No. 14-

IN THE

Supreme Court of the United States

ALEJANDRO ENRIQUE RAMIREZ UMAÑA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether, at capital sentencing, the government may seek to prove the aggravating factor that the defendant committed previous unadjudicated murders through hearsay statements to police of other suspects in those murders, without permitting the defendant to confront or cross-examine his accusers.

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

PETITION FOR A WRIT OF CERTIORARI

Alejandro Umaña respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-84a) is reported at 750 F.3d 320. The opinion of the district court (App. 85a-112a) is reported at 707 F. Supp. 2d 621. The order denying rehearing en banc (App. 125a) is unreported. The amended order denying rehearing en banc, including the concurring and dissenting opinions (App. 113a-124a), is reported at 762 F.3d 413.

JURISDICTION

The court of appeals entered judgment on April 23, 2014, and denied rehearing en banc on June 27, 2014. App. 125a. On September 8, 2014, the Chief Justice extended the time to file a petition for certiorari to November 24, 2014. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]

U.S. Const. amend. VI.

Relevant provisions of the Federal Death Penalty Act (FDPA), 18 U.S.C. §§3591 *et seq.*, are reproduced in the Appendix. App. 127a-142a.

INTRODUCTION

This case presents a critical question on which federal and state courts are divided and that only this Court can resolve: whether, and to what extent, the Confrontation Clause applies at capital sentencing. And the case is an ideal vehicle to resolve that question. The facts here epitomize the very evil the Confrontation Clause was designed to prevent: Alejandro Umaña was sentenced to death based on the hearsay statements of suspect-informants who accused Umaña of murders that they themselves may have committed.

Umaña was convicted of shooting and killing two men during an argument over a restaurant jukebox in Greensboro, North Carolina. (The shooting was charged as a federal offense and tried under the Feder-

al Death Penalty Act because it was allegedly prompted by one of the victims' disparaging reference to Umaña's gang.) The district court bifurcated the sentencing hearing. At the first, so-called "eligibility" phase, the jury found two statutory aggravating factors: that Umaña killed more than one person and that his conduct created a grave risk of death to others besides the victims.

Although the government could have asked the jury to weigh only those statutory aggravating factors in determining whether to sentence Umaña to death, it chose not to do so. Instead, at the second, so-called "selection" phase of sentencing, the government sought to prove additional aggravating factors. Most importantly, the government alleged that Umaña had committed three murders in Los Angeles for which he had never been tried or convicted. As evidence, the government presented the testimony of police officers who reported the hearsay statements of other suspects in the murders accusing Umaña of being the shooter. The suspect-informants themselves did not testify, and Umaña had no opportunity to confront or cross-examine them. In closing argument, the government's case for executing Umaña relied almost entirely upon the Los Angeles murders. The jury found that Umaña had committed those murders, found that the aggravating factors outweighed the mitigating factors, and sentenced Umaña to death.

A sharply divided Fourth Circuit panel concluded, on the authority of *Williams* v. *New York*, 337 U.S. 241 (1949), that this procedure did not offend the Confrontation Clause. App. 36a-38a. The court of appeals voted 8-5 against rehearing the case en banc, with the concurring opinion again relying on *Williams*. App. 113a-119a.

That reliance was misguided. *Williams* held that a state judge exercising his "discretion … to sentence to life imprisonment or death" could consider hearsay evidence of prior unadjudicated offenses without contravening due process. 337 U.S. at 245, 251-252. But the constitutional landscape has shifted dramatically in the 65 years since *Williams* was decided, rendering the court of appeals' broad reading of *Williams* irreconcilable with the law as it stands today.

First, the Court has realigned its Confrontation Clause jurisprudence with the original understanding of the Clause as a prohibition on the admission of testimonial hearsay unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him. *See, e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004). Second, the Court has repeatedly held that Sixth Amendment protections—in particular, the right to a jury trial—attach to any fact-finding necessary to the imposition of a higher sentence than a finding of guilt by itself would allow. *See, e.g.*, *Blakely* v. *Washington*, 542 U.S. 296 (2004); *Ring* v. *Arizona*, 536 U.S. 584 (2002). And, finally, "[i]n the intervening years [since *Williams*]," this Court has recognized that "death is … different." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality). The Court's death-penalty jurisprudence has eliminated the unfettered sentencing discretion *Williams* took for granted, requiring a finding of aggravating circumstances and a conclusion that aggravating factors outweigh mitigating factors before death can be imposed. *See, e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Furman* v. *Georgia*, 408 U.S. 238 (1972).

Those three lines of cases, taken together, can logically lead to only one conclusion: The Constitution does not permit basing a death sentence on an aggravating factor proven by testimonial hearsay.

As discussed further below, some courts have in fact reached that conclusion. But others, like the court of appeals here, have continued to view themselves as bound by a broad reading of *Williams* and thus unable to take full account of the sea change in this Court's Sixth and Eighth Amendment jurisprudence. There is thus widespread confusion and disagreement as to *Williams*' reach and the extent to which the Confrontation Clause's protections apply to capital sentencing. And because only this Court can clarify whether and to what extent *Williams* remains good law in light of the Court's later decisions, that confusion will not be resolved absent this Court's review. As the dissenters from the denial of rehearing en banc wrote, however the issue is ultimately decided, "Supreme Court review is … vital in order to resolve the tension in current death penalty doctrine and to achieve uniformity across federal prosecutions." App. 121a. This case presents the Court with the perfect opportunity to do so.

STATEMENT

A. The Federal Death Penalty Act

The Federal Death Penalty Act, 18 U.S.C. §§3591 *et seq.*, governs the imposition of the death penalty in federal court. A defendant found guilty of a crime referenced in §3591 receives "a separate sentencing hearing to determine the punishment to be imposed." *Id.* §3593(b). During the sentencing hearing, the same jury that determined the defendant's guilt considers aggravating factors put forward by the government and mitigating factors put forward by the defendant. *Id.* Following this hearing, the jury must make a series of factual findings. It must determine beyond a reasonable doubt that the defendant committed the crime with the intent required by 18 U.S.C. §3591(a)(2). It must also

find unanimously and beyond a reasonable doubt the existence of any statutory or nonstatutory aggravating factors. *Id.* §3593(c), (d). Finally, any juror may find the existence of a mitigating factor by a preponderance of the evidence. *Id.* §§3592(a), 3593(c), (d). If the jury finds that the crime was committed with the requisite intent and at least one statutory aggravating factor exists, it must determine "whether all the aggravating … factors found to exist sufficiently outweigh all the mitigating … factors found to exist to justify a sentence of death." 18 U.S.C. §3593(e).

Although the procedure is not required or even expressly authorized by the FDPA, some courts, including the district court below, have bifurcated the sentencing hearing into two phases: (1) an "eligibility" phase, at which the government proves the existence of at least one statutory aggravating factor, and (2) a "selection" phase, at which the government may attempt to prove additional aggravating factors and the defendant may attempt to prove mitigating factors. *See, e.g.*, App. 89a-90a, 97a; *United States* v. *Jordan*, 357 F. Supp. 2d 889, 902-904 (E.D. Va. 2005).

B. Umaña's Arrest And Indictment

In December 2007, Alejandro Umaña was arrested by local authorities for the murder of two brothers at a Mexican restaurant in Greensboro, North Carolina. App. 1a-2a, 5a-7a. The prosecution's evidence indicated that Umaña and his friends had a disagreement with the victims, Ruben and Manuel Garcia Salinas, over what music should be played on the jukebox. That disagreement escalated into a physical confrontation, during which one of the Garcia brothers insulted Umaña's gang, Mara Salvatrucha, commonly known as MS-13. App. 5a-6a. According to the prosecution, Umaña drew

his gun and fired five times, killing the Garcia brothers and wounding another man. App. 6a-7a.

State prosecutors charged Umaña with noncapital murder. CAJA309. While Umaña was awaiting trial in state custody, however, unbeknownst to his counsel, Los Angeles police interrogated Umaña about two unsolved shootings in Los Angeles, in which MS-13 was believed to be involved. After the officers assured Umaña that his statements would not "cost" or "affect[]" him (CAJA4275, 4314), Umaña admitted that he was present or nearby for both shootings, but stated that he did not commit either shooting (App. 8a).

In June 2008, federal prosecutors indicted Umaña for the Greensboro murders and also indicted 25 other individuals for various offenses stemming from their participation in MS-13 gang activities. CAJA318-422. As relevant here, the indictment charged Umaña with murder in aid of racketeering in violation of 18 U.S.C. §1959(a)(1) and use of a firearm in relation to a crime of violence resulting in death in violation of 18 U.S.C. §924(c), (j)(1). App. 8a-9a. Federal prosecutors did not charge Umaña with the Los Angeles crimes, but filed a Notice of Intention to Seek the Death Penalty listing a number of statutory and non-statutory aggravating factors, including the unadjudicated murders in Los Angeles, that the government contended justified a death sentence. App. 86a-89a.

C. The District Court's In Limine Ruling

Umaña sought to exclude hearsay evidence of the unadjudicated Los Angeles murders from the sentencing hearing, arguing that it would violate his Confrontation Clause rights. The district court held that the Confrontation Clause "applies to the eligibility phase of capi-

tal sentencing proceedings," but does not bar "hearsay testimony offered during the selection phase." App. 97a-98a. To confine the presentation of unconfronted testimonial evidence to the selection phase, the court decided to "bifurcate eligibility and selection phases into two discrete proceedings." App. 97a.

D. Umaña's Conviction And Sentencing

After a trial, the jury convicted Umaña of all counts. App. 8a-9a.

During the eligibility portion of the sentencing hearing, the government alleged two statutory aggravating factors: grave risk of death to persons in addition to the victims, and the killing of more than one person in a single criminal episode. App. 9a. To prove these factors, the government relied "almost entirely on evidence from the guilt phase." Resp. C.A. Br. 7; *see also* CAJA2571-2604. The jury found that both aggravating factors existed and that Umaña acted with the requisite mens rea as to each of the capital counts. App. 9a.

At the selection phase, the government sought to prove four additional aggravating factors. App. 9a-10a. Most significantly, the government alleged that Umaña had committed the two previous shootings in Los Angeles for which he had never been tried or convicted—one on Fairfax Street, in which two people were killed, and one in Lemon Grove Park, in which one person was killed and two were injured. App. 3a.

According to the government, the Fairfax incident began as a confrontation between MS-13 members and members of a group called "Posted on Fairfax." As the MS-13 members drove past two Posted on Fairfax members, the groups began flashing gang signs at one

another. Some of the MS-13 members exited the car, and one of them shot and killed the two Posted on Fairfax members. App. 4a.

The government's argument that Umaña was the Fairfax shooter was based primarily on self-serving statements made to the LAPD by three suspects who, during interrogation, acknowledged their own involvement in the crime. The two LAPD detectives who conducted the investigation summarized these statements for the jury, and the government submitted the transcripts of two of the interrogations. CAJA2730-2806, 4061-4257.

According to the officers, nine months after the murders, they detained two suspects, Luis Ramos and Luis Rivera. CAJA2740-2743, 2761. Rivera admitted that he and Ramos were in the car but claimed that Umaña was the shooter. CAJA2740-2742. Ramos denied knowing anything about the crime. CAJA2743, 2765-2766. The officers put the two men in the same room, where Ramos was heard to propose: "This is what we're going to say. I did not do anything and you did not do anything." CAJA2766-2767. After spending the weekend in the same jail cell with Rivera, Ramos admitted he was in the car and fingered Umaña as the shooter. CAJA2745, 2769.

The officers also testified that they interrogated the driver of the car, Rene Arevalo, who was known to have been involved in past shootings. CAJA2771. In fact, two bystanders uninvolved in the offense told the police that the driver of the car—that is, *Arevalo*—was the shooter. CAJA2757, 2775-2776, 2799, 4492. After the officers advised Arevalo that they believed Ramos and Rivera and not the bystanders, Arevalo admitted that he was driving the car but claimed that Umaña

was the shooter. CAJA2789-2791, 4071. None of these suspect-informants testified at the sentencing hearing, and Umaña was never given an opportunity to cross-examine his three accusers.

The prosecution also presented testimonial hearsay allegedly linking Umaña to a murder in Lemon Grove Park. The shooting happened at night on an unlit basketball court. Four men were sitting on a bench when two men approached them and opened fire. CAJA2685-2688. Two were injured and one died. CAJA2657-2658. The uninjured man was a rival gang member who had recently robbed an MS-13 member and was thought to be the intended target of the shooting. CAJA2898-2899; App. 4a.

The government again presented self-serving hearsay statements by a suspect-informant to implicate Umaña in the shooting. Arevalo, at that point in jail in connection with the Fairfax murders, told an officer investigating the Lemon Grove incident that Umaña was the shooter. CAJA2670-2671. Although the district court noted that there was "[n]o real basis for why [Arevalo] made that statement" (CAJA2889), the court permitted the officer to testify at Umaña's sentencing hearing. Arevalo was not present and was never cross-examined.[1]

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[1] Scant additional evidence linked Umaña to the Lemon Grove shooting. The government pointed to ballistics evidence indicating that the same gun was used in the Lemon Grove and Fairfax shootings (CAJA2818), but testimony during trial suggested that MS-13 gang members routinely shared their guns, which "belong[ed] to the gang as a whole" (CAJA1282, 1440-1441). The uninjured rival gang member, who circled Umaña's photograph in a line-up, thought Umaña "resembled" the shooter, but he was "not sure." CAJA2896. Neither injured witness identified Umaña as the shooter. CAJA2696-2697, 2707-2708.

These hearsay statements, collectively, were the centerpiece of the government's case for death. The government's closing argument repeatedly referred to the Los Angeles crimes and to the allegation that Umaña had "killed before." App. 69a-70a; *see, e.g.*, CAJA3403 ("[Umaña] had earned those two letters on his forehead and he earned them by killing."); CAJA3405 (claiming that Umaña thought after shooting the Garcia brothers, "I've done this before. I know what I have to do."); CAJA3406 (claiming that Umaña thought, "I know they were dead because I know what dead is. I've killed before."); CAJA3407 ("[W]e know he's killed before."); CAJA3408 ("Sure [the Fairfax murder] sounds familiar because that's exactly what happened later in Greensboro.").

The jury found the existence of all the claimed aggravating factors, including the Los Angeles murders. App. 2a. The jury unanimously found certain mitigating factors: Umaña was raised without the care of his mother; the Greensboro shooting did not involve substantial planning; it occurred during an emotionally charged argument; and it was a result of Umaña's indoctrination into MS-13's culture of violence. CAJA3573-3575. Some jurors also found as mitigating factors, among other things, that Umaña was exposed to violent civil war in El Salvador at an early age; that his childhood was marked by poverty and other factors that impeded his moral development; and that his early life experiences made him more susceptible to recruitment into MS-13. CAJA3573-3574. After weighing all the factors, the jury sentenced Umaña to death. App. 2a.

E. The Court Of Appeals Decision

The Fourth Circuit affirmed, holding that the Confrontation Clause did not apply to the testimonial hearsay presented to prove the prior unadjudicated murders. App. 37a-38a.

The Fourth Circuit reasoned that "[c]ourts have long held that the right to confrontation does not apply at sentencing, even in capital cases." App. 36a. For that proposition, the court relied on this Court's decision in *Williams* v. *New York*, 337 U.S. 241 (1949), concluding that *Williams* "squarely disposes of Umaña's argument that the Sixth Amendment should apply to capital sentencing." App. 37a. The court opined that the rule in *Williams* was a salutary one because applying the Confrontation Clause at sentencing "would frustrate the policy of providing full information to sentencers." App. 38a.

In a portion of its decision in tension with its discussion of *Williams*, the court went on to note that a jury may engage in "'constitutionally significant'" fact-finding during the eligibility phase when it "finds the facts necessary to support the imposition of the death penalty." App. 40a. The court distinguished the selection phase, however, reasoning that during that phase "the jury exercises discretion in selecting a life sentence or the death penalty, and any facts that the jury might find during that phase do not alter the range of sentences it can impose on the defendant." *Id.*

Judge Gregory dissented. He would have held, in light of the original understanding of the Confrontation Clause and the structure of FDPA proceedings, that the Confrontation Clause applies to evidence of aggravating factors introduced at either the eligibility or the selection phase. App. 65a. The dissent explained that

under the FDPA, a defendant cannot be sentenced to death based solely on the facts found at the eligibility phase. App. 67a, 77a-79a. Rather, the jury must find *all* the aggravating factors, and determine that they outweigh the mitigating factors, before it can impose a death sentence. App. 78a. "As such, the permissible range of sentencing is increased in th[e selection] stage, indicating that Sixth Amendment rights do apply." App. 78a-79a.

The significance of facts found at the selection phase was particularly clear here, the dissent stated, because without the hearsay evidence linking Umaña to the Los Angeles murders, "it is doubtful that the government could meet the burden necessary to apply the death penalty under the FDPA." App. 78a. The "unconfronted testimony used against Umaña was as critical to the government's case as it was inherently suspect." App. 69a. Umaña's "three potential co-defendants" had a "strong incentive to push the blame onto Umaña." App. 70a. And the remaining evidence linking Umaña to the Los Angeles murders was "conflicting," "equivocal, unclear," and "weak." App. 71a, 72a. The dissent concluded that "Umaña is being sent to his death based on accusations by self-interested accomplices … whose testimony, at least in part, was contradicted by independent witnesses." App. 84a.

Umaña petitioned for rehearing en banc. By an 8-5 vote, the court denied the petition. App. 113a. Judge Wilkinson, joined by Judge Niemeyer, issued a concurring opinion explaining that the court was bound by *Williams*. App. 114a-119a. Even if *Williams* had been undermined by subsequent decisions of this Court, the concurrence reasoned, to depart from *Williams* would be to "ignore a clear and consistent directive from the

Supreme Court not to overturn higher precedent preemptively." App. 114a.

Judge Gregory, joined by Judge Wynn, dissented "to explain why … Supreme Court review of Mr. Umaña's argument is warranted." App. 119a. The dissent explained that "Supreme Court review is vital because this Court … misread the past five decades of Supreme Court jurisprudence on the Sixth Amendment and the death penalty," and "this misreading is the difference between Mr. Umaña living and dying." *Id.* "However, even if [our] view on the reach of the Confrontation Clause is incorrect," the dissenters wrote, "Supreme Court review is still vital in order to resolve the tension in current death penalty doctrine" caused by the uncertainty regarding the continuing vitality of *Williams* "and to achieve uniformity across federal prosecutions." App. 121a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS THE LONGSTANDING SPLIT OF AUTHORITY ON WHETHER AND TO WHAT EXTENT THE CONFRONTATION CLAUSE APPLIES IN CAPITAL SENTENCING PROCEEDINGS

There is substantial confusion and a deepening split of authority among the federal and state courts on whether—and to what extent—the Confrontation Clause applies in a capital sentencing proceeding. *See United States* v. *Fields*, 483 F.3d 313, 363 (5th Cir. 2007) (Benavides, J., dissenting in part) ("The persuasive authorities, and our Sister Circuits in particular, are divided on the issue *sub judice*."); *United States* v. *Mills*, 446 F. Supp. 2d 1115, 1128 (C.D. Cal. 2006) ("[T]here is a great deal of disagreement over whether and to what extent *Williams* still controls."); *State* v. *Carr*, 331 P.3d 544, 724 (Kan. 2014) ("Until we have a

definitive answer from [the U.S. Supreme] Court, we recognize that other jurisdictions are split and we accept … that confrontation law is applicable to a capital penalty phase trial."); Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1970 (2005) ("Lower courts … disagree[] about questions as fundamental as, 'Does the right of confrontation apply at capital sentencing?'").

Uncertainty regarding the continuing vitality and scope of *Williams* has led to a split among the courts of appeals. One court of appeals has held that the confrontation right applies at capital sentencing, albeit only in narrow circumstances. *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1251-1255 (11th Cir. 1982), *modified*, 706 F.2d 311, 311-312 (11th Cir. 1983). Two courts of appeals (including the court below) have held, based on *Williams*, that confrontation does not apply at the selection phase of capital sentencing but reserved judgment as to whether it would apply during the eligibility phase. App. 39a-41a; *Fields*, 483 F.3d at 325-327. And one court of appeals (on collateral review) has relied on *Williams* to refuse to recognize any confrontation right at sentencing. *Szabo* v. *Walls*, 313 F.3d 392, 398 (7th Cir. 2002).

State courts of last resort and lower federal courts have split along similar lines. While most of those courts recognize that the confrontation right applies at capital sentencing, they disagree as to whether the right applies throughout the proceeding or only at the eligibility phase (or its state-law analogue). Three federal trial courts and six state courts of last resort have held that the confrontation right applies throughout capital sentencing, and four federal trial courts and four state courts of last resort have held or suggested that confrontation applies only to the eligibility determination. Two

state courts of last resort do not recognize a right to confrontation at capital sentencing at all.

A. Courts That Have Held That The Confrontation Clause Applies At Capital Sentencing

Although no court of appeals has held that the right to confrontation applies to all evidence introduced during a capital sentencing proceeding, the Eleventh Circuit has determined that the Confrontation Clause applies to hearsay in a psychiatric report introduced at the penalty phase. *See Proffitt*, 706 F.2d at 311-312, *modifying* 685 F.2d at 1251-1255, 1269 (vacating death sentence on the ground that the defendant had a constitutional right to cross-examine the report's author). *Proffitt* noted that *Williams* viewed procedural protections at capital sentencing as "no more rigorous" than those at noncapital sentencing, but explained that the "constitutional requirements governing capital sentencing … have undergone substantial evolution in the wake of *Furman*." *Proffitt*, 685 F.2d at 1252. And it explained that "[t]he Supreme Court's emphasis … on the reliability of the factfinding … [needed] to impose the death penalty convinces us that the right to cross-examine [such] adverse witnesses applies." *Id.* at 1254.[2]

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[2] The Eleventh Circuit has recently made clear, however, that *Proffitt* is limited to its facts. *Muhammad* v. *Secretary, Fla. Dep't of Corr.*, 733 F.3d 1065, 1075 (11th Cir. 2013). That decision rejected on collateral review a Confrontation Clause challenge where the defendant had an opportunity to rebut the hearsay. *Id.* at 1077 (citing *Williams*). *Muhammad*'s limiting of *Proffitt* occasioned a lengthy dissent. *See id.* at 1083, 1084 & n.4 (Wilson J., concurring in part and dissenting in part) (noting that *Proffitt* is "routinely cited [in the Circuit] … as authority for the proposition that the Confrontation Clause applies at a capital sentencing" and that while *Williams* "ha[s] not been overturned," "it is evident that the

Three federal district courts have held that the Confrontation Clause applies more broadly throughout a capital sentencing proceeding, including during the selection phase. In *United States* v. *Mills*, for example, the government sought at the selection phase to introduce evidence of "never-prosecuted acts of murder." 446 F. Supp. 2d at 1119. Noting that "death penalty jurisprudence has evolved significantly" "[s]ince *Williams*," the court relied on the structure of the FDPA and this Court's decisions in *Ring* v. *Arizona*, 536 U.S. 584 (2002), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005), to hold that confrontation is required for testimonial evidence of "aggravating factor[s]," including factors introduced during the selection phase. *Id.* at 1123, 1135. It reasoned that because "the FDPA completely limits the jury's discretion until it has rendered its findings on the aggravating factors (whether statutory or non-statutory)," "C*rawford*['s] protections apply" to all aggravating factors. *Id.* at 1134, 1135. Two other federal district courts have reached the same conclusion, reasoning that what "actually increases the punishment is the existence of all the aggravating factors found by the jury (taken together)." *United States* v. *Concepcion Sablan*, 555 F. Supp. 2d 1205, 1221 (D. Colo. 2007); *United States* v. *Stitt*, 760 F. Supp. 2d 570, 581 (E.D. Va. 2010) (same).

Six state courts of last resort have also held that the Confrontation Clause applies throughout capital sentencing. *Rodgers* v. *State*, 948 So. 2d 655, 663 (Fla. 2006) (testimonial hearsay related to a prior felony "violated Rodgers' Sixth Amendment right under

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Supreme Court … has developed subsequent case law expanding Sixth Amendment protections in capital sentencing hearings").

Crawford"); *State* v. *Carr*, 331 P.3d 544, 723 (Kan. 2014), *petition for cert. filed*, No. 14-450 (Oct. 16, 2014) ("confrontation law is applicable" at the penalty phase to hearsay allegations in police reports); *Grandison* v. *State*, 670 A.2d 398, 413 (Md. 1995) (right to cross-examine "extends to the sentencing phase of a capital trial and applies to victim impact witnesses as well as factual witnesses"); *Pitchford* v. *State*, 45 So. 3d 216, 251-252 (Miss. 2010) (same); *State* v. *Bell*, 603 S.E.2d 93, 115-116 (N.C. 2004) (relying on *Crawford* to hold that confrontation is required for evidence of "aggravating circumstance[]" related to a prior crime of violence); *Russeau* v. *State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005) (introduction of prison "incident" and "disciplinary" reports during the "punishment phase" violated defendant's confrontation right).

B. Courts That Have Held That The Confrontation Clause Does Not Apply At The Selection Phase But Held Or Suggested That It Would Apply At The Eligibility Phase

Two courts of appeals—the court below and the Fifth Circuit—have held, relying on *Williams*, that the Confrontation Clause does not apply at the selection phase of a capital sentencing proceeding, while leaving open the possibility that it might apply at the eligibility phase. In *Fields*, the Fifth Circuit held that "the principles underlying *Williams* are relevant, persuasive, and ultimately fatal to Fields's Confrontation Clause challenge" to evidence introduced during the selection phase of capital sentencing. 483 F.3d at 338. However, the court "decline[d] to decide the applicability of the Confrontation Clause to the presentation of evidence at sentencing that is relevant … to death eligibility." *Id.* at 326 n.7; *see also id.* at 331 n.18 ("[T]hough labeled as 'sentencing factors,' [death-eligibility] factors are more

appropriately considered as elements of a capital offense." (citing *Ring*)).[3] The Fourth Circuit below similarly, and without resolving the question, distinguished selection from eligibility on the ground that the jury purportedly "finds the facts necessary to support the imposition of the death penalty in the guilt and *eligibility* phases of trial[] … only." App. 40a.

Several federal district courts, including the district court below, have gone a step further and held that "testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* … [but] *Crawford* would not … bar similar hearsay testimony offered during the selection phase." App. 97a-98a; *see also United States* v. *Jordan*, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005) (same); *United States* v. *Bodkins*, 2005 WL 1118158, at *4-5 (W.D. Va. 2005) (same); *cf. United States* v. *Johnson*, 378 F. Supp. 2d 1051, 1060-1062 & n.5 (N.D. Iowa 2005) (holding that confrontation right does not apply at selection after assuming, without deciding, that it applies at eligibility).

Four states with capital schemes comparable to the FDPA have drawn similar conclusions. Two states

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[3] The Fifth Circuit's decision drew a sharp dissent from Judge Benavides, who believed that "[t]ext, history, structure and precedent favor applying the Confrontation Clause with full force to capital sentencing." *Fields*, 483 F.3d at 376. He explained that "the selection phase of FDPA sentencing [is not] purely discretionary, [because] a jury that finds a defendant death eligible 'has not found all the facts which the law makes essential to the punishment.'" *Id.* at 367 (quoting *Blakely*, 542 U.S. at 303-304). Rather, when the government relies on additional aggravating factors proven at the selection stage, the jury must still find that those factors exist (and that all the aggravating factors together outweigh any mitigating factors) before imposing a death sentence. *Id.* at 368. He would have held that the confrontation right applies to such aggravating factors. *Id.* at 367-368.

have explicitly held that the right to confrontation extends only to testimony used to establish death eligibility. *State* v. *McGill*, 140 P.3d 930, 942 (Ariz. 2006) (en banc); *compare People* v. *Banks*, 934 N.E.2d 435, 462 (Ill. 2010) (Confrontation Clause does not apply in proceeding akin to death selection), *with People* v. *Ramey*, 604 N.E.2d 275, 287 (Ill. 1992) (Confrontation Clause violated where State "attempted to establish defendant's eligibility for the death penalty" through testimony about which defense counsel was "prohibited from questioning" the witness). Two other states have raised the distinction without resolving the question. *State* v. *Johnson*, 284 S.W.3d 561, 584 (Mo. 2009); *State* v. *Berget*, 826 N.W.2d 1, 20-21 & n.11 (S.D. 2013).

C. Courts That Have Held Or Implied That The Confrontation Clause Does Not Apply At All In Capital Sentencing Proceedings

Finally, one court of appeals and two state courts of last resort have held or suggested that confrontation rights do not extend to any phase of capital sentencing proceedings.

In *Szabo* v. *Walls*, 313 F.3d 392 (7th Cir. 2002), the Seventh Circuit rejected on collateral review a claim that the Confrontation Clause applied at capital sentencing. Relying on *Williams*, the Court determined that the Confrontation Clause "applies through the finding of guilt, but not to sentencing, even when that sentence is the death penalty." *Id.* at 398.[4]

Both state courts also relied on *Williams*, reasoning that "'most of the information now relied upon by

[4] The court noted, however, that it could not consider the effect of *Apprendi* and *Ring* on *Williams*, since the question before it was whether "in 1985 Illinois was entitled to proceed as it did"—a question the court believed *Williams* resolved. 313 F.3d at 399.

[fact-finders] to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.'" *Summers* v. *State*, 148 P.3d 778, 782 (Nev. 2006) (quoting *Williams*, 337 U.S. at 250); *see also State* v. *Dunlap*, 313 P.3d 1, 34 (Idaho 2013) ("'[M]odern penological policies … favor sentencing based on the maximum amount of information about the defendant'" (citing *Williams*, 337 U.S. at 246-250)), *cert. denied*, 135 S. Ct. 355 (2014). Neither court believed that *Crawford* altered that conclusion. *See Summers*, 148 P.3d at 782, 783 ("*Crawford* did not overrule *Williams*"); *Dunlap*, 313 P.3d at 34 (similar). In *Summers*, that conclusion was drawn over the dissent of three justices who contended that, notwithstanding *Williams*, a defendant is "entitled to confront the witnesses against him in the eligibility phase of a capital penalty hearing because it is during this phase that the jury must determine whether the elements of capital murder have been established." 148 P.3d at 786 (Rose, C.J., concurring in part and dissenting in part).

* * *

The decision below thus reflects a deep divide among federal and state courts over whether and to what extent the Confrontation Clause applies at capital sentencing. There is no sign that the split will resolve itself. Indeed, the uncertainty surrounding the continued viability of *Williams* all but ensures that the division will persist. As described above, courts that have given *Williams* a broad reading have concluded that they are not free to revisit *Williams*' reasoning even if it has been undermined by later developments. *See, e.g.*, App. 114a-115a; *Summers*, 148 P.3d at 783 (refusing to recognize confrontation rights at capital sentencing "[a]bsent controlling authority overruling *Wil-*

liams"). Other courts have determined that this Court's later decisions have undermined *Williams* in whole or in part. Only this Court can resolve the tension between *Williams* and the Court's subsequent Sixth and Eighth Amendment caselaw, and heal the confusion and disarray that tension has generated.

II. THE DECISION BELOW IS WRONG

The Fourth Circuit's decision was based on one central, mistaken premise: It relied on *Williams* to draw a bright line between the guilt and penalty phases of a capital trial. According to the Fourth Circuit, Confrontation Clause rights end where capital sentencing begins. App. 36a ("Courts have long held that the right to confrontation does not apply at sentencing, even in capital cases." (citing *Williams*)); App. 37a ("We conclude that *Williams* squarely disposes of Umaña's argument that the Sixth Amendment should apply to capital sentencing"). That conclusion cannot be reconciled with the original understanding of the Confrontation Clause or with this Court's post-*Williams* Sixth and Eighth Amendment jurisprudence. And the Fourth Circuit's alternative suggestion that a line might be drawn between the so-called "eligibility" and "selection" phases of an FDPA sentencing proceeding is equally unsound in cases like this, in which a death sentence is based on the jury's finding of aggravating factors at the "selection" stage.

A. The Confrontation Clause Was Intended To Prevent Defendants From Being Put To Death Based On Hearsay Accusations

1. Umaña was sentenced to death based on the out-of-court statements of suspects in the same unadjudicated murders of which they accused him. That is

precisely the scenario the Confrontation Clause was designed to prevent.

As this Court recognized in *Crawford* v. *Washington*, "the principal evil at which the Confrontation Clause was directed was the … use of *ex parte* examinations as evidence against the accused," and in particular out-of-court testimonial statements such as "[s]tatements taken by police officers in the course of interrogations." 541 U.S. 36, 50, 52 (2004). *Crawford* discussed the notorious trial of Sir Walter Raleigh, who was convicted of treason and sentenced to death based on the out-of-court testimony of an alleged accomplice. *See id.* at 44-45. In this case, the government used precisely the same kind of testimonial hearsay—blame-shifting statements by alleged accomplices—to obtain a death sentence.

To be sure, unlike Raleigh's trial, Umaña's trial was broken into guilt, eligibility, and selection phases, and the suspect-informants' statements were introduced only at the selection phase—that is, the phase at which Umaña was actually sentenced to death. But the Framers would not have recognized such distinctions.

As an initial matter, the Sixth Amendment's text provides that the right to confrontation—like the right to counsel—applies "[i]n all criminal prosecutions." U.S. Const. amend VI. Because sentencing is part of a "criminal prosecution[]," *id.*, "the right to counsel applies at sentencing," *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). *See also Strickland* v. *Washington*, 466 U.S. 668, 686-687 (1984) ("A capital sentencing proceeding … is sufficiently like a trial in its adversarial format … that counsel's role in the proceeding is comparable to counsel's role at trial."). There is no textual basis for treating the right to confrontation any differently.

Nor is there any historical basis, in capital cases, for cutting off the confrontation right at sentencing. When the Sixth Amendment was drafted, for a host of felonies, a guilty verdict mandated a death sentence. Conviction and capital sentencing thus necessarily occurred in a single proceeding. But the jury in those proceedings did not simply determine guilt or innocence with no eye to the sentencing consequences. On the contrary, juries frequently brought in verdicts of not guilty or guilty of lesser offenses precisely to avoid application of the death penalty. And that practice was accepted as a feature of the jury system—a necessary safeguard against "too much death." Langbein, *The Origins of Adversary Criminal Trial* 334 (2003); *see id.* at 59 ("Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence … . To the extent that trial had a function in [the majority of] cases … it was to decide the sanction."); Douglass, *Confronting Death* at 1972-1974, 2011-2015; *see also Apprendi* v. *New Jersey*, 530 U.S. 466, 479 n.5 (2000) (citing Blackstone). The Confrontation Clause was thus designed to ensure, not just that a defendant would not be found guilty, but also that he would not face death without an opportunity to confront his accusers.[5]

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[5] *Williams* stated that when "the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him." 337 U.S. at 246. As discussed above, with respect to *capital* sentencing, that is simply not so. Capital sentences were imposed by juries in proceedings in which the Sixth Amendment's adversarial protections applied. The sources *Williams* cited involved only *non-capital* sentencing, which has a very different history. *See* Douglass, *Confronting Death* at 1977-1978. Historical evidence suggests that sentencing in such cases did frequently occur in proceedings that

2. *Williams* should not be a barrier to that conclusion. First, *Williams* was not a Confrontation Clause case at all. It was decided before the confrontation right was incorporated against the states. *See Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). *Williams* thus considered only the general protections of the Due Process Clause and not the specific right to confront adverse witnesses afforded by the Sixth Amendment. 337 U.S. at 245.

Moreover, when *Williams* was decided, the Confrontation Clause was satisfied so long as an out-of-court statement bore "adequate 'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). *Crawford* reordered Confrontation Clause jurisprudence when it held that all out-of-court testimonial statements are inadmissible—regardless of their reliability—unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the speaker. *See* 541 U.S. at 68-69 (overruling *Roberts*).

Put simply, *Crawford* made clear that the constitutional command is "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. The Fourth Circuit's reasoning here—that "[a] policy of full information at sentencing, unrestricted by the [Confrontation Clause], enhances reliability by providing the sentencing jury with more relevant evidence" (App. 39a)—may be consistent with *Williams*, but it cannot be reconciled with *Crawford*. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a de-

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lacked the formality, and attendant protections, of jury trials. *See id.* at 2016-2018.

fendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62.

In any event, the notion that refusing to permit a defendant to confront witnesses accusing him of crimes in which they were themselves implicated *increases* reliability is absurd on its face. The "very mission" of the Confrontation Clause "'is to advance the accuracy of the truth-determining process,'" *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985), and cross examination is "'the greatest legal engine ever invented for the discovery of truth,'" *White* v. *Illinois*, 502 U.S. 346, 356 (1992). That is particularly true of the kind of evidence at issue here. "Not only are … incriminations [by potential codefendants] devastating to the defendant but their credibility is inevitably suspect … . The unreliability of such evidence is intolerably compounded when the alleged accomplice … does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Bruton* v. *United States*, 391 U.S. 123, 136 (1968).

B. This Court's Jury-Trial Decisions Demonstrate That The Confrontation Right Applies To Aggravating Factors Found At The Selection Phase Of Capital Sentencing

The Fourth Circuit's reliance on *Williams*' sharp distinction between trial and sentencing also cannot be squared with the nature of modern death-penalty proceedings and this Court's decisions regarding the nature of the jury-trial right at sentencing.

1. *Williams* involved a state capital sentencing scheme that afforded the judge essentially unfettered sentencing discretion. Indeed, *Williams* observed that had the judge imposed a death sentence "giving no reason at all," "no federal constitutional objection would

have been possible." 337 U.S. at 252. Such a capital sentencing scheme would be unconstitutional today. *See, e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586, 598 (1978) (noting that "[t]he constitutional status of discretionary sentencing in capital cases changed abruptly … [after] *Furman*" and citing *Williams* as a decision undermined by *Furman*); *Gregg* v. *Georgia*, 428 U.S. 153, 188-189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (in capital cases, sentencing discretion must be "directed and limited" so that there can be a "'meaningful basis for distinguishing the … cases in which [the death penalty] is imposed from the many cases in which it is not'"); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (because "the penalty of death is qualitatively different from a sentence of imprisonment … there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

This Court quickly recognized that *Furman* and subsequent decisions restricting sentencing discretion in capital cases precluded reading *Williams* broadly. "In 1949, when the *Williams* case was decided," the Court explained, it was "assumed that after a defendant was convicted of a capital offense, … a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality). Since then, however, the Court has recognized both that "death is … different" and that "the sentencing process, as well as the trial" must satisfy due process. *Id.* at 358 (rejecting argument that *Williams* permitted death sentence based in part on confidential information in presentence report).

Modern death-sentencing schemes, including the FDPA, thus do not permit a judge or jury to exercise unguided discretion in determining whether to sen-

tence a defendant to death. Rather, they require a finding of aggravating factors that can meaningfully distinguish the few cases in which the death penalty is permissible from the many in which it is not. And they require that the sentencer consider all mitigating factors and weigh them against the aggravators before imposing death. *Lockett*, 438 U.S. at 604-605.

2. This Court has recognized that such a scheme does not permit drawing a bright line between trial and sentencing with respect to the right to a jury trial.[6] In *Apprendi*, this Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. And that is so even if the government labels the fact a "sentencing factor": The question "is one not of form, but of effect." *Id.* at 494.

In *Ring*, the Court applied that principle to Arizona's death-penalty scheme, holding that aggravating factors necessary to subject a defendant to the death penalty must be found by the jury beyond a reasonable doubt. 536 U.S. at 609. *Ring* overruled *Walton* v. *Arizona*, 497 U.S. 639 (1990), which had held that because aggravating factors were merely "sentencing 'considerations,'" they need not be found by a jury, *id.* at 648. Rejecting the State's argument that the first-degree murder statute authorized death as a penalty, the Court held that "[i]f a State makes an increase in a de-

[6] Notably, there is a stronger textual basis for such line-drawing in the jury-trial context than in the confrontation context. The right to confrontation applies "[i]n all criminal prosecutions," while the defendant has a "right to a … *trial*, by an impartial jury." U.S. Const. amend. VI (emphasis added). The confrontation right, like the right to counsel, thus applies whenever the jury-trial right applies but may apply even when the jury-trial right does not.

fendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

Subsequently, in *Blakely*, the Court held that an "exceptional" sentence in a kidnapping case could not be imposed absent a jury finding of "deliberate cruelty"—the justification for the exceptional sentence. 542 U.S. at 303-305. Again, the Court rejected the State's argument that the sentence was within the statutory maximum for kidnapping, and reiterated that "the prosecutor [must] prove to a jury all facts legally essential to the punishment." *Id.* at 313; *see also Booker*, 543 U.S. at 243-244 (striking down mandatory application of Sentencing Guidelines, which permitted judges to make factual findings that increased guideline ranges, even though sentences were within statutory maximum); *Alleyne* v. *United States*, 133 S. Ct. 2151, 2157-2158 (2013).

In light of these decisions, the sharp line *Williams* drew in the capital context between trial and sentencing is no longer tenable. Because the FDPA makes the imposition of death turn on specific factual findings beyond a mere finding of guilt, the Sixth Amendment's protections—including the Confrontation Clause—apply to those factual findings.

3. In a tacit admission that *Williams* has been undermined by *Apprendi* and its progeny, the Fourth Circuit acknowledged that a jury makes "'constitutionally significant'" findings of fact during the eligibility stage of FDPA sentencing. App. 40a. But the selection stage—at least in a case like this where the jury finds additional aggravating factors at that stage—is no different.

The Fourth Circuit opined that "[d]uring the sentence selection phase …, the jury exercises discretion in selecting a life sentence or the death penalty, and any facts that the jury might find during that phase do not alter the range of sentences it can impose on the defendant." App. 40a. But where, as here, the government chooses to rely on non-statutory aggravating factors presented during the selection phase, that is simply not so. In such a case, although the jury must find at least one statutory aggravating factor at the eligibility phase, it cannot impose a death sentence based on that factor alone. Rather, the jury must first return special findings on each of the additional aggravating factors alleged at the selection phase; it must find each such factor unanimously and beyond a reasonable doubt. 18 U.S.C. §3593(c), (d). And before the jury may sentence the defendant to death, it must weigh *all* the aggravating factors—not simply those proven at the eligibility phase—against all the mitigating factors and determine that the aggravators collectively outweigh the mitigators. *Id.* §3593(e).

In this case, an aggravating factor that the government chose to present at the selection phase—that Umaña had committed three other gang-related murders—was the crux of the government's case for death. Those previous murders dramatically overshadowed the statutory aggravators presented at the eligibility phase, which simply echoed the facts of the crime. Absent the previous murders, the jury would have had little or no basis to determine that the unplanned, emotionally-charged shooting of which Umaña was convicted warranted the death penalty. The hearsay evidence regarding the previous murders permitted the jury to find that the balance tipped in favor of death. Had the

jury found that the balance tipped the other way, a death sentence would have been unlawful.

The "fact" of the previous unadjudicated murders thus increased the maximum penalty that Umaña faced. As *Blakely* put it, it was a fact "legally essential to the punishment." 542 U.S. at 313. Sixth Amendment protections should therefore attach to the finding of that fact.

The Fourth Circuit's contrary reasoning adopts a form-over-substance approach that this Court has consistently rejected. Moreover, the consequence of that approach is that the government may strategically present the most damning evidence against the defendant at the stage of trial at which he enjoys the fewest protections. The government should not be permitted to shelter behind such formalism here, where the result is that Umaña will be put to death based on self-serving testimony of suspect-informants he could not confront or cross-examine.

III. This Case Presents An Issue Of Exceptional Importance And Is An Excellent Vehicle For Resolving It

The decision below strips Umaña of his Sixth Amendment right to confront his accusers in a proceeding in which the jury must decide whether he is fit to live. At this critical juncture, the decision below holds, the "constitutionally prescribed method of assessing [the] reliability" of witness testimony, *Crawford*, 541 U.S. at 62, does not apply. That is wrong. The scope of a defendant's Sixth Amendment rights should not depend on a prosecutor's decision about which facts to allege in the "eligibility" phase and which in the "selection" phase. Nor should it depend—as it does now—on the venue in which a case is brought.

Whether the Confrontation Clause applies in capital sentencing is one of the most significant unsettled questions regarding the death penalty. Because the courts below are constrained by *Williams*, which has generated profound confusion and disagreement, only this Court can resolve the question, and it should be resolved now.

This case is an ideal vehicle to do so. It comes to this Court on direct appeal from a federal court of appeals affirming a death sentence, and is thus unencumbered by the complexities that typically accompany capital cases on federal habeas review. In addition, there is "no dispute" that the challenged hearsay is testimonial in nature. Resp. C.A. Br. 84. Nor has the government argued harmlessness. Pet. C.A. Br. 39 (noting the government's waiver).[7] For good reason. This case demonstrates that the question presented can mean the difference between life and death.

The Greensboro shooting—prompted by an emotionally-charged argument—itself lacked significant features distinguishing it from the average non-death-worthy murder. *See Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002) ("[T]he culpability of the average murderer is insufficient to justify the most extreme sanction

[7] This case thus suffers from none of the vehicle problems afflicting the petition this Court recently denied in *Dunlap* v. *Idaho*, No. 13-1315, in which the State disputed, among other things, whether the evidence at issue was testimonial, whether any error was harmless, and whether the issue had been properly raised before the state court. *Dunlap* Opp. 9-11, 17-18, 19-21 (U.S. July 30, 2014). It is also a superior vehicle to the petitions in *Kansas* v. *Carr*, Nos. 14-449, 14-450, in which the court's judgments vacating the sentences of death were based on other errors, not the admission of testimonial hearsay, and the court thus did not consider harmlessness, *Carr*, 331 P.3d at 739. At a minimum, if this Court grants *Carr*, this petition should also be granted.

available to the State."). The government's case for death thus hinged on an aggravating factor—multiple unadjudicated homicides—unrelated to the Greensboro crime and not introduced by the government until the second half of a bifurcated penalty trial. That prosecution tactic was highly prejudicial.

As this Court has recognized, evidence of unadjudicated murders is "the worst kind of bad evidence." *Wong* v. *Belmontes*, 558 U.S. 15, 26 (2009). First, it requires the defendant to respond to a separate murder charge—or charges—in front of the same jury that has just convicted him of capital murder. The government's summation at the penalty stage stoked the resulting adverse inference, repeatedly connecting the charged crime with the other unconfronted accusations, claiming that death was warranted because Umaña "had killed before." *See supra* p. 11. Second, such evidence necessarily concerns offenses for which the defendant has not been tried or convicted. Here, the criminal allegations that were the centerpiece of the government's case for death had never been tested before a jury. Worse, they were proffered through the self-serving hearsay testimony of other suspects in the crimes, who blamed Umaña under police pressure. Yet Umaña was not permitted to test the truth of those life-or-death allegations by cross-examining his accusers. Thus, not only did the jury hear "'the most powerful imaginable aggravating evidence,'" *Wong*, 558 U.S. at 28, but it did so without the constitutional safeguard devised especially to ensure that the truth or falsity of such evidence could be brought to light. *See Crawford*, 541 U.S. at 66 ("The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

That is a profound error, the consequence of which is that defendants will be executed based on adverse testimony they had no opportunity to confront. Without this Court's intervention, that will happen here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2014

APPENDICES

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ALEJANDRO ENRIQUE RAMIREZ UMAÑA,
a/k/a Wizard, a/k/a Lobo,
Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:08-cr-00134-RJC-2)

Argued: January 28, 2014
Decided: April 23, 2014

Before NIEMEYER, GREGORY, and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the majority opinion, in which Judge Agee joined. Judge Gregory wrote a dissenting opinion.

* * *

NIEMEYER, Circuit Judge:

Alejandro Enrique Ramirez Umaña shot and killed two brothers, Ruben and Manuel Salinas, at point-blank

range in a restaurant in Greensboro, North Carolina, because Umaña perceived that the brothers had insulted Umaña's gang, Mara Salvatrucha, commonly known as MS-13. A jury convicted Umaña of all counts for which he was charged, including two counts charging him with murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), and two counts charging him with committing murder while using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and (j)(1). The convictions on those charges subjected Umaña to a maximum sentence of death.

Following the verdict of conviction, the same jury returned a verdict that Umaña was death eligible on the four capital counts, as provided in 18 U.S.C. §§ 3591-3596. The jury found that two statutory aggravating factors applied: (1) that Umaña had created a grave risk of death to one or more persons in addition to each victim, and (2) that he had killed more than one person in a single criminal episode.

Finally, in the sentence selection phase of trial, the jury imposed the death penalty, finding that four additional nonstatutory aggravating factors applied: (1) that Umaña had killed the two brothers to protect and maintain the reputation of MS-13 and to advance his position in that gang; (2) that Umaña had caused injury and loss to the brothers' family and friends; (3) that Umaña had earlier intentionally committed several murders in Los Angeles; and (4) that Umaña posed a continuing and serious threat to the lives and safety of others, as evidenced by his lack of remorse, his allegiance to MS-13, his lack of rehabilitation, and his pattern of violence. The jury also found several mitigating factors. After weighing the aggravating and mitigating factors, the jury imposed the death penalty.

On appeal, Umaña challenges every phase of the proceedings below. After carefully considering each of Umaña's arguments, we reject them and affirm the convictions and sentence.

I

Umaña, who was born in El Salvador in the early 1980s, illegally entered the United States in 2004 to live in Los Angeles. At the time, he had been a member of the MS-13 gang for several years, having joined in 2001, while he lived in El Salvador.

MS-13 was formed in Los Angeles in the 1980s by immigrants from Central America, predominantly El Salvador. To gain membership into MS-13, an individual must submit to a 13-second beating. The gang uses violence and extortion to gain and control territory, and for a member to build his reputation in MS-13, he has to be ready to attack rival gang members or anyone else who disrespects the gang. MS-13 punishes betrayal by putting the "green light" on the member, which constitutes an order that he be targeted for death.

While Los Angeles continues to be the mecca of MS-13 activity, MS-13 has become a transnational organization, with groups, or "cliques," across the United States, in Canada, and in Central America.

Umaña's activities in Los Angeles

During the sentence selection phase of Umaña's trial, the government introduced evidence implicating Umaña in several Los Angeles shootings: one on Fairfax Street on July 27, 2005, where two persons were shot and killed, and one in Lemon Grove Park on September 28, 2005, where a group of four persons were shot at and one was killed and two were injured.

On the occasion of the Fairfax Street murders, Umaña was in the passenger seat of a car with several other MS-13 members. The car pulled up alongside two males walking down the street, and the two groups began flashing gang signs at one another. The two males on the street were graffiti artists, or "taggers," and they made hand gestures that were perceived as challenging MS-13. Some or all of Umaña's group exited the car to confront the taggers. There were conflicting accounts about what happened next. Umaña's fellow MS-13 members claimed that Umaña shot the two taggers, but two civilian eye witnesses claimed that the driver of the car shot them.

On the occasion of the Lemon Grove Park murder, two men approached a group of four who had just finished playing basketball and were sitting on bleachers in the park. Without a word, the two men took out guns and opened fire on the group. One of the four basketball players was killed, while two others were wounded. The fourth, Freddie Gonzalez, who was apparently the target of the attack, escaped uninjured. Several pieces of evidence linked Umaña to this murder. First, Gonzalez identified Umaña in a photo lineup and confirmed the identification in court, although he admitted to some uncertainty. Also, Umaña admitted to driving the shooters to the basketball court, although he denied being a shooter himself. Finally, ballistics matched the gun used in the Fairfax Street murders with the gun used in the Lemon Grove Park murder, and there was no evidence that anyone but Umaña was present at both crime scenes.

Umaña's New York activities

Umaña left Los Angeles and, by the summer of 2007, was residing in New York. By this time, he had

built up a substantial reputation within MS-13. One witness recalled that Umaña, who had taken on the moniker of "Wizard," was treated by his fellow gang members like he was "big time."

In the fall of 2007, an MS-13 leader in New York directed Umaña to travel to Charlotte, North Carolina, as the Charlotte MS-13 cliques had been experiencing significant infighting. Because of his experience and exposure to gang life in Los Angeles, Umaña was ordered to "set them straight" in North Carolina. This was confirmed by a Charlotte-based MS-13 member who stated that it was expected that Umaña would "take control" because he knew "how to run a gang."

Umaña's North Carolina activities

When he arrived in North Carolina, Umaña convened a meeting, during which he instructed the MS-13 members as to how they should be extorting money, selling drugs, and stealing cars. He inspected the gang members' guns; he emphasized to them the importance of respect; and he told them to merge the Charlotte cliques together. Over the course of the following months, Umaña conducted numerous meetings with MS-13 members in Charlotte.

On December 8, 2007, Umaña was in Greensboro, North Carolina, having dinner with several fellow MS-13 members at Las Jarochitas, a Mexican food restaurant. Also at the restaurant were Ruben and Manuel Salinas, regulars at Las Jarochitas, who were eating and drinking with several other men. The Salinas brothers were not affiliated with any gang.

Umaña and his associates were sitting near the jukebox, and they began selecting songs. This upset Manuel Salinas, who liked to listen to "corrida," a type

of Mexican country music, whenever he visited Las Jarochitas. As one witness reported, the two groups then began "arguing and kind of like pushing each other." Perhaps fearing that the situation was getting out of hand, Manuel Salinas tried to calm things down by buying the MS-13 members a bucket of beers. The MS-13 members, however, rebuffed the peace offering, refusing to drink or even acknowledge the beers.

A concerned waitress asked the MS-13 members to leave the restaurant. As they were filing out, the groups were "exchanging words," and Ruben Salinas told the MS-13 members that he "wasn't scared of them." The gang members responded that Ruben Salinas should not "mess with them" because "they were from … MS." Ruben retorted that the gang was "fake to him."

All of the MS-13 members left the restaurant except for Umaña, who stayed behind. Upon realizing that Umaña was still in the restaurant, an MS-13 member named Spider came back inside. When the waitress tried to pull Umaña to the door, Spider grabbed her and told her not to touch him. It was at this point that Umaña pulled out his gun and pointed it at Ruben and Manuel, but he did not shoot right away. He held his gun sideways, while Manuel and Ruben stood motionless. No one said anything. After some time elapsed, perhaps as much as a minute, Umaña fired five shots at the brothers. Ruben received a gunshot wound to the chest, and Manuel was shot in the head. Both were pronounced dead at the scene of the crime. A third individual was shot in the shoulder and survived.

Witnesses identified Umaña as the shooter, and Umaña does not contest that he pulled the trigger.

Immediately after the murders, Umaña's group contacted a fellow MS-13 member, who had been serving as a confidential informant, to help them get back to Charlotte that night. The informant met Umaña and the other gang members at an IHOP restaurant between Charlotte and Greensboro. Umaña switched cars and rode with the informant back to Charlotte. During the ride, he was cocking and uncocking his gun and discussing its bullets. Their first stop was a nightclub and nearby taco stand outside of Charlotte, where Umaña told the confidential informant to smell the gun, because it smelled like gunpowder from being fired. Umaña also told the informant that he was going to "pee on [his] hands" to get rid of the gunpowder. Several other MS-13 members had congregated at the taco restaurant. One MS-13 member later recounted Umaña's explanation for why he had committed the murders—"[Umaña] said they insulted the MS-13. And he was doing it not only because of him, because he was doing it because of us, too." Of the third victim, Umaña lamented that he "didn't kill that son of a bitch." When asked about the prospect of being pulled over by the police with the murder weapon, he responded, as recorded on tape, that the officer would be on the wrong end of his gun, as "she is always close by."

Charlotte police arrested Umaña at an MS-13 member's house on December 12, 2007. The police found the murder weapon in the sofa where Umaña was sitting. Umaña later told other MS-13 members that the police were "lucky" because he had been "trying to grab for his gun."

Procedural history

While Umaña was being held in custody by North Carolina authorities, several Los Angeles police detec-

tives interrogated him about the shootings that had occurred in Los Angeles. Umaña denied committing those murders, although he did admit to being present or nearby when they occurred.

Two months later, a federal grand jury in Charlotte, in the Western District of North Carolina, indicted Umaña for the murders committed in Greensboro, which is in the Middle District of North Carolina. Umaña filed a motion to dismiss the indictment for improper venue, which the district court denied. He also requested a hearing pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), which forbids execution for mentally retarded defendants. The court granted the *Atkins* hearing and found that Umaña had failed to prove his disability by a preponderance of the evidence.

While in prison awaiting trial, Umaña maintained contact with MS-13 members. He wrote lengthy letters expressing his continuing loyalty to the gang and his hatred for his enemies. His letters also gave orders to execute rivals and intimidate potential witnesses against him. While the letters were encoded, the FBI broke the code.

The case proceeded to trial. On the first day of jury selection, U.S. Marshals frisked Umaña and discovered that he had tied a four-inch metal blade (in a paper sheath) to his penis. And when the confidential informant testified during trial, Umaña flashed MS-13 gang signs with his hands and, as the informant was leaving, said in Spanish, "[Y]our family's going to pay you mother—." This threat took place in front of the jury.

The jury convicted Umaña on all counts. It found him guilty of conspiring to conduct, or to participate in the conduct of, the affairs of an enterprise affecting interstate commerce through a pattern of racketeering

activity, in violation of 18 U.S.C. § 1962(d) (prohibiting RICO conspiracy). It found that this RICO conspiracy included the "willful, deliberate and premeditated murder" of the Salinas brothers, in violation of N.C. Gen. Stat. § 14-17. The jury also found Umaña guilty of murdering the Salinas brothers in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). Finally, the jury found Umaña guilty of using a firearm in relation to a crime of violence, resulting in the death of the Salinas brothers, in violation of 18 U.S.C. § 924(c) and (j)(1). The jury also found Umaña guilty of several lesser offenses not at issue here, including being an alien in possession of a firearm, robbery affecting interstate commerce, and witness tampering.

The government sought the death penalty for the § 1959 and § 924 counts. Accordingly, the district court divided the trial into three phases—the first to determine guilt or innocence; the second to determine Umaña's eligibility for the death penalty; and the third, if Umaña were found death eligible, to select between the death penalty and life imprisonment without the possibility of release.

After finding Umaña guilty, the jury found him eligible for the death penalty under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3596. In addition to finding that, during the commission of the crimes, Umaña was of sufficient age and had a sufficiently culpable state of mind, it found that two statutory aggravating factors applied. First, it found that Umaña had created a grave risk of death to one or more persons in addition to each victim, and second, it found that he had killed more than one person in a single criminal episode.

After the jury found Umaña eligible for the death penalty, the court proceeded to the sentence selection

phase, during which the government put on evidence to prove four additional nonstatutory aggravating factors: (1) that Umaña had killed the Salinas brothers to protect and maintain the reputation of MS-13 and to advance his position therein; (2) that Umaña had caused injury and loss to the Salinas brothers' family and friends; (3) that Umaña had intentionally committed several murders in Los Angeles; and (4) that Umaña posed a continuing and serious threat to the lives and safety of others, as evidenced by his lack of remorse, his allegiance to MS-13, his lack of rehabilitation, and his pattern of violence. The jury found the existence of all four aggravating factors unanimously and beyond a reasonable doubt. They also considered the evidence presented by Umaña in mitigation, which consisted primarily of (1) the effects that Umaña's upbringing had on his culpability; (2) videos of his family and friends; and (3) testimony about safety precautions that would be in place should Umaña be sentenced to life imprisonment. All or some of the jury members found that Umaña had proved various mitigating factors by a preponderance of the evidence. In particular, they found that the murder occurred during an emotionally charged argument and that the murder occurred as a result of Umaña's indoctrination into the ways and thinking of MS-13. After weighing the aggravating and mitigating circumstances, the jury sentenced Umaña to death.

This appeal followed, raising numerous challenges, as discussed herein.

II

Umaña challenges first the venue of his trial in the Western District of North Carolina. He contends that "venue on the capital counts [Counts 22-25] was proper

only in the Middle District of North Carolina [in Greensboro], where the killings occurred because 'murder' was the only essential 'conduct' element of the charged offenses (violations of 18 U.S.C. § 1959 and §§ 924(c) & (j)(1))," and that venue was not proper in the Western District of North Carolina, where he was tried. He argues that committing murder "for the purpose of … maintaining or increasing position in an enterprise engaged in racketeering activity," as punished by § 1959, has only one conduct element—that of committing murder—and that the element of maintaining or increasing position in a racketeering enterprise is a *mens rea* element. He points out that under established venue jurisprudence, a *mens rea* element does not contribute to determining the *locus delicti* of the crime, *i.e.*, where it was committed for venue purposes. *See United States v. Jefferson*, 674 F.3d 332, 366-68 & n.46 (4th Cir. 2012); *United States v. Oceanpro Indus., Ltd.*, 674 F.3d 323, 329 (4th Cir. 2012). He further argues that venue was improper for the trial of the two § 924 counts because those counts depended on the two § 1959 counts.

The government contends that venue in the Western District was proper because the murders were committed by Umaña in "connection to the 'racketeering enterprise' and RICO conspiracy," which were "continuing offense[s] centered in Charlotte," in the Western District. It argues that just as murder was an essential conduct element, so too was the racketeering activity with which the murders were necessarily connected, justifying venue in either the Western or Middle Districts.

Both the Constitution and the statutes implementing it require that criminal trials be conducted where the crime was "committed." *See* U.S. Const. art. III,

§ 2, cl. 3; U.S. Const. amend. VI; 18 U.S.C. §§ 3235-3237; Fed. R. Crim. P. 18. The place where a crime is committed—the *locus delicti*—"must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998)). Thus, to determine venue, we must first "identify the conduct constituting the offense" and then "discern the location of the commission of the criminal acts." *Id.* The location of the criminal acts is determinative. *See Jefferson*, 674 F.3d at 365; *Oceanpro*, 674 F.3d at 328; *United States v. Bowens*, 224 F.3d 302, 311 (4th Cir. 2000). Of course, if the criminal conduct spans multiple districts, the crime may be tried in any district in which at least one conduct element was committed. *See* 18 U.S.C. § 3237(a); *Rodriguez-Moreno*, 526 U.S. at 281.

Counts 22 and 24 of the indictment charged Umaña with the murders of Ruben Salinas and his brother, Manuel Salinas, in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(1), and venue for trial of those offenses lay where the essential conduct elements of the § 1959 offense were committed.

In order to establish murder in aid of racketeering activity under § 1959, the government must show:

(1) that there was an enterprise engaged in racketeering activity;

(2) that the enterprise's activities affected interstate commerce;

(3) that the defendant committed murder; and

(4) that the defendant, in committing murder, acted in response to payment or a promise of payment by the enterprise or "for the

> purpose of gaining entrance to or maintaining or increasing position in an enterprise."

18 U.S.C. § 1959(a)(1); *see also United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994).

Umaña argues that the only *conduct* element of the § 1959 offense was the murder itself. He characterizes the language linking the murder to the racketeering enterprise—i.e., "for the purpose of … maintaining or increasing position in an enterprise engaged in racketeering activity"—as merely descriptive of the crime's requisite *mens rea*, which cannot determine where the crime was committed for venue purposes. *See Oceanpro*, 674 F.3d at 329.

We decline to read that element so narrowly. We think that "for the purpose of … maintaining or increasing position in an enterprise" defines a motive element that includes a requirement that the defendant have interacted with the enterprise with respect to his purpose of bolstering his position in that enterprise. Such activity could occur before commission of a violent crime covered by the statute—for example, if a mafia boss instructed a member to commit murder or else be cast out of the organization—or after commission of a violent crime—for example, if the member returned to mafia headquarters to boast about his exploits with a mind toward advancement.

Two reasons underlie our interpretation. *First*, we think this reading avoids the illogical—and possibly unconstitutional—result that § 1959 would criminalize a murder committed with a secret intent to join a gang where the murderer has absolutely no prior connection with the gang itself. Congress made clear, when enacting § 1959, that the offense was aimed at eliminating violent crime "committed as an *integral part* of an or-

ganized crime operation." S. Rep. No. 98-225, at 305 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3485 (emphasis added). And a physical manifestation of purpose is necessary to ensure that the act is actually carried out to further the enterprise's goals.

Second, the statutory context suggests that the "for the purpose of" prong requires a manifest *quid pro quo* between the member and the gang. The earlier, parallel portion of the statute criminalizes violent crime conducted "as consideration for the receipt of" or "as consideration for a promise or agreement to pay … anything of pecuniary value." 18 U.S.C. § 1959(a). This portion of the statute clearly indicates that there must be a reciprocal arrangement between the enterprise and the individual, and we believe it sensible to read the "for the purpose of" language similarly.

At bottom, we hold that § 1959(a)(1) includes as an element an objective, physical act that links the defendant with the enterprise with respect to the underlying violent crime and that this element is a conduct element supporting venue.

In this case, Umaña's actions in Charlotte were sufficient to satisfy this conduct element. Umaña was sent to Charlotte with orders to shape up the North Carolina cliques. Upon arriving in Charlotte, he instructed the local MS-13 members at length about weapons and ammunition. He passed around his own gun. He discussed maintaining respect. One witness, who was at the initial Charlotte meeting, testified that respect "was everything" to Umaña. And after killing the Salinas brothers for their failure to respect his gang, Umaña immediately returned to Charlotte, where he boasted to his fellow MS-13 members about the murders. He told them that he had killed the Salinas

brothers because they had insulted MS-13 and that he had killed them for his fellow gang members. These objective manifestations of Umaña's purpose to further his position in the enterprise were sufficient to support venue in the Western District of North Carolina for the § 1959 prosecution.

In Counts 23 and 25, Umaña was charged and tried for violations of 18 U.S.C. § 924(c) and (j)(1). The indictment in those counts alleged that Umaña used a firearm "during and in relation to a crime of violence, that is: conspiracy to participate in a racketeering enterprise [18 U.S.C. § 1962] and murder in aid of racketeering [18 U.S.C. § 1959]," resulting in the unlawful killing of Ruben and Manuel Salinas. Venue for § 924(c) prosecutions is appropriate wherever the underlying crime of violence took place. *Rodriguez-Moreno*, 526 U.S. at 281.

Umaña does not dispute that venue was proper in the Western District of North Carolina for the underlying § 1962 prosecution and, as we are holding, venue was also appropriate there for the § 1959 prosecution. Thus, regardless of which predicate crime of violence the jury relied on, venue for the § 924(c) counts was appropriate in the Western District.

III

Umaña next contends that his convictions on Counts 22 and 24 for murder in aid of racketeering activity under 18 U.S.C. § 1959(a)(1) punished conduct that "is a quintessential, noneconomic, local activity that lies beyond Congress's authority to regulate under the Commerce Clause," much like the activity regulated in the Violence Against Women Act, which the Supreme Court struck down in *United States v. Morrison*,

529 U.S. 598 (2000). Moreover, he asserts, requiring that the murder be committed to maintain or further one's status in "a street gang fails to change its noneconomic nature." And because his convictions on Counts 23 and 25 under § 924(c) were predicated on his § 1959 convictions, Umaña reasons that they too exceeded the government's Commerce Clause authority. Accordingly, he argues that his convictions on Counts 22 through 25 must be reversed.

Because Umaña failed to present this argument to the district court, we review it for plain error. *See United States v. Forrest*, 429 F.3d 73, 77 (4th Cir. 2005) (conducting a plain error review of a Commerce Clause challenge that was not raised before the district court).

Article I, § 8, of the U.S. Constitution authorizes Congress to make laws as necessary to regulate commerce among the States so long as it has a "'rational basis' … for … concluding" that the prohibited activities, "taken in the aggregate, substantially affect interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005).

Section 1959(a) punishes violent crimes, including murder, committed "for the purpose of … maintaining or increasing position in an enterprise engaged in racketeering activity," with the term "enterprise" defined to include "any partnership, corporation, association, or other legal entity … which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(a), (b)(2). The question therefore is whether Congress could rationally have concluded that intrastate acts of violence, such as murder, committed for the purpose of maintaining or increasing one's status in an interstate racketeering enterprise, would substantially affect the interstate activities of that enterprise. We conclude that it could have.

We find it wholly reasonable to believe that members of a criminal enterprise might engage in violence to solidify their status in the organization or rise in the ranks of its leadership, and that by doing so, they would enhance the power and reach of the racketeering enterprise itself. Indeed, the circumstances of the present case provide a convenient illustration. Because of Umaña's substantial reputation in MS-13, which he seems to have built up partly through acts of violence in Los Angeles, MS-13 leadership—through international telephone calls—sent him from New York to North Carolina to instruct the cliques there on how more effectively to deal drugs, steal cars, and extort money. Congress could rationally have concluded that proscribing reputation-enhancing violence committed by members of a criminal enterprise would disrupt the interstate commerce that the enterprise itself engages in. *Accord United States v. Crenshaw*, 359 F.3d 977, 986 (8th Cir. 2004) (upholding the constitutionality of § 1959 under the Commerce Clause, noting that "[i]t seems … clear that criminal enterprises use violence or the threat of violence in connection with their commercial activities"); *see also United States v. Nascimento*, 491 F.3d 25, 43 (1st Cir. 2007) ("Given the obvious ties between organized violence and racketeering activity—the former is a frequent concomitant of the latter—we defer to Congress's rational judgment, as part of its effort to crack down on racketeering enterprises, to enact a statute that targeted organized violence"). Indeed, Congress reached just such a conclusion when it observed that murders, assaults, and other crimes proscribed by § 1959 constituted an "integral aspect of membership in an enterprise engaged in racketeering activity." S. Rep. No. 98-225, at 304, *reprinted in* 1984 U.S.C.C.A.N. at 3483.

Moreover, § 1959 includes a jurisdictional element that limits its reach to activities connected with enterprises "engaged in" or whose activities "affect" interstate commerce, thereby justifying its constitutionality under the Commerce Clause. 18 U.S.C. § 1959(a), (b)(2); *see also United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012). This jurisdictional element distinguishes § 1959 from the Violence Against Women Act struck down in *Morrison*. 529 U.S. at 613. In *Morrison*, the Supreme Court explicitly noted the lack of a limiting jurisdictional element that would have confined the statute to those activities actually affecting interstate commerce. *Id.* (noting that the Gun-Free School Zones Act, which was struck down in *United States v. Lopez*, 514 U.S. 549 (1995), and the Violence Against Women Act at issue in *Morrison* "contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"). But § 1959 *does* have a limiting jurisdictional element that confines its reach to crimes that affect interstate commerce.

Umaña argues further that the application of § 1959 *to his particular circumstances* is unconstitutional because "the murder here had no effect on interstate commerce, was non-commercial in nature, and was unrelated to organized interstate trafficking efforts in drugs or other contraband." But such an argument is of no consequence to the Commerce Clause analysis, which does not focus on whether particular conduct under the statute had an impact on interstate commerce, but rather on whether "the class of acts proscribed had such an impact." *Gibert*, 677 F.3d at 627; *see also Raich*, 545 U.S. at 17 ("[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under

that statute is of no consequence" (quoting *Lopez*, 514 U.S. at 558) (internal quotation marks omitted)); *United States v. Gould*, 568 F.3d 459, 475 (4th Cir. 2009); *United States v. Williams*, 342 F.3d 350, 355 (4th Cir. 2003).

Accordingly, we find no error, let alone plain error, and therefore we reject Umaña's Commerce Clause challenge.

IV

Umaña contends that the district court abused its discretion in refusing to excuse Jurors 286 and 119 on account of their personal bias. He argues that Juror 286 was biased based on a past life experience with respect to a crime committed against her brother and that Juror 119 was biased as indicated by the answers she gave about whether she could meaningfully consider life imprisonment, in lieu of death, upon a finding of guilt on the charges in this case.

We review the district court's decisions to seat these jurors for abuse of discretion, *Poynter v. Ratcliff*, 874 F.2d 219, 222 (4th Cir. 1989), and we will find abuse only "where a per se rule of disqualification applies" or "where the [trial] court 'demonstrate[d] a clear disregard for the actual bias' of the juror," *United States v. Fulks*, 454 F.3d 410, 432 (4th Cir. 2006) (quoting *United States v. Turner*, 389 F.3d 111, 115 (4th Cir. 2004)).

A

Juror 286 recounted during voir dire that more than 30 years earlier, her brother had been the victim of an attempted murder; that the assailant received a short sentence; and that, after release, the assailant committed murder and then suicide. Based on this life

experience and on Juror 286's answers during voir dire, Umaña argues that the district court should have found that Juror 286 was *actually* biased or that, based solely on her life experience, she was in any event *impliedly* biased.

During voir dire, the prosecutor asked Juror 286 several questions about her ability to dispense penalties impartially:

> Q: And are you able to keep an open mind until you've heard the evidence to make [the decision between life in prison and the death penalty] together with the other jurors?
>
> A: I would like to think so. I mean, I don't know anything about the case.
>
> Q: And that's the point. But you haven't heard the evidence, so are you able to keep an open mind and consider both options at the conclusion of the evidence?
>
> A: I think so.
>
> * * *
>
> Q: And given the information that you shared about the tragedy with your brother … , are you able to come into this courtroom and consider only the facts and evidence that are presented in this case in making your decision?
>
> A: I hope that I can. I mean, I can't forget those … experiences that I've had. … I would hope, and I think that I would look at the facts of this case.
>
> * * *

> Q: All right. And so as you sit here today … until you've heard all the facts in evidence in this case, you would be able to fairly consider both potential punishments; life imprisonment without parole and the death penalty?
>
> A: Yes.

Umaña's counsel followed up on Juror 286's answers with the following inquiry:

> Q: Does [your frustration with how your brother's case was handled] come into play now, if you're a juror in a case like this, that involves two charges of murder?
>
> A: I don't know if it would or not, to be honest. I do have strong feelings about it. You know, the sentence—the sentence to me did not—it was not justified, based on the circumstances and what happened. And that person, because he didn't have a sufficient sentence, I think, initially, went on to do additional murder and suicide. And yeah, I do have a problem getting past that.

Then, after Umaña's counsel explained to Juror 286 that, upon a finding of guilt for murder, there would be only "two options on the table"—life without the possibility of release and death—he questioned her as follows:

> Q: Knowing that, does your attitude about your frustration with the judicial system and the sentence that that assailant of your brother's got, how—can you tell us whether that would be an issue or affect you?

A: I think it's a bit different than the situation with my brother. Because in that instance I just didn't think that there was sufficient punishment that fit the crime. In this case you're looking at the death penalty, or as you're telling me, someone who would be in prison the rest of their life. It's different, and I hope that I would see that.

* * *

Q: Are you saying then, that … you would consider equally, or give fair consideration to both types of sentences? In other words, that you would think that either death or life without parole would be considered as sufficient sentences for those crimes?

A: I think depending on the circumstances and the evidence.

Q: … [W]ould you meaningfully consider both of these sentencing options in the sentencing phase of this trial?

A: Yes. Yes.

* * *

Q: [D]o you think that the experience with what happened to your brother's attacker and everything, would have any impact on your ability to be a fair judge on the facts, as far as … guilty versus not guilty?

A: … I would hope it would not enter into my decision, but I still have that experience.

Q: … [T]he defendant has the right, as does the government, to have a jury of people who are fair and impartial and open-

minded. And I guess, do you feel that you are one of those people right for this case?

A: I don't know if I can say 100 percent. I really don't.

At that point, the district judge intervened to describe to Juror 286 the presumption of innocence and to explain that the government bears the burden of proof. The judge then asked the following questions:

Q: Now, is there anything about your life experience that keeps you from understanding those principles and agreeing to apply them in this case?

A: I understand the principles entirely. And I hope that I could, you know, … do the job that's requested. I just … have these things in my experience that I don't know whether they would prevent me from doing the job correctly or not.

Q: Do you agree with those principles?

A: Yes, I do.

* * *

Q: And is there anything about your past experience that would prevent you from meaningfully participating in that process [of determining the penalty options]?

A: No, I don't think so.

The judge then declined to excuse Juror 286.

Based on Juror 286's answers, Umaña argues that Juror 286 displayed actual bias because she "remained equivocal regarding whether the circumstances surrounding the attempt on her brother's life would affect

her ability to keep an open mind and be a fair and impartial juror during the guilt/innocence phase." Thus, he contends that there remained uncertainty after voir dire "about whether she could actually apply [the presumption of innocence and proof beyond a reasonable doubt] in light of her past experiences." He suggests that *United States v. Thompson*, 744 F.2d 1065 (4th Cir. 1984), required a finding that Juror 286 was actually biased.

In *Thompson*, one of the jurors notified the judge during trial that a piece of evidence had "moved [him] quite heavily." 744 F.2d at 1067. When the judge told the juror that he wanted to make sure that the juror still had an open mind, the juror responded, "*I don't think that I do. … I am not sure that I could be totally fair.* I would try to be as much as I could, but I am just not sure I could be totally fair." *Id.* (emphasis added). After denying a motion for a mistrial, the judge asked the juror if he could keep an open mind and maintain the presumption of innocence, and the juror responded, "I will try. I am not sure, your Honor." *Id.* at 1067-68. We found that the trial court had abused its discretion by declining to excuse the juror, and we held that "after [the juror] gave an equivocal response to repeated questions about his ability to proceed with an open mind … the trial court should have asked for an affirmative response." *Id.*

The circumstances in *Thompson*, however, were different in kind and effect from those here. In *Thompson*, the juror had suggested that *he was unable to be fair*. When asked whether he had an open mind, the juror said, "I don't think that I do." By contrast, Juror 286 left the court with the opposite message, suggesting that she "would like to think" that she could keep an open mind. Moreover, when the judge asked Juror 286

whether she agreed with the basic constitutional principles relating to the presumption of innocence and the government's burden of proof, she said that she did. She also told the judge that her past experiences would not prevent her from "meaningfully participating in [the sentencing] process." To be sure, Juror 286 stated that she could not be 100% sure about how she would conduct herself, but nonetheless she repeatedly stated that she thought she could keep an open mind and "look at the facts of this case."

We similarly distinguished *Thompson* in *United States v. Hager*, 721 F.3d 167 (4th Cir. 2013), where a juror expressed some equivocation about whether he could be impartial. In *Hager*, the judge interrogated the juror at length, asking, for example, whether the juror could "give effect to those two instructions [regarding the presumption of innocence and burden of proof]," and the juror answered, as did Juror 286 in this case, "Yes, I would try." 721 F.3d at 190-91. The court followed up this inquiry by asking, "[I]s there any reason why you wouldn't succeed?" to which the juror responded, "No, I wouldn't think [so]." *Id.* at 191. The *Hager* court found that the judge had not abused his discretion by seating the juror, distinguishing the circumstances from *Thompson* in this way:

> Although Juror 144 and the juror in *Thompson* both initially stated only that they would try to be fair, the district court here followed up by asking if there was any reason that the juror could not be fair. And each time that question was posed, Juror 144 said that there was not. The district court in *Thompson*, however, failed to solicit such a response.

Id. at 192; *see also United States v. Capers*, 61 F.3d 1100, 1104-05 (4th Cir. 1995) (finding no abuse of discretion where a trial judge refused to excuse a juror who stated that he "might favor the government").

We conclude that the district judge in the present case did not abuse his discretion by declining to find that Juror 286 was actually biased. A juror need not express unflinching certainty for a trial judge to determine that she will be able to remain impartial. *See, e.g.*, *Hager*, 721 F.3d at 191-92. Moreover, in this case, the judge took care by repeatedly asking, in followup questions, whether Juror 286 could be fair and impartial. Juror 286 affirmed without qualification that she agreed with the principles that defendants are presumed innocent and that the government has the burden of proof, and she repeatedly affirmed that she would be able to consider equally the two penalty options of life in prison and the death sentence.

Umaña argues further that despite the answers given by Juror 286, her life experiences alone should have prompted the trial court to conclude that she was *impliedly* biased.

"[T]he doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988). Implied bias might arise where there is "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."

Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

We conclude that Juror 286's experience 30 years ago was sufficiently remote and insufficiently prejudicial to impute bias to her. We have held that "it is generally within a trial court's discretion to qualify a juror whose close relative was a victim of a crime similar to that with which a defendant is charged, [and so] such a circumstance is not, standing alone, sufficiently 'extreme' to warrant a finding of implied bias." *Fulks*, 454 F.3d at 432-33 (citation omitted). Likewise here, we conclude that it was within the district court's discretion to qualify Juror 286.

Umaña also argues that the views Juror 286 expressed about law enforcement evidenced actual bias, as indicated by the following exchange during voir dire:

> Q: [A]re you going to treat civilians and law enforcement, you're going to be able to evaluate their testimony and weigh it equally?
>
> A: Um, I think so. But in all honesty, I do have to say that I do have a positive feeling towards them, police officers, detectives and so forth.
>
> * * *
>
> Q [S]o you would be able to judge fairly the testimony of a police officer, the same way you would a civilian witness in this case?
>
> A: I have to answer again in all honesty that I hope that I would be able to. But also as I say, I do support and see law enforcement in a favorable light.

* * *

Q: [W]ould you follow that same instruction and use the same standard in evaluating the credibility of each type of witness?

A: I think so. I've never done it before, as I say. I just have to say that I would hope and I would think that I would.

Based on these answers, Umaña contends that "Juror 286 was equivocal about whether her beliefs about law enforcement would interfere with her duty to treat all witnesses equally."

Because Umaña did not, during voir dire, object to Juror 286 on this ground, we review this issue under the plain error standard. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732-34 (1993).

Although "bias in favor of law enforcement officials [i]s inappropriate," *United States v. Lancaster*, 96 F.3d 734, 743 (4th Cir. 1996) (en banc), we conclude that the district court did not err in failing to find actual bias based on Juror 286's statement that she had "positive feelings" about law enforcement, especially where she went on to affirm (albeit in her cautious fashion) that she would use the same standard in evaluating every witness's credibility. *See Capers*, 61 F.3d at 1105 (no abuse of discretion where juror said he "might" favor the government). A juror's generally favorable impression of law enforcement does not necessarily amount to bias any more than does a juror's personal association with law enforcement. *See United States v. Larouche*, 896 F.2d 815, 830 (4th Cir. 1990). Based on our review of the record, we conclude that the district court's ruling was not in error.

B

Umaña contends that Juror 119 was also biased insofar as she did not confirm during voir dire that she would "meaningfully consider life imprisonment upon a finding of guilt of the charged offenses."

On Juror 119's questionnaire, she gave seemingly contradictory answers with respect to whether she would consider life in prison for an individual convicted of racketeering offenses. But she explained at voir dire that she had been confused by the wording of the question. More importantly, she expressed unhesitatingly that she would consider both life in prison and the death sentence:

> Q: [T]he question I have for you is whether you would consider those both—those two options?
>
> A: Oh, yes.
>
> Q: Or automatically choose one over the both?
>
> A: No. No.
>
> Q: You would consider both?
>
> A: I would consider both.

Later in voir dire, Juror 119 did say that she would "lean heavily towards the death penalty for … intentional killing." When the district judge followed up on this statement, Juror 119 initially expressed some equivocation, stating that she was "not sure" whether she could keep an open mind about the sentencing options. The judge continued to probe Juror 119:

> Q: Let me ask you this question: I'm not asking you to tell me what your decision will be. What I'm asking you is, are you willing

in good faith, to go through the process of considering and weigh both options?

A: Yes.

Q: As part of that, would you be willing to consider and weigh the aggravating factors presented by the government and the mitigating factors presented by the defendant?

A: Yes.

Q: Would you be able to follow the Court's instructions on those points?

A: Yes. I would have to.

The judge concluded that Juror 119 "could in good faith weigh both options."

We conclude that the judge did not abuse his discretion. In making his judgment, he followed the instructions from *Hager* precisely, following up with a series of shorter, simpler questions when the juror manifested some initial equivocation. The juror answered these questions unambiguously, making clear that she was not "irrevocably committed to imposing the death penalty." *United States v. Caro*, 597 F.3d 608, 615 (4th Cir. 2010).

As we have previously noted, a juror's mind need not be a blank slate. *See United States v. Jones*, 716 F.3d 851, 857 (4th Cir. 2013) ("Because jurors will have opinions from their life experiences, it would be impractical for the Sixth Amendment to require that each juror's mind be a tabula rasa"). "[I]f a district court views juror assurances of continued impartiality to be credible, the court may rely upon such assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice." *Id.* (quoting *United States*

v. Corrado, 304 F.3d 593, 603 (6th Cir. 2002)). The judge in the present case acted within his discretion in crediting Juror 119's assurances that she could follow the law and consider all sentencing options.

V

During the third phase of trial—the sentence selection phase, during which the jury decided whether to impose life imprisonment without the possibility of release or the death penalty—the government sought to prove that Umaña had committed several murders in Los Angeles in 2005. To that end, it introduced into evidence the transcript of an interrogation of Umaña, conducted by Los Angeles police detectives while he was in state custody in North Carolina. During the interrogation, Umaña placed himself at the two scenes of the Los Angeles murders, although he denied actually committing the murders. Even so, the evidence helped the government implicate Umaña in the murders because no evidence indicated that anyone but Umaña was present at the two locations, and the same gun was used to commit all of the murders.

Challenging the introduction of the transcript, Umaña contends that the statements he made during the interview were obtained in violation of his *Miranda* rights and, in any event, were given involuntarily, in violation of the Fifth Amendment. He bases his argument on the fact that during the interview, the Los Angeles detectives repeatedly told him that his statements would not "affect" the North Carolina case and that his statements would not "cost" him anything, when in fact they were used against him in this case.

As to his *Miranda* claim, the record shows that after the Los Angeles detectives read Umaña a *Miranda*

warning in Spanish, they followed up with questions to ensure that he understood, again speaking to him in Spanish:

Detective:	Do you understand what I'm saying?
Umaña:	Yes.
Detective:	Do you want to talk about, uh, what we want to talk about here of things that happened in Los Angeles … freely?
Umaña:	I already told you, let's see about it.
Detective:	Okay.
Umaña:	Yes.
Detective:	Yes? Okay. …
Umaña:	You will be explaining more things.

The detective who conducted this interview later testified that he thought that Umaña understood his right to remain silent and intended to waive that right. The district court found the officer to be credible and that Umaña's response of "Yes," plus his subsequent willingness to answer questions, indicated that he did indeed intend to waive his *Miranda* rights and speak with the detectives.

We agree. "To effectuate a waiver of one's *Miranda* rights, a suspect need not utter any particular words." *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000). A suspect impliedly waives his *Miranda* rights when he acknowledges that he understands the *Miranda* warning and then subsequently is willing to answer questions. *See United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996). That is precisely what happened in this case.

Umaña contends that, in any event, his statements were extracted involuntarily, in violation of his Fifth Amendment rights, because the Los Angeles detectives said that Umaña's statements would not "cost" him anything or "affect" him. He identifies 10 such comments that occurred over the course of a two-and-one-half hour interview. For example, when asking about the Fairfax Street murders, one detective stated: "Why don't we go ahead and clear up everything in the past that you've done in Los Angeles. It doesn't cost you anything." And, referring to the North Carolina investigation, a detective stated: "We don't … want to affect the case here at all."

To determine whether a statement or confession was obtained involuntarily, in violation of the Fifth Amendment, "[t]he proper inquiry 'is whether the defendant's will has been overborne or his capacity for self-determination critically impaired.'" *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (en banc) (quoting *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987) (internal quotation marks omitted)). To make this determination, we consider "the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *Pelton*, 835 F.2d at 1071.

We have consistently declined to hold categorically that a suspect's statements are involuntary simply because police deceptively highlight the positive aspects of confession. For example, in *United States v. Whitfield*, 695 F.3d 288 (4th Cir. 2012), we refused to find a confession involuntary where the police officers told the suspect that by talking to them he "would do 'nothing but help[] [himself].'" *Id.* at 303 n.8 (alterations in original). Similarly, in *Rose v. Lee*, 252 F.3d 676 (4th Cir. 2001), we held that "the cryptic promise that 'things

would go easier' on [the suspect] if he confessed [did not] amount[] to unconstitutional coercion." *Id.* at 686; *see also United States v. Rutledge*, 900 F.2d 1127, 1128, 1131 (7th Cir. 1990) (finding that the statement "all cooperation is helpful" was the sort of "minor fraud that the cases allow" and did not make subsequent statements involuntary). "The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity … does not automatically render a confession involuntary." *Braxton*, 112 F.3d at 780. Rather, we must look at the totality of the circumstances to see if Umaña was not acting of his own volition.

Considering the entirety of the interrogation, we conclude that Umaña's statements were made voluntarily. While the detectives' statements may have been misleading, they never amounted to an outright promise that nothing Umaña said would ever be used against him. Rather, they were akin to the cryptic encouragement we allowed in *Whitfield* and *Rose*. *See also Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns").

Moreover, Umaña's statements and behavior during the interrogation belie any notion that he thought his statements could not be used against him. When the detectives were pushing him to confess to the Fairfax Street murders, he observed that "later on you're going to come to me with another case," obviously indicating that he knew his words could be used against him. And despite the detectives' suggestions that confessing would not "cost" him anything, Umaña never did so. His most significant "confessions" were to admit to being in the car during the Fairfax Street mur-

ders and dropping off the shooters in Lemon Grove Park. But he never admitted to committing any of the murders. To the contrary, throughout the interrogation, Umaña's statements were evasive and misleading. For example, when an officer asked, "[W]ho fired at the two dead persons?," Umaña first responded, "I don't know that," and then, "Look … perhaps my hands, perhaps someone else's hands, perhaps Negro's hands, perhaps Chipie's hands." At one point, he began rapping an MS-13 song to deflect the focus of the interview. Umaña had experience in prior police interrogations, and in this case he was given a *Miranda* warning and acknowledged that he understood it. We have little doubt that Umaña knew what he was doing as he played a cat-and-mouse game with detectives.

At bottom, we conclude that there simply was no evidence that Umaña thought his statements would not be used against him, and we decline to conclude that any violation of his Fifth Amendment rights against self-incrimination occurred.

VI

During the sentence selection phase of trial—again in connection with the Los Angeles murders—the district court allowed the government to introduce hearsay statements of MS-13 members accusing Umaña of committing the murders. Specifically, the court allowed detectives to testify at trial about their interviews with Luis Ramos, Luis Rivera, and Rene Arevalo. The court also allowed the government to introduce the transcripts of the interviews with Rivera and Arevalo.

Umaña objected to the evidence on the grounds that it (1) violated his right to confrontation under the

Sixth Amendment and (2) constituted unreliable hearsay. The district court overruled the objections, holding that the Confrontation Clause does not apply to the sentence selection phase of capital sentencing and that the hearsay statements bore sufficient indicia of reliability and trustworthiness to be admissible during sentencing. Umaña now contends that the district court erred on both counts. We address each, seriatim.

A

Umaña argues that "it is clear from the Sixth Amendment's text and history, the Eighth Amendment, and the statutory requirements of the [Federal Death Penalty Act] that the right to confrontation applies throughout the sentencing phase of a federal death penalty case." Recognizing that the Sixth Amendment has traditionally not been applied during sentencing, he argues that the death penalty is qualitatively different from other punishments and that application of the Confrontation Clause would enhance reliability in the determination that death is the appropriate punishment.

Courts have long held that the right to confrontation does not apply at sentencing, even in capital cases. In *Williams v. New York*, 337 U.S. 241 (1949), a state judge imposed the death penalty on a defendant based on (1) the evidence presented to the jury at trial, (2) "additional information obtained through the court's Probation Department," and (3) information obtained "through other sources," as authorized by state law. *Id.* at 242-43 (internal quotation marks omitted). The defendant challenged the constitutionality of the sentence because it was "based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for

cross-examination or rebuttal." *Id.* at 243 (quoting *People v. Williams*, 298 N.Y. 803, 804 (1949)). In rejecting the challenge, the Supreme Court noted that in modern sentencing, which seeks a punishment that fits the offender, not just the crime, the sentencing judge should be able to consider "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. If that information were "restricted to that given in open court by witnesses subject to cross-examination," it would become "unavailable." *Id.* at 250. The Court explained that "the type and extent of this information [necessary to the 'practice of individualizing punishments'] make totally impractical if not impossible open court testimony with cross-examination." *Id.* The Court also explained that sentencing is a highly discretionary function, which is distinct from finding guilt, where due process requires that the factfinder be "hedged in by strict evidentiary procedural limitations." *Id.* at 246. The *Williams* Court indicated that the standard is no different for capital cases, stating, "We cannot accept the contention" that "we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed." *Id.* at 251.

We conclude that *Williams* squarely disposes of Umaña's argument that the Sixth Amendment should apply to capital sentencing.

Umaña maintains nonetheless that intervening case law has eroded *Williams*, which he characterizes as containing "analysis of a bygone era of untrammeled judicial discretion." But he provides no authority suggesting that *Williams* has been overruled. To the contrary, *Williams* remains good law. The Supreme Court recently affirmed its viability in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), in which the Court recit-

ed *Williams*' holding that "the Sixth Amendment does not govern" "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" *Id.* at 2161 n.2 (quoting *Williams*, 337 U.S. at 246). And we recently held in *United States v. Powell*, 650 F.3d 388 (4th Cir. 2011), that "a sentencing court [may] consider 'any relevant information before it, including uncorroborated hearsay, provided that the information has sufficient indicia of reliability to support its accuracy.'" *Id.* at 392 (quoting *United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010)). Indeed, in *Powell*, we specifically rejected the claim Umaña now makes that intervening case law undermined *Williams*, holding that "[r]ecent Confrontation Clause decisions do not require us to reconsider this settled distinction between trial evidence and sentencing evidence in the hearsay context." *Id.*

Moreover, Umaña's suggestion that evidence at sentencing be restricted by the Confrontation Clause would frustrate the policy of presenting full information to sentencers. As the *Williams* Court pointed out, "Modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." 337 U.S. at 247. Indeed, this policy has repeatedly been recognized as essential to sentencing "reliability." *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (noting in the Eighth Amendment context, "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision"); *see also Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (invalidating a North Carolina death penalty statute for failing to allow defendants to put on evi-

dence of their particular character and the circumstances of their offense). In *United States v. Fields*, 483 F.3d 313, 336 (5th Cir. 2007), the court explained:

> Where the [Supreme] Court discusses the need for reliability in the Eighth Amendment context, it is not talking about the appropriate sources for information introduced at sentencing or even, more generally, about the reliability of evidence. It is instead focusing on (1) the need to delineate, *ex ante*, the particular offenses for which death is a proportionate punishment and (2) the need for the jury to be able to consider all factors (particularly mitigating, but also aggravating) relevant to choosing an appropriate punishment once the death penalty is in play.

We agree with *Fields*. A policy of full information during sentencing, unrestricted by the strict rules of evidence, enhances reliability by providing the sentencing jury with more relevant evidence, whether presented by the government or the defendant. To now impose the rigorous requirements of confrontation would not only be a setback for reliable sentencing, it could also "endlessly delay criminal administration in a retrial of collateral issues." *Williams*, 337 U.S. at 250.

Finally, Umaña contends that the Confrontation Clause should apply to every fact that the jury finds, even during the sentence selection phase, because facts of guilt and punishment are "constitutionally significant." He argues that jury factfinding of aggravating factors during the sentence selection phase of trial "alters the legally prescribed range *and* does so in a way that aggravates the penalty." (Quoting *Alleyne*, 133 S. Ct. at 2161 n.2). We find this argument unpersuasive.

During the sentence selection phase of a capital trial, the jury exercises discretion in selecting a life sentence or the death penalty, and any facts that the jury might find during that phase do not alter the range of sentences it can impose on the defendant. Under the Federal Death Penalty Act, the jury finds the facts necessary to support the imposition of the death penalty in the guilt and *eligibility* phases of trial. *See* 18 U.S.C. §§ 3591-3596. It is only during these phases that the jury makes "constitutionally significant" factual findings.

Only after finding Umaña death penalty eligible did the jury in this case consider hearsay evidence to assist it in exercising its discretion to select the appropriate sentence. During the selection phase, a jury is not legally required to find any facts. And while it may do so, such facts are neither necessary nor sufficient to impose the death penalty—they merely guide the jury's discretion in choosing a penalty. As the Supreme Court has recently explained:

> Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. *Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment "within limits fixed by law." Williams v. New York*, 337 U.S. 241, 246 (1949). While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing.

Alleyne, 133 S. Ct. at 2161 n.2 (emphasis added).

Accordingly, we conclude that the Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase of capital sentencing. *Accord Muhammad v. Sec'y, Fla. Dep't of Corrections*, 733 F.3d 1065, 1073-77 (11th Cir. 2013); *Fields*, 483 F.3d at 337-38. The district court's holding that the Confrontation Clause did not prevent the government from introducing the hearsay statements of Umaña's coconspirators during the selection phase of sentencing is therefore affirmed.

B

Regardless of whether the Confrontation Clause applies, Umaña challenges the admission of the hearsay testimony in this case on the ground that it did not bear "sufficient indicia of reliability to support its probable accuracy." *Powell*, 650 F.3d at 394 (quoting U.S.S.G. § 6A1.3(a)). We review the district court's ruling in this regard for abuse of discretion. *See United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009).

With respect to the Fairfax Street murders, Umaña argues that the hearsay statements of Ramos, Rivera, and Arevalo—all of whom accused him of being the shooter—did not bear sufficient indicia of reliability. He argues that their statements were not corroborated by independent evidence; that any similarities in their statements were on "undisputed peripheral details"; that Rivera and Ramos spent a weekend in jail together before telling the same stories; that the statements were the product of police pressure; that they were contradicted in some respects by neutral observers; and that they were self-serving inasmuch as they exculpated the accusers, *see Lee v. Illinois*, 476 U.S. 530, 541 (1986) (noting that "accomplices' confessions that incriminate defendants" are "presumptively unreliable").

While these are all legitimate arguments, we conclude that the court had other evidence that rendered the hearsay testimony sufficiently reliable to overcome any presumption and support its discretion in admitting the evidence. First, there was undisputed ballistics evidence indicating that the same gun was used for both the Fairfax Street and Lemon Grove Park murders. Umaña admitted to being at the scene of both crimes, and there is no evidence that anyone else was present at *both* murder sites. Moreover, there was strong evidence, as discussed below, linking Umaña to the Lemon Grove Park murder. Umaña attempts to explain away the significance of the ballistics match by suggesting that MS-13 members sometimes share guns, but there was no evidence that Umaña himself ever shared his gun. In addition, there was not just one accusation against Umaña by the declarants, but three. To be sure Ramos's accusation arose only after he spent the weekend in jail with Rivera, but there is no evidence that either Rivera's or Arevalo's accusations were tainted by collusion. Finally, as the district court noted, the statements themselves contained many other consistent details, such as the "make and model of car involved, the presence of crutches, the names of the other participants, the number of victims, and the specific gang signs displayed by the victims." In light of all of these circumstances, we conclude that the district court did not abuse its discretion in finding the hearsay accusations of Rivera, Ramos, and Arevalo regarding the Fairfax Street murders sufficiently reliable to admit them into evidence.

With respect to the Lemon Grove Park murder, the government introduced Arevalo's hearsay statement accusing Umaña of committing the crime. As with the Fairfax Street murders, the ballistics evidence provid-

ed support for the reliability of Arevalo's accusation. Moreover, Freddie Gonzalez—the target of the Lemon Grove Park attack who escaped—identified Umaña in open court as the assailant. This evidence, we conclude, provided Arevalo's accusation with sufficient indicia of reliability to warrant its admission at sentencing. *See* U.S.S.G. § 6A1.3(a).

At bottom, we conclude that the district court did not abuse its discretion in admitting the hearsay evidence about the Los Angeles murders during the sentence selection phase of trial.

VII

Umaña next contends that the district court abused its discretion in admitting the transcripts of the detectives' interviews of Rivera, Arevalo, and Umaña himself on the ground that the transcripts included the detectives' statements vouching for the credibility of several MS-13 members during the interviews, which, he argues, amounted to improper government vouching at trial. He points out that during the course of the interviews, the detectives told Rivera, for example, "I'm kind of buying your story here," and Arevalo, "You don't seem like the guy that did that." In the interview of Umaña himself, a detective stated that Ramos, Arevalo, and Rivera were "in jail right now for something that he did."

Umaña did not make this objection at trial, and accordingly we review it under the plain error standard. That standard requires Umaña to demonstrate (1) that the admission of the evidence was error; (2) that the error was plain; and (3) that it affected his substantial rights. Even then, we may only exercise our discretion as to whether to notice the error if it seriously affected

the fairness, integrity, or public reputation of the proceedings. *See Johnson v. United States*, 520 U.S. 461, 466-67 (1997).

While government vouching for the credibility of its own witness is inappropriate, it is generally improper only when it comes to the jury at trial from the prosecutor's indication of his personal belief about the credibility of a witness, although it could also be improper for the prosecutor to solicit similar vouching from government witnesses. *See United States v. Lewis*, 10 F.3d 1086, 1089 (4th Cir. 1993).

In this case we find no error, much less plain error. A reasonable jury would not take the detectives' comments during the interviews as vouching for the trustworthiness of the witness being interviewed, but rather as interrogation devices designed to encourage the witness to talk. Patronizing a witness with positive comments in order to uncover evidence of criminal conduct, when introduced by the prosecutor in a transcript, can hardly be taken as a prosecutor's opinion that the witness was trustworthy. And admitting several such isolated comments embedded in voluminous transcripts would not in any event be plain error that affected Umaña's substantial rights.

In a similar vein, Umaña challenges as vouching a question by the prosecutor during trial to a detective who interviewed Ramos, Arevalo, and Rivera, in which he asked what was "consistent among all of the individuals [he] interviewed." We find that this question was not vouching at all, but a factual inquiry to uncover statements common among the witnesses.

For these reasons, we reject Umaña's vouching claims.

VIII

Umaña contends that the district court abused its discretion in refusing to permit him—during the sentence selection phase—to introduce evidence of the murders committed by his RICO coconspirators, who were also MS-13 members. He argues that the evidence was relevant to show that his own violent proclivities were not unique but rather were a "product of social conformity."

The district court applied 18 U.S.C. § 3592(a)(8), which provides for the admission of evidence in the sentence selection phase relating to the "defendant's background, record, or character or any other circumstance of the offense that mitigate[s] against imposition of the death sentence," and concluded that evidence of other MS-13 murders was "irrelevant to his character or the circumstances of his offenses." In addition, the court concluded that such evidence would "confuse and mislead the jury." *See* 18 U.S.C. § 3593(c) (authorizing the judge to exclude evidence if "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury").

We conclude that the district court did not abuse its discretion. It is difficult to imagine that giving the jury evidence of unrelated murders by MS-13 members would contribute to the individualized decision of whether to impose the death penalty on Umaña. Indeed, it might even work against him, linking him with a number of other unrelated murders. Moreover, whatever benefit Umaña might have obtained from introducing such evidence was already available to him from evidence in the record. For example, an MS-13 member testified that he had once acted as a lookout while another MS-13 member "robbed two drunk His-

panic guys," and one of the victims "was shot dead" during the robbery. Another MS-13 member testified about the activities his clique engaged in: "Sell drugs, rob people, try to kill people." A detective testified that MS-13's motto was "Mata, Violar, Controla," which translates to "Kill, Rape, Control." Finally, the jury had a copy of the indictment, which listed many of the murders about which Umaña wanted to submit evidence.

The district court was appropriately concerned that if Umaña tried to prove these murders during sentencing, the process would amount to mini-trials that would take days and distract the jury. In excluding this evidence, the court acted well within its discretion.

IX

Umaña contends that during closing argument in the sentence selection phase of trial, the prosecutor made a number of improper statements to the jury that were sufficiently prejudicial as to require reversal of the death penalty verdict. *See United States v. Scheetz*, 293 F.3d 175, 185-86 (4th Cir. 2002). But Umaña objected to only one of the statements when made at trial, and therefore we will review the others for plain error. *See United States v. Woods*, 710 F.3d 195, 202 (4th Cir. 2013); *United States v. Adam*, 70 F.3d 776, 780 (4th Cir. 1995).

A

The statement that Umaña objected to was the prosecutor's comment to the jury about Umaña's attempt to bring a concealed shank (tied to his penis) into the courtroom. The prosecutor argued that Umaña tried to bring in the shank "to fight off rivals. … You know who the rivals were? They're the Marshals.

Those are his rivals. The judge is his rival. I'm his rival. Anybody in this courtroom is a rival. *You're his rival*. He brought it on the first day of jury selection." (Emphasis added). The court sustained Umaña's objection, and the prosecutor continued the closing argument thereafter making a different point—that Umaña's rival was "justice."

Umaña contends that the prosecutor's statement that "you're his rival" was improper because it encouraged the jurors to abandoned their role as "neutral adjudicators" and become "interested parties." *See United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994); *see also Caro*, 597 F.3d at 626. We agree. The prosecutor's statement portraying the jurors as Umaña's rivals was improper. Indeed, the government concedes that it was "ill-advised."

Nonetheless, we conclude that it was not so prejudicial as to deprive Umaña of a fair sentencing trial. The comment was isolated and did not constitute a pervasive theme throughout the closing argument. Moreover, its effect could only be minimal in light of the fact that Umaña did indeed try to bring a shank to the jury selection proceeding, which likely influenced the jurors more than did the prosecutor's statement. In addition, we think that, in light of Umaña's attempt to bring the shank to the jury selection, the prosecutor's comments were, to some degree, invited.

In sum, while the remark was inappropriate, we do not believe that it was so prejudicial as to call into question the integrity of the jury's death sentence. The jury found every aggravating factor beyond a reasonable doubt, making it unlikely that the isolated comment was material to its decision.

B

The other comments made during the government's closing argument that Umaña challenges were not objected to when made, and therefore we review them under the plain error standard.

Umaña contends that the prosecutor misleadingly compared him to other MS-13 members with the following comment:

> Let's bring something back to the front here and that's that this defendant is compared with other MS 13 members according to what they would have you believe, because all those MS 13 members were framed and formed and created out of El Salvador.
>
> * * *
>
> So let's compare him to the people around him and quit taking him out and separating him and looking at him as if he is only this way because of factors. He's here because of who he is. And he's a killer. He's shown it over and over and over again. And he's a killer among killers. They talk about killing, yeah. But we haven't had any evidence of it. And of all the people that were around him, he was the killer. He rose to the top as the killer.
>
> * * *
>
> He's the only killer.

Umaña argues that it was improper for the prosecutor to refer to him as the "only killer" in MS-13 when he was not permitted to put on evidence to the contrary.

First, as we have already concluded, the district court acted within its discretion in refusing to allow

Umaña to submit additional evidence regarding murders committed by other MS-13 members. Moreover, Umaña misreads the statement, "He's the only killer." When taken in context, the government clearly could not have meant that Umaña was the only member of MS-13 who had committed murder. Indeed, shortly before making that statement, the prosecutor stated that Umaña was a "killer *among killers*." (Emphasis added). Finally, there was ample evidence before the jury that other MS-13 members committed murders, as we have already summarized.

We conclude that the statement can reasonably be taken only as commenting that among the MS-13 members in the RICO conspiracy charged in the case, Umaña was the only one who pulled the trigger in the Salinas brothers' murders. If the statement was error, it was not plain error, nor did it affect Umaña's substantial rights.

C

Umaña claims next that the prosecutor made the following improper comment:

> But you know what we heard today from one of their witnesses? There are only 240 MS-13 members in prison. And I can promise you that if one of them was there for life and was behaving, we would have heard all about it.

Umaña notes that the district court had earlier denied his motion to obtain data from the Bureau of Prisons regarding the behavior of incarcerated MS-13 members. Nonetheless, he obtained the evidence he wanted when he called as a witness a retired warden for the Bureau of Prisons who testified that MS-13 is not considered an especially serious security risk in the prison

environment. Understood in that context, the prosecutor's statement was just a critique of this testimony, and we find nothing improper about it.

D

Next, Umaña objects to the prosecutor's comment made during closing argument that "[y]ou want to bring El Salvador here. … [Y]ou'd better be ready for some American justice." He argues that the statement "invoked an us-versus-them theme" that did nothing more than encourage "[r]acial prejudice." The government argues that the comments were not inappropriate in view of the fact that Umaña's mitigation case turned on his upbringing in El Salvador, and therefore it was appropriate to "urg[e] the jury to hold him to American standards of justice."

We cannot agree that the comment that Umaña should be "ready for some American justice" responds to Umaña's mitigation case that his impoverished El Salvadoran upbringing was responsible for his criminality. But the statement was isolated in only a small part of the prosecutor's closing argument. Moreover, any prejudice that the statement may have caused was likely dwarfed by the racial prejudice Umaña himself incited in letters he had written from prison evincing strong anti-American rhetoric. For example, one letter in evidence claimed that "2012 and 2013 … are when these little Americans are going to be humiliated by all Hispanics from Central America, South America, and Latin America, especially by prisoners, drug dealers, mafias, and gangbangers."

Finally, the district court instructed the jury that national origin could not play a part in its verdict, and each juror certified in writing that it had not.

As such, even if the error was plain, we conclude that it did not affect Umaña's substantial rights.

E

Next, Umaña challenges the following prosecutorial statement made during closing argument:

> [I]f you give him life, [he] is going to have his inmate bill of rights. … He took lives. Are you going to give him his bill of rights? Manuel and Ruben didn't have a bill of rights.
>
> * * *
>
> They cease to become living, breathing humans and became a corpse. Well, they're a corpse. And they're a corpse and you're going to send him to the dining hall. Is that justice?

Umaña argues that this statement improperly compared the plight of the victims with life in prison, thus making light of a term of life imprisonment without the possibility of release.

We do not believe that it was error, much less plain error, for the prosecutor to have compared Umaña's potential prison sentence with the plight of the victims. In *United States v. Runyon*, 707 F.3d 475, 513 (4th Cir. 2013), the prosecutor "made a number of comments contrasting the criminal justice system's treatment of [the defendant] with [the defendant's] treatment of [the victim]." We declined to find such comments to be improper, noting that "it is, of course, perfectly permissible for the prosecution to urge the jury not to show a capital defendant mercy." *Id.* In *Runyon*, we thought that "the whole matter represent[ed] the sort of thrust and parry in which attorneys typically engage in the

course of their last chance to persuade a jury." *Id.* We reach the same conclusion here.

F

Finally, Umaña challenges the prosecutor's use of religious imagery during the course of closing argument. When discussing Umaña's letters, sent while he was in prison, the prosecutor said:

> This [letter] is called—it's got a title. One more day with the beast. Do you remember who the beast is? It's tattooed on his body. It's in his heart. It's the devil. It goes like this:
>
> > "One more day has now begun and I thank the beast that we keep on standing here with a joint of weed and a fully loaded gun, ready and prepared to go out into the streets like I have always planned. …"

Umaña argues that, in these comments, the prosecutor was "compar[ing] [him] to 'the devil.'"

To be sure, we have condemned "religiously charged arguments as confusing, unnecessary, and inflammatory." *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996). In this case, however, prejudice could hardly have occurred, as Umaña's conduct amply invited reference to the devil. When he was in the courtroom, he "threw" MS-13's gang sign—the horns of the devil. Moreover, he had tattoos of devilish figures on his body. And, of course, his prison letters—including the one that the prosecutor read immediately after she made the beast comment—contained vivid imagery evoking the devil. While it might have been better not to make so explicit or direct an allusion to the devil and its place in Umaña's heart, we cannot conclude that, in

context, the comment so prejudiced Umaña as to affect his substantial rights.

In sum, we conclude that the prosecutorial statements made during closing argument either were not error or, if they were, were not sufficiently prejudicial to require vacating the death penalty verdict.

X

Umaña next challenges the district court's decision to allow the government to prove "future dangerousness" as a nonstatutory aggravating factor during the sentence selection phase of the trial. He argues that, in the prison context, the jury can never make a prediction about future dangerousness on any reliable basis. He points to several empirical studies by Mark Cunningham, his defense expert, who reported a lack of correlation between future dangerousness findings and actual prison violence.

We have, however, previously rejected this precise argument, holding that whether a defendant would pose a danger to others while in prison is a proper question for the jury. *See Hager*, 721 F.3d at 200. As we said in *Hager*, "Perhaps we might someday be presented with a case in which we are persuaded that the evidence presented as to a defendant's future dangerousness was merely speculative or that it was constitutionally infirm." *Id.* Like in *Hager*, we conclude that this is not such a case. Indeed, there was ample evidence presented in this case to allow the jury to find that Umaña was likely to commit criminal acts of violence in the future, even in prison, and that he would constitute a continuing and serious threat to the lives and safety of others.

With respect to this aggravating factor, Umaña also challenges the structure of the verdict form because it allowed the jury only to indicate that it had found the particular subfactors and did not give the jury an opportunity to indicate whether or not they had found the "overarching aggravator" of future dangerousness. Umaña argues that this created a "presumption" of future dangerousness upon finding any one of the subfactors.[1]

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[1] The form that the district court submitted to the jury for the purpose of finding the aggravating factor of future dangerousness appears as follows:

> Do you, the jury, unanimously find that the government has proven beyond a reasonable doubt that the defendant is likely to commit criminal acts of violence in the future which would constitute a continuing and serious threat to the lives and safety of others, as evidenced by at least one or more of the following:
>
> a. The defendant has engaged in a continuing pattern of violence, attempted violence, and threatened violence, including but not limited to the crimes alleged against the defendant in the Indictment.
>
> Yes: _____ No: _____
>
> b. The defendant poses a future danger to the lives and safety of other persons as demonstrated by his lack of rehabilitation after incarceration, his pattern of criminal conduct, and his allegiance to and membership in MS-13?
>
> Yes: _____ No: _____
>
> c. The defendant has never expressed any remorse for killing Ruben Garcia Salinas as indicated by defendant's statements to fellow gang-members during the course of and following the offenses alleged in the Indictment?
>
> Yes: _____ No: _____

We disagree with Umaña's reading of the form. To be sure, we think that the form would have been clearer had the introductory language ended after the first two lines and had each lettered paragraph thereafter begun with future dangerousness language. But the form as used did not create any presumption, as Umaña argues. Rather, it presented the jury with four specific factual circumstances of future dangerousness on which the government presented evidence. The form was not designed to permit the jury to find future dangerousness except by finding one or more of the specific facts evidencing future dangerousness. And, of course, the form permitted the jury to find a fact evidencing future dangerousness only if they were unanimous and the fact was proved beyond a reasonable doubt.

XI

Umaña argues that he should have been allowed to submit evidence regarding the impact that his execution would have on his wife and child. This argument, however, is squarely foreclosed by our decision in *Hager*, 721 F.3d at 194 ("[A]llowing a capital defendant to argue execution impact as a mitigator is improper").

XII

Umaña next contends that his death sentence violated the Eighth Amendment because he was only convicted of "second degree murder." He points out that the verdict form in this case reflected a finding that he committed murder, but not an additional finding that he

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d. The defendant has demonstrated an allegiance to and active membership in MS-13, a violent criminal enterprise?

Yes: _____ No: _____

did so with "premeditation and deliberation." He therefore argues that the jury's finding of guilt was sufficient to "establish only a conviction for second degree murder." Moreover, he maintains that there is a "national consensus … against death as a punishment for second degree murder." He explains that because second degree murder is "unpremeditated malice killing," it is "not well suited to capital punishment" because such murders cannot be deterred by the death sentence. Finally, he asserts that only nine States "authorize death for the second degree murders that occurred here."

The death-qualifying conduct that the jury found in this case was (1) that Umaña murdered the Salinas brothers in aid of racketeering for the purpose of maintaining or increasing his position in a racketeering enterprise, in violation of § 1959(a)(1); (2) that he used a firearm in relation to a crime of violence resulting in the deaths of the Salinas brothers and that the killings were done "with malice aforethought," in violation of § 924(c) and (j)(1); and (3) that he killed the two brothers and attempted to kill another person "in a single criminal episode." The jury also found that the other criteria for imposing the death penalty, as contained in the Federal Death Penalty Act of 1994, were satisfied in this case. The question raised by Umaña's challenge is whether the death penalty, which is authorized by these statutes, is an excessive or cruel and unusual punishment for the conduct found by the jury, as prohibited by the Eighth Amendment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419

(2008) (alterations in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). To ensure proportionality, "capital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.'" *Id.* at 420 (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)) (internal quotation marks omitted). As such, States and the federal government must "limit the class of murderers to which the death penalty may be applied." *Brown v. Sanders*, 546 U.S. 212, 216 (2006). This limiting function is generally accomplished when "the trier of fact … convict[s] the defendant of murder and find[s] one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The Supreme Court has also recognized several "categorical restrictions on the death penalty." *Graham v. Florida*, 560 U.S. 48, 59 (2010). In so doing, the Court uses the following approach:

> [It] first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Id. at 61 (quoting *Roper*, 543 U.S. at 563, and *Kennedy*, 554 U.S. at 421).

These Eighth Amendment principles do not suggest, as Umaña urges, a categorical ban on capital punishment for "second degree murders." To the contrary, the Supreme Court has explicitly approved a plethora of aggravating factors that afford the jury "wide discretion" in crimes "where the victim dies." *Kennedy*, 554 U.S. at 440. And there is no indication by the Court that the States or the federal government must include premeditation or deliberation as a required aggravating factor. Indeed, the Court has repeatedly upheld death penalty schemes that did not require a finding of premeditation and deliberation. For instance, in *Arave v. Creech*, 507 U.S. 463 (1993), the statute under which the defendant was convicted defined "first degree murder" to include not only premeditated murders but also murders where, for example, (1) the victim was a fellow prison inmate or law enforcement officer, (2) the defendant was already serving a sentence for murder, (3) the murder occurred during a prison escape, or (4) the murder occurred during the commission of specified felonies. *Id.* at 475. In the context of that statute, the Court found sufficiently narrowing as an aggravating factor the fact that the defendant was a "cold-blooded, pitiless slayer." *Id.* at 472-76. Similarly, in *Jurek v. Texas*, 428 U.S. 262 (1976), the Court upheld the death penalty for murder that had to be deliberate but not premeditated and where the jury made a finding of future dangerousness. *Id.* at 269 (describing the regime). And in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court upheld the death penalty for a participant in a felony murder who had not actually committed the murder. The Court held that the defendant's "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" *Id.* at 154. In short, there is no suggestion that

capital punishment is appropriate only for murders involving premeditation and deliberation.

In the same vein, a survey of state statutes reveals a lack of any national consensus that premeditation and deliberation are necessary to qualify a defendant for the death penalty. Most state statutes that divide murder into degrees include in "first degree murder" more than just premeditated murders. The overwhelming majority include felony murders and make them punishable by death without any showing of premeditation.[2] And there are numerous examples of other types of murder, for which the penalty may be death, that do not require premeditation or deliberation.[3] The

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[2] On our review of the 22 States that divide murders into degrees, 17 make felony murder without premeditation a capital crime. *See* Ariz. Rev. Stat. Ann. § 13-1105; Ark. Code Ann. §§ 5-10-101 to -102; Cal. Penal Code §§ 189, 190; Colo. Rev. Stat. §§ 18-3-102, -1.3-1201; Del. Code Ann. tit. 11, § 636; Idaho Code Ann. §§ 18-4003 to -4004; La. Rev. Stat. Ann. § 14:30; Miss. Code Ann. § 97-3-19; Neb. Rev. Stat. § 28-303; Nev. Rev. Stat. § 200.030; N.H. Rev. Stat. § 630:1; N.C. Gen. Stat. § 14-17; Okla. Stat. tit. 21, §§ 701.7, 701.9; S.D. Codified Laws §§ 22-16-4, -6-1; Tenn. Code § 39-13-202; Wash. Rev. Code §§ 10.95.020-.030; Wyo. Stat. Ann. § 6-2-101.

And in the 10 States that do not include degrees, all 10 provide for capital punishment for felony murder absent any premeditation. *See* Ala. Code § 13A-6-2; Ga. Code Ann. § 16-5-1; Ind. Code §§ 35-42-1-1, 35-50-2-3; Ky. Rev. Stat. Ann. § 507.020; Mont. Code Ann. § 45-5-102; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. §§ 163.095, .105, 115; S.C. Code Ann. §§ 16-3-10 to -20; Tex. Penal Code § 19.03; Utah Code Ann. § 76-5-202.

[3] *E.g.*, Ariz. Rev. Stat. Ann. § 13-1105(A)(3) (classifying as first degree murder the unpremeditated, intentional killing of a police officer in the line of duty); Ark. Code Ann. § 5-10-101 (making it a capital crime to cause the death of a child less than 14 years of age while exercising extreme indifference to human life); Nev.

principle that may be derived from these state statutes is that capital murders are not defined solely by premeditation and deliberation, but rather by elements that make those murders particularly heinous.

The federal statutes applicable in this case follow the national consensus. Section 1959 authorizes the death penalty for murder that aids racketeering enterprises, and § 924(c) and (j)(1) authorize the death penalty for committing murder with malice aforethought, as defined in 18 U.S.C. § 1111(a), while using a firearm during and in relation to a crime of violence. The Federal Death Penalty Act further narrows the circumstances where the death penalty may be imposed by requiring that the jury find that the defendant had the requisite intentional *mens rea*, 18 U.S.C. § 3591(a)(2), and that at least one statutory aggravating factor existed, *id.* § 3593(d). The jury found the conditions satisfied in this case, including that Umaña had engaged in multiple killings. *See id.* § 3592(c)(16).

In light of the flexibility the Supreme Court affords lawmakers in determining the aggravating factors that define capital murders, *Kennedy*, 554 U.S. at 440, and because there is no nationwide consensus requiring premeditation or deliberation as required predicates for the imposition of the death penalty, we conclude that §§ 1959(a)(1) and 924(c), (j)(1), in concert with the Federal Death Penalty Act, impose sufficient narrowing criteria to satisfy the Eighth Amendment.

Umaña contends alternatively that even if the death penalty is not categorically barred as a punishment for the crimes of which he was convicted, it was nonetheless excessive in the particular circumstances

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Rev. Stat. § 200.030(1)(c) (defining as murder in the first degree murders committed to avoid arrest).

of this case. This argument merits minimal discussion. The jury found that Umaña killed two people in furtherance of a racketeering enterprise, and that he had killed before and posed a danger in the future. We conclude that the death penalty was proportional to the crimes for which Umaña was convicted.

XIII

Finally, Umaña contends—with respect to the claim he made to the district court that he is mentally retarded and therefore should not receive the death penalty—that the government should have borne the burden of proof. He does not challenge the merits of the district court's findings with respect to his claim of mental retardation. Rather, he argues that since his interest in the issue is a "matter of life and death," *see Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the death penalty is inappropriate for mentally retarded defendants), the government should have borne the burden to prove him competent and, because it did not carry the burden, he should not have received the death penalty.

We conclude that Umaña cannot now make this argument. He argued below that he had the burden of proof on the issue, and any error that he now claims was invited by him. In his motion for a pretrial hearing on mental retardation, he stated:

> Because Defendant's court-appointed neuropsychologist has obtained a full-scale IQ result of 66, it appears that there is a substantial possibility that Defendant will ultimately be able to *carry his burden of establishing by a preponderance of the evidence* that he is mentally

> retarded and thus ineligible for the death penalty.

(Emphasis added). This statement by Umaña that he bore the burden of proving mental retardation was not an errant mistake. In two other motions requesting a hearing on mental retardation, he included citations to various district court cases describing the procedure for such hearings, which included the following parenthetical: "finding that question of mental retardation should be resolved by the judge at a pretrial hearing, and burden should be on defendant by preponderance of the evidence." Moreover, at the hearing itself, the district court stated at the outset that the burden would be on Umaña to prove mental retardation by a preponderance of the evidence, and Umaña did not object. He cannot now complain that the district court followed the very procedure that he requested. *See United States v. Lespier*, 725 F.3d 437, 449-51 (4th Cir. 2013).

In any event, we conclude that Umaña correctly stated the law in representing to the district court that he had to carry the burden of proof on the issue. When a defendant seeks to show that he is mentally retarded, he is putting on an *affirmative defense* that would preclude execution, *see Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005), and defendants may constitutionally be made to bear the burden of proof for affirmative defenses, *see Leland v. Oregon*, 343 U.S. 790, 799 (1952) (holding, in the context of a capital case, that States may require defendants to bear the burden of proving insanity beyond a reasonable doubt); *see also Patterson v. New York*, 432 U.S. 197, 210 (1977) ("Proof of the non-existence of all affirmative defenses has never been constitutionally required").

Umaña now argues that, as a matter of due process, the government must bear the burden of proof on mental retardation, citing *United States v. Bush*, 585 F.3d 806, 814 (4th Cir. 2009), where we held that the involuntary administration of antipsychotic drugs to restore a defendant's competence for trial required the government to prove the relevant factors by clear and convincing evidence. *See also Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (concluding that the government's proof must meet a "clear and convincing evidence" standard for civil commitment). These cases, however, are inapt comparisons. When the government seeks to involuntarily commit or medicate a defendant, it is not presenting an affirmative defense but attempting to infringe on the individual's constitutionally protected liberty interests. *See Sell v. United States*, 539 U.S. 166, 177-79 (2003); *Addington*, 441 U.S. at 425.

Umaña also argues that a finding of mental retardation was an *Apprendi* element of his capital offense, which would alter the prescribed range of sentences to which he was exposed and, therefore, be the government's responsibility to prove. *See Alleyne*, 133 S. Ct. at 2160. But we rejected this precise argument in *Walker*, where we stated:

> [T]he finding of mental retardation does not increase the penalty for the crime beyond the statutory maximum—death. Rather, a defendant facing the death penalty may avoid that penalty if he successfully raises and proves by a preponderance of the evidence that he is mentally retarded. The state does not have a corollary duty to prove that a defendant is "not retarded" in order to be entitled to the death penalty. Accordingly, "an *increase*" in a de-

> fendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease.

399 F.3d at 326 (citations omitted). When a defendant raises mental retardation as an issue, its resolution can only *decrease* the sentence to which the defendant is exposed, and the *Apprendi* line of cases is therefore not applicable. *See In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) ("[N]either *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt. As the state points out, the absence of mental retardation is not an element of the sentence any more than sanity is an element of an offense" (citation omitted)).

We accordingly reject Umaña's argument that the government had the burden of proving the absence of mental retardation in order for him to receive the death penalty.

XIV

Umaña has presented numerous issues in challenging his conviction and sentence, each of which has been fully presented in his fulsome brief and at oral arguments to the court. After having carefully considered each of his arguments, as well as the record in this case, we conclude that Umaña had a fair trial and that the death penalty was justified by the jury's factual findings and by law and was not imposed under the improper influence of passion, prejudice, or any other arbitrary factor. Accordingly, we affirm his conviction and sentence.

AFFIRMED

GREGORY, Circuit Judge, dissenting:

The majority opinion denies Mr. Umaña the right to confront his accusers in a jury proceeding to determine whether he lives or dies. The right to confront one's accusers is a right as old as it is important. *Cf. Acts* 25:16 ("[I]t is not the Roman custom to hand over anyone before they have faced their accusers…"). The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him" "in all criminal prosecutions." U.S. Const. amend. VI. It also guarantees the right to an attorney, jury factfinding, notice of the crimes of which a defendant is accused, and a trial in the venue where the crime was committed. *Id.*

The last four of these Sixth Amendment rights—counsel, jury, venue, and notice—are not at issue today, nor are they controversial. During Federal Death Penalty Act ("FDPA") proceedings, a defendant cannot be sentenced to death without these Sixth Amendment rights. However, under the majority's holding today, capital defendants are denied the right to confront their accusers throughout certain stages of an FDPA proceeding. In contravention of the history and text of the Confrontation Clause, and in spite of modern Supreme Court jurisprudence emphasizing the importance of the Confrontation Clause, the majority strips Umaña of the Sixth Amendment right most important for ensuring the accuracy of trial outcomes during the most important proceeding of his life.

This is an important constitutional question that the Supreme Court has not yet resolved, though three circuits have wrestled with the issue. *See Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065 (11th Cir. 2013) (finding that Confrontation Clause does not apply

to capital cases after guilty verdict); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (same); *United States v. Fields*, 483 F.3d 313, 324–338 (5th Cir. 2007) (same); *Proffitt v. Wainwright*, 685 F.2d 1227, 1252–53 (11th Cir. 1982) (finding a right to cross examine the author of a psychiatric report under the Sixth Amendment during sentencing) *modified*, 706 F.2d 311 (expressly limiting case to psychiatric reports).[1] This is an issue of first impression in this circuit, though we have held that the Confrontation Clause does not apply in non-capital sentencing. *United States v. Powell*, 650 F.3d 388, 392–93 (4th Cir. 2011).

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). I would refuse to strip a defendant of the Confrontation Clause right—a right whose "very mission … is to advance the accu-

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[1] In addition, district courts have addressed this issue, reaching conflicting results. Four district courts have found that the Clause applies. *See United States v. Stitt*, 760 F. Supp. 2d 570, 581-82 (E.D. Va. 2010); *United States v. Sablan*, 555 F. Supp. 2d 1205 (D. Colo. 2007); *United States v. Mills*, 446 F. Supp. 2d 1115, 1127–1129 (C.D. Cal. 2006); *United States v. Green*, 372 F. Supp.2d 168, 175 (D. Mass. 2005). Another district court found that the right applies, but this decision was vacated. *United States v. Jacques*, 768 F.2d 684, 698–700 (D. Vt. 2011) *vacated by United States v. Jacques*, 684 F.3d 324, 330 (2d Cir. 2012). Two district courts have found that the right applies only during the eligibility phase of sentencing, which is the second stage of FDPA trials. *See United States v. Jordan*, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005); *United States v. Bodkins*, CRIM.A. 4:04CR70083, 2005 WL 1118158 (W.D. Va. May 11, 2005).

racy of the truth-determining process in criminal trials"—at a proceeding in which a jury must decide whether a man lives or dies. *United States v. Inadi*, 475 U.S. 387, 396 (1986) (internal quotation marks and citations omitted). Accordingly, I dissent.

I.

I begin with some of the factual background that provides the foundation for my reasoning. First, one must understand the unique structure of FDPA trials, which illustrates that the Confrontation Clause should not disappear simply because a defendant is accused of a crime at a later stage of his judicial proceedings. Second, one must understand the nature of the accusations made in this particular case. Mr. Umaña was sentenced to death largely based on unconfronted testimony that was as damning as it was dubious.

The FDPA requires three jury findings before a criminal defendant can be killed by the federal government. First, the defendant must be found guilty of a death-eligible crime. 18 U.S.C. § 3591. Second, a factfinder must decide whether one of several aggravating factors exists. The factors that make a defendant eligible for death are listed by statute. 18 U.S.C. § 3593(e). Third, if such an aggravating factor is found, the factfinder must finally decide whether all aggravating factors outweigh all mitigating factors. *Id.* Unless the factfinder makes the requisite findings in each of the three stages, death is not within the permissible range of sentences.

In this case, the district judge trifurcated the proceedings so that each of the above steps was conducted separately. J.A. 3224. In the second phase, the government only sought to prove that Mr. Umaña met two

statutory aggravating factors: an attempt to kill more than one person in a single criminal episode, and the knowing creation of a grave risk of death to more than one person. J.A. 2631; *see* 18 U.S.C. § 3592(c)(5), (c)(16). In the third phase, the government sought to prove four more aggravating factors. J.A. 3543–45. Most relevant in this case, and what ultimately became the keystone of the government's argument, was whether Mr. Umaña had been involved in other acts of violence not reflected in his criminal record, specifically two separate incidents of murder in Los Angeles. J.A. 3544. The primary evidence for these crimes was a series of transcripts of police interrogations in which accomplices of Umaña who were with him during the first of two Los Angeles murder incidents claim that Umaña was the only member in their group who fired a weapon that killed two teenagers. Umaña had no opportunity to cross-examine these witnesses.

The FDPA provides a set of safeguards that applies to evidence at capital sentencing, though constitutional safeguards also apply. *See Estelle v. Smith*, 451 U.S. 454, 462–63 (1981). While evidence presented need not comport with the entirety of the Federal Rules of Evidence, information must nonetheless be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593; *accord* Fed. R. Evid. 403. In addition, the FDPA explicitly provides for rights echoing those of the Sixth Amendment. The FDPA requires that the government attorney give notice of the specific aggravating factors that will be used to justify a death sentence. *Compare* § 3593(a) *with* U.S. Const. amend. VI ("[T]he accused shall enjoy the right … to be informed of the nature and cause of the accusation."). The defendant is given the right to a ju-

ry. *Compare* § 3593(b) *with* U.S. Const. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury."). However, the statute is silent on other Confrontation Clause rights. *See generally* 18 U.S.C. §§ 3591-99. Importantly, the fact that the FDPA is silent on certain constitutional rights does not mean that those rights do not exist or that the Act is unconstitutional. *See United States v. Fulks*, 454 F.3d 410, 437–38 (4th Cir. 2006); *United States v. Sampson*, 486 F.3d 13, 22–23 (1st Cir. 2007).

Finally, in addition to understanding the structure of FDPA trials, it is important to emphasize that the unconfronted testimony used against Umaña was as critical to the government's case as it was inherently suspect. In *Bruton v. United States*, a co-defendant's accusation against the defendant was introduced as evidence by a separate witness. 391 U.S. 123, 124 (1968). In finding a violation of the Confrontation Clause, the Court noted that accusations from co-defendants facing punishment for the same crime are not only "devastating to the defendant but their credibility is inevitably suspect … given the recognized motivation to shift blame onto others." *Id.* at 136. A review of the record in this case demonstrates both how "devastating" and how "suspect" such accusations can be. *Id.*

First, the accusations were devastating: the government made the evidence of multiple previous murders the centerpiece of its case for the death sentence. Nearly every page of the transcript of the government's summation argument in the third phase of the trial focuses on these unconfronted accusations of murder. *See, e.g.*, J.A. 3402 ("[Umaña] had killed before"); J.A. 3403 ("[Umaña] had earned those two letters on his forehead and he earned them by killing"); J.A. 3404 ("[Umaña] … had killed before. And he was going to

kill again."); J.A. 3405 (claiming to jury that Umaña thought "I've done this before. I know what I have to do."); J.A. 3406 (claiming to jury that Umaña thought "I know they were dead because I know what dead is. I've killed before."); J.A. 3407 ("We know he's killed before."); J.A. 3408 ("Does that [previous murder] story sound familiar? … Sure it sounds familiar because that's exactly what happened later in Greensboro."); J.A. 3409 (arguing that Umaña thought to himself, "I'm Wizard from MS-13. We need to go out and we need to take care … of the people in [Lemon Grove Park]. And that's exactly what he did."); J.A. 3411 (pointing to "the two that you heard a lot of evidence on, the two additional—the three additional murders").

The record also reveals that the accusations, though "devastating," were "suspect." *Bruton*, 391 U.S. at 136. For the first Los Angeles murder incident, in which a group of MS-13 members exited a car to shoot two teenagers who had flashed rival gang signs, there is conflicting eyewitness evidence on Umaña's role. Two eyewitnesses with no role in the altercation stated to police that the shooter was the driver of the car. However, three of Umaña's fellow gang-members who were in the car with him claimed that Umaña was the shooter, but also stated that Umaña was not the driver. Thus, for this murder allegation, the only evidence linking Umaña to the crime was given by three potential co-defendants with a strong incentive to push the blame onto Umaña. Neutral eyewitnesses, meanwhile, suggest that Umaña was not the shooter.

The only other inculpatory evidence for these two murders is from Umaña himself. Police officers from Los Angeles who were investigating these murders interviewed Umaña in North Carolina after Umaña had been arrested for the murder of the Salinas brothers.

These officers told Umaña that he might as well admit to the Los Angeles murders because, given that he was facing a mandatory life sentence for the North Carolina murders, it would make no difference if he claimed responsibility for the prior crimes. After denying that he was responsible for the prior murders at length, Umaña eventually gave in to the interrogation, albeit with an equivocal, unclear statement:

> Officer: Did you shoot him? Tell me, tell me face to face. Did you shoot him?
>
> Umaña: Say that, that I did it. Right? I really didn't do it, right?
>
> Officer: You did it?
>
> Umaña: To say it like that.
>
> Officer: No. Not just to say it, but to say the truth
>
> …
>
> Umaña: To say the truth? … [laughs]
>
> Officer: You did it? Not out of meanness, but because you thought they were, were gang members.
>
> Umaña: Ah …
>
> Officer: Is that right?
>
> Umaña: Yes. … And that is[,] that is the point that mattered to him? [Laughs]?

J.A. 4382–83.

Umaña was also linked to a third murder that occurred in Lemon Grove Park. Two pieces of evidence link Umaña to this crime. First, the same gun was used in this murder as was used in the previous Los Angeles

murders, at which Umaña was present. This evidence is weak in light of expert testimony during trial suggesting that MS-13 gang members share their firearms as a matter of course. That said, Umaña admits to having been present at both murders, which gives more weight to the fact that the same murder weapon was used. However, while "there is no evidence that anyone else was present at *both* murder sites," Maj. Op. at 51, there were apparently one or two dozen people at the scene of the second murder, and the identities of these people are unknown. Thus, Umaña was present at both murders, but it is speculation to conclude that no one else was as well.

In addition to this circumstantial evidence, there is weak eye-witness evidence that implicates Umaña in the Lemon Grove Park murder. The witness, a member of a rival gang, twice picked Umaña out of a photo lineup. In 2005, the witness chose Umaña's picture out of a six-person photo lineup, but only concluded that "I remember seeing this guy but I'm not sure if he is the one that came that day to the park." J.A. 4060. Three years later, the witness again picked Umaña's picture out of a lineup, but again expressed uncertainty, noting that "I'm not 100% sure," because "everything happened so fast." J.A. 4057. The witness clarified that "what I saw was the gun and after that I began to run." *Id.* This witness testified during sentencing, where he noted that the shooting occurred after 9 p.m. on a basketball court where the overhead lights had been turned off. Thus, while Umaña has been linked to another Los Angeles murder, the best evidence of this link is from a witness who saw the shooter from twenty feet away at night with at best partial lighting. Further, this witness admitted that he only saw a gun before taking off running in the opposite direction. This

witness has never been able to make an identification nearing 100% certainty.

Finally, and most problematic, the government introduced evidence linking Umaña to murders in El Salvador, even though this evidence had been ruled as inadmissible and even though Umaña had no chance to confront his accusers. At sentencing, the government sought to introduce evidence that Umaña had committed violent crimes, including homicide, in El Salvador. Specifically, the government wanted to call an El Salvadoran prosecutor to testify. The district court denied the government's motion, concluding that the evidence "lacks sufficient indicia of reliability" and that "its probative value is outweighed by a danger of unfair prejudice." J.A. 3232.

Incredibly, in spite of the district court's clear ruling, the government introduced a transcript as evidence in which a United States law enforcement officer is quoted as saying "I know he's done stuff in El Salvador," J.A. 4301, "[w]e know … that they were looking for you for homicide also in El Salvador," J.A. 4316, and "[w]e know that he's, he's a violent, violent guy. We know that he's wanted in El Salvador … for many violent crimes … I know he's a shooter. I know he's an enforcer. I know he's a gangster," J.A. 4315. Through an evidentiary back door left wide open, the government snuck in testimony that "lacked consistency and credibility," per the district court, but had enough prejudicial value that the government made its entire case at sentencing about Umaña's past uncharged homicidal conduct.

In sum, the evidence linking Umaña to previous murders was as powerful as it was problematic. For both the Los Angeles and El Salvador murders, there

was not enough evidence for prosecutors to bring a case or sustain a conviction in stage one of an FDPA trial. Unfazed, the government simply bided its time until the third stage of the trial, when, per the district court's ruling and the majority opinion today, important constitutional safeguards disappear. Umaña filed a timely objection at sentencing, arguing that his Sixth Amendment rights were violated.

II.

Turning to the merits, an understanding of the history and purpose of the Confrontation Clause, as well as an analysis of the Supreme Court's recent jurisprudence on the Confrontation Clause and Sixth Amendment factfinding, shows that the government violated Umaña's constitutional rights when he was sentenced to death without a chance to confront his accusers. District courts cannot dodge the constitutional guarantee of confrontation by splitting a capital trial into three segments and waiting until the third segment to strip a defendant of his Sixth Amendment rights. Further, because the Sixth Amendment right at issue here—the right of cross-examination—is "the constitutionally prescribed method of assessing reliability," *Crawford v. Washington*, 541 U.S. 36, 62 (2004), it is especially offensive to the Constitution to deny a defendant this right during the very stage of the proceedings in which a jury must decide whether he deserves to live or be killed.

I begin with the text of the Sixth Amendment, but conclude that the words themselves do not settle the matter. "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. Because the FDPA did not exist at the time of the founding, the Sixth Amendment is silent on the distinction between

different stages of FDPA trials. While the right applies to all criminal prosecutions, the text does not give guidance on when a criminal prosecution ends.

An analysis of the history leading to the Sixth Amendment is more helpful. The historical developments that led to the Confrontation Clause weigh in favor of its application at all stages of FDPA trials. In the leading case on modern Confrontation Clause doctrine, the Supreme Court explained that the Confrontation Clause right "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. The FDPA sentencing regime did not exist at the time of the founding, nor was there an analogous system. Rather, at the time when the Confrontation Clause was crafted, a death sentence flowed automatically from convictions for certain capital felonies. *See United States v. Fields*, 483 F.3d at 370 (Benavides, J., dissenting); *see also* 1 Stat. 112–19 (defining a series of federal crimes and mandating a death sentence upon conviction for certain capital crimes); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urb. L.J. 347, 360-65 (1999). Thus, there was no separate hearing to determine whether death was appropriate. *See Woodson*, 428 U.S. at 289 (1976). When capital trials are structured in this way, no defendant receives a death sentence after a trial in which he is denied the Confrontation Clause right, nor is any defendant sentenced to death on the basis of unconfronted accusations of prior crimes. "By the time the Bill of Rights was adopted," "the jury determined which homicide defendants would be subject to capital punishment by making factual determinations." *Ring*, 536 U.S. 599 (quoting *Walton v.*

Arizona, 497 U.S. 639, 710–11 (Stevens, J., dissenting)). These factual determinations could only be made in proceedings in which the Confrontation Clause applied in full force. Thus, at the time of the founding, there was no exception to the Confrontation Clause right for capital sentencing.[2]

Crawford lends further support to the idea that, based on the purpose of the Confrontation Clause, the right to confront adverse witnesses extends to every stage of an FDPA trial. In discussing the history of the clause, the Supreme Court noted that the common law right to confrontation developed in response to abuses in certain infamous trials in England. In these notorious cases, defendants were convicted, and sometimes executed, without the right to examine their accusers. *Crawford*, 541 U.S. at 43–45. One of "[t]he most notorious instances" of such abuses occurred in the treason trial for Sir Walter Raleigh. *Id.* at 44. In concluding that a judge's reliability ruling cannot substitute for the right to confrontation, the Court noted that "[i]t is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh [reliability] factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront [the key government witness] in court." *Id.* (emphasis added). Thus, part of the reasoning motivating *Crawford* was the desire to reject any interpretation of the Confrontation Clause which would lead to the same abuses seen in the Raleigh trial. Further, the Court emphasized that what made that infa-

[2] In non-capital sentencing, meanwhile, hearsay testimony was often used and proceedings were more informal, suggesting a distinction between capital and non-capital sentencing. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 2016–17 (2005).

mous case so odious was the lack of a confrontation right before Raleigh was sentenced to death.

Mr. Umaña now finds himself in the same position as Raleigh, stripped of his right to confront face-to-face those whose words would condemn him to die. Powerful accusations were made against Umaña, and though these accusations were not the basis for the initial guilty verdict, they ultimately helped form the basis for his capital sentence. Further, like Raleigh, Umaña lacked the opportunity to confront his accusers before the death sentence was issued. The distinction between the cases is that Sir Walter Raleigh was sentenced to death after a unitary proceeding in which guilt and penalty were decided simultaneously. In Umaña's case, meanwhile, the judge trifurcated the trial and ensured that any constitutional protections had been severed by the time of stage three, in which a jury weighs whether death is the appropriate sentence. If the judicial proceeding that led to Sir Walter Raleigh's execution is unconstitutional, as it no doubt is, then it is unclear why the same situation would lead to a different result merely because the court artificially cabins the proceeding in which the constitutional abuse occurs.

Recent Supreme Court case law on Sixth Amendment rights in sentencing further buttresses this view. In *Ring v. Arizona*, the Supreme Court considered whether the right to jury factfinding applies for aggravating factors necessary to apply a death sentence, which would be the equivalent of the second stage of an FDPA trial. 536 U.S. at 608–09. The Court held "that the Sixth Amendment applies to" this stage of death sentencing: defendants have the right to jury factfinding for such factors. *Id.* at 609. Granted, *Ring* does not control here, since this case concerns the introduction of unconfronted testimony in the third stage of FDPA

trials. The majority finds this distinction key, arguing that once a defendant is found death-eligible in stage two of an FDPA trial, "the jury exercises discretion in selecting a life sentence or the death penalty, and any facts that the jury might find during that phase do not alter the range of sentences it can impose." Maj. Op. at 48–49. This is incorrect. Under the FDPA, a jury cannot impose a death sentence until it finds that "all the … aggravating factors found to exist sufficiently outweigh all the mitigating factors." 18 U.S.C. § 3593(e). Only when a jury finds that aggravating factors sufficiently outweigh the mitigating factors may it impose a death sentence under the FDPA. Thus, while stage three of FDPA trials involves some jury discretion, juries must nonetheless make certain factual findings in this final stage before a death sentence can be imposed.

Put another way, the jury's burden in stage three—a finding that the aggravating factors sufficiently outweigh the mitigating factors—"is not optional." *Green*, 372 F. Supp. 2d at 177. "Because we will never know exactly how each factor influences the jurors' ultimate punishment determination, logic dictates that all aggravating factors—together—be considered legally essential to the punishment." *Id.* As in *Green*, "the government's argument that non-statutory factors are not essential is disingenuous; if the government does not require additional evidence to convince the jury to vote for death, why is it invoking non-statutory factors at all?" *Id.* In this case, the proof is in the pudding: the government pointed to the past murders on nearly every page of the transcript of its closing argument at sentencing. Without these past murders, it is doubtful that the government could meet the burden necessary to apply the death penalty under the FDPA. As such, the permissible range of sentencing is increased in this

stage, indicating that Sixth Amendment rights do apply. *See also Sablan*, 555 F. Supp. 2d at 1221 ("[U]nder the structure of the FDPA, it is not the finding of a statutory aggravating factor that actually increases the punishment. The fact that actually increases the punishment is the existence of all the aggravating factors found by the jury (taken together).").

The majority argues that *Williams v. New York*, 337 U.S. 241 (1949), a pre-*Crawford*, pre-*Ring* Supreme Court case, directly disposes of the issue before us. That case is neither on point nor persuasive, and in any event, its power is dubious in light of more recent Supreme Court jurisprudence. In *Williams*, the Supreme Court upheld a death sentence that relied in part on a probation report that implicated the defendant in prior crimes. *Id.* at 243. The Court continues to cite *Williams* for the proposition that sentencing decisions contain an element of discretion and can rely on evidence that would not be admissible at trial. *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229, 1235 (2011). We have cited to *Williams* for the similar concept that sentencing courts "must have recourse to a much broader array of information than we allow the trier of fact to consider in determining a defendant's guilt." *Powell*, 650 F.3d at 391–92.

Nonetheless, *Williams* is not controlling, because that case is a pre-incorporation, pre-FDPA case concerning a state death sentence. That is, *Williams* was not a Confrontation Clause case at all, but rather a Due Process Clause case, and it considered a state capital sentencing regime, not the federal one used for Mr. Umaña. *Williams*, 337 U.S. at 252. Nothing in the holding of *Williams* dictates that the Confrontation Clause does not apply to the third stage of FDPA trials. Rather, the holding in *Williams* merely means that it

does not offend due process for a state judge to rely on unconfronted hearsay in death sentencing. This is different from a ruling that a far more specific clause of the constitution permits a jury to rely on such evidence in a proceeding to decide whether the death sentence can be applied. Further, the decisions cited above—concerning the Sixth Amendment right to factfinding at sentencing, death penalty procedure, and the Confrontation Clause—all suggest that even if *Williams* is not dead letter, it should not be extended to apply to FDPA proceedings on Sixth Amendment grounds.

Even though *Williams* is not on point, the majority nonetheless argues that its spirit is intact. That is, *Williams* embodies the idea that the Confrontation Clause should not apply because "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence." *Id.* at 247.

This argument is internally consistent, but it elides a far more important principle of capital sentencing, which is the need for reliability. As the Supreme Court has noted, death is such a weighty punishment and so different from a prison term that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson*, 428 U.S. at 305 (plurality opinion). Thus, greater access to information for the sentencing court is but one principle of death sentence jurisprudence—a principle that gives way to the more important principle that a death sentence be based on accurate factfinding. Further, as discussed above, the Supreme Court has explained that "the Confrontation Clause's very mission … is to advance the accuracy of the truth-determining process in criminal trials." *United States*

v. Inadi, 475 U.S. 387, 396 (1986) (internal quotation marks and citations omitted). Taken together, the Supreme Court's parallel jurisprudence on the Confrontation Clause and on the need for reliability in death sentences demonstrates why Umaña's sentence must be reversed. Death sentences must stand on reliable ground, and the Confrontation Clause is "the constitutionally prescribed method of assessing reliability." *Crawford*, 541 U.S. at 62.

Further, in striking the balance between the desire for more evidence and the unquestionable need for reliability in death sentences, it is important to note that the Confrontation Clause right will not only enhance reliability—it will do so at a small practical cost, contrary to the concerns voiced by the majority. The majority frets that if we recognize Mr. Umaña's Sixth Amendment rights through each stage of an FDPA trial, we would "'endlessly delay criminal administration in a retrial of collateral issues.'" Maj. Op. at 48 (quoting *Williams*, 337 U.S. at 250). To the contrary, the Confrontation Clause applies only to testimonial evidence, and would only be implicated in a narrow range of aggravating factors, suggesting that recognizing Mr. Umaña's Sixth Amendment right will not "endlessly delay criminal administration of collateral issues." Maj. Op. at 48 (quoting *Williams*, 337 U.S. at 250). As recognized in *Crawford*, the Confrontation Clause only reaches "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51. Even testimonial evidence continues to be admissible so long as the defendant has a prior chance to cross-examine the witness and the witness is unavailable. *Id.* at 51–52. Thus, the vast

majority of the evidence in Mr. Umaña's case, and in most FDPA trials, would be unaffected by recognizing Mr. Umaña's Sixth Amendment right. Only for a narrow range of aggravating factors, related to uncharged prior crimes, would the Confrontation Clause be implicated, and even then only some of the time.

In any case, given that the prosecution made Mr. Umaña's uncharged prior crimes the centerpiece of its capital case in the final stage of his FDPA trial, I cannot accept the majority's conclusion that the unconfronted evidence used against Mr. Umaña was a mere "collateral issue[]." To the contrary, the government's entire case for the death penalty relied on the accusation that Umaña "had killed before." J.A. 3404. In sum, Mr. Umaña's Sixth Amendment right to confrontation provides enormous benefits in terms of reliability in capital sentencing, and this benefit comes at a small cost—limiting only very specific types of aggravating information.

The majority supports its ruling by pointing to "the policy of presenting full information to sentencers," Maj. Op. at 47, but this reasoning creates an evidentiary loophole that turns FDPA trials upside-down. Unquestionably, a sentencing court must have access to information not relevant to guilt in order to ensure that punishments are individualized. While this general proposition is valid, applying it blindly in this case is problematic because it lumps together evidence like a defendant's 4th grade report card with evidence of murder. In a typical criminal trial, the most serious crime gets proven at a guilt trial, where the full panoply of constitutional and evidentiary rights apply. In the later sentencing stages, softer evidence, both negative and positive, is introduced, to allow for individualization of punishment. This structure makes sense: the

more serious an allegation, the more serious the protections given to a defendant.

Under the majority's ruling, this structure is flipped. It would have been outrageous for the government to convict Umaña for the North Carolina murders without giving him his Sixth Amendment rights. Yet, the centerpiece of the government's case for the death sentence was a series of uncharged murders that were in many ways more serious than the North Carolina incident. The third stage of an FDPA trial is typically reserved for evidence about the victims' families or about the defendant's elementary school performance or Boy Scout record. The jury must weigh these soft, more subjective factors to fit the punishment to the crime. The evidence we consider here is so much more severe than a 4th grade report card that it is different in kind, not degree. When a jury considers a Boy Scout record, the truthfulness and reliability of the evidence is a secondary matter at best. The more difficult task for this type of information is fitting it into a cohesive, complete picture of the defendant. The weight to be accorded to the evidence is the predominant inquiry, and its reliability is a lesser concern. In contrast, when a jury considers evidence of three additional murders, the reliability of the evidence is the predominant concern, whereas the weight to accord such evidence is much easier to discern. That is, it is easy to know how much weight to accord evidence of past murders because it completely overwhelms evidence like an elementary school report card, as the government's closing argument demonstrates. Instead, for this type of evidence the most important inquiry is as to its truth and reliability. This distinction again shows why the district court committed legal error. The government is essentially exploiting the district court's ruling to

have a second murder trial, only without the restrictions that the Supreme Court mandated in *Crawford* and *Ring*. The majority's ruling today lets the tail wag the dog, and it will encourage strategic posturing by prosecutors to punish defendants for crimes that could never be found beyond a reasonable doubt by a rational factfinder.

III.

The majority today strips a defendant of his Sixth Amendment right to confront his accusers. Further, it denies this right in a proceeding in which a jury must decide whether a human being is fit to live. In this, the most momentous decision a jury can make, the majority would do away with the "constitutionally prescribed method of assessing reliability" of evidence. *Crawford*, 541 U.S. at 62.

Umaña is being sent to his death based on accusations by self-interested accomplices—self-interested accomplices whose testimony, at least in part, was contradicted by independent witnesses. This illustrates the Supreme Court's admonition that accusations from co-defendants facing the same punishment are "devastating to the defendant." *Bruton*, 391 U.S. at 136. "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* Because I conclude that the Confrontation Clause applies at every stage of an FDPA trial, not just the first two stages, and because I conclude that it is both wrong and unconstitutional for a death sentence to rest on unconfronted accusatory evidence, I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. 3:08CR134-RJC

UNITED STATES OF AMERICA,

v.

ALEJANDRO ENRIQUE RAMIREZ UMANA,

April 19, 2010

ORDER

* * *

ROBERT J. CONRAD, JR., Chief Judge:

THIS MATTER is before the Court on the "Defendant's Motion to Strike Non-statutory Aggravating Factor and to Exclude Evidence of Unadjudicated Criminal Acts During Penalty Phase of Trial" (Doc. No. 483) filed April 24, 2009; the "Defendant's Motion to Strike Non–Statutory Aggravating Factors from Notice of Intent to Seek the Death Penalty" (Doc. No. 488) filed April 24, 2009; the government's Consolidated Response (Doc. No. 503) filed May 8, 2009; the defendant's "Motion to Strike the Non–Statutory Aggravating Factor of Future Dangerousness from the Notice of Intent to Seek the Death Penalty" (Doc. No. 968) filed April 6, 2010; and the government's Response (Doc. No. 991)

filed April 13, 2010. For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion to strike non-statutory aggravating factors (Doc. No. 488) and **DENIES** the defendant's remaining motions (Doc. Nos. 483 & 968).

I. BACKGROUND

The defendant is charged in a Superseding Indictment with multiple federal offenses arising out of his alleged affiliation with La Mara Salvatrucha, also known as the MS–13 gang (hereafter "MS–13"). Count 1 of the Indictment charges the defendant with a RICO conspiracy, in violation of 18 U.S.C. § 1962(d). As an overt act in furtherance of this conspiracy, the Indictment alleges that on December 8, 2007, the defendant murdered two individuals, Ruben Garcia Salinas and Manuel Garcia Salinas, in a restaurant in Greensboro, North Carolina. These murders are also charged separately in Counts 22 and 24 of the Indictment as murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), and in Counts 23 and 25 as use of a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. § 924(j). In the event the defendant is found guilty of Counts 22, 23, 24, or 25, the government has filed a Notice of Intention to Seek the Death Penalty (Doc. No. 275), as required by the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3591 *et seq*. In its Notice, the government lists several aggravating factors it contends justify a sentence of death. Several of these are enumerated aggravating factors listed in § 3592(c) (the "statutory aggravating factors"). The government has also given notice of its intent to prove additional aggravating factors which are not enumerated in § 3592(c) (the "non-statutory aggravating factors"), including the following:

1. Gang Motivated Killing.

The defendant killed Ruben Garcia Salinas to protect and maintain the name and reputation of the criminal enterprise MS–13, and to advance his position and reputation within the criminal enterprise.

* * *

3. Callous Disregard for the Severity of the Offense.

Defendant has demonstrated a callous disregard for the severity of the offense, as evidenced by his words and actions following the murder of Ruben Garcia Salinas.

4. Participation in Additional Uncharged Murders and Other Acts of Violence.

Apart from the offenses charged in the First Superseding Bill of Indictment, defendant has been involved in other serious acts of violence, which are not reflected in his criminal record. Including but not limited to:

a. On or about July 27, 2005, in Los Angeles, California, defendant knowingly, intentionally, and unlawfully killed Jose Herrera and Gustavo Porras.

b. On or about September 28, 2005, in Los Angeles, California, defendant knowingly, intentionally, and unlawfully participated and aided and abetted the killing of Andy Abarca.

5. Future Dangerousness.

Defendant is likely to commit criminal acts of violence in the future which would constitute a continuing and serious threat to the lives and safety of others, as evidenced by at least one or more of the following:

a. Continuing Pattern of Violence.

Defendant has engaged in a continuing pattern of violence, attempted violence, and threatened violence, including but not limited to the crimes alleged against defendant in the First Superseding Bill of Indictment.

b. Low Rehabilitative Potential.

Defendant poses a future danger to the lives and safety of other persons as demonstrated by his lack of rehabilitation after prior incarceration, his pattern of criminal conduct, and, his allegiance to and membership in MS–13.

c. Lack of Remorse.

Defendant has never expressed any remorse for killing Rubin Garcia Salinas as indicated by defendant's statements to fellow gang-members during the course of and following the offenses alleged in the First Superseding Bill of Indictment.

d. Gang Membership.

Defendant has demonstrated an allegiance to and active membership in MS–13, a violent criminal enterprise.

(Doc. No. 275 at 4–5).[1] On April 24, 2009, the defendant filed two motions to strike non-statutory aggravating factors from the government's Notice. (Doc. Nos. 483 & 488). Therein the defendant moves to strike all his non-statutory aggravating factors as unauthorized by the FDPA. The defendant also moves to strike on various other grounds the aggravating factors Uncharged

[1] Each aggravating factor is also re-alleged with respect to the other murder victim, Manuel Garcia Salinas. (Doc. No. 275 at 5–8).

Murders and Other Violent Conduct, Gang Motivated Killing, and Callous Disregard for the Severity of the Offense. Later, on April 6, 2010, the defendant filed a third motion to strike the non-statutory aggravating factor Future Dangerousness. (Doc. No. 968).

II. LEGAL FRAMEWORK

A. Capital Sentencing

The FDPA directs that sentencing in a federal capital case be performed in two discrete phases. The first phase, "eligibility," requires the jury to determine whether the defendant qualifies for the death penalty, while the second phase, "selection," requires a decision as to whether a particular defendant "should in fact receive that sentence." *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Both the eligibility and selection phases are conducted in a special sentencing hearing mandated by the FDPA. 18 U.S.C. § 3593(b). At this hearing, "information may be presented as to any matter relevant to the sentence, … regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). However, the process must be "neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa*, 512 U.S. at 973, 114 S.Ct. 2630 (citing *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

To be eligible for the death penalty in a homicide case, the jury first must find that the defendant acted intentionally in killing another person. 18 U.S.C. § 3591(a)(2). Next, it must find beyond a reasonable

doubt the presence of at least one statutory aggravating factor alleged in the government's Notice. 18 U.S.C. 3593(e)(2). If these findings are made, the defendant is eligible for the death penalty, and the jury proceeds to the selection phase. During this phase, the jury may consider the presence of any statutory or non-statutory aggravating factor for which the government has given notice. 18 U.S.C. § 3592(c). Each juror then weighs aggravating factors, found unanimously beyond a reasonable doubt, against mitigating factors, found by that juror by a preponderance of evidence. 18 U.S.C. § 3593(d). The jury may recommend the death penalty if it unanimously concludes that "all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist …, or, in the absence of a mitigating factor, … the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593(e).

B. Constitutional Protections

The Fifth, Sixth, and Eighth Amendments of the Constitution require that a capital sentencing scheme "'suitably direct[] and limit[]'" a sentencing jury's discretion "'so as to minimize the risk of wholly arbitrary and capricious action.'" *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Pursuant to these protections, the Court will not permit the jury to consider aggravating factors that are impermissibly vague, overbroad, or otherwise fail to "'genuinely narrow the class of persons eligible for the death penalty.'" *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)); *accord Maynard v. Cart-*

wright, 486 U.S. 356, 364, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (invalidating an aggravating factor that "an ordinary person could honestly believe" applied to every eligible defendant). In sum, the Court must ensure that aggravating factors put before a sentencing jury permit it "to make a principled distinction between those who deserve the death penalty and those who do not." *Jeffers*, 497 U.S. at 776, 110 S.Ct. 3092.

III. DISCUSSION

A. FDPA Authorization of Non–Statutory Aggravating Factors

At the outset, the defendant challenges the government's right to present evidence[2] of any non-statutory aggravating factor during the selection phase of his sentencing. Section 3591(a) of the FDPA directs the jury to "consider[] … the factors set forth in section 3592" when deciding whether to impose the death penalty. The defendant argues that because § 3591(a) references only the factors "set forth" in § 3592, it authorizes the jury to consider only the statutory aggravating factors explicitly listed in that section. Thus, the FDPA is vague as to whether non-statutory aggravating factors are ever proper to consider. In light of this vagueness, the defendant argues that the rule of lenity[3]

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[2] The FDPA conspicuously uses the term "information" rather that "evidence," perhaps because the Federal Rules of Evidence are explicitly rendered inapplicable to capital sentencing proceedings. 18 U.S.C. § 3593(c). However, because the parties have often used the term "evidence" in their briefing of these issues, the Court will use that term throughout this Order.

[3] The rule of lenity requires a court to resolve any ambiguity in a criminal statute in favor of the defendant. *United States v. Munn*, 595 F.3d 183, 194 (4th Cir.2010) (citing *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020, 2025, 170 L.Ed.2d 912 (2008)).

should compel the Court to construe the FDPA to limit the government's Notice and subsequent proof to the statutory aggravating factors enumerated in § 3592(c)(1)-(16).

The defendant's argument fails because the FDPA is not vague in this regard. Section 3592(c) contains an explicit "catch-all" provision authorizing the jury to consider "any other aggravating factor for which notice has been given…." Moreover, section 3593(d) contains identical language instructing the jury to consider the presence of both statutory aggravating factors "and any other aggravating factor for which notice has been provided," i.e., any non-statutory aggravating factor alleged in the government's Notice. Reading the FDPA as a whole, it is clear that the "set forth" language in § 3591(a) authorizes the consideration of both statutory and non-statutory aggravating factors. Moreover, any contrary construction of the FDPA would render several of its other provisions essentially meaningless. To the extent possible, a statute should be read so that no part is rendered superfluous or inoperable. *Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 244 (4th Cir.2009); *Zheng v. Holder*, 562 F.3d 647, 654 (4th Cir.2009). Other courts have considered the arguments raised by the defendant and reached the same conclusion. *See United States v. Le*, 327 F.Supp.2d 601, 614 (E.D.Va.2004); *United States v. Nguyen*, 928 F.Supp. 1525, 1536 (D.Kan.1996). Thus, the Court finds that the FDPA generally authorizes a jury to consider any non-statutory aggravating factor for which notice has been provided.

B. Uncharged Murders and Other Violent Conduct

The defendant lodges several objections to the non-statutory aggravating factor "Uncharged Murders and

Other Violent Conduct," which alleges the defendant's participation in additional uncharged murders and other acts of violence. First, the defendant makes a constitutional challenge under the Fifth, Sixth, and Eighth Amendments to the use of uncharged criminal conduct as an aggravating factor. Next, the defendant argues that because the FDPA includes certain types of prior convictions as statutory aggravating factors, Congress intended to exclude unadjudicated criminal conduct from consideration. Finally, as an additional ground to his motion to strike, the defendant claims evidence of uncharged acts should be excluded from his sentencing hearing because the probative value of such evidence is outweighed by its likelihood to confuse or mislead the jury.

1. Constitutionality

In support of his constitutional challenge under the Fifth, Sixth, and Eighth Amendments, the defendant makes two separate arguments: (1) that it is unconstitutional to try uncharged conduct under the relaxed evidentiary standard mandated by the FDPA; and (2) having already convicted the defendant of capital offenses, the jury will be unable to remain impartial when determining whether he committed the uncharged conduct.

Despite these concerns, the established law in the Fourth Circuit is that non-statutory aggravating factors alleging uncharged criminal conduct do not violate the Constitution so long as the jury is properly instructed that it must find such conduct unanimously and beyond a reasonable doubt. *See United States v. Higgs*, 353 F.3d 281, 323 (4th Cir.2003); *see also United States v. Cisneros*, 363 F.Supp.2d 827, 838–39 (E.D.Va.2005) (citing *Higgs*, denying a motion to strike aggravating factors alleging uncharged criminal con-

duct); *United States v. Beckford*, 964 F.Supp. 993, 1002–03 (E.D.Va.1997) (holding that due process does not require a defendant's sentencing hearing to be governed by the Federal Rules of Evidence, even when allegations of unadjudicated conduct are present).

Here, the defendant is alleged to have committed, or aided and abetted in the commission of, uncharged acts of violence including participation in the murder of several individuals. Critically, the government's allegations attribute these crimes to the defendant himself, not MS–13. *Cf. United States v. Rivera*, 405 F.Supp.2d 662, 670–71 (E.D.Va.2005); *United States v. Grande*, 353 F.Supp.2d 623, 638 (E.D.Va.2005) (related cases, both striking non-statutory aggravating factors attempting to impute to the defendants acts of violence committed by their affiliated gang). Thus, the government's non-statutory aggravating factor alleging uncharged criminal conduct does not violate the defendant's Fifth, Sixth, and Eighth Amendment rights.

2. FDPA Authorization

Next, the defendant argues that in enacting statutory aggravating factors related to six categories of prior conviction,[4] Congress intended for the FDPA to exclude all uncharged criminal conduct from the jury's consideration. This proposition is based upon the maxim of statutory construction *expressio unius est exclusio alterius*, meaning "that the express designation of one thing may properly be construed to mean the exclusion of another." *Volvo Trademark Holding Aktie-*

[4] *See* 18 U.S.C. § 3592(c)(2) (violent felony involving firearm); (c)(3) (offense for which death or life imprisonment was authorized); (c)(4) (two violent felony offenses); (c)(10) (two felony drug offenses); (c)(12) (serious federal drug offense); (c)(15) (sexual assault or child molestation).

bolaget v. Clark Mach. Co., 510 F.3d 474, 483 (4th Cir.2007) (quoting *Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip. Corp.*, 416 F.Supp.2d 404, 411 (W.D.N.C.2006)). "The maxim requires great caution in its application, and in all cases is applicable only under certain conditions." STATUTES AND STATUTORY CONSTRUCTION § 47:25 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (quotations omitted). One such limitation of the maxim is that it should not be applied if it creates "contradiction" within a statute. *Id.*; *see also U.S. Dept. of Labor v. Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir.1982) ("The maxim is to be applied with great caution and is recognized as unreliable.").

Here, the defendant's preferred construction of the FDPA would contradict a number of its provisions. Section 3592(c) itself specifically allows the sentencing jury to consider not only statutory aggravating factors but "any other aggravating factor for which notice has been given." Similarly, the jury is instructed to return findings for any statutory aggravating factor "and any other aggravating factor for which notice has been provided…." 18 U.S.C. § 3593(d). These open-ended provisions would be thwarted by applying a literal interpretation to the categories of prior conviction enumerated as statutory aggravating factors. Noting this, the Fourth Circuit has rejected the defendant's line of reasoning. *See Higgs*, 353 F.3d at 322–23. Thus, the Court concludes that by listing six categories of prior conviction as statutory aggravating factors, Congress did not intend for the FDPA to preclude allegations of uncharged criminal conduct in non-statutory aggravating factors.

3. Admissibility of Evidence

Finally, the defendant argues that any evidence of uncharged violent acts is inadmissible at his sentencing hearing under 18 U.S.C. § 3593(c), which directs the Court to exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." The defendant claims that because the Federal Rules of Evidence are inapplicable to a capital sentencing hearing, any evidence of uncharged criminal acts admitted at his sentencing hearing would lack sufficient indicia of reliability. The defendant concludes that complete exclusion is necessary under § 3593(c) because the probative value of such evidence would be limited, while the risk of unfair prejudice, confusion of the issues, and misleading the jury would be high.

Although the Federal Rules of Evidence do not apply, "the FDPA provides a capital defendant with constitutionally sufficient evidentiary protection." *United States v. Fulks*, 454 F.3d 410, 438 (4th Cir.2006); *accord United States v. Lee*, 374 F.3d 637, 648 (8th Cir.2004); *United States v. Fell*, 360 F.3d 135, 145–46 (2d Cir.2004) (reaching the same conclusion). Thus, the mere fact that the Rules are inapplicable is no reason to categorically exclude evidence. Without ruling on any specific evidence the government might seek to admit at the defendant's sentencing hearing, the Court declines to hold that all evidence of uncharged acts of violence is *per se* inadmissible. The Court therefore denies the defendant's motion to strike the non-statutory aggravating factor Participation in Additional Uncharged Murders and Other Acts of Violence.

In this manner, the Court defers making an admissibility determination of specific evidence of unadjudi-

cated criminal conduct until after its review of said evidence. Should the defendant's trial proceed to the penalty phase, the Court will bifurcate eligibility and selection phases into two discrete proceedings. Both the government and the defendant have argued to the Court whether the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), should apply to the selection phase of the defendant's sentencing hearing. If *Crawford* does apply, its prohibition against the admission of testimonial statements from unavailable witnesses not subject to a prior opportunity for cross-examination would operate to bar certain statements proffered by the government as evidence of the defendant's unadjudicated criminal acts.

Although the Fourth Circuit has noted pre-*Crawford* that "it is far from clear that the Confrontation Clause applies to a capital sentencing proceeding," *Higgs*, 353 F.3d at 324, the applicability of *Crawford* to a capital sentencing proceeding is unsettled in this jurisdiction. *See United States v. Jordan*, 357 F.Supp.2d 889, 901 (E.D.Va.2005) (noting that *Higgs* is "of limited value in a post-*Crawford* analysis"). Absent guidance from the Supreme Court or the Fourth Circuit, the district courts are left to determine this issue. After review, the Court agrees with the districts courts in this jurisdiction that have determined *Crawford* only applies to the eligibility phase of capital sentencing proceedings. *See United States v. Bodkins*, No. 4:04cr70083, 2005 WL 1118158, at *4–5 (W.D.Va. May 11, 2005); *Jordan*, 357 F.Supp.2d at 903–04. Thus, testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury. *Crawford*

would not, however, operate to bar similar hearsay testimony offered during the selection phase.

Nevertheless, regardless of Crawford, courts recognize that heightened reliability concerns related to capital sentencing require a threshold determination that evidence of unadjudicated conduct is reliable prior to its admission. *See Jordan*, 357 F.Supp.2d at 904; *United States v. Cisneros*, 363 F.Supp.2d 827, 838–39 (E.D.Va.2005); *United States v. Breeden*, No. 3:03cr13, 2004 WL 1920981, at *4 (W.D.Va. Aug. 27, 2004); *United States v. Foster*, No. CRIM. CCB–02–410, 2004 WL 903921, at *1 (D.Md. Apr. 9, 2004); *Beckford*, 964 F.Supp. at 1000. Therefore, should the defendant's trial proceed to the penalty phase, the government shall present to the Court and to the defendant information it intends to introduce as unadjudicated conduct for a determination of reliability. Only if the government satisfies that threshold determination will such evidence be presented to the jury. *See Beckford*, 964 F.Supp. at 1000.

C. Future Dangerousness

The defendant moves to strike the non-statutory aggravating factor "Future Dangerousness" in its entirety on the grounds that any inquiry into his future dangerousness is unreliable within the meaning of the Eighth Amendment, and that by alleging that the defendant "is likely" to commit criminal acts of violence in the future, the government improperly suggests its burden of proof is less than proof beyond a reasonable doubt.

1. Constitutionality of Future Dangerousness

It has long been held that a sentencing court may evaluate and consider a defendant's propensity to

commit acts of violence in the future as an aggravating factor weighing in favor of the death penalty. *See Jurek v. Texas*, 428 U.S. 262, 274–76, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Jurek*, the Supreme Court noted that:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a [capital sentencing jury] jury must perform in answering the … question [of future dangerousness] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

Id. at 274–75, 96 S.Ct. 2950. *See also Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (reaffirming the central holding of *Jurek*).

In addition to lay testimony, the government may also offer expert opinion testimony concerning the de-

fendant's future dangerousness. *See Barefoot v. Estelle*, 463 U.S. 880, 897–99, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), *superseded in part by statute*, Pub.L. No. 104–132, § 102 (1996) (28 U.S.C. § 2253(c)), as recognized in *Slack v. McDaniel*, 529 U.S. 473, 480–81, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In *Estelle*, the petitioner argued that scientific experts were categorically unable to render predictions about a defendant's future dangerousness with any degree of reliability. 463 U.S. at 896, 103 S.Ct. 3383. Although the Court recognized a disagreement among penological experts about the accuracy of these predictions, it was "not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." *Id.* at 899, 103 S.Ct. 3383. Applying these precedents, the Fourth Circuit has consistently upheld consideration of future dangerousness as an aggravating factor. *E.g.*, *Eaton v. Angelone*, 139 F.3d 990, 998 (4th Cir.1998); *Bunch v. Thompson*, 949 F.2d 1354, 1367–68 (4th Cir.1991); *Woomer v. Aiken*, 856 F.2d 677, 680 (4th Cir.1988) (all denying habeas relief, upholding state capital sentencing schemes that consider a defendant's future dangerousness).

In citing to studies that suggest predictions of future dangerousness are often wrong, or that subsequent advancements in federal corrections facilities have reduced prisoner violence, the defendant argues that the Court should conclude that *Jurek* and *Barefoot* are no longer controlling law. These are not legitimate grounds for a district court to question the continuing validity of otherwise mandatory precedent. Moreover, few of the reliability concerns raised by the defendant in the instant motion are new considerations. In *Barefoot*, the Supreme Court explicitly recognized that

some studies indicated that predictions of future dangerousness were often wrong. 463 U.S. at 899 n. 7, 103 S.Ct. 3383. However, this did not render consideration of future dangerousness unconstitutional, because "[a]ll of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury." *Id.* Thus, the Court denies the defendant's motion to strike Future Dangerousness on the ground that it is unreliable within the meaning of the Eighth Amendment.[5]

2. "Is Likely" Phrasing

The defendant next argues that by alleging that he "is likely" to commit acts of violence in the future, the factor improperly suggests that the government's burden of proof is less than is required by due process and the FDPA. This argument is plainly without merit. The term "is likely" is necessary phrasing because, of course, one cannot predict future events with absolute certainty. The government still retains its required burden of proof, i.e., it must prove beyond a reasonable doubt that the defendant poses a danger to the lives and safety of others. It is no surprise, then, that the Fourth Circuit has noted that "[f]uture dangerousness is best defined as evidence that a defendant is 'likely to commit criminal acts of violence in the future that would be a threat to the lives and safety of others.'" *United States v. Basham*, 561 F.3d 302, 331 (4th Cir.2009) (quoting *United States v. Bernard*, 299 F.3d 467, 482 (5th Cir.2002)). Thus, the government's phras-

[5] For the same reasons, the Court denies the defendant's motion for an order requiring the government to produce empirical evidence establishing the reliability of the sub-factors Low Rehabilitative Potential and Lack of Remorse as a condition to presenting evidence of these sub-factors.

ing of this aggravating factor does not imply a lesser burden of proof than the defendant's right to due process requires.

3. Sub-factors

As an alternative to striking the factor in its entirety, the defendant challenges the government's allegation of four specific sub-factors supporting a finding of future dangerousness: (1) "Continuing Pattern of Violence"; (2) "Low Rehabilitative Potential"; (3) "Lack of Remorse"; and (4) "Gang Membership." (Doc. No. 275 at 4–5). The defendant first argues that alleging specific sub-factors under the heading Future Dangerousness will mislead the jury. The defendant also argues that an allegation of his low rehabilitative potential is irrelevant where the defendant's only alternative to the death penalty is life in prison without the possibility of parole,[6] and that his lack of remorse is alleged in such a way that violates his Fifth Amendment right to silence.

As an initial matter, the government may allege specific sub-factors under Future Dangerousness without misleading the jury from its core inquiry of whether the defendant is likely to commit acts of violence in the future. To the contrary, these sub-factors clarify the factor's "common-sense core of meaning," *Jurek*, 428 U.S. at 279, 96 S.Ct. 2950 (White, J., concurring in judgment), and focus the jury on the government's proffered evidence. For this reason, Future Dangerousness is often alleged with multiple sub-factors, including Low Rehabilitative Potential and Lack of Re-

[6] The Court notes that although this is true for Counts 22 and 24, *see* 18 U.S.C. § 1959(a)(1), Counts 23 and 25 do not neces-sarily carry a minimum life sentence. *See* 18 U.S.C. § 924(j)(1) (authorizing punishment "by death or by imprisonment for any term of years or for life").

morse. *See United States v. Bin Laden*, 126 F.Supp.2d 290, 303–04 (S.D.N.Y.2001) (collecting cases). Moreover, because these sub-factors are alleged as evidence—not elements—of future dangerousness, the jury need not separately find the presence of all four sub-factors to find the presence of future dangerousness. Thus, the government may generally allege specific sub-factors in support of an allegation of the defendant's future dangerousness.[7]

Next, because certain of his capital offenses carry a life sentence as the only alternative to the death penalty, the defendant challenges the relevance of the sub-factor Low Rehabilitative Potential. The defendant reasons that the issue before the jury is not whether he can be rehabilitated, but whether he would pose a continuing danger to others in federal prison.

This argument ignores the fact that although future dangerousness is the jury's overall inquiry, the defendant's potential for rehabilitation is directly relevant to his future dangerousness. *See United States v. Gooch*, No. 04–128–23, 2006 WL 3780781, at *29 (D.D.C. Dec. 20, 2006) ("[The defendant's] alleged low rehabilitative potential is relevant … as it bears on his future dangerousness in prison."). This case is not one where the criminal behavior alleged by the government would be wholly prevented by the defendant's incarceration. *See United States v. Taveras*, 424 F.Supp.2d 446, 463–64

[7] To the extent the defendant suggests that certain of these sub-factors are unconstitutionally duplicative of each other, duplicative sub-factors are not unconstitutional, because each sub-factor falls under the umbrella of a single non-statutory aggravating factor: future dangerousness. *United States v. Mayhew*, 380 F.Supp.2d 936, 950–51 (S.D.Ohio 2005); *United States v. Taylor*, 316 F.Supp.2d 730, 742–43 (N.D.Ind.2004); *United States v. Davis*, No. CR.A. 01–282, 2003 WL 1873088, at *10 (E.D.La. Apr. 10, 2003).

(E.D.N.Y.2006) (excluding evidence of sexual abuse against minors to prove a defendant's future dangerousness, when it was highly unlikely the defendant would ever be released from prison). Rather, the government alleges by this sub-factor that the defendant's low potential for rehabilitation increases the likelihood that he will commit acts of violence against other prisoners and correctional officers throughout his incarceration. For these reasons, Low Rehabilitative Potential is a relevant sub-factor of Future Dangerousness.

Finally, the defendant raises a Fifth Amendment challenge to the sub-factor Lack of Remorse, which alleges that he "has never expressed any remorse for [the murders] as indicated by defendant's statements to fellow gang-members during the course of and following the offenses…." (Doc. No. 275 at 5). There is nothing *per se* unconstitutional about considering a defendant's lack of remorse as a characteristic that favors imposition of the death penalty. *See Zant*, 462 U.S. at 885 n. 22, 103 S.Ct. 2733 (noting that lack of remorse is an appropriate aggravating factor); *see also United States v. Cooper*, 91 F.Supp.2d 90, 112–13 (D.D.C.2000); *Nguyen*, 928 F.Supp. at 1541 (both citing *Zant*). However, the Fifth Amendment limits proof of lack of remorse to "affirmative words or conduct" expressed by the defendant. *United States v. Caro*, 597 F.3d 608, 627 (4th Cir.2010) (citing *United States v. Basham*, 561 F.3d 302, 334 (4th Cir.2009), and *Emmett v. Kelly*, 474 F.3d 154, 170 (4th Cir.2007)).

Given this restriction, the Court finds the government's allegation that the defendant "has never expressed any remorse" somewhat troubling. However, upon reading the sub-factor in its entirety, it seems clear that the government intends to offer only affirmative statements made by the defendant to others to

prove his lack of remorse. Moreover, if necessary, the Court will offer an instruction to the jury that the defendant's mere silence may never be considered as proof of lack of remorse. *See Caro*, 597 F.3d at 630–31 (approving of a similar instruction). Thus, although the Fifth Amendment places restrictions on admissible evidence concerning the defendant's lack of remorse, it does not require the Court to strike this sub-factor from the government's Notice. The Court therefore denies the defendant's motion to strike Future Dangerousness and certain of its sub-factors.

D. Gang Motivated Killing

The defendant moves to strike the non-statutory aggravating factor "Gang Motivated Killing" from the government's Notice as duplicative of both the criminal conduct alleged in Counts 22 and 24 of his Superseding Indictment and the non-statutory aggravating factor Future Dangerousness.[8] The defendant asserts that the duplicative nature of this aggravating factor violates the Eighth Amendment in the sense that it fails to narrow the class of persons eligible for the death penalty from those guilty of the underlying capital offense, which in the defendant's case is a violation of 18 U.S.C. § 1959(a)(1).

In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the United States Supreme Court upheld a state capital sentencing scheme that required a jury to consider certain circumstances as both statutory elements of first-degree murder *and* aggra-

[8] In his motion, the defendant fails to specify which non-statutory aggravating factor is supposedly duplicative of Gang Motivated Killing, but the government ad-dresses Future Dangerousness in its response. Absent a reply from the defendant, the Court assumes that this is the aggravating factor at issue.

vating factors. *Id.* at 241–43, 108 S.Ct. 546. Because each circumstance elevated the offense beyond a common-law murder, thereby "genuinely narrowing the class of death-eligible persons," there was nothing unconstitutional about the jury performing this narrowing function at the guilt phase of the trial. *Id.* at 244–45, 108 S.Ct. 546. Thus, "the fact that the aggravating circumstance duplicated one of the elements of the crime [did] not make the [the] sentence constitutionally infirm." *Id.* at 246, 108 S.Ct. 546. Federal courts, including the Fourth Circuit, have uniformly applied the *Lowenfield* holding to aggravating factors that duplicate elements of federal homicide statutes. *See Higgs*, 353 F.3d at 315–16 (upholding an aggravating factor that duplicated an element of 18 U.S.C. § 1111(a), causing death during the commission of a kidnapping); *see also Deputy v. Taylor*, 19 F.3d 1485, 1502 (3rd Cir.1994) ("Following … *Lowenfield*, federal courts of appeals have consistently held that a sentencing jury can consider an element of the capital offense as an aggravating circumstance even if it is duplicitous.").

It is less clear, however, whether the same circumstance alleged as two separate non-statutory aggravating factors would comply with the Constitution. The Supreme Court has expressly declined to rule on this issue. *See Jones v. United States*, 527 U.S. 373, 398, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (declining to decide whether "aggravating factors could be duplicative so as to render them constitutionally invalid"). Prior to the *Jones* decision, the Fourth Circuit held that permitting a jury to make "cumulative findings" during the penalty phase of trial creates a "clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally." *United States v. Tipton*, 90 F.3d 861,

899 (4th Cir.1996) (citing *Stringer v. Black*, 503 U.S. 222, 230–32, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992)). Although *Tipton* concerned a jury's cumulative finding of several death-eligible *mens rea* identical to those set forth in 18 U.S.C. § 3591(a)(2)(A)-(D), several district courts within the Fourth Circuit have concluded that *Tipton* also prohibits duplicative aggravating factors. *See, e.g.*, *Rivera*, 405 F.Supp.2d at 668; *Grande*, 353 F.Supp.2d at 631; *United States v. Regan*, 228 F.Supp.2d 742, 750–51 (E.D.Va.2002); *United States v. Johnson*, 136 F.Supp.2d 553, 559 (W.D.Va.2001). These courts have held that aggravating factors are impermissibly duplicative if they "necessarily subsume[]" each other. *Regan*, 228 F.Supp.2d at 750 (quoting *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir.1996)). This occurs "when the factors in question substantially overlap, or the factor's elements necessarily include elements of another factor." *Id.*

As it relates to Counts 22 and 24 of his Indictment, the defendant's argument is foreclosed by *Lowenfield* and *Higgs*. In order to convict the defendant on Counts 22 and 24, the government will have to prove not only that he murdered Ruben and Manuel Salinas, but that he did so for the purpose of maintaining or increasing position in MS–13. 18 U.S.C. § 1959(a); (Doc. No. 623: Third Superseding Indictment ¶ 49 & 54). Thus, a guilty verdict on Count 22 or 24 "genuinely narrow[s] the class of death-eligible persons" from those who simply commit murder to those who commit murder for the purpose of maintaining or elevating position in a racketeering organization. *Lowenfield*, 484 U.S. at 244, 108 S.Ct. 546. Such a finding during the guilt phase of the trial would not prevent the government from properly re-alleging the same circumstance as an aggravating factor.

Moreover, Gang Motivated Killing is not duplicative of Future Dangerousness. Each aggravating factor relates to a different characteristic of the defendant: Gang Motivated Killing concerns the defendant's motive for committing a specific act of violence in the past, while Future Dangerousness concerns his propensity for violence in the future. The only overlap is found in the sub-factor Gang Membership, which alleges as evidence of the defendant's future dangerousness that he "has demonstrated an allegiance to and active membership in MS–13, a violent criminal enterprise." (Doc. No. 275 at 5). Although the defendant's allegiance to MS–13 is certainly relevant to both factors, this single commonality does not create a substantial overlap between Gang Motivated Killing and Future Dangerousness, nor does it subsume the elements of one factor into the other. *Regan*, 228 F.Supp.2d at 751. Thus, these aggravating factors are sufficiently distinguishable such that a finding of both would not impermissibly or arbitrarily skew the jury's weighing process in favor of the death penalty.

E. Callous Disregard for the Severity of the Offense

Finally, the defendant moves to strike the non-statutory aggravating factor "Callous Disregard for the Severity of the Offense" (hereafter "Callous Disregard") on the ground that it is unconstitutionally vague, irrelevant, and duplicative of the non-statutory aggravating factor future dangerousness.[9]

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[9] In his motion, the defendant again fails to specify which non-statutory aggravating factor is supposedly duplicative of Callous Disregard, and the government does not identify one in its response. After a review of the government's Notice, it seems likely that the defendant is again referring to Future Dangerousness.

A factor is not unconstitutionally vague if it possesses "some 'common-sense core of meaning … that criminal juries should be capable of understanding … .'" *Tuilaepa*, 512 U.S. at 973, 114 S.Ct. 2630 (1994) (quoting *Jurek v. Texas*, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)). However, "the proper degree of definition" required to withstand a vagueness challenge falls well short of "mathematical precision." *Id.* (quoting *Walton v. Arizona*, 497 U.S. 639, 655, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). Moreover, a relevant aggravating factor is one that assists the jury "in distinguishing 'those who deserve capital punishment from those who do not….'" *United States v. McVeigh*, 944 F.Supp. 1478, 1488 (D.Colo.1996) (quoting *Creech*, 507 U.S. at 474, 113 S.Ct. 1534); *accord Johnson*, 136 F.Supp.2d at 558 ("[T]he aggravating factor must be sufficiently relevant to the question of who should live and who should die.") (internal quotations omitted). Courts have often emphasized that relevant evidence is "particularized to the individual defendant." *United States v. Chong*, 98 F.Supp.2d 1110, 1116 (D.Hawai'i 1999) (citing *United States v. Frank*, 8 F.Supp.2d 253, 279 (S.D.N.Y.1998)). If the aggravating factor bears only a "tangential relationship" to whether the defendant deserves the death penalty, it should be excluded. *Rivera*, 405 F.Supp.2d at 668. Finally, aggravating factors are not duplicative unless they substantially overlap, or the elements of one necessarily include the elements of another. *Regan*, 228 F.Supp.2d at 751.

Callous Disregard is neither unconstitutionally vague nor irrelevant. As is noted *supra*, general constitutional challenges to Lack of Remorse, a similar factor, have failed. *See Cooper*, 91 F.Supp.2d at 112–13; *Nguyen*, 928 F.Supp. at 1541 (both citing *Zant*, 462 U.S.

at 885 n. 22, 103 S.Ct. 2733). In order to prove his callous disregard for the severity of these offenses, the government will have to show that the defendant, through his words and actions, failed to appreciate the gravity of killing two human beings. This has a "common-sense core of meaning" sufficient to overcome any vagueness concerns. *Jurek*, 428 U.S. at 279, 96 S.Ct. 2950 (White, J., concurring). Moreover, the factor is also relevant, because whether the defendant appreciated the gravity of his actions relates to his individual character and provides one legitimate basis to distinguish whether the death penalty is justified in this particular case. *Creech*, 507 U.S. at 474, 113 S.Ct. 1534. Thus, Callous Disregard is sufficient to overcome vagueness and relevance challenges.

Greater concerns are raised by the defendant's claim that Callous Disregard is duplicative of Future Dangerousness. Both the government and the Court have likened the concept of callous disregard for the severity of the offense to a lack of remorse, which the government also alleges in its Notice as a sub-factor of Future Dangerousness. (Doc. No. 275 at 5). As a starting point, the Court recognizes the difference between alleging lack of remorse in its own right and alleging of lack of remorse as it relates to the defendant's future dangerousness. Moreover, Lack of Remorse is alleged as only one of four sub-factors of Future Dangerousness, each of which is meant to explain rather than supplant that aggravating factor. But despite these distinctions, a possibility exists that the jury could interpret the government's Notice as suggesting that a finding of Lack of Remorse automatically results in a finding of both Future Dangerousness and Callous Disregard. In this sense, the jury could perceive that the elements of Callous Disregard necessarily subsume the

elements of Future Dangerousness. *Regan*, 228 F.Supp.2d at 750. To eliminate this risk, the Court grants the defendant's motion to strike Callous Disregard from the government's Notice. No part of the Court's ruling on this matter shall prevent the government from arguing the defendant's lack of remorse as proof of his future dangerousness.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

1. The "Defendant's Motion to Strike Non–Statutory Aggravating Factors and Exclude Evidence of Unadjudicated Criminal Acts During Penalty Phase of Trial" (Doc. No. 483) is **DENIED**;

2. The defendant's "Motion to Strike the Non–Statutory Aggravating Factor of Future Dangerousness from the Notice of Intent to Seek the Death Penalty" (Doc. No. 968) is **DENIED**;

3. The "Defendant's Motion to Strike Non–Statutory Aggravating Factors from Notice of Intent to Seek the Death Penalty" (Doc. No. 488) is **GRANTED IN PART** and **DENIED IN PART**; that is, **GRANTED** such that the Court **STRIKES** the non-statutory aggravating factor "Callous Disregard for the Severity of the Offense" from the government's Notice of Intention to Seek the Death Penalty (Doc. No. 275), and **DENIED** in all other respects; and

4. Should the defendant's trial proceed to the penalty phase, the government shall present to the Court and to the defendant information it intends to introduce as unadjudicated conduct

for a determination of reliability. Only if the government satisfies that threshold determination will such evidence be presented to the jury.

APPENDIX C

AMENDED ORDER

PUBLISHED

FILED: August 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6
(3:08-cr-00134-RJC-2)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEJANDRO ENRIQUE RAMIREZ UMANA,
a/k/a Wizard, a/k/a Lobo,
Defendant-Appellant.

ORDER

The Court denies the petition for rehearing en banc.

A requested poll of the Court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judge Motz, Judge Gregory, Judge Keenan, Judge Wynn, and Judge Thacker voted to grant rehearing en banc. Chief Judge Traxler, Judge Wilkinson, Judge Niemeyer, Judge King, Judge Shedd, Judge Duncan, Judge Agee, and Judge Floyd voted to deny rehearing en banc. Judge Diaz recused himself and did not participate in the poll.

Judge Wilkinson wrote an opinion concurring in the denial of rehearing en banc, in which Judge Niemeyer joined. Judge Gregory wrote an opinion dissenting from the denial of rehearing en banc, in which Judge Wynn joined.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor, Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

Judge Niemeyer's fine opinion for the court fully addresses the points raised here by the dissent. *United States v. Umaña*, 750 F.3d 320 (4th Cir. 2014). I agree with that opinion, and add only these brief observations.

Were we to renounce *Williams v. New York*, 337 U.S. 241 (1949), this court would ignore a clear and consistent directive from the Supreme Court not to overturn higher precedent preemptively. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the court of appeals had declined to follow a decades-old Supreme Court case on the enforceability of arbitration agreements, *Wilko v. Swan*, 346 U.S. 427 (1953), because in the view of the court of appeals, the Court's intervening decisions on the construction of related federal statutes had reduced it to "obsolescence," *Rodriguez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988). While the Court finally did overrule *Wilko*, *Shearson*, 490 U.S. at 484, its opinion is best remembered for one sentence that is pure ice: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals

should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.*

The "tea leaves" for overruling were far clearer in *Shearson* than they are in this case. But the practice of circuit courts trying to anticipate, based on "trends," what the Supreme Court would do with an actual holding has not only raised eyebrows upstairs but had heretofore met with disfavor on our court. *See, e.g.*, *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012) ("Thus, lower courts should not conclude that the Supreme Court's 'more recent cases have, by implication, overruled [its] earlier precedent.'" (alteration in original) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997))), *cert. denied*, 133 S. Ct. 1459 (2013). Because *Williams* controls this case, I concur in the denial of the petition for rehearing en banc.

Williams examined which rules of evidence were applicable to "the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant" in a capital murder case. 337 U.S. at 246. In rejecting the view that the defendant enjoyed trial confrontation rights at sentencing, the Court noted:

> In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. … A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sen-

> tence is the possession of the fullest information possible concerning the defendant's life and characteristics. … It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention.

337 U.S. at 246-47, 251.

The three circuits to have addressed this issue have found *Williams* to be controlling in capital sentencing cases. The procedures or sentencing criteria may vary, but a sentencing proceeding remains a sentencing. Its purpose of providing a complete and rounded sense of the one to be sentenced does not fluctuate with the identity of the sentencer or the severity of the sanction to be imposed. The Seventh Circuit explicitly stated that the "Confrontation Clause does not apply to capital sentencing," that "the Supreme Court … has never questioned the precise holding of *Williams v. New York*," and that it was not free to revisit the *Williams* decision. *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002). Likewise, the Eleventh Circuit considered *Williams* controlling when it made clear that a defendant has a right to rebut before the jury information relevant to his character and record, but not to exercise full confrontation rights as to hearsay declarants. *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1074 (11th Cir. 2013). Finally, the Fifth Circuit grounded its opinion on *Williams* and indicated that it also was not free to revisit that decision. *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007). Granting rehearing en banc in this case not only would fail to resolve a circuit split but in fact would risk creating one in the face of controlling Supreme Court precedent.

Unlike in *Shearson*, it is anything but clear here that the Supreme Court will overrule *Williams*. Numerous factors support *Williams*'s continuing vitality, even after the passage of the Federal Death Penalty Act of 1994. Citing *Williams*, the Court recently continued to differentiate between a trial's guilt and sentencing phases and affirmed the broader evidentiary discretion attached to the latter. *See Alleyne v. United States*, 133 S. Ct. 2151, 2163 n.6 (2013) ("[J]udges may exercise sentencing discretion through 'an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" (alteration in original) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972))); *id.* ("'[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.'" (alteration in original) (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949))). This position has been firm and consistent. *See United States v. Watts*, 519 U.S. 148, 154 (1997); *Witte v. United States*, 515 U.S. 389, 399-401 (1995); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994). It is not just that an "already convicted defendant," *Williams*, 337 U.S. at 244, no longer benefits from the presumption of innocence in the sentencing phase. Practical considerations likewise counsel against formal constrictions that may not only impede the quest for a full human picture in all of its complexity, but lay the groundwork for additional sparring and sow the seeds for added assignments of error.

Circumscribing these rights does not leave the convicted defendant without protection from unreliable

evidence. Due process requires that the broader range of evidence available during sentencing still possess sufficient indicia of reliability. *United States v. Powell*, 650 F.3d 388, 393-94 (4th Cir. 2011); see also U.S. Sentencing Guidelines Manual § 6A1.3(a) (2013). The defendant also retains the opportunity for rebuttal of adverse evidence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *see also* U.S. Sentencing Guidelines Manual § 6A1.3. Furthermore, the Supreme Court has identified certain "structural errors" that "undermine the fairness of the entire criminal proceeding" and require automatic reversal. *United States v. Davila*, 133 S. Ct. 2139, 2142 (2013); *see also Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Among these structural errors are violations of the rights to counsel and to an unbiased judge, both of which are retained during sentencing. *Fulminante*, 499 U.S. at 308-10; *Gardner*, 430 U.S. at 358. Confrontation Clause violations, by contrast, are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 684 (1986). The trial right to confrontation and cross-examination remains part of our imperishable inheritance of liberty, *see Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), but it is not among the constitutional accoutrements of sentencing, in part because "*Williams* shows that witnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause," *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005).

It is not our office to create a circuit split, preemptively overturn Supreme Court holdings, and attempt to force the Court's hand. It bears note that the hierarchical nature of the judicial system lends to law a stability and consistency that would be lost if, for example, district courts treated our rulings in the fashion urged

by those with a more aggressive view of the intermediate appellate role. Society lives by law. When courts, convened in their roles as guardians of law, set the example of abiding by law, society as a whole will replenish its faith in our most cherished institutions.

Judge Niemeyer joins me in this opinion.

GREGORY, Circuit Judge, dissenting from the denial of rehearing en banc:

The government used unconfronted accusations from police informants to send a man to his death. I strongly believe that this violated Mr. Umaña's Sixth Amendment rights. My full reasoning is set out in my dissent. *United States v. Umaña*, 750 F.3d 320, 360–70 (4th Cir. 2014). With all due respect, I consider our refusal to rehear this case en banc to be a grave mistake. However, I write today to explain why I believe that Supreme Court review of Mr. Umaña's argument is warranted.

I believe Supreme Court review is vital because this Court and the district court misread the past five decades of Supreme Court jurisprudence on the Sixth Amendment and the death penalty. Further, I believe this misreading is the difference between Mr. Umaña living and dying. The conviction supporting the death sentence was a gang-related double murder that occurred after an argument in a bar. Though this crime was appalling, it is unlikely that it alone would have supported a death sentence, given Mr. Umaña's lack of previous convictions. Rather, the reason Mr. Umaña now faces execution is that the prosecutor was able to introduce out-of-court accusations from police informants that accused Umaña of several previous murders. An examination of the government's summation argu-

ment at sentencing demonstrates this: nearly every page of the transcript references these past murders. *Umaña*, 750 F.3d at 362 (collecting references to past murders) (Gregory, J., dissenting). For the reasons set out in my dissent, these accusers were not tenable witnesses: they would likely not have withstood the scrutiny of cross-examination. Mr. Umaña was never given this chance, however. Instead, the court substituted a reliability finding for Umaña's Sixth Amendment rights, and the result was that the jury sentenced Umaña to death.

As Justice Scalia writes, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *See Crawford v. Washington*, 541 U.S. 36, 62 (2004). "This is not what the Sixth Amendment prescribes." *Id.* Further buttressing my view is that this constitutional violation occurred during a Federal Death Penalty Act trial, in which a jury is required to make factual findings before a death sentence is within the permissible range of punishments. 18 U.S.C. § 3593(e) (requiring a jury to find the existence of enumerated aggravating factors, any additional aggravating factors, *and* that all aggravating factors outweigh all mitigating factors before death is permissible). Even in sentencing proceedings, certain Sixth Amendment rights apply for factfinding that can increase the range of punishments. *Ring v. Arizona*, 536 U.S. 584, 589 (2002). "[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Id.* at 610 (Scalia, J., concurring). Thus, the primary reason that I believe Supreme Court review is necessary in

this case is because the district court's decision, and our panel opinion affirming it, do not heed the clear trend that *Crawford* and *Ring* represent.

However, even if my view on the reach of the Confrontation Clause is incorrect, Supreme Court review is still vital in order to resolve the tension in current death penalty doctrine and to achieve uniformity across federal prosecutions. The panel's decision is driven in large part by the Supreme Court's ruling in *Williams v. New York*. 337 U.S. 241 (1949). That case held that under the Due Process Clause, the defendant did not have a right to confront his accusers during New York's death sentencing procedure, in which a judge had discretion to reject a jury-imposed life sentence for a death sentence. *Id.* The reason I respectfully disagree with the majority opinion is that since *Williams*, several lines of Supreme Court cases have created a sea change in death penalty procedure and Sixth Amendment doctrine. *See Crawford*, 541 U.S. 36 (overruling precedent to find that reliability finding cannot substitute for cross-examination); *Ring*, 536 U.S. 584 (overruling precedent to find that Sixth Amendment can apply during sentencing); *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that death penalty cannot be imposed using sentencing procedures that create a risk of arbitrary and discriminatory enforcement). In fact, *Williams* was decided before it was even accepted that the Sixth Amendment applied to state sentencing procedures in the first place. Thus, while the majority and I disagree on the reach of the Confrontation Clause, it is clear that there is tension in Supreme Court case law. *Ring* and *Crawford* suggest a broader understanding of Sixth Amendment rights and *Furman* creates more muscular requirements for death sentencing procedure, and these developments postdate the *Williams* decision. While *Williams* has not been

overruled, this tension suggests that it must be revisited in light of our modern understanding of the Sixth Amendment and the quality of procedure necessary for the government to take a man's life.

More importantly, this tension in Supreme Court case law has fostered a lack of uniformity in federal death sentencing procedure that creates intolerable unfairness. The end result is that a defendant's constitutional rights depend on the whims or strategic maneuvering of the prosecutor. In the absence of Supreme Court guidance, district courts across the country have reached conflicting views on whether the Confrontation Clause applies throughout a Federal Death Penalty Act trial, with some courts adopting my view and others adopting the majority's view that the rights only apply to the initial stage of capital sentencing. *Compare United States v. Umaña*, 707 F. Supp. 2d 621, 633 (W.D.N.C. 2010) (finding Confrontation Clause rights in first stage of federal capital sentencing but not the second stage), *with United States v. Stitt*, 760 F. Supp. 2d 570, 581-82 (E.D. Va. 2010) (finding Confrontation Clause rights in both stages of federal capital sentencing), *and United States v. Sablan*, 555 F. Supp. 2d 1205 (D. Colo. 2007) (same). Circuit court judges, too, have disagreed on this precise issue.* The result is that in federal capital trials—the most important possible proceeding of a defendant's life—the scope of a defendant's

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* *See Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065 (11th Cir. 2013) (divided panel opinion finding that Confrontation Clause does not apply to capital cases after guilty verdict); *United States v. Fields*, 483 F.3d 313, 324–338 (5th Cir. 2007) (same); *Proffitt v. Wainwright*, 685 F.2d 1227, 1252–53 (11th Cir. 1982) (finding a right to cross examine the author of a psychiatric report under the Sixth Amendment during sentencing) *modified*, 706 F.2d 311 (expressly limiting case to psychiatric reports).

Sixth Amendment rights depends on the district in which the case is brought. *See, e.g.*, *Umana*, 707 F. Supp. at 633 ("Absent guidance from the Supreme Court or the Fourth Circuit, the district courts are left to determine this issue."); *United States v. Mills*, 446 F. Supp. 2d 1115, 1122 (C.D. Cal. 2006) (noting its struggle "to apply the Supreme Court's decision in *Crawford*" and lamenting that "recent Supreme Court decisions complicate the matter"). Thus, even if my view is wrong, Supreme Court review is necessary to ensure fairness and uniformity in federal death cases. The scope of a defendant's Sixth Amendment rights should not depend on the venue in which a case is brought.

Justice Scalia has lamented that "the repeated spectacle of a man's going to his death" without the Sixth Amendment protection of jury factfinding "accelerate[s]" the "perilous decline" of "our people's traditional belief in the right of trial by jury." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). He argues that "we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." *Id.* I firmly believe that these words are as true for the Confrontation Clause of the Sixth Amendment as they are for the jury clause. There is no doubt that Mr. Umaña is being sent to his death in large part based on accusations of murder for which he was never charged, much less convicted. There is no doubt that the basis for these accusations was weak and would have withered under the scorching sunlight of cross-examination. Mr. Umaña was never given this opportunity, however. For the Framers of the Constitution, this state of facts was unacceptable when they occurred in England in the infamous Sir Walter Raleigh trial. *Crawford*, 541 U.S. at 44, 62. I consider it just as unacceptable today. Accordingly, I dissent.

Judge Wynn joins in this dissent.

APPENDIX D

FILED: June 27, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6
(3:08-cr-00134-RJC-2)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEJANDRO ENRIQUE RAMIREZ UMANA,
a/k/a Wizard, a/k/a Lobo,
Defendant-Appellant.

ORDER

The Court denies the petition for rehearing en banc.

A requested poll of the Court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judge Motz, Judge Gregory, Judge Keenan, Judge Wynn, and Judge Thacker voted to grant rehearing en banc. Chief Judge Traxler, Judge Wilkinson, Judge Niemeyer, Judge King, Judge Shedd, Judge Duncan, Judge Agee, and Judge Floyd voted to deny rehearing en banc. Judge Diaz recused himself and did not participate in the poll.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3591

§3591. Sentence of death

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

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

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

(A) intentionally killed the victim;

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

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

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

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a

hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

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

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

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

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

18 U.S.C. § 3592

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

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

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

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

(3) Minor participation.—The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

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

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

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

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

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

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

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

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

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

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

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

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

section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm.—For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

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

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

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

(6) Heinous, cruel, or depraved manner of committing offense.—The defendant committed the

offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

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

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

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

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

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

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

(13) Continuing criminal enterprise involving drug sales to minors.—The defendant committed

the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Previous conviction of other serious offenses.—The defendant has previously been convicted

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

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

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

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

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

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

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

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

18 U.S.C. § 3593

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

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

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

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

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing Before a Court or Jury.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty

of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

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

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

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

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

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

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

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

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

(c) Proof of Mitigating and Aggravating Factors.—Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentenc-

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

the existence of such a factor is established by a preponderance of the information.

(d) Return of Special Findings.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a Finding Concerning a Sentence of Death.—If, in the case of—

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

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

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

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating

factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special Precaution To Ensure Against Discrimination.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.