No. 18-6826

IN THE SUPREME COURT OF THE UNITED STATES

Carlos Caro, Petitioner,

vs.

United States of America, Respondent.

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

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A unanimous panel of the Fourth Circuit recently held that a capital defendant has a right to have Mark Cunningham, Ph.D., a psychologist and prison violence risk assessment expert, testify at a Virginia state court trial that a defendant will not pose a risk of future dangerousness to the state's prison community if not sentenced to death. *See Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018). In reversing the district court's denial of habeas relief on the claim that the state trial court's exclusion of Dr. Cunningham's testimony violated the Eighth and Fourteenth Amendments, the Fourth Circuit found Dr. Cunningham to be "qualified," *id.* at 618, and that it was appropriate for him to assess Lawlor's future dangerousness against the backdrop of "evidence of prison conditions and security measures in the face of the jury's choice between [life in prison without parole] and the death penalty." *Id.* at 631. Because it was with respect to a claim brought under 28 U.S.C. § 2254(d)(1), the Fourth Circuit observed that "[i]t is likewise clearly established that the sentencing body should be presented with *all possible relevant information about a defendant's probable conduct in prison*." *Id.* at 628 (emphasis added).

Yet, in *United States v. Caro*, 733 Fed. Appx. 651 (4th Cir. 2018) (unpublished), a panel majority of the same court held that Dr. Cunningham, despite his use of the same methodology he employed in *Lawlor* to assess Caro's future dangerousness based on evidence of group behavior within the relevant prison community, in this case, the prison population at ADX Florence, is not entitled to review available empirical data maintained by the Bureau of Prisons ("BOP") that would inform his judgment to the most accurate extent possible regarding the risk Mr. Caro would pose to the federal prison community if not sentenced to death. The decision in *Lawlor*, with its recognition of the relevance and significance of accurate violence risk assessment evidence at capital sentencing, especially with regard to the particular community that would be impacted by

a jury's decision not to impose the death penalty, "prison society" and not exclusively the society at large, 909 F.3d at 629-31, contributes significantly to Petitioner Caro's reasons why the Court should grant certiorari and reverse the decision of the Fourth Circuit panel majority in which it affirmed the denial of relief on the claim brought pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The Fourth Circuit's decision in *Caro* is simply incongruous with the panel majority's decision in *Lawlor*.

In summary, Caro claimed in the district court in his § 2255 petition that he was denied his Fifth Amendment right to due process under *Brady w*here the Government withheld material exculpatory evidence in the possession of the BOP that reflects how long the BOP held similarly-situated inmates and would hold Caro at ADX Florence if the jury did not sentence him to death. *See* Opening Brief of Appellant Carlos David Caro, *United States v. Caro*, Fourth Cir. No. 16-1, Doc. 25-1 at 22-40. After being retained by the defense prior to trial, Dr. Cunningham requested the relevant ADX Florence data from the BOP. It is now clear that such data would have impeached the testimony of retired BOP Warden Gregory Hershberger elicited by the prosecution at the selection phase of capital sentencing to the effect that an inmate would likely be held in the BOP's most secure setting at ADX Florence for only three years before being stepped down to less secure BOP institutions. Moreover, it would have undermined the Government's repeated statements in closing argument that Caro would serve a maximum of only three years at ADX Florence if not sentenced to death. *See* JA 923-24, 979. This Court ruled in *Kyles v. Whitley*, 514 U.S. 419, 444-45 (1995), that the "likely damage" to the prosecution's case had the exculpatory evidence not been suppressed at trial "is best understood by taking the word of the prosecutor" in closing argument. The suppressed BOP data was clearly material here due to the fact that the

Government returned repeatedly in its closing to Warden Hershberger's inflexible testimony concerning the three-year step-down program.

The BOP data also would have bolstered the testimony of Dr. Cunningham that inmates are routinely held at BOP's most secure location well past three years, including one who has been held there for 27 years, thus assuring that Caro would not pose a danger in the future to other inmates and correctional officers if the jury did not impose a sentence of death. In his partial dissent, Chief Judge Gregory stated that, had the BOP data not been suppressed by the Government at trial, Dr. Cunningham would have been able "to testify about what the BOP *actually does* with high risk inmates, rather than what it aspires to do . . . Rather than rely on expert witnesses, the BOP data would have conclusively shown that the Government can – and routinely does – keep dangerous inmates at Florence ADMAX securely and for far longer than the aspirational three year step down program suggests." *Caro*, 733 Fed. Appx. at 681 (Gregory, C.J., *dissenting in part*) (Appx. C-20-21) (emphasis in original).

A. The important national questions omitted from the Government's BIO.

While it may be advantageous in the present exercise for the Government to characterize, as it has, Caro's Petition as presenting narrow, parochial claims affecting only Caro and not the stuff of a grant of certiorari under the Court's practice, *see* BIO at 19, 21, 24-25, that would be a mischaracterization of what Caro has placed before the Court. The Government ignores Caro's argument that the geography of where a capital defendant is tried appears to govern whether the BOP will be compelled to produce data it maintains regarding how long federal prisoners sentenced to death can be held in virtual isolation at ADX Florence before being stepped down to less secure institutions. As Caro noted in the Petition for Writ of Certiorari, with citation to relevant docket items, had he been tried in the District of Colorado, the Government would have

been ordered to produce to Dr. Cunningham its data on average length of incarcerations at ADX Florence and other data relevant to his risk assessment. *See* Petition for Writ of Certiorari at 20 (*citing United States v. Watland*, D. Colo. No. 1:11-cr-38-JLK (D. Colo.)). Of course the magistrate judge in Caro's case in the Western District of Virginia similarly ordered the data disclosed but the district court reversed that ruling when the Government objected. JA 49, 144. The district court's ruling constituted error, and so did the Fourth Circuit's decision to affirm it.

The Government also fails to engage with Caro's argument that the Fourth Circuit's decision allows for the propagation of false and misleading evidence from Warden Hershberger that any and all federal capital defendants can be held at ADX Florence for only three years before being stepped down to less secure institutions where they presumably will commit other homicides. *See* Petition for Writ of Certiorari at 19. Hershberger gave testimony in the United States District Court for the Eastern District of Texas in two capital trials that occurred after Caro's trial in which he again maintained that the defendants could only be held at ADX Florence for three (3) years before being stepped down if not sentenced to death. *See id.* n. 2. Empirical BOP data clearly contrary to Hershberger's anecdotal recollections establishes both the favorability and materiality prongs of the test for a violation of *Brady* under *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The Court should grant certiorari and reverse the judgment of the Fourth Circuit in order to vindicate the Eighth Amendment's interest in the accuracy and reliability in the imposition of capital sentences. *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994).

Caro treats *seriatim* the Government's procedural bar argument and its argument on the merits of Caro's *Brady* claim.

B. The Government's suppression of *Brady* material necessarily insured there could not have been a full and fair determination of the merits on direct appeal.

Caro alleged in the Petition that the Fourth Circuit's procedural bar conflicts with the decisions of this Court in *Sanders v. United States*, 373 U.S. 1 (1963), and *Banks v. Dretke*, 540 U.S. 668, 690 (2004). Petition at 25, 29. The Government misconstrues the Court's decision in those cases and their applicability here. *Sanders* actually bolsters Caro's argument that the district court here should have reached the merits of the *Brady* claim in the post-conviction proceeding brought under 28 U.S.C. § 2255 instead of ruling the claim to have been procedurally barred. The Government fails to address the salient portion of *Sanders* that holds that a claim brought without factual support in an initial § 2255 motion may be brought, with factual support, in a subsequent § 2255 motion. The Court ruled that where a first motion "was denied because it stated only bald legal conclusions with no supporting factual allegations," "a denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient." *Sanders*, 373 U.S. at 17. As the Government notes, the principle of *Sanders* has been extended to situations where a claim brought on direct appeal is later raised in a § 2255 motion. *See* BIO at 20 (*citing Davis v. United States*, 417 U.S. 333 (1974)).

Prior to trial, the district court found that Caro stated only an unsupported legal conclusion that *Brady* was violated. JA 149. Yet, on § 2255 appeal, the panel majority ruled that Caro "raised an identical claim" on direct appeal notwithstanding that he lacked the BOP data with which to support the favorability and materiality prongs of *Brady*. *Caro*, 733 Fed. Appx. at 659; Appx. C-6. As Chief Judge Gregory stated in his partial dissent:

> 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.

733 Fed. Appx. at 664; Appx. C-9.

The Government's effort to distinguish *Banks*, 540 U.S. 668, is equally misguided because, in *Banks* this Court did reach "the application of a relitigation bar." BIO at 26-27. The Court ruled that "cause" in the form of suppression by the prosecution of materially favorable evidence and "prejudice" in the form of *Brady* materiality, that is, a reasonable probability of a different outcome had the evidence been disclosed, would excuse the procedural default and result in the grant of habeas relief. 540 U.S. at 690. That principle should, based on the Court's precedents, extend from procedural default in a § 2254 case to the procedural bar upon which the Fourth Circuit relied in this § 2255 matter.

The circuit decisions included in the Government's string citation that would deny review of a claim on collateral review "absent exceptional circumstances," after some form of the claim was raised on direct appeal, offer no support. BIO at 20 (*citing Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999)). One of the cases cited by the Government actually supports Caro's claim.

In *United States v. Hayes*, the only decision of the 12 cited by the Government in which *Brady* is even tangentially implicated, the Ninth Circuit ruled that "[w]hen a defendant has raised a claim *and has been given a full and fair opportunity to litigate it on direct appeal*, that claim may not be used as basis for a subsequent § 2255 petition." 231 F.3d 1132, 1139 (9th Cir. 2000) (italics added). In a mail and wire fraud case, Hayes alleged that the Government withheld exculpatory SEC records in violation of *Brady* but the Ninth Circuit held on direct appeal that Hayes had "independent access to the SEC documents." *Id.* *Hayes* would only support the Government's position here if Caro had "independent access" to the BOP data on ADX Florence,

raised the *Brady* claim on direct appeal and lost on the merits, and later sought to raise the claim in his § 2255 proceeding. Of course Caro and his risk assessment expert, Dr. Cunningham, had no access to the BOP data on average length of stay at ADX Florence and related data prior to trial and Caro therefore could not fully and fairly litigate that claim. The Fourth Circuit erred in erecting a procedural bar to the claim.

In none of the other 11 cases did the purported exceptional circumstance upon which a petitioner relied specify that the prosecution suppressed evidence exclusively in its control that was both favorable to the defense and material in violation of *Brady*. *Jones* sought to litigate an error in the application of a Sentencing Guideline amendment that the Sixth Circuit held either to be waived for failure to raise it on direct appeal or barred as not constituting an "exceptional circumstance" or giving rise to "a complete miscarriage of justice," but it was, in either case, an error of the defendant's own making. 178 F.3d at 796. The Government does a disservice to the Court by failing to discuss with regard to the cases it cites the actual claims brought in § 2255 proceedings or compare them to the claims brought on direct appeal, which would illuminate that the cases contained in the string citation merely show that a petitioner sought to relitigate precisely the same claim on collateral review.

In *United States v. Michaud*, 901 F.2d 5, 6 (1st Cir. 1990), the First Circuit held only that "certain other claims raised in the § 2255 motion were decided on direct appeal and may not be relitigated under a different label on collateral review." *Id.* None of Michaud's claims on direct appeal alleged a *Brady* claim. *See United States v. Michaud*, 860 F.2d 495 (1st Cir. 1988).

In *United States v. Sanin*, 252 F.3d 79, 83 (2d Cir. 2001), the Second Circuit denied relief on a direct appeal claim that alleged a violation of the Confrontation Clause. On § 2255 appeal, the court held there was no change in the law under this Court's decision in *Gray v. Maryland*, 523

U.S. 185 (1998), that altered the law in a manner that conferred additional rights to confrontation that could be brought on collateral review. Sanin did not allege a *Brady* claim.

In *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3rd Cir. 1993), the Third Circuit refused to allow DeRewal to repackage a Fourth Amendment suppression claim that lost on direct appeal as a habeas claim of government misconduct. *Brady* was not implicated.

In *United States v. Roane*, 378 F.3d 382, 396 n. 7 (4th Cir. 2004), the Fourth Circuit set forth in a footnote four claims raised in the movant's § 2255 motion that "were already addressed and rejected on direct appeal" and were, therefore, barred from relitigation on collateral review. Two claims raised purely legal issues while two other claims raised issues of sufficiency of the trial evidence. None of Roane's claims was predicated on new evidence or newly-unearthed evidence that had been suppressed by the Government.

In *United States v. Webster*, 392 F.3d 787, 791 & n.5 (5th Cir. 2004), the Fifth Circuit held that the petitioner could not bring on collateral review the claim that the trial court erred in replacing a juror with an alternate where precisely the same claim was raised on direct appeal. The claim did not implicate *Brady*.

In *White v. United States*, 371 F.3d 900, 902 (7th Cir. 2004), the Seventh Circuit held that the petitioner's claim that he is not an armed career criminal, which was raised in an *Anders* brief and dismissed, could not be raised in a subsequent § 2255 proceeding. The petitioner's ACCA claim did not implicate *Brady*.

In *United States v. Lee*, 715 F.3d 215, 224 (8th Cir. 2013), the Eighth Circuit held that Lee was not entitled to consideration of a claim in his § 2255 petition that his federal death sentence was disproportional to the non-capital sentence imposed on his co-defendant and therefore

violative of the Eighth Amendment where the claim had been raised and rejected on direct appeal. The claim did not implicate *Brady*.

In *United States v. Pritchard*, 875 F.3d 789, 791 (10th Cir. 1989) (per curiam), the Tenth Circuit ruled that Pritchard could not bring in § 2255 proceedings two claims that were "fairly encompassed" in his direct appeal absent there being "an intervening [change of] law of the circuit," which had not occurred to justify reconsideration. The claim did not implicate *Brady*.

In *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012), a panel majority held that the Eleventh Circuit's decision to deny sentencing relief on the defendant's claim that the conduct underlying his state court conviction for battery of a law enforcement officer precluded sentencing as an armed career criminal, did not require reconsideration as an intervening change in the law after the Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010). There was no *Brady* claim.

In *Garris v. Lindsey*, 794 F.2d 722, 726 (D.C. Cir. 1986) (per curiam), the United States Court of Appeals for the District of Columbia ruled that a habeas petitioner was not entitled to litigate the claim that he had been denied his right to *pro per* representation where he had earlier raised that claim unsuccessfully on appeal to the District of Columbia Court of Appeals. The appellant brought no *Brady* claim.

The Government posits that the lower federal courts were justified in relying on the relitigation bar because Caro failed to demonstrate he met the principle outlined in *Townsend v. Sain*, 372 U.S. 293 (1963), that the new evidence of length of stays at ADX Florence could not have been presented in the earlier proceedings. BIO at 24. In summary, the Government alleges the data was available to Caro earlier and "did not qualify as 'newly discovered evidence.'" *Id.*

The rulings below demonstrate disdain for the command of 28 U.S.C. § 2255, which requires an evidentiary hearing at which the district court will determine the issues and make findings of fact and conclusions of law "[u]nless the motion and the files and the records conclusively show that the prisoner is entitled to no relief." The Fourth Circuit, like the district court, manufactured of whole cloth its conclusion that Caro could have developed the evidentiary record he proffered in support of the *Brady* claim in the § 2255 proceeding if he had only tried.

Chief Judge Gregory noted the unreasonableness of the panel majority's conclusion as to availability in his partial dissent:

> Caro has a legitimate justification for not providing the 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 form in November 2010, which the [FPD Investigator Susan] 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 source" doctrine only when the evidence was either already known by the defendant or reasonably accessible. But Caro had no knowledge of or access to the underlying BOP data. Nor is the evidence reasonably available from other sources when even diligent investigation only exposed 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 Caro, 733 Fed. Appx. at 676-77; Appx. C-18 (*citing Townsend*, 372 U.S. at 317; *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996) (emphasis in original).

The faultiness of the panel majority's appellate factfinding was pointed out in the additional declaration of FPD Investigator Richardson, which was attached to Caro's Petition for Rehearing and for Rehearing *En Banc*, Fourth Cir. No. 16-1, Doc. 82 at 86-91, Appx. B, and later to the present Petition for Writ of Certiorari. Ms. Richardson pointed out, in contrast to the panel

majority's supposition as to the ease with which the data could have been unearthed, how onerous the task was of gathering the ADX Florence inmate data, including that which supported her Tables that were attached, along with her 2013 declaration, to Caro's response to the Government's motion to dismiss:

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

Appx. E, ¶ 3. Even with the additional post-trial resources available to conduct the investigation, Ms. Richardson acknowledged that her research was "incomplete and under-represented the total number of inmates who have been designated to ADX Florence for more than three years" and failed to account for inmates who were held in the Control Unit at USP-Marion prior to the opening of ADX Florence. JA 1751 ¶¶ 5, 6. These facts undercut the panel majority's relitigation bar and demonstrate that a more robust showing of favorability and materiality would have been made with the BOP's empirical data.

Certiorari should be granted to correct the panel majority's misapplication of § 2255(b).

C. *Brady* materiality was proven; in the alternative, BOP production is required because the Fourth Circuit's merits ruling was made on an inadequate record.

When it finally reaches the merits, the Government argues that the district court and Fourth Circuit were correct in finding that the suppressed BOP data would not have been favorable or material and thus Caro would not be entitled to relief on the *Brady* claim. *See* BIO at 27. These conclusions are undermined by the Government's concession in its Fourth Circuit brief that, "in the course of his habeas proceedings, Caro presented some statistical evidence extrapolated from raw data he located independently, *that appears to favor his position on future dangerousness*." *See* Brief of Appellee, *United States v. Caro*, Fourth Cir. No. 16-1,

Doc. 74 at 40 (emphasis added). It did more than that; it proved materiality as well – for the reasons stated in the Petition (at 8-11).

With respect to *Brady* materiality, Caro rests on the data set forth in the Petition (at 13-14), except to highlight that, in contrast to Warden Hershberger's opinion that stays at ADX Florence are largely fixed at three years, Caro attached evidence to his § 2255 petition that showed that 43 inmates remained at ADX Florence for more than eight years, 22 for more than 13 years, three for more than 18 years, and one for more than 27 years. In dissent, the chief judge listed the factors that prove *Brady* materiality under this Court's precedents, and concluded that, "[a]pplying these principles, the BOP data is material because its absence undermines confidence in a juror's vote for death." *See Caro*, 733 Fed. Appx. at 680; Appx. C-20 (citations omitted).

The suppression did three things that fundamentally disadvantaged Caro at sentencing. First, it deprived the jury of accurate sentencing information about how long the BOP can securely house similarly dangerous inmates. In addition, it deprived Caro of evidence with which to disprove Warden Hershberger's testimony about the inflexibility of the three-year step-down program. Finally, the suppression of BOP data deprived Dr. Cunningham of the ability to conduct a risk assessment of Caro's future dangerousness that would impact the jury's decision as to whether Carlos Caro should live or die. *Id.* at 682; Appx. C-21.

As Chief Judge Gregory concluded:

> 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 demands 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.

*Id.*at 684; Appx. 23.

CONCLUSION

This Court should grant Carlos Caro's Petition for Writ of Certiorari and order that the writ issue as to his capital sentence. In the alternative, the Court should grant the writ with directions that the lower federal courts order disclosure of the suppressed BOP data on length and conditions of stays at ADX Florence and, consistent with § 2255(b), order an evidentiary hearing before deciding Caro's § 2255 motion.

Respectfully submitted this 14th day of May, 2019.

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