAX until he aged out of violence. The government countered by offering evidence that Caro would remain dangerous for the rest of his life but, pursuant to BOP policy, Caro could not be permanently assigned to Florence ADMAX. To disprove the government's argument, Caro requested BOP data on the length of time inmates spend at that institution.

In this appeal, Caro identifies 155 inmates who have spent more than three years at Florence ADMAX, sixty-three inmates who have spent more than five years there and twenty-five inmates who have spent over ten years there. According to Caro, these figures show that the requested BOP data would have been favorable to the proposed mitigating factor that the BOP would house him at Florence ADMAX until he aged out of violence. We find that these statistics do not support such a conclusion.

The statistics are not relevant, let alone favorable, to the mitigating factor at issue. The jury rejected Caro's allegation that he would become less violent with age. Accordingly, the requested data would only be relevant to the jury's future dangerousness finding if the data showed that the BOP would likely house Caro at Florence ADMAX for the rest of his life. The statistics Caro provides in his § 2255 motion ***662** reflect that some inmates spend a long time at Florence ADMAX but they do not identify any inmate that has served a full life sentence there. This is consistent with Cunningham and Hershberger's trial testimony that the BOP does not permanently assign inmates to Florence ADMAX.

For these reasons, Caro has failed to demonstrate that the requested BOP data would be favorable to his sentence.

2.

Caro's *Brady* claim also fails to satisfy the materiality element. Evidence is "material" if "there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Wood v. Bartholomew*, 516 U.S. 1, 5, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (per curiam). A "reasonable probability" exists when "the likelihood of a different result is great enough to undermine[ ] confidence in the outcome of the trial." *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) (internal quotation marks omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). On the other hand, "[t]he mere possibility that an item of undisclosed information ... might have affected the outcome of the trial, does not establish 'materiality'...." *United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In Caro's case, the BOP records are material if there is a reasonable probability that their disclosure would have persuaded at least one juror to vote for a life sentence. *See* 18 U.S.C. § 3593(e) ("[T]he jury by unanimous vote ... shall recommend whether the defendant should be sentenced to death...."). Caro argues that the requested BOP data would have undermined the jury's finding that he would commit future acts of violence if sentenced to life in prison because that data would have shown that he would be housed at Florence ADMAX until he aged out of violence. During the sentencing phase of his trial, however, none of the jurors found that Caro would grow less violent with age.[5] Accordingly, even if we assume that the jury was convinced that Florence ADMAX could safely house Caro, the requested BOP data would only have affected the jury's future-dangerousness determination if it showed that Caro would remain at Florence ADMAX for the rest of his life. Caro has not demonstrated that the data would support such a conclusion.

At trial, the parties did not dispute that some inmates take longer than the average five years to complete the step-down program. However, Cunningham and Hershberger both testified that the BOP does not *permanently* assign inmates to Florence ADMAX as a matter of policy, because the objective of the institution is to rehabilitate prisoners so they can be safely transferred to less secure facilities. Moreover, Caro's attorney stated during closing arguments, "[E]ven when you're talking about the super maximum facility in the Federal Bureau of Prisons, where they send the worst of the worst offenders, ... they still believe in the power of redemption, that Step Down Unit program is proof of that." J.A. 962. At best, then, the requested BOP data—which Caro posits ***663** would show that some inmates remain at Florence ADMAX longer than the average five years—would merely reiterate undisputed information that the jurors found was outweighed by the BOP's policy against permanently assigning inmates to Florence ADMAX and its goal of transferring inmates to less secure institutions. Therefore, Caro has failed to demonstrate a "reasonable

probability" that the requested data would have affected his sentence. [6]

In addition, Caro failed to demonstrate beyond a "mere possibility" that the statistical evidence he requested even existed. Indeed, there is unrebutted evidence in the record that the BOP does not maintain a database of all the inmates ever housed at a particular institution. *See* J.A. 113. The argument that data, which the government did not possess in any accessible format, would have changed the result at trial is highly speculative, *see United States v. Wolf*, 860 F.3d 175, 193 (4th Cir. 2017) ("The government did not have this evidence until after [the defendant's] trial ended. Therefore there was no *Brady* violation."), and suggests that Caro was attempting to engage in the type of fishing expedition *Brady*'s materiality requirement seeks to foreclose, *see Caro*, 597 F.3d at 619 ("*Brady* requests cannot be used as discovery devices.").

For these reasons, we are compelled to hold that Caro failed to satisfy *Brady's* requirement that the requested evidence create a "reasonable probability" of a different result at trial.

III.

In summary, the *Brady* claim alleged in Caro's § 2255 motion was procedurally barred because it was previously denied on direct appeal. Even if the claim was not barred, it lacked merit because the requested evidence was not favorable or material to Caro's sentence. For these reasons, the judgment of the district court is

AFFIRMED.

GREGORY, Chief Judge, dissenting in part:

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? The Bureau of Prisons (BOP) certainly does not lack the means to securely house highly dangerous inmates; indeed, the BOP's highest security prison, Administrative Maximum United States Penitentiary in Florence, Colorado (Florence ADMAX or ADX), currently holds Unabomber Ted Kaczynski, Atlanta Olympics bomber Eric Rudolph, 9/11 conspirator Zacarias Moussaoui, Oklahoma City bomber Terry Nichols, underwear bomber Umar Farouk Abdulmutallab, and Thomas Silverstein, who killed two inmates and a BOP guard over three decades ago. [1] At trial, Caro argued ***664** that the BOP can securely house him as well, negating the need to put him to death. The Government disagreed, claiming that the BOP had no facility that could hold Caro securely and therefore his future dangerousness justified the death penalty.

To support his contention, Caro invoked *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), before his trial, diligently seeking data from the BOP about other inmate assaults and murders in the prison system, instances of violence in Florence ADMAX, and the length of time inmates are actually held at Florence ADMAX. But the Government successfully fought to keep this information hidden and then told a jury that Caro would only be held at Florence ADMAX temporarily because of its three-year step down program. That jury then sentenced Caro to death. Eight years ago, we affirmed the denial of Caro's *Brady* claim based only on the record developed at trial, concluding that he had failed to show that the requested data would have been favorable to him. *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010).

Caro now returns to this Court with data vindicating his prior suppositions: the BOP routinely houses dangerous inmates—including specific inmates who have committed particularly violent homicides while in the BOP—at Florence ADMAX well beyond the aspirational three years suggested by the step-down program. The majority and I do not differ on the law: a defendant cannot use her collateral attack to relitigate issues that were "fully considered" on direct appeal, *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curiam), and a *Brady* claim has been "fully considered" if the defendant presents the exact same arguments and evidence on collateral review. But we do differ on the facts: Caro has presented new evidence proving that the data he requested pretrial is materially favorable to him.

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.[2]

I.

A.

On December 17, 2003, Caro killed Roberto Sandoval, his temporary cell mate at United States Penitentiary (USP) Lee in Jonesville, Virginia. After the murder, ***665** Caro was single-celled[3] in the Secure Housing Unit (SHU) at USP Lee for almost two years before being moved in November 2005 to Florence ADMAX. Caro remained in Florence ADMAX until March 2006, when he was moved between USP Lee and a local jail in preparation for trial, again single-celled. He committed no further acts of violence.

In January 2006, a grand jury indicted Caro for Sandoval's murder and the Government filed a notice of intent to seek the death penalty under the Federal Death Penalty Act (FDPA), 18 U.S.C. §§ 3591–99. Under the FDPA, a defendant can be sentenced to death only if a unanimous jury finds that he is eligible for the penalty (the "eligibility phase") and selects the death penalty as the justified punishment (the "selection phase"). § 3591. After a four-day trial in February 2007, during which the defense conceded that Caro had killed Sandoval, the jury unanimously found Caro guilty of first degree murder and eligible for the death penalty.

Caro's future hinged on the selection phase: After a hearing in which both sides presented testimony, the jury had to decide whether the death penalty was justified by weighing statutory and non-statutory aggravating factors proved by the Government against mitigating factors proved by the defense. § 3593(c)–(e). The Government alleged three non-statutory aggravating factors but focused almost exclusively on one: Caro's future dangerousness to other people, including other inmates.[4] In response, Caro presented twenty-two mitigating factors, but focused primarily on undercutting the Government's allegations of future dangerousness.[5] The crux of the selection phase was the competing testimonies of clinical and forensic psychologist Dr. Mark D. Cunningham, who testified that Florence ADMAX could securely house Caro for as long as necessary, and retired Florence ADMAX warden Gregory L. Hershberger, who testified in rebuttal that Florence ADMAX aimed to send inmates back to lower security prisons.

To understand their testimony, I must take a step back and examine the information Caro had attempted to acquire a year earlier under *Brady*.

B.

A year before trial, the Government told Caro and the court that it intended to prove future dangerousness during the selection phase. To rebut the Government's anticipated argument, Caro requested data about inmates housed at Florence ADMAX and inmate killings within the BOP, intending to show that the BOP could securely house him just as it had other dangerous inmates. Caro filed four different motions for this data, including one under *Brady*. In his *Brady* motion, Caro requested: movement sheets, investigative reports, and histories for all inmates who have killed another inmate within the BOP in ***666** the last 20 years; records on all inmates in Florence ADMAX's control unit, including records of assaultive conduct; disciplinary records on all inmates at Florence ADMAX; records on frequency and level of violence at each security level of Florence ADMAX; records showing how long inmates are kept at Florence ADMAX; and records showing what caused inmates to be transferred to Florence ADMAX and which inmates are still there (the "BOP data"). Specifically, he requested:

> A. Data from Florence ADMAX Colorado showing 1. median length of stay, 2. range of length of stay, and 3. standard deviation of the distribution of length of stay at Florence ADMAX for all inmates since it was opened in 1994 to the present time.
>
> B. Data from Florence ADMAX Colorado showing how many inmates who were admitted to Florence ADMAX from the date of its opening to the present time continue to be confined there, broken down by name, register number, offense conduct that caused them to be transferred to Florence ADMAX, and Security Threat Group classification.

C. Movement sheets from the Bureau of Prisons on every inmate currently at Florence ADMAX who has killed another inmate within the Bureau of Prisons within the last twenty years.

D. Investigative reports on all inmate homicides at Florence ADMAX since it was opened including any "after action reports" indicating any operational or institutional changes in response to each killing and final memorandum from SIS to the Warden of the institution regarding each killing.

E. Regarding each inmate of the above (subparagraph D.) involved in an inmate killing within Florence ADMAX since it opened, the respective inmate's "Chronological Disciplinary Record" and "Inmate History ADM-REL" and/or movement sheets within the Bureau of Prisons.

F. Records of any assaultive conduct by an inmate in the Control Unit at Florence ADMAX from the time it opened to the present date, showing the inmate involved, register number, Security Threat Group classification, date of occurrence, description of conduct, staff member victim or inmate victim of each assault. Assaultive conduct can be identified and grouped by using the Bureau of Prison's misconduct codes, including 100 Level Prohibited Acts (Killing, 100; Assault, 101; Escape, 102; Weapon, 104; Riot/ Encourage Riot, 105/106) and 200 Level Prohibited Acts (Escape, 200; Fighting, 201; Assault, 224).

G. Names, register numbers, assignment rationale, Security Threat Group classification, and tenures of all inmates in the Control Unit at Florence ADMAX since it opened to the present time showing the date assigned, the reason assigned, and the date exiting the Control Unit to lesser security or release from the BOP, and reason leaving the Control Unit.

H. Names of all correctional officers working on the Control Unit at Florence ADMAX showing date assigned and date left.

I. Disciplinary Incident Reports on all inmates in the Control Unit at Florence ADMAX from its opening to the present time showing inmate name, register number, date of offense, details of the disciplinary incident, and Security Threat Group classification.

J. Correctional Services Significant Incidents Data on level and frequency of violence at each security level at Florence ADMAX by year from and including 2001 to and through 2006.

*667 K. Movement sheets from the Bureau of Prisons on every inmate who has killed another inmate within the Bureau of Prisons within the last twenty years.

L. Investigative reports on all inmate homicides within the Bureau of Prisons within the last twenty years including any "after action reports" indicating any operational or institutional changes within the institution or within the Bureau of Prisons in response to each killing and any final memorandums from SIS to the Warden of each institution regarding each killing.

M. Regarding each inmate in the above (Subparagraph L.) involved in an inmate killing with the Bureau of Prisons within the last twenty years, the respective inmate's "Chronological Disciplinary Record" and "Inmate History ADM-REL" and/or movement sheets within the Bureau of Prisons.

J.A. 19–20.

In support of his *Brady* motion, Caro attached a declaration from Cunningham, who had (at the time) testified in over one hundred state and federal capital cases about sentencing determination issues, including "mitigation and capital violence risk assessment." J.A. 22–48. Cunningham explained that he needed the BOP data in order to conduct a "reliable individualized assessment" of the "likelihood that Mr. Caro will commit acts of serious violence from this point forward while confined for life in the Federal Bureau of Prison." J.A. 28. To prepare a reliable assessment, he needed to review the behavior of other inmates who had committed a similar crime and had been housed in similarly restrictive conditions. Using group data to predict Caro's individual behavior—common in any risk-based assessment, from medicine to insurance—was necessary to rebut the Government's argument of future dangerousness. Indeed, the Government's own argument was "necessarily relying on a group-based assumption" that killing another inmate in the BOP "is related to future misconduct." J.A. 35.

Cunningham also sought the BOP data to rebut "the corollary that the federal Bureau of Prisons is unable to safely contain this defendant, and thus a penalty of

death is a reasonable preventative measure." J.A. 33. "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.* He also noted that the Government "has routinely represented at federal capital sentencing that placement in ADX is temporary," an assertion he claimed was "suspect at best for a large proportion of the inmates at ADX, given historic refusals of BOP/DOJ to detail length of stay information regarding inmates at ADX and broad data reflecting only 7–9% of inmates at ADX being transferred to lower custody in any given year." J.A. 39.

Finally, Cunningham rebutted the Government's assertions of burden and stated that he would be happy to receive the raw facility census information. But he argued that it was "patently inconceivable that BOP has not calculated detailed length of stay information regarding this unique facility housing the 'worst of the worst' when an in-house BOP research unit is available to examine such vitally important performance and outcome data." *Id.*

The magistrate judge granted almost all of Caro's *Brady* motion, finding that the requested data was both favorable and material, and thus exculpatory. But the Government objected to the magistrate judge's order, asserting that the information was not favorable under *Brady* and that it would be burdensome to disclose. The district court held a hearing, after ***668** which the Government filed several declarations discussing burden. Cunningham then filed a second declaration specifically rebutting the Government's purported difficulty or inability to produce the records. He included specific examples of the exact BOP records he needed—documents he had received from the BOP in prior cases, evidently without controversy.

The district court sustained the Government's *Brady* objection on the merits, without addressing the Government's asserted burden. The court concluded that the BOP records were not favorable: "While the defense obviously hopes that the information requested here will support its expert's opinion, there is no indication before me that it will do so[.]" J.A. 149. Caro proceeded to trial and sentencing without the BOP data.

C.

At the sentencing hearing, Cunningham testified as "an expert in prison violence and security measures in prisons." J.A. 677. He testified that Caro is likely to pose a high risk of harming someone else if placed in the general population of a USP during the next five or ten years. But he emphasized that Caro's violent *tendencies* differ from Caro's future *dangerousness* because the latter hinges on the BOP's capability to incapacitate and control him. Cunningham testified that Florence ADMAX is not intended to be a permanent placement for most inmates, but stressed that there are some individuals "for whom there is no foreseeable plan for their return to a lower level of security." J.A. 699–702. He testified that a Florence ADMAX official had told him that inmates stay there for an average of five years, but pointed out that he had only "limited information on average length of stay at ADX." J.A. 699–702. He testified that there had been two murders in Florence ADMAX in 2005, but explained that the prison had taken steps to prevent future violence by isolating inmates in the general population even during recreation and by moving the pre-transfer unit to a different facility.

Cunningham reiterated throughout his testimony that he could only offer anecdotes and estimates because the Government had denied him access to accurate data about Florence ADMAX and inmate violence in the BOP. J.A. 699–702, 736–40, 792–98, 799–802. For example, Cunningham testified that the BOP had at one point provided him with "the assaultiveness conduct that took place on the Control Unit from the time ADX opened in December of 1994 through June of 2001." J.A. 738. During that time period, there were seventeen attempted or actual minor assaults by inmates in the Control Unit, most of which involved throwing liquids and ten of which were committed by the same inmate. Cunningham had "asked specifically for an update on assaultiveness conduct on the Control Unit, as well as length of stay information on the Control Unit because it's so critical to this question of how long can an inmate be held, what's typical in terms of holding them." J.A. 740. But the BOP had refused. Later, Cunningham criticized as "misleading" the Government's evidence that several inmates initially placed in Florence ADMAX were now in lower-security facilities because "the critical issue is what happened to [the inmate] between the time he was

guilty of the killing, and now," not simply where he ended up. J.A. 793–94. Cunningham stated that he could not "comprehend why that simple scientific data would be something that the U.S. Department of, Department of Justice would resist." J.A. 797.

Cunningham explained that the BOP data was critical to developing an accurate risk assessment of Caro's future dangerousness; in its absence he was limited only ***669** to discussing the conditions of Caro's confinement:

> If I want to know the best way of gauging the risk that killing another inmate in prison has for future conduct, if I want to know what effect does it have for somebody to kill another inmate in prison, how does that affect the rest of their time in prison, and how much violence they commit, then I need to collect the data on individuals who have done that. If I want to know what the risk is of a 16 year old male unmarried driver, then I need to track 16 year old male unmarried drivers and their driving records so I will know whether being 16 is a risk factor for driving, or not, and how much of a risk factor it is. This is fundamental to accurate risk assessment, is to collect data about individuals that have a similar background. The same thing happens in medicine. If I want to know what the prognosis is for a given disease, I need to track the outcomes of people with that disease.
>
> So, that's what I asked for here, is – there are computer print outs, it's relatively easily obtained, there are three or four computer print outs that would show the inmate's movement history within the Bureau of Prisons, so I could identify whether they were being held at a SHU, or went to ADX, or went to some other facility. I also want the print out of their chronological disciplinary record that would have let me view what offenses they had gotten in prison before the homicide, and what offenses they had in prison after the homicide. Then I would have a body of data about prison homicide offenders in the Bureau of Prisons so that we wouldn't have to speculate about how long are inmates held, going to be held at ADMAX, and does it make any difference whether they have a gang affiliation, or those kind of things. We would have data about that, and would also have data about what to expect from those offenders over time when they came out from under being locked down on a SHU or ADX. It was fundamental scientific data to inform a risk assessment of Mr. Caro.
>
> Now, in the absence of that data, it's not possible to do that kind of risk assessment. It's only possible to talk about what conditions of confinement are available that the Bureau of Prisons can bring to bear, and what the effect of those conditions are on what, on rates of violence on the Control Unit, which is the kind of unit where, essentially, ADX is functioning as at this point. It's simply critical to informing this, informing an understanding of the future prison behavior of an inmate homicide offender.

J.A. 799–801 (emphasis added).

In rebuttal, the Government called Hershberger, who emphasized that Florence ADMAX officials expect to return inmates to lower security prisons. J.A. 835, 837–38, 841–44, 863. He stated that the "primary program" at Florence ADMAX "is to get them in, work them through a minimum three year program and out to another open penitentiary," even if the inmate had been convicted of killing another inmate. J.A. 837–38. He agreed that once inmates complete "12 months in general population, 12 months in the immediate, and 12 months in transition, then it's anticipated they would leave ADX to go to this pre-transfer unit at USP Lee." J.A. 841–44. Hershberger did agree that Thomas Silverstein, who killed two inmates and a BOP officer, has been in solitary confinement since 1983, but called him "a very special case" and his review "a very special review." J.A. 858–61, 870. Despite the danger that the Government claimed Caro posed, Hershberger testified that Caro would not be treated the same as Silverstein.

***670** In its closing argument, the Government focused almost exclusively on how Caro's future dangerousness justified a capital sentence. The Government argued that Caro's past history of violence meant that he will be violent in the future and claimed that the BOP cannot control him. The Government also repeatedly asserted that, if sentenced to life in prison, Caro would be imminently released from Florence ADMAX:

> What do we know? We know that if, if Carlos Caro goes to that facility he's not going to stay there. Whether it's through the Control Unit, or whether it's through the general population at the ADX, he eventually, ladies and gentlemen, will, will graduate out, be stepped down out of that facility back into a United States penitentiary just like the United States

Penitentiary in Lee County. If he goes, he can probably still communicate with his gang buddies because we know that despite the best precautions at the ADMAX facility, people send out coded letters. They have certain privileges which would allow the communication, and also increasing contact. He can use the telephone. He can have visitation with his buddies. He has exercise. He can use a library. We know that he can write letters. He has a right to medical services, and as all those contacts increase, particularly as we go to the step down, that his contact, his access to inmates, his access to staff is going to increase, ladies and gentlemen, and we also know that he will eventually end up back in the USP just like USP Lee unless he harms someone else before going there.

How long is it going to take to do that? You saw the regulation. You heard the testimony of Mr. Hershberger. Three years, three years for him to be stepped down out of ADX and into a USP. Can he be controlled with ADMAX? We know ADMAX is the most secure federal prison, but it's not failsafe, and I think what Mr. Hershberger said, where there's a will there's a way.... And Hershberger told you, based on his experience as a warden, if Mr. Caro was given a light sentence, he may initially go to ADMAX, but he will be moved out to the USP on a three year program, well within the life of violence of Carlos Caro.

* * *

Again, you decide what the facts are. You decide, is he going to get out in three years as Warden Hershberger says from ADX, or is he going to get out in five years as Dr. Cunningham says? Does that really matter? Everyone agrees, every witness agrees he's getting out of ADX, that in some time within three to five years he will be back at a USP, right where he stabbed Rick Benavidez, and right where he strangled Roberto Sandoval. That is the evidence. Those are the facts. You have to decide what significance that is.

J.A. 923–24, 979 (emphasis added).

After deliberating for two hours, the jury unanimously imposed the death penalty. All jurors found that the Government had proved all three non-statutory aggravating factors beyond a reasonable doubt. All jurors also found that Caro had proved twelve mitigating factors by preponderance of the evidence,[6] while some jurors ***671** found that Caro had proved an additional four mitigating factors.[7] On March 30, 2007, the district court sentenced Caro to death.

D.

Caro filed a direct appeal of his conviction and sentence. My colleagues and I affirmed the district court's denial of Caro's *Brady* motion because Caro could "only speculate as to what the requested information might reveal" and so had "failed to establish that the information requested would be favorable to him." *Caro*, 597 F.3d at 619. The majority otherwise affirmed Caro's conviction and sentence. *Id.* at 636.

Caro timely filed a motion to vacate his sentence under 28 U.S.C. § 2255. He claimed that the Government had violated *Brady* by withholding the BOP data. In support, Caro presented newly uncovered evidence that revealed some of the suppressed BOP data. This new evidence showed that a substantial portion of the Florence ADMAX population, including specific inmates who committed homicides within the BOP, has been held there for more than three years.

First, Caro presented a November 2011 affidavit from Jeanne Dvorak, an employee of Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg, & Bienvenu, LLP in New Mexico. J.A. 1338–46. In the affidavit, Dvorak describes the survey she sent to 129 inmates at Florence ADMAX in November 2010. Between late 2010 and early 2011, 69 inmates responded. Fourteen other surveys were returned unfilled because the inmates were in Special Administrative Measures (SAMS)—an extreme form of isolation that places special restrictions on an inmate's communications—and unable to receive mail.

Of the 69 respondents, 43 inmates stated that they had been at Florence ADMAX (or Florence ADMAX and USP Marion[8]) for eight or more consecutive years. Twenty-four inmates stated that they had been at Florence ADMAX (or Florence ADMAX and USP Marion) for 13 or more consecutive years. Dvorak included a table listing the names of the surveyed inmates and the years they entered USP Marion and Florence ADMAX.

***672** Second, Caro presented two 2013 declarations from Mark A. Bezy, who worked for the BOP for 28 years. J.A. 1220–28, 1689–90. Bezy worked as a captain at USP

Marion and oversaw the transfer of high security inmates from USP Marion to Florence ADMAX. Bezy stated that numerous inmates were held well beyond three years. He recalled at least eight inmates by name who had been housed at Florence ADMAX for more than three years and who were still there as of December 2012.

Finally, Caro presented an October 2013 declaration from Susan Richardson, an investigator with the Federal Public Defender's Office for the Western District of Virginia. J.A. 1750–68. 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.

Richardson estimated that as of October 2013, 126 inmates have been held at Florence ADMAX for more than five years, and at least 155 inmates have been held there for more than three years. Of these 155 inmates, 125 were still designated to Florence ADMAX. In other words, almost 30% of Florence ADMAX's October 2013 population of 434 had been held there for more than three years. At the time of Caro's trial in January 2007, Richardson found that there were at least 79 inmates held at Florence ADMAX for more than three years, at least 63 who had been held there for more than five years, and at least 25 inmates who had been held there for at least 10 years. [9]

Richardson located ten cases nationwide in which the Government sought the death penalty for a defendant who committed homicide within the BOP, but where the jury imposed a life sentence. Nine of these ten defendants had been continuously held at Florence ADMAX since the imposition of their life sentences, while the tenth had been held elsewhere due to significant mental disorder. She also located at least 54 inmates who have been convicted or accused of committing a homicide within a BOP facility and who were sent to Florence ADMAX. All 54 were still at Florence ADMAX, including 22 who were placed there in or before 2007.

II.

"When the district court denies § 2255 relief without an evidentiary hearing, the nature of the court's ruling is akin to a ruling on a motion for summary judgment. In such a circumstance, we review the facts in the light most favorable" to Caro, the § 2255 movant. *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007) (citing *United States v. Nicholson*, 475 F.3d 241, 248 (4th Cir. 2007)).

The majority concludes that Caro's *Brady* claim is both procedurally barred and meritless. I disagree with both conclusions.

A.

In finding that Caro's *Brady* claim is procedurally barred, the majority relies on ***673** a well-established doctrine: A defendant cannot use her collateral attack to relitigate issues that were "fully considered" on direct appeal. *Boeckenhaupt*, 537 F.2d at 1183; *accord United States v. Dyess*, 730 F.3d 354, 360 & n.5 (4th Cir 2013); *United States v. Linder*, 552 F.3d 391, 396–97 (4th Cir. 2009); *United States v. Roane*, 378 F.3d 382, 396 n.7 (4th Cir. 2004). But the majority's invocation of *Boeckenhaupt* here is misplaced. [10]

We have never before applied *Boeckenhaupt* to an alleged *Brady* violation—and for good reason: *Boeckenhaupt* and its progeny concerned *exactly* the same claims made with *exactly* the same evidence and *exactly* the same arguments on both direct and collateral review. *E.g.*, *Dyess*, 730 F.3d at 360 (rejecting on collateral review the defendant's argument that "the indictment did not allege a specific drug quantity" and therefore his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because we rejected that precise argument on direct appeal); *Linder*, 552 F.3d at 396–97 (rejecting on collateral review the defendant's challenge to his sentence under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), because we rejected the identical argument on direct appeal); *Roane*, 378 F.3d at 396 n.7 (rejecting on collateral review the defendants' claims of discrimination, unconstitutional delegation of legislative authority, insufficient evidence, and juror misconduct because we "already addressed and

rejected" them on direct appeal); *Boeckenhaupt*, 537 F.2d at 1183 (rejecting on collateral review the defendant's arguments that he was arrested without probable cause, unlawfully detained, and unlawfully sentenced because we had "fully considered" those issues on direct appeal). Had Caro brought the exact same *Brady* claim, supported by the exact same evidence and the exact same arguments, I would agree with the majority that he cannot relitigate it now. *Ante* 659–60. But he has not. The majority's conclusion to the contrary, and its holding that Caro's newly uncovered evidence was "previously" or "publicly" available, *ante* 658–59, 660, has no basis in the record.

1.

As the Supreme Court has recognized, there are three types of *Brady* violations: undisclosed evidence unknown to and unrequested by the defense, undisclosed evidence requested generally by the defense pretrial (e.g., a request for "*Brady* material"), and undisclosed evidence specifically requested by the defense pretrial (e.g., the BOP data here). *United States v. Agurs*, 427 U.S. 97, 104–07, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *see Kyles v. Whitley*, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (stating that the Government has equal obligation to disclose materially favorable evidence in all three circumstances). The commonality between all three is nondisclosure: a *Brady* claim by definition involves an assertion that the Government has *suppressed* (willfully or inadvertently) materially favorable evidence at trial. *Monroe v. Angelone*, 323 F.3d 286, 299–300 (4th Cir. 2003). 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—and thus not part of the record to which a court of appeals is limited on appeal. *See United States v. King*, 628 F.3d 693, 702 (4th Cir. 2011) ("*Brady* cases ... typically involve a defendant's ***674** post-trial discovery of evidence that the Government has assertedly suppressed."); *United States v. Dodson*, 291 F.3d 268, 275 (4th Cir. 2002) (stating that *Brady* claims "often arise for the first time in collateral proceedings").

In this way, *Brady* claims resemble ineffective assistance of counsel (IAC) claims, which also almost always turn on facts outside the trial record. *Massaro v. United States*, 538 U.S. 500, 505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (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.* at 504, 123 S.Ct. 1690. 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 court 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, 123 S.Ct. 1690.

The same is true with *Brady* claims. Unsurprisingly, the Fourth Circuit has never held that a *Brady* claim raised for the first time in a collateral challenge under § 2255 is procedurally defaulted. To the contrary, we have declined to review *Brady* claims on direct appeal when the allegedly suppressed evidence was not part of the trial record. *E.g.*, *United States v. Russell*, 971 F.2d 1098, 1112 (4th Cir. 1992). We do so because we recognize that plaintiffs should be allowed to present *Brady* claims, like IAC claims, "to the right tribunal at the right time." *Massaro*, 538 U.S. at 504, 123 S.Ct. 1690 (quoting *Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring)); *see Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) ("In the case of a *Brady* claim, it is impossible for the defendant to know as a *factual* matter that a violation has occurred before the exculpatory evidence is disclosed."); *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (stating that *Brady* claims may be raised in § 2255 proceedings because they "permit greater development of the record," citing *Massaro*, 538 U.S. at 500, 123 S.Ct. 1690).

But unlike IAC claims, *Brady* motions are often filed by the defendant pretrial, making the motion's denial inevitably part of the record we review on appeal. Fed. R. App. P. 10(a). Applying the *Boeckenhaupt* doctrine, collateral consideration of an unsuccessful pretrial *Brady* motion would be barred—especially because *Boeckenhaupt* applies even to claims buried in the trial record that we never squarely address on direct appeal. *Dyess*, 730 F.3d at 360 & n.5. And yet we have

never before today used *Boeckenhaupt* to bar collateral review of any *Brady* claim, even in an unpublished opinion. To the contrary, in our only opinion addressing both doctrines, we recognized that a matter "considered on direct appeal ... cannot be revisited collaterally *absent a violation of* Brady." *United States v. LaRouche*, 4 F.3d 987 (Table), at *2 (4th Cir. 1993) (per curiam) (emphasis added) (addressing the merits of a *Brady* claim on collateral review even though we had previously addressed the *Brady* claim on direct appeal). This reticence to apply *Boeckenhaupt* to *Brady* claims indicates our acknowledgement that a defendant's inability to locate pretrial what the Government ***675** 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.

This mirrors how the Supreme Court has instructed us to approach, on collateral review under 28 U.S.C. § 2254, a *Brady* claim that failed in state court for lack of evidence. *Banks v. Dretke*, 540 U.S. 668, 690, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). In that situation, the state habeas petitioner's *Brady* claim is procedurally defaulted and he is barred from an evidentiary hearing in federal court —unless he can "show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." *Id.* at 690–91, 124 S.Ct. 1256 (quoting *Keeney v. Tamayo–Reyes*, 504 U.S. 1, 11, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992)). But the Supreme Court has observed that cause and prejudice "parallel two of the three components of the alleged *Brady* violation itself": a petitioner shows "cause" when "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence," and a petitioner shows "prejudice" when "the suppressed evidence is 'material' for *Brady* purposes." *Id.* at 691, 124 S.Ct. 1256 (quoting *Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). In other words, 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.

At bottom, the majority and I agree that *Boeckenhaupt* can theoretically bar relitigation of a fully considered *Brady* claim on collateral review—we differ (in the first instance) on whether Caro's *Brady* claim was fully considered, given the new evidence he has uncovered. I write here only to emphasize the narrowness of today's holding: a *Brady* claim is procedurally barred under *Boeckenhaupt* and its progeny only if it is made with *exactly* the same evidence and *exactly* the same arguments raised on direct appeal. Because the vast majority of *Brady* claims will not meet this strict requirement, *Boeckenhaupt* will likely return to dormancy in *Brady* cases.

2.

Caro's case is a variation of the typical *Brady* case: he requested disclosure of specific BOP data that he knew existed but could not prove pretrial would be favorable to him. On direct appeal, we concluded that Caro could "only speculate as to what the requested information might reveal." *Caro*, 597 F.3d at 619. Now Caro returns to court with evidence validating his speculations: the BOP data would show that the Government could securely house him at Florence ADMAX well beyond three years, the same way it routinely houses other violent inmates who have committed homicides within the BOP. Had Caro possessed the BOP data at trial, he could have undercut the Government's future dangerousness allegations, bolstered the testimony of Cunningham, and impeached Hershberger.

Rather than recognizing this evidence for what it is —newly discovered data, vigorously suppressed by the Government and therefore beyond the limited trial record we reviewed eight years ago—the majority concludes that it was "compiled from publicly available sources" and "previously available" but "left out of the direct appeal record." *Ante* 953, 953–54.[11] Thus, says the majority, Caro's new evidence "does not ***676** suffice to make the *Brady* claim raised in his § 2255 motion different from the claim we rejected on direct appeal." *Ante* 660.

The majority provides no case for the proposition that evidence being "previously" or "publicly" available means an issue was "fully considered" under *Boeckenhaupt*. Instead, the majority cites to *Small v. Hunt*, which involved a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). 98 F.3d 789, 798 (4th Cir. 1996). There, we held that Rule 59(e) relief could be granted "to account for new evidence not available at trial," provided that the moving party produced a "legitimate justification for not presenting the evidence during the earlier proceeding." *Id.* (internal quotation marks omitted). But Caro has not moved to alter or

amend any civil judgment under Rule 59(e); instead, he argues that the new evidence proves that his *Brady* claim was not "fully considered" on direct appeal. And *Small* says nothing about "previously" or "publicly" available evidence. To the contrary, the relevant evidence *was* previously available to the state (it was the state's own plans)—the state had simply declined to present those plans until ordered by the court, which we considered a "legitimate justification." *Id.*

The majority also invokes Supreme Court precedent and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), *ante* 660–61, but to no avail. It is true that *Sanders v. United States*, 373 U.S. 1, 16–17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), *abrogated in relevant part by* AEDPA (codified at 28 U.S.C. § 2255(h)), incorporated *Townsend*'s definition of "newly discovered evidence" [12] to second or successive § 2255 petitions raising previously rejected claims—but Caro is on his first petition. Contrary to the majority's mischaracterization, *Davis v. United States* did not extend this provision of *Sanders* to direct appeals; indeed, *Davis* did not discuss newly discovered evidence at all. 417 U.S. 333, 341–42, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). Instead, the "sole issue" resolved in *Davis* was affirming that a petitioner can base a § 2255 petition on a "change in the law of [a] Circuit" that occurred after the petitioner's direct appeal. *Id.* And the majority points to no provision of AEDPA itself that bars first-time § 2255 petitions if newly discovered evidence could "reasonably have been included in the direct appeal record." *Ante* 660. Indeed, nothing in the majority's cited cases suggest that *Boeckenhaupt* is limited to only a subset of newly discovered evidence.

Finally, the majority appears to indirectly invoke the "other sources" doctrine, which holds that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources," *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (internal quotation marks and citation omitted), "including diligent investigation by the defense," *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2002) (internal quotation marks and citation omitted). But this doctrine determines whether the Government has an obligation to provide the BOP data in the first instance, not whether we "fully addressed" Caro's *Brady* claim on direct appeal such that he is barred now under *Boeckenhaupt*.

Even if these doctrines applied to the *Boeckenhaupt* framework, Caro has a legitimate justification for not providing the ***677** new evidence sooner: it was not available, much less "reasonably" capable of being included in the direct appeal record. The Dvorak affidavit summarizes a survey sent to Florence ADMAX residents by an unrelated New Mexico firm in November 2010, while the Richardson declaration relies in part on the Dvorak affidavit and documents produced by the Government in response to a 2010 subpoena. Neither Dvorak's survey nor the subpoena existed in 2007; therefore, they were not "previously available" to Caro. In addition, we have applied the "other sources" doctrine only when the evidence was either already known by the defendant or reasonably accessible. [13] But Caro had no knowledge of or access to the underlying BOP data. Nor is evidence reasonably available from other sources when even diligent investigation only exposes fragments. And just because some information is publicly available *now* (such as the BOP Inmate Locator, PACER, the Federal Death Penalty Resource Counsel website, and miscellaneous internet articles relied on in part by Richardson) does not mean that it was readily available *then*. These are "legitimate" and "reasonabl[e]" explanations for not presenting this new evidence at trial. *See Townsend*, 372 U.S. at 317, 83 S.Ct. 745; *Small*, 98 F.3d at 798.

To the contrary, the majority's suggestion that Caro's attorneys should have conducted a piecemeal survey of individual inmates at Florence ADMAX, *ante* 661, is *unreasonable. Townsend*, 372 U.S. at 317, 83 S.Ct. 745. It is not reasonable to expect inmates to systematically and accurately self-report sensitive personal information, such as their assault histories. More fundamentally, inmates incarcerated in the BOP's highest security prison are not "publicly available." Indeed, only half of the surveys sent by Dvorak were even filled out. An additional fourteen were returned unfilled because the inmates were in SAMS and unable to receive mail. Because the Government tied Caro's future dangerousness in part to his ability to communicate with the outside world in code, *e.g.*, J.A. 923, this means that the very inmates Caro would be most interested in surveying were literally inaccessible.

Moreover, contrary to the majority's assertion, *ante* 661, Caro showed diligence before trial: he filed four motions for the BOP data and hired an expert (Cunningham) who filed two declarations in support of Caro's motions.

See United States v. Ellis, 121 F.3d 908, 914 (4th Cir. 1997) (finding that defendant made "substantial efforts" to obtain evidence in dispute by filing a *Brady* motion). That Caro did not uncover all of the information the Government was working so hard to hide should not keep him from seeking that information now that new evidence vindicates his original claims. As the Supreme Court has said, "[a] rule thus declaring 'prosecutor ***678** may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696, 124 S.Ct. 1256.

The bitter irony is that Caro would have been better off had he never filed the *Brady* motion to begin with. Free of the *Boeckenhaupt* doctrine, he could have proceeded to the merits of his *Brady* violation on collateral review, using the evidence he discovered in the interim. Caro's pre-trial diligence, frustrated by the Government's suppression efforts, should not bar his post-trial claims when he has provided the Court with new evidence.

B.

In the alternative, the majority concludes that Caro's *Brady* claims fail on the merits. "[A] *Brady* violation has three essential elements: (1) the evidence must be favorable to the accused; (2) it must have been suppressed by the Government, either willfully or inadvertently; and (3) the suppression must have been material, i.e., it must have prejudiced the defense at trial." *Monroe*, 323 F.3d at 299–300 (citing *Strickler*, 527 U.S. at 281–82, 119 S.Ct. 1936). It is undisputed that the BOP data has been suppressed, but the majority errs in concluding that the BOP data is neither favorable nor material.

1.

Evidence is favorable if it is exculpatory or if it can be used to impeach a witness. *Wolfe v. Clarke*, 691 F.3d 410, 423 (4th Cir. 2012) (citing *Banks*, 540 U.S. at 691, 124 S.Ct. 1256). The majority concludes that the BOP data is not favorable because it does not support one mitigating factor raised by Caro, that the "BOP would house him at Florence ADMAX until he aged out of violence." *Ante* 661. But this reads Caro's claim far too narrowly. Caro did not seek the BOP data to support only a single mitigating factor. Instead, he sought the BOP data because it would have impeached Hershberger's testimony and exculpated Caro of a capital sentence by undermining the Government's key factor of future dangerousness. [14]

First, the requested BOP data would have allowed Caro to show that he could be held indefinitely at the BOP's most secure prison. The new evidence proves that a substantial number of inmates at Florence ADMAX do remain there much longer than the aspirational three years anticipated by the step-down program. Even more importantly, nine out of ten inmates sentenced to life in prison for killing another inmate have been held at Florence ADMAX since convicted, which shows that the BOP can and does securely house inmates with a history of dangerousness. This evidence would have directly undermined the Government's arguments that it would only take "three years for him to be stepped down out of ADX and into a USP," that "if Mr. Caro was given a light sentence, he may initially go to ADMAX, but he will be moved out to the USP on a three year program, well within the life of violence of Carlos Caro," and that ***679** "in some time within three to five years he will be back at a USP, right where he stabbed Rick Benavidez, and right where he strangled Roberto Sandoval." J.A. 923–24, 979.

Second, the BOP data would have allowed Caro to impeach Hershberger. For example, Hershberger testified that Silverstein, who has been housed since 1983 in solitary confinement at USP Marion and then Florence ADMAX, was a "very special case" who receives "a very special review." J.A. 858–61. Statistics and case studies about other inmates held long-term in solitary confinement at Florence ADMAX would have shown this to be untrue. Indeed, that nine out of ten inmates convicted of killing another inmate have been held at Florence ADMAX since being sentenced to life in prison would certainly have contradicted Hershberger's claim that only Silverstein was treated in such a "special" way. In addition, Hershberger testified that "the program [at Florence ADMAX] is to get them in, work them through a minimum three year program and out to another open penitentiary." J.A. 837–38. He said that inmates who killed other inmates and were placed in Florence ADMAX would be "in the three year program." J.A. 863. He responded "That's correct" when the Government asked him whether inmates who spend 12 months at each step of the step-down program would leave Florence ADMAX. J.A. 842–43. Hard data about how long inmates actually stay at Florence ADMAX

would undermine Hershberger's testimony that Florence ADMAX operated as advertised.

The majority claims that because no juror found that Caro would age out of violence, the BOP data "would only be relevant to the jury's future dangerousness finding if the data showed that the BOP would likely house Caro at Florence ADMAX for the rest of his life." *Ante* 661–62. Not so. The majority "confuses the weight of the evidence with its favorable tendency." *Kyles*, 514 U.S. at 451, 115 S.Ct. 1555. That inmates are routinely held at Florence ADMAX well beyond the three year program would have allowed Caro to challenge the Government's arguments to the contrary, and ultimately undermine the Government's primary aggravating factor of future dangerousness. This is plainly favorable; there is no sufficiency requirement for favorability.

Caro seeks the BOP data to support his argument that he can be securely housed at Florence ADMAX. The data he has uncovered since his sentencing vindicate this argument. Therefore, the BOP data is favorable.

2.

The majority also errs in concluding that the BOP data is not material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A "reasonable probability" *does not* require the defendant to show that he more likely than not would have received a different sentence. *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. Nor does it turn on the sufficiency of the evidence. *Id.* at 434–35, 115 S.Ct. 1555 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."). Instead, there is a reasonable probability of a different result "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Id.* (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375). The majority concludes that there is no reasonable probability that the BOP ***680** data would have affected any juror's vote. *Ante* 662–63. But the majority ignores what Caro actually requested in his *Brady* motion and consequentially fails to recognize the material impact its absence had on the jury's decision.

In the penalty context, materiality does not require a showing that the balance of evidence would still justify the death penalty. *See Kyles*, 514 U.S. at 434–35, 115 S.Ct. 1555. In *Strickler*, for example, the Supreme Court struck down as "incorrect" an appellate court's holding that even "without considering [witness]'s testimony, the record contained ... evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty." 527 U.S. at 290, 119 S.Ct. 1936. Instead, the touchstone of *Brady* materiality is whether the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555; *accord Strickler*, 527 U.S. at 290, 119 S.Ct. 1936; *Juniper v. Zook*, 876 F.3d 551, 567 (4th Cir. 2017). The materiality of the evidence "turns on the cumulative effect of all such evidence suppressed by the government," not on each item. *Kyles*, 514 U.S. at 421, 115 S.Ct. 1555.

Applying these principles, the BOP data is material because its absence undermines confidence in a juror's vote for death. Caro's *Brady* motion requested not just how long inmates have stayed at Florence ADMAX since it opened in 1994, but also what offense caused them to be transferred there; the disciplinary and assaultive conduct records for inmates in the Control Unit at Florence ADMAX; records about violence at each security level of Florence ADMAX; and the movements sheets, disciplinary records, and histories of inmates (including those at Florence ADMAX) who killed another inmate in the BOP over the last 20 years. *See supra* Part I.B; *see also Kyles*, 514 U.S. at 436, 115 S.Ct. 1555 (holding that suppressed evidence must be "considered collectively, not item by item").[15] Had Caro received ***681** this information, his expert Cunningham would have been able to prepare an actual risk assessment based on how the BOP has handled inmates with similar criminal histories. Cunningham also would have been able to testify about what the BOP *actually does* with high risk inmates, rather than what it aspires to do. And Caro could have impeached Hershberger's testimony about Silverstein and his affirmance that Florence ADMAX's step-down program applies to everyone. Rather than rely on dueling 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. By ignoring the full scope of this information, the majority incorrectly assumes that Caro's penalty phase arguments would have remained the same.

In addition, the majority incorrectly assumes that because all twelve jurors found Caro likely to commit acts of violence against other inmates and not likely to grow less violent with age, they would necessarily do so again. *Ante* 662. But that is *the crux of this case*—the Government urged a capital sentence based almost exclusively on Caro's likelihood of committing future acts of violence. Had Caro received the BOP data, he could have rebutted the Government's allegations. The majority's circular reasoning presumes that the BOP data will have no effect on the outcome of the proceeding, in direct contravention of what a materiality analysis requires.

The majority also sidesteps the Government's closing arguments, which told the jury that it would only take "three years for [Caro] to be stepped down out of ADX and into a USP," that "if Mr. Caro was given a light sentence, he may initially go to ADMAX, but he will be moved out to the USP on a three year program, well within the life of violence of Carlos Caro," and that "in some time within three to five years he will be back at a USP, right where he stabbed Rick Benavidez, and right where he strangled Roberto Sandoval." J.A. 923–24, 979. The majority rightly chastises the Government for misrepresenting Cunningham's and Hershberger's testimonies. *Ante* 657 n.3.[16] But the majority ignores the fact that materiality can turn on what the Government emphasizes in closing. In *Kyles*, for example, the Supreme Court found suppressed evidence to be material in part because it would have impeached two witnesses identified by the Government in closing as "the State's two best witnesses." 514 U.S. at 444–45, 115 S.Ct. 1555. Just so here. Hard data about how long inmates are actually held at Florence ADMAX would have "undercut the prosecution" in closing by providing the jury with an objective baseline for how the BOP handles dangerous inmates like Caro. *See id* at 445, 115 S.Ct. 1555.

Indeed, the BOP data would be material even if it did not "show[ ] that Caro would remain at Florence ADMAX for the rest of his life." *Ante* 662. True, both sides testified that although the "BOP does not permanently assign inmates to Florence ADMAX," "some inmates take longer than the average five years to complete the step-down program." *Ante* 662. But Cunningham repeatedly explained that he was hamstrung in his testimony by the BOP's refusal to provide hard data. J.A. 699–702, 736–40, 792–98, 799–802. The majority notes that Cunningham "based his prediction on anecdotal examples of particularly ***682** dangerous inmates," *ante* 656, ignoring that this is precisely the point: Because the BOP data was suppressed, Cunningham was deprived of accurate data and case studies. He was not able to conduct a risk assessment of Caro's future dangerousness or provide evidence to support his contention that the BOP can securely house Caro. Had the BOP data been disclosed, Cunningham likely would have testified about the dozens of Florence ADMAX inmates who had been there for over a decade, including inmates who had likewise committed homicides within the BOP. He also would have testified about how the BOP actually addressed the security concerns of these other dangerous inmates. From these real examples, a juror could have concluded that the Government can house Caro securely and that executing him is unnecessary.

The majority claims that Caro had failed to show that the "statistical evidence he requested even existed" because "there is unrebutted evidence in the record that the BOP does not maintain a database of all the inmates ever housed at a particular institution." *Ante* 663. But Caro had not requested a list of all inmates in the BOP system; most of the requested records concern only Florence ADMAX and the remaining records concern inmate homicides within the BOP. *See supra* Part I.B. Moreover, Cunningham's two declarations and testimony effectively rebutted many of the Government's arguments about the BOP data's existence by noting inconsistencies between the several Government declarations while clarifying exactly what records he needed. J.A. 126–43. Indeed, Cunningham had previously received from the BOP the exact type of records he requested, apparently without controversy. It strains plausibility that the BOP would not update their records about the inmates who commit violent acts behind bars and where they are held. *See* J.A. 39 (declaration of Cunningham stating that "it is patently inconceivable that BOP has not calculated detailed length of stay information regarding this unique facility housing the 'worst of the worst' when an in-house BOP research unit is available to examine such vitally important performance and outcome data."). Whatever

the measure of materiality, the BOP data requested by Caro undoubtedly does exist.

In sum, Caro sought information about how the BOP has managed similarly situated inmates—inmates who have committed assaults and even murders behind bars. He sought this information to prove that the BOP could manage him securely as well. In denying him this information, the Government deprived not only the jury of accurate data but also Caro's expert of the ability to develop a risk assessment and rebut the Government's expert. Had the jury known that the BOP securely houses other highly dangerous inmates and routinely keeps them in Florence ADMAX for well beyond three years, I am not confident that every juror would still have concluded that Caro's future dangerousness justified the death penalty. And because a capital sentence in this context is not "worthy of confidence," there is a "reasonable probability" that disclosure of the BOP data would have led to a "different result." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (quoting *Bagley*, (473 U.S. at 678, 682, 105 S.Ct. 3375)). Reviewing the facts "in the light most favorable" to Caro, *Poindexter*, 492 F.3d at 267, I would find that the BOP data is material.

C.

But even if Caro has not met the favorability and materiality prongs of *Brady*, his claim is at worst one of the "atypical cases" in which " 'it is impossible to say whether' requested information 'may be ***683** relevant' " to the defendant's case. *King*, 628 F.3d at 703 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)). Under our established precedent, the solution to a *Brady* problem created and perpetuated by Government suppression is not dismissal—it is remand for *in camera* review.

In *King*, the defendant was indicted for felony possession of a firearm that he said belonged instead to a cooperating witness named Bilal. *Id.* at 698–99. Bilal had also told police that King had kidnapped and assaulted him, but King was never federally indicted or convicted for the purported crime. *Id.* at 697. Before trial, King repeatedly requested and was repeatedly denied copies of Bilal's grand jury testimony, which the Government claimed "contained no exculpatory information." *Id.* at 698. At trial, King argued that the firearm belonged to Bilal, but without success. *Id.* at 698–99. The district court then applied an eight-level sentencing enhancement based on Bilal's unsubstantiated claim that King had kidnapped him. *Id.* at 699.

On direct appeal, we sustained King's *Brady* objection and vacated the firearms conviction. *Id.* at 704. We recognized that "a defendant cannot demonstrate that suppressed evidence would have changed the trial's outcome if the Government prevents him from ever seeing that evidence." *Id.* at 702. In these "atypical cases," the defendant is not required to "make a particular showing of the exact information sought and how it is material and favorable." *Id.* at 703 (quoting *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995)). Instead, "a defendant need only 'make some plausible showing' that exculpatory material exists." *Id.* (quoting *Ritchie*, 480 U.S. at 58 n.15, 107 S.Ct. 989; *Love*, 57 F.3d at 1313). A "plausible showing" requires the defendant to "identify the requested confidential material with some degree of specificity." *Id.* (quoting *United States v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)). Once a defendant makes a "plausible showing," he "becomes 'entitled ... to have the information'—not immediately disclosed to him—but 'submitted to the trial court for in camera inspection' to determine if in fact the information is *Brady* material subject to disclosure." *Id.* (quoting *Love*, 57 F.3d at 1313); *see also Ritchie*, 480 U.S. at 58, 107 S.Ct. 989.

We concluded that King had made such a "plausible showing" that the grand jury transcript *could* be materially favorable to both his culpability and its sentence. *King*, 628 F.3d at 703. Even though "the jury disbelieved King's story about Bilal," we held that "it remains plausible that Bilal's grand jury testimony contained information that *might* have affected that disbelief." *Id.* at 704 (emphasis added). And because the district court judge credited Bilal's statements about kidnapping, the grand jury transcript could reveal information that significantly reduced King's sentence. *Id.*

King should have guided our decision here. Caro has identified specific records maintained by the BOP that would likely show the BOP's ability to securely incarcerate him long-term in Florence ADMAX and would have likely allowed his expert to prepare an accurate risk assessment. Given what Caro has now uncovered, it is at least "plausible" that the BOP data "contain[s] information that might have affected" the jury's belief

about Caro's future dangerousness. *See id.* at 704. At the very least, Caro is entitled to have the district court review those records and determine whether their absence undermined confidence in the jury's sentence—a sentence that will otherwise lead to Caro's imminent execution.

III.

"[D]eath is a different kind of punishment from any other which may be imposed ***684** in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion). It is the "ultimate sanction," *Furman v. Georgia*, 408 U.S. 238, 286, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring)—there is no more severe or final punishment, nor any more grave exercise of state power. We must tread cautiously when the Government claims that a defendant is too dangerous to be kept alive—and then fights tooth and nail to prevent that defendant from accessing data that he says will prove otherwise. Justice demanded that Caro receive an opportunity to fully rebut the Government's claim of dangerousness with information about how the Government handles those with equally dangerous histories. Because Caro was denied that opportunity, I respectfully dissent.

All Citations

733 Fed.Appx. 651

Footnotes

1 This court also granted Caro a Certificate of Appealability to consider whether his trial counsel's decision not to proffer mental-health testimony "fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After a thorough review of the record, we conclude that it did not. Trial counsel hired a mental health expert, Dr. Keith Caruso, who informed the trial team that Caro's evaluation revealed damaging information. In light of Caruso's assessment, it was reasonable for counsel to decide that the potential benefits of mental-health testimony were outweighed by its risks.

2 BOP facilities have various levels of security. From least to most secure, they consist of: federal prison camps, low-security federal correctional institutions, medium-security federal correctional institutions, U.S. penitentiaries and Florence ADMAX. In addition, every BOP facility has a secure housing unit, which serves to temporarily segregate inmates from the facility's general population for disciplinary reasons or pending transfer to another institution.

As the security level increases, the amount of contact inmates have with each other and with prison staff decreases. In low-security, medium-security and the general population of high-security facilities, inmates perform jobs and engage in recreational activities that bring them into contact with other inmates and prison staff. However, in the secure housing unit of a penitentiary and Florence ADMAX, inmates have restricted access to other people. At Florence ADMAX, for example, inmates spend twenty-three hours of each day in solitary confinement. They spend the remaining hour in an exercise pen where they can communicate with, but cannot touch, other inmates.

3 In closing argument, the government stated, "You heard the testimony of Mr. Hershberger. Three years, three years for him to be stepped down out of [Florence ADMAX] and into a [U.S. penitentiary]." J.A. 924. This statement misrepresented Hershberger's testimony that the step-down program takes *a minimum* of three years to complete. While we disapprove of the government's misrepresentation, Caro does not challenge the statement in this appeal. In fact, Caro does not even suggest that the government misrepresented Hershberger's testimony. He merely invokes the government's closing argument to support his position that the requested BOP data is material because it would likely disprove Hershberger's testimony, which the government emphasized during its closing argument.

4 Caro argues that, on direct appeal, he did not intend for us to decide the merits of his *Brady* claim. Instead, he raised a *Brady* challenge intending for us to remand the case so that the district court could determine whether the government withheld *Brady* evidence. Therefore, this court should not have addressed the merits of his *Brady* claim on direct appeal. This argument borders on the bizarre. This court has the authority to decide whether a claim should be resolved on the merits or remanded for further proceedings. *See* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."). This authority is cabined only by the law, not the litigants' desires.

5 According to the dissent, our materiality analysis cannot rely on the jury's refusal to find that Caro would become less violent as he aged because the requested BOP data could have undermined that conclusion. We are not persuaded.

Caro's *Brady* motion requested information on the BOP's ability to incapacitate and control him. It did not seek any data on the likelihood of Caro's rehabilitation. Accordingly, we conclude that the requested BOP data would have had no bearing on the jury's refusal to find that Caro would age out of violence.

6 The dissent asserts that our analysis is too narrow because it focuses exclusively on the effect of data showing the amount of time that inmates have served at Florence ADMAX. According to the dissent, we should consider the cumulative effect of all the information Caro requested in his pretrial *Brady* motion, which included statistics about the frequency of violence at Florence ADMAX and the disciplinary records of inmates at the facility. We disagree. Caro has not challenged the government's failure to turn over all of the information requested in his pretrial *Brady* motion. He merely argues that he "was denied his right to due process of law under the Fifth Amendment where the Government withheld Bureau of Prisons' data *on the maximum length of time inmates can be housed at ADX Florence.*" Appellant's Opening Br. at 22 (emphasis added).

1 BOP, *Inmate Locator*, https://www.bop.gov/inmateloc/ (last visited Apr. 18, 2018) (saved as ECF opinion attachment 1); J.A. 700. *See generally* Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. Times Mag. (Mar. 25, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html (saved as ECF opinion attachment 2). Known as the "Alcatraz of the Rockies," Florence ADMAX is "a place to incarcerate the worst, most unredeemable class of criminal—'a very small subset of the inmate population who show,' in the words of Norman Carlson, the former director of the Federal Bureau of Prisons, 'absolutely no concern for human life.' " *Id.* Another former warden has described Florence ADMAX as "a clean version of hell." Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 Am. U. L. Rev. 1331, 1404 (2012) (citation omitted).

2 I join the majority in concluding that Caro has not presented a colorable ineffective assistance of counsel claim. *Ante* 3 n.1.

3 To "single cell" an inmate is to place him alone in a cell and give him only limited contact with other inmates or prison officials. Single-celled inmates are handcuffed anytime they are moved and take only an hour or two of exercise a day, typically in isolation.

4 The Government's other non-statutory aggravating factors were the impact of the murder on Sandoval's friends and family and Caro's lack of remorse. Sandoval's daughter testified about the impact his murder had on her and her family. No witness testified about Caro's remorse or lack thereof.

5 Caro also presented the testimony of five family members and one teacher, who testified about his difficult childhood and his overall character, and a second expert, who provided general information about Florence ADMAX, and opined that the BOP has the ability to control Caro in the long-term.

6 The jury unanimously found that Caro (1) was exposed to domestic violence growing up, (2) was not encouraged in school, (3) came from an impoverished community, (4) was well-behaved growing up, (5) failed to reach high school after needing special education, (6) was shy and respectful compared to his brothers, (7) was brought into illegal drug trafficking by his uncles, (8) never abused his wife or daughter, (9) was not violent or aggressive until his thirty-year prison sentence, (10) has never attacked prison staff, (11) has never tried to escape, and (12) has been securely detained "at various high security federal institutions" since December 18, 2003. *Caro*, 597 F.3d at 613 n.6.

7 One juror voted that Caro's father had a corrupting influence, five voted that Caro's execution would grieve his family, eight voted that Caro's life has value to his family, and nine voted that during a life sentence Caro would be "incarcerated in a secure federal institution." J.A. 882–85.

No juror found any of the remaining six factors: (1) Caro exhibited symptoms of failure to thrive as an infant, (2) Caro's mother was not able to nurture her children because of her violent and abusive husband, (3) Caro was sometimes a good father and husband, (4) Caro was not involved in gang-related activity while in the community, (5) Caro was not involved in gang-related activity in prison until he was sentenced in 2001, and (6) Caro is 40 years old and is less likely to engage in violence as he ages.

8 Florence ADMAX opened in 1994; before that, USP Marion was the BOP's most secure prison. Justin Peters, *How a 1983 Murder Created America's Terrible Supermax-Prison Culture*, Slate (Oct. 23, 2013), http://www.slate.com/blogs/crime/2013/10/23/marion_prison_lockdown_thomas_silverstein_how_a_1983_murder_created_america.html (saved as ECF opinion attachment 3). After Silverstein and another inmate murdered two prison officials in 1983, USP Marion went into a 23-year lockdown. *Id.* In 2006, USP Marion came out of lockdown and was downgraded to a medium-security prison. *Id. See also* J.A. 836–37, 848.

9 In November 2006, Florence ADMAX had a capacity of 490 cells, and held approximately 470 inmates. J.A. 697, 835. As of April 2018, Florence ADMAX holds 405 inmates. *Generate Inmate Population Reports, Florence ADMAX*, BOP, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Apr. 18, 2018) (saved as ECF opinion attachment 4).

10 The majority only cites to *Dyess*, 730 F.3d at 360 and *Linder*, 552 F.3d at 396, which are the most recent iterations of the doctrine. *Ante* 659–60. But because *Boeckenhaupt* is one of our earliest articulations of the doctrine, I refer to it by that case name.

11 Even the district court here found that Caro's new evidence was collected from various sources, "some of which were not available at the time of Caro's trial." J.A. 1955.

12 *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (noting that "newly discovered evidence" is "evidence which could not reasonably have been presented to the state trier of facts"), *overruled in nonrelevant part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

13 *E.g.*, *United States v. Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (evidence was form submitted by defendant himself to Department of Labor and could also have been obtained by written request); *Roane*, 378 F.3d at 402 (evidence was witness statements providing defendant an alibi, but defendant knew where he was); *Fullwood*, 290 F.3d at 686 (evidence was defendant's own statements to police); *United States v. Bros. Const. Co. of Ohio*, 219 F.3d 300, 316 (4th Cir. 2000) (defendant obtained the same information via FOIA); *Barnes v. Thompson*, 58 F.3d 971, 976–77 (4th Cir. 1995) (evidence was location of victim's gun, which defendant either knew or could have obtained from his co-defendant's earlier trial); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994) (defendant was aware of evidence and never requested it); *Epperly v. Booker*, 997 F.2d 1, 9 (4th Cir. 1993) (defendant could have obtained evidence through discovery, independent expert testimony, or cross-examination); *Wilson*, 901 F.2d at 381 (evidence was statements of witness the defendant was free to question ahead of trial but did not).

14 Even the Government acknowledges that Caro's new evidence is favorable. Appellee's Resp. Br. 40 (stating that Caro had now "presented some statistical evidence extrapolated from raw data he located independently, that appears favorable to his position on future dangerousness"). The Government then shifts the goalposts, arguing two pages later that "Caro has again failed to show that the requested evidence is favorable" because his new evidence does not establish that the BOP data would show exactly how long the BOP would hold Caro at Florence ADMAX. *Id.* 42. But Caro never sought to show exactly how long he would be held at Florence ADMAX, only that Florence ADMAX would be able to house him securely.

15 The majority claims that the Court cannot consider everything Caro requested in his *Brady* motion because Caro states in his brief that the Government withheld the BOP data related to "the maximum length of time inmates can be housed at ADX Florence." *Ante* 663 n.6 (quoting Appellant's Opening Br. 22). But this quote is from a header in Caro's opening brief that summarizes the many categories of information requested by Caro in his *Brady* motion. *See supra* Part I.B. The maximum length of time inmates can be held at Florence ADMAX is not a category of information requested by Caro in his *Brady* motion, and he does not limit himself to only that information. Instead, Caro's briefs make repeated references to all the data sought by Caro in his *Brady* motion, indicating that the full BOP data, not a small subset, are properly before this Court. *E.g.*, Appellant Opening Br. 18 (describing the suppressed BOP data as reflecting "how long BOP would hold Caro at ADX Florence," which was likewise not a specific category of information requested and something that could only be discovered if the full BOP data were disclosed); *id.* 26 (summarizing his *Brady* motion as "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"), *id.* (stating that his *Brady* motion is "[s]ignificant to the certified claim brought in this appeal"), *id.* 27 (stating that the BOP records requested by Cunningham "are the subject of the *Brady* motion at issue here"); *id.* 34 (stating that "the *Brady* claim in the trial court, in the absence of the production of the BOP data requested by Caro in discovery and initially ordered produced by the magistrate judge, was not 'fully considered' " and thus cannot preclude review by this Court); Appellant Reply Br. 7–9 (same); *id.* 15 (arguing that a Government assertion at trial "could have been disproved had the district court affirmed the magistrate judge's decision to compel the production of the BOP data"); *id.* 16 (describing the suppressed BOP data in part as "length of stays at ADX Florence during its history, including for those who have killed while in federal custody").

16 The majority errs in concluding that Caro has not challenged these statements—he did, in both his opening and reply briefs. *See* Appellant's Opening Br. 31; Appellant's Reply Br. 3, 14–15.

End of Document

FILED: July 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1
(1:06-cr-00001-JPJ-1)
(1:13-cv-80553-JPJ)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CARLOS DAVID CARO

Defendant - Appellant

ORDER

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

Entered at the direction of the panel: Chief Judge Gregory, Judge Duncan, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

DECLARATION OF SUSAN RICHARDSON
PURSUANT TO 28 U.S.C. § 1746

I, Susan Richardson, do make oath and swear:

1. I am currently employed as an Investigator with the Federal Public Defender's Office for the Western District of Virginia. I have been assigned to work on the case of *United States v. Carlos Caro*, 1:06cr00001 (W.D. Va.).
2. One of my assignments was to collect as much data as possible on the length of stay of inmates housed at the Bureau of Prison's Administrative Maximum facility in Florence, Colorado ("ADX"). Based on my research, in 2013 I prepared tables entitled "Inmates Housed at ADX-Florence For More Than Three Years", "Inmates Housed at ADX-Florence Who Have Been Convicted or Accused of Committing a Homicide Within a Bureau of Prisons Facility" and "Location of Inmates Convicted of Committing a Homicide in the Bureau of Prisons Following a Jury Trial In Which the Government Sought the Death Penalty." *See* Exhibit 72 of the Opposition to United States' Motion to Dismiss. Docket Entry 797. I obtained the information presented in the tables from various sources available to me in 2011 – 2013.
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 possible length of confinement at ADX-Florence.

4. In order to obtain names of inmates potentially housed at ADX-Florence I first conducted a general internet search. Articles regarding the conditions at ADX-Florence, civil suits against ADX- Florence and documentaries about ADX-Florence produced some inmate names. The articles and documentaries were created after 2006.

5. My general internet search also led me to the Wikipedia website for ADX-Florence. While citation of Wikipedia webpage content may be considered unacceptable, it can be a useful investigation tool. The Wikipedia page for ADX- Florence was helpful as it listed the names of multiple inmates. 58 inmates described as "notable" were listed on this page as well as discussion about civil suits against ADX-Florence which provided additional inmate names. Wikipedia has a unique feature in that a user can view previous versions of the web page. I was able to view the Wikipedia page for ADX-Florence that was available in January 2007. The notable inmates list in January 2007 only consisted of 16 names. Also, I reviewed the Wikipedia page entitled "Inmates of ADX Florence". The page provided 60 inmate names. The page was not created until November 2012.

6. In addition to general internet searches I utilized the Federal Death Penalty Resource Counsel's (FDPRC) website, capdefnet.org. The FDPRC had several charts available to review on multiple topics, but importantly it provided what I required most - inmate names. I reviewed the following specific charts: Federal Prosecutions Where the Defendant was Convicted of a Lesser Included Offense; Authorized Federal Capital Cases Where the Judge Dismissed for Legal Reasons; Federal Capital Prosecutions Resulting in an Original Sentence of Death from Jury; Authorized Federal Cases Resulting in a Guilty Plea; Authorized Federal Capital Cases Pending Trial; Federal

Capital Prosecutions Which Resulted in the Authorization Being Withdrawn; Completed Federal Cases Involving an Inmate; Authorized Federal Capital Cases by Attorney General Holder Involving BOP Inmate; Potential Federal Capital Cases Involving Bureau of Prisons Murders; Completed Federal Capital Cases Involving an Inmate; and BOP Locations of Capital Defendants Serving Life Sentences. Each of these charts were prepared between 2011 and 2013. I was able to obtain numerous inmate names from these charts.

7. Additional inmate names were obtained as a result of a 2010 subpoena issued to the Bureau of Prisons in *United States v. Vincent Basciano*, 1:05-cr-060 (E.D.N.Y.). While the inmate names were redacted from the documentation supplied, the Bureau of Prisons' register numbers were provided. The Bureau of Prisons Inmate Locater can be searched by name and/or register number. I was able to obtain additional inmate names and locations utilizing the register numbers provided to defense counsel in *Basciano* in 2010 and 2011.

8. I also had the benefit of the research, chart and affidavit prepared by Jeanne Dvorak in 2011 that provided the names of over 100 inmates. Ms. Dvorak conducted a survey with inmates housed at ADX-Florence and the chart prepared was based on information received from inmates.

9. I also utilized PACER to locate inmate names. I searched for civil cases in the District of Colorado filed against ADX-Florence. The PACER search provided additional inmate names. Many of the civil suits were not filed until 2006 or later.

10. Once the search for inmate names was completed and current location confirmed as being at ADX-Florence through the Bureau of Prisons' Inmate Locator, a letter was mailed to

each inmate requesting information regarding their length of stay and the signing of a release to obtain their inmate housing records for confirmation. Some inmates responded that they did not want to sign a release, some signed and returned the release and some inmates never received the request because of the Bureau of Prisons' Special Administrative Measures (SAMs). The letters to inmates under SAMs restrictions were returned as undeliverable. For these inmates there is no way to confirm their length of stay, because a release of information request cannot be delivered to them. The Bureau of Prisons prevented the request from being received by the inmate. I do not know how many inmates were under SAMs restrictions in 2006.

11. Additionally, after inmate names were gathered a review of each District Court docket sheet on PACER was conducted. The docket sheets provided useful information, such as dates of sentencing, returned judgments showing location, and/or letters from inmates with return addresses of ADX-Florence. The information obtained from the docket sheets on PACER was utilized to piece together approximate lengths of stay for inmates. PACER was nearly universal in early 2007, with most district courts adopting online filing and viewing in late 2006. Carlos Caro's trial began in January 2007. A few districts however were later, such as the North District of Alabama which did not begin online filing until 2014.

12. The only information that I utilized in preparing the three tables regarding length of stay at ADX-Florence that I am certain was available in 2006 is a list I believe was provided to and then by defense expert, Mark Cunningham, entitled "Inmates found guilty of 100-code-killings" that was current through 2001. The list provided 47 inmate names, 15 of which were listed as released or deceased in 2001 and were not helpful to my research.

I declare under penalty for perjury that the foregoing is true and correct.

Executed on 6-21-18.

Susan Richardson

Susan Richardson