

No. 17-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

DYLANN STORM ROOF,
Defendant/Appellant.

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

BRIEF OF APPELLANT

AMY M. KARLIN
Interim Federal Public Defender
ALEXANDRA W. YATES
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012
(213) 894-2854 (tel.)
(213) 894-0081 (fax)
Amy_Karlin@fd.org
Alexandra_Yates@fd.org

JAMES WYDA
Federal Public Defender
SAPNA MIRCHANDANI
Assistant Federal Public Defender
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770
(301) 344-0600 (tel.)
(301) 344-0019 (fax)
James_Wyda@fd.org
Sapna_Mirchandani@fd.org

Counsel for Appellant

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INTRODUCTION

When Dylann Roof represented himself at his capital trial, he was a 22-year-old, ninth-grade dropout diagnosed with schizophrenia-spectrum disorder, autism, anxiety, and depression, who believed his sentence didn't matter because white nationalists would free him from prison after an impending race war. His experienced counsel, whom Roof jettisoned to prevent evidence of his mental illness from coming to light, told the court that in their decades of experience, none had represented a defendant so disconnected from reality.

And yet, the court allowed Roof not only to stand trial, but to represent himself and present no mitigating evidence or argument to the jury. Though Roof's mental state was the subject of two competency hearings, and five experts found him delusional—findings swiftly dismissed by the court, in its rush to move the case along—jurors never heard any of that evidence. Instead, prosecutors told them Roof was a calculated killer with no signs of mental illness. Given no reason to do otherwise, jurors sentenced Roof to death. Roof's crime was tragic, but this Court can have no confidence in the jury's verdict.

Additional errors tainted Roof's sentencing. The court's evidentiary rulings and government misconduct prevented jurors from considering evidence that Roof posed no future danger, while allowing jurors to weigh the victims' virtuousness and a survivor's call to send Roof to "the pit of hell" in favor of death. These errors further undermine any confidence this Court might have in the verdict.

Indeed, the federal trial shouldn't have happened at all. South Carolina swiftly brought capital charges for Roof's wholly-intrastate crime. Months later, federal prosecutors intervened, using novel theories of jurisdiction to seek their own death sentence—a move unwelcomed by the State, who viewed the federal prosecution as unnecessary and disruptive. This Court should vacate Roof's convictions and death sentence.

JURISDICTIONAL STATEMENT

Roof appeals from a judgment of conviction and death sentence entered on January 23, 2017, by the United States District Court for the District of South Carolina (Gergel, J.). JA-6968-72. The court denied Roof's motion for new trial or judgment of acquittal on May 10, 2017. JA-6996-7026. Roof timely filed a notice of appeal on May 23, 2017. JA-

7029. The district court had jurisdiction under 18 U.S.C. §3231. This Court has jurisdiction under 18 U.S.C. §§3595, 3742, and 28 U.S.C. §1291.

STATEMENT OF ISSUES

This appeal raises 20 issues for review.

Points related to competency to stand trial

1. Did the court clearly err in finding Roof competent to stand trial where evidence established he suffered from a delusional belief that white nationalists would stage a revolution, overtake the federal government, and free him, and thus deemed the proceeding irrelevant?
2. After Roof tried to sabotage his defense on the eve of trial, the court held an expedited competency hearing. Did it abuse its discretion by refusing a brief continuance, which deprived one expert of sufficient time to evaluate Roof and blocked another from testifying?
3. After Roof sought to represent himself at penalty, the court agreed his competency was again in doubt. Did it abuse its discretion by declaring its earlier factual finding “the law of the case” and blocking material evidence that predated the first hearing?

Points related to self-representation

4. Roof reluctantly proceeded pro se to block mental-health evidence, on the court's advice that counsel controlled the decision whether to present it. Did the Supreme Court's subsequent decision in *McCoy v. Louisiana*, holding counsel cannot override a defendant's primary goal even if it increases the chance of a death sentence, render Roof's waiver of counsel invalid?

5. Did Roof have an implied right to represent himself at penalty under the Sixth Amendment, which only guarantees self-representation to "the accused," not the convicted?

6. Assuming Roof had an implied right to represent himself at penalty, did the Constitution and federal death-penalty statute prevent him from self-representing and presenting no mitigation?

7. Was Roof's waiver of counsel not knowing and intelligent because the court misadvised Roof of his personal obligation to object and make motions as his own counsel, and the assistance standby counsel would be allowed to provide?

8. Was Roof's waiver of counsel not knowing and intelligent because the court didn't advise Roof of his option to keep counsel at voir

dire and guilt, then represent himself at penalty, leading him to conduct voir dire unaided?

9. Did the court err by failing to recognize its unconstrained discretion to deny Roof's untimely motion to waive counsel, made during jury selection?

10. Did the court abuse its discretion in finding Roof competent to represent himself?

11. Did the court abuse its discretion by denying Roof generally-accepted standby-counsel assistance and minor accommodations for his known impairments?

Points related to death verdict

12. The court prevented Roof from introducing particularized evidence of proposed mitigating factors that he didn't pose a risk of future violence and could be safely confined; allowed the government to capitalize on its error in argument; and refused the jury's request for clarification about the mitigating factors. Should Roof receive a new penalty hearing where jurors properly consider this evidence?

13. The government's first witness repeatedly called Roof "evil" and said he belonged in the "pit of hell." Did the court's admission of

this inflammatory testimony, without curative instruction, render Roof's death sentence unconstitutional?

14. Prosecutors urged jurors to sentence Roof to death because his victims were exceptionally good and devout. Did this improper comparative-worth evidence and argument render Roof's death sentence unconstitutional?

15. Is Roof's death sentence cruel and unusual because he was 21 and suffering neurodevelopmental and mental disorders at the time of his offense?

Points related to guilt verdict

16. Did Congress exceed its Commerce Clause authority in enacting 18 U.S.C. §247(a)(2), prohibiting obstruction of religion?

17. Should Roof's convictions for obstructing religion be vacated because the court didn't require prosecutors to prove Roof was motivated by hostility to religion, a necessary element?

18. Did Congress exceed its Thirteenth Amendment authority in enacting 18 U.S.C. §249(a)(1), the Hate Crimes Prevention Act?

19. Did the Attorney General improperly certify Roof's federal prosecution because the State prosecution made it unnecessary to secure substantial justice?

20. Should Roof's firearm convictions be vacated because they are based on predicate offenses that aren't crimes of violence?

STATEMENT OF FACTS

A. The crime

On the evening of June 17, 2015, 21-year-old Dylann Roof drove to Emanuel African Methodist Episcopal Church ("Emanuel") in Charleston. After sitting in his car for about 30 minutes, Roof walked inside carrying a small bag hiding a gun and ammunition. JA-4268-69; *see* Govt.Exs-23e, 23c (videos). He entered the fellowship hall, a meeting space on the ground floor where congregants were gathered for Bible study. Reverend Clementa Pinckney stood, handed Roof a study sheet and Bible, and offered him a chair. JA-3698, 5014-15. Roof sat next to Pinckney for the next 45 minutes. JA-3699, 5014-15. When parishioners stood and closed their eyes in prayer, Roof took out his gun and started shooting. JA-3697-703, 5014-21.

As Roof fired the first shots, parishioners huddled under the half-dozen tables dotting the room. JA-3700, 3722, 3790. Roof circled the

hall and continued shooting, stopping multiple times to reload. After firing 77 rounds, Roof asked congregant Polly Sheppard if he'd shot her, and she said no. Roof told Sheppard he planned on killing himself and would let her live to tell the story. Then he left. JA-3700-02, 3706, 4279, 5016-17.

Nine of the twelve parishioners at Bible study that night died: Sharonda Coleman-Singleton, Cynthia Hurd, Susie Jackson, Ethel Lance, Depayne Middleton-Doctor, Clementa Pinckney, Tywanza Sanders, Daniel Simmons, and Myra Thompson. JA-4972. Three individuals—Sheppard, Felicia Sanders, and Sanders's 11-year-old granddaughter—escaped physical injury. Pinckney's wife, Jennifer, and their 6-year-old daughter, who hid in an adjacent office, also were not physically harmed. JA-5008-09.

B. Roof's arrest and confession

Roof left Emanuel before police arrived. He later told agents he anticipated being surrounded by officers and shooting himself, for which he saved one magazine of bullets. With no escape plan, Roof drove through the night toward Nashville. JA-4279-80, 4290-92.

The next morning, officers in Shelby, North Carolina, acting on a tip, stopped Roof's car. JA-4291-92. Roof complied with officers' directions, quietly identified himself, admitted responsibility for the shooting, and said the gun was in his backseat. JA-4013-21, 4082-88; JA-4275, 4291-92.

Officers drove Roof to the Shelby police station, where he agreed to speak with FBI agents. JA-4088-89, 4096-4104, JA-4346. Asked what happened, Roof said: "I killed them. Well I guess, I mean I don't really know." JA-4265. Over the next two hours, Roof described his "racial awakening" two years earlier, which started when he read about the shooting of Trayvon Martin. Before then, Roof didn't think much about race because, like other white people, he was "brainwashed." But after typing the phrase "black on white crime" into Google, he found websites that "woke [him] up." JA-4285, 4310-12. He told agents: "[Y]ou know, black people are killing white people every day on the streets and they rape, they rape white women, a hundred white women a day." JA-4269.

Roof told agents he decided somebody had to do something, and developed a plan to kill African-Americans, hoping it might spur a "movement" among white people to defend themselves. JA-4300-01,

4310-13, 4328-30. He denied trying to start a race war, though he believed one was inevitable. JA-4284. Roof said he chose Emanuel for its historical significance and almost-exclusively African-American population. (He initially considered attacking a “black festival,” but decided against it because of security concerns and the pressure of having to take action on a specific day.) Roof agreed his victims were innocent, stating, “[C]riminal black people kill innocent white people every day.” JA-4280-82.

At several points during the interview, Roof seemed confused. He thought it was July instead of mid-June. JA-4265-66. He said he began firing about 15 minutes after entering the church, though he sat for 45 minutes. JA-4267, 3699. And he estimated shooting “[f]our or five” parishioners, expressing disbelief upon hearing he’d killed nine people. JA-4266, 4303-05.

C. The government seeks a death sentence

The day after the shooting, the State of South Carolina charged Roof with nine counts of murder, three counts of attempted murder, and one weapon-possession count. JA-108, JN-44. Over a month later, on July 22, 2015, federal prosecutors charged Roof with 33 hate-crime,

religious-obstruction, and firearm offenses resulting in death or involving an attempt to kill. JA-49-63.

At his federal arraignment, Roof expressed his intent to plead guilty. But because the government was considering seeking a death sentence, the court entered a not guilty plea on his behalf. JA-77.

The state noticed its intent to seek the death penalty on September 3, 2015. JN-1-2. More than eight months later, on May 24, 2016, the government filed its notice of intent to seek death. JA-145-51. Roof offered to plead guilty in exchange for a sentence of life-without-parole, an offer that remained open throughout trial, but the government declined. JA-5794.¹

D. Doubts about Roof's competency surface on the eve of trial

In early November 2016, after three days of jury selection, counsel alerted the court that Roof, who cooperated with them for 16 months, suddenly became oppositional. They explained Dr. Park Dietz, the prosecution's psychiatrist, recently evaluated Roof and suggested counsel planned to portray him as developmentally disabled or mentally

¹ After Roof's federal trial concluded, the State accepted his offer to plead guilty and waive appeals in exchange for life-without-parole.

ill. Roof insisted he was neither, claiming his “friend” Dietz agreed. JA-537-40, 544, 557; *see* JA-1725.

Counsel told the court their experts diagnosed Roof with an array of mental illnesses. Because of Roof’s resistance to a mental-health diagnosis, counsel planned to share the findings with him at the appropriate time. But Roof’s recent behavior, which suggested he “form[ed] an alliance in his own mind with the prosecution,” raised concerns. JA-537-45, 650.

Within days, Roof sent prosecutors a handwritten letter insisting he wasn’t mentally ill and accusing his attorneys of engaging in “scare tactics, threats, manipulation, and outright lies.” Roof acknowledged he had “no real defense” because his preferred strategy was not one “[his] lawyers would present or that would be acceptable to the court.” JA-586-89.

Counsel requested a hearing, declaring doubt about Roof’s competency to stand trial. JA-573-85. The next day, the court halted trial proceedings and, over the next 48 hours, convened multiple hearings to decide how to proceed. At one, the court commented on the

unprecedented turn in events: “Never has th[is] occurred in a capital case.” JA-596; *see* JA-634.

At an *ex parte* hearing, Roof told the court he wrote prosecutors because he opposed counsel’s plan to present “mental health stuff,” particularly evidence he was autistic, which he considered a fate worse than death. JA-621-42; *see* JA-632 (“[O]nce you’ve got that label, there is no point in living anyway.”). Asked why, Roof cryptically responded he “ha[d] to be careful” and would get “in trouble” if he said too much. JA-630. The court repeatedly asked Roof what “trouble” he feared, reminding him he faced a death sentence, to which Roof replied, “I can’t say.” JA-630-31. When the court switched tacks and asked about his preferred defense, Roof said he “[could]n’t talk about it,” then claimed his ideal defense was irrelevant because it would only “aggravate things.” JA-638-41.

Out of Roof’s presence, counsel said their experts diagnosed him with symptoms of a psychotic disorder (delusions, paranoia, and grandiose beliefs), anxiety, depression, and autism. They explained they managed to work with Roof for months despite the challenges, but his delusions now impeded their efforts. JA-642-46, 652-54.

Counsel described Roof's most prominent delusion—that African-Americans were mounting a race war to extinguish the white population, and a vast media conspiracy was hiding it. Roof insisted that if he could simply explain this threat to white people, they would understand—in fact, *support*—his conduct. At the same time, Roof felt he didn't need the public's support because a race war was imminent, and white nationalists would set him free:

[Roof] does not believe he's going to be executed, no matter what sentence is imposed . . . because he firmly believes that there will be a white nationalist takeover of the United States within roughly six, seven, eight years, and when that happens, he will be pardoned. And he also believes it probable, although not certain, that he will be given a high position, such as the governorship of South Carolina.

JA-652-54.

According to counsel, Roof's race-war delusion was consistent with his documented history of other delusional beliefs. For example, Roof insisted testosterone had pooled on one side of his body, leaving him asymmetrical—though doctors assured him this was neither true nor physically possible. He believed his forehead was disfigured, and kept it

hidden behind a bowl-cut. And he was convinced he would soon be bald because his hair was falling out, though it clearly was not. JA-644-46.

E. The court agrees Roof's competency is in doubt and holds an expedited hearing

The court agreed there was reasonable cause to question Roof's competency to stand trial under 18 U.S.C. §4241, though it expressed skepticism about the request's timing. JA-659 ("Am I being played?"). Counsel pointed out that Roof's letter, an attempt to sabotage the defense, signaled they could no longer accommodate his delusional beliefs. JA-710-11.

The court scheduled a hearing the following week, and appointed a psychiatrist to examine Roof the next morning. JA-592-93, 679-85. Counsel objected to the expedited schedule, requesting additional time. JA-681, 706-19, 773-98. The court initially denied relief, then agreed to extend the schedule by a few days so the process didn't "appear[]" rushed. JA-694-95, 805-06. When counsel learned a critical defense expert would be abroad on the hearing date, they requested a one-week continuance, which was denied. JA-773-78, 808-09.

The court held a two-day competency hearing on November 21-22, 2016. JA-885-1117, 1463-754. It directed parties to focus on the two-

pronged competency standard under *Dusky v. United States*, 362 U.S. 402 (1960): (i) whether Roof understood the charges and legal proceedings; and (ii) whether he had the capacity to rationally assist counsel in his defense. The defense, which carried the burden of proving by a preponderance of the evidence Roof didn't satisfy either prong, focused its presentation on the second. JA-827-28, 890-92.

1. Experts testify Roof exhibits symptoms of a psychotic-spectrum disorder

Five mental-health experts who evaluated Roof testified, orally or in writing, as follows:

- Defense expert Dr. Donna Maddox² testified Roof suffered symptoms of psychosis—including delusions, paranoia, and grandiose beliefs—that prevented him from appreciating the gravity of his situation and rendered him unable to rationally assist counsel. She diagnosed Roof with, *inter alia*, schizophrenia-spectrum or other psychotic-spectrum disorder, autism-spectrum disorder, and anxiety disorder. JA-1485-86, 1510-15, 1536-45.
- Defense expert Dr. William Stejskal³ testified Roof was delusional, expressed paranoid and grandiose beliefs, and suffered distorted

² Maddox, psychiatry professor at Medical University of South Carolina, previously performed hundreds of competency evaluations. JA-1481-85, 1827-35.

³ Stejskal, clinical and forensic psychologist and professor at University of Virginia's Institute of Law, Psychiatry, and Public Policy, had performed 300-400 competency evaluations. JA-1662-67, 2049-59.

thinking and perception. He believed Roof was in the early stage of schizophrenia-spectrum disorder, but could not make a conclusive finding because Roof refused to see him after learning counsel requested a competency hearing. JA-1668-69, 1683-84, 1690-93.

- Defense expert Dr. Rachel Loftin⁴ testified Roof exhibited symptoms of psychosis (including delusions of grandeur and somatic delusions), disordered thinking, obsessive-compulsiveness, anxiety, depression, and suicidal ideation. She diagnosed Roof with autism-spectrum disorder, and concluded his symptoms were “consistent with” schizophrenia-spectrum disorder. JA-1773-75.
- Defense expert John Robison⁵ testified Roof showed clear signs of autism, including an inability to distinguish trivial from nontrivial matters and obsessive focus on the former. Robison also described Roof’s paranoia and delusions, including his expectation of being pardoned for his crime. JA-1825-26.
- Court-appointed expert Dr. James Ballenger⁶ testified Roof exhibited signs of psychosis (including somatic delusions), but didn’t have a “broad” psychotic disorder that rendered him incompetent. Ballenger diagnosed Roof with probable schizoid-

⁴ Loftin, assistant professor and clinical director of Rush University Medical Center’s autism center, was in Cyprus on the hearing dates; counsel submitted a brief declaration of her key findings. JA-1773-75, 2035-48.

⁵ Robison is a neurodiversity scholar-in-residence at William & Mary and autistic.

⁶ Ballenger, clinical professor at Medical University of South Carolina, had never conducted a pretrial competency exam. He previously testified in one capital case, where the court dismissed his testimony as “contrived” and “unreliable.” JA-1121-36, 1371-411.

personality disorder, social-anxiety disorder, mixed-substance-abuse disorder, possible depression, and possible autism-spectrum disorder (which “may” affect his competency). JA-907-11, 952-55, 989-90, 1358.

Additionally, two defense experts who reviewed Roof’s records testified as follows:

- John Edens⁷ testified Roof’s results on a personality-assessment test were consistent with psychotic-spectrum disorder, contrary to Ballenger’s findings. JA-1776-87.
- Dr. Laura Carpenter⁸ testified autism and intelligence are not mutually exclusive, and described how the latter often masks the former. JA-1533-34, 1638-44.

2. Experts testify Roof believes he will be rescued by post-revolutionary white nationalists

Every expert who evaluated Roof testified about his fixed belief white nationalists would win a race war, overtake the government, and free him. JA-1080, 1487-88, 1509-13, 1551, 1774.

All but one, the court-appointed expert, concluded this was a delusion. JA-1486-91, 1510-11, 1700, 1774, 1823. Ballenger agreed Roof envisioned a “future universe” run by white nationalists:

⁷ Edens, licensed psychologist, is lead author of a personality-assessment test similar to the one Roof took. JA-1776.

⁸ Carpenter is an autism expert and professor at Medical University of South Carolina. JA-1788-89, 1795-817.

[Roof]'s conviction that there is ongoing widespread black on white crime and this will result in a 'war' between the races and that the 'white nationalist' movement will win this actual war and establish a new order and government drives [his] criminal actions and thinking and working with his attorneys.

JA-1368. Ballenger also agreed Roof anticipated being freed after the war. JA-989-90, 1341. But in his view, Roof's visions were "over-valued" racist views, not delusions, because they were "less bizarre" and "more logical" than delusions and because "nothing else about [him was] psychotic."⁹ JA-1033-34, 1082-83, 1348.

3. Experts testify Roof has autism-spectrum and anxiety disorders

Experts also agreed Roof either suffered from or exhibited symptoms of autism-spectrum disorder. Maddox, for example, testified Roof showed the following traits, some starting in early childhood: (i) pedantic speech (matter-of-fact and slow-moving); (ii) trouble making eye contact; (iii) disorganized thinking (switching between seemingly-unrelated topics); (iv) inappropriate affect (smiling while discussing

⁹ Over-valued ideas are unreasonable beliefs held with strong conviction, while delusions are fixed false beliefs maintained despite incontrovertible contrary evidence. David B. Arciniegas, *Psychosis*, 3 Behav. Neur. & Neuropsychiatry (2015), 715-36.

upsetting topics); (v) constricted affect (narrow range of emotions); and (vi) mood disturbances. JA-1496-1503, 1554.

They similarly testified about Roof's anxiety, confirming a longstanding diagnosis. Maddox described how at age 14, Roof told his mother he was going to kill himself. Doctors at a mental-health center subsequently diagnosed Roof with anxiety, social phobia, obsessive-compulsiveness, and cannabis dependency (which they viewed as an attempt to self-medicate), issues for which he briefly sought treatment before abruptly quitting. JA-1515-29, 1137-91. Roof's anxiety and isolation worsened over time. JA-1539. Within a year, he dropped out of school, after which he "spen[t] all of his time at home." JA-1929-40.

4. Counsel attests to Roof's inability to make essential trial decisions

Before the hearing, counsel produced an affidavit attesting to the practical effects of Roof's impairments on his capital trial. Counsel described Roof's paranoia, delusions, persecutory beliefs, rigidity, grandiosity, fixations, and inability to control certain aspects of his demeanor in the courtroom (such as smiling inappropriately). They said Roof was "so distracted by his delusional ideas," which rendered the

trial “irrelevant,” that he couldn’t aid in the “myriad decisions” needed to prepare for trial. JA-7365-71.

5. Roof asserts he isn’t mentally ill and his counsel are “serial liars”

Roof addressed the court last. He denied ever claiming he wanted to start a race war or gain status in the post-revolutionary world—despite every witness’s testimony and counsel’s statement to the contrary. JA-1700, 1733-34; *see* JA-989-90, 1318-19, 654. Roof even denied the existence of such a group: “[T]here are no white nationalists.” JA-1734. (Later, when the court asked if Roof wanted to “create a potential white nationalist revolution,” he essentially admitted as much, saying, “[i]f you want to put it like that.” JA-1736-37.)

Roof told the court he wrote prosecutors to stop counsel from suggesting he had “some kind of mental problem.” JA-1735, 1739-40. The court characterized this as a “rational” decision, and Roof agreed. JA-1740. But when asked if he thought a potential death sentence would “never be carried out because [he] will be rescued by white nationalists,” Roof hesitated before answering, “Anything is possible.” When the court pressed Roof on the likelihood of a rescue, Roof said it was “less than half a percent.” JA-1728-33.

F. The court finds Roof competent to stand trial

The court found Roof did not have a psychotic disorder and was competent to stand trial. JA-2060-84. It rested its finding on Ballenger's opinion that Roof's race-war beliefs were not delusional; Ballenger's impression of Roof as "relaxed, even humorous, in his interactions" (contrary to the "classic" signs of psychosis); his testimony that Roof's testing "eliminated" a schizophrenia-spectrum diagnosis; the court's untrained observation of Roof's "calm" and "attentive" courtroom demeanor and ability to speak in "clear and coherent language"; Roof's "striking" IQ, which was in the 96th percentile for overall intellectual function; and Roof's claim the likelihood of a future rescue was slight. JA-2070-72, 2078 (citing JA-1347-48).

The court did not address the testimony of every expert (even Ballenger) that Roof exhibited a constellation of symptoms indicative of a psychotic disorder, including somatic delusions, paranoia, and grandiose beliefs. Nor did the court address the heart of defense counsel's presentation, including their sworn statement about Roof's impairments, Roof's repeated insistence over the prior year he would be rescued by white nationalists, Ballenger's misinterpretation of Roof's

standardized-test results, and evidence Roof began minimizing signs of mental illness after learning his competency was in doubt. JA-2060-81.

G. The court grants Roof's motion to discharge counsel, then reappoints counsel at his request

At the end of the competency hearing, Roof asked if he could continue to trial represented by counsel, but direct his attorneys not to present mental-health evidence. The court said no. Roof then asked if he could represent himself and “not do anything.” The court reluctantly agreed that, if Roof made such a motion, the court would consider it. JA-1741-44.

Five days later, Roof moved to discharge counsel and represent himself. JA-2085-86. At an in-chambers hearing, the court announced Roof “ha[d] the capacity” to proceed pro se, even if it didn't like his decision. JA-2111-12, 2293. Defense counsel objected, reiterating their concerns about Roof's competency. The court disagreed, told counsel it would grant Roof's motion, and encouraged them “to be active standby counsel.” JA-2111-12, 2124.

Immediately thereafter, the court held a brief hearing and advised Roof of his rights and its intent to appoint standby counsel “who would be available to assist [him] if [he] desired that assistance.” Roof waived

counsel, but requested they remain seated beside him in a standby capacity. JA-2130-37.

With Roof serving as his own counsel, voir dire of prospective jurors—a process expected to take three weeks—was over in five days. JA-159-60; *see* JA-33-34. During this time, Roof repeatedly asked if standby counsel could help him voice objections and pose questions to jurors; alternatively, he asked the court to slow down. The court denied each request. JA-2403-09, 2561-64, 2533-38, 2548-52, 2678-80, 2867-68, 3533-51.

After completing voir dire, but before the final day of jury selection, Roof asked the court to reappoint counsel for peremptory strikes and the guilt phase of trial. JA-3460-62. The court granted the request. JA-3477-78, 3548-50. Roof made clear he intended to represent himself at the penalty phase, and the court agreed to this plan. JA-3470-78.

H. The guilt phase

In December 2016, prosecutors detailed the Emanuel shooting, and asked jurors to find Roof guilty on all counts. JA-3634-53. Roof, through counsel, admitted guilt and advised jurors the defense likely

would not call witnesses or ask many questions of the government's witnesses. JA-3653-64.

Notwithstanding the defense's concession, prosecutors laid out extensive evidence to prove Roof's guilt, calling 37 witnesses and introducing roughly 500 exhibits over two weeks. JA-37-38, 6810-40.

Felicia Sanders, one of three survivors, testified first. She told how parishioners welcomed Roof to Bible study, and how he sat with them, waiting until they closed their eyes before shooting. Sanders described hiding beneath a table, then watching as her son, Tywanza, stood after being shot, told Roof they "mean[t] [him] no harm," and was shot again. JA-3666-707. Polly Sheppard, the other adult survivor, testified last. She told jurors when the shooting started, she ducked under a table, from where she watched Roof's boots circling the room. When Roof reached her, he demanded she stop praying, asked if he'd shot her, said he'd let her live, then left. JA-4995-5022.

Between Sanders and Sheppard, nearly three-dozen witnesses testified for the prosecution. Nine law-enforcement officers and first responders described securing and processing the crime scene. JA-3707-809, 3840-94, 3903-81. Using photos, sketches, and other demonstrative

exhibits, they virtually “walked” jurors through the church. Witnesses testified to recovering 7 magazines, 74 shell casings, and 22 projectiles in and around the hall, and they identified dozens of markings in the floor, ceiling, walls, tables, and chairs where bullets had struck, passed through, or become lodged. JA-3954-70.

Medical examiner Susan Presnell testified each victim sustained, at minimum, five-to-ten gunshot wounds, JA-4967-94, and a crime scene agent testified to recovering 54 projectiles from the victims’ bodies, JA-3962-70.

Officers described Roof’s arrest the day after the shooting. JA-4011-55, 4082-95. An FBI agent who interviewed Roof testified about his confession, and prosecutors played the two-hour recording in full. JA-4112-80; *see* Govt.Ex-5 (video).

Special Agent Burke, from the state’s crime-scene unit, identified dozens of items recovered from Roof’s car, including the gun, magazine packaging, ammunition trays, lists of churches and historical sites around Charleston, and a journal containing white-nationalist symbols. JA-4181-223, 4402-54. She read the journal in its entirety, narrating its claims that African-Americans “are stupid and violent,” Jews should be

turned “blue for 24 hours” so they can be identified, and “homosexuality should be illegal.” JA-4205-19, 4234-59. Burke also read into the record two handwritten notes found in Roof’s car. The first read: “Dear Mom, I love you. I’m sorry for what I did, but I had to do it . . . I know that what I did will have reprecussions [*sic*] on my whole family and for this I truly am sorry. At this moment I miss you very much and as childish as it sounds I wish I was in your arms. I love you, Dylann.” JA-4202, 4347. The second read: “Dear dad, I love you and I’m sorry. You were a good dad. I love you.” JA-4202, 4348.

More than a dozen witnesses testified about documentary and digital evidence tying Roof to the crime, including his purchase of the gun, magazines, ammunition, and tactical pouch used, and the manufacture of each outside South Carolina. JA-4112-80, 4455-546, 4554-74, 4581-617, 4623-27, 4644-51, 4681-718, 4726-31, 4739-70, 4785-803, 4804-09, 4917-33.

FBI Case Agent Joseph Hamski summarized the work done by his team of roughly 50 agents, who conducted 215 interviews, performed 13 searches, and issued 65 subpoenas, resulting in the collection of 530 items of evidence. JA-4829-31. As he testified, Hamski presented more

than 200 slides summarizing the government's evidence, including Roof's writings, white-supremacist drawings, and photographs. JA-4812-908. On cross-examination, Hamski agreed that Roof was alone in virtually every one of thousands of pictures, and that he appeared alone on each trip to Charleston in the months before the shooting. JA-4903-05. Hamski also confirmed the absence of evidence tying Roof to any white-nationalist organization. JA-4908.

Finally, Hamski displayed a timeline to illustrate Roof's activity leading up to the shooting. He highlighted several events, including a February 2015 call from Roof's mother's house to Emanuel; three round-trip visits from Roof's hometown to Charleston; Roof's application for a gun license; and his purchases of magazines and of ammunition. JA-4858-97.

At the end of the government's case, the defense moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. The court denied the motion. JA-4954-61, 5023-26; *see* JA-3501-32.

Counsel moved the court to introduce evidence of Roof's state of mind and personal characteristics during the months leading up to the shooting. They argued that evidence of Roof's extreme isolation,

incapacitating depression, and preoccupation with imaginary illness was necessary—both to counter prosecutors’ proof of his intent (an element of the crime) and to fill gaps in the prosecution’s timeline, which portrayed Roof as behaving in a “calm” and “calculated” manner. JA-4934-53, 4060-67. The court denied the motion, stating evidence of Roof’s mental state was potentially relevant only at penalty, not guilt. JA-5026-34.

The defense rested without calling any witnesses. JA-5039.

In closing, the prosecution highlighted Roof’s racist writings, months of preparation, and decision to sit with parishioners until they closed their eyes before shooting, describing him as a “man of immense hatred.” JA-5065-91.

Defense counsel asked jurors to look beyond the horror of Roof’s crime and consider the utter irrationality of his beliefs about race, his social isolation, and his conviction that he “had to” kill nine innocent strangers—a phrase Roof used repeatedly in his confession. At nearly every mention of Roof’s unusual thinking, the government objected; the court sustained each, directing counsel to avoid commenting on Roof’s mental state. JA-5092-107.

In rebuttal, the prosecutor called defense counsel's argument "a distraction." He then directly addressed Roof's mental state, describing Roof as a "calm, confident, callous man who show[ed] no signs that mental illness had anything to do with" his crime. JA-5107-13.

During deliberations, the court granted the jury's only request, to see the part of Roof's videotaped confession where he expressed surprise over the number of people he killed. JA-5162-64. On December 15, 2016, after less than three hours of deliberation, the jury found Roof guilty of all 33 counts. JA-5164-73, 5184-97.

I. Roof confirms his intent to represent himself at penalty and present no mitigation

The court inquired whether Roof still sought to represent himself at penalty, advising he could change his mind until the start of that phase. Roof confirmed he did, and the court accepted his waiver, discharged counsel, and reappointed them to serve in a standby capacity. JA-5176-81, 5198-99.

The following day, Roof filed a handwritten, single-paragraph notice stating he "[would] not be calling mental health experts or presenting mental health evidence" at penalty. JA-5205. After the government announced their plan to call 38 witnesses, Roof said he

didn't "intend[] to offer any evidence at all" or "call any witnesses whatsoever." JA-5230-35, 5239-40.

J. Standby counsel request a second competency hearing

On December 29, 2016, two weeks after the verdict, standby counsel moved the court to evaluate Roof's competency to stand trial and represent himself at penalty, submitting four mental-health reports that weren't available at the earlier hearing. Counsel noted the gravity of their request, stating that in their combined decades of experience, none "represented a competent defendant who [was] so disconnected from the reality of an impending death sentence." JA-5249.

In their motion, counsel described Roof's ongoing insistence jurors would spare his life once they understood why he "had to" commit the crime. JA-5251-55. They pointed to Roof's bizarre conduct during the guilt phase of trial, including his refusal to speak to counsel when jurors were present, inability to recall the day's events, and fixation on whether his clothes were "the right color, texture, thickness and fit" and whether they were "cleaned with the correct type and amount of detergent." JA-5243, 5249, 5251-55. Finally, counsel argued that even if

Roof was competent to proceed to the penalty phase, his impairments prevented him from representing himself. JA-5257-59, 5483-86.

K. The court agrees to a limited competency hearing

The court scheduled a second competency hearing out of “an abundance of caution,” but declared its earlier ruling “law of the case,” agreeing only to hear evidence arising *after* November 22, 2016 (the day the prior hearing concluded). JA-5518-20. The court reappointed Ballenger to evaluate Roof over the weekend and directed that he, too, not review any material that predated the November hearing. JA-5463-64, 5977, 5991. It set a hearing for January 2, 2017, one day before the penalty phase’s scheduled start. JA-5463-64. Standby counsel moved for a one-week continuance, which the court denied. JA-5467-71.

At the hearing, in reliance on the preclusion doctrine, the court rejected a lion’s share of the evidence counsel proffered to prove Roof’s incompetence. The excluded evidence included testimony and written evaluations of four defense experts, two of whom were not able to testify at the November hearing: (i) Loftin, who submitted a bare-bones declaration drafted without access to her case notes; and (ii) Dr. Paul J. Moberg, psychiatry professor at the University of Pennsylvania, who

conducted a neuropsychological exam of Roof in early 2016. In the court's view, the proffered evidence (including the newly-presented testing and reports) was irrelevant to the January competency determination because Roof refused to see the defense experts after mid-November—because of his antagonism toward a mental-health diagnosis. JA-5523-31, 5640-41, 5730-33.

As a result of its ruling, the court admitted only standby counsel's declaration; Ballenger's testimony and written report based on a five-hour interview with Roof the preceding weekend; Loftin's testimony (limited to observations of Roof's late-November and December recorded jail visits with family); and testimony from Roof's spiritual advisor, Father John Parker, about their post-November visits. JA-5512-735, 6950-67.

L. The court finds Roof competent to proceed to penalty and represent himself

At the close of the hearing, the court found Roof competent to stand trial and represent himself at penalty. Standby counsel objected that Roof was incompetent and the court's evidentiary limitations violated his due-process rights. The court dismissed the objections. JA-

5730-38. It further denied counsel's alternative request to independently present mitigating evidence. JA-6646-47.

In a subsequent memorandum, the court adopted Ballenger's opinion that Roof's goal for penalty was not to avoid death, but "to express his political ideology" and "preserve his reputation." JA-6958 (citing JA-5993). The court also cited Roof's in-court claims that he opposed mental-health evidence not because he expected to be rescued, but because "it[] [was] not true." JA-6964-65. The court admitted it didn't credit the testimony of either defense witness—Loftin because she didn't see Roof after mid-November, and Parker because he wasn't a mental-health expert. JA-6960-64. And the court only briefly addressed counsel's observations." JA-6958-59 (citing JA-5994).

M. The penalty phase

1. Pretrial rulings

Roof submitted two mitigating factors to highlight his risk of victimization in prison because of his age, small size, and notoriety, and the difficult confinement conditions he would face as a result. JA-464. But on the government's motion, the court struck the proposed factors.

The court also categorically foreclosed the defense from introducing evidence about prison classifications, designations, services,

programs, and conditions, holding that “details of prison administration are not a proper matter for a capital sentencing jury.” JA-489-95. The ruling prevented Roof from introducing evidence in support of two additional mitigating factors—that Roof, if given a life sentence, would not pose a future danger and could be safely confined. JA-496-97.

2. Opening statements

The government highlighted three themes in its penalty-phase opening statement: Roof’s racist motive; the crime’s impact on victims’ families, friends, and community; and his lack of remorse. JA-5776-93.

Roof then stood and addressed jurors for the first time. He said he chose to self-represent to stop counsel from arguing he was mentally ill, but conceded his choice “accomplishe[d] nothing” because the competency hearing record eventually would become public. Roof then insisted he wasn’t mentally ill, claiming “there is nothing wrong with me, except logic.” He ended by asking jurors to “forget” anything his attorneys said, adding “none of it is worth remembering anyway.” JA-5793-94.

3. Stipulations

The parties agreed to three factual stipulations: (i) Roof was born on April 3, 1994, and on June 17, 2015, was 21; (ii) he had no prior

felony convictions; and (iii) he offered to plead guilty in exchange for a life-without-parole sentence. JA-5794-95.

4. Prosecution case

Prosecutors presented 23 victim-impact witnesses (family, close friends, and colleagues of the victims). JA-5795-967, 6003-175, 6313-469, 6527-79.

Before the penalty phase, Roof moved to limit victim-impact evidence to what the Supreme Court has countenanced—a “quick glimpse” of the victims’ lives. Noting his plan to present no mitigation, he argued that anything beyond a glimpse threatened to “take over the whole sentencing trial and guarantee [he] g[ot] the death penalty.” JA-5743-44.

The court cautioned the government to stay within the bounds of due process, but nonetheless allowed them to present nearly two-dozen victim-impact witnesses, who shared their stories of grief, loss, and trauma, accompanied by photographs, video, and audio of the victims. JA-6810-40. Throughout, the government highlighted the victims’

exemplary qualities and Christian faith. JA-5795-967, 6003-175, 6314-469, 6527-80.¹⁰

The government also presented 2 fact witnesses. A Charleston County intelligence analyst testified about written material retrieved from Roof's cell after his arrest, including drawings of swastikas and other white-nationalist symbols and a 29-page handwritten statement similar to his journal entries (which the government called a "manifesto"), the entirety of which she read into the record. JA-6178-210, 6213-54.

Hamski then explained the meaning of white-nationalist symbols and phrases found in Roof's cell, identified messages Roof wrote on a white-nationalist website using the name "Little Aryan," and summarized the roughly-half-dozen trips Roof made to Charleston between December 2014 and June 2015 in apparent preparation for the shooting. JA-6213-54, 6281-313.

¹⁰ Victim-impact witness Jennifer Pinckney also described hiding in the church office with her daughter during the shooting, and the government played part of her call to 911. JA-5868; Govt.Ex-9 (audio).

5. Defense case

Roof, who cross-examined no witnesses, announced he wouldn't call anyone to testify on his behalf, then rested. JA-6583-84.

Standby counsel requested the court call mitigation witnesses, as authorized by the Federal Rules of Evidence¹¹ and its supervisory authority, including: (i) Father Parker, to testify about Roof's polite demeanor and capacity for redemption; (ii) Roof's family, to testify to their continued love for and visits with Roof; and (iii) a prison expert, to testify about Roof's good behavior in custody and likelihood of compliance and non-violence if given a life sentence. In the motion, counsel pointed out that when the court found Roof competent to self-represent at penalty, it relied on his stated intent to present non-mental-health mitigation. JA-6521-23. The court declined to consider the motion. JA-6646-51.

6. Closing arguments

In closing, the prosecutor described at length the victims' "extraordinar[ly] good[ness]," highlighting each's exemplary qualities

¹¹ Fed.R.Evid. 706(a) (allowing court to appoint experts and call them at trial).

and deep faith. Then—despite having sat through two competency hearings at which experts detailed Roof’s mental illnesses—the prosecutor announced Roof made a series of “cold and calculated choices” with no “imagined” explanation beyond pure racism. JA-6665-710. The government also seized on the court’s evidentiary ruling precluding defense evidence on “details of prison administration,” and argued jurors heard “no evidence” Roof wouldn’t be a future danger. JA-6697-98.

Roof then stood and gave a short, meandering closing statement. He said he “didn’t have to” commit his crimes, as the government claimed, but “felt like [he] had to.” And he responded to the prosecutor’s assertion he was filled with hate by explaining “anyone who hates anything in their mind has a good reason for it,” including the prosecutors trying to kill him, whom he described as “misled.” Then Roof asked jurors, in a roundabout way, to consider sentencing him to life:

[F]rom what I have been told I have a right to ask you to give me a life sentence, but I’m not sure what good that would do anyway. But what I will say is that only one of you has to disagree with the other jurors, and I know that at least some of you during the jury selection were asked if you

would be able to stand up for your own opinions in deliberation, and if you were asked that, you answered yes, because if you said no, you wouldn't be here. That's all.

JA-6712-13.

In rebuttal, the prosecution called Roof an “unrepentant racist,” said his statements reinforced the aggravated nature of his crime, and urged jurors to return a death sentence. JA-6715-16.

7. Jury notes

During deliberations, jurors submitted two notes about Roof's lack-of-future-dangerousness and safe-confinement mitigating factors.¹² The first, on whether Roof posed a risk of violence if sentenced to life, asked: “Would he personally inflict the violence, or would he in[c]ite violence? Need clarification.” The second, on whether Roof could be safely confined, asked the court to “define ‘safely confined.’ Does this include his writings getting out of prison.” JA-6774-75; *see* JA-8188.

Over defense objection, the court declined to provide any clarification, and answered both notes by directing jurors back to

¹² Jurors also asked to re-watch a video of Reverend Pinckney, which the court arranged. JA-6773-75.

existing instructions and encouraging them to use their “common sense.” JA-6774-75.

8. Verdict and sentencing

Shortly thereafter, jurors voted to sentence Roof to death on each death-eligible count. JA-6806. They unanimously found nine aggravating factors: multiple victims; vulnerable victims (due to old age); substantial planning; racial bias; attempt to incite violence; causing harm to victims’ loved ones; endangering others’ safety; targeting a church to magnify the crime; and showing no remorse. JA-6796-801.

Jurors also unanimously found six mitigating factors the court allowed Roof to submit: Roof turned 21 shortly before the crime; did not have significant criminal history; offered to plead guilty in exchange for life-without-parole; cooperated with authorities; confessed; and had no history of violence. JA-6803-04. But no jurors found by a preponderance of the evidence that Roof proved he didn’t pose a future danger or could be safely confined. JA-6804.

The court entered judgment on January 23, 2017, sentencing Roof to 15 concurrent life sentences (Counts 1-12 and 22-24) and 18

concurrent death sentences (Counts 13-21 and 25-33). JA-6968-72. On May 10, 2017, it denied his motion for new trial or judgment of acquittal, and on May 23, 2017, Roof timely appealed. JA-6996-7030; *see* JA-6843, 6973-81.

SUMMARY OF ARGUMENT

The court clearly erred in finding Roof competent to stand trial and sentencing, and it violated his due process rights by holding inadequate competency hearings.

Even if Roof was competent, he shouldn't have represented himself. The court advised that Roof's only option for blocking mental-health evidence was to self-represent, but a recent Supreme Court decision teaches otherwise. Further, there is no right to represent oneself at capital penalty, and certainly no right to do so and present no defense. In any event, Roof's waiver of counsel for voir dire was invalid because the court misadvised him on standby counsel's role and his option to waive assistance at penalty only. Roof's request also was untimely. Finally, Roof was not competent to represent himself, and the court abused its discretion by denying him standard accommodations that might have enabled him to do so.

Separately, Roof was sentenced to death after the court improperly blocked jurors from hearing mitigating evidence about his lack of future-dangerousness; took inadequate curative action when a survivor told jurors Roof belonged in the “pit of hell”; and allowed prosecutors to argue for death because the victims were good, devout people. Regardless, Roof’s age and mental impairments made him ineligible for capital punishment.

Roof’s convictions also are infirm. The Commerce Clause gave Congress no authority to criminalize intrastate religious obstruction, and even if it did, the statute requires proof of religious hostility, which is absent here. Likewise, the Thirteenth Amendment doesn’t give Congress the power to criminalize intrastate hate crimes. Moreover, none of these charges should have been certified for federal prosecution because the State already brought capital charges, making them unnecessary to secure justice. Finally, Roof’s firearm convictions are based on predicate offenses that are not crimes of violence, rendering them invalid.

ARGUMENT

Points Related to Competency to Stand Trial

At first glance, the court's agreement to hold two competency hearings—one before guilt and one before penalty—suggests it fully vetted Roof's ability to stand trial. The reality is different. The court, acting under enormous pressure to bring closure to a grieving community, sprinted into the first hearing with an unprepared, discredited expert, then ignored four expert opinions that Roof appeared psychotic. When new doubts about Roof's competency arose before penalty, the court hurried into another hearing—but this time, blinded itself and its court-appointed expert to previously-unavailable evidence of Roof's incompetency.

Still, the evidence that emerged left no doubt Roof believed white nationalists would stage a revolution, establish a new government, and set him free; and due to this envisioned future, Roof's goal was not to secure a life sentence, but to avoid being labeled mentally ill because it would diminish his chance of rescue.

The court clearly erred in finding Roof was competent, and it violated his due process rights by rushing into the first hearing and

blocking material evidence from the second. These errors require vacating Roof's convictions or, at least, vacating his death sentence and remanding for a new penalty proceeding.

I. BACKGROUND

A. The expedited November 2016 competency hearing

1. The court refuses a one-week continuance

In June 2016, before any questions about Roof's competency arose, the court set trial for November 2016, stating "only [a] shot out of the dark" would justify a continuance. JA-157, 204-05.

That "shot out of the dark" came in early November, when Roof wrote a letter to prosecutors accusing counsel of using "scare tactics" and "threats" against him. JA-586-89, 596. At a hearing on November 7th, the court agreed Roof's letter cast doubt on his competency. It arranged for Ballenger to evaluate Roof the next morning, and set a hearing for the following week, denying counsel's repeated requests for more time. JA-681-82, 706-27; *see* JA-592-93. Eventually, the court agreed to move the hearing back five days so the process didn't "appear" rushed. JA-694-95, 805-06.

The following week, counsel sought a one-week continuance, alerting the court that a critical defense expert would be in Cyprus until

shortly after the hearing. Counsel also argued the rapid pace left insufficient time “for an evaluation that meets professional standards.” JA-773-81, 808-09; *see* JA-768 (“[W]e have found no case in which evidence of a defendant’s incompetence led to a court-ordered evaluation and a competency hearing on so fast a schedule.”) The court denied relief. JA-808-09. On the morning of the competency hearing on November 21st, counsel renewed their motion, which the court denied again. JA-894-95.

a. Ballenger has 8 days to evaluate Roof

At the competency hearing, Ballenger testified about the 8-day window in which he prepared for, conducted, and summarized Roof’s competency evaluation—the first of his career. JA-932-34. Though Ballenger claimed he had “enough” time to complete the work, he also admitted not reviewing Roof’s developmental history or grand jury testimony that conflicted with his findings due to “time considerations.” JA-932-49, 1468-69; *see* JA-7358-71. As a result, at the hearing Ballenger admitted “surprise” to learn his report contained multiple factual inaccuracies. JA-935.

b. Loftin is temporarily unavailable to testify about her 4-month evaluation of Roof

Ballenger wasn't the only expert affected by the rushed schedule. The defense's primary autism expert, Dr. Rachel Loftin, was in Cyprus at the time of the hearing. Loftin interviewed Roof over four months, between June and October 2016. She reviewed hundreds of background records (including pediatric, mental-health, and school records); interviewed Roof's family; and read dozens of witness statements from people who knew Roof long before his crime. JA-5263, 5318-40. Among her findings:

- Roof was born predisposed toward autism and co-morbid psychiatric disorders such as psychosis, anxiety, and depression. JA-5263.
- Because Roof's mother suffered mental-health issues, his older sister largely cared for him during his elementary-school years, but moved away when he was 11. Soon after, Roof suffered crippling anxiety and increasingly spent his days inside and alone. JA-5272, 5302.
- Though Roof was a good student in elementary school, his grades dropped sharply in middle school. He failed ninth grade and, after another unsuccessful attempt, quit school at age 15. JA-5264, 5298-99.
- After dropping out, Roof became a virtual recluse, refusing to even walk to his mailbox. He became paranoid, fearing he was being sickened by chemicals in household cleaners and laundry

detergent, and he refused vaccinations, fearing they could be used to control him. JA-5263-64, 5295-97, 5304-17; *see* JA-7284-351, 1319.

- Roof's anxiety intensified over the years. On the rare occasion he left home, hiding under a hooded sweatshirt, Roof begged his mother not to stop their car parallel to another because he didn't want anyone looking at him. JA-5302-03.

Based on her evaluation, Loftin concluded Roof first exhibited signs of psychosis during these years of isolation, when he absorbed extreme-right-wing propaganda and its hypothesis of white genocide. She concluded Roof's disordered thinking, autistic focus, and emerging delusions combined to give rise to "an irrational belief that he *had* to commit these crimes." JA-5297, 5310-17.

Because the court refused a one-week continuance, it didn't hear any of Loftin's testimony, which she later summarized in a detailed 87-page report. JA-5261-317. Instead, the court had only a skeletal 1½-page declaration, which Loftin wrote in Cyprus, without access to her case notes. JA-1773-75.

2. Experts uniformly testify Roof expects white nationalists will free him after the revolution

At the competency hearing, every expert who examined Roof testified to his fixed belief in an impending racial revolution. They

recounted his expectation that a race war will erupt, white nationalists will overtake the federal government, and they will free Roof, hailing him as a hero. JA-980-1002, 1344-47, 1487-88, 1512-13, 1700, 1774, 1823.

The experts explained that because of his race-war beliefs, Roof insisted on blocking counsel from presenting mental-health evidence at trial. He believed a mental-illness diagnosis would make him appear “defective,” marring his reputation as a “perfect specimen” and impairing his chance of being rescued. JA-980, 989-90, 1000-01, 1344-47. As Ballenger explained, Roof’s desire to “keep[] any mental illness or weakness secret” stemmed from the belief that white nationalists, like Nazis, would sterilize and eliminate “non-perfect, non-white people.” JA-1344-45.

Of the five experts who testified about Roof’s convictions, four concluded his belief in a coming war and future rescue were delusions, which are fixed false beliefs that cannot be moved by objective conflicting evidence (and a sign of psychosis). JA-1486-91, 1510-11, 1700, 1774, 1823.

Ballenger alone concluded Roof's beliefs weren't delusions, but "over-valued racist views." He offered four reasons for his finding. *First*, the race-war beliefs didn't have a "bizarre quality" to them. In Ballenger's view, Roof's expectation "white people will finally wake up and do something" about "all of the violence black people are doing against white people every day" was "more logical" than a delusion and simply reflected his "deep-seated racial prejudice."¹³ JA-1033-34, 1325, 1346. Notably, Ballenger later amended his testimony to clarify there is no clinical distinction between bizarre and non-bizarre delusions. JA-1033, 1045-46. *See* Section III.E.2.

Second, Ballenger claimed Roof didn't exhibit other signs of psychosis—a notion refuted by every expert who testified at the hearing, even Ballenger himself. JA-1082-83.¹⁴ *See* Section III.E.2.

Third, Ballenger believed Roof didn't have the general demeanor of a

¹³ Ballenger was more equivocal in his written report, where he stated whether Roof's belief in a race war was "a delusion or an over-valued racist view has not been determined." JA-1318.

¹⁴ Ballenger cited as support the opinions of a prison physician who briefly examined Roof shortly after his arrest in June 2015, and a psychologist who spent 4½ hours conducting tests on Roof in mid-November 2016, noting neither reported seeing signs of psychosis in Roof. JA-1320-22.

psychotic person; instead, he found Roof “humorous” and “engaging”—a description at odds with those of virtually everyone who knew Roof before November 2016 (when his competency was first questioned). JA-1010. *See* Section III.E.3. And *fourth*, Ballenger believed Roof’s personality assessments “eliminated” a schizophrenia diagnosis—a finding challenged by four experts who testified Roof’s scores were consistent with a psychotic-spectrum disorder. JA-968-76, 1320-23, 1571-1600, 1639-41, 1695-96, 1779-81. *See* Section III.E.3.

3. Experts uniformly testify Roof exhibits signs of psychosis including somatic delusions, paranoia, grandiose beliefs, and disordered thinking

According to expert testimony and medical records, Roof complained for years about imaginary ailments and disfigurements (that his body was lopsided, he was going bald, and his forehead was misshapen) that proved to be somatic delusions, which are fixed false beliefs about one’s body. JA-1506-08, 1554, 1774, 5353.

Even Ballenger agreed that, despite Roof’s repeated denials,¹⁵ it was evident he suffered phantom inflictions for years. JA-977-78, 981-

¹⁵ Ballenger said Roof either deflected or denied reports of somatic delusions. JA-977-81, 1343-44; *see* JA-1330-31 (Roof said he “couldn’t

86. Although Ballenger did not call them “somatic delusions”—instead using the terms “body-dysmorphic disorder,” “anxious health concerns,” and “extreme health anxiety”—he agreed Roof’s distorted views could be a sign of psychosis: “That is an important issue because if there [are] somatic delusions, as you said, that has implications that *maybe [Roof]’s going to become schizophrenic. Maybe he is secretly now.*” JA-988-91, 1008 (emphasis added).

Experts also agreed Roof exhibited paranoia, another sign of psychosis. Ballenger described Roof’s insistence that his white-genocide fears weren’t paranoia because whites “undeniabl[y]” would be eliminated. JA-5989-90. Robison said Roof believed his attorneys “were making things up” about him. JA-1824. And Maddox described Roof’s growing suspicions about counsel during her seven-month evaluation. Initially, he thought counsel didn’t want to help him; later, he thought they were trying to discredit him; and before the competency hearing, he was sure they were trying to kill him. JA-1489, 1514-15.

talk about” body asymmetry); JA-1011 (describing Roof as “guarded” and “aware, planning, protecting himself every second”).

Examiners similarly recognized Roof's delusions of grandeur.

Ballenger testified Roof claimed to have “broken his own brain washing” by learning about the ongoing white genocide, and viewed himself as a “political prisoner” who sacrificed himself for an altruistic goal—to end “black on white killings.” JA-1328-31. On one occasion, Roof spoke of great people in history who had worked on special missions; when asked to give an example, Roof named himself. JA-1318-19. Stejskal recounted Roof boasting he was a genius. JA-1679-86. Maddox described Roof's insistence that if he could talk with prosecutors, they would like him and decide not to seek a death sentence. JA-1510. And Ballenger, Maddox, and Stejskal all described Roof's claim that the judge liked him and was his “friend.” JA-993, 1488, 1511, 1683.

Experts further detailed Roof's distorted thinking and behavior. Stejskal testified Roof's adolescent development showed a consistent pattern of distorted thinking, distorted perception, and deteriorating social and life skills—traits that characterize an emerging schizophrenia-spectrum disorder. JA-1690-93. Similarly, Ballenger testified Roof displayed “odd behavior” during childhood and “schizoid

behavior” during adolescence, which were “consistent with” (and sometimes a precursor to) a psychotic disorder. JA-970-72.

4. The court finds Roof does not have a psychotic disorder and his hope to be rescued by white-nationalists is not a delusion

Despite the near-unanimity and weight of the testimony and documentary evidence, the court concluded Roof did not have a psychotic disorder that rendered him incompetent to stand trial. It described Roof’s belief in an impending white-nationalist takeover not as a delusion, but an unwise trial strategy born of “deep racial prejudice.” JA-2069-71 (citing JA-1346-48).

In its written decision, the court only briefly addressed the contrary expert findings. It rejected Maddox’s opinion (that Roof’s expectation of rescue left him unable to contribute to his defense) by concluding Roof didn’t *really* believe what he said. As proof, the court highlighted Roof’s in-court claim that his chance of rescue was negligible. JA-2078 (stating it “closely questioned” Roof and was “satisfied that [he] understands the nature and consequences of the proceedings”). It summarily dismissed the remaining experts’ testimony

by stating (incorrectly) they “gave no opinion” on whether a mental disease or defect rendered Roof incompetent for trial.¹⁶ JA-2074.

Notably, the court never addressed the chorus of testimony from experts (including Ballenger) that Roof exhibited significant signs of psychosis such as paranoia, somatic delusions, grandiosity, and disordered thinking. Nor did the court address counsel’s statement detailing how Roof’s impairments—his inability to communicate in court, belief the judge liked him, and fixation on trivialities—undermined his practical ability to assist in his defense. JA-2060-81.

B. The abridged January 2017 competency hearing

1. The court excludes material, newly-presented evidence of Roof’s incompetency

In late December 2016, two weeks after the jury returned its guilty verdict, counsel moved for a second competency hearing. Counsel alerted the court to Roof’s bizarre conduct during jury selection and trial, as well as his “obsessive[]” focus on using the penalty phase to

¹⁶ Loftin and Stejskal testified Roof exhibited symptoms consistent with schizophrenia-spectrum disorder, JA-1774, 1691, and Robison testified about Roof’s delusional beliefs, detachment from reality, and autistic fixation on trivial matters. JA-1533. Edens and Carpenter, who did not personally evaluate Roof, did not give an opinion on his competence.

block purportedly-embarrassing evidence (such as unflattering photos) that might tar his reputation in the post-revolutionary world. JA-5244, 5249-55.

The court agreed there was sufficient evidence to question Roof's competency, and ordered a second hearing. It appointed Ballenger to evaluate Roof over two days, and scheduled a hearing for January 2nd, the day before the scheduled start of penalty. But the court announced its earlier competency ruling was "law of the case," and it wouldn't consider any evidence that arose or could have arisen before November 22nd. JA-5463-64, 5519. Counsel unsuccessfully objected to this limitation, saying it precluded evidence of Roof's history of delusions and other psychotic symptoms to rebut Ballenger's testimony. JA-5523-31.

As a result of its law-of-the-case ruling, the court refused to admit testimony and written reports from four defense experts—although two experts weren't available to testify at the first hearing and none of the written reports existed at the time. JA-5633, 5640-41. The court also directed Ballenger not to review or consider any evidence that predated

the earlier hearing—including the defense’s new psychiatric testing and reports. JA-5977.

In the end, the court blocked the testimony and written reports of the following experts:

- Moberg, who diagnosed Roof with other-specific-schizophrenia-spectrum and other-psychotic disorders and frontal-system dysfunction, concluding these conditions interfered with Roof’s ability to weigh options, integrate new information, make decisions, and modify his behavior. JA-5349-61.
- Loftin, who diagnosed Roof with autism and symptoms of psychosis, and produced a detailed social-history that identified early signs of mental illness during Roof’s adolescence. JA-5261-348. *See* Section I.A.1.b.
- Maddox, who concluded after a seven-month evaluation that Roof could not “rationally communicat[e] with his attorneys” or “assist in his own defense.” JA-5362-413.
- Robison, who concluded Roof had social-emotional reciprocity deficits, limited emotional range, detachment, and a “profound disconnect from the grave reality of his situation.” JA-5414-40.

2. The court admits only post-November 2016 evidence

Having blocked this evidence, the court admitted only: (i) standby counsel’s declaration detailing Roof’s post-November inability to communicate or assist during jury selection and the guilt phase; (ii)

testimony and evaluation from Ballenger, based on his five-hour meeting with Roof the prior weekend; (iii) testimony from Loftin (limited to observations of Roof's post-November jail visits with family); and (iv) testimony from Father Parker (limited to his post-November visits with Roof). JA-5472-82, 5532-610, 5651-707. The court also questioned Roof. JA-5708-29.

a. Standby counsel's declaration

Three of Roof's attorneys, acting as standby counsel, submitted a sworn declaration describing Roof's post-November behavior during jury selection and the guilt phase of trial. Among their observations:

- Roof demanded counsel “do nothing” and “stop making objections,” saying their efforts were hurting him and proved they were “trying to kill” him;
- Roof believed the testimony of an agent who read into the record his journal (which included incendiary statements about “Blacks,” “Jews,” and “Homosexual[s]”) was “great” because she had “a nice voice”;
- Roof insisted he did not have somatic delusions because his head and body *are* deformed;
- Roof expressed confidence jurors wouldn't sentence him to death because they liked him, and if they did impose a death sentence, he could stop the execution by crying;
- Roof accused counsel of “trying to kill [him]” because the sweater they provided for court felt filmy and smelled of detergent; and

- Roof criticized lead counsel's closing argument because he didn't tell jurors the statistics of black-on-white crime.

JA-5472-78; *see* JA-4234-59, 5520-21, 5610.

b. Loftin's testimony

Per the court's ruling, Loftin limited her testimony to observations of videotaped jail visits between Roof and his family in late November and December 2016. She explained how three traits, observable in the videos and consistent with Roof's attenuated psychosis and autism diagnoses, impaired his ability to assist in his defense: (i) "very severe" detail bias (Roof fixated on minor details while missing larger, more important ones); (ii) rigidity (Roof got "stuck" and couldn't transition between topics); and (iii) deficits in perspective (Roof couldn't understand others' views). JA-5654-60.

c. Parker's testimony

Father Parker, an Orthodox Christian priest, visited Roof weekly for two years, spending approximately 100 hours with him. JA-5677-98. Parker testified he couldn't reconcile Roof with his crime because he was neither cold-hearted nor angry. Parker also didn't think Roof was a white nationalist, despite his professed beliefs. He noted Roof was intelligent and could recite facts he'd read years earlier; but when Roof

spoke about race, he sounded like a “broken record,” stuck in a loop of white-nationalist rhetoric. JA-5690.

d. Ballenger’s testimony

Ballenger concluded Roof was competent to stand trial and represent himself at penalty. JA-5977-98. His findings largely echoed those from the first hearing, including that Roof had a “different agenda” than counsel and wanted to protect his “long-term” reputation. JA-5535-38, 5545. Ballenger confirmed Roof’s goal wasn’t to secure a life sentence, but “to try to get out of the record any evidence of mental illness or autism or any other defects.” JA-5542. He substantiated counsel’s fear Roof aligned himself with the prosecution, describing Roof’s claim that “he feels like he’s sitting at the wrong table” in court. JA-5545. And, as with the first hearing, Ballenger agreed Roof showed signs of psychosis; in particular, Ballenger admitted “struggl[ing] with” Roof’s claim that jurors would spare his life because they liked him. JA-5598-99 (“[H]e’s never said anything like that to me[;] his presentation is straightforward and devoid of any of that kind of crazy idea stuff.”).

One difference Ballenger noted was that Roof now “laugh[ed] about the humor involved with” what he said before the first hearing—

the “fanciful notions that he’ll be rescued by white nationalists, revolutionaries who have taken over the Government and let him out of jail.” 17 JA-5546-47. The *real* reason Roof opposed mental-health evidence, Ballenger said, was that it simply wasn’t true:¹⁸

[Roof] stated that his concern with the diagnoses that I gave him was not that it would cause him problems in a future white nationalists’ world, but that they were ‘not true.’ If all these diagnoses were true, he would let his attorney represent him, because he ‘hates lying.’

JA-5982.

e. Roof’s testimony

Answering a series of yes-or-no questions from the court, Roof denied claiming he wouldn’t be sentenced to death if he smiled, or that he could stop an execution by crying—though his attorneys (officers of the court) swore under oath he said both. JA-5708-13. Roof claimed to

¹⁷ Ballenger also updated his diagnosis of schizoid personality disorder to “possible,” and added a new “possible” diagnosis: avoidant personality disorder. JA-5788-89, 6965.

¹⁸ Addressing Roof’s previous claims he would be rescued by white nationalists, Ballenger suggested Roof liked to “mess with” people. Without pointing to any evidence, Ballenger stated: “He says things that sound insane, sound psychotic, like ‘The jury is going to like me so much they are not going to find me guilty.’ It is my opinion and belief that he doesn’t believe that.” JA-5547.

understand he likely would be executed if he was sentenced to death—though a half-dozen experts testified that before November (when he learned his competency was in doubt), he consistently stated otherwise. JA-5713-14. And Roof denied caring about his reputation, stating he opposed mental-health mitigation because it was “all a bunch of lies”—despite contrary testimony from expert witnesses. JA-5714, 5719.

3. The court finds Roof competent to stand trial

At the end of the hearing, the court again found Roof competent. JA-5733-34, 5737-38, 6950-68. In a subsequent written opinion, the court mentioned, but did not address, the cumulative weight of evidence it rejected and focused on the three witnesses’ testimony. The court decided Ballenger’s opinion was “more credible” than Loftin’s because she didn’t see Roof after November 2016; and it found Parker’s testimony (though “powerful”) “not probative” of Roof’s competence. JA-6961, 6964. Like with the first hearing, the court relied on Roof’s own statement “den[ying] . . . white nationalists will rescue him from the death penalty.” JA-6964. Also like the first hearing, the court largely ignored counsel’s declaration, except to note Roof’s “very logical”

explanation for fixating on his courtroom attire, stating his concern was understandable in such a “high-profile” trial. JA-6958-59.

II. STANDARDS OF REVIEW

A competency ruling is a factual determination this Court reviews for clear error. *United States v. Cox*, 964 F.2d 1431, 1433 (4th Cir.1992). Clear error exists when the Court, after examining the record, is “left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Though the clear-error standard is deferential, “it is not toothless.” *United States v. Wooden*, 693 F.3d 440, 452 (4th Cir.2012). If a court fails to “properly tak[e] into account substantial evidence to the contrary” or reaches factual findings “against the clear weight of the evidence considered as a whole,” it clearly errs. *Id.* at 462 (finding court clearly erred by relying on flawed expert opinion and ignoring, or failing to account for, “substantial body of contradictory evidence”); *United States v. Antone*, 742 F.3d 151, 165 (4th Cir.2014)(holding court clearly erred by giving inadequate consideration to substantial contrary evidence).

This Court reviews the denial of a continuance for abuse of discretion, which exists if the court's decision was "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay," *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), or so fundamentally unfair it affects a defendant's constitutional rights, *Shirley v. North Carolina*, 528 F.2d 819, 822-23 (4th Cir.1975)(reversing where court denied continuance to secure essential witness); *United States v. Wells*, 86 F.3d 1154 (4th Cir.1996)(reversing where court denied continuance to identify eyewitnesses). If the error prejudiced the defendant, this Court reverses. *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir.1991); *United States v. Lorick*, 753 F.2d 1295, 1297 (4th Cir.1985).

This Court reviews the exclusion of evidence for abuse of discretion, *see General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997), which exists where the court applies erroneous legal principles, *see Koon v. United States*, 518 U.S. 81, 100 (1996), or rests its decision on clearly erroneous factual findings, *see United States v. Barber*, 119 F.3d 276, 283 (4th Cir.1997)(en banc). In the context of competency hearings, where due process guarantees a defendant's right to "adequate"

procedures to avoid being tried while incompetent, a court must consider all relevant information, including medical opinions, the defendant's behavior, and counsel's representations. *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Medina v. California*, 505 U.S. 437, 450 (1992); *Beck v. Angelone*, 261 F.3d 377, 387 (4th Cir.2001); *United States v. Basham*, 789 F.3d 358, 379 (4th Cir.2015).

III. THE COURT FORCED ROOF TO STAND TRIAL WHILE HE WAS INCOMPETENT

The court's decisions finding Roof competent to stand trial suffer from five distinct flaws. Each undermines the court's rationale; together, they produce the "definite and firm conviction that a mistake has been committed." *U.S. Gypsum Co.*, 333 U.S. at 395.

First, the court incorrectly determined Roof's expectation of an impending racial revolution and white-nationalist rescue wasn't a delusion, but an unwise trial strategy rooted in racism. *Second*, the court incorrectly relied on Roof's in-court statement denying and minimizing his delusional beliefs, which contradicted the testimony of expert witnesses and was belied by Roof's own prior statements and ongoing behavior. *Third*, the court ignored the best evidence of Roof's

incompetency—counsel’s sworn statements describing his inability to communicate with them or rationally assist in his defense. *Fourth*, the court conflated *Dusky*’s cognitive and rationality requirements. *Fifth*, the court adopted the opinion of its appointed expert despite his impaired credibility, flawed evaluation, and the existence of substantial contrary evidence.

A. The court’s finding that Roof’s expectation of a white-nationalist rescue was not a delusion was clearly erroneous

Evidence that a person suffers symptoms of a psychotic disorder—particularly delusions—is frequently the hallmark of incompetence. *United States v. Watson*, 793 F.3d 416 (4th Cir.2015)(finding defendant incompetent because of delusions); *Lafferty v. Cook*, 949 F.2d 1546, 1556 (10th Cir.1992); *United States v. Kowalczyk*, 805 F.3d 847 (9th Cir.2015); *United States v. Zedner*, 29 F.App’x 711 (2d Cir.2002), *rev’d on other grounds*, 547 U.S. 489 (2006); David Freedman, *When is a capital charged defendant incompetent to stand trial?*, Int’l J. Law & Psychiatry 32 (2009).

Here, four mental-health experts concluded Roof’s anticipation of being freed by white nationalists after a racial revolution was

delusional.¹⁹ In reaching that conclusion, experts relied on two factors: *first*, the strength of Roof's convictions; and *second*, the presence of other delusional beliefs and other symptoms of a psychotic-spectrum disorder.

Regarding the first factor, a delusion, by definition, is a belief that cannot be moved even by undisputable evidence to the contrary. David B. Arciniegas, *Psychosis*, 3 Behav. Neur. & Neuropsychiatry 715-36 (June 21, 2015). And here, the testimony resoundingly showed Roof's views about a race war, future rescue, and the trial's irrelevance were delusional. Loftin testified Roof was sure a death sentence "would never be carried out," JA-1774, 5307; she said he was "not tentative," but "emphatic, as if he were certain about what to expect," JA-5306. Robison testified Roof was certain he'd be pardoned "in four or five years." JA-1823. Moberg noted Roof was "80% sure" he would be hailed as "a hero" after a racial uprising. JA-5353. And Stejskal testified Roof wasn't concerned about trial because "he will be rescued." JA-1700.

¹⁹ Robison, an autism expert, also considered Roof's race-war beliefs delusional. JA-1823 ("It seemed delusional, particularly as he seemed so serious when he said it.").

Regarding the second factor, the experts similarly testified that Roof's other symptoms of psychosis—most notably, his documented history of suffering somatic delusions—confirmed that his beliefs about a coming race-war and future rescue were also delusional. JA-1485-86, 1510-15, 1536-42, 1668, 1698-99, 1774, 5360.

But the court adopted Ballenger's dissenting opinion, concluding Roof's beliefs were "over-valued racist views" because they were "more logical" and "less bizarre" than delusions. JA-1033-34, 1356-58 ("This is in fact not a 'crazy' idea, but a logical one given his understanding that in a post-revolutionary white supremacist world, he would want to look 'pure' and 'unblemished.'"). Ballenger subsequently amended his testimony, making clear the bizarre/non-bizarre distinction was immaterial to the diagnosis. Yet the court still relied on his initial opinion—minus the correction—to conclude Roof was not delusional, not psychotic, and competent. JA-2060-81.

The Tenth Circuit's decision in *Lafferty*, 949 F.2d 1546, reversing the trial court's finding that a death-sentenced defendant was competent, illustrates the court's error here. In *Lafferty*, the defendant suffered delusional beliefs, some involving defense counsel, which led

him to interrupt his murder trial and demand that counsel not present any defense on his behalf. *Id.* at 1549. The federal court granted habeas relief because the defendant's inability to "accurately perceive reality due to a paranoid delusional system" undermined his capacity to assist in his defense. *Id.* at 1554-55.

The court's decision finding Roof competent bears a strong resemblance to the overturned finding in *Lafferty*. In both, the court agreed the defendant's crime was driven by a fixed, non-bizarre belief—here, that Roof wanted to stop "black-on-white" violence; in *Lafferty*, that the defendant's victims caused his wife to leave him. *Id.* at 1549. In both, the court relied on the defendant's attempt to sabotage his case in service of his delusion as evidence of his competence—here, the court described Roof's letter to prosecutors as "a creative, well-reasoned, and articulated maneuver"; in *Lafferty*, the court found defendant's "refusal to cooperate" with attorneys "consistent" with his beliefs. *Id.* at 1554. Finally, in both, the court relied on expert testimony the defendant's obstructive behavior was rational, not the result of mental illness—here, the court cited Ballenger's testimony Roof could work with counsel

“if he want[ed] to”; in *Lafferty*, the court relied on expert testimony the defendant could assist counsel “if he so chooses.” *Id.* at 1554.

The court here, like the state court in *Lafferty*, failed to recognize that Roof’s goal (to avoid a mental-health diagnosis so he didn’t appear defective to white nationalists) was *itself* the product of delusions—the same delusions that underlay Roof’s insistence he “had to” commit the crime, his fear he’d be “in trouble” if he told the court why he opposed mental-health evidence, and the reason he appeared “guarded” after his competency was questioned.

The court’s findings, which rationalized Roof’s delusions by calling them a “dubious legal view[],” “higher priority,” “inadvisable strategy,” and “really stupid decision,” was clearly erroneous. JA-1548-49, 2067, 2124-25.

B. The court’s reliance on Roof’s in-court statements denying or minimizing delusional beliefs was clearly erroneous

In finding Roof was not delusional (and, therefore, competent), the court relied on Roof’s in-court statements minimizing the likelihood he would be freed by white nationalists and denying he wanted to be seen as a hero in his envisioned future world. JA-2076-77; *see* JA-2070 (citing

JA-1324, 1332). The court heralded these statements as proof that Roof understood “the seriousness and gravity of the risk of death.” JA-2076-77.

The court clearly erred by relying on these claims for three reasons. *First*, they contradicted the testimony of *every* expert who met Roof between February and November 2016, each of whom described his confidence in the coming war. JA-1700, 1774, 1823, 5307, 5352-53, 5366. *See* Facts-E.2. Even Ballenger (who met Roof after his competency was challenged) described his belief in a white-nationalist takeover as a *certainty*, not a mere hope. JA-1368 (describing Roof’s “conviction” nationalists “will win this actual war and establish a new order and government”).

Second, the court’s decision to accept Roof’s statements on their face ignored evidence that he wanted to be found competent and attempted to mask his mental illness. Roof told the court he opposed a mental-health diagnosis, and his test results confirmed that agenda by showing his efforts to minimize signs of mental illness. JA-630, 634, 1779-81; *see* JA-5663-65. Indeed, experts uniformly testified that until Roof learned his competency was in doubt, he talked openly about his

expectation of rescue. JA-1487-89, 1571-604. Later, Roof became “guarded” and appeared to be “withholding information.” JA-989-90, 1011, 1550-51, 1588-90 (Maddox testified Roof “stopped discussing” certain matters after November 8th); *see* JA-996, 1335 (Ballenger recalled Roof’s statement in mid- to late-November that he previously “said too much” to other experts).

Third, the court ignored Roof’s *ongoing* effort to maintain his future reputation as mentally sound. Roof admitted to Ballenger that he opposed mental-health evidence because he feared future white nationalists would see him as “defective.” JA-1344. If, as the court said, Roof actually believed a racial revolution was unlikely, he would have no reason to block evidence from coming out at trial. By his own conduct, Roof revealed the opposite was true—he desperately sought to be seen as a “perfect specimen.”

The court committed clear error by accepting Roof’s self-serving claims minimizing and denying his delusional beliefs. They contradicted statements Roof made to at least a dozen people over the prior year; promoted his express goal of being found competent; and were belied by his ongoing efforts to hide any “defects” from his would-be rescuers.

C. The court's failure to weigh counsel's sworn statements was clearly erroneous

It is well-settled that a defendant's attorneys provide the "best-informed view" of their client's ability to communicate with counsel and rationally assist in his defense. *Medina*, 505 U.S. at 450; *see Drope*, 420 U.S. at 177 n.13; *McGregor v. Gibson*, 248 F.3d 946, 959-61 (10th Cir.2001)(reversing conviction and death sentence where court ignored attorney's opinion, "perhaps the most important" evidence of incompetence); *Watts v. Singletary*, 87 F.3d 1282, 1288 (11th Cir.1996) ("[T]he defendant's attorney is in the best position to determine whether the defendant's competency is suspect."); *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir.1991)(stating counsel is in "best position to evaluate a client's comprehension of the proceedings").

Here, counsel alerted the court in late-October 2016 (before Roof wrote his letter to prosecutors) that his mental impairments were hindering the defense. JA-724 (stating Roof was "not invested in a life sentence due to his delusional belief that the threat of execution is not real and he will be broken out of prison by a group of white nationalists"). Then, before the January 2017 hearing, standby counsel filed a declaration detailing his bizarre behavior during jury selection

and the guilt phase. JA-5472-82; *see* JA-5242-60. Counsel told the court Roof directed them to stop objecting, fixated on trivialities (for example, whether people “liked” him and whether the length of his pants were precisely as requested) and even accused them of “trying to kill” him (by washing a sweater with too much detergent). JA-5472-78. The court barely acknowledged, and never substantively addressed, counsel’s observations in either ruling. JA-2060-81, 6952-53.

But in *United States v. Mason*, 52 F.3d 1286 (4th Cir.1995), this Court was critical of a trial court’s “[o]utright rejection” of counsel’s observations, noting it is often the best evidence on competency, and emphasizing counsel were “officers of the court” whose statements were “subject to disciplinary action if untrue.” *Id.* at 1292; *see United States v. Burgin*, 440 F.2d 1092 (4th Cir.1971).

The court’s error here was far worse than in *Mason*, where the judge rejected counsel’s observations as “unbelievable.” *Mason*, 52 F.3d at 1292. In this case, the court never suggested a reason to doubt counsel’s credibility. Indeed, the court agreed with many of counsel’s assertions about Roof. JA-6958. Yet the court sidestepped counsel’s most alarming claims (including Roof’s statements about his future

rescue and belief counsel wanted to kill him), while casually dismissing Roof's fixation on clothing as legitimate. By ignoring the guidance of *Medina* and *Mason*, the court clearly erred.

D. The court's conflation of *Dusky*'s cognitive and rationality prongs was clearly erroneous

The *Dusky* test requires a defendant have "factual" and "rational" understandings of the proceedings against him (the first prong), and a "rational" ability to communicate with counsel and assist in his defense (the second prong). *Dusky*, 362 U.S. at 402. Because both cognitive and rational abilities are necessary, strength in one area doesn't compensate for impairment in the other.

Even an intelligent defendant may lack the ability to make rational decisions and, therefore, be found incompetent to stand trial. *White v. Horn*, 112 F.3d 105, 111 (3d Cir.1997)(vacating competency finding despite defendant's "considerable intelligence and expressive powers" because of delusional beliefs about death sentence); *United States v. Hemsli*, 901 F.2d 293, 296 (2d Cir.1990)(affirming defendant's incompetency despite intellectual understanding of charges because impaired sense of reality undermined judgment); *United States v. Nagy*, 1998 WL 341940, at *2, *8 (S.D.N.Y. 1998)(finding defendant

incompetent despite “significant level of knowledge regarding legal proceedings” because of paranoia and skewed perception); *State v. Holland*, 921 P.2d 430, 438 (Utah 1996)(reversing competency finding where court focused on cognitive abilities, not decision-making abilities, as indicated by repeatedly describing defendant as “articulate”).

In this case, the court focused on Roof’s *cognitive* abilities, minimizing his capacity to think and act *rationally*. In its first decision finding Roof competent, the court was swayed by his “striking” IQ in the 96th percentile for overall intellectual functioning and the 99.7th percentile for verbal comprehension. JA-2071-72. Similarly, despite expert testimony that good behavior and psychosis aren’t mutually exclusive, the court relied on Roof’s “calm” demeanor and ability to express himself “clear[ly] and coherent[ly]” during proceedings. JA-2078. *Odle v. Woodford*, 238 F.3d 1084, 1088 (9th Cir. 2001)(“Some forms of incompetence manifest themselves through erratic behavior, others do not.”).

The court also ignored the “remarkable” gap between Roof’s cognitive abilities and real-world functioning. JA-5297. Loftin reported that despite Roof’s relatively-high IQ, his performance in real-world

settings was “poor” and reflected skills of a middle-schooler. JA-5297. Roof’s ability to interpret others’ perspectives, transfer insights, and transfer learning from one setting to another were the equivalent of a 13-to-14-year-old, and his social-interaction skills were equivalent to a 9-year-old. JA-5288, 5297. Likewise, Stejskal testified Roof’s unusual array of test scores—superior verbal comprehension, significantly lower processing speed, and intermediate reasoning and memory—resembled scores of patients suffering from schizophrenia and autism. JA-1694-97 (stating that absent evidence of brain injury or metabolic condition, no other psychiatric condition produces similar array of scores).

The court’s failure to independently assess Roof’s ability to think and act rationally (an assessment unrelated to his relatively strong cognitive abilities) was clearly erroneous.

E. The court’s reliance on Ballenger’s flawed opinion, which ignored substantial contrary evidence, was clearly erroneous

The court relied almost exclusively on Ballenger’s opinion Roof was neither delusional nor psychotic in both decisions finding him competent. While a court is entitled to make credibility determinations about experts, the court’s steadfast reliance on Ballenger to the

exclusion of other experts was remarkable. Ballenger was the least familiar with Roof's social and medical history, an essential part of a competency evaluation, and admitted he didn't pursue questions about psychosis because Roof registered discomfort. What is more, Ballenger's findings about Roof's abilities were internally inconsistent and contradicted by the opinion of five defense experts.

1. Ballenger's credibility was impaired

This was Ballenger's first pretrial competency exam. JA-885, 917-21, 1056; *see* JA-1371-82. In the only capital case where Ballenger previously testified, the court dismissed his testimony as "contrived and unreliable." JA-920-21, 928, 947-48; *see* JA-1121-35. Additionally, Ballenger worked as a paid consultant for Park Dietz & Associates, a firm led by the government's retained expert, raising concerns of a conflict of interest. JA-931-32, 1068, 1136.

2. Ballenger's evaluation was flawed

Ballenger's testimony didn't allay any concerns about his credibility. He admitted having insufficient time to review Roof's developmental history; conceded he never read relevant interviews or grand jury testimony; and admitted "surprise" upon learning basic facts about Roof's family and social history. JA-932-49.

Ballenger's testimony also was inconsistent. Most notably, Ballenger claimed Roof's insistence about an impending race war wasn't delusional, but an over-valued racist belief, because it wasn't bizarre. But on cross-examination, Ballenger admitted that *any* fixed false belief (whether bizarre or not) can be delusional.²⁰ JA-1033-34, 1045-46. Similarly, Ballenger also claimed Roof's beliefs weren't delusions because he didn't exhibit other signs of psychosis. Subsequently, though, Ballenger conceded Roof suffered somatic delusions, then admitted the combined symptoms suggested he could be schizophrenic. JA-989-90.

In addition to these internal contradictions, Ballenger admitted several facts that undermined his findings, including:

²⁰ The Diagnostic and Statistical Manual of Mental Disorders describes non-bizarre delusions as beliefs that originate with a misinterpretation of everyday experiences that are not accepted by others—for example, that one is under surveillance by the police. It describes bizarre delusions as those that are physically impossible—for example, that a stranger removed one's internal organs and replaced them with another's without leaving scars. JA-1045-46. The most recent version of the manual, DSM-5, removed the diagnostic distinction between the two types of delusions. *The New DSM-5: Schizophrenia Spectrum and Other Psychotic Disorders*, <http://www.mentalhelp.net/schizophrenia/the-new-dsm-5/>.

- Roof was “guarded” when asked about potential symptoms of psychosis, which Ballenger believed was itself a sign of psychosis, but which he did not pursue out of concern Roof would end the interview, JA-966, 980-993, 1084-86, 1011, 1330-31;
- Roof exhibited “schizoid behavior” in the years before the crime, which can be a precursor to developing a psychotic disorder, JA-970-72;
- Roof’s self-described racial awakening two years before his crime resembled the classic early stage of schizophrenia, JA-970-72, 977-89, 1049-50; and
- Because Roof met the diagnostic criteria for anxiety and autism, he was more likely to develop a psychotic disorder, JA-947-49.

Collectively, these admissions undermined Ballenger’s finding that Roof’s race-war beliefs weren’t evidence of a psychotic disorder because he didn’t exhibit other signs of psychosis. JA-1082-83.

3. Ballenger’s findings were refuted by substantial evidence

The court accepted Ballenger’s findings without addressing the substantial weight of evidence, from five different experts, establishing Roof was delusional and had either a schizophrenia-spectrum or other-psychotic-spectrum disorder. *Antone*, 742 F.3d at 165 (reversing for clear error where court failed to consider contrary evidence and account for it in making civil-commitment decision); *Wooden*, 693 F.3d at 457 (reversing for clear error where court’s civil-commitment decision relied

on flawed expert opinion and ignored or failed to account for “substantial body of contradictory evidence”).

For example, the court cited Ballenger’s opinion that Roof’s standardized test scores “eliminate[d]” schizophrenia-spectrum disorder as a possible diagnosis. JA-968-76, 1320-23. But the court didn’t address the testimony of four experts (including Edens, author of a similar test) criticizing Ballenger’s interpretation of Roof’s results. Edens testified Roof’s personality assessment showed “significant defensiveness and minimization,” yet still generated a paranoia score commensurate with psychosis. JA-1779-81. Maddox and Carpenter testified Roof’s IQ scores were consistent with psychotic and neurodevelopment disorders. And Stejskal testified Roof’s array of scores was “characteristic” of a schizophrenia diagnosis. JA-1571-1600, 1639-41, 1695-96.

The court also credited Ballenger’s opinion that Roof’s demeanor belied a schizophrenia diagnosis because he was “humorous” and “engaging.” JA-910-11, 994, 1009-10, 2070; *see* JA-1347-48 (testifying Roof “developed an excellent and humorous joke” during the interview, saying he had to commit the crime or “white nationalists would kill him

and his family”). But Ballenger alone held this impression. Dozens of Roof’s family members, former teachers, classmates, family friends, and coworkers uniformly described him as profoundly awkward and socially withdrawn. JA-5276-94 (“Social withdrawal and social awkwardness were raised as descriptors [of Roof] in nearly every interview and grand jury testimony.”) Evaluating experts who saw Roof before November 2016, when he became “guarded,” had similar impressions.

The court committed clear error by uncritically embracing Ballenger’s opinion—despite his impaired credibility, materially flawed evaluation, and the existence of substantial contrary evidence.

IV. THE COURT DENIED ROOF A FULL AND FAIR COMPETENCY HEARING BEFORE TRIAL

Even if the court’s pretrial competency decision wasn’t clearly erroneous—based on the evidence it had—it abused its discretion by unnecessarily expediting the proceeding.

A. The court abused its discretion by denying experts sufficient time to evaluate Roof and present live testimony

The court never clearly explained why it denied counsel’s request to continue the November 2016 hearing by one week, which counsel sought so Ballenger could perform a thorough evaluation and Loftin

could present live testimony. JA-895. Its comments suggest it had two concerns: reluctance to disturb the trial calendar and counsel's retention of mental-health experts months earlier. JA-895 (stating "[e]verything is a delay" and "[y]ou have hired countless experts").

Neither concern justified the court's ruling. *First*, it is axiomatic that inconvenience is an insufficient reason not to protect a defendant's constitutional rights. *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir.2018)("We are mindful that having to make these adjustments on the eve of trial is not ideal. But a criminal defendant's constitutional rights cannot be neglected merely to avoid added expense or inconvenience." (quotations omitted)). Because nearly every continuance is inconvenient, a court commits error by denying relief for that reason alone, without assessing whether delay is justified based on: (i) the moving party's diligence; (ii) the availability of witnesses and evidence; (iii) the extent of the proposed disruption; and (iv) the potential prejudice to the requesting party. *United States v. Soldevila-Lopez*, 17 F.3d 480, 490 (1st Cir.1994)("[B]ecause [defendant] ha[d] a constitutional right not to be sentenced while incompetent" and brief

delay would cause only minor inconvenience, court's denial of continuance was "arbitrary and unreasonable.").

Had the court applied that test here, it would have found each factor amply supported relief. Counsel acted diligently, by advising the court of Roof's increasingly erratic behavior and by working around-the-clock to prepare for the hearing. JA-477-78, 536-63, 618-75. The court was informed Loftin was unavailable to testify on the scheduled hearing date, but would be available shortly thereafter. JA-777, JA-808-09. A one-week continuance would cause minimal disruption to the trial, which already moved at an unusually swift pace. JA-157-58. And the prejudice to Roof was immense because the defense bore the burden of proving incompetency. Indeed, because Roof faced capital charges, he was entitled to heightened procedural safeguards to avoid being tried while incompetent. *Robinson*, 383 U.S. 375; *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Second, counsel's retention of mental-health mitigation experts was an inadequate basis for denying a continuance. The court failed to appreciate the different tasks experts have at penalty proceedings and competency hearings. Though defense experts had begun (but not

completed) their *mitigation* evaluations of Roof, they had no reason to probe Roof's *competency* before November 2016. JA-1546 (Maddox: "[T]he idea [was] I would have been testifying in . . . the sentencing phase of this trial. So for me to be here today was unexpected."). That is, they had not assessed Roof's ability, at the time of trial, to rationally assist in his defense—an altogether different question from whether, historically, he had mental-health issues that might persuade jurors to spare his life.

As the court recognized, Roof's decision to write prosecutors—the very individuals trying to secure his death sentence, to accuse his attorneys of acting “aggressive[ly]” toward him—was an extraordinary event. JA-586-89, 634 (“I have been 40 years in this business and I’ve never heard [of] anybody doing that.”). This makes its refusal to briefly pause the proceeding to consider Roof's competence inexplicable, especially considering how far outside the judicial norm the court strayed to affirmatively expedite it. Although national data on the time typically preceding a competency hearing isn't available, a review of federal cases tried in South Carolina in the last two decades offers some

perspective.²¹ In 9 published cases, all non-capital, the time between the evaluation order and competency hearing (or report) ranged from 2 to 5 months, with an average span of 4 months. In this case, only 14 days separated the court's evaluation order and Roof's hearing.

Against that backdrop, the court's refusal to grant a one-week extension in this capital case was an abuse of discretion.

B. The court's error prejudiced Roof by leaving one expert unprepared and another unavailable

The court's refusal to grant a one-week continuance prejudiced Roof by leaving one expert insufficient time to properly evaluate him, while preventing another expert who *had* properly evaluated him from testifying.

Ballenger had only 8 days to prepare for, conduct, and summarize Roof's competency evaluation. Though he claimed it was enough to complete the task, he also admitted having insufficient time to read crucial background records—including Roof's social history, interviews with family members, pediatric reports, and school records—which are an essential component of reliable competency determinations.

²¹ See Addendum for list of cases.

Professional standards direct examiners to “make a thorough inquiry into all important events” and review “all available school records, . . . medical history, and family history.” 40 Am.Jur. Proof of Facts 2d, §36. Even the district court recognized the importance of examining a defendant’s “entire life” to make a reliable competency determination. JA-625 (“[M]ental health diagnoses are based on the entire life, not just on the immediate information.”). Yet, despite Ballenger’s omissions, the court relied almost exclusively on his opinion—over the contrary findings of experts who conducted thorough background inquiries—to find Roof competent.

The court’s refusal to briefly delay the hearing so Loftin could testify also prejudiced Roof. In Loftin’s absence, the court didn’t hear about the childhood origins of Roof’s mental-health issues, a narrative derived from pediatric records, interviews with family members, school records, and witness statements from dozens of people who knew Roof before his crime.

Had Loftin been able to testify, she would have told the court Roof was born with a predisposition to schizophrenia-spectrum and autism-spectrum disorders, conditions that frequently co-occur due to “share[d]

biological underpinnings.” JA-5263, 5313. She would have described Roof’s autistic struggles as a young child, and the deterioration of his mental health in late-adolescence and early-adulthood, which culminated in his “racial awakening” at 19—which Loftin described as the early phase of a psychotic-spectrum disorder. JA-5274-96.

Without her live testimony, the court summarily dismissed Loftin’s barebones 1½-page declaration, criticizing its brevity and stating (incorrectly) it “offered no opinion regarding whether [Roof’s] condition had any effect on his competency to stand trial.” JA-2074. In fact, Loftin’s declaration stated Roof “was not afraid of receiving a death sentence, because [he believed] it would never be carried out”—evidence at the heart of the competency question that directly refuted the court’s own finding.²² JA-1774.

The court abused its discretion by depriving one expert of adequate time to evaluate Roof, while guaranteeing that another who *had* sufficiently evaluated him couldn’t appear at the hearing to testify. The

²² Loftin’s declaration also concluded Roof suffered symptoms “consistent with the schizophrenia spectrum”—including “anxiety, depression, suicidal ideation, obsessive-compulsive symptoms, disordered thinking, and psychosis (including delusions of grandeur and somatic delusions).” JA-1774.

court did not weigh the benefits and risks of the proposed delay or offer any justifiable reason for denying it. Its insistence on racing forward, contrary to the court's own practice, deprived Roof of his right to a full and fair competency hearing.

V. THE COURT DENIED ROOF A FULL AND FAIR COMPETENCY HEARING BEFORE SENTENCING

Even if the court properly conducted the first competency hearing, it abused its discretion by precluding material evidence of Roof's incompetency from the second competency hearing.

A. The court abused its discretion by using the law-of-the-case doctrine to exclude material evidence of Roof's incompetence

The court further abused its discretion by refusing to consider proffered evidence of Roof's incompetence at the January 2017 hearing.

First, the court applied a preclusion doctrine that preserves legal rulings to the factual competency finding. *Second*, the court blinded itself to material evidence of incompetency (including psychiatric reports and testing), contrary to precedent requiring plenary consideration of "prior medical opinions on competence to stand trial." *Drope*, 420 U.S. at 180; *see United States v. Saingerard*, 621 F.3d 1341

(11th Cir.2010); *United States v. Arendas*, 2011 WL 3477021 (D.Utah 2011).

1. The court misapplied the law-of-the-case doctrine

The court incorrectly declared its November 2016 competency finding the “law of the case” and refused to consider any evidence predating it. This was error because the law-of-the-case doctrine prevents relitigation of settled *legal* issues: “[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983); *see United States v. Aramony*, 166 F.3d 655, 661 (4th Cir.1999). A competency hearing, meanwhile, results in a *factual* finding of the defendant’s current capacity to participate in his defense, a status that “can vary over time.” *Indiana v. Edwards*, 554 U.S. 164, 175 (2008); *United States v. Percy*, 765 F.2d 1199 (4th Cir.1985)(discussing four competency hearings on defendant’s varying ability to assist counsel).

Because the law-of-the-case doctrine doesn’t apply to factual questions, the court abused its discretion by relying on it to exclude relevant evidence of Roof’s incompetence. *Maxwell v. Roe*, 606 F.3d 561,

569 (9th Cir.2010)(reversing where court treated prior competency finding as binding); *United States v. Houston*, 603 F.App'x 7 (2d Cir. 2015)(same).

Even assuming the law-of-the-case doctrine could apply to factual findings, it “is not an inexorable command but rather a prudent judicial response to the public policy favoring an end to litigation.” *Sejman v. Warner–Lambert Co., Inc.*, 845 F.2d 66, 68 (4th Cir.1988). Thus, a court may depart from the doctrine if: (i) a subsequent trial produces substantially different evidence; (ii) there is a change in the law; or (iii) the decision was clearly erroneous and would result in manifest injustice. *Aramony*, 166 F.3d at 661 (quotations omitted).

Here, because counsel proffered substantial new evidence at the second hearing that demonstrated the court’s initial competency finding was clearly erroneous (working a manifest injustice), the first and third exceptions applied. The new evidence “call[ed] into serious question the factual predicate on which the [court] relied” in its November 2016 decision finding Roof competent. *Dobbs v. Zant*, 506 U.S. 357, 359 (1993). Key to its decision was the court’s findings that Roof didn’t really believe white nationalists would free him from prison and that he

didn't suffer from a serious mental illness that rendered him incapable of assisting in his defense—which the proffered evidence “call[ed] into serious question.”

Moberg's evaluation, for example, reported Roof's claim he was “80% sure” there would be a white uprising after which he would be released and hailed as “a hero,” possibly becoming the governor of South Carolina—evidence that flatly refuted the court's finding Roof didn't expect to be rescued. JA-5352-53. Meanwhile, as explained more fully in Section I.A.1.b, Loftin's evaluation established Roof's history of suffering neurodevelopmental and psychiatric illness—evidence that flatly refuted the court's finding he didn't have a serious mental illness that impaired his ability to participate in trial. JA-5261-348.

2. The court deliberately blinded itself and its expert to material evidence

Even if the November 2016 competency finding could constitute the law-of-the-case—contrary to the doctrine itself—the court still was required to consider pre-November evidence to decide whether Roof was competent in January 2017. This is because the court's decision five weeks earlier only established Roof's competence *as of that date*. To determine whether Roof was competent in January 2017, the court

needed to consider “all evidence before it” and “accept as true all evidence of possible incompetence.” *Mason*, 52 F.3d at 1290.

This approach is consistent with the terms of the competency statute, which directs examiners to consider “[t]he person’s history and present symptoms,” 18 U.S.C. §4247(c)(1), and case-law treating subsequent competency hearings as plenary proceedings where courts weigh all relevant mental-state evidence. *Saingerard*, 621 F.3d at 1343 (“At a second competency hearing, the court reviewed the results of the additional testing as well as the evidence presented at the first hearing and again determined that Saingerard was competent to stand trial.”); *Arendas*, 2011 WL 3477021 (ordering additional evaluation after hearing where court broadly reviewed competency evidence, including evidence previously presented).

B. The court’s errors prejudiced Roof

The court’s refusal to admit evidence that arose (or could have arisen) more than five weeks earlier undermined its finding that Roof was competent to proceed to the penalty phase in January 2017. In making its decision, the court relied primarily on two sources: (i) Ballenger, who, at the court’s direction, also ignored any evidence of

incompetence arising before late-November, and (ii) Roof, who mirrored his statement from five weeks earlier that he didn't expect to be freed by white nationalists.

The evidence proffered by standby counsel but rejected by the court—particularly the testimony and reports of Moberg and Loftin, who didn't appear at the first hearing—would have refuted both. Moberg diagnosed Roof with a psychotic-spectrum disorder and frontal-system dysfunction, which is characterized by reduced processing speed (14th percentile), poor planning and execution skills (1st percentile), perseverative responses, and difficulties with memory—traits that impaired Roof's ability to process information and make rational decisions. JA-5350, 5356-60. Moberg also conducted a facial morphology assessment—not performed by any other expert—which revealed “significant disrupt[ion]” in Roof's frontonasal features that was indicative of schizophrenia and related disorders. Based on the combined results of Roof's neuropsychological, facial-anthropometric, and clinical testing, and review of Roof's social history,²³ Moberg

²³ Moberg reviewed Roof's school, medical, dental, mental-health, pharmacy, and arrest records; his writings and confession; and Roof's mother's and sister's grand jury testimony. JA-5350-51.

diagnosed “a long-standing neurodevelopmental disorder largely involving the frontal lobes” with “psychosis spectrum features.” JA-5360.

Loftin’s testimony and report, which detailed the long trajectory of Roof’s neurodevelopmental and psychiatric illnesses, would have provided similarly powerful evidence of Roof’s incompetency. In her report, Loftin described the developmental delays, obsessive tendencies, and repetitive behaviors Roof exhibited in early childhood,²⁴ as well as the isolation, paranoia, anxiety, and grandiosity he experienced in late adolescence, all of which contributed to his embrace of white-nationalist propaganda and development of race-war delusions in early adulthood. JA-5273-81, 5303-10.

The court misapplied the law-of-the-case doctrine and departed from clear precedent when it blinded itself to this wealth of evidence, depriving Roof of his procedural due process right to a full and fair competency hearing before the penalty phase of trial.

²⁴ For example, around age 3, Roof insisted on completing acts three times. In the morning, he “kissed [his mother] precisely three times” and “told her he loved her three times.” JA-5280.

Points Related to Self-Representation

Roof's primary goal at trial wasn't to avoid a death sentence, though he hoped he would. It was to prevent his attorneys from presenting mental-health evidence at penalty. When Roof learned of their plan to do so, he tried to intervene. First, he asked to control mitigation decisions, but the court instructed Roof he had no say over them unless he waived counsel. Based on that advice—which was wrong—Roof reluctantly went pro se. Though the court was uneasy with this arrangement, recognizing Roof lacked the necessary skill to try a capital case and would hide his mental illness, it felt compelled to honor his request.

The result was a farce of a trial. Roof represented himself during voir dire—a process estimated to last three weeks, but that under his control took five days. As Roof struggled through the complicated process, he sought counsel's assistance, but it was denied. He asked to slow down, and again was denied. Eventually, Roof gave up, asking counsel to take over for the final moments of jury selection and guilt. But Roof persisted in his desire to control penalty for the sole purpose of excluding mental-health evidence. He sat passively through days of

impassioned victim-impact testimony, neither calling nor cross-examining witnesses, and rambling through nonsensical opening and closing arguments.

These events were remarkable not only because they made a mockery of due process, but also for their absurdity. As Roof acknowledged, the mental-health evidence he sought to suppress eventually would be made public, so his “self-representation accomplishe[d] nothing.” JA-5793.

On appeal, Roof argues he shouldn’t have had to waive counsel to achieve his objective—preventing mental-health mitigation. The court underestimated Roof’s autonomy interest in making this choice. Because Roof reluctantly represented himself based on advice the Supreme Court has since repudiated, his waiver of counsel was invalid.

Alternatively, the court erred by granting Roof’s motion for six independent reasons. *First*, the Sixth Amendment’s implied right to self-represent doesn’t extend to capital penalty proceedings. *Second*, even if defendants may waive counsel at penalty, they cannot do so and forgo all mitigation. *Third*, Roof chose self-representation mistakenly believing his former attorneys could meaningfully assist him. *Fourth*,

the court never advised Roof he could proceed with counsel at voir dire and guilt, then self-represent at penalty, unnecessarily leading him to conduct voir dire alone. *Fifth*, Roof's motion was untimely. And *sixth*, even if he was competent to stand trial, Roof wasn't competent to represent himself in a capital case.

Finally, even if the court properly granted Roof's motion, because of Roof's evident impairments, the court abused its discretion by refusing standby assistance and minor accommodations.

Each error is structural and indelibly affected the proceedings. Without counsel, Roof failed to adequately vet potential jurors, and relinquished substantial evidence and argument warranting a life term. This Court should vacate Roof's convictions or, at minimum, his death sentence.

VI. BACKGROUND

A. Roof reluctantly waives counsel solely to block mental-health evidence

For over sixteen months, Roof cooperated with defense counsel. Then in November 2016, after meeting with government-expert Dietz and learning counsel planned to present mental-health mitigation, Roof ended his cooperation. JA-537-41, 7563-71. As he explained, though he

wanted a life sentence, JA-662, 5477, he cared more about preserving his reputation. JA-629 (“[I]f the price [of contesting death] is that people think I’m autistic, then it’s not worth it.”). And to Roof, being labeled mentally-impaired was a fate worse than death: “[O]nce you’ve got that label, there is no point in living anyway.” JA-630-34.

Roof asked if he could “make the decisions” about mitigation, but the court said counsel alone controlled them. JA-629, 635. Roof inquired whether he “could write a document that would take away all responsibility from [his] lawyers, but still keep them” to do as he directed. The court said no, advising Roof’s power at trial was limited to a handful of matters, not including mitigation. JA-1741-43.

Stymied, Roof asked if he could represent himself and “not do anything.” The court expressed concern, but agreed to consider it. JA-1743-44. Five days later, Roof moved to discharge counsel. JA-2085-86.

B. The court holds a hearing on Roof’s motion to self-represent

Before the hearing on Roof’s motion, the court told defense counsel it planned to grant relief, and encouraged them “to be active standby counsel.” Counsel reiterated their concerns about Roof’s competence. JA-2111-12, 2124.

At the hearing, the court advised Roof of the charges, his constitutional rights, and that counsel could better serve him. It also told Roof that, if it granted his motion, standby counsel “would be available to assist [him] if [he] desired that assistance.” Roof confirmed he understood, and waived counsel. JA-2130-37.

C. Roof represents himself at voir dire

With Roof conducting his own defense, voir dire—expected to last three weeks—took a brisk five days. JA-159-60. Press reports entered in the record described Roof’s difficulties in court, including his long pauses, stuttering, trouble summoning thoughts, repetition, and infrequent questions or objections. JA-3560, 3564-76. Counsel also documented Roof’s inability to make timely objections or pose questions when needed. JA-3332-37, 3560-61, 5253-54, 5473-74; *see* 2190-91, 2539-40, 2843-54, 3500, 4068.

By voir dire’s second day, Roof realized he needed help, and asked if standby counsel could assert objections and pose questions. JA-2403-09, 2533-38, 2548-52, 2561-62, 2867-68. When the court denied assistance, Roof asked to slow down, but the court denied that request too. JA-2406-09, 2561-64, 2678-80, 3533-51.

After representing himself for five days, Roof gave up and sought counsel's reappointment for the last day of jury selection and the guilt phase, stating he would self-represent at penalty. JA-3460-62. The court agreed, and Roof stood trial with counsel's assistance through the end of the guilt phase. JA-3470-78.

D. Roof represents himself at penalty

Before granting Roof's request to discharge counsel, the court expressed concern jurors wouldn't hear crucial evidence they needed "to make a fair and just decision," thereby "undermining" the capital-sentencing process. JA-636-37, 1744. Its prediction came true. For four days, the government presented aggravating evidence, including testimony from 23 victim-impact witnesses. JA-6810-40. Roof presented nothing. JA-6583-84, 6841-42. He cross-examined no witnesses, introduced no evidence, and made no case for life. In the government's words, Roof "did nothing to try to mitigate" against death. JA-6715.

1. Roof forgoes substantial mental-health mitigation

The jury never learned that of the five experts who evaluated Roof, all diagnosed him as mentally ill, and all but one concluded delusions and paranoia drove his conduct. Absent that counter-

narrative, prosecutors told jurors there was no “imagined” explanation for Roof’s actions besides “cold” and “calculated” “hatred,” and no reason to act as “detective[s] to figure out why” Roof committed his crime. The answer was simple: Roof was an “unrepentant racist” who deserved to die. JA-6689, 6714; *see* JA-5110 (arguing in guilt-rebuttal Roof was “a calm, confident, callous man who shows no signs that mental illness had anything to do with” his crime).

2. Roof forgoes substantial non-mental-health mitigation

Counsel, before being discharged, planned a substantial non-mental-health mitigation case—one that Roof didn’t object to, but did not independently present—including:

- testimony Roof was shy and nonviolent before his online radicalization;
- evidence Roof reacted passively when assaulted in jail;
- expert testimony on Roof’s good behavior in pretrial detention, likely future as a nonviolent, compliant prisoner, and ways he could be safely confined;
- testimony from Roof’s religious adviser describing his rehabilitative potential;
- testimony from Roof’s family about their continued love for and ongoing relationship with him; and

- expert testimony describing how internet algorithms featuring hateful content facilitated Roof's radicalization.

JA-5251-52, 6521-23.

Counsel moved the court to exercise its supervisory authority to present this mitigation. The court refused, claiming it would make a “mockery” of Roof's self-representation. JA-5258, 6521-23, 6646-47. Absent that evidence, the government seized its advantage, arguing Roof remained a danger, even in custody, and lacked rehabilitative potential. JA-6697-98. Jurors, who heard nothing suggesting otherwise, apparently agreed, rejecting mitigating factors that a life sentence “offers the possibility of redemption and change,” Roof “poses no significant risk of violence to other inmates or prison staff,” and he “can be safely confined.” JA-6804.

E. The Supreme Court holds a defendant need not waive counsel to control his defense

The Sixth Amendment expressly affords “the accused” the right “to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. Nearly 200 years after its adoption, a divided Supreme Court announced the Sixth Amendment also “implicitly” protects an accused's right to represent himself at trial. *Faretta v. California*, 422 U.S. 806,

807, 814 (1975). In its seminal *Faretta* decision, the Court found support for this implied right in the history of self-representation and structure of the Sixth Amendment, which grants rights to the accused personally. *Id.* at 818-19. Weighing respect for defendant autonomy against the recognition counsel “is essential to assure the defendant a fair trial,” the Court struck the balance in favor of autonomy. *Id.* at 832-34. Still, *Faretta* recognized limitations on the right to self-represent. It explained courts may deny the right when used to “abuse the dignity of the courtroom” or not “comply with relevant rules of procedural and substantive law”; and required a knowing, intelligent, and voluntary waiver of counsel following advice on “the dangers and disadvantages of self-representation.” *Id.* at 834-36 n.46.

In a trio of later decisions, the Court endorsed additional limits on the implied *Faretta* right, emphasizing it “is not absolute.” *Edwards*, 554 U.S. at 171; see *Martinez v. Court of Appeal*, 528 U.S. 152, 154 (2000); *McKaskle v. Wiggins*, 465 U.S. 168 (1984). In *McKaskle*, the Court approved appointment of, and active participation by, standby counsel over defendant objection. In *Martinez*, 528 U.S. at 154, it confined exercise of *Faretta* rights to the “trial” stage of proceedings.

And in *Edwards*, it allowed courts to force counsel on defendants who are competent to stand trial but lack the mental capacity to conduct proceedings alone. The Court also stressed the “strong presumption against waiver of the right to counsel,” and endorsed denying such waivers when not timely made. *Martinez*, 528 U.S. at 161-62 (quotations omitted); see *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir.1997)(explaining this Court favors counsel over self-representation because the former, “if denied, leaves the average defendant helpless” (quotations omitted)).²⁵

In each case, the Court acknowledged tension between defendant autonomy and counsel’s role in ensuring a fair trial, and at times questioned the balance *Faretta* reached. *Edwards*, 554 U.S. at 176-79; *Martinez*, 528 U.S. at 160-61 & n.9; *McKaskle*, 465 U.S. at 177-78, 183-84; see *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir.1995)(en banc).

In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), the Court harmonized the two interests somewhat, relying on the Sixth Amendment’s guarantee of attorney “assistance” to hold a defendant

²⁵ There also is a statutory right to self-representation in federal court. 28 U.S.C. §1654. But, like the constitutional right, it is “limited.” *United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir.1978).

need not waive counsel to be master of his defense. *McCoy* explained, “[t]he choice is not all or nothing,” and a defendant may enjoy the benefits of counseled representation while simultaneously exercising his “[a]utonomy to decide . . . the objective of the defense.” *Id.* at 1508. Though counsel—“an assistant”—retains authority to make “[t]rial management” decisions, he cannot “negate [defendant] autonomy by overriding [a] desired defense objective.” *Id.* at 1508-09.

VII. STANDARDS OF REVIEW

This Court reviews de novo constitutional questions, including the scope of the Sixth Amendment. *United States v. Under Seal*, 709 F.3d 257, 261 (4th Cir.2013). Absent constitutional concerns, it reviews for abuse of discretion decisions granting motions to discharge counsel, finding defendants competent to self-represent, and imposing limitations on self-representation. *United States v. Barefoot*, 754 F.3d 226, 233 (4th Cir.2014); *United States v. Beckton*, 740 F.3d 303, 307 (4th Cir.2014); *United States v. Bernard*, 708 F.3d 583, 593 (4th Cir.2013).

Here, the court effectively relieved counsel before its colloquy on Roof’s motion, leaving him “to his own devices” at that hearing. JA-2112. (“I’m going to allow [Roof to self-represent]. And congratulations,

you will be standby counsel, okay?”). This Court thus reviews de novo the validity of Roof’s waiver of counsel. *United States v. Ductan*, 800 F.3d 642, 648 (4th Cir.2015); see *United States v. Erskine*, 355 F.3d 1161, 1166-67 (9th Cir.2004). The waiver is valid only if made knowingly, intelligently, and voluntarily. *Godinez v. Moran*, 509 U.S. 389, 400-02 & n.12 (1993); *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir.2000). The government bears the heavy burden of proving valid waiver, against which “courts indulge in every reasonable presumption.” *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

Each of the errors described below is structural, requiring reversal of Roof’s convictions and sentence. *McCoy*, 138 S.Ct. at 1511; *Ductan*, 800 F.3d at 653.

VIII. THE COURT MISADVISED ROOF THAT COUNSEL COULD PRESENT MENTAL-HEALTH EVIDENCE OVER HIS OBJECTION

Roof chose self-representation for one reason: “to prevent the presentation of mental health mitigation evidence.” JA-2296; see JA-6964. Though he preferred not to waive counsel, Roof believed it was his only option, given the court’s repeated instructions they had exclusive authority over presentation of penalty-phase evidence.

But the court was mistaken. After Roof’s trial, the Supreme Court clarified that a defendant need not forgo counsel to prevent argument inconsistent with his primary objective—even if achieving that objective increases his chances of a death sentence. *McCoy*, 138 S.Ct. 1500.²⁶ Because Roof’s waiver was based on erroneous advice, it wasn’t knowing, intelligent, or voluntary. This Court should remand for a new trial.

A. *McCoy* held counsel cannot override a defendant’s broadly-defined objective

McCoy was charged with killing his estranged wife’s relatives, and maintained his innocence, despite overwhelming evidence. His attorney concluded the only way to avoid a death sentence was to admit guilt and plead for mercy, which counsel did against McCoy’s wishes. *McCoy*, 138 S.Ct. at 1505-07. McCoy was convicted, and the Louisiana Supreme Court affirmed on appeal, holding counsel’s tactic “was permissible” because he “reasonably believed that admitting guilt afforded McCoy the best chance to avoid a death sentence.” *Id.* at 1507.

²⁶ The court’s decision relied on Fourth Circuit cases *McCoy* has since “undermined.” *United States v. Winston*, 850 F.3d 677, 683 (4th Cir.2017). JA-2255-58.

The U.S. Supreme Court disagreed. Focusing on the Sixth Amendment's guarantee of "the *Assistance* of Counsel for his defence," U.S. Const. amend. VI (emphasis added), the Court held a defendant who desires counsel's services "need not surrender control entirely" to "affirm [his] dignity and autonomy" interests. Rather, he retains control over "the objective of the defense," which counsel "must abide by" and "not override." *McCoy*, 138 S.Ct. at 1508-09 (quotations omitted).

Though McCoy shared counsel's objective of averting a death sentence, he had a higher goal: "to avoid, above all else, the opprobrium that comes with admitting he killed family members." *Id.* at 1508; *see id.* at 1510. Counsel was required to pursue a defense consistent with that objective, however foolhardy the approach. *Id.* at 1509. Because the "court allowed counsel to usurp control of an issue within McCoy's sole prerogative," it violated his Sixth Amendment right to autonomy; and because that error was structural, the Court vacated McCoy's conviction. *Id.* at 1511.

B. Per *McCoy*, counsel could not override Roof's primary objective—precluding mental-health mitigation

Like *McCoy*, Roof had a higher priority than prevailing at trial—not being labeled mentally ill. So the decision to present mental-health evidence rested squarely with him, not counsel. Because the court misadvised Roof on this point, and he waived counsel solely because of that advice, his waiver was neither knowing and intelligent nor voluntary. *Clark v. Louisiana*, 138 S.Ct. 2671 (2018)(vacating and remanding post-*McCoy*, where capital defendant claimed *Faretta* waiver involuntarily premised on belief counsel controlled defense);²⁷ *United States v. Audette*, 923 F.3d 1227, 1236 (9th Cir.2019)(recognizing advice contrary to *McCoy* could render *Faretta* waiver unknowing and unintelligent, but holding court correctly advised).

No court appears to have addressed *McCoy*'s application to a capital defendant's objection to mental-health evidence. But two courts have considered closely analogous situations.

In *Taylor v. Steele*, 372 F.Supp.3d 800 (E.D. Mo. 2019), the capital defendant instructed counsel not to present any mitigation or closing

²⁷ *State v. Clark*, 220 So.3d 583, 636-37 & n.61 (La.2016).

argument at penalty because of his religious beliefs. In post-conviction, he claimed counsel were ineffective for complying. *Id.* at 861-63. Relying on *McCoy*, the court rejected that argument, finding the defendant “was aware of his attorneys’ objective of averting the imposition of the death penalty,” but “made a conscious and informed decision to value a different objective more highly”—despite “extensive warnings from the trial court as to the likely consequences [of] his decision.” In such circumstances, counsel were required to defer to his objective and not present mitigation. *Id.* at 866-67.

Similarly, in *People v. Amezcua & Flores*, 6 Cal.5th 886 (2019), codefendants protested penalty-phase mitigation, explaining their paramount desire not to involve loved ones or deflect blame. The trial court reluctantly acquiesced, holding defendants controlled the evidence at penalty. *Id.* at 920-25. On appeal, defendants switched course, claiming they had “no right to control the attorney’s strategic and tactical decisions regarding the defense.” The California Supreme Court disagreed, reasoning, “To accept [defendants’ argument] would be to read out of existence the allocation of responsibilities the high court recognized in *McCoy*.” *Id.* at 925-26.

Other courts also have read *McCoy* broadly. *State v. Horn*, 251 So.3d 1069, 1075 (La.2018)(“*McCoy* is broadly written and focuses on a defendant’s autonomy to choose the objective of his defense.”); *People v. Flores*, 246 Cal. Rptr.3d 77, 78-79 (Ct. App.2019)(characterizing *McCoy* as holding “fundamental principles of personal autonomy inherent in the Sixth Amendment” give defendants “the right to tell their own story and define the fundamental purpose of their defense”); *cf. Coleman v. Mitchell*, 268 F.3d 417, 448 & n.16 (6th Cir.2001)(holding, pre-*McCoy*, counsel is an assistant and must defer to capital defendant’s decision to withhold mitigation).

Particularly relevant is *United States v. Read*, 918 F.3d 712 (9th Cir.2019), where the Ninth Circuit extended *McCoy* to a defendant’s right to prevent counsel from presenting a viable insanity defense. Reversing the trial court’s decision allowing counsel to argue insanity over Read’s objection, the court explained, “[A] defense of insanity . . . carries grave personal consequences that go beyond the sphere of trial tactics. . . . Just as conceding guilt might carry opprobrium that a defendant might wish to avoid, above all else, a defendant, with good

reason, may choose to avoid the stigma of insanity.” *Id.* at 720 (citations and quotations omitted).

That logic applies here. Because Roof’s primary objective was to avoid the opprobrium of a mental-health diagnosis, counsel couldn’t override it. The government effectively conceded as much below, asserting existing precedent established a represented “defendant may choose not to present a mitigation case.” JA-2093 n.2. The court’s contrary advice rendered Roof’s *Faretta* waivers unknowing, unintelligent, and involuntary.

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

Even if the court properly advised Roof on who controls the defense, it should not have granted his motion to self-represent because there is no Sixth Amendment right to represent oneself in capital penalty proceedings. This rule is evident from the language of the amendment and *Martinez*, which sets forth the framework for deciding when the right applies.

A. *Martinez* establishes the test for when a defendant may self-represent

In *Martinez*, 528 U.S. at 154-64, the Court held the right to self-represent doesn’t extend to appeals. To reach that conclusion, the Court

considered three factors underlying *Faretta*'s contrary holding for trials. *Id.* at 156.

First, Faretta “examined historical evidence identifying a right of self-representation that had been protected by federal and state law since the beginning of our Nation,” which supported a pro-se right at trial. *Id.*; see *Faretta*, 422 U.S. at 812-17. *Martinez*, 528 U.S. at 159, by contrast, found no historical justification for self-representing on appeal because “the right of appeal itself is of relatively recent origin” and was virtually unheard-of when the Sixth Amendment was enacted.

Second, Faretta “interpreted the structure of the Sixth Amendment, in the light of its English and colonial background,” *Martinez*, 528 U.S. at 156, and found in it “an implied right” to self-represent, *Faretta*, 422 U.S. at 819 n.15. The combination of enumerated rights—to counsel, notice, confrontation, and compulsory process—suggested this right, because each was granted personally to the accused. *Id.* at 818-19. But the amendment’s structure and history couldn’t support the same right on appeal because its drafters didn’t recognize the right to appeal. *Martinez*, 528 U.S. at 159-60.

Third, Faretta “grounded [the right to self-representation] in part in a respect for individual autonomy.” *Id.* at 160 (citing *Faretta*, 422 U.S. at 834). *Martinez* found that consideration also applied on appeal. But because the first two factors pointed against extending *Faretta* to appeal, it concluded such a right, should it exist to preserve autonomy, must be grounded in due process. *Id.* at 160-61. The Court rejected that possibility, though, because counsel invariably will perform better than a pro se appellant, self-representation is not “wise, desirable, or efficient,” and counseled representation “is the standard, not the exception.” *Id.*

That these factors pointed to different results in *Martinez* didn’t trouble the Court because *Faretta* itself “recognized[] the right to self-representation is not absolute,” and “[e]ven at the trial level,” the “government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” *Id.* at 161-62. Following conviction, “the balance between the two competing interests surely tips in favor of the State,” for “[t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a

jury returns a guilty verdict.” *Id.* His “autonomy interests” become “less compelling,” while “the overriding state interest in the fair and efficient administration of justice remains as strong as” at trial. *Id.* at 163.

Though courts have discretion to allow self-representation following conviction, nothing requires them to do so. *Id.*

B. *Martinez* confirms there is no penalty-phase right to self-representation

Martinez establishes there is no right to waive counsel at capital penalty. *First*, like the right to appeal, the right to a penalty hearing “is of relatively recent origin.” *Id.* at 159. Whereas the appeal right first arose in the late nineteenth century, *see id.*, penalty proceedings are an invention of the late twentieth, *see Gregg v. Georgia*, 428 U.S. 153, 190-95 (1976)(opinion of Stewart, Powell, Stevens, JJ.). And so, like *Martinez* but unlike *Faretta*, “the historical evidence does not provide any support for an affirmative constitutional right to” self-representation at penalty. *Martinez*, 528 U.S. at 159.

Second, because there was no such thing as a capital penalty phase when the Sixth Amendment was adopted, this Court cannot infer a right to self-represent from the structure or origins of its text. Instead, defendants historically have had little say over the evidence presented

at sentencing. *Payne v. Tennessee*, 501 U.S. 808, 821 (1991)(recognizing courts “may appropriately conduct an inquiry broad in scope, largely unlimited” as to kind or source of evidence); *Williams v. New York*, 337 U.S. 241, 246 (1949)(describing historical exercise of “wide discretion in the sources and types of evidence used” at sentencing).

Indeed, the amendment’s text—that in “all criminal prosecutions” an “accused” shall have counsel’s assistance “for his defence”²⁸—excludes penalty proceedings because they are sentencing hearings, not “prosecutions.” *Cf. State v. McGill*, 213 Ariz. 147, 159 (2006)(holding “penalty phase is not a criminal prosecution”). The defendant is no longer “the accused”; he has been convicted. *Martinez*, 528 U.S. at 162-63; *Betterman v. Montana*, 136 S.Ct. 1609, 1614 (2016)(“At the founding, ‘accused’ described a status preceding ‘convicted.’”).²⁹ And rather than presenting a “defence,” he must establish mitigating factors

²⁸ U.S. Const. amend. VI.

²⁹ *But see United States v. Haymond*, 139 S.Ct. 2369, 2379 (2019)(plurality)(four Justices stating “‘criminal prosecution’ continues and the defendant remains an ‘accused’ with all the rights provided by the Sixth Amendment, until a final sentence is imposed”).

that jurors weigh in making “a unique, individualized, and reasoned moral judgment.” JA-6744. 18 U.S.C. §3593(c).

This reading accords with the Sixth Amendment’s structure, listing other trial rights that don’t apply at capital sentencing. *United States v. Umaña*, 750 F.3d 320, 346-48 (4th Cir.2014)(finding no confrontation right at penalty); *cf. Betterman*, 136 S.Ct. 1609 (finding no speedy trial right at sentencing).

Third, because the first and second factors don’t support a historical or structural right to self-representation at penalty, any limited autonomy right that survives conviction must be grounded in due process, not the Sixth Amendment. But the reasons that precluded a due-process right on appeal apply with greater force at capital sentencing, where the public’s interest in fairness, efficiency, and reliability is at its apex, along with the risk self-representation will thwart those goals. *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (describing “heightened reliability” requirement in capital cases). Thus, allowing capital defendants to self-represent at penalty undermines, rather than furthers, due process.

C. This Court should hold there is no penalty-phase right to self-representation

Only two federal circuits have considered whether *Faretta*'s implied right to self-representation extends to capital penalty. Pre-*Martinez*, the Seventh Circuit could “think of no principled reason” why *Faretta* should not apply in full to penalty proceedings. *Silagy v. Peters*, 905 F.2d 986, 1007 (7th Cir.1990). *Martinez*, of course, alters that analysis.

Post-*Martinez*, the Fifth Circuit decided *United States v. Davis*, 2001 WL 34712238 (5th Cir.2001)(“*Davis I*”), an appeal from the denial of Davis’s request to self-represent at capital penalty. A divided appeals court summarily granted Davis’s petition, without adversarial briefing or argument. *Davis I*, 2001 WL 34712238, at *4 (Dennis, J., dissenting). In two paragraphs that didn’t address *Martinez*’s three-factor test, the majority found that case inapplicable, and held *Faretta* extends to sentencings generally. It declined to distinguish Davis’s capital proceedings because it was confident the parties and court would present the jury with necessary sentencing information. *Id.* at *2-3 (majority opinion).

The *Davis* district court’s “thoughtful” opinion, *id.* (Dennis, J., dissenting), however, detailed why a defendant “does not have a constitutional right to self-representation at the penalty phase” of a capital case, *United States v. Davis*, 150 F.Supp.2d 918, 919 (E.D. La.2001). Relying on *Martinez*, the court distinguished sentencing as a proceeding where defendants historically “do not have the prerogative to select their sentence” and “judges are expected to gather information from a wide range of sources.” *Id.* at 922. At capital sentencing in particular, constitutional concerns—especially reliability—outweigh a defendant’s autonomy rights. *Id.* at 923-30.

When Roof’s counsel raised this issue, the district court recognized it as one of first impression in the Circuit. JA-3179-80, 3468, 3538. But it rejected counsel’s position as “absurd,” stating the Sixth Amendment necessarily applies at penalty because, “were it not so, a defendant would have neither the right to self-representation nor the right to counsel.” JA-3541 & n.5.

The court was wrong. Whether the *textually-grounded* right to counsel applies at penalty is distinct from whether the *implied* right to self-represent does. Further, a capital defendant’s right to penalty-

phase counsel initially was rooted in due process, not the Sixth Amendment. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Though later cases extended the Sixth Amendment right to capital sentencing, even that extension was premised on due process. *Strickland v. Washington*, 466 U.S. 668, 686-67 (1984). So, though the Sixth Amendment doesn't support an implicit right to self-represent at penalty, defendants still have a right to counsel at that stage, just as criminal appellants are entitled to counsel on due process and equal protection grounds post-*Martinez*. *Anders v. California*, 386 U.S. 738 (1967).

Like the *Davis* district court, this Court should hold there is no implied right to self-representation at capital sentencing.

X. ROOF WAS PROHIBITED FROM WAIVING BOTH COUNSEL AND MITIGATION

To the extent Roof had any right to self-represent at penalty, it was diminished after conviction. *Martinez*, 528 U.S. at 162-63. Because the Fifth and Eighth Amendments and Federal Death Penalty Act (“FDPA”) require capital juries to consider mitigation, they outweighed

the diminished right here, preventing Roof from self-representing and doing nothing.³⁰

A. The Constitution requires juries to consider mitigation

The Supreme Court repeatedly has held capital juries *must* consider all relevant sentencing evidence, including mitigation. *Payne*, 501 U.S. at 822 (describing mitigation as “evidence which *must* be received”); *Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, Stevens, JJ.) (“requir[ing] consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death” (citation omitted)); *Gregg*, 428 U.S. at 190 (opinion of Stewart, Powell, Stevens, JJ.) (holding “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die”). If jurors are prevented from considering relevant mitigation, they cannot issue an individualized penalty verdict, and the resulting sentence is

³⁰ Roof recognizes the tension between this claim and the *McCoy* argument above, and presents them in the alternative. Either Roof’s autonomy interest in controlling his penalty-phase presentation was sufficiently strong that he had authority to do so, or it was sufficiently weak that other constitutional interests outweighed it.

unconstitutional. *Saffle v. Parks*, 494 U.S. 484, 507 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990).

B. The FDPA requires juries to consider mitigation

Similarly, the FDPA requires presentation of mitigating evidence. It states: “In determining whether a sentence of death is to be imposed on a defendant, the finder of fact *shall* consider any mitigating factor, including . . . factors in the defendant’s background . . . that mitigate against imposition of the death sentence.” 18 U.S.C. §3592(a)(8) (emphasis added); *see id.* §3593(b)-(c)(mandating penalty proceeding where “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” (emphasis added)).

This mandatory language is unsurprising; if the statute failed to “ensure[] that the sentencing authority is given adequate information,” it would be unconstitutional. *Gregg*, 428 U.S. at 195; *see Jones v. United States*, 527 U.S. 373, 381 (1999); *United States v. Simms*, 914 F.3d 229, 251 (4th Cir.2019)(en banc)(“We are obligated to construe a statute to avoid constitutional problems . . . if such a reading is fairly possible.” (alterations and quotations omitted)).

C. These demands outweigh any implicit right to self-represent at penalty

These statutory and constitutional demands trump a defendant's implied right to self-represent at penalty, if such right even exists, and present nothing. *Martinez*, 528 U.S. at 162 (“[T]he government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.”); *Billings v. Polk*, 441 F.3d 238, 253-54 (4th Cir.2006)(explaining whether state interest in reliable penalty proceeding outweighs defendant’s interest in preventing mitigation is “open question,” but suggesting state’s interest paramount); *Frazier-El*, 204 F.3d at 559-60.

Even during trial, where autonomy interests are strongest, “[t]he right of self-representation is not a license to abuse the dignity of the courtroom [or] not to comply with relevant rules of procedural and substantive law.” *Faretta*, 422 U.S. at 834 n.46; see *Beckton*, 740 F.3d at 306; *United States v. West*, 877 F.2d 281, 287 (4th Cir.1989). In a capital case, substantive and procedural law mandate individualized consideration of mitigation. Here, because Roof sought to flout that law by offering no mitigation, the court should have denied his request to waive counsel.

That is precisely what the dissent concluded in *Davis I*, where it explained *Faretta* makes clear “the Sixth Amendment does not guarantee [a] defendant the right to engage in a sham self-representation for the purpose of abandoning his adversarial defense”; it guarantees the right “to make a genuine adversary defense.” *Davis I*, 2001 WL 34712238, at *6 (Dennis, J., dissenting). When a defendant seeks to “sabotage[] or abandon a defense” at penalty, he “flout[s] the dignity of the courts,” and his “autonomy interests, which began to wane upon his conviction” must yield to other constitutional concerns. *Id.* at *5-6.

Alternatively, the court could have allowed Roof to self-represent while ordering independent presentation of mitigation, as the *Davis* court did on remand. *United States v. Davis*, 180 F.Supp.2d 797 (E.D. La.2001).³¹ Though a divided Fifth Circuit again reversed, *United States v. Davis*, 285 F.3d 378 (5th Cir.2002)(“*Davis II*”), the dissent had the better argument. It recognized the “many exceptions and qualifications” to self-representation, including that “[a] *pro se*

³¹ Counsel requested independent mitigation, but the court refused. JA-5258, 6521-23, 6646-47.

defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense,” or “from an amicus counsel appointed to assist the court.” *Id.* at 387-88 (Dennis, J., dissenting)(quoting *McKaskle*, 465 U.S. at 177 n.7). Independent presentation of mitigation fits squarely within that paradigm. *Billings*, 441 F.3d at 253 (finding no precedent bars submission of mitigation over defendant’s objection, and “emphasiz[ing] the importance of ensuring that the jury has access to all mitigating evidence”).

Had the court either denied Roof’s motion or required independent mitigation, its decision would be consistent with precedent affirming limitations on *how* a defendant self-represents. *Beckton*, 740 F.3d at 305-07; *Fields*, 49 F.3d at 1034-37. Likewise, either decision would be consistent with approaches taken by some states’ high courts under similar circumstances. *State v. Reddish*, 181 N.J. 553 (2004)(requiring independent mitigation in pro-se capital cases); *Muhammad v. State*, 782 So.2d 343 (Fla.2001)(same); *cf. State v. Koedatich*, 112 N.J. 225

(1988)(holding society's interest in reliable penalty proceeding outweighs counseled defendant's right to waive mitigation).

Because Roof had no right to self-represent and forego mitigation, the court should have denied his request to discharge counsel or conditioned it on independent presentation of mitigation.

XI. ROOF'S INITIAL WAIVER OF COUNSEL WAS INVALID

Even if Roof had a constitutional right to represent himself, his initial waiver of counsel (before voir dire) was invalid for two reasons. *First*, Roof discharged counsel on the mistaken understanding he would have standby assistance as desired. And *second*, the court never advised Roof of his option, belatedly recognized, to proceed with counsel at jury selection and guilt, and self-represent at penalty. Consequently, the government cannot meet its "heavy burden" of proving Roof's initial *Faretta* waiver was knowing, intelligent, and voluntary, and this Court must reverse his convictions and sentence. *Brewer*, 430 U.S. at 404-05 (quotations omitted).

A. The court misadvised Roof on standby counsel's role

During the hearing on Roof's motion, the court advised that if Roof represented himself, he would have standby counsel's assistance as

needed—specifically, they “would be available to assist [him] if [he] desired that assistance.” JA-2133. The court said nothing more about standby counsel’s role, though it asked if Roof could “make as-needed motions or objections, ask questions, [and] make arguments.” JA-2134-35. Roof affirmed, and the court granted his motion. JA-2137.

Roof’s confusion over what the court meant by “assistance” of standby counsel quickly became apparent. JA-3535. Consistent with their understanding of the law (and the court’s direction to play an “active” role), counsel advised Roof they could help with procedural matters like making and explaining objections, an offer that “comforted” him. JA-2124, 2403-08, 2533-38, 2548-52, 2867-68; *see* JA-2561-62. But the court, apparently viewing “assistance” differently, rejected Roof’s requests for help with those tasks. JA-2406-09, 2561-64, 3533-51.

Whether or not those limitations were proper,³² Roof evidently didn’t appreciate them when he waived counsel. After the court restricted standby counsel’s role, Roof temporarily sought their reappointment. JA-3460-62. Because the court misadvised Roof about

³² *See* Section XIV.B.

his *personal* obligation as counsel, his initial waiver was neither knowing nor intelligent.³³

The error has two dimensions. *First*, the court didn't apprise Roof of the limits it would place on standby counsel or his *personal* obligation to follow procedural rules, which made his waiver unknowing and unintelligent. *United States v. Hansen*, 929 F.3d 1238 (10th Cir.2019)(vacating judgment for insufficient warning on personal obligation to follow procedural rules). *Second*, the court affirmatively assured Roof standby counsel would be available as he desired, minimizing his responsibilities at trial. *Iowa v. Tovar*, 541 U.S. 77, 89 (2004)(explaining waiver not knowing and intelligent unless court "rigorously convey[s]" "hazards" of complying with procedural rules and "object[ing]" (alterations and quotations omitted)).

Curiously, the court provided no clear explanation of counsel's role, despite finding "much wisdom," JA-3546, in a state court's advice that judges avoid "confusion surrounding the differing roles" standby counsel can fill by "precisely" defining the role and "clear[ly] inform[ing]

³³ In addition to the reasons already given, the Court reviews this claim de novo because the error wasn't apparent until the district court limited standby counsel's role after Roof's waiver. Fed.R.Crim.P. 51(b).

counsel and the defendant” of any limitations in advance. *State v. Powers*, 211 W.Va. 116, 123 (2001). Particularly relevant here—though unaddressed by the court—*Powers* explained that defining standby counsel’s role “will provide defendants with a more definite appreciation of the risks they will assume in undertaking the monumental task of self-representation.” *Id.* at 123 n.5.

Because the court misadvised Roof on “the dangers and disadvantages of self-representation,” as well as his and counsel’s relative responsibilities at trial, his initial *Faretta* waiver was neither knowing nor intelligent. *Faretta*, 422 U.S. at 835.

B. The court failed to advise Roof of his option to self-represent at penalty only

Roof’s initial *Faretta* waiver also wasn’t knowing, intelligent, or voluntary because the court never advised that he could proceed with counsel at voir dire and guilt, but self-represent at penalty.

Roof made clear he wanted counsel’s assistance and sought to discharge them solely to control penalty. Assuming, *arguendo*, the court correctly advised Roof that counsel controlled mitigation, he still could have achieved his goal by assuming control after guilt. Indeed, that’s

what ultimately happened—but only after Roof was alone for critical voir dire, incapable of formulating proper questions and objections.

The option of proceeding pro se solely at penalty should have been apparent to the court. This Court approved a similar procedure in *Hilton*, where the judge denied defendant's motion to waive counsel at jury selection, but granted that relief for trial. *United States v. Hilton*, 701 F.3d 959, 964-65 (4th Cir.2012); see *Audette*, 923 F.3d at 1236 (recognizing defendant may limit *Faretta* waiver to single stage of criminal proceedings).

In this capital case, mindful of the preference for counsel, *Singleton*, 107 F.3d at 1102, the court had a duty to explore alternatives to self-representation. And it was obligated to explain Roof's options so he could make a decision "with eyes open." *Faretta*, 422 U.S. at 835 (quotations omitted). Instead, the court forced Roof into a false choice—waive counsel before voir dire or defer to their judgment at penalty—making his initial waiver invalid.

XII. THE COURT INCORRECTLY BELIEVED IT LACKED DISCRETION TO DENY ROOF'S UNTIMELY MOTION

Alternatively, the court could have denied Roof's motion because it was untimely, but failed to appreciate its authority to do so. The

decision to grant an untimely *Faretta* motion “rests within the sound discretion of the trial court,” *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir.1979), and this Court reviews exercise of that discretion for abuse, *Hilton*, 701 F.3d at 963. A court that misapprehends its own discretion, and for that reason fails to exercise it, necessarily abuses its discretion. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993); see *Bernard*, 708 F.3d at 594 (Diaz, J., dissenting) (“[T]here can be no greater abuse of discretion than to reach a permissible result believing it to be mandatory, for that is not an act of discretion at all.”); cf. *Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir.1990).

A. Roof’s motion to self-represent was untimely

A motion to self-represent is untimely if made after “meaningful trial proceedings have commenced.” *Lawrence*, 605 F.2d at 1324 (quotations omitted). By that point, the defendant has “waived” the right through “failure timely to assert it.” *Singleton*, 107 F.3d at 1096 (quotations omitted).

When jury selection began on September 26, 2016, Roof was represented by counsel. He didn’t move to discharge them until two months later, on November 27, 2016, following three days of juror

screening. JA-2085-86. By then, “meaningful trial proceedings” had “commenced,” and the court had absolute discretion to deny relief. *Hilton*, 701 F.3d at 963-65 (holding meaningful trial proceedings commenced by morning of jury selection); *Lawrence*, 605 F.2d at 1322-25 (holding meaningful trial proceedings commenced before jury empanelment).

Counsel for both parties recognized as much. The prosecution explained that a mid-voir-dire *Faretta* motion was untimely. JA-2097-98. And defense counsel, before being discharged, said Roof’s “*Faretta* right has probably about run its course, it’s probably too late.” JA-547. The court agreed, finding Roof made his motion “after ‘meaningful trial proceedings’ commenced.” JA-2298, 3549.

B. The court had absolute discretion to deny Roof’s untimely motion

Despite recognizing the untimeliness of Roof’s motion and “believ[ing] the interest of justice [was] served best” by counseled representation, the court erroneously thought it lacked discretion to deny it. JA-3550. According to the court, its discretion was “not boundless,” but available only if Roof sought to “exercise his rights abusively” to delay, disrupt, or manipulate the trial process. JA-2298.

Stating Roof's motion was not abusive, the court "could find no cause to deny [it] as untimely." JA-2299; *see* JA-2136-37.

The court clearly misunderstood the rule, though it is straightforward: "[I]f a defendant first asserts his right to self-representation after trial has begun, the right may have been waived. The decision at that point whether to allow the defendant to proceed *pro se* . . . rests in the sound discretion of the trial court." *Singleton*, 107 F.3d at 1099; *see id.* at 1096-97; *Dunlap*, 577 F.2d at 868-69 & n.3. Though a court may consider abusive conduct in exercising its discretion, *see Hilton*, 701 F.3d at 965, the absence of abuse doesn't limit its authority to deny an untimely request. *Lawrence*, 605 F.2d at 1322-25. Indeed, a defendant's *Faretta* right does not even "arise" unless it is "clearly asserted . . . before trial." *Lorick*, 753 F.2d at 1298.

Here, the court had absolute discretion to deny Roof's untimely motion to self-represent, but failed to appreciate that fact, and felt constrained to grant it. Because the court did not exercise discretion it

plainly had (and evidently would have exercised), it abused that discretion, and Roof's convictions must be reversed.³⁴

XIII. EVEN IF ROOF WAS COMPETENT TO STAND TRIAL, HE WAS NOT COMPETENT TO REPRESENT HIMSELF

In *Indiana v. Edwards*, 554 U.S. at 171, the Supreme Court held that because “the right of self-representation is not absolute,” courts may impose “mental-illness-related limitation[s] on [its] scope.” Specifically, where a defendant meets *Dusky*'s competence-to-stand-trial standard, but seeks to waive counsel and represent himself, the court may deny his request if he “lacks the mental capacity to conduct his trial defense” unaided. *Id.* at 174. Such a “gray-area” defendant is “able to work with counsel at trial, yet at the same time [is] unable to carry out the basic tasks needed to present his own defense without the help of counsel”—for example, “making motions, arguing points of law, participating in *voir dire*, [and] questioning witnesses.” *Id.* at 175-76. Allowing such a defendant to self-represent doesn't affirm his dignity; it

³⁴ To the extent the timeliness decision was a factual finding, it was clearly erroneous because a *Faretta* motion is untimely after meaningful trial proceedings commence. A court abuses its discretion when it bases its ruling on clearly erroneous facts. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

results in a “spectacle” and “undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial.” *Id.* at 176-77.

Each time the court found Roof competent to stand trial (first during voir dire, then before penalty), standby counsel argued he was a “gray-area” defendant, meaning the court had discretion to deny relief. JA-767, 2112, 5242-60, 5483-86. Indeed, they urged that in a capital case, counsel are *required* for gray-area defendants. JA-5483-86. The court accepted this premise, agreeing it would “raise serious constitutional concerns to allow [such] a capital defendant to proceed *pro se.*” JA-6957. But the court decided Roof was “more than capable of carrying out the basic tasks of self-representation,” and granted his motions. *Id.*; *see* JA-2299. Those decisions were wrong.

A. A “gray-area” defendant is competent to stand trial but not represent himself

A defendant is competent to stand trial if he has a rational and factual understanding of the proceedings, and the ability to rationally consult with counsel. *Dusky*, 362 U.S. at 402. “Th[is] standard[] assume[s] representation by counsel and emphasize[s] the importance of counsel.” *Edwards*, 554 U.S. at 174.

When a defendant seeks to waive counsel and represent himself at trial, the court faces “a very different set of circumstances” that “calls for a different standard.” Specifically, the court inquires whether the defendant, who is “competent enough to stand trial under *Dusky*,” nonetheless “suffer[s] from severe mental illness to the point where [he is] not competent to conduct trial proceedings by [him]sel[f].” *Id.* at 175, 178; see *Barefoot*, 754 F.3d at 233-34 (emphasizing distinct *Dusky* and *Edwards* standards).

B. Roof is a “gray-area” defendant

Even if the court correctly found Roof competent under *Dusky*, it incorrectly rejected counsel’s argument that Roof’s mental impairments left him without capacity to conduct trial proceedings alone.

Plainly, if Roof was delusional, he wasn’t competent to self-represent. But even absent psychosis, the court agreed Roof suffered social-anxiety disorder and depression, and possibly autistic-spectrum, schizoid-personality, and avoidant-personality disorders—precisely the types of mental illness that concerned the *Edwards* Court. JA-2079, 6965. The court’s conclusion that Roof “had no mental illness leaving

him unable to carry out the basic tasks of self-representation” conflicts with that precedent. JA-6956.

1. Roof was diagnosed with severe mental illness

Psychosis aside, Roof’s diagnoses—anxiety, depression, autism, and personality disorders—are “severe” mental illnesses. *Mental Illness in America: A Series of Public Hearings Before the S. Comm. on Appropriations*, 103d Cong. 45 (2003). Thus, if they interfered with Roof’s ability to conduct his trial alone, the court had discretion to deny his *Faretta* motion.

2. Roof’s mental illness interfered with his capacity to represent himself

In *Edwards*, the Court relied on undisputed evidence from the American Psychiatric Association “that disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, [and] anxiety,” among other mental-illness symptoms, “can impair the defendant’s ability to play the significantly expanded role required for self-representation.” *Edwards*, 554 U.S. at 176 (alteration and quotations omitted). Here, the district court received ample evidence of Roof’s disorganized thinking, attention deficits, and anxiety, and descriptions of how these symptoms would impair his ability to self-

represent. Roof's abysmal performance handling jury selection and penalty confirmed those predictions.

a. Roof's anxiety inhibited him from speaking up and presenting mitigation

Experts who evaluated Roof uniformly described his crippling anxiety—a disability supported by historical evidence that even Roof endorsed. JA-1539, 5548, 5608, 5719. Roof's anxiety impaired his ability “to carry out the basic tasks needed to present his own defense”—including “making motions, arguing points of law, participating in *voir dire*, [and] questioning witnesses.” *Edwards*, 554 U.S. at 175-76.

First, Roof's deep-seated fear of being looked—or laughed—at prevented him from speaking up as often or forcefully as he needed to protect his rights. At *voir dire*, he was “unable to make objections because of his unreasonable fear of displeasing the court, or of risking embarrassment should his position be rejected.” JA-3560; *see* JA-3332-33, 5253-54, 5473-74. At penalty, he didn't object to plainly improper testimony, despite the court (and standby counsel) urging him to do so. JA-6023, 6034-45, 6108.

Roof foreshadowed this result in his initial interviews with Ballenger, explaining he was comfortable talking one-on-one, but “if

there were 20 people watching,” “[o]f course” he couldn’t speak. JA-911. Roof’s plan for how he would self-represent despite these feelings was to do nothing: “‘When it got to me, I would say no defense,’ or ‘the defense rests’ or something like that.” JA-1100-01.

Counsel, too, predicted Roof’s difficulties, based on their experience during jury selection. They described anxiety “so acute” Roof refused to communicate with them (even in writing) with jurors present. They also relayed Roof’s inability to look at jurors directly, depriving him of visual feedback on demeanor. JA-722-23, 7368-69.

Experts similarly anticipated these problems. Maddox stated: “[H]e doesn’t like being in public. He doesn’t like being looked at. He doesn’t like attention being drawn to him.” JA-1539. Loftin explained Roof’s anxiety symptoms were “so severe as to impact vital decision-making processes.” JA-5301. Even Ballenger testified that Roof’s anxiety could limit his ability to perform in court with others watching and inhibit him from speaking up when necessary. JA-910-11. These expectations were consistent with Roof’s history of anxiety so debilitating it interfered with his day-to-day functioning. JA-5302-03.

Second, Roof's anxiety prevented him from presenting any mitigation. Loftin, who interviewed Roof six times over four months, concluded Roof's attempts to sabotage his defense stemmed from anxiety and his desire to avoid being "embarrassed in court," labeled mentally ill, or "seem[ing] uncool." JA-5301. Maddox, who met with Roof nine times over seven months, agreed. JA-5382 (finding Roof's "overwhelming fear of embarrassment prohibits him from participating in rationally weighing the risks and benefits" of presenting evidence).

b. Roof's disorganized thinking and attention deficits interfered with his decision-making

Multiple experts described Roof's disorganized thinking, reduced processing speed, memory problems, and difficulty integrating new information. JA-1500, 1695, 5308, 5359, 5368, 5658-59. These observations were consistent with Roof's neuropsychological test results "indicating mild frontal system dysfunction." JA-5359. "The real-world implications of these impairments included disruptions of decision-making, coding and tracking new information, weighing options, adjusting to new information and modifying thinking and behavior." *Id.*

Likewise, abundant evidence established Roof's difficulty sustaining attention and concentrating on important matters. Experts

described his distractibility and perseveration on trivial details, which caused him “to miss the bigger picture.” JA-1793, 1820-22, 5316, 5418. The predicted effect was Roof missing crucial information and “the main point” of court proceedings. JA-1621, 1624, 1628, 1632, 5655-59.

The record shows that’s what happened. Roof admitted to Ballenger that, when jury selection began, he was so intensely focused on avoiding blushing attacks he couldn’t communicate with counsel. JA-5985-86. Counsel observed the same, describing Roof’s confusion over proceedings, inability to process advice, and selection of jurors for trivial reasons. JA-5253, 5473-74.

As the penalty phase approached, Roof became “almost entirely focused on whether and when the Court [would] unseal” competency proceedings, and on his clothes’ “color, texture, thickness and fit”—but showed “little concern about the possibility of receiving a death sentence.” JA-5249; *see* JA-5253-54, 5474-77 (describing Roof’s focus at trial on irrelevant matters like whether witnesses “liked” him). As counsel put it, “Given [Roof’s] all-consuming focus on irrelevant and objectively trivial details,” it was “questionable whether he [could] be

fairly described as representing himself. It would be more accurate to say that no one [was] representing him.” JA-5255.

C. The court ignored this evidence, relying on questionable sources to conclude Roof is not a “gray-area” defendant

Despite overwhelming evidence that Roof’s anxiety, disorganized thinking, and attention deficits would—and did—interfere with his capacity to conduct trial, the court twice found Roof competent to self-represent.

The first time, during jury selection, the court made its decision without a developed record, having focused at the initial competency hearing on the *Dusky* standard only. JA-889-92, 899-900. Because Roof’s ability to manage his own case—a separate question from his competence to stand trial—wasn’t at issue, none of the testimony directly addressed it. To the extent evidence shed light on the matter, it suggested Roof’s anxiety, distraction, and disorganized thinking impaired his capacity to conduct his defense. JA-722, 910-11, 1100-01, 1500, 1539, 1619-35, 1643-44, 1695, 1820-22.

Yet the court ignored this evidence, resting its decision on two sources: Roof’s assessment of his capacity to manage his trial, and the

court's observations of him. JA-2299. Because Roof "asserted that he has the capacity to represent himself," and appeared "cogent and articulate" with a "high IQ," the court determined Roof was not a gray-area defendant. *Id.* (quotations omitted); *see* JA-2136.

But Roof's claim he could handle his defense—made at the same time he vowed to do nothing—should have carried little weight. For "defendants who choose to represent themselves often do so because they" have unrealistic views of their abilities. *Bernard*, 708 F.3d at 591. This proposition rang particularly true here, where evidence proved Roof was unaware of, and unwilling to accept, his limitations. *See* Section III.B.

Similarly, the court's untrained observations and Roof's intelligence not only were unreliable indicators of his ability to self-represent, but also were contradicted by evidence his intelligence masked his illness. *See* Section III.B. While, in some cases, a judge may be "in the best position to observe [defendant's] demeanor and make judgments about his mental abilities," *Bernard*, 708 F.3d at 591, that was not true here, where the court's observations were limited to Roof's

passive presence at pretrial hearings and ability to ask and answer questions in closed-door settings. JA-629.

At the second competency hearing, Roof's competence to self-represent was at issue; yet, despite having received no direct evidence on his ability to self-represent at the first hearing, the court refused to consider relevant information that predated its earlier decision. JA-5463, 5613-14, 5630-32. *See* Section V.

The evidence counsel proffered at the second hearing squarely addressed Roof's incapacity to self-represent. It established beyond doubt his crippling anxiety, disordered thinking, reduced processing speed, memory problems, difficulty integrating new information, and fixation on trivial details. But the court, and Ballenger at its direction, deliberately blinded itself to this information. JA-5463, 5977, 5991. *See* Section V.

The court also ignored counsel's representations that, at the guilt phase, Roof couldn't follow arguments and evidence, failed to understand their impact on jurors, and fixated on trivial matters. JA-5474-77. *Cf. Read*, 918 F.3d 712 (affirming revocation of *Faretta* waiver after defendant's inability to present defense became clear); *Bernard*,

708 F.3d at 591 n.12. Instead, the court relied on Roof's in-court responses, its observations of him in a closed courtroom, and expert testimony that assumed Roof would "present evidence and cross-examine witnesses." JA-5733-34, 5992, 6959-60, 6964-66.

Because each time the court found Roof capable of conducting his defense, it relied on questionable factors and "ignored" or "inadequately consider[ed]" "substantial evidence to the contrary," it abused its discretion. *Antone*, 742 F.3d at 165-67 (reversing similarly flawed analysis on more-deferential clear-error review); *Wooden*, 693 F.3d 440 (same). Its disregard of probative facts casts particular doubt on the rulings. *Taylor v. Maddox*, 366 F.3d 992, 1007-08 (9th Cir.2004) ("[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding.") (cited favorably in *Wooden*).

Roof's case is unlike *Bernard*, where this Court affirmed a mentally-ill defendant's waiver of counsel—an opinion on which the district court relied. *Bernard* actively participated at trial, testifying and examining witnesses. *Bernard*, 708 F.3d at 587. Roof's so-called defense paled in comparison. *United States v. Ferguson*, 560 F.3d 1060,

1069 (9th Cir.2009)(explaining failure to do anything logical at trial is evidence of incapacity to self-represent); *see Read*, 918 F.3d at 722 (holding defendant whose “behavior is decidedly bizarre” and arguments “nonsensical” is gray-area).

More on point is *Shorthill v. State*, 354 P.3d 1093, 1097-111 (Alaska Ct. App.2015), where the court affirmed revocation of a waiver for a defendant whose “disorganized thinking and deficits in sustaining his attention and concentration” affected his ability to self-represent. *See State v. Jason*, 779 N.W.2d 66, 75-76 (Iowa Ct. App.2009)(finding autistic individual may be gray-area defendant).

D. Roof lacked capacity to represent himself in a capital case

What is more, as a plain-error, noncapital case, *Bernard* has limited application to the question here—whether Roof was able to self-represent at a capital trial with heightened reliability requirements. Though the Supreme Court hasn’t yet addressed whether *Edwards* applies differently to capital proceedings, it necessarily does.

The need for accuracy and fairness in death-penalty cases is acute. “[D]eath is a different kind of punishment from any other which may be imposed in this country.” *Gardner*, 430 at 357. As such, capital counsel

are held to higher standards, both at appointment and throughout representation. 18 U.S.C. §§3005, 3599; *A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 1.1 (rev.2003), *reprinted in* 31 Hofstra L.Rev. 913, 1033 (2003)(requiring “significantly greater degree of skill and experience” for capital counsel).

Even assuming—without conceding—Roof had the capacity to self-represent in a *noncapital* case, the question here is whether he could “carry out the basic tasks needed to present his own defense” in a *capital* proceeding. *Edwards*, 554 U.S. at 175-76. And counsel’s tasks differ markedly in a capital case. “[A]rguably the central[] duty of counsel in a capital case is to humanize the client in the eyes of those who will decide his fate.” Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel*, 36 Hofstra L.Rev. 663, 664 (2008). Roof’s disabilities made him particularly unsuited for that role. To humanize himself, Roof needed to understand cultural rules and others’ perspectives, communicate socially, show emotion and appropriate affect, and consider the big picture—abilities that, by all accounts, he lacked. JA-5278, 5282-85, 5288-92, 5315-16.

Because death-penalty cases are different, the Eighth Amendment demands counsel for “gray-area” defendants—an argument the district court accepted. JA-6957. But even if not, capital defendants must be held to a higher standard to satisfy *Edwards*. Because Roof’s ability to defend himself against capital charges was severely compromised, the court abused its discretion by allowing it.

XIV. THE COURT UNREASONABLY DENIED ROOF’S REQUESTS FOR NECESSARY ACCOMMODATIONS

Should this Court conclude the district court didn’t err in allowing Roof to self-represent, reversal still is required because it unreasonably denied him needed accommodations. The court put Roof in a Catch-22, allowing him to control mitigation only if he waived counsel, then refusing his requests for standard assistance and minor accommodations. The court’s rulings, which undermined Roof’s “dignity and autonomy” and denied him “a fair chance to present his case,” were an abuse of discretion. *McKaskle*, 465 U.S. at 177; *Lawrence*, 161 F.3d at 253 (requiring “reasonable” exercise of discretion over standby counsel’s role).

A. The court denied Roof needed assistance and accommodations

The first day Roof self-represented, he missed the opportunity to timely object, which counsel sought to remedy at his request. The court rejected counsel's effort, and ordered Roof to make objections himself. JA-2190-91.

The following day and the next, Roof sought "limited assistance in the context of jury selection—the ability for counsel, with [his] specific authorization," to "explain objections made by [him] during voir dire" and "assist [him] in proposing more questions to the jurors." JA-2548-49, 2561; *see* JA-2405-09, 2533-38. Roof's motions were based, in part, on concern the proceedings moved too quickly for him to handle these tasks. JA-2408 ("Roof is very concerned about time. He feels great time pressure."). The court denied the requests, after which Roof asked that proceedings "slow down." JA-2407-08, 2561, 2678. The court denied that motion, too, memorializing its decisions "limiting Standby Counsel to a primarily consultative role." JA-2678-80, 3544; *see* JA-3547-48.

Several days into jury selection, counsel asked the court if Roof could merely note an objection, stating his anxiety over having to explain himself prevented him from speaking up. The court encouraged

Roof to object as desired, but emphasized follow-up might be needed. JA-3332-37. Two days later, Roof revoked his *Faretta* waiver for the remainder of jury selection and the guilt phase. JA-3460-62.

After counsel's reappointment, the defense sought adjustments to mitigate Roof's difficulty focusing and processing events, including shorter days, intermittent breaks, and advance-notice of government testimony. JA-3577-81. Counsel argued these "modest" accommodations were necessary "to ensure [Roof's] ability to effectively participate in the legal proceedings." JA-3577. The court denied the motion. JA-3585-86.

At penalty, after the court rejected as untimely a belated, pro-se objection to victim-impact evidence (JA-5743-44, 5902-03), and Roof failed to lodge another objection (JA-6023, 6034-39), the court urged Roof to speak up. JA-6039. Counsel then sought "an accommodation," explaining Roof "is not capable of intervening to object or protect his rights," and requesting permission to lodge objections on his behalf. JA-6040-42. Alternatively, counsel asked for written notice of testimony so Roof could object in advance. JA-6041-42. The court denied the motions, noting Roof had chosen to self-represent, which came with "downsides."

JA-6043-44. Later that day, the court denied another tardy objection.

JA-6108.

B. The court abused its discretion by denying Roof generally-accepted assistance

McKaskle described standby counsel's typical tasks to include the assistance Roof sought: "bring[ing] appropriate objections directly to the attention of the court"; "call[ing] the judge's attention to matters favorable to the accused upon which the judge should rule"; and "assist[ing] the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task" such as lodging objections. *McKaskle*, 465 U.S. at 171, 179 n.10, 183 (quotations omitted). The Court flatly rejected the notion "standby counsel is to be seen, but not heard," holding "counsel need not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant's express or tacit consent." *Id.* at 173, 188 (quotations omitted). Even absent defendant's consent, "standby counsel may participate in the trial proceedings . . . as long as that participation does not seriously undermine the appearance before the jury that the defendant is representing himself." *Martinez*, 528 U.S. at 162 (alterations and quotations omitted).

Active standby participation is routine. *United States v. Fields*, 483 F.3d 313, 362 (5th Cir.2007)(approving “mak[ing] arguments for [capital defendant] outside the jury’s hearing” where defendant couldn’t “protect his own interests”); *United States v. McDermott*, 64 F.3d 1448, 1453 (10th Cir.1995)(“expect[ing]” standby counsel to consult, object, and make motions); *United States v. Mills*, 895 F.2d 897, 900-05 (2d Cir.1990)(approving active involvement, including objecting and making motions); *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir.1988) (affirming general assistance and witness examination).

And it’s routinely considered consistent with self-representation. *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971)(Burger, C.J., concurring)(discussing “wisdom” and typicality of allowing standby objections); *Batchelor v. Cain*, 682 F.3d 400, 409-10 (5th Cir.2012)(recognizing “significant degree of participation by standby counsel that remains *consistent* with” self-representation); *Frantz v. Hazey*, 533 F.3d 724, 751 (9th Cir.2008)(en banc)(Gould, J., concurring)(“*McKaskle* [doesn’t] limit[] the defendant’s ability to delegate any chores of trial to standby counsel.”).

Roof's requests aligned with these accepted norms. While the court unquestionably had discretion to grant them, it refused on the mistaken belief Roof's choice of counsel was all-or-nothing. As the court saw things, "you are either fish or fowl," and it "d[id]n't want a situation where" Roof self-represented while avoiding the "disadvantages" of that status. JA-2310; *see* JA-3545-46.

But the Supreme Court has since made clear the "choice" between counsel and self-representation is "not all or nothing." *McCoy*, 138 S.Ct. at 1508. Defendants who waive counsel relinquish "many" (but not all) benefits of representation. *Faretta*, 422 U.S. at 835. Particularly during jury selection, where the parties objected outside jurors' presence, counsel's active participation was consistent with Roof's self-representation. *McKaskle*, 465 U.S. at 181-82.

Importantly, the court's concern Roof's proposals threatened the trial's "solemnity" and could "bring the court proceedings into public disrepute" had the matter precisely backwards. JA-3546. For "[t]here is something [e]specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially

when the professed object of the rules so used is to provide for his defence.” *Faretta*, 422 U.S. at 822-23 (quotations omitted).

Because the court’s denials of Roof’s requests for limited assistance were “arbitrar[y],” “irrational[],” and “relied on erroneous factual [and] legal premises,” it abused its discretion. *United States v. Welsh*, 879 F.3d 530, 536 (4th Cir.2018)(quotations omitted). The abuse was greater still during jury selection, where Roof waived counsel on the court’s promise he would have standby assistance as desired. See Section XI.A.

The court’s rulings also violated Roof’s rights to due process, an impartial jury, and a reliable penalty verdict, giving the abuse of discretion “constitutional dimension.” *Shirley*, 528 F.2d at 820 & n.2 (holding court abuses discretion when it denies constitutional right); *Snyder v. Coiner*, 510 F.2d 224, 225 (4th Cir.1975)(similar). Neither this Court nor the Supreme Court has decided if a judge may deny assistance to a willing, pro-se, capital defendant. *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting)(noting open question of “constitutional right to assistance of standby counsel”); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir.2006)(identifying no clearly-established law on

whether capital standby counsel required); *cf. Singleton*, 107 F.3d at 1100 (finding no right in *noncapital* case).

It cannot, as Roof argued below. JA-2550-51, 2855-64. “[D]eath is different.” *Gregg*, 428 U.S. at 188 (opinion of Stewart, Powell, Stevens, JJ.). And “the finality of the sentence,” at times, “warrants protections that may or may not be required in other cases.” *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring).

But while there is ample support for a constitutional rule, this Court need not resolve these Fifth, Sixth, and Eighth Amendment issues. Given the serious constitutional questions presented and courts’ general acceptance of Roof’s requests, it is sufficient for this Court to find the district court abused its discretion by unreasonably limiting standby counsel’s role.

C. The court compounded the error by denying Roof minor accommodations

The court compounded its error by denying Roof’s alternative motions to slow down, preview evidence, and entertain late objections. Once the court allowed a concededly-impaired defendant to self-represent at his capital trial without traditional support of standby counsel, it at least needed to grant these modest requests, without

which Roof had no “fair chance to present his case.” *McKaskle*, 465 U.S. at 177.

The court’s denial of accommodations was an abuse of discretion. *Cf. United States v. Norrie*, 2012 WL 4955211, at *8 (D.Vt.2012)(finding defendant competent for trial only with accommodations to manage “rapid pace” and difficulties processing and comprehending information); U.S. District Court, C.D.Cal., *Guidelines for Providing Accommodations for Trial Participants with Communications Disabilities, Jurors, and Members of the Public* at 1 (2014), <https://www.cacd.uscourts.gov/sites/default/files/forms/G-122A/G-122A.pdf> (implementing judiciary policy to “provide reasonable accommodations” by offering them to individuals with “developmental disabilities” and “autism”).

Points Related to Death Verdict

Under the FDPA, if the government notices its intent to seek death and jurors convict on those capital charges, they must then determine whether the defendant was at least 18 at the time of the offense and whether the government proved, beyond a reasonable doubt, one of the mental-state gateway factors and at least one statutory aggravating factor. If jurors make those eligibility findings, they must weigh all of the aggravating factors the government proves unanimously beyond a reasonable doubt against any mitigating factors the defense proves by a preponderance to any juror individually. Only if every juror concludes the aggravating factors sufficiently outweigh the mitigating factors to justify a death sentence may the court impose that punishment. 18 U.S.C. §3591-93.

Here, three errors fundamentally undermined this weighing process. *First*, the court incorrectly excluded evidence of prison safety measures, and the government improperly capitalized on that error, undermining jurors' consideration of two crucial mitigating factors—Roof's lack of future-dangerousness and ability to be safely confined. The court never cured this error, despite jurors submitting two notes on

these factors. *Second*, a victim's unexpected remarks during the guilt phase, calling Roof "evil" and telling jurors he belonged in the "pit of hell," placed an unconstitutional thumb on the death side of the scale. And *third*, the government flooded its penalty-phase presentation with improper evidence and argument on the victims' worthiness, asking jurors to vote for death because the victims were good and religious people.

These errors mattered. The government cannot show beyond a reasonable doubt the verdict would have been the same without them.

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

The court violated Roof's Eighth Amendment and statutory right to have the sentencing jurors give effect to relevant mitigating evidence about his life in prison if spared death: It precluded evidence that Roof would pose no risk of future violence and could be incarcerated safely and securely. And it refused to instruct that the jurors should consider, as mitigating factors, that Roof, due to his age, small size, and the notoriety of his crimes, would himself be targeted and at risk of victimization in prison and would, accordingly, spend a life sentence under onerous and isolated conditions of confinement. The government

then capitalized on these errors, misleadingly telling jurors no evidence of Roof's lack of future-dangerousness existed. Roof's lack of future-dangerousness was a central concern at the penalty phase, with the government aggressively challenging his mitigating factors in its summation and the deliberating jurors submitting two notes on the subject. Accordingly, the errors mattered to the jury's sentencing determination. This Court should vacate Roof's death sentence and remand for a new sentencing proceeding.

A. Standards of review

“This Court reviews evidentiary rulings implicating constitutional claims de novo.” *United States v. Williams*, 632 F.3d 129, 132 (4th Cir.2011). Regarding claims of prosecutorial misconduct involving “specific guarantees of the Bill of Rights,” the Supreme Court has required that the courts take “special care to assure that prosecutorial conduct in no way impermissibly infringes them.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The adequacy of the court's response to a jury note seeking clarification is reviewed for an abuse of discretion. *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1036 (4th

Cir.1975). Roof preserved each of his arguments. JA-479, 6689, 6710, 6754-55, 6758, 6771-72.

B. The court precludes crucial mitigating factors and evidence, the government improperly capitalizes on its ruling, and the court refuses to answer juror calls for clarification

In his first notice of proposed mitigating factors, Roof submitted two that would have highlighted that, if spared death, Roof was himself at risk of victimization:

Due to his small size, youth, and notoriety, a sentence of life in prison without the possibility of release will be especially onerous for Dylann Roof, because the danger of violence he will face from other inmates will require that he serve his life sentence under isolating conditions of confinement.

A sentence of life in prison without the possibility of release will be especially onerous for Dylann Roof because he will serve his entire life sentence in fear of being targeted by other inmates.

JA-464.

The government moved to preclude submitting these factors to the jury, arguing “general” evidence of “conditions of confinement” isn’t proper mitigation because it doesn’t pertain to “the defendant’s character or background, or the circumstance of his crime.” JA-472. In response, the defense explained the court did not need to decide

whether evidence of conditions of confinement, generally, might be proper mitigation, because the challenged factors were individualized to Roof and his particular characteristics. JA-483-84.

The court agreed with the government, and granted its motion to strike the proposed mitigators. JA-493. And despite the defense objection, the court's order categorically foreclosed any evidence of prison conditions or security and management measures. Observing the government had noticed a potential rebuttal expert, whose expected testimony would cover "inmate classification and designation process, both initial and ongoing reevaluations; the services, programs, and conditions of confinement in correctional facilities; special confinement; and restrictive housing," the court unequivocally held "such details of prison administration are not a proper matter for a capital sentencing jury." *Id.*

The defense later submitted two additional mitigating factors focusing the jurors on the fact that, if sentenced to life in prison, Roof posed no risk of future acts of violence and could be incarcerated safely and securely:

Dylann Roof poses no significant risk of violence to other inmates or prison staff if imprisoned for life.

Given his personal characteristics and record, Dylann Roof can be safely confined if sentenced to life imprisonment.

JA-496. The government did not move to strike these factors, and the court included them on the penalty-phase verdict form as defense mitigating factors 8 and 9. JA-6804. But the court's prior ruling left the defense unable to introduce expert evidence—including security and special-confinement measures and restrictive housing—to prove Roof posed no future danger and could be safely confined. JA-5251.

In closing, the government took advantage of the court's order forbidding evidence on “details of prison administration.” It focused the jurors on Roof's jailhouse “manifesto” and access to mail in custody, which it argued showed his ongoing intent and ability to incite others to violence. JA-6688-89, 6697. And it urged, repeatedly, that Roof's “no risk of violence” and “safely maintained” mitigators were “simply not true,” and that the jurors had heard “no evidence” to support them—“quite to the contrary.” JA-6697-98.

Roof immediately objected to this line of argument. JA-6698. He raised the matter again after the government's summation, explaining the court's evidentiary ruling had prevented him from introducing evidence about prison administration. JA-6710. With the court's permission, standby counsel renewed these objections before deliberations began, emphasizing the unfair and misleading nature of the government's arguments, given the court's categorical prohibition on evidence of prison administration. JA-6754-55, 6758. Counsel requested a curative instruction that defendants aren't permitted to introduce evidence about conditions of confinement. *Id.* at 6754. The court overruled each objection, and refused to issue a curative instruction. JA-6698, 6711, 6761-62.

The jury took the government's arguments seriously, submitting two notes specifically addressing Roof's lack-of-future-danger mitigating factors. Regarding mitigating factor 8 (Roof posed no significant risk of violence to inmates or staff), jurors asked, "Would he personally inflict the violence, or would he insite [sic] violence? Need clarification." JA-6765; see JA-8188. Regarding mitigating factor 9 (Roof could be safely

maintained), jurors asked, “Please define ‘safely confined.’ Does this include his writings getting out of prison.” JA-6766; see JA-8188.

The defense requested the court instruct jurors they should, individually, construe the mitigating factors narrowly, in favor of the defense. JA-6771-72. The court declined, however, to provide any clarification requested by the jurors, JA-6772, instructing only, “My response is that you need to simply read the mitigating factor as written and use your common sense to interpret it. It would not be proper to comment further.” JA-6775; see *id.* (“Same response. It is not appropriate for me to define it further. Use your common sense and good judgment to determine what it means.”).

Not one juror found either of these mitigating factors proved. JA-6804.

C. The errors violated the Constitution and FDPA

The Eighth Amendment and FDPA clearly and broadly define a capital defendant’s right to present evidence that mitigates against a death sentence. A defendant is entitled to present and have jurors consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

sentence less than death.” *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)(quotations omitted); see 18 U.S.C. §3592(a)(“In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor.”).

Relevant mitigating evidence is broadly defined to mean evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” *Tennard v. Dretke*, 542 U.S. 274, 284 (2004)(citation and quotations omitted). Once this “low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to” mitigation. *Id.* at 284–85; see *Payne*, 501 U.S. at 822 (“[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”).

Defendants are given such wide berth to present mitigating evidence because the risk of a death sentence where factors warrant less severe punishment is “unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)(plurality). Accordingly, the jury “must be able to give meaningful consideration and effect to all mitigating evidence

that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

1. The court improperly excluded individualized evidence about Roof’s future-dangerousness

The Supreme Court has expressly held that evidence of a lack of future-dangerousness—“evidence that the defendant would not pose a danger if spared (but incarcerated)”—“must be considered potentially mitigating” and thus “may not be excluded from the sentencer’s consideration.” *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); see *United States v. Troya*, 733 F.3d 1125, 1135-36 (11th Cir.2013)(holding court erred by excluding expert evidence of defendant’s lack of future-dangerousness in federal capital case).

Here, the court broadly precluded mitigating evidence and factors related to Roof’s future incarceration, including categorically prohibiting evidence of security and special-confinement measures and restrictive housing. JA-493. The court believed “such details of prison administration” were inappropriate and “not a proper matter for a capital sentencing jury.” *Id.*

But in *Lawlor v. Zook*, 909 F.3d 614, 631 (4th Cir.2018), decided after Roof's trial, this Court found a similar worry about conditions-of-confinement evidence was a "red herring." The *Lawlor* trial court had prevented a capital defendant from introducing "specialized and relevant testimony of a qualified witness" who would have explained that the defendant represented "a very low risk for committing acts of violence." *Id.* at 618 (quotations omitted). The Virginia Supreme Court affirmed, holding in part that courts may properly exclude mitigating evidence of prison conditions. *Id.* at 629, 631-32.

This Court reversed, explaining the state courts unreasonably applied clearly-established Supreme Court law, including *Skipper*, *Eddings*, and *Lockett*. *Id.* It held: "The red herring infecting all stages of this case is the idea that prisoners may not present evidence of prison conditions or security measures as mitigating evidence in the face of a jury's choice between LWOP and the death penalty." *Id.* at 631. Because Lawlor's evidence about conditions of confinement and security measures was specific to him and relevant to his ability to adjust to prison life, this Court rejected Virginia's concern about generalized conditions of prison life as a rationale supporting its decision. *Id.*

In Roof's trial, the district court, without the benefit of this Court's decision in *Lawlor*, was distracted by the same red herring. The mitigating factors and evidence Roof sought to introduce were tailored specifically to him, individually, and his future life and adjustment in custody. The struck factors—that Roof would be vulnerable to other inmates in prison and would, for his own security, be housed in secured-confinement conditions—were grounded in facts unique to Roof: that his small stature, youth, and notoriety would make incarceration especially difficult because he would be subject to isolating conditions, and he would live in perpetual fear of attack by another inmate or a guard because of the high-profile nature of his crimes. JA-4051, 4476.

And evidence of security and special-confinement measures and restrictive housing, specifically precluded by the court's ruling, would have allowed Roof to prove that, whatever the intent and meaning of his jail "manifesto," prisons could ensure such writings never reached a broader audience or incited others to violence. Such evidence would have been tailored to Roof's own conduct, and directly addressed the government's arguments (and jurors' concern) about Roof's ability to foment others to act as he had.

The court erred in striking Roof's proposed mitigating factors and categorically barring evidence of "prison administration." The excluded mitigation fell squarely within the heartland of evidence endorsed by *Skipper* and *Lawlor*.

2. The government misleadingly argued Roof's mitigating factors were "not true"

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg*, 428 U.S. at 190 (plurality); see *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988)(reversing death sentence where "jury was allowed to consider evidence that has been revealed to be materially inaccurate"); 18 U.S.C. §3593(c)(requiring exclusion of information from capital sentencing if its probative value is outweighed by danger of "misleading the jury").

This principle has been applied with particular rigor to the important consideration of future violence. *Simmons v. South Carolina*, 512 U.S. 154, 165-66 (1994)(reversing death sentence where capital jury misled about defendant's possible future custody status, prejudicing its evaluation of threat he would pose if sentenced to life); cf. *Coleman v. Calderon*, 210 F.3d 1047, 1050 (9th Cir.2000)(reversing death sentence

where it was “misleading” not to inform jury of “additional hurdles to be overcome” before capital defendant could obtain commutation of life sentence).

Since the only alternative to a death sentence for Roof was life-without-parole, jurors considering Roof’s future-dangerousness had to assess the likelihood of his violence in a prison setting specifically designed, organized, and staffed to secure and manage inmates like him. *Simmons*, 512 U.S. at 166 n.5 (explaining for “parole ineligible” defendant, issue is “danger” he will pose “to others in prison” and whether “executing him is the only means of eliminating the threat to the safety of other inmates or prison staff”); *United States v. Sampson*, 335 F.Supp.2d 166, 227 (D. Mass.2004)(“The danger any individual presents is a function not only of that individual, but also of his environment.”). These predictions are difficult for capital jurors to make, particularly without additional information, because as laypersons they lack familiarity with the workings of prisons.

To ensure jurors fairly assessed Roof’s likelihood of future violence, they should have received scrupulously accurate information about the correctional setting where he would live if spared the death

penalty. Thus, in *United States v. Johnson*, No. 1:02-cv-06998 (N.D. Ill. Dec. 13, 2010), ECF No. 112 at 5, the court vacated a federal death sentence because future-violence testimony by a government expert “may have left the jury with the mistaken impression” about communications restrictions the defendant would face if sentenced to life. And in *United States v. Gilbert*, 120 F.Supp.2d 147, 154-55 (D. Mass.2000), the court precluded the government from arguing that the defendant, a nurse who killed patients, would be a dangerous “poisoner,” since the defendant would not have access to medication in prison.

Here, the government’s arguments, and the court’s rulings allowing them, fundamentally undermined that constitutional and statutory imperative, injecting unreliable and misleading considerations on the critical factor of Roof’s future-dangerousness into the jury’s sentencing deliberations. And it did so through forms of argument routinely condemned as misconduct.

First, the government’s argument misrepresented the state of the evidence before the jury, and the inferences jurors could draw from the evidence, taking advantage of a lack of evidence it had itself secured.

United States v. Young, 470 U.S. 1, 8 n.5 (1985) (“It is unprofessional conduct for the prosecutor intentionally to . . . mislead the jury as to the inferences it may draw.”)(citation and quotations omitted); *United States v. Wilson*, 135 F.3d 291, 299 (4th Cir.1998) (“The prosecutor should not intentionally . . . mislead the jury as to the inferences it may draw.”)(citing 1 ABA Stand. for Crim. Justice 3–5.8(a)(3d ed.1993)).

The government urged jurors to reject the mitigating factors that Roof posed no risk of future acts of violence and could be incarcerated safely, arguing that the factors were “simply not true” and, therefore, that the defense had introduced no evidence supporting them. In other words, the prosecution suggested that jurors heard no evidence because no such evidence existed, Roof objectively *did* pose a risk of future acts of violence, and the prison system objectively would be *unable* to stop him. It cited, as support, Roof’s jail “manifesto” and access to the mail, implying he would continue to write documents inciting violence, would send those documents out to a receptive world audience, and nothing could be done to prevent his efforts. “What you have seen is the defendant sending letters out, writing racist manifestos, continuing

what he has done. Ask yourself whether there is evidence he can be safely confined.” JA-6697.

But it was the government who had ensured, through its motion to preclude evidence of prison conditions, any evidence of prison security measures available to safeguard against Roof communicating with the outside world. The suggestion that jurors had heard no evidence because the evidence did not exist—when, in fact, such evidence had been excluded on government motion—was misleading. *United States v. Silva*, 995 F.2d 234 (9th Cir.1993)(unpub.).

As the government was well aware, the Federal Bureau of Prisons has adequate measures to restrict Roof’s communications with the outside world. From monitoring his non-confidential mail, 28 C.F.R. §540.14; to imposing Special Administrative Measures, which severely restrict a prisoner’s communications upon a finding they pose a risk of death or serious bodily injury, *id.* §501.3; to placement in restricted housing like a Communication Management Housing Unit, *id.* §540.200-205, or the United States Penitentiary, Administrative Maximum Facility (“ADMAX” or “Super Max”), with severe restrictions on communications, these measures exist. The government was fully

aware of them, but nonetheless successfully prevented Roof from telling the jury.

Second, in repeatedly averring that the two mitigating factors were “simply not true”—separate and distinct from its misleading claims about a lack of evidence—prosecutors improperly vouched for their view of the evidence. It is improper for any government attorney to intimate to the jury his or her own personal beliefs or opinions. *Young*, 470 U.S. at 18-19. Vouching by the prosecution is forbidden because such comments can convey to jurors that evidence not presented, but known to the prosecutor, supports the charges, vitiating the defendant’s right to be tried based solely the evidence introduced in court; and the jury may give undue weight to prosecution’s opinion, which carries the imprimatur of the government. *Id.*

To avoid those twin dangers, the government may not state an opinion regarding the defense evidence or the defendant himself. *Sechrest v. Ignacio*, 549 F.3d 789, 810-11 (9th Cir.2008)(“flagrant misconduct” for prosecutor to represent, inaccurately, “as a lawyer, as an attorney for the people of this county,” “the pardons board has the authority to commute [a sentence of life-without-parole] tomorrow if

they want to”); *Boyle v. Million*, 201 F.3d 711, 715, 717 (6th Cir.2000) (granting habeas relief based, in part, on prosecution’s vouching for defendant’s guilt, including statement that “[W]hat I do know for sure is he’s guilty.”); *Miller v. Lockhart*, 65 F.3d 676, 682-84 (8th Cir.1995) (affirming grant of habeas relief where prosecutor argued at capital sentencing that in his 20-year experience with “a lot of criminals and a lot of people,” he had “never seen me one that was as tough” as defendant).

Although the government’s “simply not true” representations were more subtle and less flagrant than, for example, the express “as an attorney for the people of this county” statement in *Sechrest*, its comments posed the same risks to Roof’s fair trial rights.³⁵ It suggested the prosecuting attorney, a law-enforcement official, knew—from what jurors would reasonably assume was his professional expertise with prison administration—that prisons lacked the ability to safely incarcerate Roof and prevent him from communicating with the outside

³⁵ There are no “magic words” to identify improper vouching. *Hodge v. Hurley*, 426 F.3d 368, 379 n.21 (6th Cir.2005)(“[I]t is not necessary for the prosecutor actually to use the words ‘I believe,’ or any similar phrase, for a statement to constitute improper comment on the credibility of witnesses.”).

world. The comments both signaled information outside the record and added the imprimatur of the government's representative and, therefore, were improper vouching.

The government's claim that it was "simply not true" Roof could be maintained safely and would pose no risk of future violence was, itself, simply not true and improperly left the jury with the unfair and misleading—false—impression that nothing short of death could prevent Roof from inciting others to follow his path.

3. The court denied jurors' requests for clarification, exacerbating these errors

The Supreme Court has held that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). As this Court has observed, "[T]he responsibility of the judge to the jury is particularly marked where the jury indicates its confusion on a specific subject. Once 'a jury makes known its difficulty', it is the duty of the judge to be responsive to that difficulty, and he is 'required to give such supplemental instructions as may be necessary.'" *Price*, 509 F.2d at 1036 (quotations omitted).

While district courts have considerable leeway in formulating responses to jury questions, *see Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir.2003), a judge may not simply refuse to respond to or ignore a question entirely. *United States v. Southwell*, 432 F.3d 1050, 1052-53 (9th Cir.2005)(holding failure to answer jury’s question is an abuse of discretion). And when the jurors’ expressed difficulty involves an issue “central to the case,” a helpful response is mandatory. *Price*, 509 F.2d at 1036.

Here, Roof’s sentencing jury was unequivocal in asking for help on an issue “central to the case”—Roof’s lack-of-future-dangerousness. Regarding the mitigating factor that Roof posed no risk of violence to inmates or staff, the jurors were explicit: They informed the court they needed “clarification” as to whether the factor was limited to Roof personally inflicting violence or swept broadly to include inciting others. JA-6765; *see* JA-8188. Regarding the mitigating factor that Roof could be safely maintained, the jurors asked the court to define the terms, specifically questioning whether the factor included the risk of Roof’s writings getting out of prison. JA-6766; *see* JA-8188.

In response, the court did nothing. Although the jurors had said the words as written did not suffice, the court told them, only, to “read the mitigating factor as written and use your common sense to interpret it,” and that further comment would not be proper. JA-6775.

But doing nothing left the jury free, as defense counsel warned, to read the mitigating factors broadly, effectively expanding the defense burden of proof on each. For each mitigator, the jurors’ questions indicated a debate as to what the defense had to prove. To establish Roof posed no risk of violence to staff or inmates, did the defense have to prove he would not incite others to act violently? To establish Roof could be maintained safely, did the defense have to prove the prison could prevent his writings from reaching the outside world? Each of the broader potential interpretations added an element to the defense’s burden, which it could not meet because the court excluded evidence of security measures. The court thus erred in declining to provide clarification, and its error exacerbated the earlier evidentiary exclusion and government misconduct.

D. The errors mattered

The government cannot show, as it must, these deprivations, singly or in combination, were harmless beyond a reasonable doubt. *United States v. Barnette*, 211 F.3d 803, 824 (4th Cir.2000); 18 U.S.C. §3595(c)(2).

The government emphasized, in its penalty summation, Roof's future-dangerousness and continued ability to incite violence, urging jurors to reject his mitigating factors as "simply untrue." Its arguments hit their mark, with jurors sending out notes seeking clarification about each lack-of-future-dangerousness mitigating factor. The notes tracked precisely the government's suggestion that Roof would, through access to the mail, be able to incite others to violence: The jurors asked the court to clarify whether the defense had to prove that Roof would not incite others to violence and that the prison had security measures that could keep his writings from reaching the outside world. As in *Lawlor*, the jury notes alone demonstrate the errors prejudiced Roof. *Lawlor*, 909 F.3d at 634 (citing *Shafer v. South Carolina*, 532 U.S. 36, 53 (2001))(finding jury's questions "left no doubt about its failure to gain . . . any clear understanding" of the disputed issue)). And the court's "use

your common sense” answers the jurors’ questions “did not go far enough to alleviate the prior errors.” *Id.*

That conclusion comports with empirical studies of actual capital jurors that show future-dangerousness weighs heavily on their minds. John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 Cornell L.Rev. 397, 398 (2001); Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings L.J. 103, 117 (Nov. 2010)(finding capital jurors “consistently expressed the view—even those who were strongly moved by the defendant’s case for life—that they would vote for a death sentence if they were not assured that the defendant would be safely locked away”).

Federal capital verdict forms demonstrate that future-dangerousness represents the most critical aggravating consideration. A study of 72 cases over 13 years found 82.4% of defendants deemed to pose a future danger were sentenced to death, while 81.6% of those not so found were spared by juries. Mark D. Cunningham, Jon R. Sorensen, Thomas J. Reidy, *Capital Jury Decision-Making: The Limitations of*

Predictions of Future Violence, 15 Psychol., Pub. Pol’y & L. 223, 234-35, 244-45 & tbl. 1 (2009).

Finally, although Roof’s case was aggravated,³⁶ it was not without significant mitigation, as even the government conceded. JA-6700. The jury unanimously found Roof had just turned 21 at the time of the offense; had no significant prior history of criminal or violent conduct; offered to plead guilty in exchange for a life sentence; and cooperated with law enforcement and confessed to his crimes. JA-6803-04.

It would have taken only the vote of a single juror to reject death and require imposition of a life-without-parole sentence. *Jones*, 527 U.S. at 381. The government cannot, under these circumstances, show beyond a reasonable doubt that without the errors infecting the proceedings, no juror would have found life a sufficient sentence.

³⁶ In federal capital practice, even highly aggravated cases frequently result in sentences less than death. Brief of National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Appellant, *United States v. Tsarnaev*, No. 16-6001 (1st Cir. Jan. 7, 2019); see Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L.Rev. 1161 (2018).

XVI. VICTIM TESTIMONY THAT ROOF WAS “EVIL” AND BELONGED IN “THE PIT OF HELL” TAINTED THE DEATH VERDICT

In addition to precluding relevant mitigation, the court admitted inflammatory aggravating evidence. The prosecution’s first witness repeatedly called Roof “evil,” and told jurors to send him to “the pit of hell.” These comments violated longstanding prohibitions on victim-characterizations of the defendant; victim-opinions on the appropriate sentence; and dehumanizing, inflammatory testimony. Because the court never instructed jurors to disregard this prejudicial testimony, a new penalty hearing is required.

A. Standards of review

“This Court reviews evidentiary rulings implicating constitutional claims de novo,” *Williams*, 632 F.3d at 132, and the refusal to grant a mistrial for abuse of discretion, *United States v. Morsley*, 64 F.3d 907, 914 (4th Cir.1995). “A district court by definition abuses its discretion when it makes an error of law.” *United States v. Stitt*, 250 F.3d 878, 896 (4th Cir.2001)(alteration and quotations omitted).

B. The government's first witness called Roof "evil" and said he belonged in "the pit of hell"

The government's first witness was Felicia Sanders. JA-3666.

After responding to several questions about the shooting, Sanders described at length how she hid under a table muzzling her granddaughter and playing dead, then watched as Tywanza stood to divert Roof's attention and was shot. JA-3700-02. Sanders concluded:

I was just waiting on my turn. It was a lot of shots. Seventy-seven shots in that room, from someone who we thought was there before the Lord, but in return, *he just sat there the whole time evil. Evil. Evil as can be.*

JA-3702 (emphasis added).

The prosecutor asked if Roof left the church, but Sanders—at this point overcome by emotion—only nodded in response. JA-3702. She ended with a heart-wrenching portrayal of Tywanza's last moments, telling jurors, "I watched my son come into this world and I watched my son leave this world." JA-3703. With Sanders distraught and the courtroom in tears, the prosecutor sought a recess. *Id.*; see JA-3815-16, 4366-67.

After a ten-minute break, as the court prepared to bring in the jury, counsel advised: "Absolutely no disrespect to Miss Sanders, and

our hearts are breaking for her, but I have a job to do,” and objected to Sanders’s testimony that Roof “just sat there the whole time evil. Evil. Evil as can be.” JA-3703-04.

The court overruled the objection and, in Sanders’s presence (JA-4351), described the testimony as “her observation” (JA-3704) and thrice emphasized there was nothing “improper” about it (JA-3705). At the government’s urging, the court also found the objection untimely, rejecting counsel’s explanation that the delay was because “the witness was crying and understandably very upset during parts of her testimony, and it seemed inappropriate to respond.” JA-3704-05.

Counsel then conducted the following cross-examination:

Q. Good afternoon, Miss Sanders. I only have one question to ask you; I’ll be done.

Do you remember the man who did this saying something about that he was only 21, and then talking about what he was going to do afterwards?

A. Yes.

Q. Could you tell us what he said?

A. He say he was going to kill himself. And I was counting on that. *He’s evil. There’s no place on earth for him except the pit of hell.*

Q. He said that he was 21? And then that he was going to kill himself when he was finished?

A. *Send himself back to the pit of hell, I say.*

Q. Did—he didn't say that though. About hell. He just said he was going to kill himself?

A. *That's where he would go, to hell.*

MR. BRUCK: Yes, ma'am. I'm so sorry. Thank you.

JA-3706-07 (emphasis added).

Roof moved for a mistrial the following morning, arguing Sanders's "evil" and "pit of hell" comments incurably tainted the trial. JA-3813-18. Alternatively, Roof asked the court to strike the testimony and instruct jurors "a survivor or victim family member's opinion regarding the appropriate punishment is not a proper consideration" at trial, and should be given no weight at penalty. JA-3833, 3816-17.

The court denied the motion. JA-3822-40, 4658-66. It again described Sanders's testimony that Roof was "evil" as "a clear comment on what she had just observed, not a comment on his—him as a person," and added the testimony was "relevant to malice, it's relevant to a hate crime, it is relevant to the—she makes a reference of being in the house of God, she—it's relevant to the obstruction of religion." JA-3822-23; *see*

JA-3832, 3838, 4393, 4660, 4663. The court further claimed Roof “waived” his objection by not raising it sooner, asserting it *couldn't* consider the objection or request to strike. JA-3824-25, 3837, 4659-62.

Regarding the “pit of hell” testimony, the court acknowledged victims are prohibited from commenting on appropriate punishment in capital cases. JA-3825-26, 4664. Because Sanders’s statement suggested she recommended death, the court initially ruled it “need[ed] to instruct the jury to disregard any family comments about the appropriate punishment,” and would strike Sanders’s cross-examination responses. JA-3825-26. But the court hesitated, believing counsel intentionally sought Sanders’s problematic responses to provoke a mistrial, though counsel denied that. JA-3825-31, 4663-64 & n.2.³⁷ For this reason, and because the court believed the motion untimely, it reversed course, and refused to strike Sanders’s recommendations that Roof be sent to hell. JA-3833, 3837-39.

³⁷ Sanders previously told law enforcement that before leaving the church, Roof said, “I am 21 years old, and when I am finished, I am going to kill myself.” This was the answer counsel expected. JA-3829-31, 3833.

Still, the court recognized it needed “to instruct the jury that the sentencing decision is always a decision of the jury, it’s not the decision of anyone else,” and “they should disregard” anyone else’s comments about it. JA-3833. Yet, over defense objection (JA-3838-39), the court issued a watered-down instruction that neither referenced Sanders’s improper testimony nor directed jurors to ignore it:

I want to remind you that the decisions this jury must make, whether the defendant is guilty or not guilty, and if we come to a sentencing phase, the appropriate sentence, is always your decision to make. It is not the decision of this Court or the attorneys or the witnesses. It always will be yours.

JA-3839-40.

Roof asked for a specific instruction telling jurors “such witness testimony regarding the defendant [i.e., that he was ‘evil’] or witnesses’ opinions on the sentence he should receive, are improper, have been stricken from the evidence, and should be accorded no weight in the jury’s determination of the defendant’s guilt or punishment.” JA-4358. The court refused, and summarily rejected Roof’s mistrial motion. JA-4665.

At penalty, the court twice instructed jurors to “consider all the evidence” from the guilt phase in deciding punishment. JA-5764; *see* JA-6722. And though it advised jurors not to “infer from the testimony of any witness, including any victim witnesses, what sentence should be imposed,” the court rejected Roof’s requested instruction against assuming government witnesses preferred death JA-5774, 6621-22, 6752-53, 7991. In the end, the court never told jurors not to consider victim testimony calling for death.

C. This inflammatory testimony was unconstitutional

The Supreme Court recently reaffirmed that “admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.” *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016). Such testimony “is irrelevant,” “serve[s] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence,” and “creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.” *Booth v. Maryland*, 482 U.S. 496, 502-03, 508 (1987), *overruled on other grounds by Payne*, 501 U.S. 808.

The Supreme Court and this Court also have stressed that dehumanizing comments about a capital defendant may render a trial fundamentally unfair, in violation of due process. *Darden v. Wainwright*, 477 U.S. 168, 179-81 (1986); *Bennett v. Stirling*, 842 F.3d 319 (4th Cir.2016). Similarly, inflammatory rhetoric compromises the jury's ability to reach a reliable verdict, in violation of the Eighth Amendment. *Booth*, 482 U.S. at 508 (“[A]ny decision to impose the death sentence must be, and appear to be, based on reason rather than caprice or emotion.” (quotations omitted)).

Sanders's emotionally-charged calls to send Roof to hell and repeated description of him as “evil” violated each of these constitutional prohibitions. They contravened the clear rule against victim-characterizations of the defendant and appropriate sentence. *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir.2005)(en banc); *United States v. Bernard*, 299 F.3d 467, 480 (5th Cir.2002). And they were dehumanizing and inflammatory. *Cauthern v. Colson*, 736 F.3d 465, 474-78 (6th Cir.2013)(granting habeas relief, in part, for comments calling capital defendant “evil”); *Furnish v. Comm.*, 267 S.W.3d 656, 663 (Ky.2007)(finding “no place in a courtroom for such personal vilification

of a defendant [including calling him ‘evil’], no matter how vile the charges against him”); *People v. Johnson*, 308 Ill.2d 53, 80 (2003) (similar); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn.1998)(similar).

D. The court was obligated to correct the errors

The court believed jurors could consider Sanders’s improper testimony because Roof didn’t timely object to, or somehow intended, it. That conclusion was legally and factually wrong.

When Sanders unexpectedly called Roof “evil” on direct, counsel objected at the earliest appropriate moment, two questions and mere minutes later. The objection was timely because it “was brought to the attention of the trial court in ample time to allow the court to give a remedial and corrective instruction to the jury.” *Calhoun v. United States*, 384 F.2d 180, 184 (5th Cir.1967); see *Limbeck v. Interstate Power Co.*, 69 F.2d 249, 251 (8th Cir.1934). Indeed, in delicate situations such as this, it is proper to wait to raise the matter out of jurors’ earshot. *Young*, 470 U.S. at 13-14.

When, on cross-examination, Sanders answered not with the facts she gave investigators but charged rhetoric, Roof “ha[d] the right to have the nonresponsive material stricken.” 1 *McCormick on Evidence*

§52 (7th ed.2016); *cf. United States v. Jackson*, 585 F.2d 653, 663 (4th Cir.1978)(explaining counsel arguably invites problematic testimony where answer *responsive* to question). Counsel moved to do so before the next day's proceedings, and that motion was timely for the same reasons stated above.

But even if counsel's motions to strike were late, the court had "discretion" to strike Sanders's improper testimony. *United States v. Achiekwelu*, 112 F.3d 747, 754 (4th Cir.1997). Here, any minimal delay in counsel's objections did not prejudice the government or deprive the court of the opportunity to correct the errors, which are the underlying purposes of Federal Rule of Evidence 103's timeliness requirement. *Jerden v. Amstutz*, 430 F.3d 1231, 1237 (9th Cir.2005)("The opposing party may not delay objections until . . . it becomes too late to resolve them effectively."). Given "the extremely prejudicial nature of [Sanders's] remark[s] and the comparative simplicity of the requested remedy," the court's formalistic refusal to strike was an abuse of discretion. *Belmont Indus., Inc. v. Bethlehem Steel Corp.*, 512 F.2d 434, 438 (3d Cir.1975); *cf. Chambers v. Mississippi*, 410 U.S. 284, 302

(1973)(explaining rules of evidence “may not be applied mechanistically to defeat the ends of justice”).

The court apparently felt constrained *not* to act by the plain-error doctrine codified at Federal Rule of Criminal Procedure 52(b). JA-4662. But that principle binds appellate courts; it has no application at trial. *Young*, 470 U.S. at 15 n.12.

Further, Roof’s motions for mistrial and curative instructions were timely. “A motion for mistrial made *substantially* after the fact is an inadequate substitute for a timely objection,” but Roof’s motion came the next morning. *United States v. Brown*, 757 F.3d 183, 191 (4th Cir.2014)(emphasis added); see *United States v. Brewer*, 1 F.3d 1430, 1436 (4th Cir.1993)(finding mistrial motion timely when made before “close of the case”). Roof’s instructional requests were forward-looking and proper at any point before the court issued its jury charge. *Jones*, 527 U.S. at 387-88; *Calhoun*, 384 F.2d at 184; Fed.R.Crim.P. 51(b).

Even absent objection, the court had a duty to strike Sanders’s inflammatory comments sua sponte, and any minor delay in objecting was an unsound basis for leaving them unaddressed. *Viereck v. United*

States, 318 U.S. 236, 247-48 (1943); see *Young*, 470 U.S. at 13; *Calhoun*, 384 F.2d at 184 & n.3.

E. The testimony prejudiced Roof

The court's errors, individually and collectively, are not harmless beyond a reasonable doubt. *Barnette*, 211 F.3d at 824. The court *twice* instructed jurors to consider Sanders's statements at penalty (JA-5764, 6722), creating an unacceptable risk jurors relied on impermissible factors. *Darden*, 477 U.S. at 178-79 (recognizing guilt-phase comments can prejudice penalty verdict).³⁸

Courts prohibit testimony like Sanders's because, by its very nature, it threatens to overcome jurors with emotion and discourage them from voting for life, lest they disappoint a grieving victim. Here, those concerns were magnified by Sanders's obvious distress at the time she delivered her remarks. Even the possibility one juror considered these "emotionally-charged opinions" in sentencing Roof to death "is inconsistent with the reasoned decisionmaking we require in capital cases." *Booth*, 482 U.S. at 508-09. Their admission, without cure, "so

³⁸ Roof limits his appeal to the errors' impact on jurors' sentencing decision.

infected the trial with unfairness as to make the resulting sentence a denial of due process.” *Bennett*, 842 F.3d at 327-28 (alteration and quotations omitted).

Sanders’s testimony was especially problematic because of its religiously-loaded nature. *South Carolina v. Gathers*, 490 U.S. 805, 811-21 (1989), *overruled on other grounds by Payne*, 501 U.S. 808. Those religious overtones compounded the misdirection and provocation. *Bennett v. Angelone*, 92 F.3d 1336, 1345-46 (4th Cir.1996)(“Federal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory.”).

Considering Sanders was the prosecution’s very first witness, and jurors were unlikely to forget her emotional exhortations, the court abused its discretion in refusing to declare a mistrial. The test is “whether the improper evidence volunteered by a witness, when considered in conjunction with the cautionary instructions” so prejudiced jurors that “declaration of a mistrial was required.” *Jackson*, 585 F.2d at 663 (quotations omitted). Here, Sanders’s remarks were textbook improper testimony, and the court’s purportedly-curative instructions did nothing to lessen their taint.

At the very least, the court had an obligation to correct the errors. But the court rejected counsel's proposal to strike Sanders's testimony and instruct the jury to disregard it. JA-4358. Making matters worse, the court also rejected a simple instruction telling jurors to ignore Sanders's call to send Roof to hell, despite its partial recognition the testimony was improper. JA-3833.

Instead, the court tendered a watered-down instruction—jurors alone decide the proper sentence—that jurors wouldn't have connected to Sanders's testimony and didn't instruct them to disregard it anyway. JA-3839-40. Considering the court's earlier advisement that it would "make [it] very clear" if jurors should disregard evidence (JA-3622), jurors most likely considered Sanders's comments (and their implied sentencing recommendation) in reaching their verdict. *Jones*, 527 U.S. at 390; *Wilson*, 135 F.3d at 302 (finding general instruction insufficient to prevent jury from considering specific comments); *Miller*, 65 F.3d at 684-85 (similar). "Absent more focused and emphatic instruction, [this Court] cannot confidently [conclude] that, even absent these errors, the jury would still have voted for the death penalty in this case." *United States v. Aquart*, 912 F.3d 1, 43 (2d Cir.2018).

This Court's decisions in capital cases *Bennett v. Stirling* and *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir.2010), are instructive. In *Bennett*, the prosecutor addressed the defendant in derogatory terms. Though the remarks were arguably ambiguous, their inflammatory, dehumanizing nature "damaged the jury's ability to consider objectively, and individually, whether mercy was warranted," in violation of due process. *Bennett*, 842 F.3d at 324-26. Because the court never instructed jurors to disregard the comments, this Court ordered a new penalty hearing—even on deferential habeas review. *Id.* at 327. Likewise, in *Lighty*, this Court held that argument suggesting victim-family-members favored death violated the Eighth Amendment. Though the error was harmless, that was because the court specifically instructed jurors to disregard the offending comments, and no witness testified to the family's preferences, making it "highly unlikely the improper statements entered the sentencing calculus." *Id.* at 361-62; compare *Baer v. Neal*, 879 F.3d 769, 784-86 (7th Cir.2018)(vacating sentence on doubly-deferential habeas- and ineffective-assistance-review where, *inter alia*, prosecutor suggested family sought death).

By contrast, in *United States v. Barnette*, 390 F.3d 775 (4th Cir.2004), *vacated on other grounds*, 546 U.S. 803 (2005), this Court affirmed a death sentence despite a victim-witness' unsolicited improper testimony. A mistrial was unnecessary because the witness "offered no opinion on Barnette, the horrible nature of the actual murder, or her view of what sentence would be appropriate." *Id.* at 800. But this Court held such statements *would* violate the Eighth Amendment. *Id.* Moreover, the *Barnette* outburst didn't violate due process because it was brief and, when made, "no one in the courtroom considered it out of line." *Id.* at 801. In Roof's case, counsel promptly expressed concern over testimony that left the entire courtroom visibly shaken. JA-4349-73.

In sum, the court should have granted a mistrial or struck Sanders's testimony that Roof was "evil" and belonged in "the pit of hell." At minimum, it needed to correct the errors, which it partially recognized. But the instruction it gave never told the jury to disregard Sanders's damning statements. "[T]here is a reasonable possibility" the evidence "might have contributed to the sentence of death," *Barnette*, 211 F.3d at 825, or at least "grave doubt about" its effect, *United States*

v. Runyon, 707 F.3d 475, 499 (4th Cir.2013)(quotations omitted), mandating a new penalty hearing.

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

Also improper was prosecutors' introduction of evidence of the victims' religiosity and argument that a death sentence was warranted because the victims were exceptionally good and devout people. This comparative-victim-worth evidence and argument violated Supreme Court prohibitions on unduly prejudicial evidence and arbitrary and capricious death sentences, in violation of due process and the Eighth Amendment.

A. Standards of review

This Court reviews de novo "evidentiary rulings implicating constitutional claims," *Williams*, 632 F.3d at 132, and claims the prosecutor "made an improper statement during . . . argument [that] unconstitutionally taint[ed] the outcome of the case," *United States v. Collins*, 401 F.3d 212, 215 (4th Cir.2005).

Roof objected generally that the evidence at issue was inadmissible, unduly prejudicial, and violated due process and the

Eighth Amendment,³⁹ and specifically to some of the improper exhibits.⁴⁰ Roof also objected to penalty-phase arguments that the victims were “particularly good” people. JA-6519. These objections sufficiently preserved the issues raised. Fed.R.Crim.P. 51.

Regardless, this Court reviews the entire claim de novo because a pro-se defendant only “assumes” the risks of “silence” when he “chooses self-representation after a warning from the court of the perils this entails.” *United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002). Because the court never warned Roof “he would be obliged to adhere to federal procedural and evidentiary rules,” *Hansen*, 929 F.3d at 1256, any failure to object doesn’t result in forfeiture. *Leyva v. Williams*, 504 F.3d 357, 363-65 (3d Cir.2007); *Wright v. Collins*, 766 F.2d 841, 845-47 (4th Cir.1985). See Section XI.A.

B. The government asked jurors to impose death because the victims were good and religious people

The government’s pretrial notice included nonstatutory aggravating factors concerning the personal impact of Roof’s crime and how his selection of victims served to “magnify” its “societal impact.”

³⁹ JA-5743, 6040-42, 6105-09, 6260-61, 6264.

⁴⁰ JA-6059-60, 6082, 6261, 6264.

JA-149-50. In response to defense concerns about the potential breadth of these factors, JA-393-99, the government clarified each, stating “selection of victims” was limited to “defendant’s decision making and specific choice to target churchgoers attending Bible study in order to magnify the societal impact of his crimes,” while “victim impact” addressed “the harm done to the victims of the shooting and their families, friends and co-workers.” JA-453-54.

But at penalty, the government introduced evidence that fit neither description; it instead appeared designed to present the victims as especially good and religious individuals. Over the course of four days, prosecutors elicited victim-impact testimony from 23 witnesses, highlighting the deceased’s exemplary qualities and Christian faith. JA-5795-967, 6003-175, 6314-469, 6527-80. The government supported this testimony with photographs of the victims, including several depicting them preaching, at church, and in religious attire. JA-5970-76, 6255-59, 6655-57, 6810-40. The government also introduced audio and video recordings of the victims: singing a Christian hymn, Govt.Ex-643(audio); preaching at a funeral, Govt.Ex-768(audio); and delivering a lecture on the history of Emanuel and leading the church audience in

prayer, Govt.Ex-746(video); *see also* Govt.-Ex-750 (audio)(victim offering message of prayer to ill acquaintance), Govt.Ex-782 (video)(victim's son's song tribute with religious references).

When standby counsel raised concerns about the government's presentation, the prosecutor responded that Roof was the one who "chose to go into a church to [kill nine people], *particularly good people*, people for whom there is real loss that occurred. And the government and those witnesses are entitled to tell the jury about it. And that is what we are doing" JA-6040-43(emphasis added).

In closing, prosecutors emphasized the victims' particular worth, repeatedly reminding jurors "how extraordinarily good these people were." JA-6668; *see* JA-6677 (referencing "what great people those nine that were killed were"), JA-6669, 6692-93, 6701. And they highlighted for the jury the victims' deep Christian faith. JA-6669 (describing victim as "a man of the Word, a man who followed it strictly and believed others should do as well"), JA-6671 (describing victim and her son as "of deep faith"), JA-6672-73, 6677; *see* Govt.PowerPoint(media).

The government then argued expressly for a death sentence based on Roof's decision "to target particularly good people in a church," and

to “execute good people.” JA-6692; *see* JA-6703 (“This is not a scenario where one swerves across the center line and happens to hit a bus full of great people. He chose these great people. He went there hoping to find the best among us. And he did indeed find them.”), 6709, 6715.⁴¹

C. Victim-worth evidence and argument are unconstitutional

After twice holding victim-impact evidence unconstitutional,⁴² the Supreme Court in *Payne v. Tennessee* reversed itself and permitted prosecutors to present “a quick glimpse of the life which a defendant chose to extinguish” and the loss to a victims’ loved ones. *Payne*, 501 U.S. at 822 (quotations omitted). But in so holding, *Payne* emphasized this evidence must *not* be used to encourage jurors “to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.” *Id.* at 823; *see id.* (explaining evidence should not be “offered to encourage comparative judgments of this kind—for instance,

⁴¹ In its guilt-phase closing, the government similarly argued, “This defendant’s message of hatred was eclipsed by the good of those nine people. Hold him accountable for every one of his actions, find him guilty of all counts in this indictment.” JA-5091.

⁴² *Booth*, 482 U.S. 496; *Gathers*, 490 U.S. 805.

that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not”). When the prosecution goes beyond this carefully-circumscribed “legitimate purpose[]” of victim-impact information—to show a victim’s “uniqueness as an individual human being”—and introduces comparative-victim-worth evidence, the resulting sentence violates due process. *Id.* at 823, 825 (quotations omitted); *Humphries*, 397 F.3d at 219 (recognizing *Payne* prohibits “suggest[ing] that there are worthy and unworthy victims” (quotations omitted)); *id.* at 225 n.8 (describing “pernicious[ness]” of comparative-victim-worth arguments).

Comparative-victim-worth evidence violates not only *Payne*, but a line of cases beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), holding “that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared,” courts must “suitably direct[] and limit[]” it to “minimize the risk of wholly arbitrary and capricious action.” *Zant v. Stephens*, 462 U.S. 862, 874 (1983)(quotations omitted). Permitting a glimpse of the victims to shade into victim worthiness encourages jurors to sentence a defendant to death based on arbitrary factors, in violation of the Eighth

Amendment. In particular, it is unconstitutional for the government to inject into the penalty decision consideration of a victim's religion. *Zant*, 462 U.S. at 885; *Gathers*, 490 U.S. at 821 (O, Connor, J., dissenting) ("It would indeed be improper for a prosecutor to urge that the death penalty be imposed *because* of the race, religion, or political affiliation of the victim."); *Humphries*, 397 F.3d at 226 ("Some [victim] comparisons, such as those based on race or religion, unquestionably are unconstitutional.").

The government did not need to encourage jurors to vote for death based on the victims' comparative worth, goodness, and deep religious faith to demonstrate Roof targeted churchgoers to magnify the impact of his crime, and the victims' loved ones suffered a great loss. Under *Payne*, prosecutors were entitled to give jurors a "quick glimpse" into the victims' lives, to show they were unique individuals. And to prove the selection-of-victims aggravator, prosecutors could (and did) introduce evidence Roof intentionally chose a church to "make the biggest wave." JA-6196, 6231. What they were not permitted to do was suggest jurors should sentence Roof to death *because of* the victims' worth and religiosity.

This case is different from *United States v. Mikhel*, 889 F.3d 1003, 1053-54 (9th Cir.2018), *United States v. Mitchell*, 502 F.3d 931, 989-90 (9th Cir.2007), and *Bernard*, 299 F.3d at 477-80, where sister circuits found no plain error in admitting evidence of victims' faiths. None involved prosecutors arguing that jurors should impose death because the defendant killed "particularly good" and religious people. JA-6692. It is the comparative-worth nature of the evidence and argument in this case that takes it outside constitutional bounds.

D. The errors prejudiced Roof

Because the government cannot prove beyond a reasonable doubt this improper evidence and argument didn't affect the verdict, Roof must be resentenced. *Barnette*, 211 F.3d at 824.

Over four days, 23 of 25 penalty-phase witnesses gave victim-impact testimony, each highlighting the victims' virtuousness, and often focusing on their deep faith. In closing, prosecutors repeatedly directed jurors' attention to this evidence, and asked them to "[r]ender the full measure of justice" for Roof's attack on innocent, religious victims. JA-6715. Indeed, the prosecution devoted one-third of its penalty-phase argument to the victims' exemplary qualities and impact of the crime on

their loved ones. JA-6668-77, 6703-08; *see* JA-6752. Then, in instructions and on the verdict form, the court unambiguously told jurors to consider this evidence. JA-6724, 6738, 6799-7000. Jurors could not have ignored it.

The power of this evidence to sway jurors is well-recognized. *Kelly v. California*, 555 U.S. 1020, 1020 (2008)(Stevens, J., respecting denial of cert.)(describing “unsurpassed emotional power of victim impact testimony on a jury”). At Roof’s trial, victim-impact evidence left witnesses “sobbing” on the stand and brought the courtroom to tears, prompting standby counsel to remark the proceeding resembled a “memorial service” more than a sentencing, and the court to concede the testimony’s “very emotional” nature. JA-6042, 6106, 6263.

The government’s choice to include Exhibits 643, 746, and 768, depicting the victims offering hymns and prayers—seemingly from the grave—heightened the prejudice. *Kelly*, 555 U.S. at 1020 (Stevens, J., respecting denial of cert.)(“[W]hen victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming.”). Jurors took note, requesting during deliberations to re-watch one of these exhibits. JA-8188.

In *Stitt*, 250 F.3d at 898-99, this Court found improper victim-impact evidence harmless because it was “relatively unemotional,” “brief,” “comprised only a fraction of the total testimony heard during the penalty phase,” and the jury was told not to consider it. By contrast, the improper evidence in Roof’s case, which the jury was instructed to weigh in favor of death, was exceptionally emotional, extensive, and spanned all four days of penalty hearings. The government cannot prove beyond a reasonable doubt that at least one juror wasn’t persuaded by its call to sentence Roof to death for the murder of good and religious people.

**XVIII. ROOF’S DEATH SENTENCE IS
UNCONSTITUTIONAL BECAUSE HE WAS 21,
AUTISTIC, AND MENTALLY ILL AT THE TIME OF HIS
CRIME**

Roof was sentenced to death for a crime committed when he was 21, autistic, and suffering a schizophrenia-spectrum or other psychotic-spectrum disorder. This Court should reverse the death sentence as an Eighth Amendment violation for two reasons.

First, the Court should extend the categorical ban on executing offenders under 18 to those 21 and younger. *Second*, it should find

Roof's youth, neurodevelopmental disability, and mental illness render his death sentence cruel and unusual punishment.

A. Standard of review

Standby counsel filed a draft motion to preclude the death penalty based on Roof's age and neurodevelopmental and psychiatric disorders. JA-7752-62. Because Roof refused to sign the motion, the court never ruled on these Eighth Amendment claims. JA-5516-18. But because the issue was "brought to the court's attention," it is preserved for de novo review. Fed.R.Crim.P. 52; *United States v. Said*, 798 F.3d 182, 196 (4th Cir.2015).

B. This Court should extend the categorical ban on executions to offenders 21 and younger

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court exempted offenders younger than 18 from being sentenced to death. *Simmons* cited a national consensus against executing juvenile offenders, noting the practice was banned in 30 states and infrequently used elsewhere. *Id.* at 564. *Simmons* also cited a growing body of brain-development research establishing adolescents differ in maturity, susceptibility, and rehabilitative potential, making them less morally culpable than adults. *Id.* at 569-74.

In the 14 years since *Simmons*, legal and scientific advances, including studies showing the brain's continued development into one's early- to mid-20s, have eroded the justification for drawing the line for capital punishment at 18.

1. Human brains develop through a person's 20s

When *Simmons* was decided, scientific research “[had] not yet produced a robust understanding of maturation in young adults age eighteen to twenty-one.” E. Scott, et al., *Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy*, 85 Fordham L.Rev. 641, 653 (2016). Scientists have since discovered many adolescent-defining traits (that subvert the deterrent and retributive goals of capital punishment) persist years beyond legal adulthood. One longitudinal brain-development study concluded brains are not fully mature until at least age 25. R. Henig, *What Is It About 20-Somethings?*, N.Y. Times (Aug. 18, 2010), <https://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html>. In particular, research shows the brain's prefrontal cortex, responsible for executive functioning, “continues to change prominently until well into a person's 20s.” J. Giedd, *The Amazing Teen Brain*, 312 Sci.Am. 32, 34

(2015); see A. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L.Rev. 769 (2016).

2. There exists a national consensus that young adults can be rehabilitated

Mirroring these scientific developments, a national consensus has emerged recognizing young adults in the justice system aren't beyond rehabilitation. The U.S. Sentencing Commission recently published a report explaining 25 is the average age at which a brain fully develops. U.S.S.C., *Youthful Offenders in the Federal System* 1, 7 (2017), https://www.ussc.gov/sites/default/files/pdf/researchandpublications/research-publications/2017/20170525_youthfuloffenders.pdf. And in 2018, the American Bar Association adopted a formal resolution calling to exclude offenders 21 and younger from capital charges. Am. Bar Ass'n, *Resolution 111* (2018), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf; Am. Bar Ass'n, *Death Penalty Due Process Review Project: Report to the House of Delegates*, 1, 14 (2018).

Court rulings similarly reflect awareness that emerging adults comprise a different class of offenders. In 2017, an appellate court in New Jersey remanded a 75-year sentence imposed on a 21-year-old

offender, directing the lower court to weigh the “youthful offender’s failure to appreciate risks and consequences” and “other factors often peculiar to young offenders.” *State v. Norris*, 2017 WL 2062145, at *5 (N.J. Ct. App. 2017). That year, a Kentucky court excluded a 20-year old from death, concluding *Simmons*’s categorical bar should extend to offenders under 21. *Commonwealth v. Brehold*, No. 14-CR-161, slip op. (Ky. Cir. Ct. Aug. 1, 2017).

The categorical ban the *Simmons* Court set at 18 “disregard[s] . . . current medical standards.” *Moore v. Texas*, 137 S.Ct. 1039, 1049 (2017). Scientific and legal developments support extending it to offenders between 18 and 21. Because Roof was barely 21 when he committed his crime, his death sentence should be vacated.

C. Executing Roof for conduct committed when 21, autistic, and mentally ill violates the Eighth Amendment

This Court also should vacate Roof’s death sentence because he had diminished capacity due to his youth, neurodevelopment delay, and psychiatric disorders.

1. Adaptive, reasoning, and communications skills are essential to a fair trial

In *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), the Supreme Court relied on “evolving standards of decency that mark the progress of a maturing society” to exempt intellectually disabled offenders from capital punishment. *Atkins* reasoned such defendants have impaired capacities to “understand and process information,” “engage in logical reasoning,” “control impulses,” and “understand the reactions of others,” undermining their ability to receive a fair trial. *Id.* at 318. Executing such offenders is “cruel and unusual” because they “may be less able to give meaningful assistance to their counsel,” “are typically poor witnesses,” and “their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 307, 321.

The Court later explained *Atkins* doesn’t set a “rigid rule” requiring an offender have a specific IQ to be spared death because a bright-line test would create the “unacceptable risk that persons with intellectual disability will be executed.” *Hall v. Florida*, 572 U.S. 701, 704 (2014). Instead, courts should look broadly at evidence of one’s “failure or inability to adapt to his social and cultural environment,” as reflected in “medical histories, behavioral records, school tests and

reports, and testimony regarding past behavior and family circumstances.” *Id.* at 712.

2. Roof’s autism and psychiatric disorders undermined his right to a fair trial

Autism, like intellectual disability, is a neurodevelopmental disorder that impairs social skills, adaptive skills, and ability to communicate effectively. JA-5265-68. Indeed, mental-health experts recognized in Roof the very traits *Atkins* cited to hold death was a disproportionate punishment. *See* Facts-E.1-3. And during trial, Roof himself provided the clearest demonstration of his impaired abilities to think logically, weigh likely outcomes, and rationally communicate—for example, by writing prosecutors, waiving counsel, and presenting no evidence—all undermining his right to a fair trial. *Atkins*, 536 U.S. at 321.

Evidence also established Roof suffered from a schizophrenia-spectrum or other psychotic-spectrum disorder, marked by delusions, paranoia, grandiosity, and distorted thinking. *See* Facts-E.1. Because of these symptoms, Roof’s ability to think logically and communicate effectively with counsel was at least as compromised as, if not more compromised than, individuals spared death under *Atkins*.

D. Roof's death sentence is cruel and unusual

The Supreme Court's rationale for banning the execution of intellectually-disabled offenders in *Atkins*—and its rationale for banning the execution of juvenile offenders in *Simmons*—should apply to offenders who are biologically and psychologically similar to the excluded classes. Applying those criteria here, because Roof couldn't think logically, consider the consequences of his actions, control his impulses, communicate with counsel, or understand others' reactions, the death sentence fails to serve either of the purported goals of capital punishment: deterrence and retribution.

This Court should vacate Roof's death sentence and remand for imposition of life sentences.

Points Related to Guilt Verdict

Before trial, Roof moved to dismiss the indictment on several grounds. He argued the religious-obstruction statute, 18 U.S.C. §247(a)(2), is an unconstitutional exercise of Congress's Commerce Clause authority, and the hate-crime statute, 18 U.S.C. §249(a)(1), an unconstitutional exercise of Congress's Thirteenth Amendment power. He also explained neither statute qualifies as a necessary, predicate "crime of violence" under the firearm statute, 18 U.S.C. §924(j). JA-213-49. The court denied the motion, and rejected Roof's alternative argument that the religious-obstruction charges were improper because he didn't act with religious-hostility or in interstate commerce. JA-4388, 3501-32, 4957-59, 5023-26, 6973-77, 6998-7001.

XIX. THE RELIGIOUS-OBSTRUCTION STATUTE IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESS'S COMMERCE CLAUSE AUTHORITY

Congress enacted 18 U.S.C. §247 pursuant to its Commerce Clause authority. At the time of Roof's offense, subsection (a)(2) stated, in relevant part, whoever "intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of

religious beliefs, or attempts to do so[,] shall be punished.”⁴³ Because Section 247(a)(2) regulates non-economic conduct with no nexus to interstate commerce, Congress had no authority to enact it.⁴⁴ And even if the statute is facially constitutional, the government presented insufficient evidence of an interstate nexus, and the court incorrectly instructed the jury on this point. Roof’s religious-obstruction convictions must be vacated.

A. Standards of review

This court reviews a statute’s constitutionality, sufficiency of the evidence, and jury instructions de novo. *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir.2018); *United States v. Hamilton*, 699 F.3d 356, 361 (4th Cir.2010); *United States v. Fulks*, 454 F.3d 410, 437 (4th Cir.2006). Evidence is insufficient if, when viewed in the light most favorable to

⁴³ After Roof’s conviction, Congress clarified the statute by adding “including by threat of force against religious real property.” The change was not substantive. S.R. No.115-325, at 2 (2018).

⁴⁴ Whether Section 247(a)(2) exceeds Congress’s authority under the Commerce Clause is an issue of first impression. Two circuits have addressed challenges to Section 247(a)(1), which penalizes damage to “religious real property,” including arson of commercially-related church property. *United States v. Ballinger*, 395 F.3d 1218, 1227 (11th Cir.2005)(en banc); *United States v. Grassie*, 237 F.3d 1199 (10th Cir.2001). That subsection is not at issue here.

the government, “a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.” *Hamilton*, 699 F.3d at 361.

B. The court rejected Roof’s facial and as-applied challenges to the statute

Prosecutors charged Roof with 12 counts of obstructing the exercise of religion under 18 U.S.C. §247(a)(2)(Counts 13-24). JA-49-63. In a bill of particulars, they alleged: Roof used a telephone, navigation system, Russia-based internet server, and the internet, and traveled on interstate highways, while preparing for the crime; he used “things in interstate commerce” to commit the crime (ammunition, a gun, and a tactical pouch); and Emanuel is a church of national importance engaged in interstate activities. JA-289-92.

Roof moved pretrial to dismiss these counts, asserting facial and as-applied challenges. He argued, first, Congress exceeded its Commerce Clause authority in enacting Section 247(a)(2) because it regulates quintessentially non-economic criminal conduct with no connection to interstate commerce. And second, assuming the statute’s facial validity, the facts alleged did not establish a nexus between his conduct and interstate commerce. JA-215-26.

The court rejected Roof's facial challenge because the statute contains a jurisdictional clause—18 U.S.C. §247(b)—limiting its reach to conduct “in or affect[ing]” interstate commerce. JA-3519-25; *see United States v. Lopez*, 514 U.S. 549 (1995)(holding Commerce Clause authorizes Congress to regulate “channels” and “instrumentalities” of, and activities “substantially affecting,” interstate commerce). The court also denied Roof's as-applied challenge, concluding the alleged facts were “sufficient to survive a motion to dismiss.” JA-3525.

Roof renewed these challenges in later motions for judgment of acquittal and a new trial. JA-4957-59, 5023-24, 6973-77. He argued the evidence showed only that he: (i) used the internet and telephone to prepare for the crime; (ii) drove on highways within South Carolina before and after the crime; and (iii) used items that previously moved in interstate commerce to commit the crime—none of which established the requisite interstate-commerce connection. JA-4957-59, 6974-77.⁴⁵ The court again denied relief, affirming Congress's authority to regulate

⁴⁵ The government abandoned its plan to introduce evidence Emanuel was involved in interstate commerce and Roof's actions affected those activities. JA-4957 n.5; 6975-76.

Section 247(a)(2)'s targeted conduct and finding sufficient evidence of an interstate-commerce nexus. JA-5025-26; 6998-7001.

The court was wrong. Section 247(a)(2) regulates neither “channels” or “instrumentalities” of, nor activities with a “substantial[] effect” on, interstate commerce. It instead targets non-commercial, intrastate crime in contravention of states’ sovereign police power.

Even assuming the statute is facially valid, the evidence presented didn’t prove a nexus between Roof’s crime and interstate commerce. The court’s broad reading of the nexus requirement—which would be met anytime one used items purchased in interstate commerce or drove on intrastate highways—would sweep under federal jurisdiction virtually *every* criminal act.

C. Congress’s Commerce Clause authority is limited

The Commerce Clause authorizes Congress “[t]o regulate Commerce” among the States. U.S. Const. Art. I, §8, cl.3. This power is inherently limited; Congress cannot regulate “activit[ies] beyond the realm of commerce in the ordinary and usual sense of that term.” *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). And Congress must leave to the states regulation of activity that “is truly local,” the “clearest

example” of which “is the punishment of local criminal activity.” *Bond v. United States*, 572 U.S. 844, 858 (2014); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); see *Jones v. United States*, 529 U.S. 848, 858 (2000)(construing federal arson statute to reach owner-occupied dwellings would raise constitutional questions because “[a]rson is a paradigmatic common-law state crime”).

There are “three broad categories of activity” over which Congress has Commerce Clause authority: (i) channels of interstate commerce; (ii) instrumentalities of interstate commerce; and (iii) activities having a substantial relation to interstate commerce. *Lopez*, 514 U.S. at 558. The first two categories permit Congress to regulate “the interstate transportation routes through which persons and goods move,” such as highways and telecommunications networks, and “the people and things themselves moving in commerce,” such as cars, planes, and shipments of goods. *Morrison*, 529 U.S. at 613 n.5; *United States v. Patton*, 451 F.3d 615, 621 (10th Cir.2006); *Ballinger*, 395 F.3d at 1225-26. The third category permits Congress to regulate intrastate economic activity if its aggregate effects substantially impact interstate commerce. *Lopez*, 514 U.S. at 559; *Wickard v. Filburn*, 317 U.S. 111 (1942). But Congress

cannot regulate “noneconomic activity based solely on the effect that it may have on interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 36 (2005). Regulation of non-economic *criminal* activity is particularly disfavored. *Morrison*, 529 U.S. at 615.

D. Section 247(a)(2) is facially invalid

The court gave two reasons for rejecting Roof’s facial argument. *First*, it determined the statute’s jurisdictional element limits its reach to offenses “in or affecting” interstate commerce. *Second*, it reasoned “[o]ne could” theoretically violate the statute in a way that satisfied *Lopez*—for instance, by “us[ing] the channels or instrumentalities of interstate commerce to attack a house of worship,” “mailing a bomb to a church,” or “attack[ing] a church of national importance” so as to substantially affect interstate commerce. JA-3519-21. Neither argument has merit; the statute doesn’t satisfy *Lopez*.

1. The statute’s jurisdictional element doesn’t sufficiently limit its reach

“The mere presence of a jurisdictional element” does not “insulate a statute from judicial scrutiny under the Commerce Clause, or render it per se constitutional.” *United States v. Rodia*, 194 F.3d 465, 472 (3d Cir.1999)(quotations omitted). Because Section 247’s jurisdictional

element is coextensive with the Commerce Clause, *Ballinger*, 395 F.3d at 1240, it does nothing to distinguish this statute from ones the Supreme Court has struck down.

Congress has enacted statutes whose jurisdictional elements restrict the regulated conduct to identifiable commerce-related activities. *United States v. Hill*, 927 F.3d 188, 205 (4th Cir.2019)(finding 18 U.S.C. §249(a)(2)(B)(iv) requires conduct “interfer[ing] with commercial or other economic activity in which the victim is engaged at the time of the conduct”); *Jones*, 529 U.S. at 857-58 (finding 18 U.S.C. §844(i) requires affected property be “used in” interstate commerce or activity affecting such commerce). In these cases, the provisions define a clear, commercially-connected sphere of conduct the statute targets. But restating the limits of the Commerce Clause itself—as Section 247(b) does—fails to define an “explicit connection with or effect on interstate commerce” because it doesn’t narrow the regulated conduct any further than the Clause itself. *Lopez*, 514 U.S. at 562; see *United States v. Salerno*, 481 U.S. 739, 745 (1987); *United States v. Pappadopoulos*, 64 F.3d 522, 527 (9th Cir.1995), *partially abrogated on other grounds by Jones*, 529 U.S. 848.

The Supreme Court's decisions in *Lopez* and *Morrison* are instructive. *Lopez*, 514 U.S. at 567, involved legislation prohibiting possession of guns in school zones, which the Court held facially invalid because possessing a gun in a school zone was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Morrison*, 529 U.S. at 613, involved a statute criminalizing gender-motivated violence, which the Court deemed facially invalid because such crimes were not "in any sense of the phrase, economic activity." Section 247(a)(2)'s jurisdictional element merely restates the Commerce Clause limits *Lopez* and *Morrison* recognized, but that were insufficient to save congressional legislation targeting non-commercial, local conduct. *Lopez* and *Morrison* thus foreclose the court's reasoning.

2. Theoretical effects on commerce are not enough

Similarly, *Lopez* and *Morrison* demonstrate the court's mistake in relying on ways "[o]ne could" violate the Section 247(a)(2) to implicate interstate commerce, JA-3521, because the same theoretical effect on commerce existed in those cases. For example, one could use an interstate highway to drive guns between schools in different states or

mail a bomb to a former spouse. But the targeted conduct itself—possessing guns near schools and gender-motivated violence—had no connection to interstate commerce. Section 247(a)(2), which also targets noncommercial intrastate crime, is thus facially invalid, even if it *could* be violated in ways affecting interstate commerce.

3. The statute doesn't satisfy *Lopez*

Contrary to the court's ruling, Section 247(b)(2) cannot satisfy *Lopez*'s three tests to justify Commerce Clause regulation.

a. The proscribed conduct does not target “channels” or “instrumentalities” of interstate commerce

Section 247(a)(2) regulates religious obstruction “wherever it occurs.” Like the statutes in *Lopez* and *Morrison*, it is not “directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce.” *Morrison*, 529 U.S. at 609; *see Rodia*, 194 F.3d at 474 & n.3 (holding “instrumentalities” prong “inapt” where statute didn't target means of interstate transportation). Also like the statutes in *Lopez* and *Morrison*, Section 247 doesn't regulate “the use of,” “attempt to prohibit the interstate transportation of a commodity through,” or “target the movement of” things through

channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir.2000).

**b. The proscribed conduct does not
“substantially affect” interstate commerce**

Section 247(a)(2) also does not regulate conduct that “substantially affects” interstate commerce, a question that depends on four factors: (1) whether the regulated activity is commercial or economic; (2) whether the statute has a limiting jurisdictional element; (3) the presence of any legislative findings on the conduct’s interstate-commerce effects; and (4) whether the link between prohibited conduct and interstate commerce is “attenuated.” *Lopez*, 514 U.S. at 561-63. None of these factors supports finding Section 247(a)(2) targets conduct “substantially affect[ing]” interstate commerce.

**i. The regulated conduct is neither
commercial nor economic**

Section 247(a)(2) targets noncommercial intrastate crime—force or threatened force against religious exercise—precisely the type of conduct that falls outside Congress’s authority. *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 559. Like the *Lopez* and *Morrison* statutes, Section 247(a)(2) “is a criminal statute that by its terms has nothing to do with ‘commerce’” or any “larger regulation of economic activity.”

Lopez, 514 U.S. at 561; see *United States v. Nagarwala*, 350 F.Supp.3d 613, 630 (E.D. Mich.2018)(holding “[t]here is nothing commercial or economic about” practice of female-genital mutilation, which is “essentially a criminal assault”).

Section 247(a)(2) does not target actors or conduct with “a commercial character.” *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). Worship is “non-commercial and non-economic,” *United States v. Lamont*, 330 F.3d 1249, 1254 (9th Cir.2003), as is use of force to obstruct it. Even theoretical church functions like soliciting interstate donations or purchasing interstate supplies are “too passive, too minimal, and too indirect to substantially affect interstate commerce.” *United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir.2001); see *United States v. Davies*, 394 F.3d 182, 193 (3d Cir.2005).

Indeed, religious worship has less connection to commerce than the gun possession in school zones at issue in *Lopez*. Virtually all schools buy and sell goods, employ people, and prepare children for the workforce, whereas religious exercise does not require any organized setting. Thus, sanctioning Commerce Clause regulation of religious

obstruction carries the same risk identified in *Morrison*—opening the floodgates to federal regulation of any crime. 529 U.S. at 615.

ii. The statute’s jurisdictional element is insufficient

As discussed above, Section 247(b)’s jurisdictional element cannot save the statute because it doesn’t meaningfully limit its reach.

iii. Congress made scant findings about effects on interstate commerce

Congressional findings also fail to provide the missing link between religious obstruction and interstate commerce. Findings that merely address impact on victims—rather than impact on interstate commerce—carry little weight. In *Morrison*, for instance, Congress made “numerous findings regarding the serious impact that gender-motivated violence has on victims,” but the Court deemed them too attenuated because they merely increased the “costs of crime,” discouraged interstate travel and employment, and impeded education. *Morrison*, 529 U.S. at 612, 614-15. It held that permitting such tangential effects to justify federal regulation would “obliterate the Constitution’s distinction between national and local authority.” *Id.*

As in *Morrison*, the Congressional findings on Section 247(a)(2) relate to victim impact alone and fail to connect that harm to interstate

commerce. When Congress enacted the statute, a House Report emphasized the need to “send a strong signal that religiously-motivated violence will not be tolerated.” H.R. Rep. No.99-820 at 6 (Sept. 12, 1988). But it didn’t reference interstate commerce, except to assert that Congress can regulate activities with a substantial effect on interstate commerce generally.

Reports on a 1996 amendment that aimed to relax the statute’s jurisdictional element to allow more prosecutions similarly focused on harm to society and victims, without linking the harm to interstate commerce. H.R. Rep. No.104-621 at 2-4 (June 17, 1996); S. Rep. No.100-324 at 2-3, 5 (April 27, 1988); *see* Church Arson Prevention Act of 1996, Pub. L. No.104-55, §2, pts.1, 4, 110 Stat. 1392. An accompanying report addressed the need for strict enforcement, but drew no connection between targeted conduct and interstate commerce. H.R. Rep. No.104-621 at 3, 7 (citing “emotional harms” and “community unrest” from attacks on religious property).

Here, the court recognized “Congress did not enact detailed factual findings” on any purported connection to interstate commerce. But it held such findings weren’t required, stating their presence “may

weigh in favor of” the statute’s validity, but their absence “cannot weigh against” it. JA-3523. While it is true congressional findings are not required, their absence certainly highlights the lack of an observable interstate-commerce link. *Morrison*, 529 U.S. at 612.

iv. The link to interstate commerce is attenuated

Finally, Section 247(a)(2) cannot satisfy the “substantially affects” test because its connection to interstate commerce is attenuated. At most, religious obstruction affects interstate commerce in the same indirect ways the Court deemed insufficient in *Lopez* and *Morrison*, i.e., impacting “the national economy” through combined effects of increased violent crime, higher medical costs, and deterred interstate travel. *Lopez*, 514 U.S. at 563-64. If these were enough, Congress could regulate virtually “any activity by an individual.” *Id.* at 564; see *Morrison*, 529 U.S. at 612-13.

4. Invalidating Section 247(a)(2) doesn’t preclude punishment

Recognizing Section 247(a)(2) exceeds Congress’s Commerce Clause authority does not require the targeted conduct to go unpunished. It simply restores to individual states the decision to prosecute it. South Carolina is among 29 states with statutes

criminalizing obstruction of religion. JA-247-49. Though some laws, including South Carolina's, are narrower than Section 247(a)(2), many are not and allow comparable penalties. Ind. Code Ann. §35-50-2-9(18)(A) & (B). The varied approaches underscore the importance of maintaining states' sovereignty to "experiment" and "exercise[e] their own judgment" in the criminal arena, "where States historically have been sovereign." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *Morrison*, 529 U.S. at 613 (quotations omitted).

E. Section 247(a)(2) is invalid as applied here

Even assuming Section 247(a)(2) is a valid exercise of Congress's Commerce Clause authority, the government presented insufficient evidence of a nexus between Roof's crime and interstate commerce.

1. Using goods sold interstate does not render conduct "in" interstate commerce

Mere use of items that traveled in interstate commerce at some point—here, ammunition, a gun, magazine, and pouch—does not make conduct "in" interstate commerce. *Lopez's* "channels" and "instrumentalities" tests only permit regulation of crime "directed at the instrumentalities, channels, or goods involved in," or regulations

“target[ing] the movement of” things through, interstate commerce.

Morrison, 529 U.S. at 618; *Gibbs*, 214 F.3d at 490-91.

A crime is not “directed at” an item, nor does it regulate the item’s “movement,” simply because the item is used in its commission. To illustrate, in *Rodia*, use of materials sold in interstate commerce (film and cameras) did not justify federal regulation of child pornography. Instead, the Third Circuit reasoned, the interstate sale of those items was “only tenuously related” to the targeted conduct. *Rodia*, 194 F.3d at 473; see *United States v. Holston*, 343 F.3d 83, 89 (2nd Cir.2003)(same). Likewise, Roof’s use of items once sold in interstate commerce is “only tenuously related” to the criminalized conduct—obstructing another’s exercise of religion.

More fundamentally, permitting federal regulation of any conduct involving any item sold interstate would empower Congress “to regulate murder or any other type of violence” in contravention of states’ police power. *Morrison*, 529 U.S. at 615. As the *Rodia* court noted, “virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce.” *Rodia*, 194 F.3d at 473; see *United States v. McCoy*, 323 F.3d 1114, 1116 (9th Cir.2003)(same),

partially overruled on other grounds by Gonzales, 545 U.S. at 9; *United States v. Morales-De Jesús*, 372 F.3d 6, 13-14 (1st Cir.2004). Giving Congress authority to police such matters would obliterate any distinction between “what is truly national and what is truly local.” *Morrison*, 529 U.S. at 617-18; see *Taylor v. United States*, 136 S.Ct. 2074, 2085 (2016).

2. Using interstate “channels” to prepare for later conduct does not render conduct “in” interstate commerce

Roof’s perfunctory use of “channels” and “instrumentalities” of interstate commerce to prepare for the crime—driving on South Carolina highways, calling within the state, and posting material online—also were insufficient to render the crime “in” interstate commerce. JA-3525. To conclude otherwise, the court incorrectly relied on cases upholding Commerce Clause regulation where an instrumentality of interstate commerce—such as a cell phone or GPS—was used *during the commission of the crime itself*. *United States v. Morgan*, 748 F.3d 1024 (10th Cir.2014)(kidnapping committed by affixing GPS device to victim’s car); *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir.2006)(downloading child pornography from the

internet); *United States v. Corum*, 362 F.3d 489 (8th Cir.2004)(use of telephone to threaten synagogues). In contrast, Roof used highways and the internet to *prepare* for the crime, but didn't use any channel or instrumentality of interstate commerce *during* it.

Equally misplaced was the court's reliance on felon-in-possession cases to hold that using a firearm manufactured out-of-state to obstruct religion establishes an interstate nexus. JA-7000 (citing *United States v. Gallimore*, 247 F.3d 134, 138 (4th Cir.2001)). Firearm cases are inapposite because "[g]uns[,] like drugs, are regulated by a detailed and comprehensive statutory regime." *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir.2006); see *Scarborough v. United States*, 431 U.S. 563, 576 (1977); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir.1996). And unlike the "inherently economic activity" of firearm transfers (or drug dealing), there is no market for obstructing religion. *United States v. Williams*, 342 F.3d 350, 352 (4th Cir.2003). Indeed, if mere use of an out-of-state gun to commit a local crime were sufficient to satisfy the Commerce Clause, the Court would not have invalidated the domestic-violence statute in *Morrison* or the firearm-possession statute in *Lopez*, which both targeted conduct often committed with out-of-state guns.

F. The instructions prejudicially misstated Section 247(a)(2)'s jurisdictional element

Even if Section 247(a)(2) is constitutional on its face and applied to Roof, this Court should vacate his religious-obstruction convictions because the court incorrectly and prejudicially instructed jurors on the jurisdictional element.⁴⁶ Because that broadly-drafted element—requiring proof an offense “is in or affects interstate or foreign commerce”—is coextensive with the Commerce Clause, the court needed to properly instruct on the limits of that authority. It did not do so.

1. The court told jurors Roof's use of any “channel,” even entirely intrastate, was “in” interstate commerce

The court told jurors they could find Roof's conduct “in” interstate commerce as long as he “used a channel or instrumentality of interstate commerce”—even if that use “occurred entirely within the State of South Carolina.” JA-5142. That instruction was wrong.

Congress's authority over the “channels” of interstate commerce extends only to conduct “directed at” interstate commerce's instrumentalities, channels, or goods, *Morrison*, 529 U.S. at 618, or

⁴⁶ The defense proposed an alternative instruction on the jurisdictional element, which the court rejected. JA-5050-55.

“movement of” things through such channels, *Gibbs*, 214 F.3d at 490-91. Thus, driving intrastate on an interstate highway or conducting internet research does not render conduct “in” interstate commerce. In *Lopez* and *Morrison*, the Court held the “channels” test unsatisfied because the targeted conduct (gun-possession near schools and gender-motivated violence) wasn’t “directed at” interstate channels, even though such channels could be used to reach school zones or commit gender-based attacks. *Morrison*, 529 U.S. at 618; *Lopez*, 514 U.S. at 559. The court’s instruction on this point was overly broad.

2. The court told jurors Roof’s use of items that once crossed state lines was “in” interstate commerce

The court further instructed jurors Roof’s conduct was “in” interstate commerce if he “used a firearm or ammunition during the offense,” and the “firearm or ammunition traveled across state lines at any point in its existence,” regardless of whether he transported it interstate. JA-5142. That instruction also was wrong.

“[T]he mere use of goods that have traveled in interstate commerce to further some activity” does not make that activity “in” interstate commerce. *United States v. Wall*, 92 F.3d 1444, 1471 (6th

Cir.1996) (Commerce Clause wouldn't authorize regulation of domestic relations "simply because marital beds are purchased in interstate commerce"); *cf. United States v. Brantley*, 777 F.2d 159, 161 (4th Cir.1985)(club's use of items that moved in interstate commerce insufficient to establish nexus because uses were "not commercial transactions").

Jones v. United States clarifies this point. There, the Court refused to read the federal arson statute broadly to cover non-commercial buildings (usually built with material that moved in interstate commerce). If such a slight connection were sufficient, "hardly a building in the land would fall outside the federal statute's domain," interfering with states' ability to regulate "traditionally local criminal conduct." *Jones*, 529 U.S. at 857-58.

The same rationale precludes reading Section 247(a)(2)'s "affecting commerce" element as broadly as the court did here because "virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce." *Rodia*, 194 F.3d at 473.

3. The court told jurors “any” effect on interstate commerce (not a “substantial” effect) sufficed

Finally, the court instructed jurors that “[t]he effect of the offense on interstate commerce does not need to be substantial,” and “[a]ll that is necessary” is “that the natural consequence of the offense potentially caused an impact, positive or negative, on interstate commerce.” JA-5142-43. That instruction, too, was wrong.

Courts can aggregate effects of “purely local” activities to satisfy the interstate-commerce nexus only where the activities “are part of an economic ‘class of activities’ that ha[s] a substantial effect on interstate commerce.” *Raich*, 545 U.S. at 17 (citing *Wickard*, 317 U.S. at 128-29); see *Morrison*, 529 U.S. at 617-18 (“reject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”).

Because religious obstruction is neither economic nor “part of an economic class of activities” with “a substantial effect on interstate commerce,” the aggregation rationale doesn’t apply. *Raich*, 545 U.S. at 17 (quotations omitted). Unlike the local cultivation of marijuana in *Raich*, or child-pornography production in *United States v. Forrest*, 429 F.3d 73 (4th Cir.2005), religious obstruction creates no “fungible

commodity,” *id.* at 78, affecting an interstate market. *Odom*, 252 F.3d at 1297 (declining to apply aggregation principle to church arson because activity is noneconomic). The district court thus erred by instructing jurors the effect of Roof’s offense on interstate commerce didn’t need to be substantial.

4. The instructional errors prejudiced Roof

The government presented no evidence even purportedly satisfying the “substantially affect[s]” test—namely, no evidence about Emanuel’s interstate or commercial activities. The only evidence potentially touching on *Lopez* was directed at the “channels” and “instrumentalities” prongs—that Roof used a gun, ammunition, and tactical pouch previously sold in interstate commerce; drove intrastate on interstate highways; used a telephone to call the church; and posted writings online using a Russian server. JA-4486-500. As explained above, none of this activity rendered Roof’s conduct “in” or “affecting” interstate commerce. Because the instructions allowed jurors to convict Roof on evidence that would not “establish[] an offense under a proper instruction,” the errors were not harmless beyond a reasonable doubt,

and this Court should vacate Roof's convictions on Counts 13-24. *United States v. Hastings*, 134 F.3d 235, 241 (4th Cir.1998).

XX. THE RELIGIOUS-OBSTRUCTION STATUTE REQUIRES PROOF OF RELIGIOUS HOSTILITY

Religious-obstruction offenses under 18 U.S.C. §247(a)(2) are hate crimes. *Laws and Policies*, U.S. Dept. of Justice, <https://www.justice.gov/hatecrimes/laws-and-policies>. And, according to the Department of Justice, hate crimes “must include both ‘hate’ and a ‘crime.’” *Learn About Hate Crimes*, U.S. Dept. of Justice, <https://www.justice.gov/hatecrimes/learn-about-hate-crimes>:



Id.

Like any hate crime, violation of Section 247(a)(2) requires proof of a bias-related motive—the defendant must have been “motivated by hostility to religion.” S. Rep. No.100-324, at 2 (1988). Here, the government presented nothing proving Roof was motivated by hostility to religion. Nor did the court instruct jurors they had to find Roof’s

crime was motivated by religious hostility. Because the instructions did not require, and the evidence did not support, religious hostility, Roof's religious-obstruction convictions (Counts 13-24) must be vacated.

A. Standards of review

This Court reviews sufficiency-of-the-evidence claims and jury instructions de novo. *See* Section XIX.A.

B. Religious hostility is an element of religious obstruction

Section 247(a)(2) prohibits “intentionally obstruct[ing], by force or threat of force, . . . any person in the enjoyment of that person’s free exercise of religious belief, or attempt[ing] to do so.” 18 U.S.C.

§247(a)(2). The statute does not define “intentional,” though it is routinely defined to mean “purposefully.” *Merriam-Webster*,

<https://www.merriam-webster.com/dictionary/intentionally>

(“intentionally” means “purposely”); *see Roget’s II, The New Thesaurus* at 546 (3d ed.1995)(“intentional” means “[d]one or said on purpose: deliberate, intended, purposeful, voluntary, willful, witting”).

“Purposely,” in turn, means “consciously desir[ing a] result, whatever the likelihood of that result happening.” *United States v. Bailey*, 444 U.S. 394, 403-04 (1980)(quotations omitted); *see* Model Penal Code

§2.02. Applying that definition here, Section 247(a)(2)'s "intentional" mens rea requires a defendant's "conscious desire" to obstruct another's free exercise of religion.

Legislative history confirms this reading. Congress's stated "purpose" was "to make violence motivated by hostility to religion a Federal offense." S. Rep. No.100-324, at 2. At the time, there were "limited circumstances" where religiously-motivated violence could be federally prosecuted. *Id.* And, Congress emphasized, "[t]he need for a broader Federal criminal statute [wa]s evidenced by the growing number of incidents of religiously-motivated violence," which had reached "epidemic proportions." *Id.* at 3 (cataloging violence against religious minorities).

To combat this religiously-motivated violence, Congress passed a law that criminalizes religiously-motivated violence. Congress gave no other reason for enacting Section 247(a)(2). And it made no findings about non-religiously-motivated violence. Given this history, Section 247(a)(2) must be construed to require proof of religious hostility.

The court rejected this argument, finding the legislative history "very clear that [the statute] was broader than targeting a specific

religious belief.” JA-5025. But the court didn’t identify the legislative history to which it referred. And the statute’s application to all religious beliefs says nothing about the requisite mens rea. In holding the statute requires no religious motivation, contrary to Congress’s intent, the court erred.

C. The government presented insufficient evidence of religious hostility

The court also summarily concluded that, if religious hostility were an element, there was sufficient evidence to put the matter to the jury—without identifying any such evidence. JA-5025. There was none. The prosecution never suggested, let alone proved, Roof was motivated by hostility to religion or the victims’ free exercise thereof. To the contrary, the evidence viewed in the light most favorable to the government shows Roof selected Emanuel not for any religious reason, but because its congregants were African-American and unguarded. Indeed, Roof confessed to considering non-religious targets, including a festival. JA-4271, 4282 ,4293-94.

It is thus unsurprising prosecutors didn’t argue to the jury that Roof was motivated by hostility to religion, focusing on racial animus as his sole motivation. JA-5065-91. Because the evidence was insufficient

to satisfy Section 247(a)(2)'s mens rea element, this Court must vacate Roof's religious-obstruction convictions.

D. The court never instructed jurors to find religious hostility

The defense proposed an instruction requiring jurors to find Roof “was motivated by hostility to the victims’ religious beliefs or to the free exercise thereof.” JA-4388. Because the court concluded religious hostility wasn’t required, it rejected the instruction. JA-5050-51. This was constitutional error. *United States v. McFadden*, 823 F.3d 217, 224 (4th Cir.2016)(court commits constitutional error by omitting an element from instructions).

And the error was not harmless. “To establish harmless error in such a case, the government must show ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The prosecution cannot surmount this heavy burden because it introduced no evidence and made no argument Roof's actions were motivated by religious hostility. Because the error was not harmless, the Court must vacate Roof's Section 247(a)(2) convictions.

**XXI. THE HATE CRIMES PREVENTION ACT IS AN
UNCONSTITUTIONAL EXERCISE OF CONGRESS'S
THIRTEENTH AMENDMENT AUTHORITY**

In 2009, Congress enacted the Hate Crimes Prevention Act (“HCPA”) pursuant to its authority under the Thirteenth Amendment. The HCPA authorizes federal prosecution of an individual who “causes bodily injury . . . or attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.” Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No.111-84, §4702, 123 Stat.2838-39, 2842 (codified at 18 U.S.C. §249(a)(1)).

The Thirteenth Amendment, one of the three “Reconstruction Amendments” enacted to protect emancipated slaves’ rights, forbids “slavery” and “involuntary servitude” in the United States. U.S. Const. amend. XIII, §1. Section 2 of the amendment gives Congress power to enforce it “by appropriate legislation.” *Id.* §2.

Section 249(a)(1) is not “appropriate legislation.” It was not justified by “current needs” and was not a “congruent and proportional” response to slavery or a badge of slavery. It is thus facially

unconstitutional, and this Court should vacate Roof's convictions under it (Counts 1-12).

A. Standard of review

This Court reviews a statute's constitutionality de novo. *Fulks*, 454 F.3d at 437.

B. Thirteenth Amendment-based legislation must be “necessary,” justified by “current needs,” and a “congruent and proportional” response to slavery or a badge thereof

The term “appropriate legislation” limits Congress's power to enforce the Reconstruction Amendments. The Supreme Court has clarified these limits over the past century.

Initially, in *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), the Court held the Thirteenth Amendment gave Congress “power to pass all laws *necessary and proper* for abolishing all badges and incidents of slavery in the United States,” emphasizing the power was limited. *Id.* at 20. In particular, the Amendment didn't authorize Congress to outlaw discrimination in public accommodations because it had “nothing to do with slavery or involuntary servitude.” *Id.* at 24.

In 1968, the Court clarified Congress has the power “rationally” to identify “badges and the incidents of slavery,” and to enact “effective

legislation” in response. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). In *Jones*, the Court accepted Congress’s authority to enact 42 U.S.C. §1982, creating a private right-of-action against housing discrimination, because it rationally and appropriately addressed an identified harm. *Id.* But *Jones* did not confer unbridled power to legislate under the Thirteenth Amendment. Rather, it carefully examined the legislative record before concluding Section 1982 was “necessary and proper” to end housing discrimination against African-Americans—an evident badge of slavery. *Id.* at 439-43.

The Court further limited Congress’s power to enact “appropriate legislation” under the Reconstruction Amendments in two recent cases. Though these cases addressed the Fourteenth and Fifteenth Amendments,⁴⁷ their reasoning applies equally to the Thirteenth. *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)(reading Reconstruction Amendments’ enforcement sections as subject to identical limitations);

⁴⁷ The Fourteenth Amendment prohibits State deprivations of life, liberty, or property without due process and guarantees equal protection. The Fifteenth Amendment ensures the right to vote regardless of race or previous condition of servitude. Each contain a clause giving Congress power to enforce them “by appropriate legislation.” U.S. Const. amend. XIV, §§1, 5; *id.* amend. XV, §§1, 2.

United States v. Cannon, 750 F.3d 492, 509 (5th Cir.2014)(Elrod, J., concurring)(explaining Reconstruction Amendments have “a unity of purpose, when taken in connection with the history of the times”).

In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court interpreted Congress’s powers under the Fourteenth Amendment’s substantively-identical enforcement provision, and held legislation is “appropriate” only if there is “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Boerne* struck down congressional legislation as unconstitutional because it was “so out of proportion to [its] supposed remedial or preventive object” it could not “be understood as responsive to, or designed to prevent unconstitutional behavior.” *Id.* at 532. The Court pointed to lack of support for the concerns that purportedly prompted the statute’s enactment in the legislative record. *Id.* at 530-31.

Similarly, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court considered the Fifteenth Amendment’s substantively-identical enforcement clause. *Shelby County* held an anti-discrimination provision in the Voting Rights Act was not “appropriate legislation” because the law was not “justified by current needs” imposed by

“current burdens.” *Id.* at 542 (citation omitted). Congress’s reliance on “decades-old data and eradicated practices” could not justify it, given recent developments that made it no longer “appropriate.” *Id.* at 546, 551 (citation omitted).

Together, *Boerne* and *Shelby County* establish that legislation is not “appropriate” under the Reconstruction Amendments unless concrete evidence proves it is a “congruent and proportional” response to “current needs”—holdings that apply to the Thirteenth Amendment’s nearly-identical “appropriate legislation” clause.

Despite this, the Fifth, Eighth, and Tenth Circuits have upheld Section 249(a)(1), reasoning *Boerne* and *Shelby County* do not apply to the Thirteenth Amendment. *United States v. Metcalf*, 881 F.3d 641, 644-46 (8th Cir.2018); *Cannon*, 750 F.3d at 497-98 (5th Cir.2014); *United States v. Hatch*, 722 F.3d 1193, 1204 (10th Cir.2013). But these courts so held because the Supreme Court has not *explicitly* stated *Boerne* and *Shelby County* apply to the Thirteenth Amendment. In taking this narrow approach, these courts did not dispute the decisions should apply to identical “appropriate legislation” language in all three Reconstruction Amendments. Nor did they suggest any reason why the

decisions' logic wouldn't extend to the Thirteenth Amendment. Instead, the courts reluctantly concluded they were stuck absent clear direction from the Supreme Court.

That approach conflicts with this Circuit's rule that it "does not have license to reject the generally applicable reasoning set forth in a Supreme Court opinion." *Hill*, 927 F.3d at 199 n.3. *Hill* upheld a different subsection of Section 249 as an appropriate exercise of Congress's Commerce Clause authority, but only after adopting the Supreme Court's reasoning in *Taylor*, 136 S.Ct. 2074, which analyzed a different statute. *Hill*, 927 F.3d at 199-201. Similarly, this Court should apply the logic of *Boerne* and *Shelby County* to the Thirteenth Amendment question presented here.

C. Section 249(a)(1) is neither justified by "current needs" nor a "congruent and proportional" response to a badge of slavery

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

Congress rightfully noted that "eliminating racially motivated violence" against African-Americans "is an important means of eliminating to the extent possible, the badges, incidents and relics of slavery and involuntary servitude." National Defense Authorization Act

for Fiscal Year 2010, Pub. L. No.111-84, 123 Stat 2190 (2009). But as the *Cannon* concurrence explained, “[i]n passing [Section] 249(a)(1), Congress focused on past conditions and did not make any findings that current state laws, or the individuals charged with enforcing them, were failing to adequately protect victims from racially-motivated crimes.” *Cannon*, 750 F.3d at 510 (Elrod, J., concurring). Instead, Congress relied on the need for remedial measures *in the period immediately following adoption of the Thirteenth Amendment*. A finding based on such antiquated data “cannot serve as the justification for a current expansion of Congress’s powers.” *Id.* at 511; *see Shelby County*, 570 U.S. at 554.

Congress never adequately explained the current need for the HCPA. When enacted in 2009, 45 states had hate-crime laws, and Congress offered no data indicating widespread lack of enforcement. *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Senate Committee on the Judiciary*, 111th Cong., 7-8, 14, 62, 171 (June 25, 2009). Even in the few states without hate-crime laws, Congress didn’t find insufficient prosecution of racially-motivated offenses through existing laws, mentioning only 3 isolated instances

where states failed to adequately prosecute hate crimes. *Id.* at 14, 19-20, 171, 173-74. Those “anecdotal” instances revealed no “widespread pattern” or trend of under-enforcement by state officials. *Boerne*, 521 U.S. at 531.

Therefore, Section 249(a)(1) is not justified by “current needs.”

2. Section 249(a)(1) is not a “congruent and proportional” response to a badge of slavery

Even assuming current needs justified Section 249(a)(1), it is neither congruent nor proportional to addressing those needs because Congress didn’t narrowly tailor it.

Section 249 broadly covers discrimination against people of *all* races, colors, religions, and national origins. Thus, a defendant can be prosecuted for assaulting a Caucasian victim because of his race, color religion, or national origin, even if the root of the discriminatory conduct has no connection to slavery whatsoever. In this way, “the plain language of Section 249(a) has the power to implicate vast swaths of activities that do not relate to removing the ‘badges’ and ‘incidents’ of slavery.” *Cannon*, 750 F.3d at 512 (Elrod, J., concurring). If the Thirteenth Amendment can be used to outlaw hate crimes against

Caucasians and Christians under the auspices of eliminating slavery, it is unclear where Congress's power would end.

But Congress's authority is limited, and the Supreme Court particularly has "cautioned against" expanding federal law "into areas, like police power, that are the historical prerogative of the states." *Id.* (citing *Shelby County*, 570 U.S. at 543, and *Morrison*, 529 U.S. at 661 n.8). "As repugnant as 'hate crimes' may be, the Constitution does not vest authority in the federal government to prosecute such crimes without a federal nexus." *Id.* (citation omitted). It entrusts their prosecution to state criminal-justice systems. U.S. Const. amend. X; *see Morrison*, 529 U.S. at 618.

Because Section 249(a)(1) sweeps broadly, criminalizing conduct unrelated to badges of slavery, it is not "congruent and proportional." It is a naked usurpation of police power reserved to the states.

D. Section 249(a)(1) is not "necessary" to abolish badges of slavery

Independent of *Boerne* and *Shelby County*, Section 249(1)(a) also is not "necessary." In *Jones*, 392 U.S. at 439-40, the Supreme Court held Congress only had Thirteenth Amendment power to enact legislation that is "necessary and proper for abolishing all badges and incidents of

slavery.” As explained above, Section 249(a)(1)’s expansive reach criminalizes discriminatory conduct with no nexus to slavery, and does so despite adequate state laws. It fails to meet *Jones*’s necessity test.

E. The court incorrectly rejected Roof’s constitutional challenge

The district court made three errors in rejecting Roof’s Thirteenth Amendment challenge. *First*, it summarily concluded the “current needs” test is inapplicable to the Thirteenth Amendment, finding Congress’s authority “not contingent on any current need,” only “on whether the prohibited conduct can rationally be described as a badge or incident of slavery.” According to the court, even “total cessation of hate crimes would not compel the courts to strike down federal hate crime prohibitions as needless legislation because that cessation could not change the historical facts of slavery in the United States.” JA-3508-09. Such a sweeping statement eliminates any focus on “current needs” and squarely conflicts with *Shelby County*.

Second, the court found *Boerne*’s “proportionality” test inapplicable, because the HCPA targets “private conduct that is *malum in se*”—wrong or evil in itself—and thus “there are no competing constitutionally protected interests and hence no meaningful

proportionality analysis.” JA-3512. But under this novel theory, virtually *any* criminal law would be exempt, because nearly all criminal laws target conduct that is wrong. That result would wildly expand Congress’s police power, allowing it to enact federal crimes untailed to the goals of the Reconstruction Amendments.

Third, although the court acknowledged *Boerne*’s “congruence” test applies to the Thirteenth Amendment (finding it indistinguishable from *Jones*’s existing requirements), it erroneously decided Section 249 is congruent because “it targets rationally identified badges and incidents of slavery”—“racially motivated violence.” JA-3510-12. In so holding, the court overlooked the HCPA’s expansive reach, targeting conduct unrelated to slavery, including discriminatory acts against people of all races, colors, religions, and ethnicities.

This Court should reject the district court’s flawed reasoning and find Section 249(a)(1) unconstitutional.

F. The certification process doesn’t save the statute from unconstitutionality

Section 249 requires the Attorney General to certify, before prosecution: (A) the state does not have jurisdiction; (B) the state has requested the federal government assume jurisdiction; (C) the verdict or

sentence obtained in state court left the federal interest in eradicating hate crimes unfulfilled; or (D) a federal prosecution is in the public interest and necessary to secure substantial justice. 18 U.S.C. §249(b)(1).

While the certification provision's stated purpose is "to ensure" federal prosecutors "assert [their] new hate crimes jurisdiction only in a principled and properly limited fashion"—and not trample on states' rights to prosecute hate crimes—it sets no meaningful limits. H.R. No.86, 111th Cong., 1st Sess. (Apr. 27, 2009) at 14. As such, it does not remedy the HCPA's otherwise-unconstitutional breadth. The district court never addressed this argument because it found Section 249(a)(1) constitutional, even absent certification. JA-3516-18. But the statute is unconstitutional, and the certification process does not save it.

Standing alone, subsections (b)(1)(A) through (C) arguably could remedy Section 249(a)(1)'s "current needs" deficiency by limiting federal prosecution to cases where a state cannot adequately prosecute. However, these subsections require no "congruent and proportional" response to a badge of slavery because they allow federal prosecution for discriminatory conduct based on any race, color, religion, or national

origin, regardless of whether the conduct is rooted in slavery. Further, subsection (D) gives federal prosecutors unlimited discretion to pursue cases “in the public interest,” without any “current need” or “congruent and proportional” requirement.

Though the Department of Justice assured Congress Section 249 would serve as a “backstop” for state prosecutions only in “rare instances—where there is an inability or an unwillingness by [a] State or local jurisdiction to proceed”—that has not been the case, as Roof’s prosecution demonstrates. S. Hrg. 14. Here, the State prosecuted Roof first, for the same conduct charged federally, and did so in a manner vindicating any arguable federal interest by seeking the most severe penalty (death) and alleging Roof’s motivation in support. JN-1-6.

Yet the federal government proceeded with its own Section 249 prosecution—an action unnecessary and unwelcomed by the State, as evidenced by its repeated objections to the federal case. JA-104-05; JN-34-35, 42-52, 62. The State’s frustration arose, in part, from its “concern” the federal prosecution was “unlikely (and unnecessary) to deliver the justice that the State has found to be appropriate,” and its exasperation when the federal prosecution “needlessly create[d] issues”

that undermined its ability to achieve justice. JN-42-52, 63, 68-69 (capitalization omitted).

As this case aptly demonstrates, Section 249(b)(1)'s certification requirement does not provide the safeguards that might render the HCPA constitutional. This Court should vacate Roof's convictions under Counts 1-12.

XXII. THE ATTORNEY GENERAL ERRONEOUSLY CERTIFIED ROOF'S FEDERAL PROSECUTION

As discussed in Section XXI.F, above, the federal government cannot prosecute a Section 249(a)(1) hate-crime case unless the Attorney General certifies it complies with one of four criteria in Section 249(b)(1). The Attorney General must make a similar certification for the federal government to prosecute a Section 247(a)(2) religious-obstruction charge. 18 U.S.C. §247(e).

Here, the Attorney General certified Roof's hate-crime and religious-obstruction charges (Counts 1-24) based on findings they were "in the public interest and [] necessary to secure substantial justice." JA-62-63. Without those findings, federal charges were unauthorized. 18 U.S.C. §249(b)(1)(D); *id.* §247(e). Because the Attorney General had

no basis for her findings, this Court must reverse Roof's convictions on Counts 1-24.

The purpose of the public-interest certification requirement is to “ensure appropriate deference to state or local prosecution in most cases, while allowing Federal prosecution where state or local officials will not assume jurisdiction or for any reason are unable to secure a conviction.” S.R. 100-324, 100th Cong., 2d Sess. (April 23, 2008) at 6; *see* H.R. No.86, 111th Cong., 1st Sess. (Apr. 27, 2009) at 5, 14. But, as discussed above, South Carolina willingly assumed jurisdiction and prosecuted Roof first, for identical conduct, and did so in a manner that vindicated any arguable federal interest—by seeking the most severe penalty (death) and alleging racial-motivation in support. *See* Section XXI.F. There was no additional public interest that the federal prosecution could have vindicated. Instead, as the State made clear, the federal prosecution did damage to “the traditional rules of comity and respect regarding [its] prosecution of” Roof. JN-52. Because the Attorney General failed to satisfy the public-interest certification requirement before authorizing prosecution on the hate-crime and

religious-obstruction offenses, this Court should reverse Roof's convictions for these counts.

The Court has authority to do so. Indeed, this Court has found similar Attorney-General certification decisions, such as whether there is a "substantial Federal interest" to prosecute a juvenile federally, subject to judicial review. *United States v. Juvenile Male No. 1*, 86 F.3d 1314, 1319 (4th Cir.1996). The district court so recognized, holding "*Juvenile Male* opens the door to review the Attorney General's certification." JA-3517. Although, in *Juvenile Male*, this Court did not precisely define what standard of review applies to a certification decision, the Court suggested a deferential standard. *Juvenile Male No. 1*, 86 F.3d at 1319. But even assuming significant deference, the Attorney General's decision was improper in Roof's case because there was no basis to find the state prosecution could not fully vindicate the public interest and secure substantial justice.

The district court summarily dismissed this argument, highlighting the gravity of Roof's crimes, and finding that seriousness established "a substantial federal interest" that "would not be vindicated by an ordinary murder prosecution." JA-3517-18. But in

focusing on the nature of the crimes, the court missed the point of Congress's decision to prohibit federal hate-crime and religious-obstruction prosecutions that could interfere with states' historical police power. Although the gravity of the crimes is undisputed, Roof was aggressively prosecuted for them in state court. A separate federal prosecution added nothing to the calculus and vindicated no substantial federal interest. Instead, it interfered with the State's ability to prosecute its own case.

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

**XXIII. VACATUR OF THE RELIGIOUS-OBSTRUCTION
AND HATE-CRIMES COUNTS REQUIRES VACATUR OF
THE FIREARM COUNTS AND DEATH SENTENCE IN
FULL**

Vacatur of the religious-obstruction counts (Counts 13-21) and the hate-crimes counts (Counts 1-9), requires vacatur of the death sentence altogether. Beyond Counts 13-21, the only remaining capital counts are Counts 25-33, for 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). The alleged, underlying "crimes of violence" were the religious-obstruction

and hate-crimes counts. Because both are void for the reasons discussed above, it necessarily follows that the §924(j) counts predicated on them are void too. Therefore, the death sentence must be vacated in full.

**XXIV. ROOF'S FIREARM CONVICTIONS ARE INVALID
BECAUSE THE PREDICATE OFFENSES AREN'T
CRIMES OF VIOLENCE**

Roof was convicted of 9 counts of using a firearm during and in relation to a crime of violence under 18 U.S.C. §§924(c) and (j)(Counts 25-33). Section 924(j) provides that “[a]ny person who, in the course of a violation of [Section 924(c)], causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder . . . be punished by death or by imprisonment for any term of years or for life.” 18 U.S.C. §924(j). Section 924(c) makes it a federal crime to, “during and in relation to any crime of violence . . . use[] or carr[y] a firearm.” *Id.* §924(c)(1)(A). The statute defines a “crime of violence” as an offense that is a felony and:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. §924(c)(3). Subsection (A) is known as the force clause; Subsection (B) is known as the residual clause.

In this case, the government alleged two predicate offenses for Roof's firearm charges: the hate-crime offenses (Section 249(a)(1)) in Counts 1-9, and the religious-obstruction offenses (Section 247(a)(2)) in Counts 13-21. Because neither are crimes of violence under the force or residual clauses, this Court should vacate Roof's convictions on Counts 25-33.

The Supreme Court recently held Section 924(c)'s residual clause is unconstitutionally void. *United States v. Davis*, 139 S.Ct. 2319 (2019). No offense can qualify as a crime of violence under that clause.

The hate-crime and religious-obstruction offenses also aren't crimes of violence under the force clause. Section 249(a)(1) can be violated by de minimis force (rather than violent force) or no force at all, and Section 247(a)(2) can be violated by de minimis force or force against one's own property (not against another's property). Additionally, though both offenses have a "death results" element, that also can be satisfied with no force and no mens rea.

For these reasons, the court erred in concluding Roof's predicate offenses were crimes of violence. JA-3526-32, 7001-25. Accordingly, all Section 924(j) convictions should be vacated; and because the invalid convictions (half the capital counts) elevated the seriousness of the charges and poisoned the entire death verdict, this Court should remand for resentencing.

A. Standard of review

"[W]hether a particular offense qualifies as a crime of violence under Section 924(c) presents a legal question" reviewed "de novo." *United States v. Evans*, 848 F.3d 242, 245 (4th Cir.2017).

To decide whether an offense is a crime of violence, courts employ the "categorical approach," looking only to its statutory definition and elements, not the underlying facts. *Descamps v. United States*, 570 U.S. 254, 261 (2013); *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir.2015). Under this approach, an offense is a crime of violence if all conduct it covers—"including the most innocent conduct"—matches or is narrower than the crime-of-violence definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir.2012).

B. Section 924(c)'s force clause requires an intentional act of violent physical force against the person or property of another

Section 924(c)'s force clause only encompasses offenses that require (1) an intentional act (2) of violent physical force (3) against the person or property of another. Sections 249(a)(1) and 247(a)(2) criminalize broader conduct, making them categorical mismatches for Section 924(c).

1. The clause requires violent physical force

The Supreme Court has held the word “physical force,” as used in Section 924(c)'s force clause, requires use of “violent force,” which necessarily “connotes a substantial degree of force,” i.e., “strong physical force . . . capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010); see *Evans*, 848 F.3d at 245 (explaining *Johnson*'s and Section 924(c)'s force clauses are indistinguishable). In so holding, the Court indicated de minimis force (like an arm squeeze that bruises) isn't violent physical force. *United States v. Castleman*, 572 U.S. 157, 165-66 (2014)(citing *Johnson*, 559 U.S. at 140).

The force clause also requires an affirmative act, not injury caused by omission (e.g., failing to provide food). *United States v. Gomez*, 690

F.3d 194, 201 (4th Cir.2012)(child-abuse statute with “physical injury” element not qualifying offense because it could be violated by “neglecting to act”); *United States v. Mayo*, 901 F.3d 218, 227 (3d Cir.2018)(aggravated assault not qualifying offense because it could be satisfied by “deliberate failure to provide food or medical care”).

2. The clause requires force against the person or property of another

The force clause’s plain language further requires force against the person or property “of another.” 18 U.S.C. §924(c)(3)(A). If applying force to one’s own property violates a statute, it isn’t a qualifying offense. Accordingly, the Supreme Court held any arson offense that can be committed by “destruction of one’s own property” categorically is not a crime of violence under 18 U.S.C. §16’s identical force clause. *Torres v. Lynch*, 136 S.Ct. 1619, 1630 (2016); see *United States v. Salas*, 889 F.3d 681, 684 (10th Cir.2018)(similar).

3. The clause requires intentional use of violent force

Finally, the force clause requires *intentional* use of force. In *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2014), the Supreme Court held Section §16’s identical force clause requires “a higher mens rea” than “accidental or negligent conduct.” *Leocal* didn’t decide whether recklessness is

sufficient, *id.* at 13, but this Court extended *Leocal* to require intentional use of force—a higher mens rea than recklessness. *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir.2018) (involuntary manslaughter not qualifying because it didn't require knowingly causing physical injury); *see id.* at 497 (plurality)(force clause “requires higher mens rea than recklessness”); *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir.2018)(relying on *Middleton* plurality to find reckless mens rea insufficient); *United States v. McNeal*, 818 F.3d 141, 155 (4th Cir.2016) (recklessness not enough to qualify).

C. Section 249(a)(1) hate crimes don't satisfy the force clause because they can be committed with de minimis force, no force, or unintentional force

Section 249(a)(1) is not a crime of violence because it can be committed by de minimis force, no force, or unintentional force.

Section 249(a)(1) has four elements: (i) the defendant willfully causes (ii) bodily injury to any person (iii) because of his or her actual or perceived race, color, or national origin, and (iv) death results. *Cannon*, 750 F.3d at 505. “Bodily injury” expressly includes anything from “a bruise” to “any other injury to the body, no matter how temporary.” 18 U.S.C. §249(c)(1)(cross-referencing *id.* §1365(h)(4)). But “a bruise,”

which can be caused by mere “squeeze of the arm,” does not require violent force. *Castleman*, 572 U.S. at 165. Likewise, “bodily injury” encompasses unwanted touching (for example touching a bruise) that may inflict temporary pain but does not require violent force. “Bodily injury” can also be accomplished by omission such as failing to provide food to a child because of his race. Such acts do not require any physical force—let alone violent physical force. *Mayo*, 901 F.3d at 227; *Gomez*, 690 F.3d at 201.

Because Section 249(a)(1) can be violated with de minimis force or no force at all, it is not a crime of violence.

The district court thought the statute’s “death results” element necessarily requires intentional use of violent physical force. But the “death results” element doesn’t change the outcome for two reasons. *First*, just like “bodily injury,” the “death results” element can be satisfied by an omission (like food deprivation) that requires no force. *Second*, even assuming the “death results” element requires violent physical force, it doesn’t require *intentional* use of violent physical force because an intent to kill isn’t necessary. In fact, the element requires no mens rea at all—a conclusion “supported by a long line of cases

interpreting the phrase ‘if death results’ under analogous statutes.”

United States v. Woodlee, 136 F.3d 1399 (10th Cir.1998)(“death results” element of 18 U.S.C. §245(b), prohibiting violent interference with enjoyment of public facility based on race, does not require intent to kill); see *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir.1979)(“No matter how you slice it, ‘if death results’ does not mean ‘if death was intended.’”). The same reasoning applies here.

Although Section 249(a)(1) has a “willfulness” (intentional) mens rea, that mens rea does not attach to the “death results” element. It only requires intentional infliction of “bodily injury,” which as explained above, can be accomplished by de minimis force or no force at all. Therefore, Section 249(a)(1) only requires intentional use of de minimis force or an intentional act of omission—not intentional use of *violent physical force*.

This matters because the force clause demands a single element that simultaneously requires (1) “intentional” (2) use of “violent physical force” in the same act. *Middleton*, 883 F.3d at 498. Section 249(a)(1) has no such element because “bodily injury” only requires intentional use of *de minimis force* or *no force*. And “death results,” even

if it requires violent physical force, doesn't require *intentional* use of violent physical force. Hence, at most, the "bodily injury" and "death results" elements each come halfway toward satisfying the force clause, though neither contains both requirements at the same time.

Thus, Section 249(a)(1) criminalizes even an accidental killing—for example, a defendant squeezing someone's arm because of her race, causing her to lose her balance and fall to her death—the defendant neither intended nor anticipated. Such an unintentional result falls squarely outside Section 924(c)'s force clause.

In sum, Roof's hate-crime convictions (Counts 1-9) do not satisfy Section 924(c)'s force clause and were not proper crime-of-violence predicates for his firearm convictions.

D. Section 247(a)(2) religious-obstruction crimes don't satisfy the force clause because they can be committed with (i) de minimis force (ii) against one's own property (iii) resulting in unintentional death

Section 247(a)(2) criminalizes "intentionally obstruct[ing], by force or threat of force, including by threat of force against religious real property, any person in the enjoyment of that person's free exercise of religious beliefs." If death results, the sentence is life, a term of years,

or death. 18 U.S.C. §247(a)(2).⁴⁸ The offense has five elements: (i) intentional; (ii) obstruction of the free exercise of religious beliefs; (iii) by force (including threat of force against real property); (iv) resulting in death; (v) where the offense is in or affects interstate commerce.

Section 247(a)(2) doesn't satisfy the force clause for three reasons: it can be violated with (1) de minimis force, (2) force against one's own property, and (3) unintentional force.

First, though the statute criminalizes obstruction “by force or threat of force,” “force” is a term of art that includes de minimis force. Indeed, legislative history demonstrates the statute was intended to cover “simple vandalism,” including “defacing the walls of a synagogue with a swastika” and “anti-Semitic graffiti.” H.R. Rep. No.100-337 (Oct. 2, 1987); H.R. Rep. No.99-820 at 1 (Sept. 12, 1986); *see* Cong. Rec. at 25349 (Sept. 22, 1986). Thus, Congress intended Section 247(a)(2) to criminalize conduct involving only de minimis force. *Cf. United States v.*

⁴⁸ Congress added the phrase “including by threat of force against religious real property” in 2018, after Roof's trial. The language was clarifying, not substantive. S.R. No. 115-325, at 2 (2018); 115 Cong. Rec. H9774 (daily ed. Dec. 11, 2017).

Bowen, 936 F.3d 1091, 1104 (10th Cir.2019)(statute doesn't satisfy force clause because it includes spray-painting a car).

Second, Section 247(a)(2) criminalizes use of force against one's own property. The statute defines "religious real property" broadly to include "any church, synagogue, mosque, religious cemetery, or other religious real property." 18 U.S.C. §247(f). Like the definition of "property" under the federal arson statute, this definition of "religious real property" doesn't require harm to someone else's property. *Salas*, 889 F.3d 681. Instead, a defendant violates Section 247(a)(2) if he burns his own cross in front of an African-American church, or even if he burns down his own shared prayer room or "house church."⁴⁹ Because such conduct interferes with another's exercise of religion, it would violate Section 247(a)(2), but it does not require force against property *of another*. Therefore, like the federal arson statute in *Salas*, Section 247(a)(2) categorically fails to qualify as a crime of violence.

⁴⁹ See www.pluralism.org/religions/hinduism/the-hindu-experience/home-altar (discussing Hindu practice of maintaining in-home prayer rooms); www.rethinkchurch.org/articles/spirituality/what-is-a-house-church (describing Christian practice of worshipping in private "house churches").

Third, Section 247(a)(2)'s "death results" element is immaterial because, like Section 249(a)(1)'s similar element, it does not require an intent to kill. The district court got this point wrong by mixing and matching elements. JA-3531-32.

E. At least one juror likely considered Roof's unconstitutional firearm convictions in voting for death

Because neither hate-crime nor religious-obstruction offenses qualify as crimes of violence, Roof's firearm convictions predicated on those supposed crimes of violence cannot stand. And because the government cannot demonstrate the error was harmless beyond a reasonable doubt—i.e., that *half* the death-eligible convictions did *not* contribute to the death sentence—a new penalty phase is required.

Chapman, 386 U.S. at 24.

1. The Eighth Amendment and due process require resentencing

Roof was sentenced to death for 18 separate offenses—9 firearm offenses (Counts 25-33) and 9 religious-obstruction offenses (Counts 13-21). For the reasons discussed above, the firearm counts shouldn't have been submitted to the jury. Because *half* the convictions that resulted in death sentences are invalid, the "real question" is "whether the

sentence [on the valid convictions] might have been different” if the jury had known the others were “unconstitutionally obtained.” *United States v. Tucker*, 404 U.S. 443, 448 (1972).

In *Tucker*, the Supreme Court affirmed resentencing after two prior convictions known to the sentencer were invalidated. Finding the sentence was imposed “at least in part upon misinformation of constitutional magnitude,” the Court declared it would be “callous to assume, now that the constitutional invalidity of the respondent’s previous convictions is clear, that the [sentencer] will upon reconsideration ‘undoubtedly’ impose the same sentence.” *Id.* at 447, 449 n.8.

Though *Tucker* addressed invalid prior convictions (not invalid predicate offenses), the determinative factor was whether those convictions were known to, and likely considered by, the sentencer. Similarly, when a defendant is sentenced on multiple counts and one or more convictions is invalidated, the defendant must be resentenced on the remaining counts unless the government establishes the sentencer did not rely on the invalid counts.

Relying on *Tucker*, sister circuits have required resentencing on remaining convictions where it “appeared possible [the sentencer] might have relied in part on an unconstitutional conviction.” *James v. United States*, 476 F.2d 936, 937 (8th Cir.1973); see *Bourgeois v. Whitley*, 784 F.2d 718, 721 (5th Cir.1986)(resentencing required “unless it can be ascertained from the record that a trial court’s sentence on a valid conviction was not affected” by invalid convictions); *Jerkins v. United States*, 530 F.2d 1203, 1204 (5th Cir.1976)(same); *United States v. Pinkney*, 551 F.2d 1241, 1246 n.37 (D.C. Cir.1976)(same).

This rule has greater force in a capital case, where the Eighth Amendment “gives rise to a special need for reliability” at sentencing. *Johnson*, 486 U.S. at 584 (quotations omitted). The simple “possibility [the] jury conducted its task improperly certainly is great enough to require resentencing.” *Mills v. Maryland*, 486 U.S. 367, 384 (1988).

Importantly, resentencing is required when it’s possible an invalid conviction influenced a *single* juror to recommend death. *Johnson*, 486 U.S. at 586; *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir.1989). Here, the record fails to eliminate, as it must, the “possibility” one juror was “affected” by the invalid firearm convictions. *Mills*, 486 U.S. at 384;

Bourgeois, 784 F.2d at 721. Indeed, it is difficult to imagine the cumulative weight of 9 erroneously-submitted capital convictions—half the death-eligible counts—did *not* affect one juror’s decision to impose death. The firearm charges elevated the seriousness of the remaining religious-obstruction offenses by characterizing them as separate “crimes of violence.” And they made it harder to reject a death sentence, requiring jurors to do so for 18 eligible counts, not 9. What is more, the firearm counts were central to the government’s case; as part of their deliberations, jurors were required to answer 27 separate questions about them. JA-5184-97.

Because the firearm counts elevated the seriousness of the religious-obstruction counts and doubled the death-eligible crimes, it is possible they affected at least one juror’s sentencing decision. To conclude otherwise—that jurors “undoubtedly” would have delivered the same verdict without the unconstitutional convictions—would entail “callous” speculation. *Tucker*, 404 U.S. at 449 n.8. Roof must be resentenced on the remaining counts.

2. The sentencing package doctrine requires a new penalty hearing

When one count of a multi-count sentence is invalidated, the “sentencing package doctrine” also requires resentencing. *United States v. Ventura*, 864 F.3d 301, 309 (4th Cir.2017). The doctrine recognizes “a criminal sentence is a package of sanctions” the sentencer “utilizes to effectuate its sentencing intent.” *Pepper v. United States*, 562 U.S. 476, 507 (2011)(quotations omitted). Accordingly, when part of an aggregate sentence is vacated, “[r]esentencing on all counts” allows the sentencer to “unbundle” the package and impose a new sentence. *United States v. Ciavarella*, 716 F.3d 705, 734 (3d Cir.2013); see *United States v. Brown*, 879 F.3d 1231, 1239 (11th Cir.2018)(“If there is a chance that an erroneous sentence on one count of conviction influenced the sentencing judge’s decisions on other counts, then merely excising the mistaken sentence for one count won’t put the defendant in the same position as if no error had been made.”).

That is what happens as a matter of course, including in this Circuit, when a Section 924(c) conviction is invalidated but other counts remain. *Davis*, 139 S.Ct. at 2336; *Ventura*, 864 F.3d at 309; *United States v. Walker*, 934 F.3d 375, 380 (4th Cir.2019). The sentencing

package doctrine thus reinforces the result compelled by *Johnson*, *Tucker*, and their progeny: because Roof's firearm convictions are invalid, he must be resentenced.

CONCLUSION

Roof respectfully asks this Court to vacate his convictions and death sentence.

AMY M. KARLIN
Interim Federal Public Defender for
the Central District of California

JAMES WYDA
Federal Public Defender for the
District of Maryland

By */s/ Alexandra W. Yates*

Alexandra W. Yates
Deputy Federal Public Defender
Federal Public Defender
Central District of California
321 East 2nd Street
Los Angeles, CA 90012
(213) 894-2854

By */s/ Sapna Mirchandani*

Sapna Mirchandani
Assistant Federal Public Defender
Federal Public Defender
District of Maryland
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770
(301) 344-0600

Counsel for Appellant

REQUEST FOR ORAL ARGUMENT

This capital case involves a number of complex issues, some of which will be issues of first impression for this Court. Counsel for Appellant respectfully request oral argument in this case so the issues presented herein may be more fully developed.

ADDENDUM

United States v. Deonta Lamont Carpenter, Dist. Ct. No. 3:07-cr-01521-JFA-1

United States v. Lamont Wheeler, Dist. Ct. No. 4:11-cr-02343-RBH-1

United States v. John Cordero, Dist. Ct. No. 3:96-cr-00358-JFA-14

United States v. Michael Sanderson, Dist. Ct. No. 6:11-cr-00331-HMH-1

United States v. Richard Anthony Morgan, Dist. Ct. No. 4:98-cr-00428-CMC-1

United States v. Robert White, Dist. Ct. No. 2:00-cr-00022-PMD-1

United States v. Brett A. Rodman, Dist. Ct. No. 2:06-cr-00170-PMD

United States v. Truman Lewis, Dist. Ct. No. 2:12-cr-00507-RMG

United States v. Cornelius McDonald, Dist. Ct. No. 3:05-cr-01217-MBS-1.

CERTIFICATE OF COMPLIANCE

1. This Brief of Appellant has been prepared using Microsoft Word 2016, Century Schoolbook font, 14-point proportional type size.
2. Exclusive of the table of contents, table of authorities, and certificate of service, this brief contains no more than 50,000 words.

I understand that a material misrepresentation can result in this Court's striking the brief and imposing sanctions. If the Court so requests, I will provide a copy of the word or line print-out.

Date: 01/28/20

/s/ Sapna Mirchandani

Sapna Mirchandani

CERTIFICATE OF SERVICE

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

Bonnie I. Robin-Vergeer
U.S. Department of Justice
Civil Rights Division, Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, DC 20044-4403

on this 28th day of January, 2020.

/s/ Sapna Mirchandani
Sapna Mirchandani