No. 18-6826

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS DAVID CARO, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that petitioner was barred from relitigating on collateral review a claim under Brady v. Maryland, 373 U.S. 83 (1963), that had been rejected on direct appeal.

2. Whether the court of appeals erred in determining that petitioner's Brady claim lacked merit because evidence allegedly withheld during the sentence-selection phase of his capital trial was neither favorable to petitioner nor material.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C25) is not published in the Federal Reporter but is reprinted at 733 Fed. Appx. 651. The opinion of the district court (Pet. App. B1-B95) is reported at 102 F. Supp. 3d 813. A prior opinion of the court of appeals (Pet. App. A1-A30) is reported at 597 F.3d 608. A prior opinion of the district court is reported at 461 F. Supp. 2d 478.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2018. A petition for rehearing was denied on July 6, 2018

(Pet. App. D1). On September 27, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 19, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. Pet. App. A3. Following a penalty hearing, the jury unanimously determined that petitioner should be sentenced to death. Ibid. The court of appeals affirmed, id. at A1-A19, and this Court denied a petition for a writ of certiorari, 565 U.S. 1110. In 2013, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. B14. The district court denied petitioner's motion, id. at B1-B95, and the court of appeals affirmed, id. at C1-C9.

1. Petitioner is a federal inmate who became a leader of the Texas Syndicate, a violent prison gang. Pet. App. A2. In July 2002, while serving a 30-year prison sentence for federal drug-trafficking offenses, petitioner and other Texas Syndicate members violently attacked a group of newly arrived prisoners who belonged to a different gang. Ibid. Petitioner admitted his role

in the attack and said that he "d[id]n't give a f**k" whether he was prosecuted or transferred to a more restrictive facility because members of the Texas Syndicate "know what they're getting into" and he "ha[d] 30 years to do" anyway. Ibid.

Following that attack, the federal Bureau of Prisons (BOP) transferred petitioner to United States Penitentiary Lee (USP Lee), a more secure facility. Pet. App. A2. In August 2003, petitioner and an accomplice attacked another inmate at USP Lee, stabbing him 29 times with handmade shanks. Ibid. Petitioner subsequently pleaded guilty to conspiracy to commit murder and was sentenced to a consecutive term of 27 years of imprisonment. Ibid. He was also moved to the special housing unit at USP Lee, an even more secure facility where inmates were confined to their cells 23 hours per day. Id. at A2, A26 n.3.

Within weeks after he was moved to the special housing unit, petitioner committed the murder at issue in the current proceeding. Pet. App. A2. At about 9 p.m. on December 16, 2003, Roberto Sandoval was placed in petitioner's cell in the special housing unit. Ibid. Petitioner initially stated that he did not want a cellmate, but approved of Sandoval after realizing that they had "[d]one some time together" during an earlier prison stint. Id. at B7.

Shortly after 6 p.m. the following day, an inmate whose cell faced petitioner's saw petitioner standing behind Sandoval,

apparently choking him. Pet. App. A2. The inmate watched as petitioner and Sandoval fell to the ground. Ibid. At around 6:40 p.m., petitioner yelled to a passing guard, "[c]ome get this piece of s**t out of here." Ibid. The guard looked inside the cell and observed Sandoval lying motionless on the floor, bleeding and with a towel knotted around his neck. Ibid. When another guard asked whether Sandoval was breathing, petitioner responded, "No. At this time he's stinking up the room, get him out." Ibid.

Later that evening, petitioner told a Federal Bureau of Investigation (FBI) agent that he had eaten Sandoval's breakfast that morning, causing Sandoval to curse at petitioner and threaten to eat petitioner's breakfast the next morning. Pet. App. A2, B8. Petitioner explained that, as a result of that provocation, he killed Sandoval by strangling him with a towel for four or five minutes. Id. at A2. Petitioner later stated in a letter that he had killed Sandoval "[f]or being a fool," and admitted in a telephone call with another Texas Syndicate member that he had killed Sandoval because Sandoval had "disrespected [him]." Id. at A2, B8-B9 (first set of brackets in original).

The day after the murder, petitioner taunted a guard by grinning and asking when the prison would "assign [him] a new cellie." Pet. App. A2. Several days later, again grinning, petitioner requested that a specific inmate be his next "cellie." Ibid.

2. A federal grand jury charged petitioner with first-degree murder within the special maritime or territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. Indictment 1; see Pet. App. A2. The grand jury also alleged statutory aggravating factors that, if proved, would make petitioner eligible for capital punishment. Indictment 3. The government notified petitioner that, in addition to those statutory factors, it would also seek to prove three non-statutory aggravating factors, including that petitioner was likely to pose a continuing danger to others even if he were incarcerated. Notice of Intent to Seek the Death Penalty 3; see Pet. App. A3.

Pursuant to the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq., the district court divided petitioner's trial into three phases: one to determine his guilt; one to determine his eligibility for capital punishment; and one to determine the appropriate penalty. See 18 U.S.C. 3593(b). During the guilt phase, the jury found petitioner guilty of first-degree murder. Pet. App. A3. During the eligibility phase, the jury determined that petitioner was eligible for capital punishment, finding that both statutory aggravating factors had been proved beyond a reasonable doubt. Ibid.[1] During the sentence-selection phase, the jury recommended that petitioner be sentenced to death. Ibid.

[1] The grand jury alleged three statutory aggravating factors, see Indictment 3, but only two were submitted to the jury: (1) petitioner had previously been convicted of two state or

a. Before trial, petitioner notified the government that it intended to call an expert witness, Dr. Mark Cunningham, during the sentence-selection phase to address petitioner's future dangerousness. Pet. App. A5. Cunningham proposed to testify that BOP could "adequately secure" petitioner if it placed him in the "Control Unit" of the Administrative Maximum facility in Florence, Colorado (ADX Florence), the most secure federal prison facility in the country. Ibid.

In connection with Cunningham's proposed testimony, petitioner filed motions to compel the government to provide information about ADX Florence and other BOP security measures. Pet. App. A6. This included (1) data concerning the lengths of stay for every prisoner incarcerated at ADX Florence since the facility opened in 1994; (2) investigative reports, disciplinary records, and placement information for every prisoner who had killed another inmate in BOP custody in the last 20 years; (3) records of any assaults committed by inmates in the ADX Florence control unit since 1994; (4) identifying information, disciplinary records, and "assignment rationale[s]" for every inmate placed in the ADX Florence control unit since 1994; and (5) data concerning violent incidents "at each security level" in

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federal drug-distribution offenses punishable by more than a year of imprisonment, 18 U.S.C. 3592(c)(10); and (2) he had previously been convicted of a federal drug offense punishable by five or more years of imprisonment, 18 U.S.C. 3592(c)(12). Pet. App. A3.

ADX Florence from 2001 to 2006. Ibid. Petitioner asserted that the government was obligated to provide that information under Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure. Pet. App. A6.

The district court denied petitioner's motions. Pet. App. A6; see 461 F. Supp. 2d 478. The court determined that Brady did not require the government to disclose the requested information because petitioner had failed to demonstrate either that it would be favorable to him or that it would be material. 461 F. Supp. 2d at 481; see Brady, 373 U.S. at 87 (holding that government must disclose evidence in its possession that is both "favorable to an accused" and "material either to guilt or to punishment"). The court similarly determined that Rule 16(a)(1)(E) did not require disclosure of the information because, in the absence of any "indication that the information * * * would support Cunningham's testimony," petitioner could not demonstrate that the information was "'material to preparing [his] defense.'" Pet. App. A9 (quoting Fed. R. Crim. P. 16(a)(1)(E)(i)); see 461 F. Supp. 2d at 481.

b. Cunningham later visited ADX Florence, interviewed BOP personnel, and received information concerning the facility's policies. Pet. App. A6-A7. Cunningham subsequently opined during the sentence-selection phase that, although petitioner would likely pose a "'grave risk of serious violence'" if he were returned to a U.S. penitentiary, he would not pose such a risk if

incarcerated in the ADX Florence control unit, "where strict security measures would virtually eliminate [his] contact with other people." Id. at C4 (citation omitted). Cunningham stated that, in his opinion, the security measures in the control unit -- including solitary confinement for 23 hours per day, fences in the outdoor recreation area designed to prevent physical contact between inmates, and additional security precautions when inmates are removed from their cells -- would be sufficient to prevent petitioner from "assault[ing] another BOP inmate or guard if sentenced to life in prison." Ibid. Cunningham acknowledged, however, that inmate violence still occurred at ADX Florence, and that even if petitioner engaged in no violence himself, he might be able to send coded messages to other members of the Texas Syndicate instructing them to engage in violence on his behalf. Ibid.

Cunningham also acknowledged that BOP did not permanently assign prisoners to ADX Florence and that inmates were generally transferred to less secure facilities after "an average of five years." Pet. App. C4. But he asserted that BOP would likely keep petitioner at ADX Florence "until [he] ceased to exhibit violent tendencies, no matter how long th[at] took." Ibid. He further testified that an inmate who killed another prisoner would likely be imprisoned at ADX Florence "for six years before BOP officials even considered an alternate placement," and that BOP personnel

had told him that several inmates "had been incarcerated [at ADX Florence] continuously since the facility opened in 1994." Id. at B71; see id. at C4 (noting that Cunningham cited "anecdotal examples" of "particularly dangerous inmates" who remained at ADX Florence for long periods of time).

The government called Gregory Hershberger, the former warden of ADX Florence, in rebuttal. Pet. App. C4. Hershberger explained that ADX Florence has several units with different security levels, none of which is intended to house inmates permanently. Id. at C4-C5. He testified that even if petitioner were placed in the control unit (the most secure unit), he would be dangerous because he would have "regular contact with prison staff" and "access to materials from which [he could] fashion homemade weapons," and he might also manage "to send coded messages instructing his associates in the Texas Syndicate to carry out murders on his behalf." Id. at C5. Hershberger further explained that inmates assigned to the control unit are evaluated monthly and are moved to the facility's "general population unit" once BOP determines that they can safely interact with other prisoners. Ibid. From there, Hershberger testified, inmates may be moved to even less restrictive units if warranted by their disciplinary record, with the eventual goal of "reintegrating [them] into a U.S. penitentiary." Ibid. Hershberger testified that this "step-down"

process "takes at least three years to complete" after the inmate is placed into the general population unit. Ibid.

c. Following the sentence-selection phase, the jury unanimously determined that the government had proved each of the non-statutory aggravating factors beyond a reasonable doubt, including the non-statutory aggravator related to petitioner's future dangerousness. Special Verdict Form 1-2; see Pet. App. A3. The jury also found numerous mitigating factors. Special Verdict Form 2-7; see Pet. App. A3. The jury unanimously determined, for example, that petitioner "ha[d] been securely detained" since 2003 and had "never attacked prison staff" or "tried to escape." Pet. App. A3, A27 n.6; see Special Verdict Form 5-6. Nine jurors also found that, if petitioner were sentenced to life imprisonment, he would be "incarcerated in a secure federal institution." Special Verdict Form 3; see Pet. App. A3, A27 n.7. The jury, however, unanimously rejected petitioner's contention that he would be "less likely, as he ages, to engage in violent behavior." Special Verdict Form 6. After weighing the aggravating factors against the relevant mitigating circumstances, the jury recommended a sentence of death. Id. at 7; see Pet. App. A3. The district court imposed that sentence. Pet. App. A3; see 18 U.S.C. 3594.

3. The court of appeals affirmed. Pet. App. A1-A19. As relevant here, petitioner argued that the government violated its disclosure obligations under Brady by withholding the information

he had requested about ADX Florence and BOP security measures. Id. at A1; see id. at A5-A8; 07-5 Pet. C.A. Br. 55, 66 n.45. The court rejected that argument. Pet. App. A7-A8. It explained that Brady requires the disclosure of evidence to a defendant only if the evidence is not only favorable to him but also material, and that the latter condition requires the defendant to show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Ibid. (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The court observed that petitioner "c[ould] only speculate as to what the requested information" he sought "might reveal." Ibid. It therefore determined he had failed to satisfy his burden of demonstrating that the information would be favorable to him or material to his case. Ibid.; see id. at A8 (noting that "[t]he 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") (quoting United States v. Agurs, 427 U.S. 97, 109-110 (1976)).

Chief Judge Gregory filed a dissenting opinion on an unrelated issue. Pet. App. A19-A26. He disagreed with the majority's determination that statutory aggravating factors related to petitioner's prior drug offenses were constitutional. Ibid. Judge Gregory "concur[red] with the rest of the [c]ourt's analysis," id.

at A19, A29 n.1, including the rejection of petitioner's Brady claim. This Court denied a petition for a writ of certiorari. 565 U.S. 1110.

4. In 2013, petitioner filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. See Pet. App. B14. As relevant here, petitioner asserted that the government had violated Brady by withholding information that BOP had incarcerated inmates at ADX Florence for more than three years. Id. at B66. To support that assertion, petitioner relied on an "informal survey" of prisoners at ADX Florence conducted by a law firm in 2010, which identified 30 inmates who, as of 2007, had been incarcerated at the facility for more than five years. Ibid. He also relied on an affidavit from his own defense investigator who, after the conclusion of direct review, had compiled information from "various sources," including publicly available websites, indicating that at least 126 inmates had been incarcerated at ADX Florence for more than five years; 54 inmates had "continuously remained" at ADX Florence after committing murder at another BOP facility; 14 of those inmates had been incarcerated at ADX Florence for more than three years; and nine inmates serving life sentences for homicides committed at other BOP facilities had been incarcerated at ADX Florence "since the imposition of their life sentences." Id. at B67-B68; see id. at B67 n.11; see id. at E1-E5.

The district court denied petitioner's motion for post-conviction relief. Pet. App. B1-B95. As a threshold matter, the court determined that petitioner was procedurally barred from raising his Brady claim in a Section 2255 motion because he had "raised th[e] same Brady claim at trial and again on appeal." Id. at B69. The court acknowledged that, after petitioner's conviction and sentence became final, he "located on his own" some "sample statistics extrapolated from raw data" that were "favorable to his position on future dangerousness." Ibid. The court determined, however, that the new information did not change petitioner's underlying "legal claim," which was "no different in substance from the claim that he lost on appeal." Id. at B70; see id. at B69 ("[T]his recast version of the claim is still seeking the same data for the same reasons."). The court observed that petitioner had made "no showing that he could not have collected and presented similar evidence when he raised his original Brady claim," id. at B69, and therefore found that petitioner's statistical data did not qualify as new evidence. See id. at B70 n.12 (explaining that Section 2255 does not permit relitigation of a claim "based on a type of evidence that was not made part of the trial record only because [petitioner] did not then make the effort to do so").

The district court further determined that, even if petitioner's claim were not procedurally barred, it lacked merit because petitioner's new evidence "d[id] not meet the materiality

standard under Brady." Pet. App. B70. The court observed that the jury had heard extensive evidence about possible lengths of confinement at ADX Florence, including Cunningham's testimony that the step-down program would take "an average of five years" to complete, that several inmates had been incarcerated at ADX Florence for much longer periods of time, and that a prisoner with a record like petitioner's would likely be held at ADX Florence for six years "before BOP officials even considered an alternate placement." Id. at B71. The court found that the "new facts" petitioner had proffered in his post-conviction motion "merely reiterate[d]" such evidence and did not "contradict the government's central argument" that petitioner "could not be permanently assigned" to ADX Florence. Id. at B72. The court therefore determined that petitioner had failed to establish any "plausible reason to believe that the additional, undisclosed BOP data now presented would have persuaded jurors that the mitigating factors outweighed the aggravating factors," and that a death sentence was therefore inappropriate. Ibid.

5. a. The court of appeals affirmed. Pet. App. C1-C9.

As an initial matter, the court of appeals agreed with the district court's determination that petitioner's Brady claim was procedurally barred. Pet. App. C6-C7. The court of appeals found the claim raised in petitioner's Section 2255 motion to be substantively "identical" to the claim that it had previously

rejected on direct appeal. Id. at C6. The only difference, the court noted, was that petitioner had "include[d] statistics" -- which had also effectively been "available to [petitioner] during his trial and direct appeal" -- in his Section 2255 motion "that were absent from the direct appeal record." Ibid. The court explained that "[t]he presentation of additional, previously available evidence to support the same claim is insufficient to make an old claim new," id. at C6, and that "allowing [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 the limitations on federal post-conviction relief, id. at C7.

The court of appeals emphasized that "evidence proffered for the first time on collateral review" cannot "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." Pet. App. C7. And it found that in this case petitioner's statistics were "compiled from public sources that he could have accessed at any time" or were based on a survey of ADX Florence prisoners that petitioner could have conducted himself. Ibid. The court thus determined that petitioner's failure to diligently seek to obtain that information before trial or direct appeal did "not render the data previously unavailable." Ibid.

The court of appeals further determined, in the alternative, that petitioner's Brady claim lacked merit, finding that petitioner had failed to show either favorability or materiality. Pet. App. C7-C9. As to favorability, the court found "no indication" that additional BOP data showing the amount of time prisoners remained at ADX Florence would be favorable to petitioner. Id. at C7-C8. It observed, for example, that the government had argued that petitioner would "remain dangerous for the rest of his life," id. at C8, and that the jury had unanimously declined to find petitioner's proposed mitigating factor that he would be "less likely, as he ages, to engage in violent behavior," Special Verdict Form 6. And the court determined that petitioner's recently compiled statistics -- like Cunningham's and Hershberger's trial testimony -- merely indicated that some prisoners remained at ADX Florence for extended periods of time, not that anyone "served a full life sentence there," and thus did not establish that any undisclosed evidence would have supported a finding that BOP could securely incarcerate petitioner for the rest of his life. Ibid.

As to materiality, the court of appeals determined that petitioner had failed to show that any undisclosed evidence would have been material. Pet. App. C8-C9. The court stated that, in the context of capital sentencing, evidence is material "if there is a reasonable probability that [its] disclosure would have

persuaded at least one juror to vote for a life sentence." Id. at C8. The court, however, found no likelihood that evidence that some inmates remained at ADX Florence for more than five years would have affected the jury's sentencing determination. Ibid. The court again noted that the jury had unanimously rejected petitioner's claim that he "would grow less violent with age." Ibid. The court accordingly reasoned that, even assuming "that the jury was convinced that [ADX Florence] could safely house" petitioner, "the requested BOP data would [not] have affected the jury's future-dangerousness determination" because petitioner "ha[d] not demonstrated that the data would support" a finding that he "would remain at [ADX Florence] for the rest of his life." Ibid.

The court of appeals also observed that petitioner's proffer of additional evidence "merely reiterate[d] undisputed information that the jurors" had already considered at trial, including expert testimony from both the government and the defense "that some inmates take longer than the average five years to complete the step-down program" at ADX Florence but that inmates were "not permanently assign[ed]" to that facility. Pet. App. C8. The court found that further statistical evidence showing "that some inmates remain at [ADX Florence] longer than the average five years" would not likely have changed the jury's decision. Ibid.

Finally, the court of appeals noted that petitioner had "failed to demonstrate * * * that the statistical evidence he requested even existed" in the government's files. Pet. App. C9. The court observed that the government submitted "unrebutted evidence" establishing that "BOP does not maintain a database of all the inmates ever housed" at ADX Florence and that the government therefore "did not possess in any accessible format" the statistical evidence petitioner sought. Ibid. The court therefore found petitioner's renewed request for information to be a "fishing expedition" of the sort that "Brady's materiality requirement seeks to foreclose." Ibid.

b. Chief Judge Gregory filed a dissenting opinion. Pet. App. C9-C23. Although he emphasized that "[t]he majority and I do not differ on the law" regarding the procedural bar on relitigating claims under Section 2255 that were considered on direct appeal, he stated that "we do differ on the facts," with Judge Gregory taking the view that petitioner had "presented new evidence" that allowed a renewal of the Brady claim on collateral review. Id. at C9. And he would have found that petitioner's Brady claim was meritorious, or warranted further development, on the theory that it "undermined" the government's evidence that lengthy terms of incarceration at ADX Florence were rare and could have strengthened Cunningham's testimony. Id. at C19-C23.

ARGUMENT

Petitioner contends (Pet. 18-20) that the Court should grant certiorari to review the court of appeals' determination that his claim under Brady v. Maryland, 373 U.S. 83 (1963), failed on the merits because he had not shown that any evidence allegedly withheld during his sentencing would have been favorable and material. He also contends (Pet. 21-30) that the court of appeals erred in determining that his Brady claim was procedurally barred on collateral review based on the court's earlier rejection of his Brady claim on direct appeal. The court of appeals' determinations are correct and do not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Contrary to petitioner's assertion (Pet. 18) that this case "offers the perfect vehicle" to consider issues underlying the merits of his Brady claim, the court of appeals properly determined that the claim was procedurally barred on collateral review.

a. In Sanders v. United States, 373 U.S. 1 (1963), this Court established that a previous federal determination of a claim made on collateral review is controlling in a subsequent round of collateral review if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching

the merits of the subsequent application." Id. at 15. In Davis v. United States, 417 U.S. 333 (1974), the Court recognized that Sanders's bar to relitigation on collateral review extends to claims that were decided on direct review. Id. at 342. Davis thus establishes that law-of-the-case principles apply to claims resolved on direct appeal and then reasserted in a motion under 28 U.S.C. 2255. See also Reed v. Farley, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in the judgment) ("[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review."); Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969).

Consistent with that precedent, it is "well settled" in the courts of appeals that a Section 2255 motion "may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances." Jones v. United States, 178 F.3d 790, 796 (6th Cir.), cert. denied, 528 U.S. 933 (1999); see United States v. Michaud, 901 F.2d 5, 6 (1st Cir. 1990) (per curiam); United States v. Sanin, 252 F.3d 79, 83 (2d Cir.) (per curiam), cert. denied, 534 U.S. 1008 (2001); United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); United States v. Roane, 378 F.3d 382, 396 n.7 (4th Cir. 2004), cert. denied, 546 U.S. 810 (2005); United States v. Webster, 392 F.3d 787, 791 & n.5 (5th Cir. 2004); White v. United States, 371 F.3d 900, 902 (7th Cir. 2004); United

States v. Lee, 715 F.3d 215, 224 (8th Cir. 2013), cert. denied, 135 S. Ct. 72 (2014); United States v. Hayes, 231 F.3d 1132, 1139 (9th Cir. 2000); United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) (per curiam); Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012), cert. denied, 133 S. Ct. 1740 (2013); Garris v. Lindsay, 794 F.2d 722, 726 (D.C. Cir.) (per curiam), cert. denied, 479 U.S. 993 (1986).

The lower courts correctly applied that "well-settled" principle to the facts of this case. Pet. App. C6. They recognized that petitioner's Brady claim was collaterally attacking his sentence on a ground already raised and rejected on direct review, differing only in the addition of statistical material that was substantively available at that time. Id. at B69-B70, C6-C7. That application of established law to the circumstances of petitioner's case does not warrant this Court's review. See Sup. Ct. R. 10; Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.") (quoting Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

b. Petitioner errs in contending (Pet. 22, 23-25) that the general prohibition against relitigating claims on collateral

review does not apply in this case because he did not actually raise a Brady claim on direct appeal. Petitioner filed motions in the district court seeking to compel the government to provide information concerning the length of incarceration at ADX Florence and other issues under both Brady and Rule 16(a)(1)(E)(i) of the Federal Rules of Criminal Procedure. See Pet. App. A6; see also 461 F. Supp. 2d at 481. After the district court denied those motions, ibid., petitioner challenged that determination on appeal on the same grounds. 07-5 Pet. C.A. Br. 55-93; see id. at 55 (contending that the district court's denial "violated his rights under Rules 16 and 17 * * * and the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution") (capitalization altered); id. at 66 n.45 (arguing that, "[b]ecause Rule 16 and Brady both require the disclosure of exculpatory evidence, this claim also alleges a violation of Brady's constitutional commands"); 07-5 Pet. C.A. Reply Brief 38-39 (describing "the question presented on appeal" as whether "the information [was] material for preparation of the defense under Rule 16" or should otherwise "have been disclosed under * * * Brady"). The court of appeals reasonably treated petitioner's Brady claim as properly presented, Pet. App. A5, and rejected it on the merits, "agree[ing]" with the district court's determination that petitioner had "failed to establish that the information requested" would have been favorable or material, id. at A8; see id. at A7-A8.

Petitioner similarly errs in arguing that the denial of his Brady claim on direct review should be construed as "'merely a ruling that [his] pleading was deficient,'" not a ruling on the merits that foreclosed relitigation of the claim on collateral review. Pet. 25 (quoting Sanders, 373 U.S. at 17). In his view (Pet. 24-25), he could not have brought a "fully supported Brady claim on direct appeal" -- and thus his claim could not have been "'fully considered'" -- because "the evidence that supported it was suppressed by the government." But petitioner cites no authority to support his assertion (Pet. 24) that a Brady claim cannot be considered on the merits unless it is "fully supported" by a proffer of the evidence that was allegedly suppressed. Indeed, petitioner argued in the district court -- and a magistrate judge initially determined -- that Brady required disclosure of the statistical information at issue based on petitioner's preliminary showing that the information would be "necessary to rebut anticipated government claims in the sentencing phase" concerning his future dangerousness, and that it was therefore "'material' on the issue of punishment and 'favorable' in that it may be used to impeach anticipated government witnesses." 2006 WL 3251738, at *4 (magistrate judge ruling). The district court and the court of appeals disagreed with the merits of that assessment. See Pet. App. A5-A8; 461 F. Supp. 2d at 481. The record contains no indication that those courts denied petitioner's claim because

he did not adequately plead his claim or that the claim was not fully considered.

c. Petitioner's challenge (Pet. 25-28) to the lower courts' determination that the statistical information he compiled in support of his motion for post-conviction relief could have been presented earlier likewise does not warrant further review.

This Court has explained that "the principles developed" in Townsend v. Sain, 372 U.S. 293 (1963), apply to the application of the relitigation bar on collateral review. Sanders, 373 U.S. at 18. Among those principles is the rule that a prisoner seeking post-conviction relief may not seek to reopen an earlier judgment denying his claim unless (as relevant here) he presents "newly discovered evidence * * * which could not reasonably have been presented" in the prior proceedings. Townsend, 372 U.S. at 317; see Pet. App. C7 (same).[2] The lower courts both determined that the statistics petitioner compiled in support of his Section 2255 motion were available to him earlier, and therefore did not qualify as "newly discovered evidence." Pet. App. B69-B70, C7. No reason

[2] That rule is especially strong in the context of a Brady claim, which is concerned with the fairness of the trial, not "the good faith or bad faith of the prosecution," 373 U.S. at 87, and therefore does not extend to the government's alleged failure to provide a defendant with information that the defense could obtain from nongovernment sources through the exercise of reasonable diligence. See, e.g., United States v. Bond, 552 F.3d 1092, 1095 (9th Cir. 2009); United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991).

exists for this Court to review that factual determination. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

In any event, petitioner's factbound challenge lacks merit. He asserts (Pet. 26-27) that some of his statistics are drawn from sources that did not exist at the time of direct appeal, including a survey of prisoners in ADX Florence conducted by a law firm in 2010 and data gleaned from third-party websites (including Wikipedia and the Federal Death Penalty Resource Counsel), some of which was uploaded to the internet after his conviction and sentence became final. As the court of appeals explained, however, petitioner has not demonstrated that he was precluded from conducting the same survey or acquiring the same raw data on which others later relied. Pet. App. C7. Although petitioner asserts that he would have encountered "logistical difficulties" in obtaining it, Pet. 27, the court of appeals found no record support for the proposition that the data was in fact unavailable, see Pet. App. C7. As for petitioner's contention (Pet. 27) that he had "insufficient time" to compile the data before his trial, even if petitioner reasonably could not have compiled the information in the two years between defense counsel's appointment and the start of his trial, ibid., he provides no explanation for his

failure to do so in the more than two-and-a-half additional years that passed before he filed his opening brief on direct appeal.

d. Finally, petitioner errs in asserting (Pet. 29) that the court of appeals' application of the relitigation bar is inconsistent with this Court's decision in Banks v. Dretke, 540 U.S. 668 (2004). In Banks, a state prosecutor's office maintained an open-file discovery policy and affirmatively represented to the defendant that it had turned over all exculpatory material, but in fact did not disclose information about a paid informant and rehearsal sessions with a prosecution witness. Id. at 675-678. On federal habeas review, the Court rejected the argument that "when the prosecution represents that all such material has been disclosed," a defendant nevertheless "must scavenge for hints of undisclosed Brady material." Id. at 695. The Court accordingly concluded that, in the context of that case, "the State's suppression of the relevant evidence" established "cause" for the defendant's failure to develop the facts to support his claim in prior state-court proceedings. Id. at 691; see id. at 693 ("[B]ecause the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, Farr's connections to Deputy Sheriff Huff."). The Court did not address the application of the relitigation bar to a situation where, as

here, the defendant could reasonably have obtained information he sought from other sources at the time of his trial and direct appeal, but did not do so.

2. In any event, the court of appeals correctly determined that, even if petitioner's claim were not procedurally barred, it failed on the merits because he did not show that any evidence allegedly withheld during his capital trial would have been favorable and material. Pet. App. C7-C9. A violation of Brady consists of three parts: first, the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; second, "that evidence must have been suppressed by the State, either willfully or inadvertently"; and third, "prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999); see Brady, 373 U.S. at 87. Brady's prejudice element requires proof of materiality, under which the defendant must establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-434 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)).

The court of appeals correctly determined, consistent with the district court, that petitioner failed to establish that the information he sought satisfied those elements. Pet. App. C6-C9; see id. at B70-B72. The court of appeals noted, for example, that

the jury's unanimous rejection of petitioner's assertion that he would be "less likely, as he ages, to engage in violent behavior," Special Verdict Form 6, significantly reduced the probative value of evidence that petitioner might be kept at ADX Florence for more than five years, particularly given that it would not rebut the consistent testimony of defense and government experts that prisoners were not permanently incarcerated at that facility. See Pet. App. C8. The court further observed that petitioner's recently compiled statistics largely repeated testimony that was already before the jury, including the undisputed fact that some inmates take more than five years to transition to less restrictive facilities and that some prisoners have remained at ADX Florence for extended periods of time. Ibid. And the court found that petitioner had failed to show that the statistical compilations he requested "even existed" in the government's files in light of BOP's record-keeping practices. Id. at C9; see United States v. Agurs, 427 U.S. 97, 106 (1976) (explaining that Brady applies only to information "in the possession of the prosecutor").[3]

[3] Petitioner asserts (Pet. 20) that, in 2011, the government "produce[d] the same BOP records requested here" in United States v. Watland, No. 11-CR-38 (D. Colo.). But the defendant in Watland did not request the same BOP records as petitioner. Compare Pet. 20 (highlighting a request for "the inmate's housing history"), with Pet. App. A6 (noting petitioner's request for "[d]ata showing median length of stay, range of length of stay and standard deviation of the distribution of length of

To the extent that petitioner argues the merits of his claim, he suggests (Pet. 19-21) only that "empirical BOP data" would have been favorable and material because it would have undermined the testimony of the government's expert witness, former ADX Florence warden Hershberger, regarding the three-year "step-down" program for reintegrating inmates held at ADX Florence back into a U.S. penitentiary. As the court of appeals explained, however, petitioner's statistics are not inconsistent with Hershberger's testimony that inmates are not intended to be permanently assigned to ADX Florence, and that the step-down program is designed to be completed in a minimum of three years. Pet. App. C7-C8; see C.A. App. 824-872 (Hershberger testimony). Nor would evidence of a longer average time likely have affected the jury's sentencing determination in light of the evidence, with which the jury's unanimous conclusion accords, that petitioner would be dangerous for the rest of his life. Pet. App. C7-C8. Those factbound determinations do not warrant further review by this Court.

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stay at Florence ADX for all inmates since it was opening in 1994 to the present time").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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