No. 17-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

DYLANN STORM ROOF,
Defendant/Appellant.

On Appeal from the United States District Court
for the District of South Carolina, Charleston Division
(The Honorable Richard M. Gergel)

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Introduction

A series of substantial errors left Dylann Roof, a mentally-ill 22-year-old, defending himself without the benefit of counsel at a capital sentencing where jurors heard no mitigating evidence. The proceedings did not meet the basic standards of due process and reliability our system demands before imposing the ultimate punishment: death.

Roof stood trial while profoundly mentally-ill, under the delusion he would be rescued from prison by white-nationalists—but only, bizarrely, if he kept his mental-impairments out of the public record. But rather than thoroughly reviewing Roof's competency, a fundamental trial right, the court raced into truncated hearings, refusing to consider overwhelming evidence of his incompetence.

The court then compounded those errors by letting Roof, who everyone agreed suffered cognitive deficits, fire his lawyers to prevent jurors from learning of his mental-impairments. The result was a complete breakdown in the adversarial process as the government, essentially unopposed, made an inflammatory case for death while jurors were left in the dark about significant mitigation.

Still, a death verdict was not a foregone conclusion, even in this aggravated case. Though the court erroneously blocked Roof from introducing evidence he could be safely confined and posed no risk of future violence, jurors sent the court two notes asking whether and how it could consider that question—establishing both the prejudice of the court's evidentiary error and that their deliberations were not hollow formalities.

After his federal trial, Roof pleaded guilty in South Carolina state court in exchange for a sentence of life imprisonment; he will spend the rest of his days in prison, no matter the outcome here. But the federal trial that resulted in his death-sentence departed so far from the standard required when the government seeks the ultimate price that it cannot be affirmed. This Court should vacate Roof's convictions and sentence or, alternatively, remand for a proper competency evaluation.

Points Related To Competency To Stand Trial

Abundant evidence proved Roof could not rationally assist his defense because of his delusional belief he would never be executed—a symptom of psychosis. The court ignored most of that evidence when it rushed into the first competency hearing with unprecedented speed,

blocked critical testimony from the second, and misread the law to disregard what remained. The court then adopted the outlier opinion of its appointed examiner (conducting his first-ever competency evaluation) that Roof's decision to hide his mental-illness to appear "pure" in a post-revolutionary world was logical. The court's competency finding was clearly erroneous, and its refusal to continue the first hearing and invocation of an inapplicable preclusion-doctrine at the second were abuses of discretion. The Court should remand for a retrospective hearing on Roof's competency to stand trial.

I. THE COURT CLEARLY ERRED IN FINDING ROOF COMPETENT FOR TRIAL

The government claims the court reasonably found Roof competent by relying on its appointed expert's dissenting opinion, Roof's self-serving denials he was delusional, and its own limited observations of Roof's courtroom demeanor. GAB-29-58. That argument is fundamentally flawed for four reasons. *First*, it depends on claims Roof made in late-2016, when he admittedly sought to hide his mental-illness, and ignores months of contradictory statements he made before counsel questioned his competency. *Second*, it rests on the erroneous view "only one" expert testified Roof was incompetent, misconstruing

the evidence and distorting the defense's burden. *Third*, it minimizes defense counsel's opinions based on the flawed premise counsel should have raised competency sooner. *Finally*, it portrays as rational that which is utterly irrational: Roof's insistence his best chance at survival was to hide his mental-illness from jurors so white-nationalists would deem him "pure" and rescue him after a race-war.

A. The government relies exclusively on what Roof said in late-2016, ignoring his prior delusional claims

The government, like the court, relies on Roof's own assurances he understood he likely would be executed—not rescued—if sentenced to death. GAB-29, 35, 39, 40, 45, 49. But Roof made each of these statements during the last two months of 2016, after he told the court he'd be "in trouble" if his mental-health history were disclosed. JA-630. As Roof later told the court's examiner, Ballenger, he feared mental-health evidence would ruin his reputation as a "perfect specimen" among white-nationalists, impeding his future rescue. JA-989-90, 1000-01, 1030, 1344-47.

Roof's late-2016 assurances contrasted sharply with his earlier claims. Experts and counsel described Roof as "preoccupied" with his

belief in a sweeping conspiracy to extinguish the white population and faith that white-nationalists would fight back and win an all-out race-war. JA-1509-13, 1551, 1700, 1774, 4952, 5367. In February 2016, Roof told defense-expert Moberg he was "80% sure" he would never be executed because the race-war's victors would release him and possibly appoint him Governor of South Carolina. JA-5353. He made similar predictions to defense-expert Maddox over nine interviews between April and November 2016, and defense-expert Loftin over six interviews between June and October 2016.[1] JA-5363-64, 5263.

But in mid-November 2016, after counsel questioned his competency, Roof told Ballenger he "shouldn't have trusted" his attorneys and "probably said too much to previous [defense] experts." JA-1335. Maddox, the only expert who interviewed Roof before and after his competency was questioned, testified Roof "stopped discussing" his delusions after the court scheduled a hearing.[2] JA-1588-90. Over the

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[1] Maddox testified Roof's inability to understand he might be executed distinguished him from the hundreds of capital defendants she had examined over her career. JA-1584-87.

[2] Roof had already shown an ability to adjust his behavior to appear "normal." JA-5290 (Loftin reported Roof proudly admitted "faking" eye contact and physical gestures).

next two months, Roof insisted he understood his likely fate, telling Ballenger and the court he saw an 85% chance of being executed if sentenced to death and denying he ever claimed otherwise.[3] JA-1341. Contradicting his prior statements, Roof downplayed a white-nationalist uprising as "extremely unlikely," placing the odds at "less than a half-percent." JA-1729-30.

Roof made a similar reversal in his willingness to discuss somatic-delusions. Since his teens, Roof had told doctors his body was lopsided because of unevenly-pooled testosterone; he later complained of a misshapen head, thinning hair, and enlarged lymph nodes. JA-1953-60; *see* JA-1515-29, 1961-2034, 7617. After his June 2015 arrest, Roof reiterated these verifiably-false grievances to prison doctors, defense counsel, and experts. JA-1296-1301, 1506-08, 1554-55, 1761-62, 5306-07, 5353, 5365-66. But in November 2016, Roof promptly ceased discussing these problems after learning experts considered them

[3] The government repeats Ballenger's suggestion Roof was "messing with" people when he denied he'd be executed. GAB-44. But Ballenger admitted this was merely his opinion and Roof never claimed to have joked about the race-war. JA-5546-47.

evidence of psychosis, and offered no explanation for his earlier, documented complaints. JA-977-91, 1011, 1330-31, 1343-44.[4]

The government never addresses this conflict between Roof's delusional claims (about a race-war and his disfigurement) before—and denials after—his competency was questioned. GAB-29-58. The court made the same error, skipping over Roof's steadfast claims in 2015 and most of 2016, to fixate on two months in late-2016—when Roof admittedly sought to convince the court he was competent. AOB-70-72. By ignoring substantial evidence contrary to its finding, the court clearly erred. *United States v. Wooden*, 693 F.3d 440, 462 (4th Cir.2012)(clear error to disregard "substantial body of contradictory evidence"); *United States v. Antone*, 742 F.3d 151, 165 (4th Cir.2014)(same).

B. The government misreads *Dusky*

The government also misreads *Dusky v. United States*, 362 U.S. 402 (1960), as requiring expert testimony (1) opining on the ultimate

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[4] Even Ballenger believed Roof's body dysmorphia could indicate psychosis. JA-988-91 (somatic-delusions suggest Roof "is secretly" schizophrenic or will become so); JA-1008 (agreeing somatic-delusions "consistent with a psychotic process").

issue of competency, and (2) diagnosing a particular psychiatric disorder. The court committed the same error when it concluded "only one" defense expert deemed Roof incompetent, while others offered "no opinion." JA-2074-76; GAB-35, 37, 38, 40, 48, 51.

But competency is a legal determination for judges, not a medical assessment for physicians. *Drope v. Missouri*, 420 U.S. 162 (1975); *Maggio v. Fulford*, 462 U.S. 111 (1983); *United States v. Makris*, 535 F.2d at 905, 907 (5th Cir.1976)("[C]ompetency is a legal conclusion."). Accordingly, expert mental-health testimony on the ultimate issue of competency is discouraged in favor of testimony describing a mental-defect's impact on the defendant's understanding of the proceedings or ability to assist the defense. Kirk Heilbrun, *Principles of Forensic Mental Health Assessment*, at 219-26 (2001); Melton, Petrila, Poythress, and Slobogin, *Psychological Evaluations for the Courts* (2nd ed.), at 17, 129 (1997).

Here, every defense expert agreed Roof suffered a delusional belief he would be rescued by the victors of a race-war, which prevented him from understanding the threat of execution was real:

- Maddox: Roof believed "when the race war happens, prison guards will be on his side" and "will [help him break] out of prison." JA-5366.

- Loftin: Roof was "not afraid of receiving a death sentence" because he "emphatic[ally]" believed he'd be "rescued by white nationalists after they take over the government." JA-1774, 5306-09, 5312.

- Stejskal: Roof "essentially [was] not concerned about" his trial and held an irrational belief he'd be liberated from prison, which he later appeared to mask. JA-1683, 1699-1701.

- Moberg: Roof was "'80% sure' that there would be an uprising of white people and that he would be released and hailed as 'a hero.'" JA-5353.

- Robison: Roof didn't think he needed to present a defense because he would be pardoned. JA-1823-24.[5]

Five mental-health experts thus found Roof so detached from the reality of potential execution he couldn't rationally participate in his defense. Yet the court discarded each's testimony, save Maddox's, because they didn't declare Roof incompetent—though that finding belonged to the court alone.

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[5] The government dismisses Robison's testimony because he was a "professor on autism, not a medical doctor." GAB-51. But competency evidence may be presented by expert- and lay-witnesses alike. *Makris*, 535 F.2d 899 (affirming competency finding based on lay-witness testimony rebutting expert); *Wallace v. Kemp*, 757 F.2d 1102 (11th Cir.1985); *United States v. Duncan*, 643 F.3d 1242 (9th Cir.2011).

The government also contends the defense didn't satisfy *Dusky* because experts were at different stages in their diagnoses of Roof. GAB-52-53 (complaining Maddox did not diagnose "delusional disorder," Stejskal deemed Roof "not yet fully possessed of a delusional disorder," and Loftin believed it "too early to predict [Roof's] psychiatric trajectory"). But *Dusky* doesn't require formal diagnosis of a psychiatric disorder, only the presence of a "mental disease or defect" that compromises one's ability to understand the proceedings or "assist properly in his defense." 18 U.S.C. §4241; *Dusky*, 362 U.S. at 402; *Wright v. Secretary, Dept. of Corr.*, 278 F.3d 1245, 1256 (11th Cir.2002)(competency depended not on schizophrenia diagnosis but ability to communicate); *People v. Buenrostro*, 430 P.3d 1179 (Cal.2018)(*Dusky* "does not require a specific medical diagnosis"). And while not required, multiple experts diagnosed Roof with, or found he suffered symptoms of, a schizophrenia-spectrum or other psychotic-spectrum disorder. JA-1486 (Maddox), 1668 (Stejskal), 1773-74 (Loftin), 5349-61 (Moberg).

C. The government minimizes counsel's observations

The Supreme Court has held counsel's opinions on a defendant's ability to consult and assist are uniquely valuable to the competency assessment. *Medina v. California*, 505 U.S. 437, 450 (1992)(inability to assist counsel can itself "constitute probative evidence of incompetence"); *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir.1996)(defense counsel "is in the best position to determine whether the defendant's competency is suspect"). Yet the government gives short shrift to counsel's opinions based on 18 months of representing Roof.[6] GAB-29, 30, 36, 41, 58-60.

The court similarly expressed skepticism toward counsel's sworn observations, repeatedly questioning why counsel had not raised competency sooner. But as discussed in greater detail below, Section-II.A, counsel could not have raised Roof's competency any earlier. Under *Dusky*, incompetency requires both the presence of a mental-defect (the first element) and an inability to rationally consult with counsel (the

[6] The government claims Ballenger "thoroughly considered" counsel's opinions because he spoke to them before testifying. GAB-54-55. But it was the *court*'s duty to weigh counsel's observations. Plus, Ballenger largely dismissed counsel's experience, choosing instead to credit Roof's self-serving representations. AOB-77-82; JA-1367-68.

second element). Though counsel knew early in their representation Roof was mentally-ill—satisfying the first element—he was at that time able to aid his defense. It was not until the eve of trial, when Roof became convinced prosecutors were his allies and counsel his enemies, that he became unable to rationally assist them—satisfying the second element. At that point, counsel could (and immediately *did*) request a competency hearing.

Because the court, like the government, discounted counsel's representations based on the mistaken assumption they were "playing" the court by raising competency at the eleventh hour, it clearly erred. JA-659.

D. The government mischaracterizes Roof's delusions as political ideology

Finally, the government, like the court, incorrectly portrays Roof's expectation of a white-nationalist rescue as a political stance. GAB-35. In fact, as every witness *except* Ballenger concluded, it was a delusion.[7]

[7] The government claims Leonard, a jail psychiatrist, confirmed Ballenger's opinion Roof wasn't psychotic. GAB-33, 47. But Leonard briefly assessed Roof's suicide risk in mid-2015; she never evaluated his competency. JA-1770-71.

The hallmark of competency is the ability to think and act "rationally." *United States v. Moussaoui*, 591 F.3d 263, 294 (4th Cir.2010). The competency question was, therefore, whether it was rational for Roof to believe that if he appeared mentally-intact at trial, white-nationalists might release him from prison after seizing control of the government—and, if so, whether it was rational for Roof to stake his life on that possibility, forfeiting the opportunity to persuade a single juror to choose a life-sentence.

The court answered this question with a *yes*. Relying on Ballenger, the court deemed Roof's decision to fire counsel on the eve of trial to conceal his mental-illness rational considering his "world view." JA-1549. It agreed with Ballenger that Roof's desire to be seen as "unblemished" didn't indicate mental-illness, but was a "logical" extension of his plan for the "post-revolutionary white supremacist world." JA-1357 (Ballenger called "logical" Roof's choice to risk execution rather "than ruin his reputation in his longed for future

world" where white-nationalists would "favor the elimination of" mentally-ill people).[8]

But Ballenger's description of Roof's vision—as a "longed for future world"—underscores that vision's irrationality.[9] A belief in conflict with the existing world, firmly held despite objective contrary evidence, is the essence of a delusion. JA-652-54 (counsel investigated Roof's purported crime statistics, but found them "all untrue"); JA-1329 (Roof wanted jurors to "learn the truth" about black-on-white-crime); JA-5351 (Roof spoke of relentless attacks on white people by African-Americans and "def[ied]" an examiner to "find a video" showing the reverse); JA-5352 (Roof was "incredulous" others did not see the conspiracy against white people).

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[8] The government attempts to bolster Ballenger's credibility, contending he persistently explored topics Roof sought to avoid. GAB-55-58. But Ballenger admitted he was unable to persuade Roof to even *acknowledge* his delusions—a topic on which he previously had spoken without hesitation. JA-998-1001. When Roof "finally admitted what he had been hiding" to Ballenger, he revealed his "worry" about "elimination" if seen as defective. JA-1356-57.

[9] Ballenger used similar language in saying Roof saw his offense as "purely political" but "realize[d]" this wasn't a viable defense "in our world." JA-5540.

Presumably, had Roof said he expected to be rescued from prison by unicorns, Ballenger would have agreed that was delusional. Roof's expectation of rescue by white-nationalists who would appoint him governor was equally untethered from reality. That these beliefs had political undertones did not make them any less inconsistent with the existing world or maintained despite objective evidence they were false. AOB-79 n.20. They no more reflected Roof's "political ideology" than one's belief he is God's prophet reflects his religious ideology.

Nor did Roof's delusions reflect "mainstream" political views, as the government contends. GAB-49. Stejskal testified Roof's beliefs "depart[ed] from" "mainstream racist views," JA-1699, and even in the online alt-right forums Roof frequented, the idea of white-nationalists triggering, let alone winning, a race-war was pure fantasy. A. Taub, '*White Nationalism,' Explained*, N.Y.Times, Nov. 21, 2016, *https://tinyurl.com/avzws5us*.

Substantial evidence proved Roof's delusions prevented him from understanding the gravity of trial or rationally defending himself against a death-sentence. The court, which failed to credit or even consider that evidence, clearly erred in finding Roof competent for trial.

Lafferty v. Cook, 949 F.2d 1546 (10th Cir.1991)(defendant incompetent due to delusion counsel was conspiring against him);[10] *United States v. Mahoney*, 717 F.3d 257, 265-66 (1st Cir.2013)(defendant incompetent based on delusions about counsel); *United States v. Hemsi*, 901 F.2d 293, 296 (2d Cir.1990)(defendant incompetent because "impaired sense of reality" prevented "rational decisions regarding the defense"); *Strickland v. Francis*, 738 F.2d 1542, 1551 (11th Cir.1984)(defendant incompetent because delusions left him "out of touch with reality"); *cf. Walton v. Angelone*, 321 F.3d 442 (4th Cir.2003)(defendant competent because death-and-resurrection-based delusion didn't interfere in defense.).[11] This Court should vacate Roof's convictions and sentence or,

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[10] The government wrongly claims *Lafferty*'s procedural posture, reversing and remanding a competency finding based on an incorrectly-applied standard, undermines its holding that a defendant's inability to "accurately perceive reality due to paranoid delusions" prevents him from rationally assisting his defense. GAB-53. In fact, the court on remand found the defendant incompetent for that reason. *State v. Lafferty*, 20 P.3d 342 (Utah 2001).

[11] The *Dusky* analysis would be different if Roof objected to mental-health evidence for a different—rational—reason. *Pennsylvania v. Manuel*, 2004 WL 144247 (Pa.2004)(defendant competent where he barred counsel from pursuing mental-health-defense based on "rational" concern about losing medical license); *United States v. Nagy*, 1998 WL 341940 (S.D.N.Y.1998); *United States v. Blohm*, 579 F.Supp. 495 (S.D.N.Y.1983).

alternatively, remand for a retrospective competency hearing based on a complete evidentiary record.

II. THE COURT ABUSED ITS DISCRETION BY REFUSING TO CONTINUE THE FIRST COMPETENCY HEARING

This Court should also remand based on the flawed process the court used to find Roof competent. The court abused its discretion in largely denying counsel's requests to continue the first competency hearing, held just 2 weeks after Roof tried to sabotage the defense. Counsel sought a reasonable extension of time to allow the court's examiner to thoroughly evaluate Roof, secure a critical expert's testimony, mend the ruptured attorney-client relationship, and prepare for the hearing. AOB-82-89; JA-706-25. The court refused all but a minimal extension, forging ahead with unprecedented speed and leaving *one-eighth* the average preparation time allotted in *non*-capital cases. AOB-App'x; JA-695 (court agreed to "stop the process to quickly perform a competency evaluation").

The government does not dispute the court rushed into the hearing; and it does not—because it cannot—point to any case where a court held a competency hearing so quickly after agreeing a defendant may be unfit for trial. Nor does the government argue the court

properly weighed the continuance request under a test like that described in *United States v. Soldevila-Lopez*, 17 F.3d 480 (1st Cir.1994). GAB-58-61. Instead, the government contends (1) counsel failed to act diligently, and (2) the expedited schedule did not prejudice Roof. The record refutes both claims.

A. Counsel diligently sought a competency hearing

The government echoes the court in portraying counsel as not having acted diligently because they requested the competency hearing on the eve of trial. GAB-29, 30, 36, 41, 58-60; JA-537-48. But counsel could not have sought the hearing any earlier.

To raise an incompetency claim, two elements are required: *first*, a mental disease or defect; and *second*, an inability to rationally assist counsel. *Dusky*, 362 U.S. at 402; 18 U.S.C. §4241. While counsel recognized early on Roof suffered mental-defects, it was not until late-October 2016—when government-examiner Dietz told Roof counsel would depict him as "crazy"—that Roof's illness obstructed his ability to rationally assist the defense. JA-539. Within days, Roof stopped speaking to his attorneys, asked to waive counsel, offered help to prosecutors seeking his execution, and accused his counsel of 16 months

of trying to kill him by alerting white-nationalists to mental-health concerns that would thwart his rescue. JA-1001, 1357, 1489, 1514-15.

The court, apparently not appreciating Roof's competency hinged on his ability to assist in his defense, accused counsel of "with[holding]" their competency concerns. JA-2061-62. Counsel explained that Roof's "substantial mental impairment[s]" were clear "from the very beginning." JA-537, 644-49, 655-62, 669-70 (describing efforts to navigate Roof's delusions and paranoia while building trust as "walking a tight rope"). But Roof's mental-illness alone did not make him incompetent. JA-665; *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir.2000)("[n]ot every manifestation of mental illness demonstrates incompetence"). Though counsel managed to work with Roof for nearly a year-and-a-half, Roof's illness "crossed the line into incompetence to stand trial" when it finally drove him to embrace the prosecution. JA-646-49, 659-69, 1676; *see* JA-706-25.

Against this backdrop, any contention counsel failed to timely raise Roof's competency is a non-starter. To accept it would mean counsel should have requested a hearing, disclosing privileged communications and risking irreparable damage to their relationship,

when Roof was consulting with them and assisting in his defense—that is, when he was legally *competent* per *Dusky*.

B. The accelerated schedule prejudiced Roof

The government asserts the court's accelerated schedule didn't prejudice Roof because Ballenger already completed his evaluation and Loftin could testify remotely. GAB-60. But Ballenger conceded "time considerations" precluded review of critical, and potentially-determinative, background records (including grand-jury transcripts and records of Roof's social- and developmental-history).[12] JA-948; *see* JA-932-36, 942-947. And Loftin could not testify—even remotely—on the expedited schedule because she was in Cyprus without access to notes from her 4-month evaluation. JA-1773-75; *see* JA-5261-317.

The government further claims Loftin's testimony was immaterial because she would have addressed Roof's autism, not psychosis or

[12] Ballenger cited neuropsychological tests by Mark Wagner, who admitted "time constraints" prevented him from reviewing "any documents" and relegated him for background to Wikipedia and his knowledge as "a resident of Charleston." JA-1412-13.

competence. GAB-60-61.[13] But while Loftin initially focused on Roof's autism, she concluded Roof suffered "psychiatric symptoms" not explained by autism, including "obsessive-compulsive symptoms, disordered thinking, and psychosis (including delusions of grandeur and somatic delusions)." JA-1773-74, 5263-64. Her final report (prepared after the first hearing) detailed Roof's somatic- and race-war-delusions, paranoia, and unusual thinking. JA-5261-348. It concluded Roof's "highly unusual symptoms" suggested a "lack of contact with reality" and possible psychosis. JA-5306-09. Thus, the absence of Loftin's testimony, which would have confirmed Maddox's and Stejskal's testimony and refuted Ballenger's, deprived the court of critical evidence of Roof's incompetency at the first hearing.

A one-week continuance would have allowed Ballenger to review necessary background records and Loftin to present live testimony showing symptoms of psychosis. JA-5261-348. The court abused its discretion by refusing to grant the modest extension. *United States v. Clinger*, 681 F.2d 221, 223 (4th Cir.1982)(court abused discretion by

[13] The government's claim Loftin's absence didn't prejudice Roof contradicts its criticism that "only one" expert, Maddox, testified Roof was incompetent. Section-I.B.

denying continuance to obtain witness); *United States v. Ellis*, 263 F.App'x 286 (4th Cir.2008)(court abused discretion by denying continuance to secure unavailable expert witness); *United States v. Adams*, 569 F.App'x 174 (4th Cir.2014)(court abused discretion by denying two-month continuance to secure potentially-exculpatory testimony). This Court should vacate Roof's convictions, or alternatively remand for a retrospective competency hearing.

III. THE COURT ABUSED ITS DISCRETION BY EXCLUDING MATERIAL EVIDENCE FROM ROOF'S SECOND COMPETENCY HEARING

The court also abused its discretion in excluding critical expert testimony and reports from Roof's second competency hearing in January 2017. AOB-89-95. Erroneously relying on the law-of-the-case doctrine, the court blocked all evidence that arose or was available before November 22, 2016, the date of its first competency ruling. The ruling prejudiced the defense by excluding evidence, unavailable at the first hearing, proving Roof's delusions prevented him from rationally participating in his defense. Had the court admitted the evidence, it would not have found Roof competent for the penalty-phase.

A. The court erroneously invoked the law-of-the-case doctrine

The government's perfunctory, three-paragraph response wholly fails to counter Roof's argument that the court improperly excluded critical evidence from the second hearing. GAB-62-63.

Appropriately, the government doesn't endorse the court's reliance on the law-of-the-case doctrine, conceding it did not apply. *Id*. This concession is dispositive because a court abuses its discretion when it excludes relevant evidence based on a legal error. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993)("[D]iscretion may be abused by an exercise that is flawed by erroneous factual or legal premises."); *United States v. Chambers*, 38 F.3d 1213 (4th Cir.1994)(unpub.)(court abused discretion by denying relief based on "erroneous legal premise").

Instead of defending the court's law-of-the-case ruling, the government contends the proffered opinions were irrelevant to Roof's competency because they were based on pre-November 2016 examinations. This argument misses the point. The question for the court in January 2017 was *not*, as the government claims, whether Roof's competency "had changed since the first hearing," GAB-63, but

whether Roof "presently" suffered a "mental disease or defect" preventing him from assisting his defense. 18 U.S.C. §4241(a).

Relevant to that question was Roof's pre-November 2016 "behavioral" and "medical" history—some of which was previously unavailable. *United States v. Bernard*, 708 F.3d 583, 593 (4th Cir.2013); *Clayton v. Gibson*, 199 F.3d 1162, 1171 (10th Cir.1999)(prior medical opinions important to competency). Thus, even assuming *arguendo* the court correctly decided Roof was competent in November 2016, that finding didn't discharge its duty to assess his competency anew in January 2017, based on *all* relevant evidence, including evidence that predated the first hearing.[14]

B. The error prejudiced Roof

The prejudice to Roof can hardly be overstated. The court deliberately blinded itself to extensive testimonial and documentary

[14] The government never mentions, let alone distinguishes, any of Roof's cited cases where courts held multiple competency hearings and, at each, conducted plenary reviews of the evidence. AOB-89-93; GAB-61-63. Nor does the government offer any authority suggesting a court properly assesses competency by examining a truncated record, as the court did here.

evidence from four experts[15] establishing Roof suffered a mental-defect (schizophrenia-spectrum or other-psychotic-spectrum disorder), the symptoms of which left him unable to rationally participate in his defense. AOB-93-95; JA-5261-440.

Equally troubling, the court mistakenly believed it had accounted for this evidence at the first hearing. JA-5633 ("The four reports are from the past. *I'm not going through that again*.")(emphasis added).[16] But the court could not have considered the reports in November 2016, because they were not completed until late-December 2016, more than a month later.[17] JA-5261-440.

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[15] Roof challenges the court's exclusion not just of "reports and testimony from Moberg and Loftin," GAB-62, but evidence from *four* experts: Moberg, Loftin, Maddox, and Robison. AOB-55-57, 89-95.

[16] The court later agreed to add the reports to the docket for appellate review, but stressed it would not consider them. JA-5530, 5622-23; *see* JA-5261-440.

[17] The government incorrectly states, "Ballenger reviewed these reports and discussed them with Roof." GAB-63. In fact, the court ordered Ballenger *not* to consider any newly-proffered evidence. JA-5977. Though Ballenger's report said the expert reports "were *again* made available and *re-reviewed*" before the second hearing, JA-5463-64, 5991 (emphasis added), Ballenger later testified this was incorrect, JA-5552-53.

Nor did the court previously hear the experts' testimony. Only Maddox testified at the first hearing, while Loftin and Robison submitted brief declarations in place of testimony. In Loftin's case, the court refused to delay the first hearing by a week to allow her to testify about her 4-month evaluation; instead, while overseas and without her notes, Loftin drafted a bare-bones affidavit, JA-1773-75, which the court disregarded because it didn't reach a conclusion on the ultimate issue. Section-I.B. At the second hearing, the court again blocked Loftin from testifying about her evaluation, limiting her testimony to observations of Roof's recorded jail visits with family. JA-5615-17.

The court never heard testimony from or considered the written evaluation of neuropsychiatrist Moberg, who examined Roof over three days in early-2016. Moberg's neuropsychological-testing revealed "frontal system dysfunction" associated with "core components of psychosis spectrum disorders" impairing "decision-making, coding and tracking new information, weighing options, adjusting to new information and modifying thinking and behavior." JA-5359. He also conducted a facial-norms-assessment, revealing "significant"

"deviations" in Roof's facial morphology "consistent[]" with "schizophrenia and related disorders." JA-5360.

Moberg's diagnostic interviews, meanwhile, revealed Roof's strongly-held somatic-delusions and "elevations" on two measures for "psychotic symptoms." JA-5352-53. They also documented Roof's insistence he would "either be 'broken out' from prison after a white uprising in America or pardoned for what he did," then "hailed as 'a hero'" and possibly "made governor" of South Carolina. JA-5353.

Based on this evidence, Moberg concluded "within a reasonable degree of neuropsychological certainty" that Roof suffered "a long-standing neurodevelopmental" brain-disorder with associated "psychosis spectrum features" including: "persistent and unshakable somatic delusions"; "magical" and "illogical" thinking; inappropriate affect and grandiosity; social isolation; and "negative symptoms" that are a hallmark of schizophrenia. JA-5360.

The excluded expert evidence refuted Ballenger's conclusions that Roof was neither delusional nor exhibited any other signs of psychosis, on which the court primarily relied to find him competent. The court's blanket refusal to admit that evidence, which proved Roof could not

rationally participate in his defense, was an abuse of its discretion. This Court should vacate Roof's death-sentence or, alternatively, remand with instructions for the court to hold a retrospective competency hearing based on a complete evidentiary record.

EVIDENCE PROFFERED at COMPETENCY HEARINGS		
Witness	**1st HEARING Nov. 21-22, 2016**	**2nd HEARING Jan. 2, 2017**
Ballenger (Court)	**Testimony & Report ADMITTED**	**Testimony & Report ADMITTED**
Maddox (Defense)	**Testimony ADMITTED**	**Testimony & Report EXCLUDED** because evaluation ended before Nov. 22, 2016 (report dated Dec. 26, 2016)
Moberg (Defense)		**Testimony & Report EXCLUDED** because evaluation ended before Nov. 22, 2016 (report dated Dec. 26, 2016)
Stejskal (Defense)	**Testimony admitted but DISREGARDED** because witness did not reach ultimate issue	
Loftin (Defense)	**Affidavit admitted but DISREGARDED** because witness did not reach ultimate issue	**Testimony & Report EXCLUDED** because evaluation ended before Nov. 22, 2016 (report dated Dec. 28, 2016) **Testimony re: jail videos admitted but DISREGARDED** because 3rd-party observation
Edens (Defense)	**Affidavit admitted but DISREGARDED** because witness did not examine Roof[18]	

[18] Edens explained Roof's standardized-test results were consistent with psychotic-spectrum disorder, refuting Ballenger. JA-1776-87.

Carpenter (Defense)	**Testimony admitted but DISREGARDED** because witness did not examine Roof[19]	
Robison (Defense)	**Affidavit admitted but DISREGARDED** because witness was not medical doctor	**Testimony & Report EXCLUDED** because evaluation ended before Nov. 22, 2016 (report dated Dec. 28, 2016)
Fr. Parker (Defense)		**Testimony admitted but DISREGARDED** because witness was not mental-health expert
Defense Counsel	**Motion admitted but DISREGARDED** as less persuasive than Ballenger & Roof	**Declaration admitted but DISREGARDED** as less persuasive than Ballenger & Roof

Points Related to Self-Representation

Because Roof could not rationally participate in his defense, the court should not have found him competent for trial. But once it did, the Sixth Amendment entitled Roof to decide his objective was to appear mentally-intact. While he also gained the right to self-represent, that right does not apply to capital-penalty-proceedings—particularly when a defendant intends to forgo mitigation. It also requires a knowing, intelligent, voluntary, and timely waiver of counsel, which Roof did not make. And in capital cases, it requires the capacity to self-represent, which Roof lacked. To the extent the court correctly disagreed, it should

[19] Carpenter testified impairments like Roof's can be masked for years and remain invisible to untrained observers, refuting Ballenger. JA-1788-94.

have granted Roof's reasonable requests for standby assistance and accommodations. Having wrongly told Roof the only way to protect his autonomy was to represent himself, the court was obligated to safeguard his ability to do so.

These errors are structural and warrant vacating Roof's conviction and sentence. *United States v. Ductan*, 800 F.3d 642, 653 (4th Cir.2015). Alternatively, because Roof never challenged his factual guilt at trial, this Court has the option of vacating Roof's death-sentence and remanding for a new penalty proceeding alone. *United States v. Tsarnaev*, 968 F.3d 24, 62 & n.33 (1st Cir.2020), *cert. granted*, 2021 WL 1072279.

IV. ROOF DID NOT NEED TO WAIVE COUNSEL TO PREVENT MENTAL-HEALTH-MITIGATION

In *McCoy v. Louisiana*, the Supreme Court held a competent defendant chooses the defense-objective, and counsel must assist in attaining it. This Sixth Amendment "autonomy right" specifically applies when a defendant "wish[es] to avoid, above all else, the opprobrium that comes with admitting" stigmatizing facts, even at the likely cost of a death-sentence. 138 S.Ct. 1500, 1508, 1511 (2018).

The government acknowledges *McCoy* retroactively governs Roof's appeal, GAB-68 n.4, but seeks to avoid *McCoy*'s impact by constricting its holding and misconceiving Roof's objective. But Roof's objective—avoiding the perceived opprobrium of admitting mental-illness, even at the cost of a life-sentence—is precisely the sort of decision *McCoy* leaves to a defendant. The court structurally erred by forcing Roof to choose between his rights to autonomy and counsel, invalidating his waiver of the latter. Had Roof known he could have both autonomy and assistance, he wouldn't have waived counsel. Instead of the spectacle of a mentally-impaired high-school-dropout representing himself in a capital trial, experienced attorneys would have questioned jurors, presented non-mental-health-mitigation, cross-examined penalty-phase witnesses, objected to improper testimony and argument, and offered a coherent case for a life-sentence.

A. The government mischaracterizes Roof's objective

The government characterizes Roof's trial-objective as avoiding a death-sentence, claiming counsel controlled the strategy for achieving that goal. GAB-64, 71, 76. But Roof's true objective emerged when he learned counsel planned a mental-health-mitigation defense, which he

feared would ruin his reputation as a "perfect specimen," undermining his political message and chance of white-nationalist rescue. JA-1029-32, 1344-45, 1356-57, 1733-38, 5537-38, 5713-14, 5719-20, 5992. When questioned by the court, Roof explained "if the price" of contesting death was being labeled mentally-impaired, "then it's not worth it." JA-629-38. So while Roof's lawyers continued to pursue their objective of a life-sentence, Roof's objective was different: preserving his reputation as mentally-intact.

Because Roof's higher objective was to avoid the opprobrium he believed attended admitting mental-impairment, his case is just like *McCoy*, where the defendant hoped to avoid death—but not at the cost of conceding certain facts. Like McCoy's attorney, the government mistakes the chosen objective (to not admit stigmatizing facts) for a trial tactic. *McCoy*, 138 S.Ct. at 1512. Its refusal to acknowledge Roof's primary objective fatally undermines its analysis.

B. The government misreads *McCoy*

The government also reads *McCoy* narrowly, positing it simply affirms a defendant's autonomy to assert innocence. GAB-75. But if *McCoy* were purely about a defendant's right to not concede guilt, it

would have been an easy case, for the Court has long held counsel cannot admit the practical equivalent of a guilty plea over defendant's protest. *Brookhart v. Janis*, 384 U.S. 1 (1966). Yet the *McCoy* majority never cites *Brookhart*. What is more, *McCoy* makes no sense as a case about admitting guilt because McCoy's attorney *contested* guilt, conceding only one element of the offense. 138 S.Ct. at 1506 n.1; *id.* at 1512 (Alito, J., dissenting).

Rather than a narrow decision predetermined by precedent, *McCoy* broadly endorses defendants' autonomous right to choose the defense-objective. The Court's repeated references to the "personal" nature of the right to defend, which "must be honored out of . . . respect for the individual," and emphasis on defendant as "master of his own defense" while counsel is an "assistant," confirm this reading. *Id.* at 1507-08. So does its citation to *Cooke v. State*, a capital case that expansively interpreted the "Sixth Amendment right to make fundamental decisions" about one's case, including "whether [mental-health] mitigation evidence should be introduced." *Cooke v. State*, 977 A.2d 803, 847 & n.67 (Del.2009)(quotations omitted).

This Court, among others, has read *McCoy* and its autonomy right expansively. *Smith v. Stein,* 982 F.3d 229, 235 (4th Cir.2020)(*McCoy* "shifts the balance of power between counsel and client"); *State v. Horn*, 251 So.3d 1069, 1075 (La.2018)("*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense."); *Krogmann v. State*, 914 N.W.2d 293, 321 (Iowa 2018)(*McCoy* gives defendants control of trial strategy). Some highlight *McCoy*'s "opprobrium" discussion, which the government largely ignores. *United States v. Wilson*, 960 F.3d 136, 144 (3d Cir.2020)(distinguishing counsel's authority to concede jurisdictional element, which "trigger[s] no opprobrium or stigma," unlike evidence of defendant's "mental state[]"); *United States v. Rosemond*, 958 F.3d 111, 124 (2d Cir.2020)(autonomy potentially violated where attorney concedes uncharged criminal-acts *and* defendant objects "because of the 'opprobrium' that accompanies such an admission").

Though no post-*McCoy* case directly addresses defendant autonomy to forego mental-health evidence, the most analogous decisions support Roof. In *Taylor v. Steele*, 372 F.Supp.3d 800 (E.D.Mo.2019), and *People v. Amezcua*, 434 P.3d 1121 (Cal.2019), courts

relied on *McCoy* to find capital defendants had autonomy to preclude mitigation. The government tries to distinguish these cases as involving defendants who contested guilt and then chose not to seek life-sentences, suggesting counsel properly pursued that objective by forgoing mitigation. GAB-78. But in fact the *Taylor* and *Amezcua* defendants, like Roof, hoped to avoid execution yet accepted that possibility as the risk of precluding mitigation. *Taylor*, 372 F.Supp.3d at 861-63 (defendant allowed some mitigation in effort to secure life-term); *Amezcua*, 434 P.3d at 1147 (defendants not committing "suicide by cop"). Only by mischaracterizing Roof's objective as seeking a life-sentence at any cost could the government assert it was any different.

Nor can *Taylor* and *Amezcua* be distinguished because they involved counsel's decisions to comply with defendants' demands. GAB-79-80. Both relied on *McCoy* to hold attorneys properly prioritized their clients' decisions to value non-legal objectives—adherence to religious beliefs or excluding family at sentencing—over a life-sentence. *Taylor*, 372 F.Supp.3d at 867; *Amezcua*, 434 P.3d at 1146-50.

Finally, the government distinguishes *United States v. Read*, 918 F.3d 712 (9th Cir.2019), by ignoring its pertinent language. GAB-80.

Read held a defendant controls whether to present an insanity defense, expressly rejecting the position that an insanity defense is tantamount to a guilty plea and for that reason requires defendant consent. As the court explained, "pleading insanity has grave, personal implications" apart "from its functional equivalence to a guilty plea." 918 F.3d at 721. Thus, even when a defendant admits guilt, he may wish "to avoid contradicting his own deeply personal belief that he is sane" and "the social stigma associated with an assertion" of mental-illness. *Id.* "These considerations go beyond mere trial tactics and so must be left with the defendant." *Id.*; *see id.* at 720 (applying *McCoy*'s "opprobrium" holding to defendant's decision not to be seen as mentally-impaired).

Consistent with these cases, this Court should hold that where a competent defendant's objective is to present himself as mentally-intact, the Sixth Amendment guarantees him counsel's assistance in pursuing that objective, regardless of sentencing risk.

C. The government relies on outdated authority

The government also disregards *McCoy*'s directive on defendant autonomy by resorting to pre-*McCoy* caselaw. But its focus on *United States v. Chapman*, 593 F.3d 365 (4th Cir.2010), and *Sexton v. French*,

163 F.3d 874 (4th Cir.1998), is doubly-misplaced because neither addresses the question presented here and because *McCoy* undermined their reasoning. *Barbour v. Int'l Union*, 594 F.3d 315, 321 (4th Cir.2010).

Chapman, a noncapital habeas appeal about the choice to reject a mistrial offer, simply holds tactical, "on-the-fly" decisions fall within counsel's discretion. 593 F.3d at 367-70. And though *Sexton*, a capital case, states "[t]he decision concerning what evidence should be introduced is best left in [counsel's] hands," it is inapposite because Sexton never challenged counsel's authority to make mitigation decisions—claiming, instead, counsel should have consulted him. 163 F.3d at 887. *Sexton* is thus like *Florida v. Nixon*, 543 U.S. 175 (2004), where the Court declined to require consent from an otherwise-silent defendant. Because *Sexton* is about counsel's "fail[ure] to secure [defendant's] consent to present certain mitigating evidence at sentencing," 163 F.3d at 887, this "circuit has not spoken directly on" the question here, and is "free to address" it "on the merits," *United States v. Horton*, 693 F.3d 463, 479 n.16 (4th Cir.2012)(quotations

omitted); *see Fernandez v. Keisler*, 502 F.3d 337, 343 n.2 (4th Cir.2007)("We are bound by holdings, not unwritten assumptions.").

Moreover, because this Court must now "apply the [*McCoy*] framework," *Chapman* and *Sexton* are "no longer controlling." *United States v. Roseboro*, 551 F.3d 226, 234 (4th Cir.2009); *see United States v. Williams*, 155 F.3d 418, 421 (4th Cir.1998)(panel not bound where holding "clearly undermined by" Supreme Court case). Those cases depict counsel as an expert whose judgment trumps the unschooled defendant's. *McCoy* makes counsel "an assistant" to whom "a defendant need not surrender control entirely." *Compare* 138 S.Ct. at 1508, *with Chapman*, 593 F.3d at 370 (counsel not an adviser).

The government also relies on pre-*McCoy* precedent holding attorneys generally decide strategy. GAB-69-71. But this principle has always yielded for fundamental decisions entrusted to defendants like whether to testify: a tactical choice about what evidence to present, but no less fundamental for that reason. And though the cited cases list fundamental decisions recognized pre-*McCoy*—pleading guilty, waiving jury, testifying, and appealing—they don't purport to catalogue an exclusive universe, GAB-69, but set forth "examples" of choices left to

defendants, *Gonzalez v. United States*, 553 U.S. 242, 251 (2008). To the extent this authority remains relevant, it is for comparison: whether the choice to depict oneself as mentally-impaired is "similar[], in nature or significance," to decisions already recognized "as belonging solely to the defendant." *Chapman*, 593 F.3d at 368. Though the government relies on this test, it favors Roof. GAB-75.

For one thing, Roof's decision resembles the choice to present a mental-impairment defense at the guilt-innocence stage of trial, which most courts hold belongs to defendants. *Read*, 918 F.3d at 719 n.2; *Johnson v. State*, 17 P.3d 1008, 1013-15 & n.14 (Nev.2001); *State v. Bean*, 762 A.2d 1259, 1265-67 (Vt.2000). Two rationales underlying that rule apply equally to mental-health-mitigation at capital sentencing. First, "[a] criminal defendant may conclude that the stigma from a criminal conviction has less long-term effect than the stigma" of "an adjudication of mental illness." *Bean*, 762 A.2d at 1266-67; *see Read*, 918 F.3d at 721; *State v. Tribble*, 67 A.3d 210, 230 (Vt.2012)("[L]ike insanity, a defense of diminished capacity based on mental impairment is a highly personal and potentially stigmatizing one, and should remain the prerogative of an otherwise competent defendant."). Second,

"if the conduct in question involves what the defendant views as a political, religious, or sociological protest," asserting mental-impairment "may rob the protest of much of its significance in the defendant's eyes." *Treece v. State*, 547 A.2d 1054, 1060 (Md.1988).

Likewise, the choice to preclude mental-health-mitigation resembles the well-established rights to testify and hire counsel of choice, which allow a defendant to tell his story as he chooses. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)(recognizing "accused's right to present his own version of events in his own words"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). A defendant's right to present himself as sane and his actions as untainted by mental-illness is essentially the right to control the narrative about who he is and what he has done. *Commonwealth v. Federici*, 696 N.E.2d 111, 115 (Mass.1998)(protecting "defendant's choice not to label himself as 'criminally insane'").

Finally, presenting a mental-health-defense is not the sort of "on-the-fly" decision best left to counsel. *Chapman*, 593 F.3d at 368. Instead, it is like decisions to plead guilty, waive jury, testify, and appeal that we expect counsel to discuss with the client at length. *McCoy*, 138 S.Ct. at 1509. As with these established rights, trials will

not grind to a halt because defendants, after consulting counsel, have the final say on mental-health-mitigation.

D. The government overstates the consequences of recognizing Roof's autonomy right

Contrary to the government's suggestion, Roof's position neither requires counsel to cede authority on "whatever issue is viewed as most important by the defendant" nor "transform[s] all decisions about" witnesses and evidence into "fundamental" ones. GAB-75-76. *McCoy* entitles a defendant to decide his objective is to avoid admitting facts that might subject him to opprobrium. This Court need not delineate the many trial decisions unquestionably outside that rubric to hold the choice to present oneself as mentally-impaired—already recognized by courts as potentially stigmatizing—rests squarely in its confines.

Indeed, ruling in Roof's favor here is the natural extension of the widespread view—settled in this Court—that counsel is not ineffective for acquiescing to a defendant's demand to forgo mitigation. *Frye v. Lee*, 235 F.3d 897, 904-07 (4th Cir.2000); *Chandler v. Greene*, 145 F.3d 1323, *3-4, 8 (4th Cir.1998)(unpub.); *Cummings v. Sec. for Dept. of Corr.*, 588 F.3d 1331, 1357-60 (11th Cir.2009); *Wood v. Quarterman*, 491 F.3d 196, 203-04 (5th Cir.2007); *Breton v. Comm'r of Corr.*, 159 A.3d 1112, 1129-

36 & nn.11-12 (Conn.2017)(collecting cases). Some courts have gone further, recognizing defendants' affirmative right to control the mitigation-presentation. *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir.1998)("whether to use mitigating evidence" client's decision); *Pruitt v. State*, 514 S.E.2d 639, 650 (Ga.1999)("competent defendant," not counsel, "makes the ultimate decision about whether to" present mitigation); *see Breton*, 159 A.3d at 1145 ("Numerous courts have held that counsel has an ethical obligation to comply with an informed defendant's refusal to allow presentation of a mental disease or defect defense or mitigating evidence in the penalty phase of a capital case.").

Because Roof waived counsel on the mistaken understanding he could not otherwise make the fundamental decision whether to present mental-health-mitigation, his waiver was invalid.

V. ROOF HAD NO RIGHT TO SELF-REPRESENT AT PENALTY

The Sixth Amendment's implied right to self-representation at trial under *Faretta v. California*, 422 U.S. 806 (1975), does not extend to capital penalty proceedings under *Martinez v. Court of Appeal*, 528 U.S. 152 (2000). AOB-113-21. The government's contrary arguments, GAB-81-89, are unpersuasive.

A. *Martinez* controls

The government claims *Martinez*'s three-factor analysis doesn't apply because *Faretta* already governs capital penalty proceedings. GAB-85-86. But *Faretta* addressed a noncapital guilt-innocence trial, not capital penalty.

And though the Sixth Amendment right to counsel applies at penalty, the existence of that *textually-grounded* right does not dictate a parallel *implied* right to self-represent. The two have never been held coextensive and have different origins, the former appearing in the Constitution's text while the latter is implied from the Sixth Amendment's "structure" and "English legal history." *Faretta*, 422 U.S. at 818, 821. And they have different scope. Even at trial—where denial of counsel requires reversal, *United States v. Cronic,* 466 U.S. 648, 659 (1984)—the government's need for integrity and efficiency "at times outweighs the defendant's interest in acting as his own lawyer." *Martinez*, 528 U.S. at 162. Though courts cannot curtail a defendant's right *to* counsel, they may limit his right to serve as his *own* counsel by appointing standby counsel or letting counsel intervene, over objection, to ensure the trial's reliability. *Faretta*, 422 U.S. at 834 n.46; *McKaskle*

v. Wiggins, 465 U.S. 168, 184 (1984). Because the judicial interest in reliability is still greater at capital sentencing, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell, and Stevens, JJ.), it eclipses the rationale for self-representation at that phase.

Martinez acknowledges this asymmetry. Rather than defining *Faretta*'s self-representation right as applying coextensively with the right to counsel, *Martinez* defines *Faretta* as "extend[ing] only to a defendant's constitutional right to conduct his own defense." 528 U.S. at 154 (quotations omitted). Anything outside the "conduct [of that] defense" is governed by the "different question" whether *Faretta*'s rationale warrants extending self-representation to a new context. *Id.*

Capital penalty presents the "different question" governed by *Martinez* because the defendant is no longer "defen[ding]" himself. Instead, accused defendants' "status" "changes dramatically [after] a guilty verdict," and their "autonomy interests" become "less compelling." *Id*. at 162-63. No longer on defense, at penalty defendants must affirmatively prove mitigating factors. 18 U.S.C. §3593(c). Indeed, sentencing "is not a 'criminal prosecution' [under] the Sixth

Amendment" at all, "because its sole purpose is to determine only the appropriate punishment for the offense, not the accused's guilt." *United States v. Francis*, 39 F.3d 803, 810 (7th Cir.1994).

The government cites *Mempa v. Rhay*, 389 U.S. 128 (1967), *United States v. Taylor*, 414 F.3d 528 (4th Cir.2005), and *United States v. Haymond*, 139 S.Ct. 2369 (2019)(plurality), for the proposition that the right to counsel applies at "every stage of a criminal proceeding where [the defendant's] substantial rights" "may be affected," including sentencing. GAB-83. But these cases say nothing about the right to *self*-representation's applicability at those stages. Similarly inapposite is *United States v. Cohen*, 888 F.3d 667, 681 (4th Cir.2018), where this Court recognized—but no party contested—the right to self-represent at *noncapital* sentencing. GAB-83-84. *Othi v. Holder*, 734 F.3d 259, 265 n.3 (4th Cir.2013)(points "merely assumed" are not precedential (quotations omitted)).

The government cites *Monge v. California*, 524 U.S. 721 (1998), to claim capital penalty is "a continuation of the trial on guilt or innocence of capital murder." GAB-84. But *Monge* based that characterization on *Bullington v. Missouri*, which analogized a state capital-sentencing

scheme to trial for double-jeopardy purposes where penalty was selected beyond a reasonable doubt. 451 U.S. 430, 434, 441-42 (1981). The FDPA, by contrast, requires only that aggravating factors "sufficiently outweigh" mitigating ones. 18 U.S.C. §3593(e); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003)(penalty not analogous to guilt-phase where not selected beyond a reasonable doubt).

The government also cites *Silagy v. Peters*, 905 F.2d 986 (7th Cir.1990), and *United States v. Davis*, 2001 WL 34712238 (5th Cir.2001), which perfunctorily held *Faretta* governs capital penalty. GAB-84. Neither is correctly decided. *Davis*, without argument or substantive briefing, never addressed *Martinez*'s focus on criminal conviction as the point when autonomy interests diminish. 528 U.S. at 162. And *Silagy* offered virtually no analysis. 905 F.2d 1007.[20]

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[20] The government's remaining citations are nonbinding, pre-*Martinez*, and fail to address *Faretta*'s applicability at capital sentencing. *Sherwood v. State*, 717 N.E.2d 131, 135-36 (Ind.1999)(addressing only *Faretta* waiver); *State v. Brewer*, 492 S.E.2d 97, 98-99 (S.C.1997)(same); *People v. Coleman*, 660 N.E.2d 919, 937-38 (Ill.1995)(addressing capital cases generally, not capital penalty); *Bishop v. State*, 597 P.2d 273, 276 (Nev.1979)(same).

B. *Martinez* does not support extending *Faretta* to capital penalty proceedings

The government contends that even if *Martinez*'s three-factor analysis applies, this Court should recognize a right to self-represent at capital penalty. GAB-86-89. That is wrong.

Martinez's first factor—historical practice—does not support a self-representation right at penalty because "[f]ounding-era prosecutions traditionally ended at final judgment" with guilt and punishment "resolved in a single proceeding." GAB-88 (quotations omitted). That unitary proceeding only underscores the foreignness of modern capital sentencing to the Founders. Murder in colonial times was "automatically punished by death" without considering the defendant's character or background. *Woodson*, 428 U.S. at 289. We have since "traveled far from th[at] period," *Williams v. New York*, 337 U.S. 241, 247 (1949), to require a separate, broad-ranging inquiry into a capital defendant's "character and record," *Woodson*, 428 U.S. at 304—a practice "nonexistent for the first century of our Nation." *Martinez*, 528 U.S. at 659.

As to *Martinez*'s second factor—the Sixth Amendment's structure—the government assumes *Faretta* applies at capital penalty

because the right to *counsel* does. GAB-88. But, as discussed, the two rights are not coextensive. In fact, the Sixth Amendment's other core protections of confrontation and cross-examination expressly *don't* apply to capital sentencing. *United States v. Fields*, 483 F.3d 313, 326-27, 336-37 (5th Cir.2007); *United States v. Umaña*, 750 F.3d 320, 346 (4th Cir.2014); *cf. Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977)(capital sentencing does not "implicate the entire panoply of criminal trial procedural rights").

And *Martinez*'s third factor—respect for individual autonomy—does not support *Faretta*'s applicability at capital penalty simply because convicted capital defendants are "haled into court" and "bear the consequences of the sentence." GAB-89. *Martinez* gauges a defendant's autonomy *not* by whether he has been "haled into court," but by whether he has been *convicted*: the point when his autonomy recedes while the State's need for reliability remains. 528 U.S. at 163. "[R]epresentation by counsel" unquestionably furthers this need by "mark[ing] the process as fair and legitimate, sustaining public confidence in the system and in the rule of law," while self-representation jeopardizes reliability by risking "manipulation of the

[capital-sentencing] process." *United States v. Frazier-El*, 204 F.3d 553, 559-60 (4th Cir.2000)(quotations omitted).

Because capital sentencing was unknown to the Sixth Amendment's drafters, and the irrevocability of a death-sentence demands heightened reliability, this Court should hold *Faretta* does not extend to capital penalty proceedings.

VI. ROOF WAS PROHIBITED FROM WAIVING BOTH COUNSEL AND MITIGATION

According to the government, the "core of [Roof's] *Faretta* right" was the ability to control his defense, and the court would have violated that right if it appointed Roof counsel or appointed independent counsel to present mitigation. GAB-91-92, 95. That is wrong for two reasons. First, Roof did not object to non-mental-health evidence; he just didn't have the capacity to present it himself. JA-496, 5251, 5472-5480, 6710.[21] Second, presentation of mental-health-mitigation by independent counsel would not have undermined Roof's autonomy over his *own* defense presentation.[22]

[21] For examples of non-mental-health-mitigation counsel prepared to convince jurors to spare Roof's life, see AOB-102-03.

[22] Indeed, Roof acknowledged mental-health evidence—developed in competency proceedings—would be made public. JA-5793.

More broadly, the government's contention *Faretta* gives pro-se defendants complete control over penalty-phase evidence ignores the heightened reliability required at capital sentencing and defendants' diminished autonomy after conviction.[23] Capital sentencing is no ordinary trial; the death penalty is "unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), making information about the defendant's character and background "constitutionally indispensable." *Woodson*, 428 U.S. at 304. Conversely, a convicted defendant's autonomy is severely diminished. *Martinez*, 528 U.S. at 163; *Billings v. Polk*, 441 F.3d 238, 253-54 (4th Cir.2006).

United States v. Davis, 285 F.3d 378, 384-85 (5th Cir.2002), *Silagy*, 905 F.2d at 1007-08, and *Bishop*, 597 P.2d at 276, incorrectly treat *Faretta* as applying monolithically to guilt and penalty, giving pro-se defendants total control over both. But *Faretta*'s self-representation right is not absolute. Even at guilt, "the government's interest in ensuring the integrity and efficiency of the trial" can outweigh it. *Martinez*, 528 U.S. at 162; *Frazier-El*, 204 F.3d at 559. And a defendant

[23] Roof acknowledged the tension between this claim and his *McCoy* argument in his opening brief, and presents them in the alternative. AOB-122 n.30.

may not use *Faretta* to "distort" the system, *id.* at 560—which withholding constitutionally-indispensable information does. AOB-121-23; *State v. Hightower*, 518 A.2d 482, 483 (N.J.1986)("constitutional necessity" of reliable penalty-phase overrides defendant's objection to mitigation).

McKaskle confirms courts may limit self-representation to ensure trial integrity, holding pro-se defendants must "accept any unsolicited help or hindrance" from the judge's calling of witnesses, the prosecutor's presentation of "evidence favorable to the defense," or "amicus counsel appointed to assist the court." 465 U.S. at 177 n.7; *see Klokoc v. State,* 589 So.2d 219, 220-21 (Fla.1991)(independent counsel may present mitigation); *Morrison v. State*, 373 S.E.2d 506, 509 (Ga.1988)(trial court may develop mitigation).[24] Indeed, judges in noncapital cases routinely gather sentencing information about pro-se defendants—even over their objection. *United States v. Davis*, 150 F.Supp.2d 918, 923 (E.D.La.2001).

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[24] Though *McKaskle* also held standby counsel cannot infringe the defendant's "control over the presentation of his defense," *id.* at 183, that comment was directed to the *guilt*-phase—not penalty, where society's need for reliability trumps a defendant's autonomy interest.

The government claims neither the Constitution nor the FDPA *requires* presentation of mitigation, just the "opportunity to present" it. GAB-92-94. But the Eighth Amendment "requires consideration" of a defendant's "character and record" to prevent arbitrary death-sentences. *Woodson*, 428 U.S. at 304; *see Lockett v. Ohio*, 438 U.S. 586, 605 (1978). So does the FDPA. 18 U.S.C. §3592(a)(8)(sentencer "shall consider" mitigation).

The government also asserts Roof's sentence was reliable because jurors were instructed on mitigating factors. GAB-92-93. But those instructions highlighted the absence of evidence, skewing the weighing process *toward* arbitrariness. When the government capitalized on this absence of evidence, telling jurors Roof "did nothing to try to mitigate what he did," JA-6715, and falsely arguing Roof's proffered factors were "not true," JA-6697-98, jurors were left to conclude mitigating factors were important, but no evidence supporting them existed.

VII. ROOF'S INITIAL WAIVER OF COUNSEL WAS NOT KNOWING, INTELLIGENT, OR VOLUNTARY

Without counsel "the average defendant [is left] helpless." *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir.1997). For this reason, even if Roof had the right to self-represent, the government "bears a

heavy burden" of proving his waiver of counsel was knowing, intelligent, and voluntary, and this Court "indulge[s] in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 402-04 (1977)(quotations omitted); *see Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)(plurality)(emphasizing "strong presumption against waiver" of counsel); *Ductan*, 800 F.3d at 649.

The government cannot meet this burden—which it neither disputes nor acknowledges—because Roof was not "made aware of the dangers and disadvantages of self-representation," and all other "relevant circumstances," before he waived counsel for voir dire. *Iowa v. Tovar*, 541 U.S. 77, 81, 89 (2004)(quotations omitted). Instead, he was falsely led to believe he would have standby counsel's assistance with procedural matters like making and explaining objections. And he was not told he could maintain representation through the guilt-phase and self-represent at penalty. Because Roof's initial waiver was not knowing, intelligent, and voluntary, he was unconstitutionally deprived of his right to counsel at voir dire.

A. Roof was unaware of his personal obligation to handle procedural matters

A waiver of counsel is knowing and intelligent only if made "with sufficient awareness of the relevant circumstances." *Id.* at 81 (alteration and quotations omitted). When a defendant seeks to self-represent at trial, "the relevant circumstances" include "the need to personally adhere to federal procedural and evidentiary rules." *United States v. Hansen*, 929 F.3d 1238, 1257, 1270 (10th Cir.2019); *see Patterson v. Illinois*, 487 U.S. 285, 299-300 & n.13 (1988)(dangers and disadvantages of self-representation include adhering to procedural rules and objecting without counsel's assistance); *United States v. Hamett*, 961 F.3d 1249, 1255-56 (10th Cir.2020); *cf Singleton*, 107 F.3d at 1098 (waiver knowing and intelligent where defendant advised "he would be required on his own to follow" procedural rules).

This is precisely what the Tenth Circuit held in *Hansen*. The government, GAB-101, never grapples with *Hansen*'s explicit requirement that, before accepting a counsel waiver, the court must ensure the defendant understands his *personal* responsibility to follow procedural rules. 929 F.3d at 1257-58. Despite minor factual differences, *Hansen* is strikingly similar to this case. In each, the court

failed to confirm the defendant understood standby counsel could *not* assist him with procedural matters; the defendant had no trial experience suggesting he appreciated what was required; and his misunderstanding became clear soon after the waiver colloquy. *Compare id.* at 1247, 1260-61, 1264; *with* JA-2130-37, 2403-09, 3535. *Hansen* held the government could not overcome the presumption against a knowing and intelligent waiver under those circumstances. 929 F.3d at 1250, 1256-70.

The Tenth Circuit also rejected the government's argument that warning a defendant he generally is better off with counsel is sufficient to support a waiver. GAB-98-100. Such nonspecific warnings do not "rigorously convey[]" the "pitfalls" an unrepresented defendant faces, including needing to follow procedural rules and explain objections. *Tovar*, 541 U.S. at 89 (alteration and quotations omitted); *see id.* (requiring defendant "be warned specifically of the hazards ahead"); *Hansen*, 929 F.3d at 1262 & n.8.

Even if general warnings could suffice—which they can't—the problem goes beyond lack of specificity. Here, the court affirmatively downplayed Roof's personal obligation to handle procedural matters,

leading him to believe standby counsel would assist with those tasks. JA-2104 (stating standby counsel "would be available to assist [Roof] if [he] desired that assistance"). While the government correctly notes there is no precise script for a *Faretta* colloquy, GAB-99, courts cannot give "misleading advice," *Von Moltke*, 332 U.S. at 729 (Frankfurter, J., concurring).

And though the government points to Roof's agreement he could "make, as needed, motions or objections," GAB-98, 100, that statement tells us nothing about what Roof understood about his personal obligation, considering he endorsed it *after* being told he'd have counsel's assistance. JA-2104-05. (The government's brief reverses the order of these representations. GAB-98.) The subsequent confusion Roof and standby counsel expressed over who bore responsibility for various tasks refutes the government's suggestion Roof understood his obligation before waiving counsel. *Singleton*, 107 F.3d at 1097 (court "examin[es] the record as a whole" to determine waiver's validity).

The government's final assertion, that it is unlikely "Roof based his self-representation decision on a misunderstanding about standby counsel's role," fares no better. GAB-100. First, it's factually

unsupported because Roof revoked his waiver once he learned counsel could not perform tasks like lodging objections. And second, it's legally irrelevant because an invalid waiver is structural error. *Von Moltke*, 332 U.S. at 710; *Ductan*, 800 F.3d at 653; *see United States v. Forrester*, 495 F.3d 1041, 1045-48 (9th Cir.2007)(rejecting similar government argument).

B. Roof was unaware of his option to self-represent solely at penalty

Roof's initial waiver also was not knowing, intelligent, or voluntary because he was presented with the false choice of waiving representation entirely or allowing counsel to present mental-health-mitigation. In reality, Roof had another option: move to self-represent solely at penalty. This is surely the path Roof would have pursued had he known it was available; but it took five days of Roof stumbling through voir dire without representation and eventually giving up for the court to acknowledge the possibility.

That never should have happened. Representation at trial is the "default" position, *Singleton* 107 F.3d at 1096, and a court must make every effort to protect a defendant's right to counsel, *Ductan*, 800 F.3d at 648-50. That is especially true when a defendant is on trial for his

life, and when granting a waiver will leave him "helpless," *Singleton*, 107 F.3d at 1096, at a "critical" stage like jury-selection, *Ductan*, 800 F.3d at 654 (Diaz, J., concurring).

The issue isn't one of timeliness. GAB-102. It is one of knowledge. Before Roof waived counsel's assistance at his capital trial, he should have been told preserving his right to self-represent at penalty didn't require sacrificing professional representation at voir dire. On the unique facts of this case, where the court understood Roof's sole reason for discharging counsel was to control the penalty-phase, its failure to properly advise Roof invalidates his waiver.

VIII. THE COURT MISAPPREHENDED ITS DISCRETION TO DENY ROOF'S UNTIMELY MOTION

The government agrees when Roof moved to discharge counsel, long after trial proceedings had begun, his request was untimely and his right to self-represent accordingly waived. GAB-104-05. And it recognizes, for that reason, the court had complete discretion to deny Roof's motion. GAB-105-06. Yet the government never grapples with the court's misunderstanding that its ability to do so was "bound[ed]," other than to acknowledge this was the court's belief. GAB-105; JA-2298. Because the court mistakenly thought it lacked absolute authority to

deny Roof's motion as untimely, the court misapprehended the discretion it had. That is an abuse of discretion. *United States v. Herder*, 594 F.3d 352, 363 (4th Cir.2010)(reversing where "court failed to recognize its discretion" to act); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 446 (4th Cir.2003)(court abuses discretion when it "misapprehends" relevant law); *cf. United States v. Roberson*, 517 F.3d 990, 995 (8th Cir.2008)(remand appropriate where "court does not consider an argument because it is unaware of its power to do so").

Tellingly, the government never addresses Roof's cited authority so holding. AOB-132. Instead, it catalogues factors the court considered in applying the "bounded" discretion it believed it had. GAB-106. But whether the court weighed proper factors is beside the point. The court could have, and should have, denied Roof's motion outright for no reason other than its lateness, but mistakenly believed that option unavailable. In so misunderstanding, the court abused its discretion—a point the government cannot truly dispute. *Tsarnaev*, 968 F.3d at 73 ("[A] material error of law always amounts to an abuse of discretion." (quotations omitted)).

And the mistake mattered. The court repeatedly said denying Roof's motion was the better course and Roof was unwise to self-represent, and it lamented a trial where jurors would not "hear all [the] evidence," which it considered the necessary price of protecting Roof's Sixth Amendment rights. JA-636, 1744-45, 2111, 2125, 2133, 3550 ("[T]he interests of justice are served best through professional representation of capital defendants."). Had the court recognized its unbounded authority to deny Roof's untimely motion, it would have done so. This Court must reverse.

IX. THE COURT ABUSED ITS DISCRETION BY ALLOWING ROOF, A GRAY-AREA DEFENDANT, TO SELF-REPRESENT

Assuming *arguendo* Roof was competent to stand trial, he nonetheless was "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Indiana v. Edwards*, 554 U.S. 164, 175-76 (2008). Because Roof struggled to follow the proceedings (sometimes not even recalling what took place), fixated on trivial matters, and was too anxious about embarrassing himself to make necessary motions and objections, he lacked the ability to self-represent even in a run-of-the-mill case. JA-5253-55, 5472-78. Plainly, he did not have the capacity to "carry out the basic tasks needed to

present" a *capital* defense: humanizing himself and persuading jurors to impose a life-sentence. Instead, Roof thought jurors would spare his life if he wore the right colors or told them about the purportedly-ongoing war against white people. JA-5253, 5255, 5477; *see* JA-5473 (Roof believed no one would sentence him to death because "people aren't that mean").

In a capital case, allowing a "gray-area" defendant like Roof to waive counsel is unconstitutional. At a minimum, the court abused its discretion by disregarding the undisputed evidence Roof's anxiety, disorganized thinking, attention deficits, and inability to understand others' perspectives affected his ability to self-represent.

A. The *Edwards* standard for waiving counsel is different from the *Dusky* standard for standing trial, and meeting it is a prerequisite to self-representing in a capital case

According to the government, if a defendant is competent to stand trial, he is competent to represent himself, even in a capital case. GAB-107-09. To reach this conclusion, the government relies on *Godinez v. Moran*, 509 U.S. 389 (1993), and *Bernard*, 708 F.3d 583, but neither applies here.

Whereas *Godinez* adopted a unitary competency standard—the *Dusky* standard—for standing trial and waiving counsel to *plead guilty*, "[t]he Supreme Court has disavowed the use of a single mental competency standard" for defendants like Roof, who wish to self-represent *at trial*. *United States v. Barefoot*, 754 F.3d 226, 233-34 (4th Cir.2014)(quotations omitted). In *Edwards*, the Court explained *Dusky* is premised on counsel's assistance, and when a defendant "choose[s] to forgo" that assistance, it "presents a very different set of circumstances" that "calls for a different standard." 554 U.S. at 174-75; *see United States v. Wright*, 923 F.3d 183, 188, 191 (D.C.Cir.2019)(describing *Edwards* standard as "higher" than *Dusky*).

While meeting the higher *Edwards* standard is not constitutionally required in a noncapital case, it is a prerequisite to self-representing at a capital trial, where the Eighth Amendment demands heightened reliability. AOB-147-49; *Edwards*, 554 U.S. at 176-77 ("[I]nsofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives,

providing a fair trial."). The district court agreed, JA-6957, and no binding precedent holds otherwise.

The government's reliance on *Bernard* in its response also is misplaced. GAB-108-09. In *Bernard*, this Court held it was not plain error to allow a mentally-ill defendant—who successfully made opening and closing statements, testified, and reopened his case for cross-examination—to self-represent at his noncapital trial. 708 F.3d at 587. *Bernard* says nothing about the requirements in a capital case, and less still when the defendant intends to present no case at all.

The government's cited authority notwithstanding, it is unconstitutional for a gray-area defendant to self-represent at a capital trial.

B. Roof did not satisfy the *Edwards* standard

Even if the court had discretion to allow Roof to self-represent at his capital trial, it abused that discretion by holding Roof had "the mental capacity to conduct his trial defense" on his own. *Edwards*, 554 U.S. at 174. Contrary to the government's rosy description of Roof's performance, GAB-110-11, his self-representation was a disaster.

By the government's own account, when Roof initially represented himself during voir dire, his crippling anxiety rendered him incapable of performing in open court. GAB-110 (citing Ballenger's testimony Roof would have difficulty self-representing in open court, but performance would improve with time); JA-910-11, 1037-40. If Roof became more comfortable as jury-selection continued, it hardly showed. Though he could memorize and repeat a scripted objection on occasion, *compare* GAB-112-13, *with* JA-5253-54, more often his anxiety, disorganized thinking, and attention deficits resulted in silence when the need to speak was plain. JA-3559-76 (describing numerous deficiencies).

To highlight but a few examples, Roof allowed qualification of prospective jurors, without follow-up or objection, who called him a "racist [who] killed nine people in cold blood"; felt they needed to "take a stand" and strongly favored a death-sentence; worked with a victim's relative; knew a witness personally and continued listening to case-related news after being directed not to; worked in law enforcement and communicated regularly with three officer-witnesses;[25] was "disgusted"

[25] After urgent prodding by standby counsel, Roof managed to request one follow-up question of this juror, then did nothing more. JA-3110-12.

by Roof's actions and wanted "to help the [victims'] families find peace"; believed a defendant who commits murder "forfeit[s] the right to" live, wavering on whether they could recommend a life-sentence for someone who intentionally murders multiple victims; and suggested death was the only appropriate punishment where a capital defendant's guilt is proved beyond a reasonable doubt. JA-2332-37, 2392-402, 2750-57, 2958-67, 3101-12, 3325-32, 3390-403, 3416-22. And Roof made no effort to rehabilitate jurors who hesitated over whether they could impose death but did not clearly meet the standard for disqualification, at one point belatedly recognizing his mistake and seeking (unsuccessfully) to object through standby counsel. JA-2163-72, 2190-91, 2192-99, 3017-22. These lapses weren't strategy; Roof told the court he couldn't keep up with the proceedings and needed help. JA-2403-09, 2678-80.

Roof's penalty-phase performance was even worse. His nonsensical opening and closing arguments likely did more harm than good. JA-5793-94, 6712-13. The "motions challenging the government's presentation" of victim-impact evidence, GAB-110-11, were written by standby counsel to address issues Roof failed to raise in real-time. Roof merely signed them, and after the court denied the second motion,

counsel pleaded for the ability to intervene because Roof proved incapable of protecting himself. JA-5743-44, 5902-05, 6033-45, 6260-62. As the government concedes, Roof cross-examined no witnesses and presented no evidence—not even non-mental-health evidence to which he had no objection. GAB-111. Rather than self-represent, Roof—in the government's own words—"did nothing to try to mitigate what he did." JA-6715.

None of this was surprising. Even if Roof had some limited ability to speak up during closed competency hearings, GAB-110, he told Ballenger if he had to self-represent at trial, he would do nothing. JA-1100-01. The idea that Roof—who by every expert's account suffered crippling anxiety, AOB-139-41—could perform in an open courtroom packed with onlookers, is absurd.

The government's cited cases—none capital—do not foreclose relief. GAB-109. Reviewing for clear error, not abuse of discretion, these courts upheld convictions for defendants who "presented a zealous defense," *United States v. Audette*, 923 F.3d 1227, 1237 (9th Cir.2019); spoke up vociferously, "made rational arguments," and obtained acquittals on several counts, *United States v. Brugnara*, 856 F.3d 1198,

1204-05, 1214 (9th Cir.2017); and were found to have no severe mental-illness,[26] likewise achieving acquittal on multiple counts, *United States v. McKinney*, 737 F.3d 773, 775-76 (D.C.Cir.2013). Roof's case stands on the opposite end of the spectrum with *United States v. Ferguson*, 560 F.3d 1060, 1069 (9th Cir.2009), where the court remanded on *Edwards* grounds after the defendant presented almost no defense, "seriously jeopardiz[ing] the fairness of the trial and sentencing hearing" as well as "the *appearance* of fairness." *See Read*, 918 F.3d at 722 (affirming counsel's reappointment where defendant's "behavior was bizarre" and "his proposed defense would likely be wholly ineffective" (quotations omitted)); *cf. United States v. Lewis*, 612 F.App'x 172, 176 (4th Cir.2015)(affirming *Faretta* denial where defendant's "disordered thinking prevented him from personally managing the large amount of documentary evidence").

And though trial courts are afforded deference in evaluating competency to self-represent, GAB-111, "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537

[26] The government doesn't dispute Roof suffers from severe mental-illnesses; it challenges only their impact on his capacity to self-represent. GAB-109-11.

U.S. 322, 340 (2003). Here, the court failed to heed expert warnings that Roof's cognitive abilities would lead it to overestimate Roof's real-world capabilities. JA-5312-13. And it relied on untrained observations of Roof in closed proceedings, ignoring Roof's long record of suffering debilitating anxiety, disorganized thinking, and attention deficits, JA-1499-500, 1539, 5306, 5368, 5658, as well as counsel's description of Roof's impaired performance during trial, JA-3559-76, 5252-55, 5472-77. In doing so, the court abused its discretion.

X. THE COURT ABUSED ITS DISCRETION BY DENYING ROOF'S REASONABLE REQUESTS FOR ACCOMMODATIONS

The government claims the court properly exercised its discretion when it barred standby counsel from assisting Roof with procedural matters. According to the government, counsel's assistance would have undermined four goals: (1) ensuring the defense speaks with a single voice, (2) preventing Roof from manipulating his *Faretta* rights, (3) maintaining an orderly process, and (4) promoting Roof's dignity and courtroom decorum. GAB-114, 117. But the requested assistance would have furthered, not undermined, those goals. Because the court relied on these same false premises to deny Roof's requests, it abused its

discretion. *James*, 6 F.3d at 239 (reliance on false premise is abuse of discretion).

First, Roof's desired assistance would not have prevented a single defense voice because counsel would have spoken in Roof's voice. Roof's request was for help, *with his express authorization*, JA-2404, JA-2561, JA-2952, to "overcom[e] routine obstacles" to "his own clearly indicated goals," *McKaskle*, 465 U.S. at 184.

Second, standby counsel's participation would not have enabled Roof to manipulate his *Faretta* rights. Rather than seeking "hybrid" counsel, as the court believed, JA-3174, Roof requested run-of-the-mill assistance *Faretta* specifically permits: "steer[ing] a defendant through the basic procedures of trial" by making objections and speaking on his behalf outside jurors' presence. *McKaskle*, 465 U.S. at 184; *see id.* at 179 (standby counsel's participation outside jury's presence consistent with *Faretta*). Because pro-se status is not "a license not to comply with relevant rules of procedural and substantive law," Roof appropriately sought assistance in fulfilling his role. *Faretta*, 422 U.S. at 834 n.46.

Third and *fourth*, standby counsel's participation would have ensured, not undermined, orderliness and decorum by averting

untimely objections the court deemed disruptive. JA-2404-05. And leaving Roof to self-represent without the assistance he needed to do so did nothing to affirm his dignity. Without counsel's help, Roof floundered at voir dire and penalty. Section-IX.B. *McKaskle* specifically approved counsel's participation to avoid such an undignified spectacle and "ensure the defendant's compliance with basic [courtroom] rules." 465 U.S. at 183.[27]

The court failed to recognize how standby counsel's participation would facilitate and dignify the proceedings in precisely the ways *McKaskle* identified, instead deeming Roof's proposal a "two headed monster." JA-3190. That view was not based on *McKaskle*, and, in fact, the court explained it had not even had a "chance to look at the case law" when it refused Roof's initial requests. JA-2309-10.

Finally, the court improperly denied Roof's separate requests to slow down, preview the government's evidence, and make non-contemporaneous objections based on an "assur[ance]" he could

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[27] Amici Curiae misapprehend Roof's claim. It is not that defendants with autism universally are incompetent to stand trial. Dkt.141 at 2. It is that, as Amici Curiae recognize, some "may need additional supports in order to ensure access to due process." *Id.* Roof also does not assert any link between autism and violence. *Id.*

"perform" these tasks. GAB-118. The cited record reveals that when Roof agreed he could object "as needed," he had not been advised of his personal obligation to timely object, and instead had been told he would have standby counsel's assistance as "desired." JA-2104-06. That is a far cry from Roof acknowledging he would "be on his own in a complex area [necessitating] experience and professional training." *United States v. King*, 582 F.2d 888, 890 (4th Cir.1978)(quotations omitted).

Points Related to the Death Verdict

XI. THE COURT PRECLUDED MITIGATING EVIDENCE ABOUT ROOF'S LACK OF FUTURE-DANGEROUSNESS

At the government's urging, the court precluded Roof's presentation of mitigating factors about the difficulties he would face in prison and evidence of the government's ability to safely confine him. That ruling was wrong. As explained in his opening brief, Roof's mitigation was individually tailored to him, and the court's expansive prohibition of "conditions of confinement" evidence suffered the same flaw this Court, in *Lawlor v. Zook*, 909 F.3d 614, 631 (4th Cir.2018), recently described as a "red herring." AOB-168-69.

In response, the government does not defend the court's legal conclusion, challenge *Lawlor*'s holding, or argue the court's expansive,

categorical prohibition on prison-conditions evidence is sustainable post-*Lawlor*. Instead, the government tries to shift blame for the court's error to Roof—a pro-se defendant, with acknowledged cognitive impairments, representing himself at capital sentencing—arguing he *chose* not to introduce this crucial evidence. That claim is contradicted by the record, and ignores the order's broad sweep and Roof's own complaint the court prevented him from presenting this information.

Not only did the court's improper order prevent jurors from considering important mitigating evidence, it allowed the prosecution to seize on an absence of evidence it had itself manufactured. When jurors then expressed confusion over how to evaluate Roof's future-dangerousness, the court failed to answer their questions, effectively converting mitigating factors into aggravating ones.

These errors gutted Roof's case for life on the critical issue of future-dangerousness, and jurors' notes demonstrate their harmful impact on deliberations. Because the government cannot prove otherwise beyond a reasonable doubt, this Court must vacate Roof's death-sentence and remand for resentencing.

A. The court barred indisputably-admissible evidence tailored to Roof's individual characteristics

The court's order prevented jurors from considering two mitigating factors specifically tailored to Roof: *first*, "due to his small size, youth, and notoriety," a life-sentence would be "especially onerous" because he would have to be confined in "isolating circumstances" for his own protection; and *second*, life in prison would be "especially onerous" for Roof because he'd live "in fear of being targeted by other inmates." JA-464.

The government responds that the stricken mitigators were not individualized to Roof, as required by *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and instead were "harsh prison conditions" arguments against the death penalty generally. GAB-124. But on their face, both factors were tailored to Roof, asking jurors to consider that a life-sentence would be especially difficult for him, as an individual, because of his age, his small size, and the notoriety of his crime. These were not generic arguments against capital punishment; they were targeted concerns that applied uniquely to Roof.

For that reason, *United States v. Johnson*, 223 F.3d 665 (7th Cir.2000), on which the government principally relies, is inapposite.

Roof did not, as the Seventh Circuit held improper in *Johnson*, seek to argue prison, as prison, is a sufficient punishment, making death unwarranted in any case. Roof sought to allow the jurors to consider his unique characteristics to decide whether life imprisonment would be sufficiently harsh for him. JA-483-84. Whatever the persuasive value of *Johnson* in this Circuit post-*Lawlor*, it says nothing about the individualized mitigating factors at issue here.[28]

B. The order prevented Roof from presenting evidence he could be maintained safely in prison

The court did allow jurors to consider two other mitigating factors: Roof "poses no significant risk of violence to other inmates or prison staff if imprisoned for life"; and "[g]iven his personal characteristics and record," Roof "can be safely confined if sentenced to life imprisonment." JA-496. But its order—issued at the government's urging over defense objection it was unnecessarily broad—precluded evidence of prison-

[28] The government's additional citations are equally irrelevant. GAB-124-25. *United States v. Roane*, 378 F.3d 382, 406 (4th Cir.2004), upholds counsel's strategic choice not to introduce evidence of harsh prison conditions. Rather than hold such evidence inadmissible, *Roane* implicitly acknowledges counsel could have presented it. *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1313-14 (11th Cir.2014), like *Johnson*, addressed prison-conditions evidence unconnected to the defendant.

security and -administration measures Roof needed to prove these mitigators. It unequivocally and categorically held "details of prison administration," including "inmate classification and designation process, both initial and ongoing reevaluations; the services, programs, and conditions of confinement in correctional facilities; special confinement; and restrictive housing," were not "proper matter[s] for a capital sentencing jury," and, thus, inadmissible. JA-493.

The government does not, after *Lawlor*'s holding that prison-conditions and -security evidence "specific to the defendant on trial and relevant to that specific defendant's ability to adjust to prison life" *is* admissible, 909 F.3d at 631, defend the court's order. Indeed, it barely acknowledges *Lawlor*. GAB-126. Instead, the government argues the order wasn't the problem because Roof *chose* not to introduce prison-conditions evidence. *Id.* But that claim is contradicted by Roof's own words.

As set out in his opening brief, AOB-164, after the government argued in closing Roof posed a danger because he could incite violence through his writing, Roof explained to the court he had not introduced

prison-conditions and -security evidence to rebut this claim *because of the court's prior categorical ruling barring such evidence*:

> THE DEFENDANT: Yes, my objection to what the prosecution mentioned about the mail and conditions of prison—
>
> THE COURT: Yes.
>
> THE DEFENDANT: —is that the Court refused to allow me to present evidence that I wouldn't be dangerous if allowed—if I got life in prison because of—you said that we weren't allowed to talk about an imaginary prison. You see what I'm saying? And that is what the prosecution did.

JA-6710. Standby counsel confirmed this understanding and sought (unsuccessfully) an instruction telling jurors Roof had been precluded from introducing conditions-of-confinement evidence. JA-6754-55.

The government ignores Roof's own representation of what he would have presented absent the improper order, instead fixating on a snippet written by standby counsel in their request (over Roof's objection) for a second competency hearing. GAB-126. There, counsel wrote that Roof, if allowed to self-represent, would forego mitigation including "the state and federal government's ability to safely manage him in the future." JA-5251. From that lone excerpt—of a pleading Roof

himself did not draft or join—the government speculates Roof would not have introduced prison-security evidence anyway.[29]

But the government never explains how standby counsel's representation—offered in support of a competency hearing Roof did not want—negates his own representation at penalty about what he would have done. And even if Roof had joined the pleading, decisions about evidence evolve as trial progresses.

The government must prove beyond a reasonable doubt the court's order—which it effectively concedes was erroneous—was harmless. Its excerpt from a collateral pleading Roof did not join do not carry that burden. The best evidence of the order's effect is the text of that order, which unambiguously prohibited evidence about "details of prison administration," and Roof's own statement that he would have

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[29] The government also suggests this snippet reflects counsel's subjective understanding of the preclusion order's scope. GAB-126. But the government's description of the excerpt is inaccurate: Counsel unambiguously noted the court's order prohibited "conditions of confinement" evidence. JA-5251 n.6. That understanding is consistent with counsel's later request (never acknowledged by the government, GAB-125-26) to instruct jurors Roof was categorically barred from introducing such evidence. JA-6754-55.

presented such evidence absent the order. The government's state-of-mind speculation ignores both these facts.

C. The government capitalized on the court's error

In closing, the prosecution seized on the court's erroneous evidentiary rulings to misleadingly suggest Roof's lack-of-future-dangerousness mitigating factors were "not true," and he didn't introduce evidence of prison-safety measures because no such evidence existed. This argument was misleading, a form of prosecutorial vouching, and improper.

On appeal, the government no longer claims Roof's lack-of-future-dangerousness mitigating factors were "not true." Appropriately so, as Roof detailed in his opening brief some of the prison measures available to safely confine him. AOB-174-75. Instead, the government contends the prosecution did not mislead or vouch, but merely commented on a lack of evidence. Yet it fails to quote or discuss the actual text of the prosecution's closing statements. GAB-128.

The record shows prosecutors did more than argue Roof failed to prove he could be incarcerated safely; the principal framing of their argument was that the proffered factors were not "true." The

prosecution told jurors Roof proffered some mitigating factors that "*are simply not true for which no evidence has been presented*." These included Roof's mitigator he "does not pose a risk of violence while incarcerated," for which there was "no evidence of that. . . . *It's simply not true*." As for Roof's mitigator he could be safely confined, the prosecution encouraged jurors to "[a]sk [themselves] whether there is evidence that he can be safely confined," and urged jurors to compare this "not true" mitigator with "others *that are truth*." JA-6697 (emphases added). After Roof unsuccessfully objected, the prosecution reemphasized: "In addition to the [mitigators] *that are simply not true that there's no evidence to support*, including the lack of a risk of violence, the safety, all of which the evidence suggests to the contrary, *there are some that are factually accurate*." JA-6698 (emphases added).

Though the prosecution referenced an absence of evidence, its theme was truth. And its thrust wasn't that Roof's prison-safety mitigators were untrue because no evidence had been offered in support, but the misleading and improper converse: that no evidence had been introduced because Roof could not, as a factual matter, be securely incarcerated.

When the prosecution strays beyond the evidence to offer its own characterizations of what is objectively true or false, with or without magic words like "I believe," it constitutes improper vouching.[30] *United States v. Craddock*, 364 F.App'x. 842, *1-2 (4th Cir.2010)(prosecutor's assertion two witnesses "told the truth" plainly-erroneous vouching); *United States v. Joyner* 191 F.3d 47, 52, 55 (1st Cir.1999)(prosecutor's statement witness "told the truth" and "[e]veryone told the truth in this case" plainly-erroneous vouching); *United States v. Swinehart*, 617 F.2d 336, 338 (3d Cir.1980)("He is an honest witness" vouching); *United States v. Gallagher*, 576 F.2d 1028, 1041 (3d Cir.1978)(prosecutor's argument witness had no motive to lie "because she was telling the truth" vouching). The prosecution's tack-on discussion of the absence of evidence—an obvious attempt to have its vouching cake and eat it too—does not cure its improper argument.

[30] This vouching is particularly troubling because it concerned prison security, a topic on which lay jurors likely assumed the prosecution had expertise.

D. The court refused to answer jurors' questions about Roof's lack-of-future-dangerousness mitigators

The deliberating jurors sent out two questions seeking clarification on Roof's prison-safety mitigators. Regarding mitigating factor 8—"Roof poses no significant risk of violence"—jurors asked, "Would he personally inflict the violence or would he incite violence, need clarification?" JA-6765. Regarding mitigating factor 9—"Roof can be safely maintained if sentenced to life imprisonment."—jurors asked, "Please define safe confinement. Does this include his writings getting out of prison?" JA-6768. Over defense objection, the court refused any supplemental instruction beyond telling jurors to use their "common sense and good judgement to determine" the mitigators' scope. JA-6775.

The government contends the court had utter discretion to leave jurors in the dark and no clarification was necessary because Roof presented no evidence in support of either factor. GAB-129. That analysis is wrong legally and factually.

Although a court has discretion in *how* it responds to juror notes demonstrating confusion, it does not have the same discretion about *whether* to respond. As this Court has held, "[o]nce a jury makes known

its difficulty, it is the duty of the judge to be responsive to that difficulty, and he is required to give such supplemental instructions as may be necessary." *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1036 (4th Cir.1975)(quotations omitted). And perfunctory recitation of prior instructions is usually not enough. *Swift v. R.H. Macy's & Co., Inc.*, 780 F.2d 1358, 1361 (8th Cir.1985). Here, jurors made plain their confusion about the scope of Roof's mitigating factors, and the court offered no guidance on how to resolve that confusion. In failing to do so, the court erred.

Importantly, jurors had heard evidence supporting the narrower interpretation of the proffered mitigators, making clarification imperative. Though the government successfully blocked jurors from learning how prisons could stop Roof from communicating with the outside world, they heard and saw ample evidence Roof posed no threat of direct acts of violence himself. They knew his youth and lack of criminal history, and observed his small, slight stature. Indeed, Roof's narrower interpretation was supported by the government's summation, which focused exclusively on his ability to incite others through the mail.

As jurors explained in their notes, there were two possible interpretations of the mitigating factors: Roof posed no direct threat of violence; or Roof posed no direct *or indirect* threat, including of inciting others to violence through the mail. Jurors heard and saw mitigating evidence to support the former, but were precluded from receiving evidence on the latter. The court's refusal to clarify which reading was correct allowed jurors to effectively convert Roof's proffered mitigators into aggravators. And, given that no juror found either mitigating factor proven, that is likely what they did.

E. The errors prejudiced Roof

These errors individually and cumulatively undermined Roof's case for life on the critical issue that he posed no risk of future acts of violence. The government cannot prove, as it must, they were harmless beyond a reasonable doubt.

The government does not dispute the importance of future-dangerousness evidence to a capital-sentencing jury. GAB-130. Nor could it. AOB-181(citing empirical studies). Instead, it makes the precisely-backwards argument "Roof provided no evidence on which any juror could have based a lack-of-future-dangerousness finding." GAB-

130. But the entire point is that, on the government's motion, the court struck two prison-related mitigators and categorically barred evidence of prison-security measures. Roof introduced no evidence he could be stopped from inciting others because the government successfully moved to prevent him from doing so—and then took advantage of that absence in its summation. The prejudice analysis is the impact of *those* errors.

The government also dismisses the juror notes as idle curiosity. *Id*. But the sentencing verdict form demonstrates otherwise. Jurors unanimously found several of Roof's proffered mitigating factors, including youth, lack of criminal history, cooperation with law enforcement, and offer to plead guilty in exchange for life. JA-6803-04. But not one juror found either of the two prison-safety mitigating factors. Jurors were diligent in their analysis of each mitigator, and their questions and findings reflect that diligence—and establish these errors impacted their deliberations.

The government also ignores *Lawlor*'s precedential holding, under the far-less-favorable habeas-prejudice standard, that juror notes alone demonstrate harm. 909 F.3d at 634 (reversing where "jury's questions

left no doubt about its failure to gain" a "clear understanding" of issue)(quotations omitted); *see Barnes v. Thomas*, 938 F.3d 526, 533 (4th Cir.2019)(characterizing *Lawlor* as holding exclusion of adjustment-to-prison mitigation not harmless where jurors "expressed confusion over whether and how [they] could consider such evidence"). As in *Lawlor*, the notes show jurors struggled with whether and how to give effect to Roof's prison-safety mitigating factors—and their findings show they ultimately concluded they could not. The errors, accordingly, were not harmless.

At bottom, the government's harmlessness argument is that Roof's case was highly aggravated. It was. But that fact alone cannot end the inquiry, or the proceedings below were hollow theater. An aggravation-only analysis misstates the harmless-error standard, which asks "not whether the legally admitted evidence was sufficient to support the death sentence," but "whether the [government] has proved beyond a reasonable doubt that the error complained of did not contribute to the

verdict obtained." *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)(quotations omitted).[31]

Here, the Court need not guess whether the future-dangerousness errors contributed to the verdict because jurors told us, through their notes and verdict form, they cared about this evidence but found it lacking. This Court should vacate Roof's death-sentence and remand for a new sentencing proceeding.

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[31] Federal juries have declined to return death-verdicts in highly-aggravated cases including: *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir.2008)(Al-Qaeda members responsible for bombing Kenyan and Tanzanian embassies, killing 224 and injuring more than 5000); *United States v. Moussaoui*, 591 F.3d 263 (4th Cir.2010)("20th hijacker" in 9/11 attack that killed thousands at World Trade Center and Pentagon); *United States v. Candelario-Santana*, 834 F.3d 8 (1st Cir.2016)(drug-cartel leader who killed 20, including 8 RICO murders after release from prison); *United States v. Kehoe*, 310 F.3d 579 (8th Cir.2002)(white-supremacist who robbed and drowned 8-year-old girl and her parents by putting bags over their heads, binding them with duct-tape, and weighing them down with rocks); *Pitera v. United States*, 2000 WL 33200254 (E.D.N.Y.2000) (Mafia hitman who committed 7 contract killings, several involving torture and dismemberment).

XII. VICTIM TESTIMONY ROOF WAS "EVIL" AND BELONGED IN THE "PIT OF HELL" TAINTED THE DEATH VERDICT

A. The government waived its timeliness argument

The government claims plain-error review partially governs Roof's challenges to witness testimony Roof was "evil" and belonged in the "pit of hell," stating in passing Roof's motions to strike this testimony were untimely. GAB-135. But it neither supports its claim with any argument nor responds to Roof's discussion of why his objections were timely. AOB-191-94. It has thus waived the timeliness point. *Hillman v. I.R.S.*, 263 F.3d 338, 343 n.6 (4th Cir.2001); Fed.R.App.P. 28(a)(8)(A), (b)(brief must provide party's "contentions," "reasons," and citations to authority).

In any event, the government concedes Roof's mistrial motions and request for curative instructions were timely. GAB-132-33, 135. Whatever standard this Court applies, Roof is entitled to relief.

B. The court erred in failing to grant a mistrial, strike improper remarks, or specifically instruct jurors to disregard them

The government depicts Sanders's testimony Roof was "evil" not as an unconstitutional characterization of Roof but as her eyewitness "account of how the crime unfolded." GAB-137. But her comments

plainly characterized "the crime, the defendant, and the appropriate punishment." *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016). Saying someone is "evil" describes his character, not something that happened. *Cauthern v. Colson*, 736 F.3d 465, 476-77 (6th Cir.2013); *Wilson v. Sirmons*, 536 F.3d 1064, 1118 (10th Cir.2008).

Equally misplaced is the suggestion the "pit of hell" statements weren't sentencing recommendations but merely the witness's take on Roof's eventual resting place. GAB-137. The court itself recognized the comments addressed "the appropriate punishment," JA-3825, as would reasonable jurors, as a defendant destined for hell is presumably deserving of death. Indeed, multiple courts have characterized victim statements that defendants should "rot" or "burn" "in hell" as inadmissible testimony about "[the] appropriate punishment, and calls to religious authority as the basis for punishment." *State v. Payne*, 199 P.3d 123, 149 (Idaho 2008); *see State v. Rhoades*, 820 P.2d 665, 678 (Idaho 1991); *cf. Marshall v. Hendricks*, 307 F.3d 36, 76-78 (3d Cir.2002)(argument about "place in hell" for defendant improper).

These comments were plainly unconstitutional under *Booth v. Maryland*, 482 U.S. 496 (1987). The declarations Roof was "evil" and

destined for "hell" were actually more inflammatory than the claims in *Booth* the defendant would not be "rehabilitated," should not "get away with the crime," and could not be forgiven. 482 U.S. at 508. They were also more inflammatory than the argument in *Baer v. Neal*, 879 F.3d 769 (7th Cir.2018), that relatives wanted a death-sentence, which prompted relief under the stringent habeas standard.

C. The errors prejudiced Roof

The government wrongly relies on the *habeas* prejudice standard for *prosecutorial misconduct*, which requires errors to have made sentencing "so unfair that it amounted to a denial of due process." GAB-138. But on *appellate* review of *evidentiary* errors at a capital trial, the standard is whether the government can prove the errors harmless beyond a reasonable doubt. *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir.2000); 18 U.S.C. §3595(c)(2). Here, it cannot.

The court's non-specific instruction that penalty was "[jurors'] decision alone," given the day after the testimony, never cured the prejudice. GAB-139. It failed to "neutralize the harm" because it did "not mention the specific statements" at issue and was "not given immediately after the damag[ing]" remarks. *United States v. Sanchez*,

659 F.3d 1252, 1258 (9th Cir.2011)(quotations omitted); *United States v. Wilson*, 135 F.3d 291, 302 (4th Cir.1998). Indeed, the court twice told jurors *to consider* witnesses' guilt-phase testimony in deciding Roof's sentence. JA-5764, 6722.

Nor were the challenged remarks "isolated" or "the only improper comments" at trial. GAB-138. On the contrary, prosecutors impermissibly urged jurors to impose death because of the victims' virtuousness, and misleadingly argued Roof's future-dangerousness mitigation was "not true." Sections-XI.C, XIII. Regardless, the exhortation that Roof was "evil" and doomed to "hell" by itself left a profound emotional mark. *Buck v. Davis*, 137 S.Ct. 759, 777 (2017)("Some toxins can be deadly in small doses."). Sanders was not only a grieving relative but also a surviving victim whose remarks came in anguished testimony so powerful it headlined stories nation-wide. JA-4362-73.

The comments also addressed the theme of the prosecutor's case—Roof's evil nature—distinguishing them from others found harmless. GAB-138-39. In *United States v. Lighty*, 616 F.3d 321, 360-62 (4th Cir.2010), the prosecutor sought death "on behalf of the [victim's]

family," but never introduced evidence of their wishes. The witnesses in *United States v. Bernard*, 299 F.3d 467, 480 (5th Cir.2002), merely referenced the defendant's "hard" heart and insensitivity. And *Barnette*, 390 F.3d at 800, involved constitutionally-*permissible* testimony about "the impact of the victim's death." *Id.* at 798.

Capital sentencing requires heightened reliability to ensure "the death sentence [is], and appear[s] to be, based on reason rather than caprice or emotion." *Booth*, 482 U.S. at 508 (quotations omitted). Because the government cannot prove beyond a reasonable doubt improper comments did not tip the balance for at least one juror, this Court should remand for resentencing.

XIII. THE GOVERNMENT INTRODUCED AND ARGUED IMPROPER VICTIM-WORTH AGGRAVATING EVIDENCE

A. Standard of review

The government acknowledges Roof preserved objections to the bulk of the improper victim-impact evidence and all the challenged closing arguments. GAB-143-44. It claims this Court should review for plain error the admission of a handful of exhibits to which Roof registered delayed or unspecific objections. GAB-144. But Roof's objections to the victim-impact evidence as a whole preserved these

errors for review. AOB-199-200; *United States v. Fortenberry*, 919 F.2d 923, 924-25 (5th Cir.1990).

Additionally, pro-se defendants need not lodge specific and timely objections unless forewarned of that duty. *United States v. Vonn*, 535 U.S. 55, 73 & n.10 (2002); *Leyva v. Williams*, 504 F.3d 357, 363-65 (3d Cir.2007)(plain error inapplicable where pro-se defendant "[n]ever warned" of need to object). The government's citation to *Cohen*, 888 F.3d at 685, is inapposite because *Cohen* never addresses an inadequate advisement. GAB-144.

The government also incorrectly asserts the preserved objections are reviewed for abuse of discretion, but constitutional errors are reviewed de novo. AOB-199; *United States v. Williams*, 632 F.3d 129, 132 (4th Cir.2011). Though the government claims Roof doesn't allege a due process violation, GAB-146 & n.7, his opening brief argues exactly that. AOB-199.

B. The government unconstitutionally asked jurors to impose death because the victims were good and devout

The government contends *Payne v. Tennessee*, 501 U.S. 808 (1991), "dismissed" concerns victim-impact evidence would encourage

comparisons of victims' worth. GAB-146. But *Payne* actually forbade such comparisons, allowing victim-impact evidence only to the extent it *doesn't* invite them. 501 U.S. at 823. Thus, arguing one who kills "a hardworking, devoted parent" deserves death, while another who kills "a reprobate" does not, violates the Eighth Amendment. *Id.*

The government even concedes *Humphries v. Ozmint*, 397 F.3d 206, 224 (4th Cir.2005)(en banc), holds victim-to-victim comparisons impermissible under *Payne*. GAB-147 (citing *Humphries* for proposition *Payne* "prohibits" such "direct 'comparisons'"). But those are precisely the comparisons prosecutors made here. The government admits it asked jurors to impose death precisely *because* the victims were especially good, only contesting whether prosecutors sought death based on their religiosity. GAB-148.[32] They plainly did, telling jurors the victims were not just "Easter Sunday people," but "the every Sunday and every Wednesday people"—"pillars of that church" who were, *for that reason*, "particularly good." JA-6685. In this framework, the

[32] Though jurors were instructed not to consider the victims' *religion*, and swore they did not, GAB-148-49, that is different from considering the victims' *religiosity*, or devoutness, which is the problem here.

victims' religiosity made them better than other victims and Roof's crime more serious than other crimes.

These arguments did more than show the victims' "uniqueness." GAB-145. They drew the victim-worth comparison *Payne* forbids. And they went beyond explaining "the societal impact of" Roof's decision to target innocent victims in church. GAB-148. Instead, they linked the victims' devoutness to the severity of Roof's offense and, by extension, the appropriateness of death—arguing what differentiated Roof's actions was his "choice" "to target *particularly good people* in a church." JA-6692 (emphasis added). The natural inference was that, had the victims been less good or devout, death might not have been warranted. Such arguments invite arbitrary imposition of the death penalty based on subjective assessments of victims' worth. *Booth*, 482 U.S. at 508 & n.8.

The government claims *United States v. Mikhel*, 889 F.3d 1003 (9th Cir.2018), *United States v. Mitchell*, 502 F.3d 931 (9th Cir.2007), and *Bernard*, 299 F.3d 467, approve evidence of victims' religiosity to show their "unique attributes." GAB-148. But none compared victims' relative goodness. In *Mikhel*, the victim's Jewish faith was presented to

"describ[e] his commitment to his family and celebration of life." 889 F.3d at 1053. In *Mitchell*, the victim's religion showed she "pass[ed] down the Tribe's traditions and practices." 502 F.3d at 989. And in *Bernard*, the victims' religious-proselytization demonstrated "care for [their] community." 299 F.3d at 479. None involved arguments the victims were especially good or devout.

C. The errors prejudiced Roof

Though the government contends these errors were harmless because the crime was aggravated, GAB-149-50, that fact does not preclude relief. *Buck,* 137 S.Ct. 759; *Wade v. Calderon*, 29 F.3d 1312 (9th Cir.1994). Roof's death-sentence was not inevitable; rather, jurors' penalty-phase questions showed they had questions. JA-6766-68. Their request to view a video of a victim speaking in church confirms this evidence resonated. JA-6773-75. And the prosecution's closing statement emphasizing the victims' virtue exacerbated the errors. JA-6685. These facts distinguish *United States v. Runyon*, 707 F.3d 475, 510 (4th Cir.2013), where an error had no plausible impact on deliberations, and *Jones v. United States*, 527 U.S. 373, 404-05 (1999), where the government's argument cured an instructional error.

Indeed, it is difficult to image how the extensive victim-impact testimony could *not* have triggered emotional responses from jurors. Far exceeding the "quick glimpse" of the victims *Payne* permits, 501 U.S. at 830 (O'Conner, J., concurring), prosecutors spent four days eliciting heart-rending testimony from 23 individuals that reduced jurors to tears as witness after witness sobbed with grief. JA-6041-42, 6106-07, 6263.[33] Such testimony has well-recognized prejudicial force. *Kelly v. California*, 555 U.S. 1020 (2008)(Stevens, J., respecting denial of cert.). Because the government cannot show beyond a reasonable doubt at least one juror's decision was not affected by its exhortation to sentence Roof to death for killing exceptionally good and religious people, this Court should remand for a new penalty proceeding.[34]

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[33] The victim-impact testimony lasted twice as long as the two-day presentation in Timothy McVeigh's trial for killing 168 people. *United States v. McVeigh*, 153 F.3d 1166, 1221 (10th Cir.1998).

[34] The government acknowledges *Jones* sets a harmless-beyond-a-reasonable-doubt standard for preserved errors, but incorrectly employs "[n]o reasonable likelihood" language. GAB-149-50. Harmless beyond a reasonable doubt is the standard. *Jones*, 527 U.S. at 404; 18 U.S.C. §3595(c)(2).

XIV. ROOF'S DEATH-SENTENCE IS UNCONSTITUTIONAL BECAUSE OF HIS YOUTH AND MENTAL-IMPAIRMENTS

Roof's youth, autism, and mental-illness make death a cruel and unusual punishment that violates the Eighth Amendment. AOB-208-15.

The government's response ignores the jurisprudential shift toward protecting vulnerable individuals from capital punishment following advances in scientific and legal understanding of adolescent development. AOB-209-12; GAB-150-54. Those advances have continued after *Roper v. Simmons*, 543 U.S. 551 (2005). While some studies cited by Roof may predate *Simmons*, GAB-152-53, they also incorporate more recent brain-development studies. In any event, the cited sources are but a small sampling of post-*Simmons* authorities indicating late-adolescent brains (aged 18 to 26) are more like juvenile brains than those of mature adults. *E.g.*, Sawyer, *et al.*, *The Age of Adolescence*, The Lancet (2018); Stetka, Bret, *Extended Adolescence: When 25 Is the New 18*, Scientific American (2017)("Twenty-five is the new 18, and delayed adolescence is no longer a theory, but a reality.").

Ignoring these studies, the government advocates rigid adherence to *Simmons*'s death-penalty-eligibility cut-off at age 18, without regard for neurological- or mental-impairments. But in the precursor to

Simmons, the Missouri Supreme Court extended *Stanford v. Kentucky*, 492 U.S. 361 (1989)(setting death-eligibility at 16), and relied on *Atkins v. Virginia*, 536 U.S. 304 (2002), to hold executing offenders younger than 18 also violated the Eighth Amendment—a decision the Supreme Court affirmed.

That logic applies equally here, where at the time of the offense Roof was 21, and indisputably suffered from undiagnosed autism and symptoms of psychosis. These impairments made him death-ineligible. Though this claim was preserved, AOB-209, it would warrant relief even on plain-error review.

Points Related to the Guilt Verdict

XV. CONGRESS LACKED COMMERCE CLAUSE AUTHORITY TO ENACT §247(A)(2)

The government contends Congress can regulate any noneconomic intrastate crime simply by requiring it be "in" or "affect[]" interstate-commerce: a legal conclusion that merely restates the limits of the Commerce Clause itself. But *United States v. Lopez* requires more than a legal conclusion; jurisdictional elements must "limit[]" a statute's "reach to a *discrete set* of" offenses possessing "an *explicit connection* with or effect on" interstate-commerce. 514 U.S. 549, 562

(1995)(emphasis added). Section 247(b) does not. And the government's claim that Congress can regulate any intrastate offense whose planning or preparation involves a phone, GPS device, highway, or the Internet—or commission involves any item that crossed state lines—would give Congress unchecked power to regulate local crime.

A. Section 247(a)(2)'s jurisdictional clause does not make it facially constitutional

The government claims §247(a)(2) is constitutional under *Lopez*'s "channels" and "instrumentalities" prongs because its jurisdictional element limits it to conduct "in" interstate-commerce. GAB-170. But *Lopez* and *Morrison* "reject the view that a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the Commerce Clause." *United States v. McCoy*, 323 F.3d 1114, 1125 (9th Cir.2003). A jurisdictional element must be "meaningful," *United States v. Maxwell*, 446 F.3d 1210, 1218 (11th Cir.2006), defining a "discrete set" of activities whose connection to interstate-commerce is "explicit." *Lopez*, 514 U.S. at 562.

Section 247 does not do this. Because religious obstruction is not inherently commercial or interstate, its jurisdictional element must delineate a link. *United States v. Lopez*, 2 F.3d 1342, 1364-65 (5th

Cir.1993)(Congressional intent to invade state prerogatives must be "clear"). But unlike the statutes in the government's cited cases, GAB-166-69 & n.9,[35] §247(b) never mentions interstate-travel, interstate-transported items, or use of interstate instrumentalities. Its "in" or "affect[ing]" interstate-commerce language simply restates a legal conclusion coextensive with the Commerce Clause, *United States v. Ballinger*, 395 F.3d 1218, 1232 (11th Cir.2005)(en banc), never specifying how the regulated activity relates to interstate-commerce.[36]

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[35] *United States v. Cobb*, 144 F.3d 319, 320 (4th Cir.1998) (automobile "transported, shipped, or received" in interstate-commerce); *United States v. MacEwan*, 445 F.3d 237, 243 (3d Cir.2006)(child pornography "mailed, or shipped or transported" in interstate-commerce); *United States v. Corum*, 362 F.3d 489, 493 (8th Cir.2004) ("use of the mail, telephone, telegraph, or other instrument of interstate" commerce); *United States v. Coleman*, 675 F.3d 615, 620-21 (6th Cir.2012)(travelling interstate without registering as a sex offender); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir.1996) (receiving federally-regulated weapons "possessed," "ship[ped] or transport[ed]" in interstate-commerce); *United States v. Folen*, 84 F.3d 1103, 1104 (8th Cir.1996)(same). Section 247(a)(2) is also distinguishable from statues targeting commercial commodities. GAB-166-67 & n.9; *United States v. Mahon*, 804 F.3d 946, 953-54 (9th Cir.2015)(commercially-connected property); *United States v. Alderman*, 565 F.3d 641, 647-48 (9th Cir.2009)(body armor "sold or offered for sale" in interstate-commerce).

[36] By contrast, in *United States v. Hill*, 927 F.3d 188, 196 (4th Cir.2019), GAB-165, 167, the statute specified how the targeted conduct must affect interstate-commerce: by "interfer[ing] with commercial or other economic activity in which the victim is engaged."

This Court found an identical jurisdictional element insufficient in *United States v. Gibert,* 677 F.3d 613 (4th Cir.2012). *Gibert* deemed a federal animal-fighting ban not to implicate *Lopez*'s "channels" or "instrumentalities" prongs, despite its limitation to conduct "*in* . . . interstate or foreign commerce"—the same language in §247(b). *Id.* at 624. The Tenth Circuit similarly concluded a prohibition on possession of body armor sold "in" interstate-commerce wasn't a regulation of interstate channels or instrumentalities, because it did not target the armor's interstate movement. *United States v. Patton*, 451 F.3d 615, 621-22 (10th Cir.2006); 18 U.S.C. §921(a)(35).

The same reasoning applies here. Like the *Gibert* and *Patton* statutes, §247(a)(2) regulates criminal conduct "wherever it occurs," *United* States *v. Morrison*, 529 U.S. 598, 609 (2000)—without mentioning interstate channels or instrumentalities. Tellingly, in 1996, Congress *removed* such language from §247, deleting the requirement of "travel[ing] in interstate or foreign commerce, or us[ing] a facility or instrumentality of interstate or foreign commerce." Pub. Law No.100-346 §1, 102 Stat. 644 (1988); Pub. Law No.104-155 §3, 110 Stat. 1392 (1996). In its current version, the statute simply "defines the offense as

[religious obstruction], not travel to commit the [obstruction]," which "use of the word 'in' does not change." *Ballinger*, 395 F.3d at 1256 (Hill, C.J., dissenting)(addressing §247(a)(1)).

The government, citing *Ballinger*, claims "in . . . commerce" is sufficiently explicit. GAB-170. But *Ballinger* wrongly held §247(a)(1) a valid regulation of interstate channels and instrumentalities by analogizing it to distinguishable statutes expressly mentioning those things. 395 F.3d at 1226 (comparing 18 U.S.C. §§1952 and 1958, explicitly prohibiting "travel[] in" interstate-commerce or use of mail or interstate-facilities.) The *Ballinger* majority sidestepped this problem, calling the adequacy of §247's jurisdictional element not a "constitutional question" but one of "statutory interpretation." *Id.* at 1229-30. But that is wrong, as *Lopez* considers a jurisdictional element's adequacy a question of the statute's facial constitutionality. 514 U.S. at 562.

The government notes courts upheld the *Lopez* statute after Congress amended it to add a jurisdictional element requiring that the firearm "moved in or otherwise affect[ed] interstate or foreign commerce." GAB-164-65. It also cites *United States v. Chesney*, 86 F.3d

564, 568-69 (6th Cir.1996), which rejected a Commerce Clause challenge to the felon-in-possession statute because its jurisdictional element requires the possession be "in or affecting" interstate-commerce. GAB-164. But such jurisdictional elements' adequacy in the context of firearm-possession statutes cannot be transferred to §247(a)(2), because guns are "things" moved in interstate-commerce, *United States v. Wilks*, 58 F.3d 1518, 1521-22 (10th Cir.1995), regulated by a "comprehensive [federal] statutory regime." *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir.2006). By contrast, §247(a)(2) targets not a "thing," but the obstruction of religion.

The government separately claims §247(a)(2) is constitutional under *Lopez*'s third prong—activities substantially affecting interstate-commerce—because religious obstruction might "prevent[] a church from engaging in an [economic] activity that affects interstate commerce—*e.g.*, operating a summer camp or a daycare center." GAB-171. But such possibilities were equally present in *Lopez* and *Morrison*, as gun possession *could* interfere with a summer camp at a school, and gender-motivated violence *could* occur at a business. Yet the Court struck both statutes by focusing on the regulated conduct's

"noneconomic, criminal nature." *Morrison*, 529 U.S. at 610.[37] Moreover, "a jurisdictional hook alone" cannot "justify aggregating" a noncommercial activity's effects to permit Commerce Clause regulation. *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir.2000).

In fact, because religious obstruction is neither "economic"[38] nor "part of an economic 'class of activities' [with] a substantial effect on" interstate-commerce, *Raich*, 545 U.S. at 17, any commercial impacts of individual violations cannot be aggregated to create the substantial effect on interstate-commerce *Lopez* requires. *Taylor v. United States*, 136 S.Ct. 2074, 2079-80 (2016)(aggregation permitted only "where [regulated] activity is economic"); *Gibbs v. Babbitt*, 214 F.3d 483, 493 (4th Cir.2000)(aggregation possible for "economic activity"); *Waucaush v. United States*, 380 F.3d 251, 256-58 (6th Cir.2004)(gang's intrastate commercial impacts can't be aggregated because gang's activity not

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[37] The government, like the district court, makes a similar argument regarding *Lopez*'s first and second prongs, citing applications like mailing a bomb to a church that, it claims, would place the offense "in" interstate-commerce. GAB-164; JA-3521; *Ballinger*, 395 F.3d at 1237. But the *Lopez* and *Morrison* statutes also allowed for valid hypothetical applications. AOB-224-25.

[38] "Economic" activities involve "production, distribution, and consumption of commodities." *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

economic). Such impacts would constitute the same attenuated "costs of crime" *Morrison* rejected as insufficient. 529 U.S. at 612-13; *United States v. Ho*, 311 F.3d 589, 598 (5th Cir.2002)(absent aggregation, regulated act must "by itself substantially affect" interstate-commerce).

B. The government introduced insufficient evidence Roof's offense was "in" or "affected" interstate-commerce

The government makes no argument its evidence sufficed to show Roof's offense "affected" interstate-commerce under *Lopez*'s third prong, waiving any such claim. The only question is whether it proved Roof's offense was "in" interstate-commerce, allowing regulation under *Lopez*'s "channels" and "instrumentalities" prongs.

1. A crime is not "in" interstate-commerce whenever its planning or preparation involves interstate channels or instrumentalities

The government relies on *Ballinger* to claim religious obstruction is "in" interstate-commerce whenever interstate channels or instrumentalities are used, intrastate, in the offense's planning or preparation. GAB-176-77. But *Ballinger* turned on the defendant's crossing of state lines *during the offense*—a "four-state church-arson spree." 395 F.3d at 1236.

The government's remaining authorities, GAB-176-77, are equally unpersuasive because they address statutes prohibiting *using* interstate channels or instrumentalities. The statute in *Runyon*, 707 F.3d at 488-89, prohibited "use [of] the mail or any [interstate commercial] facility" with intent to murder. The one in *Morgan* prohibited "use of an [interstate] instrumentality to engage in kidnapping." *United States v. Morgan*, 748 F.3d 1024, 1032 (10th Cir.2014). By contrast, Roof's offense was not using a computer, telephone, or highway but attacking congregants intrastate. Deeming intrastate crimes "in" interstate-commerce whenever *preceded* by such ubiquitous acts would permit federal regulation of any crime.

2. A crime is not "in" interstate-commerce whenever it involves items that previously moved interstate

Equally incorrect is the government's claim Roof's offense was "in" interstate-commerce because he used items during the offense—a firearm, ammunition, and a tactical pouch—that had previously crossed state lines. Though the government cites *Scarborough v. United States*, 431 U.S. 563 (1977), for this proposition, GAB-172-73, *Scarborough* addressed the felon-in-possession statute's interpretation, not its

constitutionality. *Alderman v. United States*, 562 U.S. 1163 (2011)(Thomas, J., dissenting from denial of cert.)("No party [in *Scarborough*] alleged that the statute exceeded Congress' authority, and the Court did not hold that the statute was constitutional.").

Moreover, *Scarborough* addressed gun possession, which is inherently connected to interstate-commerce because it is the final link in a heavily-regulated commercial chain. *United States v. Kirk*, 70 F.3d 791, 796-97 (5th Cir.1995)(upholding federal ban on machine-gun possession as "attempt to control the interstate [machinegun] market"). By contrast, religious obstruction—even when committed with a firearm—is not part of any product's interstate journey. "It is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons." *Kallestad*, 236 F.3d at 229.

More fundamentally, deeming an offense "in" interstate-commerce whenever committed with an item that once crossed state lines would give Congress limitless power to regulate local crime. Virtually all crimes are committed using items that have passed through interstate-commerce. *McCoy*, 323 F.3d at 1125; AOB-232-33. Courts have thus

repeatedly held such facts insufficient to render an offense "in" interstate-commerce. *Jones v. United States*, 529 U.S. 848, 857-58 (2000); *Gibbs*, 214 F.3d at 490-91; *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir.1999).[39]

C. The court improperly instructed jurors

Even if §247(a)(2) is constitutional under *Lopez* and *Morrison*, jurors were not correctly instructed on the requirements of its jurisdictional element. This was plain error.[40]

As explained, jurors could not convict Roof based on his intrastate use of (1) interstate channels or instrumentalities to plan or prepare for, or (2) a gun and ammunition during, the crime. Neither *United States v. Nathan,* 202 F.3d 230, 234 (4th Cir.2000), nor *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir.2001), GAB-178, is persuasive, because the felon-in-possession statute they address targets the

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[39] The government attempts to distinguish *Rodia* by arguing Roof's use of a gun was integral to the offense. GAB-174. But *Rodia* focused not on the connection between the item and the offense, but between the offense and the item's prior interstate movement. 194 F.3d at 473. While a firearm was directly involved in Roof's offense, its prior interstate movement was not.

[40] The government challenges only the first two prongs of the plain-error test, waiving any argument this plain error, if found, doesn't merit relief. GAB-177-81.

heavily-regulated act of gun possession, not crimes committed with guns. *Kallestad*, 236 F.3d at 229.

Jurors alternatively needed to find Roof's offense *substantially* affected interstate or foreign commerce. The government claims §247(b)'s reference to conduct "affecting" interstate-commerce erases the requirement to show any *substantial* effect "in a particular case." GAB-180. But its authorities—*Nathan,* 202 F.3d 234, *United States v. Suarez*, 893 F.3d 1330 (11th Cir.2018), and *United States v. Williams*, 342 F.3d 350 (4th Cir.2003)—do not support that claim. *Nathan* never addressed the required degree of commercial effect; it merely held firearms prohibited under §922 were sufficiently connected to interstate-commerce because they moved between states. 202 F.3d at 234. And *Suarez* and *Williams* rely on cases not requiring a "substantial effect" under the Hobbs Act because that act targets *economic, interstate* activity Congress can regulate based on its aggregate effects. *Suarez*, 893 F.3d at 1334 (citing *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir.1997)(relying on *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir.1996))); *Williams*, 342 F.3d at 354 (Hobbs Act's regulated "class of acts"—commercial robbery—is "both economic and

interstate”).[41] That reasoning does not apply to §247’s attempted regulation of intrinsically noneconomic intrastate conduct.

Because religious obstruction does not fall within any economic “class of activities” Congress can regulate in the aggregate, *Raich*, 545 U.S. at 17, each violation must substantially affect interstate-commerce “by itself.” *Ho*, 311 F.3d at 598; *see United States v. Wang*, 222 F.3d 234, 239 (6th Cir.2000). Allowing Congress to regulate noneconomic intrastate crime with only “minimal [such] effect[s],” GAB-180—which, in the government’s view, could be achieved simply by inserting an “affecting commerce” element into a statute, *id.*—would nullify *Morrison*’s rule that “noneconomic, violent criminal conduct” cannot be regulated based on its aggregate impacts. 529 U.S. at 617.

[41] *United States v. Corum*, 2003 WL 21010962, *5 (D.Minn. 2003), GAB-180-81, acknowledges a “de minimis” standard applies only to “economic or commercial” conduct, yet wrongly holds church activities commercial. *Compare United States v. Lamont*, 330 F.3d 1249, 1254 (9th Cir.2003)(worship “non-commercial and non-economic”). *United States v. Grassie*, 237 F.3d 1199, 1206, 1209 (10th Cir.2001) is inapposite, because the appellant conceded §247’s Commerce Clause validity but argued solely that *Jones* changed the analysis—a narrow argument not presented here.

XVI. SECTION 247(A)(2) REQUIRES PROOF OF RELIGIOUS HOSTILITY

The government doesn't dispute it never proved, and the jury did not find, a religious-hostility motive for the §247(a)(2) violations. GAB-181-83. And it never argues these omissions, if error, were not harmless beyond a reasonable doubt, waiving any such claim. *Id.*; *Hensley v. Price*, 876 F.3d 573, 580 (4th Cir.2017). Instead, the government asserts proof of religious hostility is not required. This argument misreads the statute's text and legislative history.

The government first notes §247(a)(2) requires "intentional[]" obstruction of religious exercise, while neighboring subsections (a)(1) and (c) criminalize acts committed "because of" bias. It reads into this contrast that Congress deliberately omitted a religious-hostility requirement from (a)(2). GAB-182. But statutes "must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004)(alteration and quotations omitted). Here, Congress needed the "because of" language in (a)(1) and (c) because their actus rei—damage to property—do not innately require bias. Subsection (a)(2), by contrast, targets obstructing religious exercise—conduct that on its face suggests a bias-

motive. Because §247(a)(2) inherently describes a hate crime, Congress had no reason to reiterate that element with a motive-defining clause.

Legislative history confirms the statute punishes religiously-motivated crime. This reading is supported not by "cherry-pick[ed]" statements, GAB-182, but *eleven* separate references from seven pages of legislative history:

- "The purpose of S. 794 is to make violence *motivated by hostility to religion* a Federal offense." S. Rep. No.100-324, 2 (1988).
- "Under current law, there are limited circumstances under which a Federal prosecution for *religiously motivated* violence may be commenced." *Id.*
- "The need for a broader Federal criminal statute is evidenced by the growing number of incidents of *religiously motivated* violence." *Id.* at 3.
- "The incidence of violence *motivated by hostility to religious groups* . . . has led to a number of studies examining the problem." *Id.*
- "*Religiously motivated* violence" is "a growing problem." H.R. Rep. No.100-337, 2 (1987).
- "In view of the increase in violence *motivated by religious bias*, it is important that Congress help combat this threat to the free exercise of religious beliefs." *Id.* at 4.
- "[T]here is evidence of recurring incidents of defacement or destruction of places of worship, and in some instances, personal injury or murder *motivated by religious hatred*." *Id.* at 2.

- "The majority of *religiously-motivated* crimes of destruction are believed to be committed against synagogues." *Id.*

- "Black churches are believed to be the next most frequent target of *religiously-motivated* violence." *Id.*

- "The dearth of accurate statistics makes it difficult to assess the full impact of these crimes because many cases are reported to police as vandalism, assault, or 'malicious mischief' without any indication of *religious motivation*." *Id.*

- "There is presently no statutory provision of Federal law that authorizes prosecution of *religiously-motivated* violence." *Id.*

(emphases added).

The government engages in its own cherry-picking to claim the statute covers religiously- *and* racially-motivated violence. But the Senate Report's reference to "Black churches," GAB-182-83, emphasized how frequently those churches were targeted by *religiously-motivated* acts. S. Rep. No.100-324, 3.

The government also ignores state-sovereignty principles. Absent a religious-hostility mens rea, §247(a)(2) would criminalize conduct—like assault and property destruction—ordinarily prosecuted by States. Because criminalizing traditional state offenses "effects a change in the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S. at 561 n.3 (quotations omitted), Congress "must make its intention to [alter this balance] unmistakably clear in the language

of the statute," *Gregory v. Aschcroft*, 501 U.S. 452, 460 (1991)(quotations omitted). Congress did not do that here; thus this Court cannot read the religious-hostility requirement out of §247(a)(2).

Because §247(a)(2) requires proof Roof was motivated by religious hostility, but no such evidence was presented or instruction given, Roof's convictions on Counts 13-24 must be vacated.

XVII. CONGRESS LACKED THIRTEENTH AMENDMENT AUTHORITY TO ENACT §249(A)(1)

Section 249(a)(1) is not a "congruent and proportional" response to badges of slavery because it broadly criminalizes acts with no nexus to slavery, against people never burdened by slavery. Nor is it justified by "current needs," because Congress enacted it without evidence states weren't prosecuting racially-motivated crimes. It is therefore not "appropriate legislation" under §2 of the Thirteenth Amendment, and is facially unconstitutional. The government's contrary arguments are unavailing.

A. The "congruent and proportional" and "current needs" tests apply to §249(a)(1)

The Thirteenth, Fourteenth, and Fifteenth Amendments were ratified in the Civil War's aftermath, all for the same purpose: to "confront slavery." *United States v. Cannon*, 750 F.3d 492, 509 (5th

Cir.2014)(Elrod, J., concurring). They use identical language empowering Congress to enact "appropriate legislation." U.S. Const., amends. XIII, XIV, XV, §2. Even so, the government contends cases interpreting those clauses—deeming legislation "appropriate" only if "congruent and proportional[]" to the injury and "justified by current needs"—don't apply to the Thirteenth Amendment. GAB-189-97. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Shelby County v. Holder*, 570 U.S. 529, 536 (2013). That is wrong.

1. *Boerne* and *Shelby County's* reasoning applies to the Thirteenth Amendment

Boerne and *Shelby County* don't discuss the Thirteenth Amendment, because it was not at issue in those cases. GAB-194. Nevertheless, since both cases interpret the "appropriate legislation" language found in all three Reconstruction Amendments, their "generally applicable reasoning" applies here. *Hill*, 927 F.3d at 199 n.3.

It also does not matter that *Boerne* and *Shelby County* don't reference *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968). GAB-190, 194. While this Court must follow relevant Supreme Court precedent, GAB-191, neither *Boerne* nor *Shelby County* is inconsistent with *Jones*. Rather, those opinions clarify *Jones*'s holding that the Thirteenth

Amendment gave Congress the power to pass "laws necessary and proper for abolishing" badges and incidents of slavery, by explaining the "necessary and proper" criteria are satisfied only when the "congruent and proportional" and "current needs" tests are met. 392 U.S. at 439. This Court is thus bound by *Boerne* and *Shelby County* in determining the constitutionally of §249(a)(1).

2. *Boerne* and *Shelby County*'s sovereignty concerns apply

The government claims state-sovereignty concerns that animated the "congruent and proportional" and "current needs" tests don't apply to the Thirteenth Amendment. GAB-190-94. Not so. As one Senator noted pre-enactment, §249(a)(1) profoundly infringes state-sovereignty by "mak[ing] every violent crime motivated by the animus toward certain classes a federal matter." 36 S. Rep. No.107-147, 36 (2002). Indeed, state-sovereignty concerns are paramount under the Thirteenth Amendment because criminalization of private conduct is generally entrusted to states. *Bond v. United States,* 572 U.S. 844, 858 (2014).

3. Contrary cases are unpersuasive

Three sister Circuits have declined to apply *Boerne* and *Shelby County*, and thus upheld §249's constitutionality. *United States v.*

Metcalf, 881 F.3d 641, 645 (8th Cir.2018); *Cannon*, 750 F.3d at 502; *United States v. Hatch*, 722 F.3d 1193, 1206 (10th Cir.2013). These decisions wrongly assume *Jones* conflicts with *Boerne* and *Shelby County*, without explaining why.

Three Circuits also have upheld 18 U.S.C. §245(b)(2)(B)—another hate-crime provision—under the Thirteenth Amendment. *United States v. Nelson*, 277 F.3d 164, 190-91 (2d Cir.2002); *United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir.1984); *United States v. Allen*, 341 F.3d 870, 884 (9th Cir.2003). GAB-188-89. But these cases were decided pre-*Shelby County*, and *Bledsoe* was decided even before *Boerne*. None considered whether the "congruent and proportional" and "current needs" requirements apply to the Thirteenth Amendment.

B. Section 249(a)(1) is not a "congruent and proportional" response to badges of slavery

Section 249(a)(1) is not a "congruent and proportional" response to badges of slavery because it covers discrimination against people of *all* races, colors, religions, and national origins, even those never subjected to slavery. Ignoring this fact, the government cites *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911), to suggest the Thirteenth Amendment authorized such sweeping legislation. GAB-193. *Bailey* recognized the

Thirteenth Amendment bans slavery against people of all races, allowing legislation proscribing slavery universally. But only when people of a certain race were subject to slavery does the Thirteenth Amendment authorize laws eradicating its badges. Consistent with this understanding, *Bailey* struck down a statute that criminalized refusing to engage in conduct akin to involuntary servitude. *Id.* at 244-45,

Because §249(a)(1) bans discrimination against people of *all* races, religions, colors, and national origins, whether or not they have been burdened by slavery, it is unconstitutional.

C. Section 249(a)(1) is not justified by "current needs"

Nor is §249(a)(1) justified by "current needs." Even accepting Congress's purpose was to confront a "serious national problem" of race-based violence or help states prosecute hate crimes, GAB-195-96, Congress relied on conclusory findings that don't satisfy *Shelby County*'s "current needs" test. When Congress enacted §249(a)(1), it cited no evidence states failed to prosecute racially-motivated crimes or needed the government's assistance to do so. H.R. Rep. No.111-86, 44 (2009)("There is zero evidence that states are not fully prosecuting violent crimes involving 'hate.'"). To the contrary, 45 states and the

District of Columbia already had and were enforcing hate-crimes laws, and nothing suggested the remaining 5 states were "unable or unwilling" to prosecute racially-motivated crimes under general criminal laws. *Id.*; *see Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Senate Committee on the Judiciary,* 111th Cong., 14 (2009)(Att'y Gen. Holder)("I don't think that I can say . . . there is a trend among the States or local jurisdictions in failing to go after these kinds of crimes.").

Without evidence states were "unable or unwilling" to prosecute racially-motivated crimes, §249(a)(1) is unconstitutional.

D. Roof's facial challenge is justiciable

Finally, the government asserts this Court lacks authority to declare §249(a)(1) facially unconstitutional because the statute is not unconstitutional as applied to Roof. GAB-192-93. This argument overlooks contrary precedent.

As this Court recently confirmed, a statute "may be invalidated as overbroad as long as a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," even if the law is constitutional as applied to the defendant.

United States v. Miselis, 972 F.3d 518, 530 (4th Cir.2020); *accord United States v. Stevens*, 559 U.S. 460, 473 (2010). Though this doctrine traditionally applies in First Amendment cases, in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), the Supreme Court reached a similar conclusion when addressing a facial vagueness challenge to a federal criminal statute. The Court struck the statutory language as void-for-vagueness, even though it was "not vague as applied to respondent" because his conduct "f[e]ll comfortably within [its] scope." *Id.* at 1250-52 (Thomas J. dissenting); *see id.* at 1214 n.3.

Likewise, this Court should find Roof's facial challenge justiciable. He argues that §249(a)(1) is overly-broad because it criminalizes conduct with no connection to slavery. This overbreadth, which renders a substantial number of its applications unconstitutional, means the statute is facially void, even if it is constitutional as applied to Roof.

In any event, even assuming *arguendo* Roof cannot challenge §249(a)(1) on "congruent and proportional" grounds, he may challenge its constitutionality under the "current needs" test because that test is not defendant-specific.

E. Section 249's certification requirement adds nothing to the analysis

Section 249's certification requirement does not save §249(a)(1) from unconstitutionality. AOB-255-58. The government protests that Roof offers no data showing the requirement sets no meaningful limits on federal prosecutions, GAB-196-97, but its plain language speaks for itself. On its own terms, the provision authorizes prosecution for conduct with no connection to slavery absent any "current need." It thus provides no limitation that might render §249(a)(1) constitutional.

Because Congress lacked authority to enact §249(a)(1), this Court should vacate Roof's convictions under Counts 1-12.

XVIII. THE ATTORNEY GENERAL IMPROPERLY CERTIFIED ROOF'S FEDERAL PROSECUTION

The Attorney General certified for federal prosecution Roof's hate-crime and religious-obstruction charges based on findings they were "in the public interest" and "necessary to secure substantial justice," and South Carolina "lack[ed] jurisdiction to bring a hate crime prosecution." JA-62-63. These findings had no basis; at the time, South Carolina had assumed jurisdiction and initiated prosecution of Roof for the exact same conduct. And South Carolina did so in a manner vindicating any

arguable federal interest, seeking the most severe penalty (death) and alleging racial-motivation in support. JN-1-6.

The government emphasizes the gravity of Roof's crimes, but never explains why the State prosecution was inadequate to address "the public interest" and "secure substantial justice." GAB-203. No reason exists. The federal charges should not have been authorized, and this Court must reverse Roof's convictions on Counts 1-24.[42]

A. Certification is subject to judicial review

The government asserts this Court lacks authority to review the certification decision, despite having reviewed a nearly-identical certification in *United States v. Juvenile Male No.1*, 86 F.3d 1314, 1319 (4th Cir.1996). GAB-201. But its purported distinction—that judicial review was necessary in *Juvenile Male* because that case involved possible interference by federal prosecutors in a traditional area of state law—applies equally here. GAB-201-02. Section 247 and 249's

[42] The government claims plain-error review applies to Roof's §247 challenge. But that challenge is identical to the one he raised below to the §249 certification. In any event, the error was plain because it was clear and it affected Roof's substantial rights and the proceedings' integrity by improperly authorizing 12 capital counts. *United States v. Olano*, 507 U.S. 725, 732, 736 (1993).

certification requirements exist to "ensure appropriate deference to state or local prosecution in most cases." S.R. 100-324, 100th Cong., 2d Sess., 6 (2008); *see* H.R. 86, 111th Cong., 1st Sess., 5, 14 (2009).

Really, the government's quarrel is with *Juvenile Male* itself. GAB-201-02. Because this Court is bound by that precedent, it has jurisdiction to review Roof's certifications.

B. South Carolina's prosecution effectively vindicated any federal interest

The government claims the certifications were justified because Roof committed "a mass murder at a historic African-American church for the avowed purpose of reestablishing the white supremacy that was the foremost badge of slavery in America." GAB-203 (quotations omitted). But if certification were simply about gravity of the crime, federal police power would extend to any offense of nationwide notoriety. Instead, certification turns on whether the State is willing and able to effectively prosecute. Only when it is not is a federal prosecution "in the public interest and necessary to secure substantial justice." 18 U.S.C. §§247(e), 249(b)(1)(D); *see* 111th Cong., 14 (Att'y Gen. Holder)(certification proper only in "those rare instances" with "inability or an unwillingness by State or local jurisdiction to proceed").

Finally, the government's argument the §249 certification was proper because South Carolina lacked jurisdiction to prosecute Roof for hate crimes is misguided. GAB-202-03. While South Carolina does not have an offense titled "hate crime," the State had—and exercised—jurisdiction to prosecute Roof for the same racially-motivated offenses under its murder statute. The government wants "the State does not have jurisdiction," 18 U.S.C. §249(b)(1)(A), to mean "the State does not have jurisdiction under an identical statute," but that's not the test.

Because the Attorney General erroneously certified Roof's offenses for federal prosecution, his religious-obstruction and hate-crime convictions (Counts 1-24) must be reversed.

XIX. VACATING THE RELIGIOUS-OBSTRUCTION AND HATE-CRIMES COUNTS REQUIRES VACATING THE FIREARM COUNTS AND DEATH-SENTENCE

The government offers no response to Roof's argument that vacatur of his religious-obstruction and hate-crimes counts requires vacatur of his firearm counts and, in turn, his death-sentence. AOB-261-62. Therefore, the government has waived any opposition to this argument, and this Court should vacate Roof's death-sentence.

XX. SECTIONS 247(A)(2) AND 249(A)(1) ARE NOT "CRIMES OF VIOLENCE"

Neither the hate-crime nor the religious-obstruction offenses that were predicates for Roof's 18 U.S.C. §924 firearm convictions are "crimes of violence." The government misconstrues the elements of each, as well as the requirements of §924(c)'s force clause. This Court should vacate Roof's convictions on Counts 25-33, and remand for resentencing.

A. Section 249(a)(1) is not a "crime of violence"

To constitute a "crime of violence" under §924(c), an offense must contain a "single" element requiring *intentional* use, attempted use, or threat of *violent physical force* against another's person or property. *Johnson v. United States*, 559 U.S. 133, 140 (2010); *United States v. Middleton*, 883 F.3d 485, 498 (4th Cir.2018). A §249(a)(1) offense fails this test because it requires only (1) willful causation of bodily injury (even if committed by de minimis force) (2) resulting in death (even if unintentional). 18 U.S.C. §§249(a)(1), (c)(1).

1. Section 249(a)(1)'s "bodily injury" element doesn't require violent physical force

Section 249(a)(1)'s "bodily injury" element doesn't require violent force because it includes a "bruise" (resulting from an arm squeeze) or

"temporary" pain (resulting from unwanted touching). 18 U.S.C. §249(c)(1)(cross-referencing 18 U.S.C. §1365(h)(4)). The "bodily injury" element thus doesn't require the "strong physical force" or "prolonged physical pain" needed to constitute violent force. *Johnson,* 559 U.S. at 140; *United States v. Fitzgerald*, 935 F.3d 814, 817 (9th Cir.2019).

The government claims "bodily injury" requires "violent physical force" under *Stokeling v. United States*, 139 S.Ct. 544 (2019), and *United States v. Allred*, 942 F.3d 641 (4th Cir.2019). GAB-210-11. But neither case so held.

In *Stokeling*, the Supreme Court held Florida robbery is a "violent felony" under the materially identical Armed Career Criminal Act's force clause. But the Court's rationale was the statute required a "physical contest between the criminal and the victim." 139 S.Ct. at 554. Section 249(a)(1) has no such requirement. And though *Stokeling*'s dicta suggests violent force may include acts like "hitting, slapping, [and] shoving," GAB-210-11, §249(a)(1) reaches farther to criminalize arm-squeezing and other unwanted touching that involves de minimis force. 18 U.S.C. §§249(c)(1), 1365(h)(4).

Allred is equally inapposite because it didn't address whether a "bodily injury" element that includes temporary pain caused by unwanted touching requires violent force. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)("[S]ince we have never squarely addressed the issue, and have at most assumed [it], we are free to address the issue on the merits."). *Allred* also incorrectly presumed the relevant statute defined "bodily injury" to *require* serious injury like "disfigurement," ignoring that it is satisfied by far less. 942 F.3d at 654-55; 18 U.S.C. §1515(a)(5).

Because §249(a)(1) can be violated by de minimis force, it does not satisfy §924(c)'s force clause.

2. Section 249(a)(1)'s "death results" element doesn't require *intentional* violent physical force

Section 249(a)(1)'s "death results" element also doesn't convert it into a "crime of violence" because—as the government admits, GAB-212-13—death need not be intentional. This Circuit has construed a similar "death results" element to require no mens rea at all. *United States v. Piche*, 981 F.2d 706, 711 (4th Cir.1992). Though the government argues the intent required for "bodily injury" *should* apply

to the "death results" element, GAB-213, that is not how the statute is written.

The government's reliance on *Tsarnaev*, 968 F.3d 24, to argue intentional conduct resulting in death equals violent force is misplaced. GAB-217. The *Tsarnaev* statute specifically required an *intent to kill*. In contrast, the only element of §249(a)(1) that requires intent—"bodily injury"—doesn't require violent force; no element combines intent *and* violent force in one act. Likewise, the government incorrectly relies on *In re Irby*, 858 F.3d 231 (4th Cir.2017), GAB-209, but *Irby* held retaliatory murder requires the actus reus of violent force without deciding whether the statute requires an *intent* to kill. *Id.*[43]

3. A realistic probability exists of violating §249(a)(1) without intentional violent physical force

The government claims there isn't a realistic probability §249(a) can be violated without simultaneous use of (1) intentional and (2) violent physical force against another's person or property. GAB-213.

[43] The government further argues §249(a)(1) is a "crime of violence" because Congress intended to target "violent" acts. GAB-212. But only a statute's elements, not its stated purpose, matter under the categorical approach. *United States v. Parral-Dominguez,* 794 F.3d 440, 446 (4th Cir.2015).

But the "realistic probability" requirement is automatically satisfied when either (1) the statute's plain language doesn't categorically match §924(c)'s "crime of violence" definition, or (2) courts construe the statute to criminalize conduct outside that definition. *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir.2020); *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir.2014)(en banc). That rule applies here because §249(a)(1)'s plain language and interpretation, *Piche*, 981 F.2d at 711, establish the "bodily injury" element is satisfied with de minimis force, while its "death results" element can be satisfied unintentionally.[44]

B. Section 247(a)(2) is not a "crime of violence"

Religious obstruction under §247(a)(2) is not a "crime of violence." It requires intentional obstruction of one's enjoyment of religious beliefs by (1) force or threat of force (including attempt) against a person or property, (2) resulting in death. 18 U.S.C. §247(a)(2). But neither element requires a single act of (1) intentional (2) use or threat of violent force (3) against another's person or property. Instead, its "force"

[44] *United States v. Bowers*, 2020 WL 6119480, *2 (W.D.Pa.2020), held §249(a)(1) and §247(a)(2) are "crimes of violence." But that decision has no persuasive value because it merely adopted the holding in *Roof* below, which was erroneous for the reasons discussed.

element criminalizes, *inter alia*, intentional de minimis (not violent) force or attempted (not actual) threat of force against one's own property (not another's), while the "death results" element requires only unintentional force.

1. Section 247(a)(2) targets offenses against *property*

The government complains Roof relies on the current version of §247(a)(2), which postdates his trial. GAB-215. But the 2018 amendment that added "against religious real property" to the statute merely *clarified* its application to property-offenses. The legislative history makes this clear. *Brown v. Thompson*, 374 F.3d 253, 260 (4th Cir.2004)(legislative history deserves "great weight" in determining whether amendment clarifies or changes existing law). The House Report, Senate Report, and congressional testimony uniformly describe the amendment as "clarifying," not substantive. S. Rep. No.115-325, at 2 (2018); H.R. Rep. No.115-456, 2 (2017); 163 Cong.Rec. H9774 (2017). "As a clarification rather than a substantive change," the amendment "amounts to a declaration" that force against property was always criminalized under §247(a)(2). *Brown*, 374 F.3d at 260.

2. Section 247(a)(2) criminalizes *attempted* threats, *de minimis* force, and force against one's *own* property

a. An attempted threat of force satisfies §247(a)(2)

This Court recently held offenses criminalizing *attempted* threats of force aren't categorically "crimes of violence" under §924(c) because the force clause requires *actual* threat of force. *United States v. Taylor*, 979 F.3d 203, 208 (4th Cir.2020). Because §247(a)(2) criminalizes "attempts to" threaten force, it isn't a "crime of violence."[45]

b. *De minimis* force satisfies §247(a)(2)

Additionally, §247(a)(2) criminalizes de minimis force against property, including simple vandalism that doesn't threaten violence. Its legislative history so indicates, referencing conduct like "defacing the walls of a synagogue with a swastika or anti-Jewish epithets." H.R. Rep. No.100-337, 2 (1987); *see* H.R. Rep. No.99-820, 1 (1986); 132 Cong.Rec. 25348 (1986)(Rep. Solarz); *id*. at 25349 (Rep. McGrath). Such

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[45] This Court decided *Taylor* after Roof filed his opening brief. He thus properly raises his "attempts" argument in this brief. *United States v. White*, 836 F.3d 437, 443-44 (4th Cir.2016)(new arguments or theories may be raised on appeal if supported by intervening Circuit or Supreme Court authority), *rev'd. on other grounds*, *United States v. Stitt*, 139 S.Ct. 399 (2018).

vandalism doesn't entail the "strong physical force" §924(c)'s force clause requires. *United States v. Bowen,* 936 F.3d 1091, 1104 (10th Cir.2019).

The government disagrees, arguing simple vandalism doesn't violate §247(a)(2), only §247(a)(1) and (c). GAB-217. But Congress confirmed §247(a)(2) covers vandalism during passage of the 2018 clarifying amendment. 163 Cong.Rec. H9774 (2017)(Rep. Raskin)(referencing "vandalism committed against churches, synagogues, mosques"); *id.* (Rep. Kustoff)("Our communities were in distress as cemeteries were vandalized because of their religious affiliation*."); id.* at H9775 (decrying "vandalism against Jewish community institutions and cemeteries"). And both the House Report and Congressional Record cite vandalism in addressing the overall "[n]eed for the legislation." H.R. Rep. No.100-337, 2; H.R. Rep. No.99-820, 1; 163 Cong.Rec. H9774-75.

The government argues §247(a)(2)'s requirement that force "obstruct[] a person's religious free exercise" means even vandalism involves a threat of violent force against another, giving the example of spray-painting a church with a threat to kill. GAB-218. But the statute

requires no such threat; spray-painting a synagogue with swastikas to deter worshippers from attending services is not a threat to kill or cause physical harm. Similarly, §247(a)(2) covers vandalism committed by the de minimis, non-violent force of throwing paint on a church to obstruct worship. *Bowen*, 936 F.3d at 1104 n.8 (no "inherent violence" in "threatening to throw paint on [another's] house")(quotations omitted). Plus, even if worshippers interpreted such vandalism as a threat of force, §924(c) requires the defendant have *intended* such threat. *Middleton*, 883 F.3d at 498. Section 247(a)(2) has no such requirement.

Even assuming vandalism is typically accomplished by threats of violent force, it is not a "crime of violence" unless the "full range of conduct"—"including the most innocent conduct"—"necessarily" requires intentional violent force against another. *United States v. Torres-Miguel*, 701 F.3d 165, 167-68 (4th Cir.2012). Because the most innocent conduct §247(a)(2) criminalizes does not qualify, the offense isn't a "crime of violence."[46]

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[46] The government's citations to *United Stated States v. Mathis,* 932 F.3d 242, 265-66 & n.24 (4th Cir.2019), and *United States v. Burke*, 943 F.3d 1236, 1237-39 (9th Cir.2019), are unpersuasive. GAB-216. Unlike §247(a)(2), Hobbs Act robbery and armed bank robbery require

c. Offenses against one's *own* property satisfy §247(a)(2)

Finally, §247(a)(2) is not a "crime of violence" because it criminalizes use of force against one's own property. The statute defines "religious real property" broadly to include "*any* church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship," *without* requiring it belong to another. 18 U.S.C. §247(f); *United States v. Salas*, 889 F.3d 681, 684 (10th Cir.2018)(similarly interpreting "property" in arson statute).

The government contends an example from Roof's opening brief—of one burning *his* cross near an African-American church—would violate §247(a)(2) "only if it conveyed a threat of violent force against the church's parishioners." GAB-220. But this adds an element the statute doesn't contain. One could burn his cross near a local church merely to discourage worshippers, without intending to threaten force against them as required by §924(c).

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threatened violent physical force and cannot be accomplished by vandalism or other de minimis force.

And the government's reliance on *United States v. McNeal*, 818 F.3d 141 (4th Cir.2016), where the "intimidation" element of armed bank robbery required a threat of force, is misplaced. GAB-220. Robbing a bank by threatening with a weapon inherently requires the threat of violent force; burning one's own cross does not.

3. Section 247(a)(2)'s "death results" element doesn't require *intentional* violent physical force

Section 247(a)(2)'s "death results" element also doesn't convert the offense into a "crime of violence" because, like §249(a)(1)'s "death results" element, it doesn't require *intentional* violent physical force. Though the government, like the district court, cites §247(a)(2)'s intent requirement, *id.*, that mens rea attaches only to the "force," element—which can be committed by (1) *de minimis* force, or (2) *attempted* threat of force, (3) against one's *own* property. Thus, §247(a) requires either intentional *attempted* threat of force or intentional use of *de minimis* force against one's *own* property—but not intentional *infliction of death*.

Although the government concedes "death results" doesn't require an intent to kill, it argues §247(a)(2) nonetheless is a "crime of violence" because it requires but-for causation between religious-obstruction and death. GAB-216-17. Yet but-for causation is of no help because it can't

substitute for the missing intent to use violent physical force, as required under the force clause. Because one can violate §247(a)(2) by unintentionally causing death, it does not require intentional use of force.

4. A realistic probability exists of violating §247(a)(2) without (1) intentional, (2) violent force or actual threat of force, (3) against another's property

Finally, a realistic probability exists of violating §247(a)(2) without simultaneous use in a single act of (1) intentional, (2) violent physical force or threat of force, (3) against another's property because, as discussed above, the statute's plain language (buttressed by legislative history) dictates no single element incorporates all these requirements.

C. The unconstitutional §924(j) convictions prejudiced Roof

A new penalty-phase is required because *half* of Roof's 18 death-eligible convictions are predicated on hate-crime and religious-obstruction offenses that are not "crimes of violence." The government cannot prove beyond a reasonable doubt these convictions did not contribute to a single juror's decision to impose death. *Chapman v. California,* 386 U.S. 18, 24 (1967).

The government claims each death-sentence stands on its own, GAB-222-23, but this ignores the possibility one juror was influenced by the cumulative weight of *nine* erroneously-submitted capital convictions. This possibility weighs too heavily for this Court to sustain Roof's death-sentence. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988)(Eighth Amendment demands heightened "reliability in the determination that death is the appropriate punishment" (quotations omitted)); *Mills v. Maryland*, 486 U.S. 367, 384 (1988)(mere "possibility" the "jury conducted its task improperly certainly is great enough to require resentencing"); *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir.1989)(resentencing required if invalid conviction possibly influenced *one* juror to recommend death).

Conclusion

Roof respectfully asks this Court to vacate his convictions and death-sentence, or remand for a retrospective competency hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief has been prepared using Microsoft Word 2016, Century Schoolbook font, 14-point proportional type size.

2. Exclusive of the table of contents, table of authorities, and certificate of service, this brief contains no more than 25,000 words.

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Date: April 22, 2021

/s/ Sapna Mirchandani
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CERTIFICATE OF SERVICE

This is to certify that the foregoing Reply Brief of Appellant was filed electronically via CM/ECF and that a hard copy of the same was sent via overnight courier to:

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