United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 18-40598

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICKY ALLEN FACKRELL; CHRISTOPHER EMORY CRAMER,

Defendants—Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:16-CR-26

Before STEWART, DUNCAN, and WILSON, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

We withdraw our prior opinion in *United States v. Fackrell*, ---F.3d---, No. 18-40598, 2021 WL 926905 (5th Cir. Mar. 11, 2021). The following opinion is substituted therefor.

Defendants Ricky Fackrell and Christopher Cramer were convicted and sentenced to death for the prison murder of Leo Johns, a fellow inmate. They appeal their convictions and sentences on numerous grounds. We AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

Ricky Allen Fackrell and Christopher Cramer were imprisoned at USP Beaumont. Both were convicted of the June 2014 prison murder of Leo Johns. Fackrell was a lieutenant in the Soldiers of Aryan Culture ("SAC"), a prison gang whose members abstained from drinking, drugs, and gambling. Members were recruited based on their beliefs in white supremacy and paganism. Cramer was a general in the SAC, and Johns was a member.

1. Fackrell

Fackrell has several previous convictions, including convictions for aggravated assault, robbery, and possession of a prohibited object. His prison record denotes several instances of misconduct including fights and property damage. He was also charged with the murder of a second inmate three months after Johns's death.

As to Johns's murder, Fackrell argued that he and Cramer only agreed to assault Johns. Johns had been drinking and gambling in violation of SAC rules, and Cramer determined that he needed to be punished. Fackrell and Cramer stabbed Johns with shanks in an inmate's cell. Fackrell argues that he stabbed Johns but left the cell before he died and that Cramer "finished Johns off."

At trial, Fackrell's defense was that he neither intended to kill nor killed Johns. Instead, Fackrell argued that he was present while Cramer killed Johns, that Cramer ordered him to participate in the assault, and that they only planned to "touch up [Johns] a little bit." The jury rejected Fackrell's defense and found him guilty of first-degree murder.

During the penalty phase of trial, Fackrell's mitigating evidence centered on his childhood. His father was an alcoholic and his mother was often working to support the family. They frequently moved around, and

Fackrell was bullied and abused by his father and brothers. He began drinking, using drugs, and committing crimes with his family when he was between 10 and 14 years old.

Fackrell's other mitigating evidence centered on his mental health diagnoses and ability to be reformed in structured environments like that of USP Florence-ADMAX ("ADX"), a maximum-security prison in Florence, Colorado. Fackrell was sent to ADX to await trial for Johns's murder.

Though individual jurors found that Fackrell had proven some mitigating factors, the jury sentenced him to death.

2. Cramer

Christopher Cramer was Fackrell's co-defendant at trial and sentencing. He has prior convictions for bank robbery and use of a firearm in relation to a crime of violence. He also has committed several instances of prison misconduct including assaults on other inmates.

At trial, Cramer's defense to Johns's murder was that he only intended to assault Johns and did not intend to kill him. He argued that his previous visits to Johns's cell on the day of Johns's murder indicated that he lacked the intent to kill Johns. The jury rejected his argument and convicted him of first-degree murder.

At sentencing, Cramer's mitigating evidence focused on his dysfunctional childhood and his ability to be safely housed at ADX. Cramer had a difficult upbringing—his mother was a prostitute and a drug addict; his father was a pimp and a drug dealer. His family moved frequently and slept in cars and parks. Due to his parents' absence, Cramer had to care for his younger siblings. He stole food to feed them and "was his siblings' hero."

His other mitigation evidence centered on ADX's ability to safely house him if he was sentenced to life. He argued that he was unlikely to ever leave a maximum-security prison given the severity of his crimes.

Both Defendants were convicted of first-degree murder and sentenced to death. They now appeal their convictions and sentences.

II. DISCUSSION

Fackrell and Cramer argue that the Government and the district court committed numerous errors at trial and at sentencing. We review each alleged error in turn.

A. Severance

Prior to trial, Fackrell and Cramer moved to sever. Fackrell requested separate trials, while Cramer requested separate trials, separate penalty-phase presentations, and separate penalty-phase juries. Both argue that the district court erred by denying their motions to sever. We disagree.

We review the denial of a motion for severance for abuse of discretion. *United States v. Rocha*, 916 F.2d 219, 227 (5th Cir. 1990).

"Under Rule 14, '[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.'" *United States v. Snarr*, 704 F.3d 368, 396 (5th Cir. 2013) (alteration in original) (quoting FED. R. CRIM. P. 14).

Even if prejudice is shown, severance is not required. *Zafiro v. United States*, 506 U.S. 534, 538–39 (1993). The district court still has discretion to grant relief. *Id.* at 539. "Severance is proper 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or

innocence.'" *United States v. Mitchell*, 484 F.3d 762, 775 (5th Cir. 2007) (quoting *Zafiro*, 506 U.S. at 539).

1. Fackrell's severance arguments

Fackrell argues that the joint trial prejudiced his rights at the guilt phase because the Government introduced Cramer's statements that implicate Fackrell in Johns's murder. Cramer told his cellmate that Fackrell volunteered to go to Johns's cell, that Fackrell jumped Johns from behind, and that he and Fackrell killed Johns. The Government introduced the statements under Federal Rule of Evidence 801(d)(2)(A), and Fackrell argues that the statements were prejudicial, lacked reliability, and would not have been introduced against him if he were tried separately.

He also argues that the joint trial prejudiced him during the penalty phase because it allowed Defendants to be conflated, their mitigation cases to be compared, and Cramer's personality disorder and prison assault history to be introduced.

Fackrell's arguments are unpersuasive. Cramer's statements are not so prejudicial as to be an abuse of the trial court's discretion in admitting them. His statements were not given in a custodial context, voiding any suspicion of unreliability present in other cases. *See United States v. Ebron*, 683 F.3d 105, 133 (5th Cir. 2012). Furthermore, Cramer's statements likely could have been introduced against Fackrell even in a separate trial as a statement against interest under Federal Rule of Evidence 804(b)(3).

Rule 14 does not mandate severance in any case, including capital trials. *See* FED. R. CRIM. P. 14. The introduction of Cramer's previous offenses, mental health history, and mitigation case was not so prejudicial as to curtail the district court's discretion to deny severance. Ample evidence of each defendant's criminal histories and prison misconduct is in the record, and mere surplusage of this evidence does not compel severance. *See United*

States v. Bieganowski, 313 F.3d 264, 287 (5th Cir. 2002) ("A spillover effect, by itself, is an insufficient predicate for a motion to sever."). Nor did the joint trial deny Defendants the right to individualized sentencing under *Lockett v. Ohio*, 438 U.S. 586 (1978). Any conflating of the Defendants or the evidence against each of them was remedied by the district court's instructions, and we "must presume that the jury heard, understood, and followed the district court's instructions." *United States v. Bernard*, 299 F.3d 467, 476 (5th Cir. 2002).

2. Cramer's severance arguments

Cramer's severance arguments mirror Fackrell's, mainly that he was prejudiced by evidence of Fackrell's prior convictions and prison misconduct. Those arguments fail under *Bieganowski* as well.

Notably, Cramer argues that he was prejudiced at sentencing when the Government introduced evidence of Fackrell's involvement in a second prison murder. After Fackrell was charged in Johns's murder, he was charged in the murder of another inmate, Ronald Griffith.[1] The jury heard that only three months after Johns's murder, Fackrell brutally stomped on Griffith's head and said that he "didn't really care that he stomped [Griffith] out."

While evidence of Fackrell's role in the Griffith murder was more shocking than evidence of other crimes and prison incidents, we cannot conclude that this evidence compels severance. The jury's similar findings on the Defendants' mitigating factors reflect the similarity between the Defendants' mitigating cases rather than any confusion by the jury. Nothing suggests that the jury failed to follow the district court's instructions and

[1] Griffith's murder will be further discussed *infra* Section G.

impermissibly considered the Griffith murder when evaluating Cramer's case for life.

We find no error in the district court's denial of Defendants' motions to sever and thus affirm.

B. Mental States under 18 U.S.C. § 3591(a)(2)

After a defendant is convicted of a capital offense, the jury must determine whether the defendant had a requisite mental state under 18 U.S.C. § 3591(a)(2) before sentencing him to death. Fackrell and Cramer argue for the first time that the Government failed to prove that they had one of the requisite mental states when they killed Johns. We disagree.

Since Defendants failed to raise this issue at trial, review is for plain error. *United States v. Avants,* 367 F.3d 433, 443 (5th Cir. 2004). To establish plain error, Fackrell must prove that "(1) there was error, (2) the error was plain, (3) the error affected his 'substantial rights,' and (4) the error seriously affected 'the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Jones*, 489 F.3d 679, 681 (5th Cir. 2007) (quoting *United States v. Olano*, 507 U.S. 725, 732–734 (1993)).

18 U.S.C. § 3591(a)(2)(A)–(D) lists four mental states. The Government must prove at least one mental state in § 3591(a)(2) beyond a reasonable doubt. It must prove that Defendants:

> (A) intentionally killed the victim;
>
> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

18 U.S.C. § 3591(a)(2)(A)–(D).

Fackrell argues that the Government did not prove that he had a requisite mental state when he participated in Johns's murder. He argues that the jury could not have concluded that he had one of the requisite mental states in § 3591(a)(2)(B)– (D) because they all require actions that *result* in the death of the victim. Because the coroner did not determine which blow was fatal, Fackrell argues that the jury could not have determined that he was the but-for cause of Johns's death. In his view, the jury convicted him of first-degree murder because he aided and abetted in Johns's murder, and this level of culpability does not demonstrate that he had a requisite mental state.

This argument fails because aiding and abetting liability does satisfy the requisite mental states in § 3591(a)(2)(C) and (D). *See United States v. Williams*, 610 F.3d 271, 287 (5th Cir. 2010); *United States v. Paul*, 217 F.3d 989, 998 (8th Cir. 2000) . Even if the jury convicted Fackrell on the basis of aiding and abetting in Johns's murder, that finding is a sufficient basis for concluding that he had the requisite mental states under § 3591(a)(2)(C) and (D). We thus cannot conclude that there was error, let alone plain error. We affirm.

C. Prosecutorial Misconduct in Statements

Fackrell and Cramer challenge several statements made by the Government at trial. They jointly challenge the Government's statements about (1) future dangerousness and the jury's responsibility for Defendants' death sentences and (2) mitigation evidence, arguing that the statements violated their Fifth and Eighth Amendment rights. Fackrell also challenges

the Government's statements about getting justice for the victim and the lack of evidence of his intent to kill Johns.

1. Joint Challenge of Statements on Future Danger and Jury Role in Sentencing

Defendants jointly challenge the Government's statements on future dangerousness and the jury's responsibility for their death sentences. They argue that the Government committed misconduct by eliciting testimony from witnesses about their ability to be released from maximum-security prison and then arguing that Defendants were likely to pose future danger. They also argue that the Government erred by implying that an appellate court would review a sentence of death. We disagree.

a. Future Danger

During the penalty-phase of trial, both the Government and Defendants called experts on future dangerousness. Defendants called Dr. Gravette, and the Government called Dr. Berkebile. Both testified about several maximum-security inmates with no relation to this case, including David Hammer. Hammer was originally sentenced to death, a court vacated his death sentence, and he was sentenced to life in a maximum-security prison. Hammer then killed another inmate.

The Government's future dangerousness argument used the experts' testimony about Hammer and other inmates to suggest that even maximum-security prisons could not contain some inmates. The Government further suggested that Defendants could one day be released from maximum-security prison and pose further danger in a less secure prison environment.

Though the record is not clear as to whether Defendants objected to the statements, Defendants' arguments fail even when reviewed for abuse of discretion. *See Snarr*, 704 F.3d at 399.

The Federal Death Penalty Act permits the introduction of aggravating and mitigating evidence unless "its probative value is outweighed by the danger of creating unfair prejudice." 18 U.S.C. § 3593(c). Our court has made clear just how broad that evidentiary standard is, concluding that "[w]here the alternative to the death penalty is life imprisonment, the government 'is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.'" *Snarr,* 704 F.3d at 394 (quoting *Simmons v. S. Carolina*, 512 U.S. 154, 165 n.5 (1994)). Defendants' arguments therefore fail.

b. Jury Responsibility

Defendants also argue that the testimony about Hammer's death sentence later being vacated allowed the jury to think it was not ultimately responsible for their death sentences.

Defendants failed to object to the testimony at trial, so review is for plain error. *See Avants*, 367 F.3d at 443.

The Government asked Dr. Gravette about David Hammer, and the testimony was as follows:

> Question from the Government: "And [Hammer] was originally given a death sentence, but for some legal reasons that sentence was later overturned. Am I right so far?"
>
> Answer from Dr. Gravette: "Yes ma'am."

This testimony came up again when the Government examined Dr. Berkebile and said Hammer "had received a death sentence [and] it was converted to life . . . ." Defendants argue that this testimony violated the Eighth Amendment by permitting the jury "to believe that the responsibility for

determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985).

This argument is incorrect because this case is distinguishable from *Caldwell.* In *Caldwell*, the Supreme Court vacated a death sentence after the prosecutor told the jury that their decision was not the final decision and that it would be reviewed by the Supreme Court. *Id*. at 325–26 (1985). Here, the Government's statements are substantially different from those requiring reversal in *Caldwell*. The Government's statements were not in error, let alone plain error. We affirm.

2. Joint Challenge to Mitigation Statements

Defendants challenge the Government's statements that referred to mitigating evidence as evidence mitigating against the crime committed, rather than as evidence mitigating against the imposition of the death penalty. After Defendants presented mitigating evidence related to their childhood traumas, the Government responded with,

> "Well, you may very well find that that's a true statement, that you find that the defense has proven that by a preponderance of the evidence. But does that mean that it mitigates against a sentence of death? Does that mean the fact that if things were different, then he wouldn't have committed the crime or he wouldn't have been in prison?"

Defendants did not object to this statement. The Government later asked whether evidence about Fackrell's father's drinking mitigated Johns's murder. Defendants objected to that statement, but their objections were overruled.

We review Defendants' evidentiary challenges for abuse of discretion. *See Ebron*, 683 F.3d at 133.

Though Defendants challenge the Government's statements linking mitigating evidence to evidence that makes the crime less severe, the statements do not warrant reversal. In *Boyde v. California*, the Supreme Court did not reverse on similar language—that the mitigating evidence did not make the defendant's crime any "less serious." 494 U.S. 370, 385–86 (1990). We find no error in the district court's denial of Defendants' motion.

Furthermore, any potential error is rendered harmless by both the Government and district court's curative measures. Though the Government made the mitigation statements described above, it also said that mitigation evidence "[is] not something that excuses or justifies the crime; but it does have to be something that mitigates the death penalty." Likewise, the district court's instructions included a similar definition of mitigating evidence that tracks our precedent. The Government has sufficiently demonstrated that any error is harmless beyond a reasonable doubt. *See* 18 U.S.C. § 3595(c)(2).

3. Fackrell's Challenge to Statements about Justice and Intent to Kill

Fackrell next points to the Government's statements urging the jury to convict him of first-degree murder to avoid "less justice," "half justice," or "no justice" for Johns. He then points to the Government's statement that "[t]here is really not any evidence to suggest that Fackrell didn't intend to kill Leo Johns."

Since Fackrell did not object to these statements, we review only for plain error. *See Avants,* 367 F.3d at 443.

To establish plain error, Fackrell must prove that "(1) there was error, (2) the error was plain, (3) the error affected his 'substantial rights,' and (4) the error seriously affected 'the fairness, integrity or public reputation of judicial proceedings.'" *Jones*, 489 F.3d at 681 (quoting *Olano*, 507 U.S. at 734).

Fackrell's argument that the statements were in plain error is unconvincing. Even assuming that the statements were error, we cannot conclude that the error was plain or affected his substantial rights. *See United States v. Rosenberger*, 502 F. App'x 389, 394–95 (5th Cir. 2012) ("[T]he references to . . . achieving justice for Rosenberger's victims fall well short of any realistic likelihood of prejudice.").

Fackrell also fails to demonstrate plain error in the Government's statements that there was no evidence that he did not intend to kill Johns. Though the Government's statement "could have been more artfully put," it is best understood as a summary of Fackrell's rebuttal evidence and therefore not in error. Moreover, any error stemming from these statements would not impact Fackrell's substantial rights. *See id.* at 395. Fackrell's argument fails, and we affirm the district court.

D. Testimony of Two Bureau of Prisons Psychologists

Fackrell next argues that the rebuttal testimony of two Bureau of Prisons ("BOP") psychologists violated his rights.

He offered various forms of mitigating evidence related to his mental health. He presented the records of Dr. Clemmer,[2] a BOP psychologist from ADX who treated Fackrell after Johns's murder (but before trial). Dr. Clemmer's notes describe Fackrell's history of depression while at USP Beaumont and note that USP Beaumont staff failed to respond to Fackrell's requests for psychological help in February 2009, December 2014, and January 2015.

[2] Though Fackrell initially designated Dr. Clemmer as a testifying witness, he chose not to call her to testify. The Government initially objected to Fackrell's motion to enter her records as evidence, but the Government ultimately withdrew its objection.

Fackrell offered testimony and evidence from psychologist Matthew Mendel. Mendel testified that Fackrell's juvenile records showed that he attempted suicide and had a provisional diagnosis of major depressive disorder that went untreated. He also testified that Dr. Clemmer's notes indicated that her treatment was helping Fackrell and causing "profound changes" in his behavior.

Fackrell also offered testimony from Robert Johnson, who holds a doctoral degree in criminal justice. Robert Johnson testified that Fackrell was suicidal when he arrived at ADX but had received help from the ADX staff. He also testified that Fackrell told him that he hoped to get treatment for his mental health issues and move forward with his life.

To rebut Fackrell's mitigation evidence, the Government called Dr. Shara Johnson and Dr. Brown, two BOP psychologists who treated Fackrell while he was at USP-Beaumont. Fackrell argues that their testimony violated his Fifth Amendment right against self-incrimination, his Sixth Amendment right to counsel, and the psychotherapist-patient privilege.

1. Right Against Self-Incrimination

Fackrell first challenges the testimony of the BOP psychologists as violative of his Fifth Amendment protection against self-incrimination. We disagree.

Fackrell did not object to the testimony of Drs. Shara Johnson and Brown on the basis that they violated his Fifth Amendment right against self-incrimination. In fact, counsel expressly stated that "we're not objecting to the government calling a rebuttal witness to say they disagree with the diagnosis of whatever it is they are going to say." Though counsel objected

to the admission of Dr. Brown's notes[3] under the Sixth, Eighth, and Fourteenth Amendments, those objections do not preserve any error based on the Fifth Amendment right against self-incrimination. *See* FED. R. EVID. 103(a)(1)(B) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party, and if the ruling admits evidence . . . [the party must] timely object or move to strike; and state the specific ground . . . ."); *see also United States v. Seale*, 600 F.3d 473, 485–87 (5th Cir. 2010). Nor can we say that the unoffered objection was apparent from the context. *See id.*

Because no objection was made on this ground, review is for plain error. *Avants,* 367 F.3d at 443.

Dr. Shara Johnson treated Fackrell between January 2015 and August 2016, and she testified that he had "no significant mental health disorders." She also testified about his diagnosis of antisocial personality disorder and his corresponding "pervasive disregard for the rights of others, irritability, aggressiveness, lack of remorse, and impulsivity."

Dr. Brown treated Fackrell beginning in January 2016, and she testified that when she met Fackrell he had "no mental health history whatsoever." She also testified that Fackrell said "[his] childhood had nothing to do with Johns's murder" and that his previous prison conduct "was funny."

More than merely undermining his case for life, Fackrell argues that the use of his statements to the BOP psychologists violated his Fifth Amendment right against self-incrimination because he was not warned that his statements to the psychologists could be used against him at trial. *See*

[3] Counsel specifically objected to Dr. Brown's documentation of her encounters with Fackrell while he was housed at USP-Beaumont for Johns's murder trial.

Estelle v. Smith, 451 U.S. 454, 468 (1981) ("Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness."). Since he did not receive *Miranda*[4] warnings before he spoke to the doctors during his treatment, he concludes that the use of those statements violated his rights under the Fifth Amendment.

We disagree with Fackrell's argument that the Government violated his Fifth Amendment right by calling the BOP psychologists as rebuttal witnesses. Under *United States v. Hall*, the Government may use its own expert witnesses to rebut a defendant's experts when the defendant places his mental health at issue. 152 F.3d 381, 398 (5th Cir. 1988), *abrogated on other grounds by United States v. Martinez–Salazar*, 528 U.S. 304 (2000). "This rule rests upon the premise that '[i]t is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony.'" *Id.* (alteration in original) (quoting *Schneider v. Lynaugh*, 835 F.2d 570, 575 (5th Cir. 1988)).

This case is distinguishable from *Smith* because Fackrell put his mental health at issue by introducing evidence and testimony from Clemmer, Mendel, and Robert Johnson. *See Smith*, 451 U.S. at 472 ("[A] different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase."). Their testimony described his past and current struggles with depression, suicide, and other untreated diagnoses. Fackrell offered the evidence as mitigating evidence, and the Government was entitled to rebut that evidence using its own witnesses.

[4] 384 U.S. 436 (1966).

We find no Fifth Amendment error in the Government's use of rebuttal testimony from the BOP psychologists.

2. Right to Counsel

Like his Fifth Amendment *Miranda* argument, Fackrell argues that his Sixth Amendment right to counsel was violated because he did not have counsel when he spoke with the BOP psychologists.

Fackrell objected to the admission of evidence on the grounds of the Sixth Amendment right to counsel.

We review de novo Fackrell's objection to the testimony on the basis of the Sixth Amendment. *See United States v. Webster*, 162 F.3d 308, 333 (5th Cir. 1998).

Because the doctor's statements were used against Fackrell at trial, he compares his treatment to a pretrial government expert evaluation. Without counsel present (or a valid waiver of the right to counsel), he concludes that his rights were violated.

In *Powell v. Texas*, the Supreme Court explained that a defendant's Fifth Amendment right "precludes the state from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he has a right to remain silent and that anything he says can be used against him at a sentencing proceeding." 492 U.S. 680, 681 (1989) (citing *Smith*, 451 U.S. at 461–69). The Court further explained that "the Sixth Amendment right to counsel precludes such an examination without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.'" *Id.* (alteration in original) (quoting *Smith*, 451 U.S. at 471).

The BOP psychologists served as rebuttal witnesses to Fackrell's own evidence about his mental health. Fackrell points to nothing that indicates

that the doctors' evaluations were carried out in order to assess his future dangerousness, as was the case in *Smith* and *Powell*. Instead, the doctors' examinations were routine and in keeping with their duty of care to all inmates. We can find no error and thus affirm the district court's denial of Fackrell's objection based on the Sixth Amendment.

3. Psychotherapist-Patient Privilege

Fackrell next argues that even if the BOP psychologists' testimony was permissible under the Fifth and Sixth Amendments, their testimony violated the common law psychotherapist-patient privilege. We disagree.

Though the application of the psychotherapist-patient privilege is a legal question, Fackrell did not raise this issue before the district court. We therefore review for plain error. *Avants,* 367 F.3d at 443.

The Supreme Court recognized the psychotherapist-patient privilege under Federal Rule of Evidence 501 in *Jaffee v. Redmond*. 518 U.S. 1, 8–10 (1996). The Court described the importance of the privilege in fostering trust and candor between psychotherapists and their patients. *Id.* at 10. The benefits of the privilege are great because "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 11. Even still, the Court noted that the privilege must give way in certain circumstances. *Id.* at 18 n.19.

Though the psychotherapist-patient privilege is an important feature of our legal system, we cannot conclude that the district court committed plain error in permitting the doctors' testimony.

First, it is not clear that the psychotherapist-patient privilege exists during the sentencing phase of federal capital trials. "Information 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). Section 3593(c) thus favors admission of all evidence except that which creates the risk of unfair prejudice, confusing the issues, or misleading the jury.

The psychotherapist-patient privilege prevents the admission of communications between psychotherapists and patients, and the privilege applies where the Federal Rules of Evidence apply after *Jaffe* (notwithstanding cases where state law compels a different result). But without the parameters of the Federal Rules of Evidence, we cannot conclude that the privilege applies in the sentencing phase of capital trials. Without the privilege limiting the admission of the doctors' testimony, the evidence could only be excluded for one of the reasons listed in § 3593(c), and we cannot say that the district court plainly erred by permitting this testimony.

Second, even if we assume that the privilege applies (and that Fackrell did not waive the privilege), we cannot conclude that the district court's error was plain. A plain error is one that is "so clear or obvious that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *United States v. Narez-Garcia*, 819 F.3d 146, 151 (5th Cir. 2016) (quoting *United States v. Hope*, 545 F.3d 293, 295–96 (5th Cir. 2008)).

Fackrell's best argument for applying the psychotherapist-patient privilege comes from two cases from our sister circuits. The first is *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007). *Koch* says that the psychotherapist-patient privilege can be waived when the party claiming the privilege "relies upon the therapist's diagnoses or treatment in making or defending a case." *Id.* at 389. Here, Fackrell argues that he did not rely on Dr. Shara Johnson or Dr. Brown's treatment in making or defending his case. The two doctors

testified for the Government on rebuttal, so they did not aid him in making or defending his case.

Following *Koch*, the Second Circuit decided *In re Sims*, 534 F.3d 117 (2d Cir. 2008). The Second Circuit agreed with *Koch* in *Sims*, adding that "a party's psychotherapist-patient privilege is not overcome when his mental state is put in issue *only* by another party." *Id.* at 134 (emphasis added).

However, neither of those cases addresses Fackrell's argument. Fackrell's mental state was put in issue by his own trial strategy because his own experts testified about his mental health history. Even if that evidence is categorized as rebuttal evidence to the Government's evidence of aggravating factors, that argument is undercut by the fact that Fackrell offered mitigating factors related to his history of depression. The record supports the conclusion that Fackrell put his mental state at issue through his choice of expert witnesses and mitigating evidence submitted to the jury.

Though both *Koch* and *Sims* are merely persuasive authority, they offer some guidance. Fackrell's claim would likely fail under both *Koch* and *Sims*. He has not cited, nor have we found, support for his position that the Government could not rebut his mental health evidence with the testimony of the BOP psychologists when he put his mental health at issue. We thus affirm, concluding that the district court did not commit plain error under the psychotherapist-patient privilege by permitting the BOP psychologists to testify.

E. Mental Health Rebuttal Witnesses

Cramer challenges the Government's use of mental health rebuttal witnesses, arguing that the testimony violated Federal Rule of Criminal Procedure 12.2 and the Fifth and Sixth Amendments. We disagree.

Because Cramer did not object at trial, review is for plain error. *See United States v. Rice*, 607 F.3d 133, 138–39 (5th Cir. 2010).

Cramer presented mental health experts during the sentencing phase. The experts focused on his difficult childhood and the impact of that childhood on his development. The Government presented a rebuttal witness, Dr. Jill Hayes. The Government agreed to limit her testimony to only direct rebuttal of Cramer's experts and to exclude all mention of Johns's murder. However, Dr. Hayes testified about statements Cramer allegedly made that indicate his lack of remorse for his crimes.

Cramer argues that her testimony went beyond pure rebuttal and thus violated Rule 12.2 and his Fifth Amendment rights. Much like cross-examination is generally limited to the topics inquired about on direct examination, Cramer argues that her rebuttal should have been tied to his mitigation evidence—evidence of his childhood and resulting traumas. *See, e.g., Kansas v. Cheever*, 571 U.S. 87, 97 (2013) (limiting cross-examination to topics from direct examination).

He further argues that his Fifth Amendment right against self-incrimination was violated when Dr. Hayes testified about his statements without his permission. Likewise, he argues that her testimony violated Rule 12.2 by violating the reciprocity principle embedded in the rule that limits rebuttal to the topics raised by the defendant.

We can find no plain error in permitting Dr. Hayes's testimony. Her testimony gave a broad overview of Cramer's life and did not stray so far from the topics Cramer raised as to constitute plain error. Cramer offered testimony about his childhood and his present-day experiences, and Dr. Hayes's testimony was similarly broad. Her testimony about Cramer's reaction to Johns's murder is no broader than the testimony of Cramer's own

expert. We find no error either under the Fifth Amendment or under Rule 12.2 and thus affirm.

F. Excluding Evidence of the Johns Family's Suit

The district court denied Defendants' request to introduce evidence from the Johns family's civil suit against a BOP warden. They argued that details of the suit were relevant to rebut the Government's evidence related to the victim-impact aggravator. We agree with the district court.

The Federal Death Penalty Act permits the introduction of aggravating and mitigating evidence unless "its probative value is outweighed by the danger of creating unfair prejudice." 18 U.S.C. § 3593(c). We review the district court's evidentiary rulings for abuse of discretion. *Snarr*, 704 F.3d at 399.

The Johns family sued a BOP warden, alleging that the BOP was liable for Johns's wrongful death. In the warden's answer urging the court to dismiss the suit, he said that Johns was primarily responsible for his death because he joined the SAC and defied the rules prohibiting drinking and gambling. In Defendants' trial, the Government argued that Johns was not responsible for his murder and that Defendants murdered him to maintain their reputations.

The district court did not err in excluding this evidence as irrelevant and likely to confuse the jury. The individual warden's response in a lawsuit does not equate to the BOP's own statement on Johns's culpability, as the BOP was not a party to the civil suit. The evidence is therefore not relevant and the relationship between the two cases is so attenuated as to risk confusing the jury. Defendants' argument therefore fails.

G. Excluding Evidence related to the Griffith Murder

During the penalty phase of trial, the Government presented evidence of Fackrell's involvement in the murder of Ronald Griffith. Fackrell attempted to introduce evidence that the Government offered a plea deal to his co-defendant in the Griffith murder. The district court denied Fackrell's request to introduce the evidence. Fackrell argues that the exclusion was in error and was not harmless beyond a reasonable doubt. We disagree.

The district court's decision to exclude information is reviewed for abuse of discretion. *Snarr*, 704 F.3d at 399. If there was error, reversal is required unless the Government can show it was harmless beyond a reasonable doubt. *United States v. Jones*, 132 F.3d 232, 252 (5th Cir. 1998).

After Johns's murder, Fackrell was charged with the deadly assault of Ronald Griffith, a fellow inmate and alleged sex-offender. Fackrell allegedly participated in this assault with another inmate and SAC member, Erik Rekonen. In the prosecution for Griffith's murder, the Government agreed to a ten-year sentence for Rekonen but pursued the death penalty against Fackrell. The Government and Rekonen's attorney met about a potential plea in 2017. The record reflects that the Government sought to make a deal with Rekonen in exchange for his testimony against Fackrell.

The district court excluded the mention of Griffith's murder during the guilt phase of Johns's murder trial but permitted its mention during the sentencing phase. The Government presented Griffith's murder as aggravating evidence, and Fackrell argued that evidence of Rekonen's plea deal should have been permitted as mitigating evidence. Fackrell asserts that Rekonen's plea deal was relevant because it demonstrated that his equally culpable co-defendant would not receive the death penalty. *See* 18 U.S.C. § 3592(a)(4) ("In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including

. . . [whether] [a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."). He also asserts that Rekonen's lesser sentence reflects the BOP's acknowledgment that prison politics force inmates to violently assault alleged sex-offenders.

Though excluding mitigating evidence may violate a capital defendant's right to due process, *Green v. Georgia*, 442 U.S. 95, 97 (1979), we cannot conclude that the district court's exclusion was in error. 18 U.S.C. § 3592(a)(4) allows defendants to put on mitigating evidence of their co-defendant's culpability—in trials for the related offense. Here, Fackrell can point to nothing in the statute nor case law that commands district courts to permit mitigating evidence about co-defendants from *other* trials. The statute refers to other defendants "in the crime," and we conclude that the crime referenced in the statute is the crime for which Fackrell faced the death penalty, Johns's murder. In doing so, we follow our sister circuit. *See United States v. Gabrion*, 719 F.3d 511, 524 (6th Cir. 2013) ("This factor does not measure the defendant's culpability itself, but instead considers—as a moral data point—whether that same level of culpability, for another participant in the *same* criminal event, was thought to warrant a sentence of death.") (emphasis added).

Evidence of Rekonen's plea could also have been admitted as "catch-all" mitigation evidence under 18 U.S.C. § 3592(a)(8). Any error in excluding this evidence is harmless given that the jury already saw videos of Griffith's assault and heard evidence of Fackrell's involvement. We cannot say that evidence of Rekonen's plea would have "diminish[ed] [his] culpability or otherwise mitigate against a sentence of death." *Id.*

Furthermore, jurors found several mitigating factors related to Griffith's murder even without the evidence of Rekonen's plea deal. Six jurors found it mitigating that officers placed Griffith near other inmates

knowing that he may be assaulted. Another six jurors found that Fackrell and other inmates had to play prison politics to stay safe. This further demonstrates that any perceived error would be harmless.

We affirm the district court's exclusion of evidence of Rekonen's plea deal related to Griffith's murder.

H. Acquitted Conduct as Evidence of Future Dangerousness

Cramer challenges the Government's use of his role in a 2012 assault charge as evidence of future dangerousness. Cramer was ultimately acquitted of the 2012 assault, and he argues that the Government violated his Fifth Amendment protection against double jeopardy. We disagree.

Cramer did not object at trial. Review is for plain error. *Avants,* 367 F.3d at 443.

"[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Dowling v. United States*, 493 U.S. 342, 349 (1990). "Extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt." *Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998).

Under *Dowling* and *Vega*, the Government was permitted to introduce evidence of Cramer's conduct related to the 2012 assault for which he was acquitted. At trial for the 2012 assault, the Government could not prove that he committed the assault beyond a reasonable doubt. However, the Government was not required to prove the 2012 assault beyond a reasonable doubt to mention it at the punishment phase of this trial. *See id.*

Thus, there was no error in the Government's mention of Cramer's charge for the 2012 assault. We affirm.

I. Categorical Approach and Fackrell's Prior Convictions

The Government alleged four statutory aggravators in its notice of intent to seek the death penalty against Fackrell, including the 18 U.S.C. § 3592(c)(2) aggravator for use of a firearm and the § 3592(c)(4) aggravator for inflicting death or serious bodily injury. Fackrell has previous federal convictions for brandishing a firearm during a crime of violence and possession of a prohibited object. He also has a state law conviction for aggravated assault.

The district court did not use the categorical approach in determining that his previous convictions fit within § 3592(c)(2) and (c)(4). Fackrell argues that the district court should have used the categorical approach to compare the elements of his prior convictions with the elements of the offenses described under §§ 3592(c)(2) and (c)(4). He argues that his convictions do not fall within the ambit of §§ 3592(c)(2) and (c)(4), and thus his sentence must be reversed. We disagree.

Since the district court's decision to reject the categorical approach was a legal conclusion, we review it de novo. *United States v. Jackson*, 549 F.3d 963, 969 (5th Cir 2008). The analysis is subject to harmless-error review as well. *See United States v. Torrez*, 869 F.3d 291, 313 (4th Cir. 2017).

Our circuit has not yet addressed whether the categorical approach is the appropriate analysis under the Federal Death Penalty Act. Both sides present persuasive arguments, but we need not answer the question to resolve this issue. Even if we assume that the categorical approach applies and thus the § 3592(c)(2) and (c)(4) aggravators were invalid, the sentence can be affirmed if it would have been imposed without the invalid aggravators. *Jones*, 132 F.3d at 251–52.

The Government argues (and Fackrell concedes) that his prior convictions were admissible at the selection phase as non-statutory

aggravators. Fackrell argues that the jury necessarily would have put more weight on statutory aggravators than non-statutory aggravators, such that reversal is warranted for re-sentencing. Nothing in our precedent compels such a result, so Fackrell's argument fails.

J. Fackrell's Hobbs Act Claim

Fackrell also challenges the characterization of his Hobbs Act robbery conviction as a statutory aggravator under 18 U.S.C. § 3592(c). He argues that the district court erred by permitting the Government to use his conviction as a § 3592(c) aggravator after *United States v. Davis*, 139 S. Ct. 2319 (2019).

Fackrell preserved this argument at trial, and review is de novo. *United States v. Hebert*, 131 F.3d 514, 525 (5th Cir. 1997).

The § 3592(c) aggravator includes convictions for violent crimes, and Hobbs Act robbery is a violent crime. *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017). The Government listed Fackrell's Hobbs Act conviction as the basis for the aggravator given its characterization as a crime of violence. Fackrell argues that this characterization is erroneous after *Davis*, where the Supreme Court held that the residual clause in § 924(c)(3)(B) was unconstitutionally vague. 139 S. Ct. 2319, 2323 (2019). He also argues that his Hobbs Act conviction was not based on a use of force because it can be committed by threatening harm to an intangible economic interest.

Fackrell's first argument is foreclosed by our decision in *Buck*. Hobbs Act robbery is a crime of violence in this circuit and therefore qualifies as an aggravator under § 3592(c). *See Buck*, 847 F.3d at 275.

Fackrell's second argument also fails. Hobbs Act extortion may be accomplished without the use of force. *See United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973). This says nothing of Hobbs Act robbery for which

Fackrell was charged, and we find no error in listing Fackrell's Hobbs Act robbery conviction as an aggravator under § 3592(c).

K. Jury Instructions on Mitigating Evidence

Fackrell challenges the district court's penalty-phase jury instructions on mitigating evidence, arguing that the two-step instruction for finding mitigating factors violates 18 U.S.C. § 3593(d). We disagree.

Fackrell preserved his objections to the verdict form. This Court "review[s] a challenge to jury instructions for abuse of discretion, 'affording the trial court substantial latitude in describing the law to the jurors.'" *United States v. Ortiz-Mendez*, 634 F.3d 837, 839 (5th Cir. 2011) (quoting *United States v. Orji-Nwosu*, 549 F.3d 1005, 1008 (5th Cir. 2008)).

Section 3593(d) provides that "[a] finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established . . . ." The district court's instruction told the jury that it could "find that the defendant has proved by a preponderance of the evidence the existence of [a mitigating] factor and that it is mitigating."

The district court's instruction requires jurors to find that a fact was proven and then find that the fact was mitigating. Fackrell argues that this instruction permitted the jury to disregard mitigating evidence because it could find that a fact was proven but then conclude that the fact was not mitigating.

Fackrell's argument is undercut by 18 U.S.C. § 3592(a), which requires jurors to consider "any mitigating factor." 18 U.S.C. § 3592(a). Whether jurors first evaluated whether Fackrell proved the existence of some facts and then determined they were mitigating or answered both questions at once, the court's instructions were proper. *See United States v. Mikhel*, 889

F.3d 1003, 1055 (9th Cir. 2018) ("[R]egardless of whether the jury found that the proffered mitigating factors were factually unsupported or that they simply did not justify a lesser sentence, the final result is the same.").

We affirm the district court's denial of Fackrell's objection to the jury instruction on mitigating factors.

L. Marshalling the Evidence in Jury Instructions

Defendants argue that the district court impermissibly "marshalled the evidence" on the jury instructions for future dangerousness. We disagree.

Defendants failed to object to the instructions on this basis at trial. Review is for plain error. *Avants,* 367 F.3d at 443.

The district court's oral and written jury instructions defined future dangerousness and listed several pieces of evidence that the Government offered as future dangerousness evidence. The instructions did not list any of the defense's evidence against future dangerousness.

Though once common, the practice of judges marshalling the evidence "has fallen into widespread disfavor." *United States v. Mundy*, 539 F.3d 154, 158 (2d Cir. 2008). Courts should refrain from commenting on the evidence at trial and should avoid one-sided summaries or comments. *See Quericia v. United States*, 289 U.S. 466, 470 (1933).

In *United States v. Coonce*, the Eighth Circuit rejected a defendant's claim that the district court had improperly summarized the evidence of future dangerousness in favor of the government. 932 F.3d 623, 637 (8th Cir. 2019). The pattern jury instructions language used "as evidenced by" to describe pertinent facts related to the aggravators, and the Eighth Circuit cautioned district courts against removing that language from the instruction. *Id*. at 638.

Here, the pattern instructions also included "as evidenced by" and summarized the evidence. Such language is meant to aid and focus the jurors' analysis on particular pieces of evidence rather than presenting them an open-ended question. *See id.* at 637.

We cannot conclude that the district court plainly erred by focusing the jury's analysis on particular pieces of evidence. In fact, the district court listed Defendants' own evidence of mitigating factors in its instructions as well, further proof that the court did not err by giving a one-sided summary of the evidence.

We affirm, finding no error in the district court's oral and written jury instructions.

M. Jury Question on Non-unanimity

Defendants challenge the district court's supplemental jury instructions. They argue that the district court refused to instruct the jurors after they asked about the consequences of a non-unanimous verdict. We disagree.

Supplemental jury instructions are reviewed for abuse of discretion in light of the entire charge. *United States v. Hale*, 685 F.3d 522, 544–45 (5th Cir. 2012).

Prior to voir dire, Defendants requested a preemptive instruction on the consequence of a split verdict, but the court denied their requests under *Jones v. United States*. In *Jones*, the Supreme Court held that the Eighth Amendment does not require every jury to be told of the effect of non-unanimity. *See* 527 U.S. 373, 383 (1999).

Later during the sentencing jurors' deliberations, they sent a note to the court asking, "What is the process if we are not unanimous with our

verdict?" The district court sent a note back to the jurors instructing them to "[p]lease continue your deliberations."

"When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir. 1994).

Defendants argue that even if the district court's initial refusal to instruct on non-unanimity was correct under *Jones*, *Jones* does not control where the jurors directly asked about non-unanimity. They argue that the district court's response should have been given in open court and should have answered the jurors' question.

We cannot conclude that the district court erred by responding to the jurors' question in writing. *See United States v. Strauch*, 987 F.2d 232, 242–43 (5th Cir. 1993). Nor can we conclude that the court abused its discretion by not providing a non-unanimity instruction in response to the jurors' question. Congress did not require such an instruction among the mandatory instructions that the district court must give. *See Jones*, 527 U.S. at 383 (citing 18 U.S.C. § 3593(f)).

Even beyond *Jones*, we can find no error where the district court's instructions explained that each juror must consider the evidence individually to render a verdict. The district court instructed the jurors that the verdict must represent the judgment of each of them and that they each must decide the case for themselves. The fact that many different groupings of jurors found various mitigating factors for Defendants further demonstrates that jurors acted individually.

We affirm the district court's supplemental jury instruction to the sentencing jury.

N. Incomplete Record

Defendants challenge the sufficiency of the record on appeal, arguing that missing components impair their ability to have a full appeal. We disagree.

The record on appeal includes transcripts of proceedings. FED. R. APP. P. 10(a). If the transcript of a hearing or trial is unavailable, Rule 10(c) permits the appellant to prepare part of that record from their recollection. FED. R. APP. P. 10(c). The district court did not permit Defendants to recollect parts of the record they contend are missing, and they argue that they do not have a substantial part of the record on appeal.

Where the defendant has new counsel on appeal, the court will reverse if (1) a missing portion of the record is substantial and significant, and (2) the trial court's reconstruction is not a substantially verbatim account. *See United States v. Pace*, 10 F.3d 1106, 1124–25 (5th Cir. 1993).

Defendants assert that the record is missing vital conferences, including the conference about the testimony of Elizabeth Rose, the Government's final witness in the guilt phase of trial. Rose was in a holding cell near Fackrell and Cramer's cells during their trial. She testified that she heard them making fun of the prosecutor's opening argument, laughing about stabbing Johns 74 times, and Fackrell saying that "[i]t didn't feel like that many [stabbings] when it was happening."

Rose was represented by an Assistant Federal Public Defender for the Eastern District of Texas, as was Cramer. She was facing a life sentence for conspiracy to possess and intent to distribute methamphetamine. She contacted her attorney and told him that she wanted him to tell the Government about what she heard. Rose's attorney petitioned to withdraw from her case given the conflict of interest created by her desire to testify against Cramer. Defendants' counsel believes that the court discussed

Rose's testimony in an unrecorded conference in chambers and that the missing record prejudices their defense. Counsel also believes that the parties discussed the potential conflict of interest facing the Federal Public Defender.

Defendants also identify the conference about the penalty-phase jury charge as another important proceeding that was unrecorded. The district court indicated that it wanted to meet with the parties to decide on the penalty-phase instructions. No recording of the conference exists. Several of counsel's proposed mitigating instructions did not appear in the instructions, and Defendants now argue that the court ruled on their proposed instructions at the unrecorded conference.

Defendants arguments fail because the discussion of Rose's testimony was not a "hearing or trial" within the meaning of Rule 10. Nor was the jury charge conference a "session of the court" pursuant to the Court Reporter's Act because it did not occur in open court. *United States v. Jenkins*, 442 F.2d 429, 438 (5th Cir. 1971). Neither the Federal Rules of Appellate Procedure nor the Court Reporter's Act compel reversal here. Furthermore, Defendants have not demonstrated that these omissions are substantial or significant. Defendants' arguments fail.

O. Cumulative Reversal

Defendants' final argument is that even if no individual error is reversible, the cumulative effect of the errors warrants reversal.

An appellate court may reverse a conviction by aggregating otherwise non–reversible errors that combine to deny the defendant's right to a fair trial. *United States v. Delgado*, 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc).

Because we do not find that the district court made any errors, cumulative reversal is unavailable.

III. CONCLUSION

For the aforementioned reasons, we AFFIRM the sentences and convictions of Ricky Fackrell and Christopher Cramer.

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

UNITED STATES OF AMERICA	§	
	§	
versus	§	CASE NO. 1:16-CR-26
	§	
CHRISTOPHER EMORY CRAMER (1)	§	
RICKY ALLEN FACKRELL (2)	§	

MEMORANDUM AND ORDER

Pending before the court is Defendants Christopher Emory Cramer ("Cramer") and Ricky Allen Fackrell's ("Fackrell") (collectively, "Defendants") Joint Opposed Motion to Settle and Approve the Statement of the Proceeding Not Recorded (#743) ("Motion for Statement"). The Government filed a response in opposition (#745), and the Defendants filed a Joint Reply (#746). Also pending before the court is Defendants' Joint Motion to Complete the Record on Appeal (#747) ("Motion to Complete"). Having considered the motions, the submissions of the parties, the record, and the applicable law, the court is of the opinion that Defendants' Motion for Statement should be denied and their Motion to Complete should be granted in part and denied in part.

I. Background

On March 3, 2016, a United States Grand Jury sitting for the Eastern District of Texas returned an indictment charging Defendants with murder in violation of 18 U.S.C. §§ 1111 and 2 and one additional count that was later dismissed. The Government filed notice of intent to seek the death penalty against each Defendant. After 15 days of jury selection, trial began on April 30, 2018, and concluded on June 13, 2018. Defendants were convicted of Capital Murder and

sentenced to death. Both filed notices of appeal, and counsel were appointed.[1] The matter is currently pending before the United States Court of Appeals for the Fifth Circuit as Case No. 18-40598.

II. Analysis

A. Request for Statement

On December 30, 2019, Defendants filed their Motion for Statement and attached a proposed statement that purportedly "represents the substance" of an in-chambers conference held on May 7, 2018. Defendants state that they relied on "notes and recollections from defense attorneys for Defendants, who were present during the chambers conference" to create the statement. Defendants request the court to settle and approve the statement and to direct the district clerk to include the statement with the record on appeal pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure.

Rule 10(c) of the Federal Rules of Appellate Procedure, entitled Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable, provides:

> If the transcript of a *hearing or trial* is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

FED. R. APP. P. 10(c) (emphasis added). The court doubts that Rule 10(c) applies to off-the-record conferences held in chambers. *See* 28 U.S.C. 753(b) (requiring that "all proceedings in criminal cases had in open court" be recorded); *United States v. Jenkins*, 442 F.2d

[1] Cramer is represented on appeal by one of his trial attorneys: Douglas Barlow.

429, 438 (5th Cir. 1971) (holding that a "charge conference in chambers was not in open court" and thus, need not be recorded under the Court Reporter's Act); *see also United States v. Layne*, 564 F. App'x 83, 84 (5th Cir. 2014) (stating that while the Fifth Circuit has not addressed in-chambers conversations with a juror, any error in failing to record such a conversation was neither clear nor obvious); 20 MOORE'S FEDERAL PRACTICE - CIVIL § 310.30 (2019) ("The term 'unavailable' is not defined, but the rule (and its predecessor Civil Rule 75(h)) have been interpreted broadly to include: unintelligible reporter's notes, the failure to record portions of a trial, and destruction of un-transcribed reporter's notes."). In addition, Defendants do not assert that they were denied an opportunity to return to the courtroom and have a record made or to request that the court reporter come to chambers to record any conference. Moreover, the Government states that it does not recall that anyone asked the court to place anything discussed in the conference on the record.[2] *See Cox v. Gen. Elec. Co.*, 302 F.2d 389, 390 (6th Cir. 1962) ("It is clear that it was the responsibility of appellant's counsel to have a record made of any off-the-record colloquies with the court that he wished to preserve."); *Cox v. United States*, 284 F.2d 704, 710-711 (8th Cir. 1960) ("Of course, it was counsel's responsibility to see that a record was made at the time if he was then interested in preserving his objection. Counsel cannot preserve an objection by colloquy off the record which he does not dignify by seeing that it is stenographically recorded. There is no claim that counsel was not given the opportunity to have such a record made here" (quoting *Camps v. N.Y. City Transit Auth.*, 261 F.2d 320, 323 (2d Cir. 1958))), *cert. denied,* 365 U.S. 863 (1961). In fact, the official transcript from May 7, 2018,

[2] The Government's response was signed by Joseph Batte, one of the Assistant United States Attorneys who prosecuted the case at trial.

includes discussion of Elizabeth Rose—the subject of Defendants' proposed statement—outside the presence of the jury, during which trial counsel for Defendants put forth their objections, the Government had a chance to respond, and the court made its rulings. (#595, 1270:13-1277:19).

In any event, nearly nineteen months elapsed from the date of the in-chambers conference and Defendants' Motion for Statement. At this late date, aside from recalling generally that Elizabeth Rose was permitted to testify at trial, the court is unable to remember the specifics of the conference with sufficient clarity to settle and approve Defendants' proposed statement. *See Gen. Elec. Co.*, 302 F.2d at 390 (holding trial judge did not err in denying appellant's motion to amend the record to include certain alleged unrecorded, off-the-record conferences, where counsel had the opportunity, but did not attempt to have the conferences stenographically recorded, and the trial court had no recollection of the events); *Cox*, 284 F.2d at 711 (refusing to overturn the trial court's denial to amend the record to include a certain alleged sidebar request made during trial when the appellant failed to claim that he was not given the opportunity to have the exchange stenographically recorded and the trial judge had "no recollection of the language used in making the request, nor that used by him in response thereto, and that he had no recollection of making or indicating any ruling in respect of the alleged request made by appellant's counsel, as set forth in his affidavit in support of motion."). Furthermore, the Government has indicated that it is not in a position to serve objections or proposed amendments to Defendants' proposed statements, because it, too, does not recall the specifics of the conference. In its response to Defendants' Motion for Statement, the Government states in part: "The undersigned was present during the meeting, but cannot verify the accuracy of Cramer and Fackrell's proposed statement."

For the foregoing reasons, the court denies Defendants' Motion for Statement.

B. Motion to Complete

On January 24, 2020, Defendants filed their Motion to Complete, making four requests: (1) that the court grant their Motion for Statement, (2) that the court provide appellate counsel with any notes that it may have from unrecorded proceedings and conferences, (3) that the court provide appellate counsel with any undocketed written communications that the court sent to trial counsel, and (4) that the court provide appellate counsel with any jury lists it may have.

1. Second Motion for Statement

For the reasons stated above, Defendants' repeated request that the court settle and approve its proposed statement of the off-record, in-chambers conference held on May 7, 2018, is denied.

2. Request for the Court's Notes

Defendants request that the court share with them any notes or other records memorializing, summarizing, or otherwise documenting sidebars, conferences, and other such unrecorded proceedings in this case. The court does not regularly take such notes or keep such records. Nor do Defendants cite any authority for requesting the same. In any event, the court has no notes or other records documenting such events. This request is denied.

3. Written Communication from the Court

Defendants state "it appears that there were email communications with trial counsel, the government, United States Marshals, and Bureau of Prisons officials noted on [Electronic Case File ("ECF")], but which were not part of the record provided to the Fifth Circuit." Defendants include a list of docket entries that are designated with a "cc" notation, and request the court to share with them copies of those emails as well as any others the court may have exchanged with the parties about the case.

With one exception—an order denying Cramer's *pro se* request to terminate his trial attorney—the items Defendants identify are sealed orders, sealed summonses, sealed writs of habeas corpus, or sealed Statement of Reasons, filed by the court in this case. When a sealed order is issued by the court, the Case Management/Electronic Case Files ("CM/ECF") system will not send the parties notice that such order has been entered. In order to facilitate the appropriate parties' access to a sealed entry by the court, the District Court Clerk's Office sends a copy of the sealed order to the lead attorney for each party who is responsible for distributing the order to all other counsel of record for that party. *See* Local Rule CV-5(a)7(D); CR-49. Similarly, with respect to Cramer's *pro se* request, when a motion is filed *pro se* by a litigant who does not have access to email, as in the case of a defendant in custody, the District Court Clerk's Office mails a courtesy copy of the relevant order to the individual. The "cc" notations on the docket sheet reflect this procedure and indicate that the District Court Clerk's Office sent a copy of a sealed entry, without any additional substantive information, to the individuals specified. The "cc" notations do not represent undocketed email communications from the court to trial counsel, the Government, the United States Marshals Service, or the Bureau of Prisons. Thus, Defendants' request for the same is denied.

The Office of the Clerk of the Fifth Circuit advised that the appellate court had granted Defendants' request for all sealed materials as to that specific Defendant (#730), and the District Court Clerk's Office has sent each Defendant's counsel the same (#732). The Fifth Circuit also granted Defendants permission to inspect and copy the nonpublic dockets (#735), and the District Court Clerk's Office provided a copy of the nonpublic docket sheet to Defendants' counsel. If

Defendants believe they are entitled to certain sealed entries by the court that they have not previously received, the court directs Defendants to request such items with specificity.

4. Jury Lists

Finally, Defendants request that the court provide them with any lists (including lists reflecting race and gender) in its possession of (a) the seated jurors, (b) the panelists who were peremptorily struck by each side, (c) the panelists who appeared for voir dire, and (d) the panelists who were summoned. The court grants this request in part and will provide Defendants' appellate counsel with copies of: (i) a list of the seated jurors; (ii) a list of the panelists who appeared for voir dire, which also reflects peremptory strikes made by the Government and Defendants; (iii) a list of the panelists who were summoned to appear on April 2, 2018; and (iv) a list of the panelists who were summoned to appear on April 3, 2018. These lists do not reflect the race or gender or the panelists/jurors, but that information can be gleaned from the juror questionnaires, which were provided by mail, under seal, to Defendants' appellate counsel on July 2, 2019. Defendants' appellate counsel shall maintain juror anonymity and shall not distribute this information to anyone who is not a member of the appellate team without further order of this court. Defendants' appellate counsel are ordered to destroy or return all copies of the jury lists and juror questionnaires to this court at the conclusion of the pending appeal.

III. Conclusion

Consistent with the forgoing, Defendants' Motion for Statement (#743) is denied, and Defendants' Motion to Complete (#747) is granted in part and denied in part.

SIGNED at Beaumont, Texas, this 30th day of January, 2020.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

UNITED STATES OF AMERICA	§	
	§	
versus	§	CASE NO. 1:16-CR-26
	§	
CHRISTOPHER EMORY CRAMER (1)	§	
RICKY ALLEN FACKRELL (2)	§	

MEMORANDUM AND ORDER

Pending before the court is Defendants Christopher Emory Cramer ("Cramer") and Ricky Allen Fackrell's ("Fackrell") (collectively, "Defendants") Joint Defense Motion to Preclude Improper Cross-Examination of Defense Experts and Rebuttal Testimony from Government Witnesses on Future Dangerousness Non-Statutory Aggravator, or, in the Alternative, for Discovery (#521). Defendants' motion requests that the court prohibit the Government from cross-examining their expert witnesses on "anecdotal" instances of violence allegedly committed in the Bureau of Prisons ("BOP") by persons other than Defendants. The Government filed a Response (#541) arguing that Defendants' motion attempts to restrict the Government's ability to effectively cross-examine the defense's expert witnesses and from calling its own rebuttal expert to testify. After reviewing the motion, the Government's response, the submissions of the parties, and the applicable law, the court is of the opinion that Defendants' motion should be denied.

I. Background

On June 2, 2016, a grand jury returned a two-count superseding indictment charging Defendants, inmates of the United States Penitentiary in Beaumont, Texas, with: (1) the unlawful killing of a fellow inmate, Leo Johns ("Johns"), with premeditation and malice aforethought, in violation of 18 U.S.C. §§ 1111 and 2, and (2) conspiracy to kill Johns with premeditation and

malice aforethought, in violation of 18 U.S.C. § 1117. *See* Doc. No. 47. The maximum penalty if convicted of Count One is death. On April 30, 2018, the Government filed a Motion to Dismiss Count Two of the Superseding Indictment (#523), which the court granted, leaving Count One as the only remaining count. *See* Doc. 527. The maximum penalty if convicted of Count One is death. Trial in this case began on April 30, 2018.

Defendants have given notice that their prison experts—Roy T. Gravette ("Gravette") and Mark Bezy ("Bezy")—will give testimony "in support of a number of mitigating factors including but not limited to the defendant's appropriate prison adjustment at the ADX Supermax since their transfer and the ability of the DOJ/BOP to adequately control the defendants should they receive a sentence of life without the possibility of release." The Government has named David Berkebile ("Berkebile") as a rebuttal expert witness and expects Berkebile, if called, to provide testimony in response to that of Gravette and Bezy. Defendants allege that Bezy has testified on behalf of other defendants in previous capital cases, and, "on numerous occasions," the Government has cross-examined Bezy about "specific acts of violence allegedly committed in BOP by persons who are in no way connected to the individual defendant being sentenced" and that many of these anecdotal events "occurred more than five years" ago—April 1, 2013. Moreover, Defendants claim that "many of the characterizations of BOP violence used by [the Government] have been inaccurate and misleading." In view of these prior events, Defendants ask the court to preclude the Government from engaging in improper anecdotal cross-examination of Defendants' expert witnesses and to restrict the Government's expert witnesses from offering similar testimony. In the alternative, Defendants ask that the court limit any anecdotal testimony to events that occurred

within the past five years and to order the Government to disclose any alleged incidents and any supporting documents at least three days prior to the witness's testimony.

The Government responds that, during its case in chief, it will not introduce evidence of instances of violence by inmates other than Cramer and Fackrell to affirmatively establish each defendant's future dangerousness. The Government argues, however, that cross-examination of Gravette and Bezy is necessary and appropriate to test the scope of their knowledge and to challenge the bases of their opinions that defendants can be safely housed and do not pose a future danger in an institutional setting. The Government further maintains that evidence of violence at BOP facilities is appropriate "to specifically rebut claims that, because of certain security measures or because of statistical analyses relating to the conduct of other inmates, BOP can safely house Cramer and Fackrell in the future."

II. Analysis

The admission or exclusion of expert witness testimony is a matter that is left to the discretion of the district court. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999); *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 194 (5th Cir. 2006); *see Nano-Proprietary, Inc. v. Cannon, Inc.*, 537 F.3d 394, 399 (5th Cir. 2008); *Stolt Achievement, Ltd. v. Dredge B.E. Lindholm*, 447 F.3d 360, 366 (5th Cir. 2006); *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004), *cert. denied*, 546 U.S. 1089 (2006). Likewise, the scope and extent of cross-examination are within the sound discretion of the trial court. *United States v. Ramirez*, 622 F.2d 898, 899 (5th Cir. 1980); *see United States v. De Los Santos-Martinez*, 55 F. App'x 716, 2002 WL 31933182, *1 (5th Cir. Dec. 20, 2002). "[T]he trial court's role as a gatekeeper is not intended to serve as a replacement for the adversary system: Vigorous cross-examination, presentation of

contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)); *accord United States v. Seale*, 600 F.3d 473, 491 (5th Cir.), *cert. denied*, 562 U.S. 868 (2010).

The Federal Death Penalty Act ("FDPA") provides:

> The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information 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. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death.

United States v. Jones, 132 F.3d 232, 241 (5th Cir. 1998) (quoting 18 U.S.C. § 3593(c)), *aff'd sub nom. Jones v. United States*, 527 U.S. 373 (1999). Accordingly, "the defendant and government may introduce any relevant information during the sentencing hearing limited by the caveat that such information be relevant, reliable, and its probative value must outweigh the danger of unfair prejudice." *Id.* Although the punishment phase is not governed by the Federal Rules of Evidence, the district court will prevent an "evidentiary free-for-all" by excluding unfairly prejudicial information under the standard enunciated in § 3593(c). *Id.* at 242; *accord United States v. Fields,* 483 F.3d 313, 338 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1065 (2008); *United States v. Smith*, 630 F. Supp. 2d 713, 716 (E.D. La. 2007).

"[T]he admission of more rather than less evidence during the penalty phase increases reliability." *United States v. Lee*, 374 F.3d 637, 648 (8th Cir. 2004), *cert. denied*, 545 U.S. 1141 (2005). Furthermore, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see Alford v. United States*, 282 U.S. 687, 692 (1931) ("It is the essence of a fair trial that reasonable latitude be given the crossexaminer."); *Albarran v. State*, 96 So.3d 131, 173 (Ala. 2011) (holding in a capital case that "[w]ide latitude is permitted in cross-examination to show bias or motive and the effect on a witness's credibility"). Therefore, the court will allow the Government to cross-examine the defense's experts concerning the ability of the BOP to safely house violent inmates, including Cramer and Fackrell, with specific instances of violence in BOP institutions.

Defendants rely heavily on *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004), to support their argument that specific actions by other inmates should not be admitted, arguing "if the [G]overnment is allowed to present evidence regarding BOP experience with other inmates," then "[t]he jury might be misled into believing that BOP might have a similar experience with these defendants." Their reliance is misplaced. In *Sampson*, the evidence at issue was testimony from a defense expert. *Id.* at 226-27. The court allowed the defense expert to testify as to the general success that BOP had experienced in controlling violent and dangerous inmates, but excluded testimony regarding BOP's successful control of specific inmates. *Id.* Here, the Government avers that it will not introduce evidence of violent incidents by inmates other than Cramer and Fackrell in its case-in-chief. As the Government observes, this evidence "will be brought out only on cross-examination of (or rebuttal to) the defense experts who testify that

Cramer and/or Fackrell are not a future danger because of BOP's conditions of confinement." In essence, Defendants wish to proffer evidence from their experts about BOP security measures that have been successfully used with other violent inmates, but want to preclude the Government from challenging such testimony by inquiring about the BOP's experiences with similar inmates or presenting evidence regarding situations in which the security measures have not proven so successful. In *United States v. Lujan*, the district court denied a defendant's requests to exclude such evidence, stating:

> Defendant desires to use the presentation of evidence as a single-edged sword; that is . . . to have his expert testify about his experience in the BOP prisons in which various security measures have been successfully used with other inmates [without allowing the Government to] challenge the experts' experiences with other similar situations in which the security measures have not been so successful.

Order at 4, *United States v. Lujan*, No. CR 05-0924, (D.N.M. Sept. 9, 2011) (No. 1316) Order at 12-13. This reasoning was adopted by another district judge in *United States v. McCluskey*, No. CR 10-2734 (D.N.M. Apr. 1, 2013) (No. 1017) (denying the defendant's motion to prohibit cross-examination and rebuttal evidence showing specific acts of violence or escape by other prisoners and denying the motion requesting that such evidence be limited to the preceding five years). The court rejects such restrictions on the Government's presentation of its case.

The court is also unpersuaded by Defendants' plea that specific incident evidence should be temporally limited. Rather than imposing an arbitrary time limit on such evidence, the court will follow the FDPA and weigh the probative value of prior incidents against the danger of creating unfair prejudice, confusing the issues, and misleading the jury. 18 U.S.C. § 3593(c). The court notes, however, that, as they become increasingly remote in time, the probative value of such events will decrease in light of the evolving standards and practices of correctional

facilities over the years. Finally, the Government need not disclose such specific instances of violence or supporting documentation to Defendants in advance of cross-examination or rebuttal testimony. Defendants cite no authority for their position, nor have they shown that the requested information would be favorable to their case, and the court declines to require the Government to preview its cross-examination and rebuttal testimony prior to trial.[1] Moreover, as the Government points out, the defense appears to be well aware of many of the specific isntances of BOP violence the Government may use in cross-examination, as evidenced by this and prior motions. The court cautions, however, the Government must ensure that it presents only accurate accounts and testimony concerning previous events.

III. Conclusion

Defendants' Joint Defense Motion to Preclude Improper Cross-Examination of Defense Experts and Rebuttal Testimony from Government Witnesses on Future Dangerousness Non-Statutory Aggravator, or, in the Alternative, for Discovery (#521) is DENIED.

SIGNED at Beaumont, Texas, this 8th day of May, 2018.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

[1] *See United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010) (holding that the defendant was not entitled to discovery of BOP records because the defense could "only speculate as to what the requested information might reveal, [and could not] satisfy *Brady's* requirement of showing that the requested evidence would be "favorable to [the] accused") (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963))), *cert. denied*, 565 U.S. 1110 (2012).

A. Yes.
Q. And, so, we've been able to stop all the violent incidents that have occurred at the BOP, correct?
A. No.
Q. But in this instance they've been able to stop -- what happened with Ishmael Petty will never happen again, correct?
A. Yes.
Q. But other things that BOP has done to change policies to try and prevent violence from happening, those haven't necessarily worked; but these changes are going to work. That's your testimony.
A. Yes.
Q. I thought you said on direct examination that in 24 years you didn't think anybody had gotten out of their cell at ADX.
A. I'm not aware of anyone.
Q. Okay. Well, let me play a video for you and see if that changes your mind.

MS. JIMENEZ: We've marked that as -- for identification as 66A. This is a video from ADX from 2013 involving Ishmael Petty that we heard testimony about.

If you would go ahead and play that, Ms. Adams.

(Video presentation to the jury.)

MR. MORROW: Ms. Jimenez, may I stop you?

Judge, I'm confused. I may have missed it. But now we're going to offer somebody else's extraneous offense video? I can't imagine how that would be more prejudicial than it is probative, and we would object to it.

MS. JIMENEZ: Well, the witness testified that nobody has been able to get out of their cell at ADX. He's also testified that this type of incident won't happen again. I think I'm entitled to show him the video, ask him if that changes his opinion.

MR. MORROW: If she wants to ask him about a specific instance, I understand that, judge; but this is just an excuse on their part to try to show somebody else's conduct that has nothing to do with our case.

THE COURT: Overruled. I think under the circumstances, with him saying that it's never happened, this would be a fair --

MR. MORROW: He said he wasn't aware of it, judge. That's all. Now she's pointed it out, and now he's aware.

THE COURT: Okay, Mr. Morrow.

MR. MORROW: Thank you, judge.

MS. JIMENEZ: Why don't we back it up a little

(Open court, defendants present, jury not present.)

THE COURT: This is a note from the jury that asks, "What is the process if we are not unanimous with our verdict?"

And I plan to say, "Please continue your deliberations."

MR. BARLOW: Your Honor, in keeping with the motion that we filed requesting that the jury be informed as to the effect of failure to reach a verdict in the case, we would renew that request that the --

THE COURT: That's denied. There is an order that I've already prepared that said it is not required to do that. It is not an Eighth Amendment problem. I'm not going to do that. I want them to continue their deliberations in hopes of reaching a unanimous verdict. I mean, at some point, of course, if they are -- they are not saying they are hopelessly deadlocked. They are not saying anything like that.

MR. BARLOW: I'd like to finish what I was putting on the record.

THE COURT: Okay.

MR. BARLOW: That we renew our request that the court inform the jury of what the law is regarding the effect of the failure to reach a verdict in the case.

MR. MORROW: And Mr. Fackrell would join in that request, your Honor.

THE COURT: Request is denied for the reasons I've already set forth in the previous order that I've written on this subject.

I don't have a docket number on it. It's -- I guess we don't have a docket number, but it has to do with -- the motion was Motion for Allowance to Discuss the Effect of the Failure to Reach a Unanimous Verdict. It was Motion 480. So, this is the response to that.

And the Supreme Court says that the Eighth Amendment does not require that jurors be instructed of the consequences, and the court does not intend to do that. So, that is --

MR. BARLOW: And, your Honor, we would point out for the --

THE COURT: So, I direct you to the complete opinion.

MR. BARLOW: -- point out that the only distinction now in relation to the court's earlier ruling is that now the jurors have specifically asked to know the answer to that question.

THE COURT: Well, they are not going to at this point. They are going to try to continue their deliberations in hopes of reaching a unanimous verdict.

At some point if they say they are hopelessly deadlocked, of course we will deal with that when that approaches, when that comes about.

Okay.

(Proceedings adjourned, 4:13 p.m.)

CERTIFICATION

I HEREBY CERTIFY THAT ON THIS DATE, JUNE 12, 2015, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/
TONYA B. JACKSON, RPR-CRR

/s/
CHRISTINA L. BICKHAM, RMR-CRR

United States Court of Appeals for the Fifth Circuit

No. 18-40598

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICKY ALLEN FACKRELL; CHRISTOPHER EMORY CRAMER,

Defendants—Appellants.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:16-CR-26-2

ON PETITION FOR REHEARING EN BANC

(Opinion 03/12/2021, 5 CIR., _____, _____ F.3D _____)

Before STEWART, DUNCAN, and WILSON, *Circuit Judges*.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Federal Death Penalty Act of 1994

§ 3591. Sentence of death

(a) A defendant who has been found guilty of--

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of--

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the condi-

tions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) Mitigating factors.--In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) Impaired capacity.--The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) Duress.--The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) Minor participation.--The defendant is punishable as a principal in the offense, which was committed by another,

but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) Equally culpable defendants.--Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) No prior criminal record.--The defendant did not have a significant prior history of other criminal conduct.

(6) Disturbance.--The defendant committed the offense under severe mental or emotional disturbance.

(7) Victim's consent.--The victim consented to the criminal conduct that resulted in the victim's death.

(8) Other factors.--Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Prior espionage or treason offense.--The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

(2) Grave risk to national security.--In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

(3) Grave risk of death.--In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime.--The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm.--For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or

State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses.--The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons.--The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense.--The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment.--The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain.--The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation.--The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(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.

(11) Vulnerability of victim.--The victim was particularly vulnerable due to old age, youth, or infirmity.

(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.

(13) Continuing criminal enterprise involving drug sales to minors.--The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials.--The defendant committed the offense against--

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution--

(i) while he or she is engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation.--In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings.--The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty.--In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal

or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses.--The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction.--The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm.--In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) Using minors in trafficking.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) Lethal adulterant.--The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

§ 3593. Special hearing to determine whether a sentence of death is justified

(a) Notice by the government.--If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice--

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim

impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury.--If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted--

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if--

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors.--Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter rele-

vant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information 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. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. 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. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings.--The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section

regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death.--If, in the case of--

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, 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, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination.--In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of

any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

§ 3594. Imposition of a sentence of death

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

§ 3595. Review of a sentence of death

(a) Appeal.--In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) Review.--The court of appeals shall review the entire record in the case, including--

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) Decision and disposition.–

(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592.

(2) Whenever the court of appeals finds that--

(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. 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.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

Federal Rules of Appellate Procedure Rule 10

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) The Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Partial Transcript. Unless the entire transcript is ordered:

(A) the appellant must--within the 14 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were

decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it--together with any additions that the district court may consider necessary to a full presentation of the issues on appeal--must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Federal Rules of Criminal Procedure 43

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) Organizational Defendant. The defendant is an organization represented by counsel who is present.

(2) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) Conference or Hearing on a Legal Question. The proceeding involves only a conference or hearing on a question of law.

(4) Sentence Correction. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) In General. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

State Procedural Rules Similar or Nearly Identical to Federal Rule of Appellate Procedure 10(c)

Alaska R. App. P. 210(b)(8); Ala. R. App. P. 10(d); Ariz. R. Civ. App. P. 11(d); Ariz. R. Crim. P. 31.8(e); Ark. R. App. P.-Civ. 6(c); Cal. App. R. 8.137; Colo. R. App. P. 10; Del. Sup. Ct. R. 9(g); D.C. Ct. App. R. 10(c); Fla. R. App. P. 9.200(b)(4); Haw. R. App. P. 10(c); Ill. Sup. Ct. R. 323(c); Ind. R. App. P. 29; Iowa R. App. P. 6.806; Kan. Sup. Ct. R. 3.04; Me. R. App. P. 5(d); Md. R. App. P. 8(c); Mich. Ct. R. 7.210(B)(2); Minn. R. Civ. App. P. 110.03; Miss. R. App. P. 10(c); Mont. R. App. P. 8(7); Nev. R. App. P. 9(d); N.J. Ct. R. 2:5-3(f); N.M. R. App. P. 12-211(H); N.Y. C.P.L.R. 5525(d); N.D. R. App. P. 10(g); Ohio R. App. P. 9(C); Okla. R. Crim. P. 2.2(C); Pa. R. App. P. 1923; R.I. Sup. Ct. R. art. 1, R. 10(d); S.D. Codified Laws § 15-26A-54; Tenn. R. App. P. 24(c); Utah R. App. P. 11(g); W. Va. R. Civ. P. 80(e); Wyo. R. App. P. 3.03.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
versus	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
CHRISTOPHER EMORY CRAMER (1)	§	
and	§	
RICKY ALLEN FACKRELL (2)	§	

CRAMER'S AND FACKRELL'S JOINT OPPOSED MOTION TO SETTLE AND APPROVE THE STATEMENT OF THE PROCEEDING NOT RECORDED AND ORDER IT INCLUDED IN THE APPELLATE RECORD

Defendants Christopher Emory Cramer and Ricky Allen Fackrell move the Court, pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure, for settlement and approval of the attached statement of district court proceeding not recorded, *see* Attachment 1, and for an order directing the district clerk to include the statement in the record on appeal. Cramer and Fackrell also move for a hearing to resolve any objections or contested changes to the statement.

A transcript of the chambers conference held on May 7, 2018, is unavailable because the court reporter did not record this proceeding. Because the conference was not recorded, appellate counsel have prepared a statement of the chambers conference from the best available means. *See* Fed. R. App. P. 10(c).[1] The statement

[1] Rule 10(c) provides that:

> (c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a

was prepared using notes and recollections from defense attorneys for Cramer and Fackrell, who were present during the chambers conference on May 7, 2018. One of those attorneys took extensive extemporaneous notes of the conference. Appellate counsel consulted with trial attorneys for Cramer and Fackrell in preparing the statement. This statement represents the substance of the conference.

Appellate counsel for Cramer and Fackrell served the statement of the May 7, 2018, unrecorded chambers conference on Government counsel on November 26, 2019. On December 2, 2019, Government counsel stated that they oppose any such statements being included in the appellate record. *See* Attach. 2. Accordingly, the statement of the May 7, 2018, chambers conference is submitted to this Court for settlement and approval. *See* Fed. R. App. P. 10(c).

Cramer and Fackrell ask this Court to settle and approve the statement of the unrecorded May 7, 2018, chambers conference. Cramer and Fackrell also request that the district clerk be instructed to include the statement in the record on appeal so that the Fifth Circuit Court of Appeals has a full, fair, and complete record to review.

> hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

FED. R. APP. P. 10(c).

Appellate counsel advise the Court that counsel are attempting to prepare statements for numerous other proceedings held during Cramer's and Fackrell's trial, which were not recorded.

For these reasons, Cramer and Fackrell move the Court for settlement and approval of the attached statement of the unrecorded May 7, 2018, chambers conference, and for an order directing the district clerk to include it in the appellate record. Cramer and Fackrell also move for a hearing to resolve any objections or contested changes to the statement.

Respectfully submitted,

/s/ DONNA F. COLTHARP
1 Camino Santa Maria
San Antonio, Texas 78228
210-436-3320
dcoltharp@stmarytx.edu
Texas Bar No. 24001909

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Deputy Federal Public Defender
Western District of Texas
727 East César E. Chávez Blvd., B–207
San Antonio, Texas 78206–1205
(210) 472-6700
(210) 472-4454 (Fax)
Judy_Madewell@fd.org
Texas Bar No. 00790727

NICOLE WIGNALL DEBORDE
Hochglaube & DeBorde, P.C.
3515 Fannin Street
Houston, Texas 77004
Phone: 713-526-6300
Fax: 713-808-9444
nicole@houstoncriminaldefense.com

Attorneys for Ricky Fackrell

/s/ Douglas M. Barlow
DOUGLAS MILTON BARLOW
Barlow Law Firm
485 Milam
Beaumont, Texas 77701
409-838-4259
409-832-5611 (fax)
barlowfedlaw@gmail.com
Texas Bar No. 01753700

ANTHONY SEYMOUR HAUGHTON
Capital Resource Counsel Project
c/o Federal Public Defender
Southern District of Texas
440 Louisiana Street, Suite 1350
Houston, Texas 77002
832-287-9548
anthony_haughton@fd.org

Attorneys for Christopher Cramer

CERTIFICATE OF CONFERENCE

I certify that I conferred with Assistant United States Attorney, Traci Lynne Kenner, concerning this motion, and she stated that the United States is opposed to it.

/s/ Donna F. Coltharp
Attorney for Ricky Fackrell

CERTIFICATE OF SERVICE

I certify that on December 30, 2019, I electronically filed this "Joint Opposed Motion to Settle and Approve the Statement of the Proceeding Not Recorded and Order It Included in the Appellate Record," with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to: Joseph Robert Batte, Jr., Assistant United States Attorney, via electronic mail.

/s/ Donna F. Coltharp
Attorney for Ricky Fackrell

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
versus	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
CHRISTOPHER EMORY CRAMER (1)	§	
and	§	
RICKY ALLEN FACKRELL (2)	§	

STATEMENT OF DISTRICT COURT PROCEEDING NOT RECORDED

May 7, 2018 Chambers Conference with Judge Marcia Crone; John Craft, Joseph Batte, and Sonia Jimenez appearing for the Government; Douglas Barlow, Patrick Black, and John McElroy appearing for Cramer; Gerald Bourque, Robert Morrow, Amy Martin, and Mark Donatelli appearing for Fackrell; Reynaldo Morin appearing for Elizabeth Rose; and law clerks.

The conference begins with Assistant United States Attorney (AUSA) Batte informing Judge Crone that Cramer's defense team had filed a motion to exclude the Government's witness, Elizabeth Rose, or to withdraw as counsel from Cramer's case.[1] In response to the Judge's question about when the motion was filed, the Government says that it was just that morning.

AUSA Craft describes "the pizza lunch and statements that were made,"[2] referring to statements that Rose allegedly heard Cramer and Fackrell make while

[1] The motion can be found at ECF No. 551.

[2] Statements in this exchange, which are set off in quotation marks, are verbatim. Statements with no quotation marks are not. All statements come from notes taken at the meeting.

in a holding facility at the federal courthouse. AUSA Batte adds that the Government learned about Rose's claims on Wednesday (May 2, 2018).

(The Judge reads Craft's memo and the defense's motion.)

Batte says that Rose's attorney, Morin, told him that Rose has an attorney-client privilege that is causing the problem with her testifying. Batte says that the Government does not know what statements would be privileged and that the defense should be required to proffer the privileged information that Rose has and the Government could use.

Batte describes Rose having entered a plea agreement and later having withdrawn it.[3] Batte says that Morin told him that a misunderstanding was discovered after the presentence investigation report was delivered. Rose was in court last week to withdraw her guilty plea, and she was allowed to do so.

Cramer's attorney, Patrick Black, the Federal Public Defender for the Eastern District of Texas, informs the Judge that a lawyer in his office, John McElroy, had been Rose's lawyer.[4] The Judge says, "Well, McElroy is not really on [Cramer's] case," to which Black says, "yes. Yes, he is." Black advises the Judge that the same issue regarding a potential witness whom his office represented is pending in the *Snarr-Garcia* case.[5] Black tells Judge Crone that the post-conviction attorneys in *Snarr* maintained that Black "should have withdrawn from representing Snarr because of

[3] *See United States v. Rose*, No. 1:17-cr-17 (E.D. Tex.), ECF Nos. 68, 83, 102, 103.

[4] *See* Mot. 3, ECF No. 551. On May 3, 2018, Assistant Federal Public Defender John McElroy had withdrawn from Rose's representation, and Criminal Justice Act attorney Reynaldo Padilla Morin was appointed to represent her. *See* Dkt. Entry for May 3, 2018.

[5] *United States v. Snarr et al.*, No. 1:09-cr-15 (E.D. Tex.).

the conflict." Black says that he never spoke to Rose, but McElroy did represent her. And, according to Black, there are confidential drug amounts involved in Rose's offense that the Government does not know about. The Judge says, "She has a right to testify. I'm not going to let you withdraw. Let's get this on the record of what you all know." Morin says that he does not know if Rose will waive her attorney-client privilege. Batte says that the privileged information is inadmissible anyways.

This exchange follows:

Judge Crone: Can we get the plea entered?

Batte says that it hasn't taken place yet.

McElroy: "Yes, the deal is signed and ready to go."

Judge Crone: "Why doesn't she just do it right now?"

Morin reported that Rose was prepared to go ahead with the plea at that time.

Judge Crone: "I'll do the plea."

Judge Crone: "I don't feel comfortable right now. You should have taken the plea. You should go talk to your client."

Black: "It's better for the record if she enters the plea first. One count in the pending indictment is conspiracy."

Craft: "Let's get a magistrate right away."

Craft then informs Judge Crone that they have an agreement under Federal Rule of Criminal Procedure 11(c)(1)(C).

From: Kenner, Traci (USATXE)
To: Katie Wang
Cc: Judy Madewell; dcoltharp@stmarytx.edu; Nicole Hochglaube; Batte, Joe (USATXE)
Subject: RE: Fackrell - Statement of 05-07-18 Conference
Date: Monday, December 2, 2019 8:39:29 AM

Good morning, Katie,

As an initial matter, we oppose any "statements" regarding unrecorded conferences being made part of the record.

I was not part of the trial team, so I cannot comment on the accuracy of the attachment, particularly the alleged quotations. I'm copying Joe Batte. He was present and may have some thoughts.

Best,

Traci

From: Katie Wang
Sent: Tuesday, November 26, 2019 5:17 PM
To: Kenner, Traci (USATXE)
Cc: Judy Madewell ; dcoltharp@stmarytx.edu; Nicole Hochglaube
Subject: Fackrell - Statement of 05-07-18 Conference

Hi Traci,

We are preparing statements of unrecorded conferences during the trial. Attached is the one of the May 7, 2018 conference. Please let us know if you have objections or proposed changes.

Thank you, and happy Thanksgiving,

Katie

Katie Y. Wang
Research and Writing Specialist
Office of the Federal Public Defender
Western District of Texas
727 East Cesar E. Chavez Boulevard, Suite B-207
San Antonio, Texas 78206-1278
(210) 472-6700
(210) 472-4454 (fax)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
versus	§	
	§	
	§	Order on Joint Opposed Motion to
CHRISTOPHER EMORY CRAMER (1)	§	Settle and Approve the Statement of the
and	§	Proceeding Not Recorded and Order It
RICKY ALLEN FACKRELL (2)	§	Included in the Appellate Record

ORDER

Having considered Christopher Emory Cramer's and Ricky Allen Fackrell's "Joint Opposed Motion to Settle and Approve the Statement of the Proceeding Not Recorded and Order It Included in the Appellate Record," the Court finds that the Motion should be GRANTED.

It is therefore ORDERED that the prepared statement of the unrecorded May 7, 2018, chambers conference is settled and approved.

It is further ORDERED that the district clerk include the statement in the record on appeal.

SIGNED at , Texas, this the day of January, 2020.

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
versus	§	
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RICKY ALLEN FACKRELL (2)	§	Included in the Appellate Record

ORDER

Having considered Christopher Emory Cramer's and Ricky Allen Fackrell's "Joint Opposed Motion to Settle and Approve the Statement of the Proceeding Not Recorded and Order It Included in the Appellate Record," the Court finds that the Motion should be GRANTED.

It is therefore ORDERED that the prepared statement of the unrecorded May 7, 2018, chambers conference is settled and approved.

It is further ORDERED that the district clerk include the statement in the record on appeal.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	
	§	
	§	
versus	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
CHRISTOPHER EMORY CRAMER (1)	§	
and	§	
RICKY ALLEN FACKRELL (2)	§	

JOINT MOTION TO COMPLETE THE RECORD ON APPEAL AND TO REQUEST THE COURT'S ASSISTANCE IN DOING SO

Despite their diligent efforts, appellate counsel for Christopher Cramer and Ricky Fackrell are still missing a substantial amount of material that should be part of the record available to counsel and the United States Court of Appeals for the Fifth Circuit in this federal death-penalty appeal. Without it, counsel cannot identify and present all viable appellate issues and thus cannot proceed with preparing an opening brief and appendix. Accordingly, Cramer and Fackrell, by their counsel, hereby move for the following, pursuant to Federal Rule of Appellate Procedure (FRAP) 10:

1. that the court settle the statements of district court proceedings not transcribed, *see* Appendix A;

2. that the court provide to appellate counsel any notes from additional unrecorded proceedings and conferences, which it may have, to shed light on the subject matter of these unrecorded proceedings and conferences, *see* Appendix B;

3. that the court provide to appellate counsel any undocketed written communications—both electronic

and non-electronic—between trial counsel and the Court or its staff, *see* Appendix C; and

4. that the Court provide any jury lists to appellate counsel.

I.

By superseding indictment,[1] Cramer and Fackrell were charged with murder, and conspiracy to murder, Leo Johns, a fellow inmate at the United States Penitentiary at Beaumont, Texas. After a joint jury trial in this Court, they were convicted of murder and sentenced to death. Both filed notices of appeal, counsel were appointed, and the Electronic Record on Appeal (EROA) was filed with the Fifth Circuit.

Since their appointment, Cramer's and Fackrell's appellate counsel have worked diligently to assemble a complete record of all the proceedings, submissions, and rulings in this Court, for use in their appeals. In reviewing the EROA, appellate counsel for both Cramer and Fackrell discovered that some exhibits, the sealed and ex parte pleadings, and the jury questionnaires were omitted from the record submitted to the Fifth Circuit. Counsel subsequently obtained the sealed and ex parte pleadings, and the jury questionnaires. *See* ECF Nos. 735, 739, 740. Counsel also recently received missing exhibits from the court. *See* ECF Nos. 742, 744.

Furthermore, counsel discovered that while many of the proceedings were recorded, there were numerous unrecorded proceedings.[2] Also, the written

[1] *United States v. Christopher Cramer and Ricky Fackrell*, 1:16-cr-00026, ECF No. 47.

[2] On December 30, 2019, we filed a motion to settle a statement concerning one of the unrecorded proceedings. *See* ECF No. 743. The Government responded on January 9, 2010, and we filed our reply on January 16, 2020. *See* ECF Nos. 745, 746. We are currently awaiting the Court's decision.

communications between the court and trial counsel and the jury lists were excluded from the record materials. As discussed below, these items should be made available to Cramer's and Fackrell's appellate counsel, so that counsel can consider them in identifying and briefing appellate claims, and so that the Fifth Circuit has a complete record available to it in reviewing this death-penalty case. Counsel therefore seek the Court's assistance.

II.

In this federal capital case, a complete record for appeal is especially critical, and is mandated not just by FRAP 10, but also by the Court Reporters Act, the Constitution, the Federal Death Penalty Act, and the ABA Guidelines. Title 28 U.S.C. § 753(b), the Court Reporters Act, requires that all proceedings in criminal court be recorded.[3] *See also Stansbury v. United States*, 219 F.2d 165, 169 n.6 (5th Cir. 1955). (The Court recognized that "[w]hile conferences outside of the jury are necessary and desirable, we doubt that they are proper unless reported…. We suggest to trial judges that the better practice would be to call the reporter…to record these conferences between court and counsel." This was the purpose of the Court Reporters Act, which was enacted to "prevent disputes and questions of veracity all too common under the old system."). Where such proceedings are not recorded, federal law further requires judicial intervention to help assemble a complete record, at the request of a party, when a "difference arises about whether the record truly discloses what occurred in

[3] Trial counsel recognized this as well and, accordingly, filed motions asking the Court to direct the Court reporter to record proceedings in this case. *See United States v. Christopher Cramer and Ricky Fackrell*, 1:16-cr-00026, ECF Nos. 117, 143. The Court granted both defendants' motions. *See id.*, ECF Nos. 162, 171.

the district court," including when "anything material to either party is omitted from or misstated in the record by error or accident." Fed. R. App. P. 10(e). Perhaps this is because, as the Fifth Circuit has recognized, "[t]he requirements of the [Court Reporters] Act are mandatory and it is the duty of the court, not the attorney, to see that its provisions are complied with." *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978). In other words, FRAP 10 provides an avenue to ensure compliance with the Court Reporters Act. Because the proceedings at issue were not recorded, and because the communications at issue involve the Court, Cramer and Fackrell require the Court's assistance so that they may present a complete and accurate record on appeal.

As the Supreme Court has recognized, a complete and accurate record, essential in any appeal, is required by the Constitution in a capital case. Thus, in *Dobbs v. Zant*, 506 U.S. 357, 358 (1993), the Court reversed the judgment because the appellate court failed to consider the full sentencing transcript, stating: "We have emphasized before the importance of reviewing capital sentences on a complete record." Such review is a critical "'safeguard against arbitrariness and caprice,'" influences that the Eighth Amendment forbids in capital cases. *Id. (*quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976)); *see also Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956) (denying indigent defendant adequate record for appeal violates due process). In appeals under the Federal Death Penalty Act (FDPA), Congress has also specifically required the Court of Appeals to "review the entire record." 18 U.S.C. § 3595(b). That includes all of the "evidence submitted during the trial," all of the

"information submitted during the sentencing hearing," and all of the "procedures employed during the sentencing hearing." *Id.* This statutorily mandated review would, of course, be impossible without a complete record.

Finally, nationwide ethical guidelines for capital cases likewise reflect this imperative. *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guidelines 10.7(b)(2), 10.8 (cmt.) (rev. 2003) ("[C]ounsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings" and "supplement it as appropriate.").

III.

Cramer's and Fackrell's appellate counsel are still missing the following categories of material that must be part of the record on appeal because they consist of communications between the court and counsel, or because they will document what occurred in the case.

A. Statement of District Court Proceedings Not Transcribed

Federal Rule of Appellate Procedure 10(c) provides a mechanism by which an appellant can attempt to reconstruct a record. The rule states:

> **Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As

> settled and approved, the statement must be included by the district clerk in the record on appeal.

In accordance with Rule 10(c), appellate counsel prepared statements of unrecorded proceedings that occurred on three separate dates: December 14, 2017; April 17, 2018; and June 8, 2018. *See* Appendix A. Like the first statement submitted to the court, *see* ECF No. 743, appellate counsel consulted with trial attorneys for Cramer and Fackrell, and resource counsel, in preparing these statements. The government, as previously indicated, opposes the reconstruction of any unrecorded proceedings.

Cramer and Fackrell now move for the Court to settle and approve the statements of district court proceedings not transcribed, and for an order directing the district clerk to include the statements in the record on appeal. Cramer and Fackrell also move for a hearing to resolve any objections or contested changes the Government has to the statements, and for an opportunity to be heard should the Court, too, disagree with the statements in any respect.

B. Unrecorded conferences and other such proceedings

After reviewing the available record, appellate counsel also discovered that the Court and the attorneys held numerous additional unrecorded sidebars and unrecorded conferences in the courtroom, in chambers, and by telephone, covering disputed legal issues and other substantive matters potentially relevant to Cramer's and Fackrell's appeals. Appellate counsel have consulted with trial counsel and have not been able to construct any detailed statement concerning these additional proceedings.

For this reason, appellate counsel respectfully request that the Court also share with them any notes or other records memorializing, summarizing, or otherwise documenting these, or any other, sidebars, conferences, and other such unrecorded proceedings in this case. In an effort to aid the Court in this endeavor, appellate counsel have produced, in Appendix B, the dates on which counsel believe such unrecorded proceedings took place and, where available, counsel have also included the subject matter of those unrecorded proceedings.

C. Written communications from the Court

From appellate counsel's review, it appears that there were email communications with trial counsel, the government, United States Marshals, and Bureau of Prisons officials noted on ECF, but which were not part of the record provided to the Fifth Circuit. A list of those communications, gleaned from ECF references, are included in Appendix C. Appellate counsel have consulted with trial counsel but have been unable to locate copies of these communications. Counsel respectfully ask that the Court share with them copies of those emails as well as any others the court may have exchanged with the parties about the case.

D. Jury Lists

Finally, appellate counsel also request that the Court provide them with any lists (including lists reflecting race and gender), which it or its staff possess of (a) the seated jurors, (b) the jurors who were peremptorily struck by each side, (c) the jurors who appeared for voir dire, and (d) the jurors who were summoned. No such lists

appear in the available record, yet they will undoubtedly be relevant to identifying and briefing appellate issues.[4]

IV.

For these reasons, the Court should grant the relief requested in this motion, all of which falls within the terms of Federal Rule of Appellate Procedure 10. The requested relief is also constitutionally and statutorily required for Cramer and Fackrell, and the Fifth Circuit, to have a complete and accurate record of what occurred in this Court.

Respectfully submitted,

/s/ DONNA F. COLTHARP
1 Camino Santa Maria
San Antonio, Texas 78228
210-436-3320
dcoltharp@stmarytx.edu
Texas Bar No. 24001909

MAUREEN SCOTT FRANCO
Federal Public Defender

JUDY FULMER MADEWELL
Deputy Federal Public Defender
Western District of Texas
727 East César E. Chávez Blvd., B–207
San Antonio, Texas 78206–1205
(210) 472-6700
(210) 472-4454 (Fax)
Judy_Madewell@fd.org
Texas Bar No. 00790727

[4] Of course, counsel assume that juror anonymity would be maintained for any such lists and that they would be provided under seal and subject to any appropriate protective order.

NICOLE WIGNALL DEBORDE
Hochglaube & DeBorde, P.C.
3515 Fannin Street
Houston, Texas 77004
Phone: 713-526-6300
Fax: 713-808-9444
nicole@houstoncriminaldefense.com

Attorneys for Ricky Fackrell

/s/ Douglas M. Barlow
DOUGLAS MILTON BARLOW
Barlow Law Firm
485 Milam
Beaumont, Texas 77701
409-838-4259
409-832-5611 (fax)
barlowfedlaw@gmail.com
Texas Bar No. 01753700

ANTHONY SEYMOUR HAUGHTON
Capital Resource Counsel Project
c/o Federal Public Defender
Southern District of Texas
440 Louisiana Street, Suite 1350
Houston, Texas 77002
832-287-9548
anthony_haughton@fd.org

Attorneys for Christopher Cramer

CERTIFICATE OF SERVICE

I certify that on January 24, 2020, I electronically filed Cramer's and Fackrell's "Joint Motion to Complete the Record on Appeal and to Request the Court's Assistance in Doing So" with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to: Joseph Robert Batte, Jr., Assistant United States Attorney, via electronic mail.

/s/ Donna F. Coltharp
Attorney for Ricky Fackrell

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	CRIMINAL ACTION NO.
	§	1:16-CR-26
	§	(Judge Marcia Crone)
versus	§	
	§	
	§	Order on Joint Motion to Complete the
CHRISTOPHER EMORY CRAMER (1)	§	Record on Appeal and to Request
and	§	the Court's Assistance in Doing So
RICKY ALLEN FACKRELL (2)	§	

ORDER

Having considered Christopher Emory Cramer's and Ricky Allen Fackrell's "Joint Motion to Complete the Record on Appeal and to Request the Court's Assistance in Doing So," the Court finds that the Motion should be GRANTED in all respects.

APPENDIX A

STATEMENT OF DISTRICT COURT PROCEEDINGS NOT TRANSCRIBED

A. December 14, 2017 status conference with Judge Marcia A. Crone, lawyers for both defendants, lawyers for the government, and the judge's law clerk.

JUDGE: Okay, what's up?

MORROW: Everything is set up at ADX to have Fackrell's brain scanned. It should occur on or about January 8. It will be performed by Mindset.

Black brings up the motion they filed to take pictures of the physical evidence. However, the FBI will not allow pictures to be taken without a court order.

GOVERNMENT: I'll give you my pictures.

BLACK: We want our photos.

JUDGE: Okay. I'll sign an order allowing the photos.

BLACK: We heard through the grapevine this case will not be deauthorized.

GOVERNMENT: Yes, that's correct.

BLACK: When did you find this out?

GOVERNMENT: I've been in and out of the office and just got the letter.

GOVERNMENT: I've been in Utah and Arizona working on this case

BOURQUE: What was the date of the letter?

GOVERNMENT: I don't recall[1].

JUDGE: I got word a week ago, but I was sort of expecting it.

JUDGE: What's with this law enforcement motion about what they are going to wear.

[1] It turned out that the letter was dated November 30, 2017.

Parties and court have discussion about suits, what the marshals will be wearing, and whether BOP employees will be in the courtroom. Judge says she wants BOP personnel in suits and ties and court security personnel will be in regular outfits. Government says BOP personnel will not be in the courtroom unless they are ready to testify.

JUDGE: I want people in church clothes, pants, shirt and jackets.

Rhonda, the marshal, says observers will have jackets on.

JUDGE: I want to make it clear there'll be no "sea of blue"

GOVERNMENT: Law enforcement witnesses won't be in the courtroom.

JUDGE: If guards show up, I want them in street clothes.

Judge's law clerk says the defense wants the security personnel to be "unobstrusive."

JUDGE: Security will stand against the wall.

JUDGE: What about prisoner witnesses in wit sec?

GOVERNMENT: We have a number of those wit sec witnesses.

JUDGE: We will bring in the prisoner witnesses before the jury comes in and secure them.

JUDGE: What clothes will be provided to prisoners?

GOVERNMENT: Cooperators will be in prison clothes.

JUDGE: Okay, shackled feet, free hands.

MARSHAL: Defendants can wear suits.

BOURQUE: We'll bring clothes to Marshals.

JUDGE: Court will be in session four days per week, except for jury selection, five days per week.

Robert Morrow expresses concerns about deadline for inmate witnesses and filing writs. It is quickly approaching and asks to extend to January 15th. Concern includes recent discovery and continuing discovery "all the time." Judge expresses concern about time it takes to get witnesses moved, not delays in disclosure, requests Marshal come back.

JUDGE: We can't wait until January 15th because it takes too long to get people here. If you disclose names after the existing deadline you do so at your own peril.

BLACK: We're getting more discovery coming all the time. How many pages are we going to get? We got email with discovery at 4:00 p.m. yesterday.

MARSHAL: Two full weeks is enough but we would like more notice to get witnesses moved.

JUDGE: Let us know as soon as you can.

BOURQUE: We are not intentionally delaying the request but we're just getting discovery now.

JUDGE: I know that.

JUDGE: I wish Jeff Sessions would have changed his mind.

BLACK: Everybody in this room is in agreement how this case should be resolved. That's what's frustrating all of us.

JUDGE: How long will this trial last?

GOVERNMENT: Four weeks.

JUDGE: Does that include deliberations?

GOVERNMENT: Probably mid-May.

BLACK: May 1st to May 15th.

JUDGE: Anything else? Aren't there motions on witnesses?

BLACK: Yes. Describes witness reimbursement issues. Adds that government just gave latest discovery including SIS information.

GOVERNMENT: SIS just gave me the stuff. I requested this years ago. This includes "internal SIS files" but there is some new stuff written by the clients.

BOURQUE: We got a three-year old letter just last night and it describes everything.

JUDGE: I don't know what you're talking about. There will be a suppression motion on January 30th.

MORROW: When Ricky Fackrell gets back to Beaumont, we may need help making arrangements to see him. We've had many problems in the past.

JUDGE: I thought we had that worked out.

BLACK: Tina at BOP is great but her recommendations are not always followed.

JUDGE: Will the defendants be housed at separate institutions? I want to be sure that they get their mail.

BLACK: We had an excellent tour at ADX last week. I was extremely impressed with the professionalism demonstrated by the staff.

JUDGE: I'd like to go. Other motions?

Back and forth between Black and Government over standing and authentication of copies of alleged kites written by Fackrell and/or Cramer.

MORROW: Judge, when we are here on the 30th, I need to make a record on many of the motions that you've already denied.

JUDGE: Which ones?

MORROW: Well a lot of them. Obviously all the ones you denied. For example, the Motion to Abate the Trial and the Motion for Severance.

JUDGE: Okay. Whatever. I will not reconsider those motions.

JUDGE: Can't I decide the "writings" motion without a hearing?

BLACK: You've given us a hearing in previous cases.

GOVERNMENT: The defendant has no standing.

BLACK: On my client's letter, I do.

GOVERNMENT: The letter was abandoned.

BLACK: We want a hearing.

MORROW: It's not admissible on other grounds.

BLACK: They don't have any originals.

JUDGE: I don't think he has a reasonable expectation to privacy, at least it's doubtful.

BLACK: We think it is inadmissible.

JUDGE: Okay. There are two issues. Where are the originals?

GOVERNMENT: I wish I knew.

BOURQUE: The Government's own Bureau of Prisons destroyed them.

GOVERNMENT: I sense a certain loss of collegiality in this proceeding like I haven't seen before in this case.

JUDGE: Where are the originals?

GOVERNMENT: We don't have any originals. Only copies from BOP.

JUDGE: Tell BOP to try and track them down. But their track record on finding documents is not good.

GOVERNMENT: I have concerns about the expert deadlines coming up.

MORROW: We will send a letter to the Government by the end of the week with our expert information.

Judge describes inconvenience that may occur due to new wallpaper being installed in her office during trial.

MARSHAL: How many prisoner witnesses will be writted to trial?

JUDGE: Each side should call the Marshal's separately and give the Marshal the number.

Discussion of recent judicial appointment.

End of conference at approximately 10:45a.m. Bourque approaches Judge with Government present and hands the recent written presentation to DOJ and the letter received two days ago sent by a prisoner to OIG describing the set-up in the Griffiths case. Bourque explains what the documents are to Judge and Judge's law clerk.

B. April 17th, 2018 conference with Judge Crone and all counsel. The conference discussed the jurors who were struck.

Chambers conference took place at approximately 3:40pm. Judge Crone noted that all the Black venire persons had been struck and asked, "Do we have a problem?" There was no immediate response. Government then responded that it was not striking jurors because they were Black. Pat Black pointed out that he planned to call mitigation witnesses who were Black. Government otherwise remained silent except to say, "We don't think there is a problem."

C. June 7th, 2018 conference with Judge Crone, all counsel, and the Judge's law clerks present. They discussed Fackrell's refusal to come to Court from Beaumont, and Cramer's refusal to go into the courtroom without Fackrell's approval.

Chambers conference took place between approximately 9:10a.m. and 9:30a.m. Prior to the chambers conference, there had been discussion with the Chief Marshal,

Chris, who indicated that Fackrell and Cramer were not coming to Court. Fackrell had refused to leave Beaumont and Cramer was in the courthouse but refusing to leave his cell unless Fackrell agreed to allow Cramer to go into Court by himself. There were attempts to get Fackrell on the phone, and Robert Morrow spoke with him briefly. Once in chambers, Marshal Chris advised the Court that Cramer was in the courthouse but refusing to come to Court and that Fackrell had refused to leave Beaumont.

Pat Black told the Court that Cramer wanted to come into Court without Fackrell. However, Cramer was concerned about prison politics, and Fackrell and Cramer had to stand together. Cramer wanted to talk to Fackrell and get his permission. Pat Black added that he could not discuss the stuff about prison politics in his conversation with Cramer on the record because it was covered by the attorney-client privilege and would cause Cramer problems if this information were in transcript.

Robert Morrow explained to all that this was a result of developments in court the previous day involving the two Beaumont Bureau of Prisons psychologists who were going to testify to conversations they had with Fackrell around the time that he and Cramer were considering going pro se and ending the case. There was some exchange about the Court's comments the day before, which were included in the transcript from that day, about what was going to be admissible.[2] The chambers exchange concerned prior discussions about redacting some of the statements and

[2] *See* Penalty Phase Transcript, Volume 9, June 6, 2018, PP. 2042-2068

allowing others. Judge Crone said, "well you presented Dr. Clemmer from ADX so I think it's proper." Judge Crone said, "It troubled me" that there was some information in there about things that might not be admissible. Robert Morrow said that Fackrell just needed time away today and would likely return on Monday.

Pat Black said Bureau of Prisons was trying to get a call set up, and that Cramer wanted to attend very badly but was prohibited from doing so because of prison politics. Judge Crone said, "I'm so sick of prison politics. We can't deal with that or delay the trial."

There was discussion about the requirements under Rule 43 regarding the defendants' absence and an opinion from the Fifth Circuit as well as to what instructions needed to be given. The parties then rehearsed what was going to happen, once back on the record, with the Rule 43 proceedings.

The Court then raised the topic of all the mitigation factors that had been submitted by team Cramer. The Judge said there were duplicates, and that she did not like the mitigator that said that the Cramer family had been "forced" to eat food out of the garbage. The Judge did not think that the word forced needed to be in there because it was not clear they were forced.

Next, there was a discussion about what to do about the Dr. Hayes issue from the day before, June 6, 2018. The transcript from that day included a long description of the problems with Dr. Hayes' reference to alleged involvement in gang activity by Ricky Fackrell. Parties went through the transcript and Joe Batte said, "I need to fix

it" and the Judge said she was embarrassed by what she had said since, apparently Batte and the Court were wrong about the lack of a reference to gang activity.

Robert Morrow was adamant that the issue was not whether Ricky was involved in gang activity so much but that Dr. Hayes was having difficulty keeping the defendants straight and this related to their severance motion. The Judge replied, "I don't want to hear anything about that." Morrow continued to protest and said that he was going to have to make his record on this confusion issue, and that the gang activity issue was totally separate. He was adamant that the expert was confused between Fackrell and Cramer. Judge Crone said she did not think the expert was confused. Morrow maintained he would have to make his record on the issue.

Appendix B

Unrecorded Proceedings

Date	Proceeding	Record Reference	Additional Details, Where Available
March 10, 2015	Chambers Conference	ECF 20	Budget
March 17, 2016	Chambers Conference	ECF 702	Scheduling Order
July or August 2016	Chambers Conference		Discussion concerning government's unopposed motion for a protective order, *see* DE 60, filed under seal on July 19, 2016
November 15, 2016	Chambers Conference		
December 14, 2016	Status Conference		
March 6, 2017	Status Conference		
November 14, 2017	Telephone Conference		
December 11, 2017	Telephone Conference		
February 14, 2018	Chambers Conference		Continuance and Jury Selection
March 27, 2018	Chambers Conference		Conference requested by Robert Morrow regarding security personnel coming into court with defendants; victim impact testimony
April 11, 2018	Chambers Conference	Voir Dire Transcript, Day 3, P. 81	Cramer and Fackrell reading jury questionnaires Juror sent a note about "boredom" One juror knew Doug Barlow and a Marshal recognized another juror

Date	**Proceeding**	**Record Reference**	**Additional Details, Where Available**
April 30, 2018	Chambers Conference, 9:15 a.m.		Discussion of two jurors with dyslexia
April 30, 2018	Chambers Conference, 1:30 p.m.		Discussion about Cramer swearing within earshot of a marshal; Cramer sending kites with informants' names; and whether defense could use priors older than 10 years
May 1, 2018	Chambers Conference		Witness cross-examinations Reference to "cleaning up the record"
May 2, 2018	Chambers Conference		Cramer expert reports
May 2, 2018	Chambers Conference	Guilt Phase Transcript, Day 3, P. 872	Discussion related to Utah witnesses
May 7, 2018	Chambers Conference	Guilt Phase Transcript, Day 5, PP. 1390, 1394, 1396-1397	Lesser-Included Offenses Closing arguments Jury charge
May 8, 2018	Chambers Conference	Guilt Phase Transcripts, Day 6, P. 1411	Court asked to speak with Pat Black, counsel for Cramer, in chambers
May 14, 2018	Chambers Conference	Penalty Phase Transcript, Day 1, P. 287	Cramer's and Fackrell's outbursts .
May 15, 2018	Chambers Conference	Penalty Phase Transcript, Day 2, P. 430	
May 16, 2018	Off-the-Record Conference		Cramer and Fackrell advised the judge they wanted to rest, quit, not present

Date	**Proceeding**	**Record Reference**	**Additional Details, Where Available**
			any mitigation evidence, and ask for a death sentence
May 29, 2018	Chambers Conference		Lunchtime car accident involving a juror; preceded a second discussion on the record
May 31, 2018	Chambers Conference		Erik Rekonen's assertion of Fifth Amendment right against self-incrimination if called to testify
June 4, 2018	Chambers Conference	Penalty Phase Transcript, Day 7, P. 1564	Court asked to speak with Fackrell's counsel in chambers
June 7, 2018	Chambers Conference		Discussion on defendants' presence at trial
June 8, 2018	Chambers Conference	Penalty Phase Transcript, Day 10, PP. 2462 and 2464	Penalty phase jury charge
June 11, 2018	Chambers Conference		

Appendix C

ECF References to Written Communications Between Court and Parties

Date	ECF	Description
March 10, 2015	13	*SEALED* SEALED ORDER granting sealed motions as to Christopher Emory Cramer. cc: Black, Barlow 3/11/15Signed by Judge Marcia A. Crone on 3/10/15. (mrp,) [1:14-mj-00203-KFG] (Entered: 03/11/2015)
March 10, 2015	14	*SEALED* SEALED ORDER granting sealed motions as to Ricky Allen Fackrell. cc: Morrow, Bourque 3/11/15 Signed by Judge Marcia A. Crone on 3/10/15. (mrp,) [1:14-mj-00203-KFG] (Entered: 03/11/2015)
April 24, 2015	16	*SEALED* ORDER granting 15 Motion for Buccal Swab Collection as to Christopher Emory Cramer (1), Ricky Allen Fackrell (2). Signed by Magistrate Judge Keith F. Giblin on 4/24/2015. (cc: AUSA on 4/24/2015 to forward copies to defense counsel) (saw,) [1:14-mj-00203-KFG] (Entered: 04/24/2015)
June 3, 2016	50	E-GOV SEALED Summons on superseding indictment issued and handed to USM for service as to Christopher Emory Cramer (bjc,) cc: USA, Black, Barlow (Entered: 06/03/2016)
June 3, 2016	51	E-GOV SEALED Summons on superseding indictment issued and handed to USM for service as to Ricky Allen Fackrell (bjc,) cc: USA, Morrow, Bourque (Entered: 06/03/2016)
June 24, 2016	58	*SEALED* SEALED ORDER re Budget as to Christopher Emory Cramer. cc: Black, Barlow 6/24/16 Signed by Judge Marcia A. Crone on 6/23/16. (mrp,) (Entered: 06/24/2016)
June 24, 2016	59	*SEALED* SEALED ORDER re Budget as to Ricky Allen Fackrell. cc: Morrow, Bourque 6/24/16 Signed by Judge Marcia A. Crone on 6/23/16. (mrp,) (Entered: 06/24/2016)
August 18, 2016	70	*SEALED* ORDER granting 60 Sealed Motion for protective order as to Christopher Emory Cramer (1), Ricky Allen Fackrell (2). Signed by Judge Marcia A. Crone on 8/18/2016. (bjc,) cc: USA, Black, Morrow (Entered: 08/19/2016)
December 7, 2016	75	*SEALED* SEALED ORDER granting Sealed Motion 74 as to Christopher Emory Cramer. cc: Black, Barlow 12/7/16 Signed by Judge Marcia A. Crone on 12/7/16. (mrp,) (Entered: 12/07/2016)
October 25, 2017	98	*SEALED* SEALED ORDER re Capital Trial Budget Attorney and Service Provider Fees as to Ricky Allen Fackrell. cc: Bourque, Morrow 10/25/17 Signed by Judge

Date	ECF	Description
		Carl E Stewart Chief Circuit Judge U. S. Court of Appeals for the Fifth Circuit on 10/23/17. (mrp,) (Entered: 10/25/2017)
October 25, 2017	99	*SEALED* SEALED ORDER re Capital Trial Budget Expert Fees as to Ricky Allen Fackrell. Signed by Judge Carl E Stewart Chief Circuit Judge U. S. Court of Appeals for the Fifth Circuit on 10/23/17. cc: Bourque, Morrow 10/25/17 (mrp,) (Entered: 10/25/2017)
December 7, 2017	249	*SEALED* SEALED ORDER as to Christopher Emory Cramer. cc: Black, Barlow 12/8/17 Signed by District Judge Marcia A. Crone on 12/7/17. (mrp,) (Entered: 12/08/2017)
December 7, 2017	250	*SEALED* ORDER granting 242 Sealed Motion as to Christopher Emory Cramer (1). cc: Black, Barlow 12/8/17 Signed by District Judge Marcia A. Crone on 12/7/17. (mrp,) (Entered: 12/08/2017)
December 7, 2017	251	*SEALED* SEALED EX PARTE ORDER REGARDING EXPERTS as to Christopher Emory Cramer, Ricky Allen Fackrell. cc: Black, Barlow, Morrow, Bourque 12/8/17 Signed by District Judge Marcia A. Crone on 12/7/17. (mrp,) (Entered: 12/08/2017)
December 18, 2017	264	*SEALED* SEALED EX-PARTE ORDER re: Capital Trial Budget as to Christopher Emory Cramer, Ricky Allen Fackrell. Signed by Chief Judge Carl E. Stewart for the 5th Circuit Court of Appeals on 12/13/17. cc: Black, Morrow 12/18/2017 (tkd,) (Entered: 12/18/2017)
January 25, 2018	330	*SEALED* SEALED Capital Trial Budget ORDER as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 1/25/18. cc: Morrow 1/16/18 (tkd,) (Entered: 01/26/2018)
February 1, 2018	345	*SEALED* SEALED ORDER on Proposed Trial Budget for the Defense Team as to Ricky Allen Fackrell. cc: Morrow, Bourque 2/2/18 Signed by District Judge Marcia A. Crone on 2/1/118. (mrp,) (Entered: 02/01/2018)
February 1, 2018	346	*SEALED* SEALED ORDER for Approval of Proposed Expert Trial Budget as to Ricky Allen Fackrell. cc: Morrow, Bourque 2/2/18 Signed by District Judge Marcia A. Crone on 2/1/18. (mrp,) (Entered: 02/01/2018)
February 7, 2018	359	*SEALED* SEALED ORDER on Supplemental Trial Budget Expert Fees as to Ricky Allen Fackrell. cc: Morrow, Bourque 2/12/18 Signed by Chief Circuit Judge Carl E. Stewart on 2/7/18. (mrp,) (Entered: 02/12/2018)
February 7, 2018	360	*SEALED* SEALED ORDER on Supplemental Capital Trial Budget Attorney and Service Provider Fees as to

Date	ECF	Description
		Ricky Allen Fackrell. cc: Morrow, Bourque 2/12/18 Signed by Chief Circuit Judge Carl E. Stewart on 2/7/18. (mrp,) (Entered: 02/12/2018)
February 14, 2018	371	*SEALED* SEALED ORDER granting 361 Sealed Ex parte Petition for Writ of Habeas Corpus ad Testificandum as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 2/14/18. cc: USM, BOP, Warden Florence Admax, FPD 2/20/18 (tkd,) (Entered: 02/20/2018)
February 14, 2018	373	*SEALED* SEALED ORDER granting 362 Sealed Ex Parte Petition for Writ of Habeas Corpus ad Testificandum as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 2/14/18. cc: USM, BOP, Warden Springfield MCFP, FPD 2/20/2018 (tkd,) (Entered: 02/20/2018)
February 20, 2018	372	*SEALED* Sealed WRIT of Habeas Corpus ad Testificandum issued as to Christopher Emory Cramer. cc: USM, BOP, Warden Florence Admax, FPD 2/20/18 (tkd,) (Entered: 02/20/2018)
February 20, 2018	374	*SEALED* Sealed Ex Parte Writ of Habeas Corpus ad Testificandum issued as to Christopher Emory Cramer. cc: USM, BOP, Warden Springfield MCFP, FPD 2/20/18 (tkd,) (Entered: 02/20/2018)
February 20, 2018	376	*SEALED* SEALED ORDER granting 367 Sealed Ex Parte Motion to Amend Allocation of Expert Funds and to Designate Additional Expert as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 2/20/18. cc: Barlow 2/21/18 (tkd,) (Entered: 02/21/2018)
March 14, 2018	397	*SEALED* Sealed WRIT of Habeas Corpus ad Testificandum as to Christopher Emory Cramer. cc: FPD, USM (tkd,) (Entered: 03/14/2018)
March 16, 2018	408	*SEALED* SEALED ORDER granting 298 Sealed Amended Ex Parte Application for WHCAT for Richard Glenn Blount III as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 3/16/18. cc: FPD (tkd,) (Entered: 03/16/2018)
March 16, 2018	410	*SEALED* SEALED ORDER granting 399 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Garmon Coats as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	411	*SEALED* SEALED ORDER granting 400 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Michael Hegyi as to Ricky Allen Fackrell. Signed by District

Date	ECF	Description
		Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	412	*SEALED* SEALED ORDER granting 401 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Aaron McCaa as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	413	*SEALED* SEALED ORDER granting 402 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Britt Vaughn Moon as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	414	*SEALED* SEALED ORDER granting 403 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Michael Shawn Radecky as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	415	*SEALED* SEALED ORDER granting 404 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Lukner Rene as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	416	*SEALED* SEALED ORDER granting 405 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Duane Roberts as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	417	*SEALED* SEALED ORDER granting 406 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for Glen Lee Sympson as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 16, 2018	418	*SEALED* SEALED ORDER granting 407 Ex Parte Application for Writ of Habeas Corpus Ad Testificandum for James Phillip Tafoya as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/16/18. cc: Bourque (tkd,) (Entered: 03/16/2018)
March 19, 2018	429	*SEALED* SEALED ORDER granting 428 Sealed Ex Parte Petition for Writ of Habeas Corpus Ad Testificandum for Jason Lynn Scoggan as to Christopher Emory Cramer, Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/19/18. cc: USA 3/20/18 (tkd,) (Entered: 03/20/2018)

Date	ECF	Description
March 21, 2018	435	*SEALED* SEALED ORDER granting 433 Sealed Ex Parte Petition for Writ of Habeas Corpus ad Testificandum for Jason Bendt as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/21/18. cc: Bourque 3/22/18 (tkd,) (Entered: 03/22/2018)
March 21, 2018	436	*SEALED* SEALED ORDER granting 434 Sealed Ex Parte Application for Writ of Habeas Corpus ad Testificandum for Mark Christopher Poe as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/21/18. cc: Bourque 3/22/18 (tkd,) (Entered: 03/22/2018)
March 23, 2018	449	*SEALED* SEALED ORDER granting 441 Sealed Ex Parte Motion for Preapproval of Travel Expenses for Jury Consultant as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 3/23/18. cc: Barlow (tkd,) (Entered: 03/23/2018)
March 23, 2018	450	*SEALED* SEALED ORDER granting 442 Sealed Ex Parte Motion for Approval of Additional Trial Attorney's Fees as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 3/23/18. cc: Barlow (tkd,) (Entered: 03/23/2018)
March 26, 2018	457	*SEALED* SEALED Capital Trial Budget ORDER re: Supplemental Attorney Fees as to Christopher Emory Cramer. Signed by Carl E. Stewart, Chief Judge for the Fifth Circuit Court of Appeals on 3/26/18. cc: Barlow 3/27/18 (tkd,) (Entered: 03/27/2018)
March 27, 2018	458	*SEALED* SEALED ORDER granting 453 Sealed Ex Parte Application for Issuance of Witness Subpoenas as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 3/27/18. cc: FPD 3/28/18 (tkd,) (Entered: 03/28/2018)
March 27, 2018	459	*SEALED* SEALED ORDER granting 454 Ex Parte Application for Issuance of Witness Subpoenas as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/27/18. cc: Bourque 3/28/18 (tkd,) (Entered: 03/28/2018)
March 27, 2018	460	*SEALED* SEALED Ex Parte ORDER granting 451 Ex Parte Application for Writ of Habeas Corpus ad Testificandum for Myron Edward Schanck as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 3/27/18. cc: Bourque 3/28/18 (tkd,) (Entered: 03/28/2018)
April 2, 2018	475	*SEALED* SEALED Amended Ex Parte ORDER granting 453 Ex Parte Application for Issuance of Witness Subpoenas as to Christopher Emory Cramer. Signed by

Date	ECF	Description
		District Judge Marcia A. Crone on 4/2/18. cc: FPD (tkd,) (Entered: 04/02/2018)
April 26, 2018	516	*SEALED* SEALED Second Amended EX PARTE ORDER granting 453 Ex Parte Application for Issuance of Witness Subpoenas as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 4/26/18. cc: FPD 4/27/18 (tkd,) (Entered: 04/27/2018)
May 1, 2018	535	*SEALED* SEALED Ex Parte ORDER granting 530 SEALED Ex Parte APPLICATION for Court Order to Require the Production of Certified Social Security Medical Records for Merrill Fackrell Jr, Defendant Ricky Fackrell's Father as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/1/18. cc: Morrow 5/2/18 (tkd,) (Entered: 05/02/2018)
May 2, 2018	544	*SEALED* SEALED Ex Parte ORDER granting 534 Sealed First Amended Ex Parte Application for Issuance of Witness Subpoenas as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/2/18. cc: Morrow 5/3/18 (tkd,) (Entered: 05/03/2018)
May 4, 2018	548	*SEALED* SEALED Ex Parte ORDER granting 542 Sealed Application for Approval of Trial Budget for the Defense Team as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/4/18. cc: Morrow 5/4/2018 (tkd,) (Entered: 05/04/2018)
May 11, 2018	587	*SEALED* SEALED Third Amended Ex Parte ORDER granting 453 Ex Parte Application for Issuance of Witness Subpoenas as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 5/11/18. cc via email: FPD Black 5/14/2018 (tkd,) (Entered: 05/14/2018)
May 11, 2018	588	*SEALED* SEALED Ex Parte ORDER granting 473 Sealed Application for indigent witness subpoenas and indigent witness expenses for Connie Dunham as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/11/18. cc via email: Morrow 5/14/2018 (tkd,) (Entered: 05/14/2018)
May 15, 2018	599	*SEALED* SEALED Ex Parte ORDER granting 586 Second Ex Parte Application for indigent witness subpoenas and indigent witness expenses for witness Connie Dunham as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/15/18. cc via email: Morrow 5/16/18 (tkd,) (Entered: 05/16/2018)
May 18, 2018	612	*SEALED* SEALED Supplemental Capital Trial Budget ORDER re Attorney and Service Provider Fees as to Ricky

Date	ECF	Description
		Allen Fackrell. Signed by Chief Circuit Judge for the Fifth Circuit Court of Appeals Carl E. Edwards on 5/18/18. cc via email: Morrow 5/22/18 (tkd,) (Entered: 05/22/2018)
May 21, 2018	609	*SEALED* SEALED Ex Parte ORDER granting 606 Third Ex Parte Motion for Approval of Additional Trial Attorney's Fees as to Christopher Emory Cramer. Signed by District Judge Marcia A. Crone on 5/21/18. cc via email: Barlow (tkd,) (Main Document 609 replaced on 5/22/2018) (tkd,). (Entered: 05/21/2018)
May 21, 2018	611	*SEALED* SEALED Ex Parte ORDER granting 608 Ex Parte Motion for Issuance of Witness Subpoena and Indigent Witness Expense for Merrill Fackrell III as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 5/21/18. cc via email: Morrow 5/22/18 (tkd,) Modified on 5/22/2018 (tkd,). (Entered: 05/22/2018)
May 25, 2018	613	*SEALED* SEALED EX PARTE ORDER as to Ricky Allen Fackrell. The Ex Parte Motion for Fackrell Family Flight Arrangements #601 is denied as moot. emailed Morrow 5/25/18 Signed by District Judge Marcia A. Crone on 5/22/18. (mrp,) (Entered: 05/25/2018)
June 7, 2019	639	*SEALED* SEALED Ex Parte ORDER granting 634 Ex Parte Motion to Withdraw Motion and denying 629 Ex Parte Motion re Proposed Trial Budget for the Defense Pathologist in a Death Penalty Case as to Ricky Allen Fackrell. Signed by District Judge Marcia A. Crone on 6/7/18. cc via email: Bourque 6/8/2018 (tkd,) (Entered: 06/08/2018)
June 12, 2018	645	*SEALED* SEALED ORDER for Approval of Additional Trial Attorney's Fees as to Christopher Emory Cramer. cc: emailed D Barlow 6/12/18 Signed by District Judge Marcia A. Crone on 6/12/18. (mrp,) (Entered: 06/12/2018)
June 13, 2018	672	SEALED Statement of Reasons re 671 Judgment as to Christopher Emory Cramer. cc: all counsel of record 6/13/18 (mrp,) (Entered: 06/13/2018)
June 13, 2018	674	SEALED Statement of Reasons re 673 Judgment as to Ricky Allen Fackrell. cc: all counsel of record 6/13/18 (mrp,) (Entered: 06/13/2018)
June 14, 2018	682	*SEALED* SEALED ORDER granting Motion for Authority for Payment for the Fact Investigation as to Christopher Emory Cramer, Ricky Allen Fackrell. cc:Bourque; Morrow 6/15/18 Signed by District Judge Marcia A. Crone on 6/14/18. (mrp,) (Entered: 06/14/2018)

Date	ECF	Description
September 26, 2018	715	ORDER denying as moot 705 Pro se Letter Motion to terminate Mr. Barlow as attorney for Christopher Emory Cramer (1). Signed by Magistrate Judge Zack Hawthorn on 9/26/18. cc: Cramer (tkd,) (Entered: 09/26/2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	Criminal Number 1:16-CR-26(1)
	§	(Judge Crone)
CHRISTOPHER EMORY CRAMER	§	
and	§	
RICKY FACKRELL	§	

JOINT DEFENSE MOTION TO PRECLUDE IMPROPER CROSS-EXAMINATION OF DEFENSE EXPERTS AND REBUTTAL TESTIMONY FROM GOVERNMENT WITNESSES ON FUTURE DANGEROUSNESS NON-STATUTORY AGGRAVATOR, OR, IN THE ALTERNATIVE, FOR DISCOVERY

NOW COME Defendants, RICKY ALLEN FACKRELL and CHRISTOPHER CRAMER, by counsel, and respectfully request this Court enter an Order precluding certain improper anecdotal cross-examination of defendants' experts related to the non-statutory aggravator future danger and the defense proposed mitigators, and requests that government witnesses be precluded from offering such testimony in rebuttal. In the alternative, if the Court determines that some form of anecdotal cross-examination and rebuttal testimony is permissible, counsel requests this Court limit the incidents to the past five years and further order that any such alleged anecdotes and supporting documents be disclosed to defense counsel forthwith.

I. Good Cause

On April 6, 2018, the Government notified counsel for defendants that it intends to call David Berkebile, a former BOP Warden to rebut testimony presented by defendants' penalty phase BOP experts. Accordingly, the defense was unable to file this motion prior that date, and in accordance with the deadline for pre-trial and trial motions set by this Court in the current

Scheduling Order.

II. Introduction

Mr. Fackrell intends to call former warden Mark Bezy to support proposed mitigating factors. For example, Mr. Bezy will testify that given Mr. Fackrell's placement in the ADX Control Unit and his appropriate prison adjustment, the Bureau of Prisons (BOP) can adequately control him. Mr. Cramer's defense expert, Tim Gravette, will provide similar testimony of behalf of Mr. Cramer.

Mr. Bezy has testified in other capital cases and expressed similar opinions as to the individual defendants facing life without parole in BOP. On numerous occasions, government attorneys have cross-examined Mr. Bezy and/or other similar defense experts about specific acts of violence allegedly committed in BOP by persons who are in no way connected to the individual defendant being sentenced. Most of the alleged anecdotes previously used by government attorneys have occurred more than five years prior to the sentencing proceeding. In some cases government attorneys have asked defense future danger experts about such irrelevant episodes as:

- The 1997 murders of inmates at USP Lewisburg for which members of the Aryan Brotherhood were convicted.
- The murders of correctional officers as USP Marion occurring in 1981.
- Alleged prison connections of prisoners to the murder of Judge John Wood in Texas in 1979.

In the course of using such anecdotal information in the cross-examination of defense danger experts, the government attorneys have never attempted to show any connection between the defendant facing sentencing and the BOP prisoner who allegedly committed the acts of violence. In none of these cases has the government attempted to show, based on the background of the prisoners involved in these past incidents, that the incidents were in any way relevant or

predictive as to whether the individual capital defendant on trial was likely to commit future acts of violence.

At the same time, many of the characterizations of BOP violence used by government Attorneys have been inaccurate and misleading. For example, in the capital trial in *U.S. v. Azibo Aquart*, Case No. 6 CRL 160(JBE) in the District of Connecticut, in the government's cross-examination of Mr. Bezy, the following exchange took place at pages 5398:

Q: And in fact there was another murder at Supermax in 2008, Gary Douglas Watland killed somebody.

A: That was at USP. It wasn't the ADX.

In fact, Mr. Bezy was correct. The homicide allegedly committed by Gary Watland, who has pleaded guilty in return for a life sentence in the District of Colorado, actually occurred at a USP across the road from the ADX Supermax. However, the government attorney was attempting to undermine Mr. Bezy's testimony with inaccurate information by suggesting that the murder had occurred at the ADX Supermax, a facility where Mr. Bezy contended that the defendant could be safely housed.

In another anecdotal cross-examination of Mr. Bezy in the same case, the government once again used inaccurate information to attempt to undercut Mr. Bezy's testimony. At page 5398, in describing a homicide that actually did occur at the ADX in 2005, the following exchange took place:

Q : Is that the 2005 murder of Manuel Torrez?

A: Correct.

Q: And he was beaten to death in the yard at Supermax, correct?

A: Correct.

Q: By Richard Santiago and Sylvestre Rivera?

A: Yes.

Q: And Santiago was at Supermax because he killed a prison guard in Fresno, right?

A: I'm not aware of what he did.

In fact, Richard Santiago, who was facing capital murder charges in the District of Colorado, has never killed a prison guard anywhere.

Furthermore, Capital Case Section Attorney Bruce Hegyi attempted to cross-examine Mr. Bezy with unsubstantiated and inaccurate anecdotal information in *United States v. Candelario-Santana*, 09-427, DPR 2013. He began by asking Mr. Bezy if he was aware of an incident in a California state facility where a "spear" was fashioned out of a rolled-up newspaper. When Mr. Bezy responded with a question regarding the facility, Mr. Hegyi change the topic to question Mr. Bezy about an incident at the BOP Supermax facility involving an incident with a rolled-up newspaper. Having elicited from Mr. Bezy that he was aware of the incident but not its particulars, Mr. Hegyi persisted.

Q. Okay. And that person then when he was supposed to be cuffed up, and the guard came to the slot, and he actually jammed that spear through and tried to kill the officer, didn't he?

A. I am not aware of the whole situation. I've heard the situation. I'm not sure of the particulars.

Q. That's what you heard, right?

A. Not that he jammed it. He lunged at the staff with it.

Q. Right, trying to kill him?

A. Well, I don't remember that.

Q. And this took place not too long after the situation in California where the inmates there rolled up a similar spear out of newspaper, hardened it, and they threw it through not one but two prison guards?

Defense counsel objected, but the damage had been done. At side bar, Mr. Hegyi continued to claim that two prison guards had been killed in the incident he, and only he, described before the jury. A recess was called to allow him to ask Mr. Bezy if he was aware of the case. When the cross resumed, the topic was dropped, but of course the damage had been done. Mr. Bezy later learned that the incident occurred 30 years ago and that Mr. Hegyi's claim that two officers were killed was erroneous. And if Mr. Hegyi was accurate, the Supermax incident with the rolled newspaper is ancient history as well, but without having the underlying data, there was no way for defense counsel to know this.

Inaccurate or outdated anecdotal information has been used by government attorneys to cross-examine defense future danger experts in the following cases:

- *U.S. v. Timothy O'Reilly*, CR No. 05-80025, Eastern District of Michigan, the government attorney, while cross examining the defense expert on future danger, was caught overstating the rate of serious assault in BOP facilities by 400%.

- *U.S. v Darryl Lamont Johnson*, No. C 6998, Northern District of Illinois, Eastern Division, where the government presented a former assistant warden from ADX who falsely testified that defendants, such as Mr. Johnson, could not be directly assigned to the ADX-Florence control unit based on offenses committed in the community.

- *U.S. v. Jessie Con-Ui*, CR No. 3:13-cr-00123, Middle District of Pennsylvania, former ADX complex Warden John Oliver falsely testified that Ted Kaczynski killed a federal judge. [1]

- *U.S. v. Mark Snarr and Edgar Garcia*, No. 1:09-cr-15, Eastern District of Texas, where the government in cross-examining Mark Bezy, without notice, injected the designation to ADX of death-sentenced prisoner Joseph Ebron. The government inaccurately suggested that such designation was a BOP mistake in its attempt to undermine Mr. Bezy's testimony, when, in fact, numerous

[1] The Government has notified the defense that it intends to call former ADX Warden David Berkebile as a rebuttal witness. This witness has testified for the Government at least twice in capital prosecutions and has described in that testimony numerous anecdotal incidents of violence occurring at the ADX Supermax. The Defendants are filing a separate motion for discovery based on Mr. Berkebile's prior testimony.

> death-sentenced prisoners, like Shannon Agofsky, Kaboni Savage and Dzhokhar Tsarnaev have been sent to ADX pursuant to BOP policy and law. See Trial Transcript, Vol. 6, P. 1182-3.

Because these exchanges have often occurred late in penalty phase proceedings, in many cases, it was only in post-conviction proceedings that the falsity or misleading nature of information used by government attorneys was discovered. Therefore, based on what has become a pattern of government cross-examination of defense future danger experts, Mr. Fackrell and Mr. Cramer request the Court enter an order:

1. Prohibiting cross-examination of defense experts, and prohibiting the admission of such evidence through government witnesses, through the use of alleged anecdotal evidence of other BOP prisoners which is in no way connected to Mr. Fackrell or Mr. Cramer.

2. Alternatively, in the event the Court determines such cross-examination through the use of anecdotes is permissible, and that such evidence is admissible in the government's rebuttal case, the defendants request this Court limit such incidents to those occurring after April 1, 2013.

3. Additionally, in the event the Court determines that such anecdotal cross-examination is permissible and that the government may introduce anecdotal evidence through its experts, the defendants request this Court order the government to disclose any alleged incidents of violence and any supporting documents at least three (3) days prior to the witness's testimony so that counsel may adequately investigate the accuracy and relevance of the incident.

III. Argument and Authorities

A. Admitting Information Regarding Specific Acts of Violence Committed by Other Prisoners and the Details of the Incidents Would Violate the Defendants' Constitutional Rights and 18 U.S.C. §3593(c).

Admission of information regarding specific acts of violence by other prisoners would violate the defendants' constitutional rights under the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fifth Amendment's Due Process Clause to an individualized sentencing proceeding. Additionally, such information should be excluded as irrelevant and likely

to cause unfair prejudice, confuse the issues and mislead the jury under 18 U.S.C. §3593(c).

The threshold determination for admission of information at a penalty phase of an FDPA trial is that the information is "relevant to sentencing." *United States v. Lujan*, 603 F.3d 850, 854 (10th Cir. 2010); 18 U.S.C. §3593(c). Evidence is relevant if it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also Lujan*, 603 F.3d at 854 ("Although §3593(c) fails to define 'relevant,' we have interpreted it as 'the same standard used throughout the federal courts under Federal Rule of Evidence 401.'"). The purpose of the "selection phase" of the sentencing hearing is for an individualized determination of all relevant evidence once the jury has determined that the defendant is eligible for the death penalty. *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994). This includes determining a defendant's likelihood of future dangerousness. *See Jurek v. Texas*, 428 U.S. 262, 275 (1976).

Section 3593(c) further provides in part that "information [at the penalty phase] may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Section 3593(c) grants this Court greater discretion to exclude unfairly prejudicial or confusing information than the analogous Federal Rules of Evidence provide during the trial phase.

"[T]he evidentiary standard found in § 3593(c) of the FDPA upholds the constitutional required balance between the needs for heightened reliability and individualized sentencing by enabling the judge, as gatekeeper, to bar unreliable or unfair sentencing information." *United States v. Taylor*, 302 F.Supp.2d 901, 905 (N.D. Ind. 2003) (citing 18 U.S.C. §3593(c). The Second Circuit has noted:

> the requirement of a fundamentally fair trial is certainly met [by §3593(c)], given that the balancing test set forth in the FDPA is, in fact, more stringent than its counterpart in the [Federal Rules of Evidence], which allows the exclusion of

> relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403.... Thus, the presumption of admissibility of relevant evidence is actually narrower under the FDPA than under the FRE.

United States v. Pepin, 514 F.3d 193, 204 (2d Cir. 2008) (quoting *United States v. Fell*, 360 F.3d 135, 145 (2d Cir. 2004)). The Court further pointed out:

> [U]nder the FDPA [s]tandard, judges continue their role as evidentiary gatekeepers and, pursuant to the balancing test set forth in §3593(c), retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair. *Id.* (quoting *Fell*, *supra*).

As held by *United States v. Johnson*, 239 F.Supp.2d 924, 946 (N.D. Iowa 2003), the FDPA "expressly supplants only the rules of evidence, not constitutional standards .... [The trial court] retains the authority under the statute to impose upon the parties any standards of admissibility or fairness dictated by the Fifth and Sixth Amendments."

"'Unfair prejudice' refers to an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one' or 'evidence designed to elicit a response from the jurors that is not justified by the evidence.'" *United States v. Ellis*, 147 F.3d 1131, 1135 (9th Cir. 1998) (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 403.04[1][b]); *accord Old Chief v. United States*, 519 U.S. 172, 180 (1997); *see also Lujan*, 603 F.3d at 858 (stating that "§ 3593(c) provides a district court greater discretion to exclude evidence than [Federal Rule of Evidence] 403 does."); *United States v. Taylor*, 635 F.Supp.2d 1236, 1242 (D.N.M. 2009) (noting that, "...the FDPA provides even greater protection against prejudicial information than the [FRE], because the FDPA permits a judge to exclude information whose probative value is outweighed by the danger of unfair prejudice, rather than the "substantially outweighed" standard set forth in Rule 403.").

B. Evidence Regarding Unrelated Incidents Is Not Relevant to a Jury's Determination of Whether the Defendants are Likely to Commit Future Acts of Violence, and its Admission would be Unfairly Prejudicial, Mislead the Jury and Confuse the Issues.

The issue that the jury must decide is whether the BOP can adequately control these defendants in the context of serving a life sentence without possibility of release in BOP. Specific actions by other inmates are not relevant to the jury's determination of this issue.

In *United States v. Sampson*, the court "permitted only general testimony about the ability of the BOP to control inmates, including gross statistics regarding assaults and other misconduct, but did not permit testimony regarding specific other prisoners." 335 F.Supp.2d 166, 227 (D. Mass. 2004). It is generally recognized that acts by persons unrelated to the defendant and the charged offenses are not probative of any issue in the case. *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008), the Second Circuit reversed the defendants' convictions for providing material support to terrorist organizations. Among other errors, the Court criticized the admission of lengthy testimony regarding a Tel Aviv bus bombing that the defendants were not charged with being involved. *Id.* at 159-61.

Although the Court's main discussion focused on the substantial unfairness of the testimony, it also noted that the witness's "highly emotionally charged account of the bombing was also not 'legally and morally relevant to the conduct constituting the offenses' with which the defendants were charged." *Id.* at 161 n.18 (*quoting United States v. Velazquez*, 246 F.3d 204, 211 (2d Cir. 2001)); *see also United States v. Nelson- Rodriguez*, 319 F.3d 12, 35 (1st Cir. 2003) (trial court properly excluded impeachment evidence that government witness-informant had been involved in murders unrelated to the drug conspiracy with which defendants were charged). Similarly, testimony regarding what inmates with no connection with these defendants may have done in BOP is not legally relevant to the issue of whether BOP can adequately control Mr.

Fackrell and Mr. Cramer.

Because any information regarding specific incidents of other inmates' violent conduct in prison has no probative value in connection with these defendants' alleged propensity to violence, its admission would be unfairly prejudicial. Admitting evidence of the alleged wide-ranging violent activities of BOP inmates is akin to the improper "wide-ranging inquiry into the generic criminality and violent dispositions of gangs and their members." *United States v. Street*, 548 F.3d 618, 632 (8th Cir. 2008). In *Street*, the Eighth Circuit reversed the defendant's conviction for aiding and abetting murder in furtherance of drug trafficking based in part on the improper admission of testimony about violent propensities of gangs with whom the defendant had no connection, concluding that the testimony "about outlaw motorcycle gangs and El Forasteros was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses." *Id.* at 633.

Information about BOP's experiences with other prisoners would also be misleading. As the *Sampson* court described: Each person in the custody of the BOP is unique, and the court found that the probative value of information about the BOP's ability or inability to control a particular other prisoner was outweighed by the danger of misleading the jury into thinking that the BOP would have a similar experience with Sampson.

The same danger is present here, if the government is allowed to present evidence regarding BOP experience with other inmates. The jury might be misled into believing that BOP might have a similar experience with these defendants.

In addition, the information would be unfairly prejudicial. "'Unfair prejudice' refers to an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one' or 'evidence designed to elicit a response from the jurors that is not justified by the

evidence.'" *Ellis*, 147 F.3d at 1135. The jury might be led to make a decision regarding potential future dangerousness based not on the defendants' own actions but on the actions of unrelated persons. *See Al-Moayad, supra; Street, supra.* The jurors might be led to determine that these defendants are likely to be a danger in prison based not on their own conduct but on the potential institutional failures of the BOP. "[I]nvoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory." *Weaver v. Bowersox*, 438 F.3d 832, 841 (8th Cir. 2006), *cert. dismissed sub nom.*, *Roper v. Weaver*, 550 U.S. 598 (2007); *see also Bates v. Bell*, 402 F.3d 635, 642 (6th Cir. 2005) (improper to argue that a death sentence was warranted to protect other inmates and guards).

C. If the Court Allows Cross-Examination Regarding Specific Incidents Regarding Unrelated Inmates, the Court Must Order the Government to Disclose all Incidents on Which It intends to Rely, Including Complete Histories of the Inmates and Incidents.

If the Court intends to allow cross-examination concerning specific prior incidents in the BOP, the defense asks the Court to immediately order the government to fully disclose all information concerning incidents on which it intends to rely, including the names of those involved, information concerning the incidents, and BOP's response to the incidents. Such information is readily available to the government. *See United States v. Burnside*, 824 F.Supp. 1215, 1254 (N.D. Ill. 1993). It is anticipated that the government may present rebuttal evidence regarding other incidents involving other prisoners in BOP custody. If the defense does not have the requested information, it will be unable to properly rebut the government's case regarding BOP's ability to control these defendants and future dangerousness and unable to subject the government's rebuttal testimony to meaningful adversarial testing.

The importance of accurate information and discovery on these issues is demonstrated by *United States v. Johnson*, No. 02 C 6998 (N.D. Ill.), in which Judge Hibbler granted habeas relief

and reversed the petitioner's sentence of death based on counsel's failure to investigate the law and facts necessary to rebut the government's rebuttal evidence. The government, in support of its future dangerousness aggravator, called as a witness a former BOP warden who presented misleading and incomplete testimony regarding BOP's placement policies "that may have left the jury with the mistaken impression that neither the BOP nor the Court had the authority to impose certain restrictions on an inmate immediately upon sentencing." *United States v. Johnson*, Memorandum Opinion and Order, Exhibit A at 5.

The Court agreed with the petitioner's claim that he "was prejudiced by his trial counsel's failure to investigate the law and facts necessary to subject the Government's case on future dangerousness to meaningful adversarial testing." *Id.* at 4. As Judge Hibbler cogently pointed out, the future dangerousness aggravator and the government's ability to protect against a defendant's future dangerousness "is an especially important factor in death penalty cases generally[.]" *Id.* at 5. Judge Hibbler noted that the government recognized the importance of the aggravator, and that empirical research supports the conclusion that future dangerousness is a highly significant issue for juries deciding whether to sentence a defendant to death. *Id.* at 6 (citing studies). He also referred to a similar case in which the jurors had received correct information about the ability of the BOP to impose restrictive conditions and had not sentenced the defendant to death despite finding that he would be a future danger. *Id.* at 7.

The defense recognizes that discovery of the required material may lead to "mini-trials" as to the accuracy and circumstances if these anecdotes which is another reason why the court should exclude or limit such testimony in the first place.

CONCLUSION

For the foregoing reasons, the defendants request the Court to either issue an order

precluding the government from cross-examining defense experts regarding specific incidents of violence by other BOP inmates and/or eliciting such testimony from government witnesses; or, in the alternative, order immediate disclosure of any such incidents on which the government intends to rely, including complete information regarding the inmates involved, their histories, and any response by BOP.

Respectfully submitted,

/s/ *Robert Morrow*
ROBERT
MORROW
TBL#14542600
24 Waterway Ave., Suite 660
The Woodlands, TX 77380
Tel.: 281-379-6901
Fax: 832-813-0321
Email: ramorrow15@gmail.com

/s/ *Gerald E. Bourque*
GERALD E. BOURQUE
TBL#02716500
24 Waterway Ave., Suite 660
The Woodlands, TX 77380
Tel: 713-862-7766
Email: gerald@geraldebourque.com
Fax: 832-813-0321

Attorneys for Defendant Ricky Fackrell

/s/ Patrick Black
PATRICK BLACK
Attorney for Defendant
110 N. College Ave., Ste. 1122
Tyler, TX 75702
(903) 531-9233

/s/ Douglas Barlow
DOUGLAS BARLOW
Attorney for Defendant

485 Milam
Beaumont, TX 77701
(979) 485-5901

Attorneys for Defendant Christopher Cramer

CERTIFICATE OF CONFERENCE

Counsel for the Defendants have not conferred with attorneys for the Government directly on the matters raised in this motion, because trial has begun, but assume the Government is opposed to the matters herein, given the nature of the requests.

/s/ Robert A. Morrow, III
ROBERT A. MORROW, III
Attorney for Defendant Ricky Fackrell

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Disclosure of Information and Documents Related to the Testimony of DOJ/BOP Rebuttal Expert Witness David Berkebile was sent via CM/ECF on April 27, 2018 to:

John Craft
Assistant United States Attorney
350 Magnolia Street
Beaumont, Texas 77701

/s/ Robert A. Morrow, III
ROBERT A. MORROW, III
Attorney for Defendant Ricky Fackrell

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff-Respondent, v. DARRYL LAMONT JOHNSON, Defendant-Movant.	No. 02 C 6998 The Honorable William J. Hibbler

MEMORANDUM OPINION AND ORDER

In 1997, a jury convicted Darryl Lamont Johnson for ordering the murder of a person assisting in a federal criminal investigation and ordering the murder of that person and another in furtherance of a continuing criminal enterprise, among 41 other counts. The jury later concluded that death was the appropriate sentence. The Seventh Circuit denied Johnson's appeal and the Supreme Court denied his petition for a writ of *certiorari*. *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000); *Johnson v. United States*, 534 U.S. 829, 122 S. Ct. 71, 151 L.Ed.2d 37 (2001).

Johnson then sought to set aside his sentence pursuant to 28 U.S.C. § 2255. In his petition, Johnson raised a number of claims, including a claim of ineffective assistance of counsel, a claim that the Government withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and a claim that his sentence was based on materially incomplete, false and/or inaccurate information in violation of the Eighth Amendment, *see Johnson v. Mississippi*, 486 U.S. 578, 584-86, 108 S. Ct. 1981, 1986-87, 100 L.Ed.2d 575 (1988). The Court denied Johnson's

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§ 2255 motion, holding that he procedurally defaulted all three of the aforementioned claims because he failed to raise those claims in his direct appeal.

A few years after the initial ruling on Johnson's § 2255 motion, the Supreme Court announced its decision in *Massaro v. United States*. 538 U.S. 500, 509, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). In *Massaro*, the Supreme Court held that a petitioner may bring an ineffective assistance of counsel claim in a collateral proceeding whether or not the petitioner could have raised the claim on direct appeal. *Id.* Consequently, the Court vacated the portion of its ruling concerning Johnson's ineffective assistance of counsel claim.[1] Following discovery, the parties provided the Court with supplemental briefing on the merits of that claim. In addition, Johnson moves the Court to once again address his *Brady* and *Johnson* claims based on what he believes to be changes in relevant law and facts. For the following reasons, the Court grants Johnson's § 2255 motion based on his ineffective assistance of counsel claim. The Court therefore vacates his death sentence and awards him a new sentencing hearing. In addition, Johnson's motion for consideration of his other claims is therefore moot.

I. Background

Johnson's ineffective assistance claim centers on trial counsel's efforts to convince the jury to impose a sentence of life imprisonment rather than one of death. At Johnson's sentencing, counsel presented evidence about the custodial options for housing him. In particular, Johnson presented evidence to suggest that if he were placed permanently in the control unit in ADX-Florence, where inmates are confined to their cells 23 hours per day and not allowed contact with other inmates, he

[1] Another judge in this district initially ruled on Johnson's § 2255 motion and the motion to reconsider pursuant to *Massaro*. The executive committee has since reassigned the case.

would have no opportunity to carry out a continuing criminal enterprise and his dangerousness to society would be mitigated.

In rebuttal, the Government called an expert, a Bureau of Prisons (BOP) warden, who had formerly served as Assistant Warden at ADX-Florence. That witness testified generally about what BOP placement was likely in Johnson's case. He testified that typically gang leaders like Johnson go to the general prison population, rather than some more restrictive setting. He also testified that even prisoners in strictly controlled environments had managed to commit crimes, including ordering the killing of other inmates. He stated that the BOP could not house prisoners in such strict conditions indefinitely. Finally, he claimed that prisoners cannot be directly assigned to the ADX-Florence control unit based solely on the offenses in the community. Instead, he said, the BOP could temporarily impose restrictions on an inmate, such as limited communication and association, if the inmate committed some infraction while in prison.

Not even one member of the jury accepted Johnson's proposed finding that he would not be "a serious and continuing danger to the society because the government has the power to imprison him for the rest of his life in a maximum security federal prison designed to control and monitor his behavior." The jury did find a number of aggravating factors, both statutory and non-statutory. In particular, the jury found that Johnson caused the killing after substantial planning and premeditation in the course of a continuing criminal enterprise that involved distribution of drugs to persons under the age of 21. It also found that he ordered the murder to obstruct justice by preventing the victim from testifying and caused harm to the victim's family. After its somewhat lengthy deliberations, the jury sentenced Johnson to death.

In Johnson's § 2255 motion, he argues that he was prejudiced by his trial counsel's failure to investigate the law and facts necessary to subject the Government's case on future dangerousness to meaningful adversarial testing. In short, Johnson suggests that trial counsel was ineffective in allowing the Government expert's testimony to go unrebutted.

Johnson argues that, contrary to the Government expert's testimony, there are laws which allow for the application of strict conditions of confinement for extended periods of time absent any infraction within prison in order to alleviate the risk a particular inmate poses to society. First, the BOP can control the conditions of confinement by employing Special Administrative Measures ("SAMs") authorized by 28 C.F.R. § 501.3(a). Second, courts can order restrictions on communication and association as part of a sentence pursuant to 18 U.S.C. § 3582(d). In fact, Johnson has presented evidence of a number of examples of such inmates in addition to those in his original motion.

II. Standard of Review

In order to succeed on his claim of ineffective assistance of counsel, a § 2255 movant must meet both prongs of a test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). First, he must show that his counsel's performance was deficient. *Id.* at 687, 104 S. Ct. at 2064. In this case, the Government concedes the point, agreeing with Johnson that his trial counsel did not effectively impeach the testimony of the Government's expert regarding Johnson's future dangerousness. Instead, the Government disputes only whether Johnson can satisfy the second prong of the *Strickland* test. Thus, Johnson must show that his counsel's deficient performance prejudiced his defense. *Id.* More specifically, he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

A "reasonable probability," for purposes of this standard, is "a probability sufficient to undermine confidence in the outcome" of the penalty phase of Johnson's trial. *Id.* The standard is lower than the more familiar "preponderance of the evidence" standard because an ineffective assistance claim "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker." *Id.* However, Johnson must show more than that his counsel's errors "had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S. Ct. at 2067.

III. Analysis

In addition to conceding that Johnson's counsel was deficient, the Government conceded at the *certiorari* stage of Johnson's direct appeal that the testimony of the Government's expert was incomplete because he failed to mention 28 C.F.R. § 501.3 and 18 U.S.C. § 3582(d). The Government admitted that the testimony may have left the jury with the mistaken impression that neither the BOP nor the Court had the authority to impose certain restrictions on an inmate immediately upon sentencing. Nonetheless, the Government argues that Johnson cannot show that defense counsel's failure to impeach the witness on those matters created a reasonable probability that the jury would not have sentenced Johnson to death.

For a number of reasons, the Court rejects the Government's argument. First, the Court finds that the probability that the errors affected Johnson's sentence is higher in this case than in some because the errors were relevant to the issue of future dangerousness. The Court recognizes the importance of the fact that the jury in Johnson's case found a number of aggravating factors that did not relate to Johnson's future dangerousness. But the Court finds that future dangerousness, and the Government's ability to protect against it, is an especially important factor in death penalty cases generally, as well as in this case particularly.

On this point, the Government's closing argument from the penalty phase of Johnson's trial is telling. The Government devoted a significant portion of its arguments in closing and rebuttal to the issue of future dangerousness and the likelihood that Johnson could not be controlled in prison - perhaps more than to any other aggravating or mitigating factor. The Government's language on these points was strong and clear. The Government stated that "as long as [Johnson] has the ability to convey his orders to his followers, either on the street or in prison with him, nobody is safe; no witness, no witness's family, anybody who stands in his way, they are not safe. It doesn't matter where he is locked up." (Tr. 2593.) Moreover, the Government reiterated the admittedly incomplete and misleading testimony of its expert by stating, among other things, that Johnson would not be going to the control unit at ADX-Florence because federal regulations would not allow it. (Tr. 2645.) The Government's focus on these points suggests that it recognized the potential importance of this factor on the jury's decision in this case.

This conclusion also finds support in the empirical research on the subject. A number of studies suggest that future dangerousness is one of the most issues, if not the most significant, for juries deciding whether or not to sentence a defendant to death. *See, e.g.,* John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue"*, 86 Cornell L. Rev. 397, 404 (2001); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559-60 (1998); Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151, 160 (1994) ("[n]early all jurors [surveyed]...offered the observation that the penalty decision hinged on the issue of whether the defendant would pose a continuing threat to society").

Johnson also points to an analogous case that illustrates the importance that this factor can have on a jury. In that case, *United States v. Jones*, No. CR-96-458-WMN (D. Md.), a jury convicted Jones of ordering the murders of federal witnesses, including one while he was incarcerated in a federal prison. The *Jones* jury found a number of the same aggravating factors as the jury did in this case, including that he was a future danger and a "continuing and serious threat to society." However, seven members of the jury also found that:

> Any concern respecting future dangerousness of Anthony Jones is significantly reduced since the Federal Bureau of Prisons is empowered to classify a prisoner serving a life sentence without possibility of release to the highest security level federal prison, under conditions of confinement that eliminate any reasonable probability that the prisoner will be a continuing and serious threat to society.

The jury did not sentence Jones to death. Johnson notes that the jury in the *Jones* case heard testimony regarding the restrictive conditions that could be imposed on Jones and that had been imposed in another case.

The Government is right to note that the fact of every case and make-up of every jury varies, and that it would be wrong to assume that the jury would do the same in Johnson's case as the jury did in Jones's case if Johnson had effective assistance of counsel. But, the Government is notably silent in its brief on how the two cases are distinguishable. And the similarities between the facts of these two cases which have different results undermines the reliability of the result in Johnson's case further.

As discussed above, Johnson faces a relatively low burden in this case. Given that "it only takes one juror to nix a death sentence," *United States v. Johnson*, 223 F.3d 665, 670 (7th Cir. 2000), he only needs to show a reasonable probability that one juror would have changed his or her mind during the course of the lengthy deliberations in this case. Johnson has shown that his future dangerousness, the

factor admittedly affected by his counsel's errors, was likely an important factor in the jurors' minds, weighing heavily on the scale for measuring aggravating and mitigating factors. Given this showing, the Court finds that there is a reasonable probability that if Johnson had effective assistance of counsel, the jury would not have sentenced him to death. He has sufficiently undermined the reliability of the penalty phase of his trial. Thus, the Court GRANTS Johnson's § 2255 motion, VACATES his death sentence, and ORDERS that he be given a new hearing before a jury to determine his sentence.

IT IS SO ORDERED.

12/13/10
Dated

Wm. J. Hibbler
Hon. William J. Hibbler
United States District Court