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

BRIEF FOR THE UNITED STATES AS APPELLEE

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INTRODUCTION

On June 17, 2015, Dylann Storm Roof, a white man, entered the Emanuel African Methodist Episcopal (AME) Church (often called Mother Emanuel), a historic African-American church in Charleston, South Carolina. The parishioners welcomed him to Bible study class, unaware that Roof had been planning for months to attack African Americans and instigate a race war. After sitting with the parishioners for 45 minutes, Roof pulled out a semi-automatic pistol and repeatedly shot them as they closed their eyes to pray. He killed nine parishioners: Reverend Sharonda Coleman-Singleton, Cynthia Hurd, Susie Jackson, Ethel Lee Lance, Reverend DePayne Middleton-Doctor, Reverend Clementa Pinckney, Tywanza Sanders, Reverend Daniel Simmons, Sr., and Reverend Myra Thompson.

Following a jury trial, Roof was convicted of federal hate-crimes and firearms charges and sentenced to death. This appeal follows.

JURISDICTIONAL STATEMENT

Roof appeals the judgment of conviction and sentence in this capital case. The district court had jurisdiction under 18 U.S.C. 3231 and entered judgment on January 23, 2017. JA-6968-6972.[1] On May 10, 2017, the court denied Roof's timely motion for a new trial or judgment of acquittal. JA-6996-7026. Roof filed

[1] "JA-" refers to the Joint Appendix. "SJA-" refers to the Supplemental Joint Appendix. "Ex." refers to media exhibits introduced by the government at trial and filed with the JA. "Br. __" refers to Roof's opening brief.

a timely notice of appeal on May 23, 2017. JA-7029-7030. This Court has jurisdiction under 18 U.S.C. 3595, 3742 and 28 U.S.C. 1291.

STATEMENT OF ISSUES

Points related to competency

1. Whether the district court clearly erred in finding Roof competent to stand trial.

2. Whether the district court abused its discretion by granting only in part defense counsel's request for a continuance of the first competency hearing.

3. Whether the district court abused its discretion by limiting the scope of the second competency hearing to new developments regarding Roof's competency since the first hearing.

Points related to self-representation

4. Whether the district court properly advised Roof that his Sixth Amendment right to counsel did not authorize him to control counsel's presentation of mitigation evidence.

5. Whether the district court correctly determined that the Sixth Amendment applies in capital penalty proceedings.

6. Whether the district court correctly determined that neither the Fifth or Eighth Amendments nor the Federal Death Penalty Act prohibited Roof from representing himself and withholding mitigation evidence.

7. Whether the district court was required to explain how it would exercise its discretion to limit the role of standby counsel, or provide Roof with an option of waiting until the penalty phase to self-represent, before it could accept Roof's waiver of the right to counsel.

8. Whether the district court correctly recognized that it had discretion to deny Roof's self-representation motion.

9. Whether the district court abused its discretion in finding that Roof had the mental capacity to represent himself.

10. Whether the district court abused its discretion by limiting the role of standby counsel or denying accommodations requested by Roof.

Points related to death verdict

11. Whether the district court reversibly erred by allowing the government to respond to Roof's mitigating factors that he would not be dangerous in prison and could be safely confined, or by declining to clarify those mitigators for the jury.

12. Whether the district court reversibly erred by declining to strike testimony that Roof was "evil" or would go to the "pit of hell."

13. Whether the district court reversibly erred by allowing the government to introduce victim-impact evidence about the victims' religious activities and to state during closing argument that the victims were good and devout people.

14. Whether the district court plainly erred by not finding the death penalty unconstitutional as applied to Roof on the grounds that he was 21 at the time of the offense and had mental-health issues.

Points related to guilt verdict

15. Whether Roof was validly convicted of intentional obstruction of persons in the free exercise of religious beliefs, in violation of 18 U.S.C. 247(a)(2).

16. Whether 18 U.S.C. 249(a)(1), which criminalizes racially-motivated violence, is constitutional under the Thirteenth Amendment.

17. Whether the Attorney General's certifications under 18 U.S.C. 247 and 249 are judicially reviewable and if so, whether the Attorney General properly exercised her discretion to certify Roof's prosecution.

18. Whether violations of 18 U.S.C. 247(a)(2) and (d)(1) and 18 U.S.C. 249(a)(1) are categorically crimes of violence under 18 U.S.C. 924(c).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On July 22, 2015, a federal grand jury in the District of South Carolina returned a 33-count indictment charging Roof with offenses arising from the murder of nine parishioners and attempted murder of three others at Mother Emanuel. JA-49-63. Roof was charged with: racially-motivated hate crimes for willfully causing, or attempting to cause, bodily injury to the parishioners because

of their race and color, resulting in death, in violation of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (Shepard-Byrd Act), 18 U.S.C. 249(a)(1) (Counts 1-9); racially-motivated hate crimes involving an attempt to kill, in violation of 18 U.S.C. 249(a)(1) (Counts 10-12); intentionally obstructing the parishioners by force in their free exercise of religious beliefs, resulting in death, in violation of the Church Arson Prevention Act of 1996, 18 U.S.C. 247(a)(2) and (d)(1) (Counts 13-21); intentionally obstructing parishioners' religious exercise by force and threat of force, involving an attempt to kill and use of a dangerous weapon, in violation of 18 U.S.C. 247(a)(2), (d)(1), and (d)(3) (Counts 22-24); and using a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1) (Counts 25-33). JA-49-58.

Death was an authorized penalty for Roof's violations of Section 247 resulting in death (Counts 13-21) and of Section 924(c) and (j)(1) (Counts 25-33). Consistent with the Federal Death Penalty Act (FDPA), 18 U.S.C. 3591-3599, the indictment also alleged facts to justify the death penalty. JA-58-61. The government later filed a Notice of Intent to Seek the Death Penalty on all 18 death-eligible counts. JA-145-151.

A jury convicted Roof on all counts. JA-5164-5173, 5184-5197. After a penalty hearing, the jury unanimously recommended that Roof be sentenced to

death on each capital count. JA-6781-6783, 6806. The district court imposed death sentences on those counts and life sentences without the possibility of release on Counts 1-12 and 22-24. JA-6937-6942. The court entered judgment on January 23, 2017. JA-6968-6972.

II. THE FEDERAL DEATH PENALTY ACT

The FDPA provides that when the government seeks the death penalty, the district court must convene a separate sentencing proceeding before the same jury that convicted the defendant of a capital crime. 18 U.S.C. 3593(b)(1). The jury decides, first, whether the government has established beyond a reasonable doubt at least one mental state specified in 18 U.S.C. 3591(a)(2) and at least one aggravating factor enumerated in 18 U.S.C. 3592(c). See 18 U.S.C. 3593(d). If the jury unanimously finds at least one mental-state factor and at least one statutory aggravating factor, the defendant is death-eligible. 18 U.S.C. 3593(e).

The jury next considers whether the aggravating factors found to exist "sufficiently outweigh" any mitigating factors "to justify a sentence of death." 18 U.S.C. 3593(e). The jury can consider any non-statutory aggravating factors that it finds unanimously and beyond a reasonable doubt. 18 U.S.C. 3593(d). The jury must also consider any mitigating factors. 18 U.S.C. 3592(d). The jury must unanimously recommend a sentence of death, life imprisonment without possibility of release, or some other lesser sentence. 18 U.S.C. 3593(e). A jury

recommendation of death or life without possibility of release is binding on the court. 18 U.S.C. 3594.

III. FACTUAL BACKGROUND

A. Parishioners Gather For Bible Study Class At Mother Emanuel

On June 17, 2015, parishioners and church leaders gathered at Mother Emanuel for the weekly Wednesday night Bible study class. JA-3680-3696, 5001-5014. The usual Bible study leader was there—Reverend Daniel Simmons, Sr., a 74-year-old pastor whom one parishioner called "the backbone of the church." JA-3676-3680; see SJA-266; JA-6502. On this particular night, Reverend Simmons invited 59-year-old Reverend Myra Thompson, who was awarded her preaching certificate earlier that evening, to lead the class for the first time. JA-3675, 3680-3683, 5002-5003; see SJA-273; JA-6509. She was excited about the opportunity and asked her close friend, Polly Sheppard, age 72, to attend for support. JA-3682, 4995-4996, 5003-5004.

Mother Emanuel's lead pastor, Reverend Clementa Pinckney, age 41, who was a state senator, also attended the Bible study class. JA-3674-3675, 5008-5009, 5014, 5813-5814; see SJA-265; JA-6501. During the class, Reverend Pinckney's wife, Jennifer Pinckney, and their six-year-old daughter, waited in the Pastor's study, adjacent to the Fellowship Hall. JA-5008-5009, 5817, 5857-5860.

Ethel Lance, the church sexton, age 70, also joined the Bible study that night. JA-3687-3689; see SJA-268; JA-6504. She was devoted to keeping the church clean and worked from early morning until late at night, sometimes accompanied by her special-needs son. JA-3688-3689, 5005-5006.

Felicia Sanders, age 58, attended with her son, Tywanza, 26 years old, with whom she was "very[,] very close," and her 11-year-old granddaughter, K.M., who often lived with them. JA-3693-3695, 5012-5013; see SJA-270; JA-6506. Tywanza Sanders loved to write poetry and act, and he took on a "father role" with K.M. JA-3671, 3694-3696, 5012.

Felicia Sanders urged another parishioner, Cynthia Hurd, age 54, a warm and hard-working librarian, to stay for class. JA-3683-3684, 5011; see SJA-267; JA-6503. Hurd sat next to Reverend Sharonda Coleman-Singleton, age 45, "the most sought after minister in Charleston." JA-3684-3685, 5009; see SJA-272; JA-6508. Also attending was Reverend DePayne Middleton-Doctor, 49 years old, who also had received her preaching certificate that evening and who "could sing like an angel." JA-3675, 3686-3687, 5002, 5010; see SJA-271; JA-6507.

Finally, Tywanza Sanders's aunt, Susie Jackson, attended the Bible study. At age 87, she was the matriarch of the Jackson family, Mother Emanuel's largest family. JA-3689-3691, 5011-5012; see SJA-269; JA-6505. "Aunt Susie" had a beautiful voice and sang in the church choir. JA-3692, 5011.

B. Roof Kills Nine Parishioners

That evening, Dylann Roof, a white 21-year-old man, drove from Columbia, South Carolina, to Mother Emanuel in Charleston, intent on killing African Americans. See JA-4889-4890; JA-4260-4345 (transcript of federal agents' interview of Roof);[2] SJA-410-414; see also JA-6500.

Around 8:16 p.m., Roof parked his car and entered the Fellowship Hall. JA-3672, 3871-3872, 4155, 4890; SJA-274, 415; Ex. 23c. He carried a Glock .45 caliber semi-automatic handgun and eight magazines loaded with 11 hollow-point bullets each, all concealed in a tactical pouch. JA-4140-4142, 4195, 4265-4269, 4274-4276, 4288-4289, 4304-4306, 4474, 4721-4722; SJA-415; Ex. 23c. The 88 loaded bullets were code for "Heil Hitler," as "H" is the eighth letter of the alphabet. JA-4142, 4161, 4836.

When Roof entered the hall, Reverend Coleman-Singleton announced, "Pastor, we have a visitor," and the 12 parishioners—all African Americans—welcomed Roof to the Bible study class. JA-3696-3698, 4267, 5014-5015. Reverend Pinckney sat Roof next to him, handing him a Bible and a study sheet. JA-3697-3698, 3928-3929, 4272-4274, 5014-5015. Reverend Middleton-Doctor told an amusing story about returning library books; Roof chuckled. JA-3698.

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[2] Ex. 5, filed with the Joint Appendix, is a video of that interview.

After about 45 minutes, as the parishioners rose and shut their eyes for the closing prayer (JA-3699, 5015-5016), Roof pulled out his gun, shot Reverend Pinckney several times, and then repeatedly fired at the remaining parishioners as they dove under tables (JA-3699-3700, 4274-4277, 4984-4985, 5016-5017). According to Felicia Sanders, it sounded "like a machine gun * * * going off in the room." JA-3700. After Roof shot Reverend Pinckney, Reverend Simmons stood up and said, "Let me check on my pastor, I need to check on my pastor." JA-3700, 5017. Roof then shot Reverend Simmons at least six times. JA-4975-4978, 5017.

Roof was "pacing around" shooting at the parishioners under the tables and repeatedly reloading his gun. JA-3940-3947, 3974-3977, 4275-4277. Felicia Sanders grabbed her granddaughter, telling her "just be quiet," but K.M. kept saying, "Granny, I'm so scared." JA-3700-3701. Sanders told her, "just play dead," and muzzled her grandchild's face into her body so tightly Sanders thought she was suffocating her. JA-3701.

Polly Sheppard saw Roof's boots from under the table as he walked toward her. JA-5017. Sheppard was praying aloud. JA-5017. As Roof reached her, he told her to "shut up." He then asked, "Did I shoot you yet?" Sheppard responded, "[N]o." And Roof said, "I'm not going to. I'm going to leave you here to tell the story." JA-5017; see also JA-3701.

Meanwhile, Felicia and Tywanza Sanders were communicating under the table, and Tywanza knew his mother and K.M. were still alive. JA-3701. Tywanza stood up to redirect Roof's attention and asked, "Why are you doing this?" JA-3701, 5018. Roof, with his gun pointed at Tywanza, said that he "ha[d] to" because "[y]ou're raping our women and taking over the nation." JA-5018; see also JA-3701-3702. Tywanza said, "You don't have to do this. We mean you no harm." JA-3702. Roof then shot Tywanza Sanders multiple times. JA-3702, 4989-4990, 5019.

During a pause in the shooting, Polly Sheppard called 911. JA-5019-5020; Ex. 8. At 9:06 p.m., Roof exited the church. JA-3702, 3858, 3872, 4890; SJA-416; Ex. 23d. Jennifer Pinckney, hiding with her daughter in the Pastor's study, also called 911. JA-5865-5866; Ex. 9. As Roof left, Tywanza Sanders, screaming for "Aunt Susie," began to make his way across the floor toward her. JA-3702-3703. Hearing sirens by then, Felicia Sanders tried to get her son to lie still and wait for help. JA-3702. He died shortly after first responders arrived. JA-3743-3744, 3750-3751, 3762. Reverend Simmons also was still alive, suffering from traumatic gunshot injuries. JA-3797-3800. He died at the hospital. JA-3764, 3798-3802, 6502. The other seven gunshot victims showed no signs of life when help arrived. JA-3764, 3781-3796.

All in all, Roof fired 74 bullets and killed nine people, riddling each of them with multiple gunshots. JA-3954-3957, 3961, 4993-4994. From the Bible study class, only Polly Sheppard, Felicia Sanders, and Sanders's granddaughter survived. JA-3751-3752, 3761, 3763. Jennifer Pinckney and her daughter survived in the Pastor's study. JA-3752, 3763, 3804-3805.

C. Roof Flees And Is Arrested

The shootings set off a massive man hunt. Based on church surveillance video (JA-3871-3872, 4890; Ex. 23c-e), police publicized photos of a suspect and set up a phone bank (JA-3859-3860, 4820-4823, 4827; SJA-275). The next morning, callers (including from Roof's family) identified the suspect as Roof. JA-4117-4119, 4823-4824.

Not expecting to survive the shootings, Roof had no plan. He drove out of Charleston on an interstate highway and eventually headed toward Charlotte, North Carolina. JA-4279-4280, 4890-4892; SJA-417-418. Around 10:30 a.m., police officers, acting on a tip, stopped Roof's car as he drove into Shelby, North Carolina. JA-4012-4054, 4082-4094, 4892.

One officer approached and ordered the driver out the car. JA-4019. The officer noticed a global positioning system (GPS) device in the driver's lap. JA-4018. The driver identified himself as Dylann Roof. JA-4019. Another officer asked Roof if he was involved in the Charleston shooting, and Roof responded

affirmatively. JA-4043, 4053. Roof told the officers there was a gun in his backseat, and officers located a Glock semi-automatic handgun there. JA-4021-4022, 4044-4045, 4053. Roof was then taken to the Shelby police station. JA-4043-4047, 4087-4089.

D. Roof Confesses

At the police station, Agent Michael Stansbury and another agent from the Federal Bureau of Investigation (FBI) obtained a *Miranda* waiver from Roof and interviewed him for about two hours. JA-4126-4173, 4260-4346; Ex. 5.

Roof confessed to the killings. JA-4264-4265. He explained that he shot African Americans at Mother Emanuel with a Glock .45 caliber handgun. JA-4265. Roof described buying the gun two months earlier when he turned 21 and where he bought the gun and ammunition; bringing eight magazines with him to the church, each loaded with 11 hollow-point bullets; and concealing the gun and magazines in a tactical bag, which he dropped as he left the church. JA-4265-4269, 4274-4276, 4288-4289, 4304, 4306. Roof agreed that his "mission" was "to kill black people," and he explained that when he bought the gun, he wanted to get "the big, the best, the biggest caliber." JA-4304.

Roof told the agents he "had to do it." JA-4269. He wanted to kill African Americans to obtain retribution for the wrongs he believed they had inflicted on white people, "agitate race relations," and cause "a race war." JA-4269-4270,

4329-4330. He stated that "black people are killing white people every day on the streets and they rape * * * a hundred white women a day." JA-4269. Roof commented that what he did was "so miniscule to what they're doing to white people every day, all the time and just because that doesn't get on the news, doesn't mean it's not happening." JA-4269. He recognized that the people he shot were innocent, but he stated that "black people kill innocent white people every day." JA-4281. Roof called himself a "white nationalist" who believed that "white people are superior to blacks." JA-4282-4283.

Roof explained that he chose Mother Emanuel for his attack because it would be a good place to find African Americans, Charleston was a historic city, and the church was historically important. JA-4271-4272, 4323-4324; see JA-4906 (Mother Emanuel founded in 1818 as the first AME church in the South). Roof thought about going to a black festival, but he knew a festival would have security. JA-4282. So, instead, Roof used the Internet to research black churches in Charleston. JA-4152, 4270-4272, 4322-4323. Roof knew Mother Emanuel would be holding a Bible study class that evening because, on a previous visit to Charleston, a parishioner outside the church told Roof that Bible study classes were held on Wednesday nights. JA-4267, 4270, 4322.

E. Roof's Planning, Preparation, And Racist Website

The evidence collected in the investigation showed that Roof had considered, planned, and prepared for this attack for months.

1. On April 16, 2015, Roof purchased the Glock .45 semi-automatic pistol used in the attack and extra magazines. JA-4441-4442, 4470-4474, 4641-4642, 4871; see Ex. 235b. Over the next two months, Roof purchased more magazines, .45 caliber hollow-point bullets, and a laser sight. See, *e.g.*, JA-4410, 4474, 4643, 4721-4726, 4832-4833, 4875-4876, 4879-4880, 4888, 4918-4921. Videos and spent cartridge casings showed that Roof had fired the gun in target practice in his backyard. JA-4758-4761, 4793-4794; see Ex. 297-299.

2. During the car search, South Carolina Law Enforcement Division agents (JA-3903, 4181-4184) found a handwritten list of six predominantly African-American churches in Charleston, the first of which was "Emanuel AME." JA-4417-4418, 4628, 4896. Another sheet of paper listed other African-American churches in South Carolina. JA-4443-4444, 4629-4630, 4893-4894. Telephone records showed that on February 23, 2015, a 13-second telephone call was made from the landline at Roof's home to Mother Emanuel. JA-4761, 4797-4803, 4863-4864; see JA-4922-4927.

Satellite data stored on the GPS (JA-4694-4695, 4702-4714, 4855-4856) showed the device had been driven on interstate highways between Columbia and

Charleston six times during the six months preceding the shooting, from December 2014 to May 2015. JA-4858-4888. On most trips, Roof stopped at historical sites around Charleston or elsewhere in South Carolina, each time visiting the immediate vicinity surrounding Mother Emanuel; the GPS maps' details were corroborated by photos Roof took during his trips and other evidence. JA-4857-4888; SJA-315-404, 426 (timeline, GPS maps, and photos).

On June 17, 2015, the day of the shootings, the GPS reflected that Roof departed Columbia at 6:13 p.m. and drove on I-26, an interstate highway, into Charleston; the GPS stopped at 7:48 p.m. near Mother Emanuel. JA-4889-4890; SJA-410-412.

3. The car search also yielded handwritten notes from Roof to his parents apologizing for what he did and a journal kept by Roof. JA-4200-4219, 4234-4259, 4719-4720, 4833, 4917. On the journal's first and last pages appeared the name of a website, "lastrhodesian.com." JA-4235, 4258. The journal expressed racist views similar to those Roof posted on that website. JA-4831-4832.

Months before the attack, Roof had set up the website, which he named after Rhodesia, the former apartheid state. JA-4838, 4845, 4847-4848. The website was hosted by a foreign Internet server, to which Roof made monthly payments. JA-4602-4603, 4650-4651, 4847-4848, 4862-4863, 4869-4870, 4875, 4888, 4928-

4933. Just hours before the shootings, Roof went to his father's house and uploaded material to the website. JA-4595-4603, 4645-4650, 4847-4848, 4889.

The website included hyperlinks to text and photos. JA-4556; SJA-276-278, 281-311. The "text" link led to a document (JA-4556, 4561-4574, 4623-4627) in which Roof expressed a racist ideology and claimed white superiority, using racial slurs in his description of African Americans as "stupid and violent" (JA-4623). He discussed black-on-white crime, which he claimed was a crisis ignored by the media. JA-4623. He wrote: "We are told to accept what is happening to us because of ancestors wrong doing [sic], but it is all based on historical lies, exaggerations and myths." JA-4624.

Roof's text continued with a call to arms, explaining that it was not "too late" to take America back and "by no means should we wait any longer to take drastic action." JA-4625. He denounced American patriotism as "an absolute joke" because Americans had nothing to be proud of while blacks murdered whites in the streets every day. JA-4626. Roof stated that nobody was "doing anything but talking on the internet," that "someone has to have the bravery to take it to the real world," and he "guess[ed] that has to be [him]." JA-4627.

F. Other Physical And Forensic Evidence

Extensive physical evidence and eyewitness testimony corroborated Roof's confession. For example, Roof purchased the Glock handgun, ammunition, and

magazines, p. 15, *supra*; his fingerprint was on the trigger (JA-4531-4533, 4644); ballistics evidence connected the fired bullets and casings to the gun (JA-4519-4521); ammunition found in Roof's car matched that found at Mother Emanuel (JA-4195); surveillance video showed Roof entering and leaving the church (JA-3871-3872, 4890; SJA-415-416; Ex. 23c-d); the gun was lying on the backseat of his car (JA-4021-4022, 4044-4045, 4198-4199, 4221); and surviving eyewitnesses identified Roof at trial (JA-3697, 5014).

IV. PRETRIAL PROCEEDINGS

The district court appointed David Bruck, an attorney with extensive capital-case experience, as lead counsel for Roof. JA-64-68. Roof offered to plead guilty in exchange for a sentence of life imprisonment. JA-77, 161, 373. The government rejected that offer, so Roof proceeded to a jury trial. JA-77, 161, 1750-1753.

A. Roof's Letter To Federal Prosecutors

The district court set a trial date of November 7, 2016. JA-152, 211. After the defense filed a notice of intent to call an expert on Roof's mental health at the penalty phase (see JA-18), the government obtained permission to examine Roof (SJA-19-21).

During a visit with Dr. Park Dietz, the government's mental-health examiner, Roof learned of his lawyers' intention to call an autism expert. JA-538-

545.[3] On November 2, 2016, during an *ex parte* hearing, defense counsel explained that, after their hired experts diagnosed Roof with autism spectrum disorder and anxiety disorder and reported some symptoms of psychosis, counsel had recently begun to explain to Roof their decision to present mental-health evidence during the penalty phase. JA-537-541. Roof had become "oppositional" and indicated he planned to send a letter to the prosecutors accusing his attorneys of misconduct. JA-538, 544, 546-547.

Shortly thereafter, Roof sent a letter to the prosecutors. JA-587-589. Roof stated that he had recently learned that his lawyers intended to present a mental-health defense. JA-588-589. He wrote, "what my lawyers are planning to say in my defense is a lie and will be said without my consent." JA-587. Roof stated that his lawyers were "grasp[ing] at straws" because he "ha[s] no real defense," or at least "no defense that my lawyers would present or that would be acceptable to the court." JA-589.

On November 6, 2016, defense counsel requested an *ex parte* hearing to address the situation. JA-573-575. The next day, defense counsel requested a competency hearing. JA-599. Before ruling on that request, the court questioned

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[3] Under Federal Rule Criminal Procedure 12.2(c)(2), Dietz's report was required to be sealed and not disclosed to the attorneys for either party unless Roof was convicted and confirmed an intent to offer mental-health evidence at sentencing, which never occurred. JA-5623-5624.

Roof, who explained that he was unwilling to allow mental-health mitigation because "[i]t discredits the reason why [he] did the crime." JA-632. Defense counsel had considered Roof's perspective but determined, in their professional judgment, that presenting the evidence was in Roof's best interest. JA-643.

B. The First Competency Hearing

On November 7, 2016, the district court ordered a competency hearing. JA-592. It appointed Dr. James Ballenger, "one of the nation's most renowned and respected psychiatrists," who had chaired the Department of Psychiatry and Behavior Sciences at the Medical University of South Carolina for 17 years, to conduct the evaluation. JA-2068; see JA-592-593, 679, 904-905, 1304-1305, 1371-1411. Ballenger submitted his report on November 15. JA-2060; see JA-1304-1370. The defense asked for a delay of the competency hearing to November 28, in part so that one of their experts, Dr. Rachel Loftin, could return from Cyprus. JA-773-778, 808, 895. The court reset the hearing for November 21. JA-805, 808-809.

Ballenger testified that Roof understood the proceedings and that it was "very clear" he had the ability to cooperate with his attorneys. JA-909, 915, 1326-1327, 1340-1341, 1359-1361. Ballenger determined that Roof's unwillingness to cooperate was not the result of a mental disorder, but rooted in "a deep seated racial prejudice." JA-1346.

For the defense, Dr. Donna Maddox opined that Roof was incompetent to stand trial. JA-1489; see JA-1540, 1552-1553. In her view, Roof's refusal to cooperate with defense counsel was "not a choice," but was driven by a belief that he would "not be rescued from death row" by white nationalists if he was mentally ill. JA-1544-1545; see JA-1486-1487, 1511, 1551. None of the other defense witnesses offered an opinion on Roof's competency. JA-1644-1645, 1668-1669, 1690, 1776-1786, 1818-1819. Loftin submitted an affidavit opining that Roof had autism. JA 1774.

The district court also heard from Roof, who confirmed both his understanding that he would likely be executed if sentenced to death and his ability to cooperate with his attorneys. JA-1719-1754. The court found Roof competent to stand trial. JA-2060-2081.

C. Roof's Invocation Of His Right To Self-Representation

At the end of the competency hearing, the district court observed that there was "no solution" to the dispute between Roof and his counsel on whether to present mental-health mitigation evidence. JA-1563. Roof wanted his lawyers to follow his instructions, but the court explained that decisions about what evidence to introduce at capital sentencing are strategic choices within counsel's authority. JA-1741-1743, 2553-2558. Counsel had listened to Roof's concerns but had no

intention of giving up his only plausible defense to a death sentence. JA-643, 831-833.

On November 27, 2016, Roof invoked his Sixth Amendment right to self-representation, recognized in *Faretta* v. *California*, 422 U.S. 806 (1975). JA-2085. The court granted the motion and appointed Roof's counsel to serve as standby counsel. JA-2103-2108. The court determined that Roof had the mental capacity to self-represent. JA-2299.

V. THE GUILT PHASE

A. Jury Selection

Before Roof invoked his right to self-representation, the parties had been preparing for jury selection for months. JA-2298. Defense counsel had done much work to prepare for voir dire, including filing briefs on jury-selection procedures and standards for screening potential jurors about their death penalty views. SJA-1-17, 22-35. Counsel also provided the court with proposed strikes for cause, questions for potential jurors, and individualized questions for specific venirepersons. JA-2871; see JA-109-264. Counsel had also filed objections to the court's proposed case-specific questions. JA-70-81, 107-108. Roof represented himself during a court-directed voir dire with limited participation by the parties. JA-257-259, 2085, 3460-3462.

B. Guilt Phase Evidence

At the end of the court-directed voir dire that identified 67 qualified jurors, Roof requested that standby counsel resume representing him until the end of the guilt phase. JA-3453, 3460-3462. The court granted that request, and defense counsel resumed representation at the point where the parties made strikes from the 67-person venire. JA-3470-3478, 3487, 3603-3617.

The case proceeded to a jury trial. The government presented eyewitness testimony from two survivors, Felicia Sanders and Polly Sheppard. JA-3666-3707, 4995-5022. It also introduced evidence from local law enforcement officers, medical personnel, FBI agents, and other experts that established Roof's guilt. See pp. 7-18, *supra*.

After the court ruled that mental-health evidence could be presented at the guilt phase only if it negated an element of the crime, the defense rested without presenting any witnesses and Roof elected not to testify. JA-4071-4081, 5024-5036. On December 15, 2016, the jury convicted Roof on all counts. JA-5062, 5164-5173.

VI. THE PENALTY PHASE

After he was convicted, Roof advised the court that he wished to represent himself during the penalty phase. JA-5180-5181. The court accepted that waiver and re-appointed Roof's counsel as standby counsel. JA-5181.

A. The Second Competency Hearing

On December 29, 2016, standby counsel filed another motion on Roof's competency. JA-5242-5260. They stated that "facts developed since the competency hearing" in November showed that Roof was presently incompetent to stand trial. JA-5242. The district court ordered an additional examination by Ballenger and set a hearing for January 2, 2017. JA-5463-5464.

Ballenger examined Roof and submitted a second report. JA-5533, 5979, 5987, 5977-5998. He testified that Roof's capacity to understand the issues and to assist his attorneys was unchanged. JA-5535-5536, 5991-5992. After hearing from defense witnesses and Roof (JA-5651-5707, JA-5713-5720), the court found no material change in Roof's competency (JA-6950-6967). The court further determined that Roof had the mental capacity to represent himself. JA-6956.

B. Aggravating And Mitigating Factors

Before the penalty phase, the government submitted notice of aggravating factors. JA-145-151. Those included three statutory aggravating factors: Roof had engaged in substantial premeditation and planning, killed multiple people in a single episode, and killed three parishioners who were especially vulnerable due to age. JA-148-149. The government also included six non-statutory aggravating factors: Roof attempted to incite violence, caused loss to the parishioners' families, endangered the safety of others, murdered based on race, targeted

worshippers in a church to magnify his impact, and demonstrated no remorse. JA-149-150.

Roof identified one statutory mitigating factor: he had no significant prior criminal history. JA-463. He also alleged eight non-statutory mitigators: he was 21 at the time of the offense, had offered to plead guilty, would face danger of violence from other inmates, would likely have to serve his sentence in isolation, had cooperated with arresting authorities, confessed to his crimes, had no prior history of violence, and was capable of redemption. JA-463-464.

The government filed a motion in limine opposing those mitigators suggesting that the jury should select life in prison because it would be especially onerous for Roof, stating they were not proper mitigating factors (JA-466-475), and the court agreed (JA-489-495). Roof later filed notice of his intent to offer two additional non-statutory mitigating factors: that he poses no significant risk of violence to inmates or prison staff if imprisoned for life and that he can be safely confined in prison. JA-496.

C. Penalty Phase Evidence

The government presented victim-impact testimony from 23 witnesses. JA-5795-5902, 5905-5967, 6003-6032, 6045-6105, 6110-6175, 6313-6366, 6368-6469, 6527-6581. The jury also heard from Lauren Knapp of the Charleston County Sheriff's Office, who described Roof's continued writings in prison (JA-

6190-6210); and FBI Agent Joseph Hamski, who described other evidence of premeditation and lack of remorse (JA-6281-6313). In his writings, Roof provided a further explanation of his racist beliefs (JA-6222-6231) and wrote that his actions were "worth it" (JA-6196, 6230-6231). Roof believed he had done "what [he] thought [w]ould make the biggest wave, and now the fate of our race [sits] in the hands of our brothers [who] continue to live freely." JA-6196, 6230-6231.

Roof did not cross-examine any witnesses or present any evidence during the penalty phase where he self-represented, but he delivered an opening statement and closing argument. JA-5793-5794, 6712-6714.

D. The Jury's Penalty Verdict

The jury unanimously found four gateway intent factors that made Roof death-eligible. JA-6793-6794. The jury then deliberated about what penalty to impose. It unanimously found all aggravating factors beyond a reasonable doubt. JA-6796-6801. The jury unanimously found most of Roof's mitigating factors to exist, but no juror found by a preponderance of the evidence that Roof was capable of redemption, posed no significant risk of dangerousness in prison, or could be safely confined. JA-6803-6804. The jury unanimously found that the aggravating factors sufficiently outweighed the mitigating factors and voted unanimously for a death sentence on each capital count. JA-6806.

The court sentenced Roof to death on Counts 13-21 and 25-33, and life imprisonment without the possibility of release on all other counts. JA-6968-6970.

SUMMARY OF ARGUMENT

The district court did not clearly err in finding Roof competent to stand trial. The finding was supported by expert testimony and was not arbitrary or unwarranted. Nor did the court abuse its discretion by declining fully to grant Roof's motion to continue the first competency hearing or by limiting the scope of the second hearing to changes in Roof's competency.

Roof's right to self-representation was correctly defined and properly protected. The court correctly determined that Roof could not control counsel's presentation of mitigation evidence and that he was entitled to self-represent at the penalty phase and withhold mitigation evidence. The court did not misadvise Roof about standby counsel's role, was not required to offer that Roof could wait until the penalty phase to invoke his self-representation right, and did not misapprehend its discretion to deny Roof's motion. The court did not abuse its discretion by finding that Roof had the capacity to self-represent or by denying certain requests for assistance from standby counsel.

No error occurred at the penalty phase. The district court did not improperly preclude Roof from introducing mitigating evidence or admit improper aggravating evidence that characterized Roof or the parishioners in a prejudicial way, and any

error was harmless. The death penalty was not plainly erroneous based on Roof's age or mental condition.

Finally, Roof's convictions rest on sound legal and constitutional grounds. First, 18 U.S.C. 247(a)(2), which prohibits intentional obstruction of a person's free exercise of religious beliefs, falls well within Congress's Commerce Clause authority. Evidence that Roof committed his crimes using items that had traveled in interstate commerce (*e.g.*, a firearm and ammunition), and by using multiple channels and instrumentalities of interstate commerce, establishes that his offense was "in or affects interstate * * * commerce." 18 U.S.C. 247(b). The district court correctly instructed the jury on the interstate commerce element. And the statute required no proof that Roof acted out of religious hostility.

Second, 18 U.S.C. 249(a)(1), which prohibits willful racially-motivated violence, falls well within Congress's Thirteenth Amendment authority to combat the badges and incidents of slavery. Third, the Attorney General properly certified Roof's prosecution, and that discretionary decision is not subject to judicial review. Finally, Roof's firearms convictions under 18 U.S.C. 924 are valid because the predicate offenses under Sections 247 and 249 categorically require the use of violent physical force.

ARGUMENT

I

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING ROOF COMPETENT TO STAND TRIAL

Roof contends (Br. 65-82) that the district court clearly erred by finding him competent to stand trial. The Court should reject that argument.

A. Background

1. Defense Counsel's Request For A Competency Hearing

On November 2, 2016, at an *ex parte* hearing five days before trial, defense counsel explained that Roof had become "oppositional" upon learning of their strategy to present mental-health evidence and they were concerned Roof might try to "fire" them. JA-536-541, 544, 546-547. Counsel did not express any concern that Roof might be incompetent to stand trial. JA-537-562. Shortly thereafter, Roof sent his letter to the prosecutors (JA-587-589), and defense counsel requested a competency hearing (JA-592-593, 599).

Before ruling on the request, the court questioned Roof. JA-620. Roof testified that he understood his lawyers planned to say he had autism, but he insisted he did not. JA-622-624. He stated that he understood the death penalty would likely be imposed if he presented no mitigation case, but he was unwilling to allow mental-health mitigation because "[i]t discredits the reason why [he] did the crime." JA-632. Roof "underst[oo]d completely" why his lawyers wanted to

present the evidence and confirmed he had the ability to communicate with them. JA-641.

Defense counsel explained that their experts, who had been preparing reports on Roof's mental health as mitigation evidence, had determined that Roof suffered from mental-health issues, including "psychosis [that] takes the form of nonbizarre delusions" that his forehead is unsightly, that his body is lopsided because testosterone had pooled on one side, and that his hair is falling out. JA-644-646. Defense counsel also stated that Roof believed any death sentence would not be carried out because he would be pardoned by white nationalists who would take over the United States and potentially reward him with the Governorship of South Carolina. JA-654. The court expressed skepticism because counsel, despite representing Roof for months, had never before questioned his competency. JA-648, 659, 665, 674.

2. The Competency Evaluation

On November 7, 2016, the day trial was scheduled to begin, the court ordered a competency hearing, appointed Ballenger to examine Roof, and granted defense counsel's motion to delay jury selection until after the competency hearing. JA-592-593, 679, 693, 726. Defense counsel objected to Ballenger because he was listed on the website of Dietz, the government's mental-health examiner. JA-707, 716. The court overruled the objection. JA-692. It scheduled

the competency hearing for November 16 and set jury selection for November 21. JA-726.

Ballenger met with Roof three times between November 8 and 12, for a total of eight hours. JA-1323, 1333, 1339. Ballenger also spoke with the defense team for one hour and 45 minutes to listen to their experience working with Roof. JA-1314-1318, 1350-1351. Ballenger had Dr. Mark Wagner, head of Neuropsychology at the Medical University of South Carolina, examine Roof and administer psychological tests. JA-1320-1321, 1412, 1438-1462, 2069.

Ballenger submitted his report on November 15. JA-2060; see JA-1304-1370. The defense asked for a delay in the competency hearing, which was set for the following day, because: (1) they lacked adequate time to review Ballenger and Wagner's reports; (2) a breakdown in their relationship with Roof had made it difficult to prepare; and (3) there had not been sufficient time for a competency evaluation by Ballenger or a defense expert. JA-773; see JA-774-778, 808. Defense counsel also stated that Ballenger's failure to specifically diagnose Roof with autism necessitated a response from defense expert Dr. Rachel Loftin, who was out of the country until after Thanksgiving. JA-777. The court granted that request in part, agreeing to delay the hearing until November 21. JA-805, 808-809.

3. The First Competency Hearing

Beginning on November 21, 2016, the court conducted a two-day competency hearing. JA-885, 1463. Defense counsel renewed their request for the hearing to be continued for one additional week, stating that they had not had time to review Ballenger's report and that Loftin was in Cyprus. JA-894-896. The court denied the request and offered that Loftin could participate by telephone or Skype. JA-895-896, 1773-1774, 5574, 5613-5614.

a. The Court's Examiner

i. Ballenger discussed the results of the psychological tests administered by Wagner. He observed that Roof's full-scale I.Q. was 125 and his verbal I.Q. was 141, which placed him in the 95th and 99.7th percentile, respectively, relative to his national standardized age peers. JA-979, 1321, 1417. Roof scored 100 for processing speed, which was the 50th percentile. JA-1321. The Personal Assessment Inventory (PAI), a widely used measure to assess the presence of psychopathology, showed Roof's results were valid with no evidence of malingering and no clinical elevations suggestive of psychopathology. JA-1321, 1417-1418. Wagner determined that Roof had "[s]uperior intellectual function and is free of psychopathology that would interfere with court proceedings." JA-1419; see JA-1322.

Ballenger also reviewed the results of a second PAI and a Minnesota Multiphasic Personality Inventory II (MMPI-II) performed by Dietz's team (JA-1322-1323, 2071 n.4), which the court made available to Ballenger with defense counsel's consent (JA-1322). Similar to Wagner's assessment, the previous PAI found no evidence of psychosis. JA-1322. Roof's response pattern on the PAI suggested he was potentially being defensive about shortcomings but was also attempting to portray himself in a negative manner in some areas. JA-1322. The MMPI-II showed that Roof may have tried to portray himself in an unrealistically favorable light, but the profile nevertheless was "within normal limits." JA-1322.

Ballenger also reviewed the records of Dr. Elizabeth Leonard, a psychiatrist at the detention center where Roof arrived after his arrest, who examined him twice in June 2015. JA-1348, 2069. Leonard had found Roof's "thought content normal" and "his affect appropriate," Roof showed no signs of psychosis, and his thoughts were logical. JA-1348-1349.

ii. Ballenger determined that Roof met the criteria for Social Anxiety Disorder, General Anxiety Disorder, possible Autism Spectrum Disorder, Mixed Substance Abuse Disorder, depression by history, and Schizoid Personality Disorder, none of which would impact his competency to stand trial. JA-1358; see JA-907-908. Ballenger found that Roof "does not suffer from a psychotic process, schizophrenic or otherwise." JA-907; see JA-970, 1358. He was "as opposite to

what it's like to be with a person with schizophrenia as you can get." JA-1009, 1022; see JA-1416 (Wagner report describing Roof as free of psychosis). Ballenger explained that Roof lacked many classic signs of psychosis, such as disorganized speech, speech abnormalities, and inability to maintain eye contact. JA-2070. Ballenger testified that Roof would not be able to fake the absence of psychosis during sustained interaction over multiple days. JA-1046-1047, 1059.

iii. In Ballenger's opinion, Roof had no difficulty understanding the proceedings or the consequences of his choices. JA-908-909; see JA-1326-1327, 1340-1341, 1359-1361. Ballenger found it "very clear" that Roof had the ability to cooperate with counsel "if he want[ed] to." JA-915; see JA-909-910. He observed that Roof's unwillingness to cooperate was not the result of a mental disorder but instead was rooted in "a deep seated racial prejudice." JA-1346. Roof explained to Ballenger that he had stopped cooperating with his attorneys because: (1) he did not want them to dilute his message by attributing his actions to mental illness; and (2) he wanted to have a "spotless record" when white nationalists eventually take over the country after a race war. JA-913-915, 1001, 1029-1032, 1324, 1344-1345, 1356-1357.

Ballenger explained that Roof's idea of a white nationalist takeover was not delusional; rather, Roof had encountered plenty of evidence in support of a white nationalist movement from reading the Internet, including the Daily Stormer

message board, and from listening to a nationally syndicated radio program by Michael Savage. JA-1003-1005, 1351-1352, see JA-1413-1415. Roof's belief that white nationalists would awaken and fight back against black-on-white crime was "a political stance which is more logical, less bizarre[,] and consonant with what [Roof] ha[d] been reading on the Internet and hearing." JA-1033-1034, 1078-1079, 1338-1339. Roof cited real-world examples like apartheid states in South Africa and Rhodesia and viewed his crimes as making a political statement "like Muslim extremists." JA-1077, 1325, 2069.

Roof admitted it was extremely unlikely that a white supremacist uprising would result in his freedom—maybe half a percent chance. JA-1080, 1332. Roof understood there was an 85% chance that he would be executed if he received the death penalty, and he attributed the other 15% to the possibility that capital punishment would be abolished or the prison would be bombed. JA-1341. He also stated in a mocking, joking way that he might be pardoned after white nationalists win a race war, citing to increased racial unrest after the election of Donald Trump. JA-1341-1342.

b. Defense Witnesses

i. The primary defense expert was Dr. Donna Maddox, a forensic psychiatrist, who was the only expert to testify that Roof was incompetent to stand trial. JA-1479, 1485-1489, 1827-1835. Maddox had met with Roof nine times

beginning in April 2016. JA-1493. She was preparing to be a mitigation witness at the penalty phase and therefore had not yet completed her report. JA-1491, 1546. Although she had performed "[h]undreds" of competency evaluations, she had apparently raised no concerns about Roof's competency during her seven meetings with him between April and August 2016. JA-1484, 1493-1494, 1546, 1555, 1569-1570, 2075-2076.

Maddox diagnosed Roof with autism spectrum disorder and "other specified anxiety disorder." JA-1486. She also diagnosed him with "other specified schizophrenia spectrum [disorder]" and "other psychotic disorder" based on his somatic delusions about his body. JA-1486, 1537-1538, 1554-1555. She did not diagnose this as a delusional disorder because the concerns were transient. JA-1538.

Maddox acknowledged that Roof "[a]bsolutely" understood the proceedings, but she believed that "[a]t this time * * * he cannot assist [counsel] in his defense." JA-1488-1489; see JA-1540, 1552-1553. She testified that Roof's refusal to cooperate with defense counsel was "not a choice," but was driven by his belief that he would "not be rescued from death row" if he was mentally ill. JA-1544-1545; see JA-1486-1487, 1511, 1551. Maddox, however, also noticed a "marked change" in Roof's relationship with his lawyers after his letter to the

prosecutors. JA-1540. He thereafter was angry, but his anger was directed toward counsel only. JA-1540-1543.

ii. Dr. William Stejskal, a forensic psychologist, also testified for the defense. JA-2049-2059 (Stejskal C.V.). Stejskal was contacted by the defense in November 2016 to conduct a competency evaluation. JA-1662-1668. Roof stopped his first meeting with Stejskal after 16 minutes. JA-1676, 1678. Stejskal returned a few days later and spoke to Roof for about 1.5 hours. JA-1675-1682.

Stejskal believed that Roof was "in the prodromal phase of an emerging schizophrenic spectrum disorder," but was "not yet fully possessed of a delusional disorder." JA-1690-1691. Stejskal had no opinion on Roof's competency. JA-1668-1669, 1690, 2074-2075. Stejskal was concerned, based on information conveyed to him, that Roof may have been making decisions based on an unrealistic belief that he would be liberated from prison. JA-1699-1700. He stated that Roof could have been trying to mask his psychotic symptoms by telling the court that he believed the chance he would be rescued was low. JA-1701.

Stejskal further testified that Roof was "trying to look bad" by selecting antisocial features on the PAI, but also "denying psychopathology." JA-1709-1710; see also JA-1776-1786 (affidavit from Dr. John Edens stating that Roof's tests should be interpreted as minimizing the presence of psychological problems). Stejskal acknowledged, however, that the PAI has a Positive Impression

Management Scale (PIM Scale) that detects whether the person is approaching the test with a response style that portrays himself in an overly positive way and that Roof's PIM Scale was within a normal range both times he took the test. JA-1716-1717.

iii. The defense submitted an affidavit from Dr. Rachel Loftin, Assistant Professor and Clinical Director of the Autism Assessment, Research & Treatment Services Center at Rush University Medical Center in Chicago. JA-1773-1774. Loftin had traveled to Charleston three times to meet with Roof and interviewed his family, but she was in Cyprus without her files because she had not anticipated a competency hearing. JA-1066, 1773-1774.

Loftin offered the opinion that Roof had autism but gave no opinion on his competency. JA-1774, 2074. She stated that Roof had said he was "not afraid of receiving a death sentence" because he anticipated being "rescued by white nationalists after they take over the government." JA-1535, 1774. She also stated that Roof had psychiatric symptoms not explained by autism, such as anxiety, depression, suicidal ideation, obsessive-compulsive symptoms, disordered thinking, and psychosis (including delusions of grandeur and somatic delusions). JA-1774. She stated his symptoms appeared to be "consistent with the schizophrenia spectrum" but it was "too early to predict his psychiatric trajectory." JA-1774.

iv. The defense submitted an affidavit from John Robison, a professor who teaches about and has autism. JA-1818-1819. Robison met with Roof on November 5, 2016, and he described Roof's unwillingness to speak to his lawyers or Robison and his unusual interest in the clothes counsel had brought for him. JA-1819-1823; see JA-1532-1533. Robison stated that Roof asked him not to testify and stated that he was going to be pardoned in four or five years anyway, which "seemed delusional." JA-1823-1824.

c. Roof's Testimony

Roof confirmed he understood that he could face the death penalty and that the death sentence may one day be carried out. JA-1728. The court asked Roof whether he thought the death penalty would not be carried out because he would be rescued by white nationalists. JA-1728-1729. Roof responded that "[a]nything is possible" and he would like for this to happen, but he understood the chance of his actually being rescued was "extremely unlikely," quantified as "[l]ess than half a percent." JA-1729-1730.

Roof confirmed he had the ability to communicate with his lawyers and that he was limiting his communication because he disagreed with their mitigation strategy. JA-1731-1734. He confirmed that he did not want mental-health evidence introduced because he did not want his act, which was an attempt to

increase racial tension and contribute to a white nationalist revolution, to be discredited. JA-1734-1737.

d. The District Court's Opinion

The district court determined that Roof was competent to stand trial. JA-2060-2081. The court observed that Maddox was the only defense witness to testify that Roof was incompetent. JA-2074 & n.5, 2075-2076. The court acknowledged Maddox's concern that Roof did not have a realistic understanding that he faced the death penalty because he believed he would be saved by white nationalists. JA-2076. The court explained, however, that Ballenger had closely questioned Roof on that issue and Roof confirmed he fully understood that any death sentence would likely be carried out. JA-2076-2077. The court acknowledged defense counsel's criticism of Ballenger's experience but stated that Ballenger's assessment was "vastly superior to what [the court] normally get[s]" in terms of "the quality, the substance, the thoroughness." JA-1476, 2068-2069 n.2.

The court explained that its own questioning had further shown that Roof had "little realistic hope that he could be saved by a white nationalist revolution or any other development." JA-2077-2078. The court further explained that Roof had confirmed the source of his dispute with his attorneys was his opposition to their strategy to present mental-health evidence, but that he had the capacity to communicate with them. JA-2078. The court observed that Roof's demeanor

"raised not the slightest question or concern regarding his competency to stand trial." JA-2078.

The court viewed the defense experts' testimony on autism as potentially important mitigation evidence, but not as evidence that Roof was incompetent. JA-2077. The court noted that during the pretrial period, Roof was evaluated by many mental-health experts, but it was not until the literal eve of jury selection that Roof's competency was questioned. JA-2062-2063. The court observed that as recently as September 20, 2016, defense counsel had assured the court that it had secured a knowing and intelligent waiver of Roof's right to attend a suppression hearing "with no suggestion that there was any question regarding [Roof's] competency." JA-2062; see JA-1587-1588. The court determined that Roof suffered from no mental disease or defect that rendered him unable to understand the proceedings or assist counsel. JA-2079-2081.

4. The Second Competency Hearing

Roof reverted to counsel for the final step of jury selection and all of trial and then resumed self-representation for the penalty phase. On December 29, 2016, standby counsel filed another motion on Roof's competency. JA-5242-5260. They stated that "facts developed since the [first] competency hearing" showed that Roof was presently incompetent. JA-5242. They explained that Roof had no plan to defend himself during the penalty phase and his primary concern was

preventing the release of mental-health information. JA-5243. Counsel also described Roof's preoccupation with his clothing and other odd behavior during trial. JA-5249, 5253-5255. Counsel later submitted a declaration describing their observations. JA-5472-5478.

Counsel attached to their competency motion exhibits from four defense experts: (1) Loftin, who had by then finished her report (JA-5262-5348); (2) Dr. Paul Moberg, a neuropsychiatrist who had evaluated Roof three times in February 2016 (JA-5350-5361); (3) Maddox, who had completed her report (JA-5363-5413); and (4) Robison, who had previously submitted an affidavit but thereafter completed his report (JA-5415-5440). Counsel urged the court to consider these reports, "which did not yet exist at the time of the competency proceedings in November." JA-5243-5244.

The district court, "[i]n an abundance of caution," ordered another competency examination by Ballenger and set a hearing for January 2, 2017. JA-5463-5464. The court advised the parties that, based on standby counsel's representation that their motion arose from new facts, the court "w[ould] only hear evidence related to any developments since the November 21-22, 2016 hearing." JA-5463.

Standby counsel requested a one-week continuance to allow more time for Ballenger and defense experts to meet with Roof. JA-5467-5469. The district

court denied the motion, stating that the scope of the hearing was limited and this was not a "redo" of the first hearing. JA-5470-5471. At the beginning of the hearing, the court established that the "law of the case is that as of November 22, 2016, [Roof] was competent." JA-5519.

a. The Court's Examiner

Ballenger met with Roof for five more hours over two days. JA-5533, 5979, 5987. Ballenger testified that he had sufficient time to complete the evaluation, and he wrote a second report. JA-5533-5534, 5977-5998. He read defense counsel's competency motion and the exhibits attached to it, including the expert reports. JA-5978-5979; see JA-5602-5603.

Ballenger testified that Roof's capacity to understand the issues and assist counsel was unchanged. JA-5535-5536, 5991-5992. He explained that Roof was unwilling to assist his attorneys because he did not want his act to be "muddied or misunderstood" and he wanted to keep his reputation intact. JA-5537, 5979-5980, 5992. He testified that Roof's decision-making was not controlled by mental illness but was a logical extension of his political and social beliefs. JA-5543, 5992-5995. Roof compared himself to a terrorist who carried out his goal successfully. JA-5539-5540, 5982, 5985. Ballenger testified that people may project mental illness onto Roof because they cannot comprehend the depth of his racist views. JA-5594; see JA-1351-1358, 5993-5994. Ballenger testified there

was no reason to believe that any autistic traits affected Roof's competency. JA-5994.

Roof told Ballenger he thought there was a "greater than 50 [percent] chance" he would get the death penalty and that he hopes the death penalty will be abolished, but he laughed when Ballenger brought up the notion that white nationalists would rescue him from prison. JA-5546-5547, 5981. Ballenger believed Roof was "mess[ing] with people" when he said that, and that Roof did not have a "a shred of doubt" that he faced a real risk of death. JA-5547, 5584, 5598.

b. Defense Witnesses

Because Roof refused to see Loftin before the hearing, she testified about videotapes of Roof interacting with his family at the jail after the first competency hearing. JA-5610-5611, 5663. She testified that in the videos, Roof exhibited signs of autism such as a focus on details of his clothing to the exclusion of the bigger picture, a rigid cognitive style, and lack of empathy. JA-5654, 5669. Loftin testified that she and Maddox had given feedback to Roof about their autism findings and it would not have been difficult for him to manufacture explanations for Ballenger about the autistic traits they had observed. JA-5664-5665.

The defense offered Maddox as a witness, but the court noted that it had already listened to Maddox for hours and that Maddox had not seen Roof since the

last competency hearing. JA-5523-5524, 5614-5615, 5631, 5635-5636. The defense stated it would "rest on the reports" of Moberg and Robison, which the court agreed to place on the docket but determined were irrelevant to the proceeding because they contained only information from before the first hearing. JA-5636-5637, 5640-5641.

c. Roof's Testimony

Roof denied believing that he would be saved by white nationalists if he received the death penalty, acknowledged a high risk that he would be sentenced to death if he presented no mitigation, and acknowledged a high risk that he would be executed if sentenced to death. JA-5713, 5715. Roof confirmed he wanted to self-represent to prevent his lawyers from undermining his message by suggesting mental illness as an explanation for his crimes. JA-5714, 5720.

d. The District Court's Opinion

The district court found no material change in Roof's competency and determined that Roof was "plainly competent to stand trial." JA-6956, 6965; see JA-5733, 6950-6967. The court found that Roof "fully understands that he faces a high risk of a death sentence if he presents no mitigation witnesses, and * * * understands that he faces a high risk of execution if sentenced to death." JA-6966. The court found that Roof's resistance to mental-health evidence "continues to arise out of his political ideology, rather than any form of mental disease or defect"

and that his mental-health diagnoses "do not prevent him from understanding the proceedings or assisting counsel with his defense." JA-6966; see JA-6962.

B. Standard Of Review

Whether a defendant was competent to stand trial is a factual question reviewed for clear error. *United States* v. *Robinson*, 404 F.3d 850, 856 (4th Cir. 2005). The district court's competency finding must be affirmed unless it is "clearly arbitrary or unwarranted." *United States* v. *Crump*, 120 F.3d 462, 467 (4th Cir. 1997) (quotations omitted).

C. The District Court's Competency Finding Is Not Clearly Erroneous

1. A defendant is mentally incompetent to stand trial if he lacks a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam); see 18 U.S.C. 4241(a). Under Section 4241, the defendant must show he "is presently suffering from a mental disease or defect rendering him mentally incompetent." *Robinson*, 404 F.3d at 856.

The district court should consider the "defendant's behavioral history and relevant medical opinions" as well as its own "first-hand interactions with, and observations of, the defendant." *United States* v. *Bernard*, 708 F.3d 583, 593 (4th Cir. 2013). A diagnosable mental condition does not automatically render a

defendant incompetent to stand trial. Rather, evidence must indicate that a mental condition such as a delusional disorder is causing "a present inability to assist counsel or understand the charges." *Burket* v. *Angelone*, 208 F.3d 172, 192 (4th Cir. 2000); cf. *Madison* v. *Alabama*, 139 S. Ct. 718, 728 (2019) (explaining in the context of competency to be executed that the question is "not the diagnosis of [mental] illness" but the implication of the diagnosis on the prisoner's rational understanding of the proceedings). "[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Burket*, 208 F.3d at 192; *Bernard*, 708 F.3d at 593.

2. The record amply supports the district court's competency finding. The court properly relied on its own observations and the opinion of Ballenger, who twice determined Roof was competent after examining him for 13 hours and reviewing psychological testing and background documents. JA-1305-1311, 1320-1323, 1333, 1339, 1346-1369, 1417-1419, 2060, 5533, 5979, 5987. Ballenger's opinion matched the findings of Leonard, the detention center psychiatrist, who had examined Roof twice and found no signs of psychosis. JA-1348-1349, 2069.

Regarding *Dusky*'s requirement that the defendant understand the nature and consequences of the proceedings, the district court referenced Roof's high I.Q. and his ability to describe in detail all aspects of the criminal proceeding. JA-2071-

2072. Even Roof's expert Maddox testified that Roof "[a]bsolutely" understood the proceedings. JA-1488.

Regarding *Dusky*'s requirement that the defendant have the present ability to assist counsel, the district court correctly recognized that Roof's *capacity* to assist his attorneys, not his willingness, determines his competency. JA-2066-2067; see *Bell* v. *Evatt*, 72 F.3d 421, 432 (4th Cir. 1995); *United States* v. *Davis*, 801 F. App'x 80, 86 (4th Cir. 2020), petition for cert. pending, No. 20-6178 (filed July 14, 2020); *United States* v. *Battle*, 613 F.3d 258, 263 (D.C. Cir. 2010); *United States* v. *Ghane*, 593 F.3d 775, 781 (8th Cir. 2010). The court properly relied on Ballenger's finding that Roof refused to cooperate with his attorneys not because of any mental disease or defect, but because he did not want them to undermine his message or ruin his reputation. JA-2072-2073; see JA-908-909, 970, 1009, 1022, 1035, 1358.

3. The critical question raised by the defense was whether Roof was under a delusion that he would be freed him from prison, *i.e.*, a fixed false belief maintained despite incontrovertible contrary evidence (Br. 19 n.9), which rendered him incapable of rationally understanding the proceedings or assisting counsel. Maddox was the only defense witness to offer that opinion. JA-2074 & n.5. The district court acknowledged her testimony that Roof's refusal to cooperate with defense counsel was driven by a delusion that he would be rescued from death row

and therefore needed to maintain a clean mental-health record. See JA-1544-1545. But the court explained that Ballenger thoroughly explored that question and determined that Roof was not under any such delusion. JA-2076-2077. Rather, Roof had consumed copious information about a white nationalist movement from mainstream Internet and radio resources, reinforced by historical examples of apartheid, that made him believe such a revolution was possible. JA-1003-1005, 1033-1034, 1077-1079, 1325, 1338-1339, 1351-1352, 1413-1415, 2069. Roof nonetheless acknowledged that the event's likelihood, even if it was his hope, was extremely low. JA-1080, 1332, 1341, 1728-1730, 5547.

Ballenger's opinion was reinforced by the district court's own observations that Roof's anxiety and possible autism did not prevent him from communicating with counsel or understanding the proceedings (JA-2080; *Bernard*, 708 F.3d at 593 (Court gives wide latitude to district court's competency finding given first-hand observation of the defendant); see *Dennis ex rel. Butko* v. *Budge*, 378 F.3d 880, 894 (9th Cir. 2004)), and by the court's questioning of Roof, which confirmed he understood the high likelihood that he would be sentenced to death and executed (JA-1728-1730, 2076-2077, 5712-5715, 6964-6966). The court's finding that Roof was competent is well-supported and not "arbitrary or unwarranted." *Crump*, 120 F.3d at 467 (quotations omitted); see *Burket*, 208 F.3d at 192 (record showing that defendant gave a detailed confession, was lucid and responsive in court, and had

been evaluated by experts who diagnosed mental-health issues but did not question competency led to "inescapable conclusion" that competency was never seriously in doubt).

D. Roof's Criticisms Of The District Court's Competency Finding Lack Merit

Roof challenges (Br. 65-82) five purported flaws in the district court's competency finding. Roof essentially contends that the court should have given greater weight to the testimony of defense witnesses, rather than relying on Ballenger's opinion and the court's own interactions with Roof. None of his arguments have merit. Only one of Roof's experts testified that he was incompetent to stand trial, and the district court's competency finding was not clearly erroneous.

1. Roof contends (Br. 66-70) that the district court clearly erred when it determined that Roof was not under a delusion that he would be rescued from prison. He contends (Br. 67) that four mental health experts—Loftin, Robison, Moberg, and Stejskal—concluded otherwise. Roof overstates the defense evidence.

Loftin stated that Roof said he would be rescued and sounded like he meant it. JA-1774, 5306-5307. That is hardly evidence that Roof suffered from an immovable belief of his impending rescue. See Br. 19 n.9. Loftin did not describe exploring that belief with Roof, and she apparently never flagged this as a

competency issue for the defense team, even though Roof said this to her sometime between June and October 2016. JA-1774, 5263.

Robison stated that Roof said he would be pardoned in four or five years and this struck him as "delusional." JA-1823. But Robison is a professor on autism, not a medical doctor. JA-1818. He met with Roof only briefly and did not offer any opinion that he was incompetent to stand trial. JA-1818-1824.

Roof also points to Moberg's report stating that Roof was 80% sure he would be freed and hailed a hero after an uprising. JA-5353. But Moberg evaluated Roof in February 2016 and was not offered as a witness at the November 2016 hearing (JA-896-897, 5350); the court thus deemed Moberg's report irrelevant when the defense tried to introduce it at the second competency hearing (JA-5640-5641). Moreover, the 80% figure does not show that Roof's thought was immovable, and Roof acknowledged to Moberg that he could not predict the future. JA-5353.

Roof finally points to Stejskal's testimony that Roof was not concerned about the trial because he would be rescued. JA-1700. But Roof never told Stejskal that—Stejskal had been told this information by others. JA-1700.

Ballenger was the only expert that explored this idea with Roof, and during two examinations, Roof admitted that a rescue by white nationalists was extremely unlikely. JA-1080, 1332, 5546-5547. Ballenger testified that Roof did not have a

"shred of doubt" that he faced a real risk of death. JA-5547; see JA-5584, 5598. The court properly relied on that expert opinion, which it also explored in its own questioning of Roof. JA-2076-2077.

Roof further contends (Br. 68) that the district court ignored evidence of psychosis—somatic delusions about his body—that reinforced the conclusion that Roof's belief about being rescued was delusional. He again overstates the defense evidence.

Ballenger opined that Roof's concerns about his body were likely related to his anxiety disorder, rather than a delusional disorder (JA-990-991), but he explained that "even if he had * * * somatic delusions, it's my professional opinion from the totality of the evidence that even if he did, they do not make him incompetent to stand trial (JA-1047). That is because, as Ballenger explained, "swallows fly in a flock," and Roof exhibited no other symptoms of psychosis. JA-1046. Ballenger explained that psychotic people cannot make jokes about their delusions or fake results on three separate psychological tests, and he emphasized that Roof's writing and speaking were logical and organized. JA-970, 1046-1047, 1071-1072.

The defense evidence did not undermine Ballenger's analysis. Maddox testified that she did not diagnose Roof with a delusional disorder because his beliefs about his body came and went. JA-1538. Stejskal testified that Roof was

"not yet fully possessed of a delusional disorder." JA-1668-1669, 1690-1691. And Loftin only briefly mentioned that Roof had "symptoms of" psychosis including somatic delusions, but she stated it was "too early to predict his psychiatric trajectory." JA-1774. That leaves Moberg's reference to Roof's "unshakable" delusions about his body, in a report that inexplicably was not presented to the court at the first competency hearing and that later refers to those symptoms as "mild." JA-5360. The district court committed no reversible error in crediting Ballenger's testimony over this defense evidence. See, *e.g.*, *United States* v. *Locke*, 269 F. App'x 292, 294-295 (4th Cir. 2008) (district court did not clearly err in crediting one expert's opinion on competency over another).

Roof relies (Br. 68-70) on *Lafferty* v. *Cook*, 949 F.2d 1546 (10th Cir. 1991), contending that the defendant in that case obtained habeas relief because he was unable to accurately perceive reality due to paranoid delusions, which undermined his capacity to assist counsel. But the Tenth Circuit in *Lafferty* found that the state trial judge had applied an incorrect legal standard, and it specifically declined to hold that Lafferty was incompetent but instead directed the state court to apply the correct standard. *Id.* at 1548. Here, in contrast, the district court applied a well-established legal standard and considered all the evidence to determine that Roof's unwillingness to cooperate was not grounded in a delusion. JA-2076-2078.

2. Second, Roof contends (Br. 70-72) that the district court clearly erred by relying on his in-court statements minimizing the likelihood he would be freed by white nationalists. He contends (Br. 71-72) that the court ignored evidence that Roof was trying to present himself as free of psychosis in his exams. Stejskal acknowledged, however, that the internal control that tests for this in the exams was within normal limits. JA-1716-1717. Even apart from the test results, the court could credit Ballenger's testimony that Roof could not fake the absence of psychosis during sustained interaction over multiple days. JA-1046-1047, 1059.

Roof further contends (Br. 72) that his desire to block mental-health evidence proves that he truly believed he would be rescued from prison, making it clearly erroneous for the court to rely on his testimony. But plenty of evidence also revealed that Roof was motivated to withhold mental-health evidence to avoid muddying his message and undermining his attempt to incite a race war. JA-5537, 5979-5980, 5992. The court did not clearly err in relying on Roof's testimony. See *Bernard*, 708 F.3d at 593 (district court's competency finding receives deference given court's first-hand interaction with the defendant).

3. Third, Roof contends (Br. 73-75) that the court clearly erred by ignoring sworn statements from defense counsel about Roof's inability to communicate and rationally assist with his defense. Defense counsel's views on Roof's competency were thoroughly considered. Before the first competency hearing, Ballenger spoke

with Roof's counsel (JA-1314-1318), and he addressed their concerns in his report (JA-1350-1351, 1362-1368). Ballenger's second report almost exclusively addressed the concerns standby counsel raised about Roof's behavior since the first hearing. JA-5991-5998. This is nothing like *United States* v. *Mason*, 52 F.3d 1286 (4th Cir. 1995) (cited at Br. 74), where the district court declined to grant a competency hearing despite an affidavit outlining counsel's concerns. The district court here took counsel's concerns seriously and twice ordered an expert to explore them.

4. Fourth, Roof contends (Br. 75-77) that the district court conflated *Dusky*'s requirements that a defendant have both a factual and rational understanding of the proceedings. He contends that the court focused only on Roof's intelligence, while ignoring that Roof was acting irrationally. The court fully explored whether Roof could act rationally when exploring whether he was suffering from any delusions, as described above. Pp. 48-53, *supra*. Roof's criticism is without merit.

5. Fifth, Roof contends (Br. 77-82) that Ballenger was not credible. Roof notes (Br. 78) that Ballenger had a referral agreement with Dietz, the government's mitigation expert. But Ballenger had not spoken to Dietz or read his report, which had not even been disclosed to the government. JA-930, 1349, 5623-5624. Accordingly, Ballenger could not have modified his findings to align himself with

Dietz. And regardless of another court's criticism of Ballenger in a capital case where he had been hired late and blocked by defense counsel from meeting with the defendant, (JA-926-928), the district court was entitled to find Ballenger credible based on his work in this case (JA-1476 (describing Ballenger's report as "vastly superior" to other competency reports)). See *United States* v. *Abdallah*, 911 F.3d 201, 220 (4th Cir. 2018) (credibility determinations are for the district court).

Roof also contends (Br. 78) that Ballenger did not have enough time to complete his report. Ballenger testified that he had sufficient time. JA-932-934. Roof criticizes Ballenger for missing some details from Roof's social history and excluding Roof's developmental history from his report. Br. 78. Ballenger made clear, however, that aside from the voluminous grand jury testimony that defense counsel sent to him at the last minute for which he obtained permission from the court to omit from his review, he read everything provided to him. JA-7105.

Roof next mischaracterizes (Br. 79) Ballenger's testimony about "bizarre" delusions as being "inconsistent." It was not. Ballenger answered a question from defense counsel about a hypothetical belief that panzer divisions loyal to the German Nazi regime had been hiding in the Black Forest since World War II and were about to emerge and free Roof. JA-1032-1033. Ballenger said that would be a bizarre belief, which is "one of the characteristics of true delusions." JA-1033.

He contrasted that with Roof's belief in a forthcoming white nationalist revolution, which is "more logical, less bizarre[,] and consonant with what he has been reading on the Internet and hearing." JA-1033-1034. Ballenger later clarified that a thought need not be "bizarre" to be delusional. JA-1045-1046. But that did not contradict his earlier testimony. Ballenger's observation that Roof's belief about a white nationalist revolution was "less bizarre" helped to explain why it was not a true delusion but a prediction Roof made based on information he had consumed. JA-1033-1034.

Roof's remaining argument (Br. 79-82) attempts to show that Ballenger wrongly concluded that Roof was not suffering from a psychotic disorder. Roof observes (Br. 80) that Ballenger did not press him on symptoms of psychosis because he did not want Roof to end the interview. To the contrary, Ballenger described how he pressed Roof when he appeared to be hiding information and finally got him to explain why he did not want mental-health evidence to be presented. JA-1086, 1356-1357. And Ballenger's testimony about Roof possibly being in the early stages of developing schizophrenia (Br. 80) conforms with his testimony that Roof was not presently suffering from a psychotic process. JA-1022, 1358.

The competency inquiry has a "modest aim"—to ensure that the defendant has "the capacity to understand the proceedings and to assist counsel." *Godinez* v.

Moran, 509 U.S. 389, 402 (1993). The district court's findings on that question are amply supported and not clearly erroneous.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO FULLY GRANT DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE

Roof next contends (Br. 82-89) that the district court abused its discretion by declining to continue the first competency hearing to the full extent requested. The Court should reject that argument.

A. Background

Ballenger submitted his report on November 15, 2016—the day before the scheduled competency hearing. JA-693, 726, 1304-1370. The defense asked for a continuance until November 28 to review it and noted that Ballenger's failure to diagnose Roof with autism warranted a response from Loftin, who was in Cyprus. JA-773-778, 808, 894-895. The court agreed to delay the hearing until November 21 (JA-805, 808-809), and offered that Loftin could participate by telephone or Skype (JA-895-896, 5574, 5613-5614).

B. Standard Of Review

This Court reviews the denial of a continuance for abuse of discretion. *United States* v. *Hedgepeth*, 418 F.3d 411, 419 (4th Cir. 2005). Even if abuse is found, the party challenging the denial of the continuance must show prejudice. *Ibid.*

C. The District Court Did Not Abuse Its Discretion In Refusing To Further Continue The First Competency Hearing

In the context of a continuance, an abuse of discretion is an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for a delay." *United States* v. *LaRouche*, 896 F.2d 815, 823 (4th Cir. 1990) (quotations omitted). No abuse of discretion occurred here. The court granted defense counsel's request to delay jury selection until after the competency hearing; it then continued the hearing to give defense counsel more time to review Ballenger's report. JA-693, 726, 805, 808-809. The only request the court did not accommodate was to begin the competency hearing after Thanksgiving, which would have added one additional week of delay, but it nonetheless offered to let Loftin participate remotely. JA-808-809, 895-896, 5574, 5613-5614.

The court explained that defense counsel had been working with mental-health experts for a year and had never raised any concerns about Roof's competence until the eve of trial, and only after Roof expressed disagreement with counsel's mitigation strategy. JA-2061-2062, 2075 n.6. The court also noted that less than two months earlier, Roof had waived his right to attend a suppression hearing with no suggestion from counsel that Roof might be incompetent. JA-2062.

This Court has recognized that "a broad and deferential standard" applies to continuance rulings based on "the burdensome task of assembling a trial" and the

district court's unique "opportunity to assess the candidness of the movant's request." *LaRouche*, 896 F.2d at 823; see *United States* v. *Caicedo*, 937 F.2d 1227, 1232 (7th Cir. 1991) (counsel's failure to raise a competency issue until late in the proceedings was probative of whether a *bona fide* doubt about competency existed). Those considerations exist here, and the court's decision to schedule the competency hearing for November 21 was not an abuse of discretion.

D. Roof Was Not Prejudiced

Moreover, Roof cannot show prejudice. *Hedgepeth*, 418 F.3d at 419. Roof claims (Br. 86-87) that Ballenger did not have enough time to evaluate Roof, which is incorrect. P. 56, *supra*. Regardless, Ballenger's report was already complete when defense counsel requested the continuance, so the court's decision on the length of the continuance would not have affected Ballenger's work. JA-774-778, 894.

Roof further contends (Br. 87-88) that he was prejudiced because Loftin was out of town and unable to testify about Roof's childhood and predisposition to schizophrenia-spectrum disorder. The court offered for Loftin to participate by phone or Skype, but defense counsel elected to submit her opinion by affidavit. JA-895-896, 5574, 5613-5614. Moreover, Loftin had examined Roof on three trips to Charleston before she left for Cyprus and evidently had no concerns about his competency. JA-1773-1774. She was preparing to be a witness on autism, not

psychosis (JA- 5264), and her final report does not even address competence (JA-5262-5317).

Roof presented testimony from six defense witnesses at the competency hearing, including live testimony from Maddox, who had met with Roof nine times and testified that he was incompetent. Pp. 35-37, *supra*. Roof has not demonstrated that the outcome of the hearing would have been different had the court further delayed it. See *Hedgepeth*, 418 F.3d at 423-424 (no prejudice where defendant had not shown that further investigation of last-minute evidence would have changed proceeding's outcome).

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE SCOPE OF THE SECOND COMPETENCY HEARING

Roof contends (Br. 89-95) that the district court abused its discretion by limiting the second competency hearing. No error occurred.

A. Background

When the district court agreed to hold a second competency hearing, it advised the parties that, based on standby counsel's representation that its motion was based on facts that arose after the first hearing, the court would "only hear evidence related to any developments since the November 21-22, 2016 hearing." JA-5463. The court declared that the "law of the case is that as of November 22, 2016, [Roof] was competent." JA-5519.

B. Standard Of Review

This Court reviews a district court's decision to exclude evidence for abuse of discretion. *United States* v. *Young*, 248 F.3d 260, 266 (4th Cir. 2001).

C. The District Court Properly Limited The Second Competency Hearing To Evidence That Roof's Competency Had Changed

Roof suggests that by limiting the second hearing's scope, the district court failed to acknowledge that competency can change over time. Br. 90-91 (citing, *e.g.*, *Maxwell* v. *Roe*, 606 F.3d 561, 569 (9th Cir. 2010)). The court fully acknowledged that competency can change. That is why it ordered a new hearing based on counsel's representation that new facts bearing on Roof's competency had emerged. JA-5463.

Roof further contends that the district court misapplied the law-of-the case doctrine, which prevents litigation of settled legal issues, by applying it to a factual finding of competency. Br. 90-92 (citing *Arizona* v. *California*, 460 U.S. 605, 618 (1983)). Regardless of whether law-of-the-case doctrine technically applies, courts are not required to revisit prior factual findings. Cf. *United States* v. *Adams*, 104 F.3d 1028, 1030 (8th Cir. 1997) ("[A]lthough the finding is perhaps not technically res judicata, it is unusual, for efficiency reasons if no other, for trial courts to revisit factual findings.").

Roof contends (Br. 92-95) he was prejudiced because the court excluded reports and testimony from Moberg and Loftin. But Moberg evaluated Roof in

February 2016 (JA-5350), and Loftin last evaluated him in October 2016 (JA-5263, 5663). Although their prior evaluations of Roof might be relevant to inform an opinion that Roof's competency had changed since the first hearing, these experts had not evaluated Roof since then. Counsel asserted that these expert reports "did not yet exist" in November (JA-5243-5244), but none of the information in them spoke to a change in competency since November. The defense essentially used the second competency motion to submit the now-completed reports of their mitigation experts, who would not have an opportunity to present their findings at the penalty phase. And contrary to Roof's contention (Br. 93-94), Ballenger reviewed these reports and discussed them with Roof. JA-5978-5979, 5602-5603; see JA-5989-5990. The district court did not abuse its discretion by declining to consider information that was available at the first hearing.

IV

THE DISTRICT COURT PROPERLY ADVISED ROOF THAT THE SIXTH AMENDMENT DID NOT AUTHORIZE HIM TO CONTROL COUNSEL'S PRESENTATION OF MITIGATION EVIDENCE

Roof contends (Br. 107-113) that the district court misadvised him on whether he could direct counsel's presentation of mitigating evidence at the penalty phase, which rendered invalid his waiver of the right to counsel. He is incorrect.

A. Background

As the trial date approached, Roof and his counsel reached an impasse over how best to present Roof's case. Although Roof had confessed, he pleaded not guilty because the government would not agree to a sentence of life imprisonment in exchange for a guilty plea. JA-77, 161, 373. Roof wanted to avoid the death penalty, and he expressed that goal to his attorneys. JA-574, 662. Roof told Ballenger that he wanted to stay alive as long as possible and part of his strategy was to insist on a trial that would create appellate issues and thereby "prolong * * * his life span." JA-5545, 5563; JA-5545 (Roof wants "as many appeals [as possible], which he thinks are all going to be turned down, but that that will keep him alive.").

Consistent with Roof's objective, defense counsel had been exploring all aspects of mitigation, including Roof's medical history and mental health. JA-536-546. But Roof became angry when he learned that his lawyers planned to call an autism expert. JA-538-545. The court observed that this conflict seemed inevitable, as it was clear that a mental-health defense would be reprehensible to Roof, who stated in his writings that he committed his crimes intentionally and was proud of what he had done. JA-544-545, 555.

After Roof sent his letter to the prosecutors, defense counsel requested an *ex parte* hearing and attached a memorandum on "the respective decisional roles of

attorney and client in deciding how to work toward the client's objective in a criminal case." JA-573-574. Counsel explained that aside from the fundamental issues that a defendant must personally decide—whether to plead guilty, waive a jury trial, testify in his own defense, and take an appeal—the lawyer has full authority to manage the trial, including decisions about what evidence to present at capital sentencing. JA-579-580.

At an *ex parte* hearing on November 7, 2016, the court asked Roof what he wanted his lawyers to present as a defense, and Roof stated that he "d[id]n't want any defense." JA-626. He wanted his lawyers to "let the prosecution present their evidence and that's it," and at the penalty phase he "want[ed] the prosecution to present all their evidence and then not present any mitigating evidence." JA-626-627, 629, 635. Roof acknowledged a high likelihood that this strategy would result in the death penalty, but stated he would rather die than be labeled autistic because it would "discredit[] the reason why [he] did the crime." JA-629-632.

The district court asked defense counsel whether they had considered altering their strategy based on Roof's vehement opposition to mental-health evidence. JA-643, 831. Counsel explained that they had listened to Roof's concerns but had nevertheless determined, in their professional judgment, that it was in Roof's interest to present the evidence. JA-643. Counsel explained that Roof had selected the goal of the representation—to avoid the death penalty—and

they had been working diligently toward that goal. JA-662. Counsel had no intention of "giv[ing] up [Roof's] only sentencing defense." JA-833.

After the competency hearing, the district court observed that there was "no solution" to the dispute between Roof and his counsel. JA-1563. The court stated that "any competent counsel would insist on asserting a mental health defense." JA-1563. Although Roof never requested new counsel, the court observed that "if [it] were to replace [defense counsel] today and bring [in] another set of lawyers, we would be in exactly the same position" because any competent lawyer would not obey Roof and "simply say, 'I have no defense.'" JA-1747.

Roof had previously expressed that he "ha[d] a hard time with the idea" that his lawyers get to make decisions on how to present his case, and he thought "they should do whatever [he] tell[s] them to do." JA-635. Roof asked the court if he "could write a document that would take away all responsibility from [his] lawyers, but still keep them as [his] lawyers, and then they could do whatever [he] say[s], but they wouldn't have any responsibility." JA-1741. The judge responded that defense counsel could not "waive" the responsibility to decide what evidence to present. JA-1742-1743.

In a written order, the court explained that a criminal defendant has control over certain fundamental decisions regarding his case—whether to plead guilty, waive a jury, testify in his own behalf, and take an appeal. JA-2555 (citing *Jones*

v. *Barnes*, 463 U.S. 745, 759 (1983)). But deciding which objections to make, witnesses to call, and arguments to advance, the court explained, are strategic choices within counsel's authority. JA-2555 (citing *Gonzalez* v. *United States*, 553 U.S. 242, 249-250 (2008)).

With that division in mind, the court determined that the Sixth Amendment does not give a defendant the right "to *instruct his counsel* not to present certain mitigation evidence in his capital sentencing proceeding, when counsel believe they have a professional obligation to present such evidence." JA-2556; see JA-2558. Citing this Court's precedent, the court determined that "[t]he decision concerning what evidence should be introduced in a capital sentencing is best left in the hands of trial counsel, and reasonable tactical decisions by trial counsel in this regard are binding on the defendant." JA-2556 (quoting *Sexton* v. *French*, 163 F.3d 874, 887 (4th Cir. 1998)).

On November 27, 2016, Roof filed a motion to discharge his court-appointed lawyers and invoked his right to self-representation. JA-2085. The court granted the motion. JA-2103-2108.

B. Standard Of Review

A district court's determination of a waiver of the right to counsel is a legal question reviewed de novo. *United States* v. *Owen*, 407 F.3d 222, 225 (4th Cir. 2005).

C. *The District Court Correctly Advised Roof As To The Allocation Of Decision-Making Authority Between Attorney And Client In A Criminal Case*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. In *Faretta* v. *California*, 422 U.S. 806 (1975), the Supreme Court held that the Sixth Amendment also guarantees a defendant the right to waive counsel and conduct his own defense. *Id.* at 819. Because a defendant managing his own defense "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel," he must "'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)).

Roof contends (Br. 107-113) that he did not knowingly and intelligently waive his right to counsel because he would not have done so but for the court's ruling allowing his attorneys to decide whether to present mental-health mitigation evidence. According to Roof, the Supreme Court's decision in *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), establishes that the decision belonged to Roof.[4] The district court properly advised Roof as to the division of decision-making

[4] *McCoy* applies retroactively to Roof's case on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 326-328 (1987).

authority under binding Fourth Circuit precedent, and *McCoy* does not undermine the district court's ruling.

1. Counsel Controls Decisions On Presentation Of The Defense Case

Division of decision-making authority between attorney and client in a criminal case is well-established. A criminal defendant "has the ultimate authority to make certain fundamental decisions regarding the case," which counsel cannot override. *Jones*, 463 U.S. at 751. Those fundamental decisions are: (1) whether to plead guilty, (2) whether to waive a jury trial, (3) whether to testify in his own behalf, and (4) whether to appeal. *Ibid.*; see *United States* v. *Chapman*, 593 F.3d 365, 368 (4th Cir. 2010). Counsel decides "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *New York* v. *Hill*, 528 U.S. 110, 114-115 (2000) (citations omitted); see *Brookhart* v. *Janis*, 384 U.S. 1, 8-10 (1966) (opinion of Harlan, J.) ("[A] lawyer may properly make a tactical choice of how to run a trial even in the face of the client's * * * explicit disapproval."); *Sexton*, 163 F.3d at 885; Am. Bar Ass'n, Defense Function Standard 4-5.2 (3d ed. 1993) (describing division of decision-making authority between client and counsel).

To "preserve actual control over the case he chooses to present to the jury," a defendant may waive the right to counsel and represent himself. *McKaskle* v. *Wiggins*, 465 U.S. 168, 178-179 (1984). But where a defendant is represented by

counsel, he cedes control of tactical and strategic decisions. *Faretta*, 422 U.S. at 820. That allocation is justified "by the defendant's consent, at the outset, to accept counsel as his representative." *Id.* at 820-821.

This division of decision-making authority reflects the unique agency relationship between lawyer and client in a criminal case. This Court has explained that an attorney's obligations in a criminal case "do not precisely mirror the obligations of a general agent representing his principal on civil matters." *Chapman*, 593 F.3d at 370. On the one hand, the defendant must make certain fundamental decisions for himself without delegating those choices to his lawyer. *Ibid.* On the other hand, notwithstanding that "a principal generally has the authority to dictate the manner in which his agent will carry out his duties, the law places certain tactical decisions solely in the hands of the criminal defense attorney." *Ibid.*

As a practical necessity, "the lawyer has—and must have—full authority to manage the conduct of the trial." *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988); *Gonzalez*, 553 U.S. at 249. Defense counsel is not simply "an adviser to a client with the client's having the final say at each point." *Chapman*, 593 F.3d at 370 (quoting *United States* v. *Burke*, 257 F.3d 1321, 1323 (11th Cir. 2001)). Rather, defense counsel "is an officer of the court and a professional advocate pursuing a result—almost always, acquittal—within the confines of the law; his chief reason

for being present is to exercise his professional judgment to decide tactics." *Ibid.* (quoting *Burke*, 257 F.3d at 1323); *Jones*, 463 U.S. at 751.

2. The District Court Correctly Advised Roof That He Could Not Control Counsel's Presentation Of Mitigation Evidence

Applying the foregoing principles, the district court correctly advised Roof that he could not control counsel's decisions regarding what mitigating evidence to introduce in the penalty phase.

Although Roof had confessed, he elected to plead not guilty and invoked his right to a jury trial—decisions that were within his sole control. See *Jones*, 463 U.S. at 759. He made those decisions for a chance to avoid the death penalty. JA-77, 161, 373. Roof's lawyers understood that his objective for his defense was to obtain a sentence of life imprisonment, and they worked toward that objective to the best of their professional ability. JA-662.

Relying on precedent from this Court that is directly on point, the district court correctly determined that "[d]ecisions about what mitigating evidence will be presented are strategic decisions within the control of counsel." JA-2556; JA-2555-2558. In *Chapman*, this Court explained that the decision of which witnesses to call "is a classic tactical decision left to counsel * * * even when the client disagrees." 593 F.3d at 369. More specifically, in *Sexton*, this Court explained that "[t]he decision concerning what evidence should be introduced in a capital sentencing" proceeding is a tactical decision that is "best left in the hands of trial

counsel" and binding on the defendant. 163 F.3d at 887 (rejecting defendant's argument that counsel had been ineffective for failing to secure his consent to present certain mitigating evidence and "portray[ing] him as the product of a severely dysfunctional upbringing").

Roof "ha[d] a hard time with the idea" that his lawyers get to decide how to present his case. JA-635. But the Sixth Amendment does not entitle Roof to counsel that will follow his instructions over their own professional judgment. Defense counsel is the professional representative of the accused, not his "mouthpiece," and any other view is "destructive of the lawyer's usefulness" to the accused. Am. Bar Ass'n, Defense Function Standard 4-1.2 cmt. As this Court has explained, "[i]f we add to the list of circumstances in which a defendant can trump his counsel's decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel." *Chapman*, 593 F.3d at 370 (quoting *Burke*, 257 F.3d at 1323). The district court correctly determined that Roof could not order his lawyers to withhold mitigation evidence that, in their professional judgment, should be presented to achieve the defense objective.

D. McCoy *v.* Louisiana *Does Not Undermine The District Court's Ruling*

Roof does not address *Chapman* and *Sexton*, the most on-point cases from this Court, other than to contend (Br. 108 n.26) that they were undermined by

McCoy. *McCoy* does not undermine the district court's decision or the precedents on which it was based. Indeed, no court has applied *McCoy* to a situation similar to this case.

1. McCoy *Held That An Attorney Cannot Override His Client's Objective (Which In That Case Was Maintaining His Innocence)*

In *McCoy*, the defendant pleaded not guilty to killing three family members of his estranged wife. 138 S. Ct. at 1506. McCoy's lawyer thought the evidence was overwhelming and that the best strategy to avoid the death penalty was to concede guilt at trial and gain credibility. *Ibid.* Over McCoy's objection, counsel conceded during the guilt phase that McCoy had killed the victims. *Id.* at 1506-1507. McCoy was convicted and sentenced to death. *Id.* at 1507.

The Supreme Court reversed. *McCoy*, 138 S. Ct. at 1512. The Court acknowledged that, in general, the attorney makes decisions about what evidence to present and what arguments to make, while the defendant decides "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* at 1508. The Court determined that the decision at issue—whether "to decide that the objective of the defense is to assert innocence"—"belongs in th[e] latter category" of fundamental decisions that the client controls. *Ibid.* Allowing defense counsel to override that decision, the Court determined, violated McCoy's "autonomy right" protected by the Sixth Amendment. *Id.* at 1511.

The Court explained that the decision to maintain innocence at trial, just like the decision to plead not guilty in the face of overwhelming evidence, is "not [a] strategic choice[] about how best to *achieve* a client's objectives," it is a choice about "what the client's objectives in fact *are*." *McCoy*, 138 S. Ct. at 1508. The Court observed that McCoy's attorney was working to avoid the death penalty, but the client "may not share that objective," and may instead wish to "risk death for any hope, however small, of exoneration" or to "avoid, above all else, the opprobrium that comes with admitting he killed family members." *Ibid.* The Court held: "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. Amend. VI).

2. McCoy *Does Not Stand For The Proposition That Withholding A Category Of Evidence Can Be The Defendant's Objective*

According to Roof, *McCoy* requires reversal here because the district court ruled that Roof's lawyers could override his objective, which was "to prevent his attorneys from presenting mental-health evidence at penalty." Br. 96; see Br. 97 (stating that Roof should not have had to waive counsel to "achieve his objective—preventing mental-health mitigation"); Br. 108. Roof contends (Br. 110-113) that

this objective was a "higher priority than prevailing at trial," so his lawyers could not override it. Br. 110. That is a misreading of *McCoy*.[5]

McCoy did not hold that whatever issue is viewed as most important by the defendant becomes the defense "objective" that counsel must follow. When the Court described the defendant's "prerogative * * * to decide on the objective of his defense," 138 S. Ct. at 1505, it described the decision as a choice about whether "to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence." *Ibid.*; see *id.* at 1508 (stating that defendant has "[a]utonomy to decide that the objective of the defense is to assert innocence"); *id.* at 1510. That decision is similar to a long-recognized fundamental decision left to the defendant—whether to plead guilty. *Id.* at 1508.

When criminal defendants have previously tried to expand the types of decisions that are within their sole control, this Court has similarly asked whether the decision "bears [any] similarity, in nature or significance, to the decisions that the Supreme Court has identified as belonging solely to the defendant." *Chapman*, 593 F.3d at 368. Unlike the decision whether to maintain innocence at trial, the

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[5] Roof's *McCoy* argument, which is based on the premise that his autonomy right was so strong at capital sentencing that he could control counsel's presentation of mitigating evidence (Br. 109), is flatly inconsistent with his arguments in Issues V and VI below, which are based on the premise that his autonomy right is severely diminished during the penalty phase (Br. 118, 122 & n.30).

decision whether to present mental-health mitigation bears no resemblance to any of those fundamental decisions.

Roof's argument that *McCoy* required his lawyers to follow his instructions because his "goal" was "to prevent his lawyers from presenting mental-health evidence at penalty" should be rejected. Br. 96. That view could transform all decisions about what witnesses to call and what evidence to introduce into fundamental decisions within the defendant's control, as long as the defendant deems that strategic or tactical decision to be his highest priority. *McCoy* must not be read so broadly. The decision is best understood as viewing the objectives of the defense that the defendant must decide as the fundamental decisions reserved for the defendant—and closely-related decisions such as whether to maintain innocence during trial.

Here, the defense objective was to avoid the death penalty. Roof offered to plead guilty in exchange for life imprisonment. JA-77, 161, 373. When that failed, he insisted on a trial in order to create appellate issues that would prolong his life span, even though he had no expectation that his lawyers would try to exonerate him at the guilt phase. JA-160-161, 833, 5545, 5563. And Roof communicated to counsel that his objective was to avoid the death penalty. JA-574, 662. The district court correctly determined that counsel controlled the strategic and tactical decisions on how to achieve that objective.

3. No Court Has Applied McCoy *To Similar Circumstances*

As Roof acknowledges (Br. 110), no court has applied *McCoy* in the factual scenario presented here. The non-binding cases on which he relies (Br. 110-111) are distinguishable.

In *Taylor* v. *Steele*, 372 F. Supp. 3d 800 (E.D. Mo. 2019), a capital defendant ordered his counsel not to present any mitigation evidence or closing argument at the penalty phase (other than a stipulation of good behavior in prison), explaining that asking anyone to spare his life violated his religious beliefs. *Id.* at 807, 861-862. The defendant then argued on postconviction review that his attorneys had provided ineffective assistance by failing to present a closing argument. *Id.* at 806-807, 861-867. The federal district court rejected that argument, stating that the defendant had the authority to waive closing argument and could not argue that his attorneys had been ineffective for following his instructions. *Id.* at 867.

In *People* v. *Amezcua & Flores*, 434 P.3d 1121 (Cal. 2019), two defendants were sentenced to death in California state court. *Id.* at 1127. Before the guilt phase ended, the defendants informed the court that if they were convicted, they preferred not to present any case for life imprisonment. *Id.* at 1146-1149. The court explained that, under state-court precedent, the defendants could not claim any error on appeal based on their attorneys' performance if they insisted on this

course. *Id.* at 1148. Nevertheless, on appeal, the defendants argued that permitting them to override their attorneys' effort to present mitigation evidence denied them effective assistance of counsel. *Id.* at 1149. The Supreme Court of California held that the decision whether to "seek a sentence of life without parole rather than death" at sentencing is committed to the defendant personally, and counsel cannot be deemed ineffective for acquiescing in that decision. *Ibid.*

The above cases are distinguishable in two ways. First, the defendant in each case, having taken a chance at an acquittal during trial to avoid criminal responsibility, then made a choice at the penalty phase *not* to avoid the death penalty. See *Taylor*, 372 F. Supp. 3d at 867 (stating that defense counsel's objective was to avoid the death penalty, but Taylor had made a different choice); *Amezcua & Flores*, 434 P.3d at 1150 ("[t]he record clearly demonstrates defendants' objective" was not to make a case for life imprisonment). Roof, in contrast, had no intention of making a case for acquittal at trial and instead opted for trial to create opportunities for trial error that would prolong his life span by generating grounds for appeal. JA-5545, 5563. Accordingly, preventing his lawyers from presenting mental-health evidence interfered with counsel's decisions about what evidence and arguments to advance in pursuit of the defense objective.

Second, in each case, defense counsel acquiesced in the defendant's wishes, and the defendants later changed course and argued that their lawyers had been ineffective for following their demands. The rejection of that tactic by both courts mirrors the Supreme Court's decision in *Schriro* v. *Landrigan*, 550 U.S. 465 (2007), which held that an Arizona post-conviction review court did not unreasonably apply clearly established federal law when holding that defense counsel's failure to present mitigating evidence was not ineffective assistance, where the defendant had instructed counsel to present no such evidence. *Id.* at 478.

In contrast, Roof's lawyers, against Roof's wishes, refused to "give up [Roof's] only sentencing defense" because, in their professional judgment, it was the best strategic choice in service of the defense objective. JA-643, 662, 831, 833; see Am. Bar Ass'n, Defense Function Standard 4-8.1(b) (providing that, at sentencing, "[d]efense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused"). Indeed, the district court noted that "any competent counsel" would refuse to follow Roof's instructions. JA-1563, 1747. That is in stark contrast to *McCoy*, where the Supreme Court observed that lawyers frequently go to trial with a weak case when the defendant insists on maintaining innocence. 138 S. Ct. at 1510. Accordingly, the question here was whether Roof could *force* his lawyers to withhold certain

items of mitigating evidence, and the district court correctly determined that the Sixth Amendment gave him no such right. JA-2556.

Roof also relies (Br. 112-113) on *United States* v. *Read*, 918 F.3d 712 (9th Cir. 2019), where the Ninth Circuit held that counsel cannot present an insanity defense over a competent defendant's objection. *Id.* at 719. The court reasoned that "[a]n insanity defense is tantamount to a concession of guilt" and thus fits within the long-recognized categories of fundamental decisions that rest solely with the defendant. *Id.* at 720. The court also observed that a defendant might "prefer a remote chance of exoneration to the prospect of 'indefinite commitment to a state institution.'" *Id.* at 720-721 (quoting *Treece* v. *State*, 547 A.2d 1054, 1060 (Md. 1988)). That tracks the teaching of *McCoy*.

Control over what arguments and evidence to present at a capital penalty phase differs substantially from the presentation of an insanity defense, where the defendant admits the acts constituting the offense and is institutionalized if the defense is successful. 18 U.S.C. 17, 4243(a) and (e). The evidentiary decision in Roof's case concerns a penalty-phase strategy supporting the defense objective, and the district court correctly determined that the Sixth Amendment did not give Roof the right to control counsel's decisions on mitigation evidence.

V

THE SIXTH AMENDMENT PROTECTS ROOF'S RIGHT TO SELF-REPRESENTATION IN CAPITAL PENALTY PROCEEDINGS

In an about-face from his autonomy-based argument above, Roof next contends (Br. 113-121) that the district court should not have allowed him to represent himself during the penalty phase because there is no Sixth Amendment right to self-representation in capital penalty proceedings. He is incorrect.

A. Background

During jury selection while Roof was self-representing, standby counsel filed a motion contending that the Eighth Amendment prohibits a capital defendant from proceeding *pro se* during the penalty phase and waiving mitigation. JA-3177-3184. The motion also argued that the self-representation right does not apply in capital penalty proceedings. JA-3179. They contended that the Sixth Amendment's text confers rights on the accused during a criminal prosecution, which does not include capital penalty proceedings where the defendant stands convicted. JA-3179-3180.

The district court rejected that argument. JA-3541. It explained that "[s]entencing is part of criminal prosecution, and the Sixth Amendment of course applies." JA-3541. Otherwise, the court explained, "a defendant would have neither the right to self-representation nor the right to counsel," and capital penalty

proceedings would instead be a "court-driven, inquisitorial inquiry," which is "obviously[] not the law." JA-3541.

B. Standard Of Review

This Court reviews properly preserved constitutional claims de novo. *United States* v. *Hall*, 551 F.3d 257, 266 (4th Cir. 2009).

C. The Self-Representation Right Recognized In Faretta *v.* California *Applies In Capital Penalty Proceedings*

In *Faretta*, the Supreme Court held that the Sixth Amendment guarantees a criminal defendant the right to waive counsel and conduct his own defense. 422 U.S. at 819. The Court explained that the Amendment's structure and language necessarily imply a self-representation right by "grant[ing] to the accused personally the right to make his defense." *Ibid.*; *id.* at 832. Because "[t]he right to defend is given directly to the accused," and because "it is he who suffers the consequences if the defense fails," the defendant "must be free personally to decide" whether counsel is to his advantage. *Id.* at 819-820, 834. The Court's reading was reinforced by historical evidence showing that colonists and the Framers highly valued the self-representation right. *Id.* at 830 n.39, 832. It recognized that the defendant's choice must be honored even though it may ultimately be to his detriment. *Id.* at 834.

Although the Sixth Amendment's text provides that "the accused" has the right to assistance of counsel for "his defence," the Supreme Court has recognized

that the Amendment establishes the right to counsel not only at trial, *Kansas* v. *Ventris*, 556 U.S. 586, 590 (2009), but also at "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected"—including sentencing, *Mempa* v. *Ray*, 389 U.S. 128, 134 (1967); see *United States* v. *Taylor*, 414 F.3d 528, 535-536 (4th Cir. 2005) (Sixth Amendment "entitles a criminal defendant to effective assistance of counsel at each critical stage of his prosecution, including sentencing") (citation omitted); *United States* v. *Haymond*, 139 S. Ct. 2369, 2379 (2019) (plurality opinion) ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.").

The penalty phase of a capital trial is part of the sentencing proceeding. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Supreme Court recognized that the Sixth Amendment right to effective assistance of counsel extends to capital sentencing, explaining that "[a] capital sentencing proceeding * * * is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 686-687 (citations omitted).

Because the Sixth Amendment applies at capital sentencing, the right to self-representation recognized in *Faretta* also applies. This Court has already

recognized that a defendant has the right to waive counsel and self-represent at sentencing. *United States* v. *Cohen*, 888 F.3d 667, 681 (4th Cir. 2018) (citing *Faretta*, 422 U.S. at 807); see *Lopez* v. *Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) (en banc); *United States* v. *Marks*, 38 F.3d 1009, 1015 (8th Cir. 1994). The penalty phase of a capital trial is undertaken "to assess the gravity of a particular offense" and is "a continuation of the trial on guilt or innocence of capital murder." *Monge* v. *California*, 524 U.S. 721, 731-732 (1998). Accordingly, no reason exists to suspend the *Faretta* right during that phase. See *Silagy* v. *Peters*, 905 F.2d 986, 1007 (7th Cir. 1990) (the Court imposed no restrictions on the *Faretta* right other than a knowing and voluntary waiver, and "no principled reason" justifies denying a death-eligible defendant his right to proceed without counsel). Several courts have expressly held that *Faretta* applies during capital sentencing. See, *e.g.*, *United States* v. *Davis*, No. 01-30656, 2001 WL 34712238, at *3 (5th Cir. July 17, 2001) (*Davis I*); *Silagy*, 905 F.2d at 1006-1008; *Sherwood* v. *State*, 717 N.E.2d 131, 135 (Ind. 1999); *State* v. *Brewer*, 492 S.E.2d 97, 99 (S.C. 1997); *People* v. *Coleman*, 660 N.E.2d 919, 937-938 (Ill. 1995); *Bishop* v. *State*, 597 P.2d 273, 276 (Nev. 1979).

D. Roof's Analysis Under Martinez *v.* Court of Appeal *Is Inapposite*

Roof contends (Br. 113-118) that capital sentencing should not include a self-representation right. He relies on *Martinez* v. *Court of Appeal*, 528 U.S. 152

(2000), where the Supreme Court held that there is no right to self-representation on direct appeal of a criminal conviction. *Id.* at 154. Roof views *Martinez* as establishing a three-factor test to determine whether a defendant has the right to self-represent. Br. 113-114. He is incorrect.

1. Analysis Under Martinez *Is Unwarranted Because The Sixth Amendment Applies At Capital Sentencing*

For phases of a criminal case that are not part of the "criminal prosecution," a right to counsel cannot be derived from the Sixth Amendment. Accordingly, the Sixth Amendment right to counsel does not apply on direct appeal, see *Coleman* v. *Thompson*, 501 U.S. 722, 755-756 (1991), or in a probation or parole revocation proceeding, see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789-790 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972). A criminal defendant may nevertheless enjoy a right to counsel during those proceedings under the Due Process or Equal Protection Clauses. *Taylor*, 414 F.3d at 536; see *Coleman*, 501 U.S. at 755-756.

Because the self-representation right recognized in *Faretta* was derived from the Sixth Amendment, a defendant does not necessarily have a right to self-represent in proceedings where his right to counsel arises from a different constitutional provision. See *Martinez*, 528 U.S. at 154 (no self-representation right on direct appeal); *United States* v. *Missouri*, 384 F. App'x 252, 252 (4th Cir. 2010) (supervised release revocation proceeding); *United States* v. *Spangle*, 626 F.3d 488, 494 (9th Cir. 2010) (parole revocation proceeding); *United States* v.

Hodges, 460 F.3d 646, 650 (5th Cir. 2006) (parole hearing). That is why the Supreme Court in *Martinez* examined the underlying rationale of *Faretta* to determine whether a self-representation right should apply on direct appeal. See 528 U.S. at 154. No such analysis is warranted for capital sentencing, where the right to counsel arises from the Sixth Amendment.

2. Even If Martinez *Applied, A Self-Representation Right Would Exist At Capital Sentencing*

Even if *Martinez* set forth a general test to determine whether a self-representation right exists, the right would exist during capital sentencing.

a. In *Martinez*, the Court explained that *Faretta* had based its holding on "three inter-related arguments": (1) historical evidence identifying a self-representation right at trial; (2) the structure of the Sixth Amendment; and (3) a recognition that a defendant's waiver must be honored out of respect for individual autonomy, even though the outcome of trial would likely be better with counsel's assistance. 528 U.S. at 156.

Applying that rationale, the Court determined that no self-representation right exists on direct appeal. 528 U.S. at 154. It explained that the historical pedigree of self-representation is not present in the appellate context because "[a]ppeals as of right in federal courts were nonexistent for the first century of our Nation." *Id.* at 159. *Faretta*'s reliance on the Sixth Amendment's structure was

"also not relevant" because the Amendment does not include any right to appeal. *Id.* at 159-160.

The Court acknowledged that *Faretta*'s focus on individual autonomy applies equally to an appeal, where the defendant may be skeptical of a court-appointed lawyer and must personally bear the consequences of the appeal. 528 U.S. at 160. The Court explained, however, that any right to self-representation on appeal would be grounded in the Due Process Clause rather than the Sixth Amendment, and the risk or suspicion of counsel's disloyalty under prevailing practices is not a sufficient concern to conclude that self-representation on appeal is essential to a fair proceeding. *Id.* at 161.

The Court explained that, in the appellate context, the balance between a defendant's autonomy interest and the government's interest in ensuring the integrity and efficiency of the proceeding tips in the government's favor. 528 U.S. at 162. That is because during a trial, the government hales a person into court and aims to convert him from accused to convicted, whereas an appellate proceeding is ordinarily initiated by a defendant seeking to overturn a finding of guilt. *Id.* at 162-163. Given that "change in position from defendant to appellant," the autonomy interests that survive a felony conviction are "less compelling than those motivating the decision in *Faretta*." *Id.* at 163.

b. Applying *Martinez* to capital sentencing, Roof contends (Br. 116) that there is no historical pedigree for a self-representation right because the separate penalty hearing for capital cases is "an invention of the late twentieth" century. The Supreme Court recently explained, however, that "[F]ounding-era prosecutions traditionally ended at final judgment" and at the time guilt and punishment were both resolved in a single proceeding "subject to the Fifth and Sixth Amendment's demands." *Haymond*, 139 S. Ct. at 2379. Accordingly, the self-representation right for capital sentencing applied at the Founding, even if the trial was not bifurcated into a trial and penalty phase.

Roof contends (Br. 116-117) that this Court cannot infer a self-representation right at capital sentencing from the Sixth Amendment's text or structure because the Sixth Amendment does not apply after conviction. That view ignores Supreme Court precedent holding that the Sixth Amendment right to counsel applies at sentencing, including capital sentencing. See *Mempa*, 389 U.S. at 134; *Strickland*, 466 U.S. at 686-687. Rejecting an argument identical to Roof's, the Fifth Circuit has explained that "[n]othing in *Martinez* can be read to push the ending point for the Sixth Amendment right of self-representation in criminal proceedings back to the end of the guilt/innocence phase of a bifurcated trial proceeding." *Davis I*, 2001 WL 34712238, at *2.

Finally, Roof contends (Br. 118) that the balance between a defendant's autonomy interest and the government's efficiency and reliability interests weigh against recognizing a self-representation right at sentencing. But none of the differences the Court described in *Martinez* between trial and appellate proceedings would justify refusing to recognize a self-representation right at capital sentencing. Unlike an appeal, capital sentencing is not voluntary or initiated by the accused trying to undo his conviction. See *Martinez*, 528 U.S. at 162-163. Rather, the defendant at capital sentencing is haled into court by the government to determine his punishment, and the defendant of course must personally bear the consequences of the sentence. *Ibid.*; see *Davis I*, 2001 WL 34712238, at *2.

Had the district court forced Roof to proceed with counsel at sentencing over his objection, Roof would undoubtedly be arguing now, on solid ground, that the court had infringed his *Faretta* right—a structural error. See *Wiggins*, 465 U.S. at 177. This Court should reject Roof's novel argument that capital defendants cannot self-represent at sentencing.

VI

ROOF WAS NOT PROHIBITED BY THE FIFTH OR EIGHTH AMENDMENTS OR THE FDPA FROM REPRESENTING HIMSELF AND DECLINING TO PRESENT MITIGATION EVIDENCE

Roof next contends (Br. 121-127) that the district court should not have permitted him to waive both his right to counsel and his right to present mitigation evidence at the penalty hearing. He contends (*ibid.*) that the Fifth and Eighth Amendments and the FDPA, 18 U.S.C. 3591-3598, *require* capital juries to consider mitigation, which "outweigh[s]" Roof's self-representation right. According to Roof (Br. 127), the court was obligated either to reject his waiver of counsel for the penalty phase and allow counsel to present mitigation or to order the independent presentation of mitigating evidence. The Court should reject those arguments.

A. Background

After Roof invoked his self-representation right (JA-2103-2108), standby counsel contended that the Eighth Amendment prohibits a capital defendant from waiving counsel and declining to present mitigation evidence (JA-3177-3183). The district court rejected that argument. JA-3541-3543. Relying on *United States* v. *Davis*, 285 F.3d 378 (5th Cir. 2002) (*Davis II*), the court explained that the core of a defendant's right to represent himself is his ability to preserve control over the

case he presents to the jury and that right remains constitutionally protected even if society would benefit from hearing the evidence. JA-3543.

During the penalty phase, standby counsel asked the court to order the independent presentation of mitigating evidence on Roof's behalf. JA-6521-6523; see JA-5258. The court denied the motion. JA-6646-6647.

B. Standard Of Review

This Court reviews preserved constitutional claims and matters of statutory interpretation de novo. *Hall*, 551 F.3d at 266; *United States* v. *Beck*, 957 F.3d 440, 445 (4th Cir. 2020).

C. The District Court Was Not Required To Force Roof To Proceed With Counsel To Ensure That Mitigation Evidence Was Presented

"[T]he core of the *Faretta* right" is the right "to preserve actual control over the case [the defendant] chooses to present to the jury." *Wiggins*, 465 U.S. at 178. Roof's right of self-representation encompasses the right to make the "specific tactical decision" whether to introduce mitigating evidence. *Davis II*, 285 F.3d at 384; accord *Silagy*, 905 F.2d at 1007-1008 (*Faretta* right applies to decision not to present mitigating evidence); *Bishop*, 597 P.2d at 276 (same). That right would be violated by the appointment of counsel whose "participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision * * * or to speak instead of the defendant on any matter of importance." *Wiggins*, 465 U.S. at 178 (emphasis omitted).

Accordingly, mandatory presentation of mitigating evidence "in direct conflict" with Roof's strategy would violate his Sixth Amendment right to represent himself. *Davis II*, 285 F.3d at 385.

1. The Fifth And Eighth Amendments Do Not Require A Court To Deny Self-Representation When A Defendant Wants To Withhold Certain Mitigating Evidence

Roof asserts (Br. 122-123) that allowing him to self-represent and withhold mitigating evidence conflicted with the Fifth and Eighth Amendments' role in protecting the fairness and reliability of capital sentencing proceedings. The Supreme Court has explained, however, that those provisions guarantee a defendant the *opportunity* to present mitigation evidence for the jury's consideration. *E.g.*, *Saffle* v. *Parks*, 494 U.S. 484, 490 (1990); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson* v. *North Carolina*, 428 U.S. 280, 303-305 (1976) (plurality opinion). The district court's decision to allow Roof to self-represent neither deprived Roof of the opportunity to present mitigation evidence nor prevented the jury from considering mitigating factors based on evidence it had heard.

In fact, the district court instructed the jury on several mitigating factors that Roof requested (JA-6740-6741; see JA-463-465, 496), and the jury found many of those factors by a preponderance of the evidence (see JA-6803-6804 (unanimously finding as mitigating factors that Roof was only 21 when he committed the

offense, had no significant criminal history, offered to plead guilty, cooperated with arresting authorities, confessed, and had no history of violence)).

The court also instructed the jury that it could consider "anything else about the commission of the crime or about the defendant's background or character that would mitigate the imposition of the death penalty." JA-6742. Roof elected not to present any additional evidence at the penalty phase, but that choice does not render the death penalty unfair or unreliable. "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone* v. *Pennsylvania*, 494 U.S. 299, 307 (1990). Here, the jury identified aggravating and mitigating factors based on all the evidence, weighed them, and determined that death was the appropriate sentence. JA-6806. That determination satisfied the constitutional requirement of an individualized sentence.

2. The FDPA Does Not Require A District Court To Deny Self-Representation Where A Defendant Wants To Withhold Certain Mitigating Evidence

Roof is also wrong to assert (Br. 123) that the district court's decision allowing him to self-represent conflicts with the FDPA. The FDPA provides that the defendant "*may* present any information relevant to a mitigating factor" at capital sentencing and the prosecution "*may* present any information relevant to an aggravating factor." 18 U.S.C. 3593(c) (emphases added). Nothing in those

provisions requires the parties to present evidence relevant to aggravating and mitigating factors in every case.

Roof observes (Br. 123) that 18 U.S.C. 3592(a) provides that the fact-finder "*shall* consider any mitigating factor, including the following," and it lists, after an enumerated list of mitigating factors, any "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." *Ibid.* (emphasis added). That the jury "shall consider" any mitigating factors from the defendant's background does not mean that the defense or the court is required to present all such evidence during the penalty phase, especially given Section 3593(c)'s express statement that the defendant *may* present mitigating evidence. Rather, the FDPA simply requires the jury to consider all mitigating factors the defense has opted to present.

The district court complied with Section 3592(a)(8)'s instruction that the jury "shall consider" any "factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence" by instructing the jury to consider any information it had learned about Roof's background and the circumstances of the offense "whether or not specifically identified by the defense" as mitigating evidence. JA-6742. The Court should not interpret Section 3592(a) to mean that such evidence must be presented over a *pro se* defendant's refusal.

D. The District Court Was Not Required To Order The Independent Presentation Of Mitigating Evidence

Alternatively, Roof argues (Br. 125-127) that the district court should have allowed him to self-represent but ordered the independent presentation of mitigating evidence. That action by the court, however, would have equally infringed Roof's self-representation right. As the Fifth Circuit explained in *Davis II*, self-representation is a personal right that "cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial." 285 F.3d at 384. The Supreme Court understood when it recognized the self-representation right that a defendant "may conduct his own defense ultimately to his own detriment," but nevertheless held that "his choice must be honored." *Faretta*, 422 U.S. at 834; see *Wiggins*, 465 U.S. at 177 n.8.

Roof contends (Br. 126) that allowing the independent presentation of mitigating evidence over a *pro se* defendant's objection would be consistent with precedent affirming limitations on *how* a defendant is allowed to self-represent. But forcing the presentation of evidence that a *pro se* defendant specifically wishes to withhold is not comparable to the cases Roof cites—a court placing limitations on a *pro se* defendant's desire to testify in a narrative format, *United States* v. *Beckton*, 740 F.3d 303, 305-307 (4th Cir. 2014), and a court prohibiting a *pro se* defendant from personally cross-examining his daughter and other young girls who

had accused him of sexual abuse, *Fields* v. *Murray*, 49 F.3d 1024, 1034-1037 (4th Cir. 1995). Here, the whole point of Roof's choice to self-represent was to prevent certain mitigation evidence from being introduced.

Roof observes (Br. 126-127) that state high courts in New Jersey and Florida have approached similar situations by allowing the independent presentation of mitigating evidence. No federal court has adopted that approach, and this Court should not follow the lead of those state courts.

In *State* v. *Reddish*, 859 A.2d 1173 (N.J. 2004), a New Jersey trial court had denied the defendant's motion to represent himself during capital penalty proceedings. *Id.* at 1195. The Supreme Court of New Jersey acknowledged that it was reversing the defendant's conviction on another ground and did not need to decide whether the trial court had erred in denying the defendant's motion to represent himself. *Id.* at 1193. The court nevertheless provided guidance for future cases by stating that standby counsel would be required for all *pro se* capital defendants and counsel should take over if the defendant refuses to present mitigating evidence. *Id.* at 1203-1204; cf. *State* v. *Koedatich*, 548 A.2d 939, 993-995 (N.J. 1988) (when a represented defendant directs his counsel not to introduce mitigating evidence, the court should ensure that the evidence is presented). That guidance was both unnecessary to the court's holding and insufficiently protective of the *Faretta* right. See *Reddish*, 859 A.2d at 1189 (criticizing *Faretta*).

In *Muhammad* v. *State*, 782 So. 2d 343 (Fla. 2001), the Florida Supreme Court held as a matter of state law that the sentencing judge had erred in placing great weight on the verdict of an advisory jury, because the *pro se* defendant had refused to present mitigating evidence. *Id.* at 362-363. The court discussed "prospective procedures" that should apply on re-sentencing, including the possible appointment of counsel to present mitigating evidence. *Id.* at 363-364. The defendant did not raise any claim that such an appointment would conflict with his self-representation right, and the court did not address any such claim.

The district court properly acted here to protect Roof's *Faretta* right. See *Wiggins*, 465 U.S. at 177 n.8. This Court should not vacate Roof's sentence based on a novel theory that the district court should have ordered an independent party to present mitigation evidence over Roof's objection.

VII

THE DISTRICT COURT DID NOT MISADVISE ROOF ON THE ROLE OF STANDBY COUNSEL OR HIS OPTIONS FOR SWITCHING BETWEEN COUNSEL AND SELF-REPRESENTATION

Roof next contends (Br. 127-131) that his initial waiver (before voir dire) of the right to counsel was invalid because the district court (1) did not adequately explain the role of standby counsel, and (2) did not advise him that he could wait until the penalty phase to self-represent. He is incorrect.

A. Background

After Roof invoked his self-representation right (JA-2085), the district court confirmed during a *Faretta* hearing that Roof understood he had a right to representation by experienced capital litigation counsel, that counsel's experience would likely be helpful, and that the court believed Roof should "get the benefit of that experience" by allowing counsel to represent him. JA-2103-2104. Roof confirmed he had considered the benefits but nevertheless wanted to represent himself. JA-2104.

Roof confirmed that he could "make, as needed, motions or objections, ask questions, [and] make arguments." JA-2105. Roof further confirmed that he understood he would "be performing in a courtroom * * * throughout the trial." JA-2105-2106. The court informed Roof that if self-representation were permitted, the court "would appoint [Roof's] present counsel as standby counsel, who would be available to assist * * * if [Roof] desired that assistance." JA-2104. The court determined that Roof's waiver of his right to counsel was valid. JA-2107.

On the second day of jury selection, standby counsel inquired about their role, stating that Roof had asked them to advance certain issues and communicate with the government. JA-2303-2305, 2549. The court stated that it would not allow standby counsel to morph into a co-counsel role, where Roof controlled his

defense while standby counsel continued to work for him. JA-2307-2308, 2310, 2407.

The next day, Roof asked the Court if standby counsel could assist him "in proposing more questions to the jurors and making objections to strike jurors." JA-2561-2562. The court explained that standby counsel was free to recommend questions and give advice and Roof was encouraged to take that advice (JA-2561), but that Roof would be required to make and explain objections himself (JA-2561-2562).

B. Standard Of Review

This Court reviews the validity of a defendant's waiver of the right to counsel de novo. *United States* v. *Ductan*, 800 F.3d 642, 648 (4th Cir. 2015).

C. The District Court Did Not Mislead Roof On Standby Counsel's Role

A defendant's assertion of the right to self-representation must be clear and unequivocal; knowing, intelligent, and voluntary; and timely. *United States* v. *Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000). Neither the Supreme Court nor this Court has "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Iowa* v. *Tovar*, 541 U.S. 77, 88 (2004); *Spates* v. *Clarke*, 547 F. App'x 289, 293 (4th Cir. 2013). Rather, this Court has stated that "the court must assure itself that the defendant knows the charges

against him, the possible punishment and the manner in which an attorney can be of assistance." *United States* v. *King*, 582 F.2d 888, 890 (4th Cir. 1978).

1. Roof contends (Br. 127-130) that his waiver of the right to counsel was invalid because the district court misled him by stating during the *Faretta* hearing that standby counsel "would be available to assist [him] if [he] desired that assistance." JA-2133. The Court should reject that argument.

The district court gave Roof a realistic warning of what would be expected of him. Roof assured the court that he could make motions and objections, ask questions, and make arguments, and he confirmed his understanding that he would be "performing in a courtroom" throughout trial. JA-2105-2106. The court also explained that by electing to represent himself, Roof would forego the benefits of representation by experienced capital counsel. JA-2103-2104.

Although the court refused to give "blanket authorization[]" for standby counsel to stand up and make objections and arguments on Roof's behalf (JA-2563), the court repeatedly explained that Roof would have every opportunity to consult with standby counsel (*e.g.*, JA-2561-2562). It is not plausible that Roof based his self-representation decision on a misunderstanding about standby counsel's role.

2. Nor was the court obligated to define the role of standby counsel before it accepted Roof's *Faretta* waiver, as Roof suggests (Br. 129-130). He cites *United*

States v. *Hansen*, 929 F.3d 1238 (10th Cir. 2019), to argue that waiver of the right to counsel cannot be knowing or intelligent where the defendant is not advised of his personal responsibility to follow procedural rules. In *Hansen*, the court allowed self-representation by a defendant who answered "no" when asked during a *Faretta* colloquy whether he understood that he could be required to comply with rules of procedure and evidence. *Id.* at 1246, 1260 (emphasis omitted). The Tenth Circuit determined that "[b]ased on Mr. Hansen's responses, we believe that the court could not make a reasonable determination regarding whether [he] did or did not understand his obligation to follow the federal rules." *Id.* at 1260.

Here, the court specifically confirmed with Roof that he would be required to make objections and perform in court, and Roof acknowledged his responsibilities. JA-2105-2106. No further explanation of precisely how standby counsel would be permitted to assist was required. *King*, 582 F.2d at 890.

Citing *State* v. *Powers*, 563 S.E.2d 781 (W. Va. 2001), Roof suggests (Br. 129-130) that a *Faretta* warning should include a description of the role standby counsel will be permitted to play. *Powers* did not require that. Rather, the court required trial courts in West Virginia to define "at the time of the appointment" the role of standby counsel "to assist a criminal defendant *who has been permitted* to proceed *pro se*." *Id.* at 788 (emphasis added). Roof identifies no case where a court found a *Faretta* waiver invalid due to an inadequate explanation during a

Faretta colloquy of how the district court defined the role of standby counsel. This Court should not adopt any such requirement.

D. The District Court Was Not Required To Advise Roof That He Could Wait Until The Penalty Phase To Invoke His Right To Self-Representation

Roof further contends (Br. 127, 130-131) that his waiver of the right to counsel before voir dire was invalid because the district court should have advised him that he could wait until the penalty phase to switch to self-representation. The court was not obligated to offer that option.

No court has held that a district court must offer a defendant who invokes his right to self-representation an opportunity to wait until later in the proceedings to invoke the right. As the district court explained, waiting until after the jury returns a verdict to invoke the self-representation right could be deemed untimely, and it would be well within the court's discretion to deny such a motion. JA-3548-3550; see, *e.g.*, *Wood* v. *Quarterman*, 491 F.3d 196, 202 (5th Cir. 2007) (finding no basis for habeas relief where the trial court denied as untimely a self-representation request made after the jury returned a verdict).

Roof contends (Br. 131) that the option he describes should have been apparent to the district court based on *United States* v. *Hilton*, 701 F.3d 959 (4th Cir. 2012). In *Hilton*, the defendant moved to represent himself on the morning of jury selection. *Id.* at 963-964. The court denied the motion as untimely but later informed the defendant that he would be allowed to represent himself at trial,

which was scheduled to begin 20 days later. *Id.* at 964-965. On appeal, the defendant challenged the district court's initial denial of his motion to represent himself. *Id.* at 964. This Court determined that the district court had not abused its discretion in finding that the motion made on the morning of jury selection had been for the purpose of delay, but that permitting the defendant to self-represent at trial 20 days later did not raise the same concerns. *Id.* at 965.

In contrast to *Hilton*, the district court here determined that Roof's self-representation motion was not made for purposes of delay. JA-2298. Roof made the motion as soon as it became evident that he and his counsel had reached an impasse over defense strategy, and Roof stated that he was prepared to proceed with jury selection as scheduled. JA-2299. In those circumstances, the court was not required to give Roof an option to wait until sentencing to invoke his self-representation right.

Roof also cites (Br. 131) a Ninth Circuit case, *United States* v. *Audette*, 923 F.3d 1227 (2019), to suggest that a defendant can limit his *Faretta* waiver to a single stage of criminal proceedings. The case cited in *Audette* for that proposition concerns whether a *Faretta* waiver carried through to a retrial or a resentencing. See *United States* v. *Hantzis*, 625 F.3d 575, 581 (9th Cir. 2010). *Audette* does not establish any duty of the district court to offer an option to switch between counsel

and self-representation during different parts of the trial. The Court should not adopt such a rule.

VIII

THE COURT RECOGNIZED THAT IT HAD DISCRETION TO DENY ROOF'S *FARETTA* MOTION

Roof contends (Br. 131-135) that the district court, in granting Roof's *Faretta* motion, mistakenly believed it lacked discretion to deny the motion as untimely. That is incorrect.

A. Background

When Roof first inquired about self-representation, preparation for jury selection had been ongoing for months (JA-2298), and Roof expressed concern that the court might deny the motion as untimely even though he had only recently learned about his lawyers' plan to present mental-health evidence (JA-1744-1745). The court stated that it would consider the lateness of the request in ruling on any motion for self-representation, but recognized the situation was not Roof's fault. JA-1744-1745. During the *Faretta* colloquy, after confirming Roof would be ready for jury selection without delay, the court determined that Roof's waiver of the right to counsel was timely. JA-2130-2137.

The court explained that Roof's assertion of his *Faretta* right "could have been seen as untimely because it occurred after 'meaningful trial proceedings' commenced," and the court recognized that it had discretion to deny the request.

JA-2298. But the court explained that its discretion was "not boundless," and it focused on whether Roof was "exercising his rights abusively." JA-2298. The court determined that Roof's motion was not intended to disrupt or delay. JA-2298. Rather, he "reacted immediately" upon learning that counsel planned to present mental-health evidence. JA-2298. Because Roof was prepared to begin immediately and had not personally taken any actions to delay the proceedings, the court found "no cause to deny [Roof's] motion as untimely." JA-2299.

B. Standard Of Review

Whether a defendant can dismiss counsel and proceed *pro se* after meaningful trial proceedings have commenced is "within the sound discretion of the trial court." *United States* v. *Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978).

C. The District Court Correctly Understood Its Discretion To Deny Roof's Faretta *Motion*

The right to self-representation may be limited or considered waived unless it is asserted "before meaningful trial proceedings have commenced." *United States* v. *Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979) (quotations omitted). Any time thereafter, exercise of the right "rests within the sound discretion of the trial court." *Id.* at 1324. The purpose of the timeliness requirement is "to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury." *Ibid.* (quoting *Dunlap*, 577 F.2d at 868). This Court has emphasized "that the right to self-representation is not 'to be used as a

tactic for delay; for disruption; for distortion of the system; or for manipulation of the process.'" *Hilton*, 701 F.3d at 965 (quoting *Frazier-El*, 204 F.3d at 560).

Roof contends (Br. 131-135) that the district court misapprehended its discretion to deny his self-representation motion as untimely. To the contrary, the court expressly recognized that it had discretion to deny Roof's motion. JA-2298. The court properly considered whether Roof had invoked the right to disrupt or delay the proceedings (JA-2298-2299), which are the primary reasons that a court should exercise its discretion to deny an untimely *Faretta* motion. *Hilton*, 701 F.3d at 965; *Lawrence*, 605 F.2d at 1324; *Dunlap*, 577 F.2d at 869. The court properly determined that Roof had acted immediately and was ready to proceed without delay. JA-2298-2299. It did not abuse or misapprehend its discretion.

IX

ROOF HAD THE CAPACITY TO REPRESENT HIMSELF UNDER *INDIANA* V. *EDWARDS*

Roof contends (Br. 135-149) that he lacked the capacity to represent himself under *Indiana* v. *Edwards*, 554 U.S. 164 (2008). He is incorrect.

A. Background

When Roof invoked his right to counsel, the district court determined that Roof had the capacity to represent himself based on his responses at the *Faretta* hearing and its own "observations of [Roof's] courtroom interactions over several weeks." JA-2299. Before the penalty phase, standby counsel asserted that Roof

lacked the capacity to represent himself and requested appointment of counsel. JA-5256-5257, 5483-5486. The court denied that motion. JA-6950-6967. It explained that under *Edwards*, it could appoint counsel over a defendant's objection where the defendant falls into a "gray area" where he is competent to stand trial but suffers from severe mental illness that prevents him from representing himself. JA-6955. The court found that Roof had "no mental illness leaving him unable to carry out the basic tasks of self-representation." JA-6956.

B. Standard Of Review

The district court's determination that Roof had the capacity to self-represent is reviewed for abuse of discretion. *United States* v. *Barefoot*, 754 F.3d 226, 233 (4th Cir. 2014).

C. The District Court Did Not Abuse Its Discretion In Determining That Roof Had Sufficient Mental Capacity To Represent Himself

1. The District Court May Allow A Gray-Area Defendant To Self-Represent

A criminal defendant must be competent to waive his right to counsel. See *Godinez*, 509 U.S. at 396. In *Godinez*, the Supreme Court held that when a defendant is competent to stand trial, the Constitution does not require a higher standard for determining whether the defendant is competent to waive his right to counsel. *Id.* at 401-402. The Court explained, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Id.* at 399 (emphasis omitted).

In *Edwards*, the Supreme Court observed that "*Godinez* involved a State that sought to permit a gray-area defendant to represent himself. *Godinez*'s constitutional holding is that a State may do so." 554 U.S. at 173 (emphasis omitted); see *id.* at 172 (describing "a gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose"). *Edwards* presented a different question: whether a State "may deny a gray-area defendant the right to represent himself" and *require* him to proceed with counsel. *Id.* at 173 (emphasis omitted); see *id.* at 174 ("*Godinez* * * * simply leaves the question open."). The Court determined that "the Constitution permits States to insist upon representation by counsel" for gray-area defendants. *Id.* at 178.

Here, having twice found Roof competent to stand trial, the court was also permitted to find him competent to waive counsel. "[U]nder *Godinez*, it is constitutional * * * to allow a defendant to conduct trial proceedings on his own behalf when he has been found competent to stand trial." *Bernard*, 708 F.3d at 589. As this Court has explained, "*Edwards* does not stand for the proposition that a state *must* deny the right of self-representation to a defendant of questionable mental competence or that district courts must conduct an additional '*Edwards*' inquiry into the competency of every defendant who requests to proceed pro se." *Id.* at 590.

Roof briefly contends (Br. 147-149) that *Edwards* should apply differently to capital proceedings, where counsel should always be required for gray-area defendants. He cites no case adopting that position. Moreover, *Godinez* was a capital case, and this Court held that *Edwards* did not affect *Godinez*'s "constitutional holding" that a gray-area defendant may be permitted to self-represent. *Bernard*, 708 F.3d at 590 (quotations omitted); see *Edwards*, 554 U.S. at 173.

2. Roof Is Not A Gray-Area Defendant

In any event, Roof was not a gray-area defendant who lacked the mental capacity to perform basic self-representation tasks. See *Bernard*, 708 F.3d at 589-590. Defendants can experience mental illness while having the intellectual capacity to self-represent. See, *e.g.*, *Audette*, 923 F.3d at 1237 (defendant with "Other Specified Personality Disorder (Antisocial and Narcissistic Features)" had capacity to self-represent); *United States* v. *Brugnara*, 856 F.3d 1198, 1214 (9th Cir. 2017) (defendant who had bipolar disorder, delusional disorder, and narcissistic personality disorder but had superior intellectual function and delivered a coherent trial performance had capacity to self-represent); *United States* v. *McKinney*, 737 F.3d 773, 779 (D.C. Cir. 2013) (defendant's psychological impairment was insufficiently severe to render him incapable of self-representation).

The district court found that Roof was not suffering from psychosis. JA-2079, 6965. Ballenger predicted that Roof's anxiety would dissipate as he spent time in the courtroom (JA-1038-1039; 1110-1111), and the court found that to be accurate (JA-2080). The court observed that Roof had been "extremely engaged" during the competency hearing and was able to address the court in detail at the end of 8.5-hour days (JA-3585), undermining Roof's assertion (Br. 141-143) that he was unable to pay attention in court.

Roof played an active role in jury selection, making motions and asking follow-up questions. Pp. 112-114, *infra*. The court commented that Roof, without professional training, was managing to select good jurors, and standby counsel agreed that "on average we've done very well." JA-2289.

At the second competency hearing, Roof "demonstrated an aptitude for witness cross-examination that is extraordinary for a *pro se* litigant." JA-6966. The court described Roof's success eliciting an alternative diagnosis from Ballenger (JA-6959-6960), and effectively cross-examining Loftin about the thoroughness of her investigation (JA-6961-6962). The court stated that if Roof is incompetent to represent himself, "almost no defendant would be competent to represent himself." JA-6956.

At the penalty phase, Roof gave an opening statement and closing argument, made motions challenging the government's presentation, and argued against

aggravating factors. JA-5793-5794, 5902-5905, 6032-6033, 6260-6262, 6263-6264, 6516-6517, 6518-6520, 6712-6714. He did not cross-examine the government's witnesses, but almost all were victim-impact witnesses, and Roof explained that he and his standby counsel had discussed that cross-examination would be inappropriate. JA-5594-5595. Nothing about Roof's penalty-phase presentation calls his capacity to self-represent into question. See *Bernard*, 708 F.3d at 593 (*pro se* defendant's failure to object during the government's case in chief, question two witnesses, or call his own witnesses did not render him mentally incompetent).

This Court has recognized that "[t]he district court [i]s in the best position to observe [the defendant] and its determinations during trial are entitled to deference." *Bernard*, 708 F.3d at 593. The court did not abuse its discretion in deciding that Roof had sufficient mental capacity to represent himself.

X

THE DISTRICT COURT DID NOT ERR IN LIMITING THE ROLE OF STANDBY COUNSEL OR DENYING ROOF'S REQUESTS FOR COURTROOM ACCOMMODATIONS

Roof contends (Br. 149-157) that the district court abused its discretion by denying him assistance from standby counsel and courtroom accommodations. It did not.

A. Background

1. Voir Dire

On the first day of jury selection, standby counsel tried to "register an objection on [Roof's] behalf" to an earlier government motion to strike a juror (JA-2190-2192), who had been struck without objection from Roof (JA-2172). The court explained that if Roof wanted to object, he should notify the court and "turn to [standby counsel] and ask for any assistance [he] may need." JA-2191. Jury selection proceeded, with Roof lodging an objection and successfully moving to strike a juror. JA-2250, 2269.

The next day, standby counsel inquired about their role. JA-2303-2305. The court stated that it would not allow standby counsel to assume a co-counsel role. JA-2307-2308, 2310, 2407. Roof continued to actively participate, successfully moving to strike jurors (JA-2329, 2249-2250), and suggesting follow-up questions (JA-2464, 2526).

Later that day, standby counsel requested additional voir dire questions on Roof's behalf, stating that Roof "finds it difficult to advance these objections on his own." JA-2403-2404. The court told standby counsel to speak to Roof, who could decide for himself whether he wanted follow-up questions. JA-2407-2408. Standby counsel also stated that Roof was "concerned about time," and the court

explained that if Roof needed more time, he should notify the court and it would allow time to consult. JA-2408-2409.

On the third day of jury selection, Roof asked whether standby counsel could assist him "in proposing more questions to the jurors and making objections to strike jurors." JA-2561. The court explained that standby counsel was free to recommend questions and give advice, but that Roof would be required to make objections himself. JA-2561-2562. Later that day, Roof told the court "it would be helpful if we could slow down." JA-2678. The court stated that it would not slow down "for [an] abstract reason," but that Roof should speak up if more time was needed for a particular juror. JA-2679-2680. Roof continued to actively participate in voir dire. JA-2584, 2636, 2667, 2699, 2729-2732, 2737-2742, 2754, 2772, 2279-2780, 2813, 2826, 2835-2836.

Several days later, standby counsel requested again to speak on Roof's behalf, stating that Roof was unsure how to explain his objections. JA-3332-3333. The court explained that when Roof had an objection, he should stand up and object, and the court would follow up if it needed more information. JA-3333-3337. Meanwhile, Roof continued to actively participate. JA-3234-3235, 3258, 3269, 3354-3355, 3361.

In a written motion, Roof objected to the jury selection proceedings "as violating his Eighth Amendment right to a reliable determination of his culpability

and sentence" because of the court's refusal to authorize the assistance Roof had requested. JA-2855-2864. The motion suggested that the court's discretion to limit the role of standby counsel might be circumscribed by the Eighth Amendment in capital cases. JA-2855, 2860-2861.

The court rejected those arguments. JA-3533-3551. It explained that a defendant who elects to proceed *pro se* has no right to standby counsel and consequently no right to have standby counsel perform any particular function. JA-3536 (citing *United States* v. *Singleton*, 107 F.3d 1091, 1102 (4th Cir. 1997)). The court rejected the argument that a court has less discretion in capital cases over the role of standby counsel. JA-3537-3540. The court explained that it had reasonably limited standby counsel's role "to ensure that the defense speaks with a single voice, to maintain an orderly trial process" that does not allow Roof's *Faretta* right to be manipulated, and "to preserve the dignity and decorum of courtroom proceedings." JA-3547-3548.

2. Trial

As explained above, Roof requested that standby counsel resume representing him for the guilt phase. JA-3460-3462, 3470-3478. Defense counsel filed a motion requesting courtroom accommodations for Roof: (1) breaks between direct and cross and between witnesses; (2) shorter court days or a shorter

court week; (3) two days' advance notice of the government's witnesses; and (4) breaks for Roof as needed when he became overwhelmed. JA-3577-3581.

The district court denied those requests. JA-3585-3586. It explained that Roof had been "extremely engaged" at the competency hearing and able to address the court in detail at the end of 8.5-hour days. JA-3585. The court stated that trial would proceed five days a week for full days, with customary breaks. JA-3585. Having observed Roof personally in court, the court was "confident these routine and customary breaks [we]re sufficient." JA-3585.

3. Penalty Phase

During the penalty phase, Roof reverted to self-representation. JA-5180-5181. After several victim-impact witnesses testified, standby counsel asked the district court if they could intervene to protect Roof's rights by objecting to what they viewed as excessive victim-impact evidence. JA-6040-6041. Alternatively, standby counsel requested that victim-impact testimony be scripted and submitted in advance. JA-6041-6042. The court denied the request, stating that the government's evidence had been appropriate and that whether to object was Roof's decision. JA-6043-6044.

B. Standard Of Review

The district court has broad discretion to determine what assistance, if any, standby counsel may provide to a defendant conducting his own defense. *United*

States v. *Lawrence*, 161 F.3d 250, 253 (4th Cir. 1998). Limitations on the role of standby counsel are reviewed for abuse of discretion. *Beckton*, 740 F.3d at 307.

C. The District Court Did Not Abuse Its Discretion In Placing Limits On Standby Counsel's Role Or Denying Accommodations

When a defendant waives his Sixth Amendment right to counsel and elects to self-represent, a court may, in its discretion, allow standby counsel, but "the Constitution does not mandate it." *Singleton*, 107 F.3d at 1100. "It follows, therefore, that a district court has 'broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense.'" *Beckton*, 740 F.3d at 307 (citing *Lawrence*, 161 F.3d at 253).

Roof contends (Br. 152-156) that the tasks standby counsel were trying to undertake, such as making objections, are routinely performed by standby counsel. Although a court may allow standby counsel to stand up and make objections without running afoul of the defendant's self-representation right, *Wiggins*, 465 U.S. at 171, 179 n.10, 183, the bounds of standby counsel's participation are defined by the district court. In *Wiggins*, the Supreme Court explored the limits of how much unsolicited participation of standby counsel over a *pro se* defendant's objection was constitutionally permissible. *Id*. at 177. But the Court reiterated that "*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed." *Id.* at 183; see *Singleton*, 107 F.3d at 1100 (Sixth Amendment does not require district court to permit hybrid representation).

The district court's limitations on standby counsel were not arbitrary or irrational, as Roof contends (Br. 156). Although the court would not allow standby counsel to stand up and object, it provided Roof with four lawyers with capital experience who sat beside him and gave advice, which the court encouraged Roof to follow. JA-2191, 2407-2409, 2561-2562, 2679-2680, 3333-3337. The court explained that the limitations it imposed were designed "to ensure that the defense speaks with a single voice, to maintain an orderly trial process" that does not allow Roof's *Faretta* right to be manipulated, and "to preserve the dignity and decorum of courtroom proceedings." JA-3548.

Those parameters were particularly reasonable here, where Roof and his counsel had reached an impasse about how to proceed, and Roof told the district court he hated his counsel and would not cooperate with them after they put him through a competency hearing. JA-1563, 1746-1747; see JA-3544 (noting that standby counsel filed motions opposed by Roof). In those circumstances, limiting standby counsel's ability to stand up was an entirely reasonable limitation to protect Roof's *Faretta* right. See *Wiggins*, 465 U.S. at 178 (actions of standby counsel may interfere with the defendant's self-representation right).

Nor did the district court abuse its discretion by denying a general request from Roof to slow down, preview the government's evidence, or entertain non-contemporaneous objections. Br. 155-156. The court repeatedly told Roof that if

he needed more time, he should simply ask (JA-2408-2409, 2679-2680), and the court was not required to bend any other rules to accommodate him. Roof assured the court when he invoked his *Faretta* right that he could make objections and perform in the courtroom. JA-2105-2106. The court did not abuse its discretion by denying the requests.

XI

THE COURT DID NOT IMPROPERLY PRECLUDE ROOF FROM PRESENTING MITIGATING EVIDENCE

Roof contends (Br. 159-182) that the district court improperly precluded him from presenting evidence during the penalty phase about his future dangerousness and whether he could be safely confined. He also argues that the government improperly capitalized on that error and that the court failed to adequately address jury questions about those mitigators. These arguments are incorrect.

A. Background

1. Pretrial Litigation On Mitigating Factors

On August 24, 2016, Roof disclosed his intent to offer several mitigating factors at the penalty phase. JA-463-465. Among the non-statutory mitigating factors he listed were that life imprisonment would be especially onerous for him because: (1) he would likely need to be isolated due to his small size, youth, and notoriety; and (2) he would live in fear of being targeted by other inmates. JA-463-464.

The government filed a motion in limine opposing those two mitigators. JA-466-475. It explained that those factors "oddly suggest that jurors should choose to impose a life sentence instead of death in order to make [Roof's] punishment particularly onerous." JA-470. The government argued that evidence about Roof's potential rough time in prison was not relevant mitigation because it does not relate to Roof's character, background, record, or the circumstances of his offense. JA-470-472. The government also provided notice of an expert on correctional facilities to respond to potential mitigating evidence. JA-488.

As relevant here, the district court granted the government's motion in limine. JA-489-495. The court explained that Roof's suggestion that life imprisonment would be a sufficiently onerous punishment was not a proper mitigation argument and that dueling experts testifying about Roof's hypothetical conditions of confinement was "not a proper matter for a capital sentencing jury." JA-493. The court cited *United States* v. *Johnson*, 223 F.3d 665, 674-675 (7th Cir. 2000), where the Seventh Circuit determined that "[t]he argument that life in prison without parole, especially if it is spent in the prison's control unit and thus in an approximation to solitary confinement, sufficiently achieves the objectives aimed at by the death penalty to make the latter otiose is an argument addressed to legislatures, not a jury." JA-493.

Subsequently, Roof filed notice of two additional non-statutory mitigating factors: (1) he would pose no significant risk of violence to other inmates or prison staff if imprisoned for life; and (2) given his personal characteristics and record, he could be safely confined in prison. JA-496. The government did not oppose those mitigating factors.

2. Penalty Phase Discussion Of Roof's Future Dangerousness And Ability To Be Safely Confined

Because Roof had given notice that he planned to present mitigating evidence on his lack of future dangerousness and ability to be safely confined (JA-496), the government preemptively addressed those mitigating factors at the penalty phase. Lauren Knapp of the Charleston County Sheriff's Office, who monitored items coming in and out of the jail where Roof had been housed, testified that she intercepted an outgoing letter from Roof with an excerpt of a book that had inspired "copycat suicides." JA-6178, 6180-6181; see JA-6252-6253.

That triggered a search of Roof's cell, where officers found additional writings. JA-6182-6183, 6190. Roof wrote that "unless [white people] take real possibl[y] violent action, we have no future" (JA-6190, 6192-6193, 6196; see JA-6222, 6224-6225, 6230); that he had done "what [he] thought [w]ould make the biggest wave, and now the fate of our race [sits] in the hands of [my] brothers [who] continue to live freely" (JA-6196; JA-6230-6231); and that most white

nationalists assume that one day someone else will do something, "[a]nd this has to change" (JA-6200; see JA-6240).

Knapp also testified that other than drawings of swastikas or other hate symbols, the writings found in Roof's cell would have been returned to him. JA-6209-6210. Roof did not cross-examine Knapp, elected not to testify at the penalty hearing, and rested without presenting mitigation evidence. JA-6210, 6583-6584.

During summation, the prosecutor addressed each mitigating factor that would appear on the verdict form. JA-6697. The prosecutor noted that some mitigating circumstances were "truth" or "factually accurate," namely, that Roof had offered to plead guilty, cooperated with authorities, confessed, was 21 at the time of the offense, and had no significant criminal history. JA-6697-6700. The prosecutor also noted another set of mitigators "that are simply not true[,] for which no evidence has been presented." JA-6697.

The prosecutor explained that "no evidence" supported Roof's contention that he posed no risk of violence in prison and that in fact "[h]is experience being incarcerated indicates there is quite a risk of violence, violence that he incites, violence that he encourages, violence that he sends to others to act." JA-6697. The prosecutor also questioned whether Roof could be safely confined, noting that he had been "sending letters out, writing racist manifestos, continuing what he has done." JA-6697. Roof objected "to the mention of the letters" and of incitement

on the grounds that "[n]one of these things were proven." JA-6698. The court overruled the objection. JA-6698.

After the prosecutor's closing argument, Roof objected to the mention of his prison mail and writings. JA-6710. He stated that the court had "refused to allow [him] to present evidence that [he] wouldn't be dangerous if * * * [he] got life in prison" and had forbidden the parties from "talk[ing] about an imaginary prison," so the prosecutor should not have been allowed to talk about conditions of confinement. JA-6710. The judge overruled the objection, explaining that its previous ruling addressed whether Roof was unusually vulnerable to violence in prison, not whether Roof himself posed a risk of future dangerousness. JA-6710-6711. The court told Roof he was free to argue about his future dangerousness during his closing, but Roof did not. JA-6711-6713.

3. Jury Findings On The Mitigators

As Roof had requested, the district court instructed the jury that it could find as mitigating factors that "given [Roof's] personal characteristics and record, [he] poses no violence to other inmates or prison staff if in prison for life," and that "given his personal characteristics and record, [he] can be safely confined if sentenced to life imprisonment." JA-6741.

The jury asked two questions about those mitigators: (1) "Would he personally inflict the violence or would he incite violence, need clarification," and

(2) "[p]lease define safe confinement. Does this include his writing getting out of prison[?]" JA-6765, 6768. The court responded to the first question by instructing the jury "to simply read the mitigating factor as written and use your commonsense to interpret it." JA-6775. For the second question, the court instructed the jury to use "commonsense and good judgment to determine what [safe confinement] means." JA-6775. No juror found either mitigator to exist. JA-6804.

B. Standard Of Review

Roof's constitutional challenges to the mitigating factors are reviewed de novo. *United States* v. *Runyon*, 707 F.3d 475, 499 (4th Cir. 2013). The district court's decision to admit specific evidence is reviewed for abuse of discretion. *Ibid.* Whether the prosecutor made improper statements during closing is reviewed de novo. *United States* v. *Collins*, 415 F.3d 304, 307 (4th Cir. 2005). The decision whether to issue clarification in response to a jury note is reviewed for abuse of discretion. *United States* v. *Smith*, 62 F.3d 641, 646 (4th Cir. 1995). This Court may not "reverse or vacate a sentence of death on account of any error which can be harmless." 18 U.S.C. 3595(c)(2); *United States* v. *Barnette*, 211 F.3d 803, 824 (4th Cir. 2000).

C. The District Court Did Not Improperly Preclude Roof From Presenting Mitigating Evidence

The Eighth Amendment requires that a defendant be allowed to present, and a jury be allowed to consider, all relevant mitigating evidence, including "any

aspect of [the] 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). The FDPA mirrors that standard. 18 U.S.C. 3592(a). Roof incorrectly contends (Br. 165-170) that the district court committed two errors regarding his mitigating evidence.

1. Roof contends (Br. 159, 169) that the court erred by granting the government's motion in limine, thereby precluding him from arguing that life in prison would be especially bad for him because he would likely need to be isolated and would live in fear of other inmates. He contends (*ibid.*) that those proposed mitigators were specific to someone with his characteristics and thus admissible under *Eddings*. That argument misses the point of the court's ruling.

By proposing as mitigating factors suggestions that life in prison would be particularly onerous for him, Roof was not arguing, as *Eddings* allows, that something about his personal characteristics warranted "a sentence less than death." 455 U.S. at 110 (quotations omitted). Instead, through those proposed mitigators, Roof was arguing that a sentence of life imprisonment would be just as bad or worse than a death sentence and, oddly, that this was a reason to impose a life sentence. JA-470, 493. The district court properly determined that Roof was not entitled to argue that harsh prison conditions made the death penalty unnecessary. JA-493 (citing *Johnson*, 223 F.3d at 674-675); cf. *United States* v.

Roane, 378 F.3d 382, 406 (4th Cir. 2004) (rejecting argument that counsel was ineffective for failure to present evidence of harsh prison conditions as mitigation); *Troy* v. *Secretary, Fla. Dep't of Corrections*, 763 F.3d 1305, 1313-1314 (11th Cir. 2014) (state court did not commit constitutional error by excluding witness testimony about prisoner's likely conditions of confinement).

2. Roof also contends (Br. 167-170) that the district court improperly precluded him from introducing evidence that his prison writings would not have incited people to violence because prison employees would have intercepted the writings. Roof misunderstands the district court's pretrial ruling.

Roof provided notice of his lack-of-future-dangerousness and safe-confinement mitigating factors ten days after the district court had granted the government's motion in limine. JA-493, 496. The government never objected to those mitigators, which are proper. See *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986). The court's previous order rejecting *different* mitigating factors did not prevent Roof from arguing or introducing evidence that he would not be dangerous in prison and could be safely confined. JA-6710-6713, 6756, 6759-6762, 6770, 6772-6773.

Filings by standby counsel belie Roof's current claim that he believed that he was barred from introducing such evidence. In their request for a second competency hearing, standby counsel asserted that Roof's competency should be

examined because he was planning to forego substantial mitigation evidence, including "expert testimony regarding [his] good behavior during pretrial detention, his likely future as a nonviolent and compliant life-term prisoner if he is not sentenced to death, and the state and federal governments' ability to safely manage him in the future." JA-5251. That argument explicitly acknowledged that Roof was not precluded from presenting evidence or argument about his future dangerousness at sentencing. In contrast, standby counsel argued that, "but for the [c]ourt's order [on the motion in limine]," Roof *also* would have offered evidence on the conditions of confinement he would likely face in a segregated housing unit. JA-5251 n.6.

Because Roof could have introduced evidence about future dangerousness and safe confinement, his reliance on *Lawlor* v. *Zook*, 909 F.3d 614 (4th Cir. 2018), is misplaced. There, the trial court had circumscribed an expert witness's ability to explain his prediction that the defendant posed a low risk of violence while incarcerated. *Id.* at 619-621. This Court determined that was error because the testimony was relevant mitigation evidence. *Id.* at 628-633. Here, in contrast, Roof declined to introduce any evidence about his lack of future dangerousness or potential for safe confinement.

D. The Government Did Not Mislead The Jury On Roof's Future Dangerousness

Roof next contends (Br. 170-177) that the prosecutor improperly urged jurors to reject Roof's proffered mitigating factors on lack of future dangerousness and safe confinement based on misleading evidence. He is incorrect.

In contrast to cases Roof cites, see *Johnson* v. *Mississippi*, 486 U.S. 578, 590 (1988) (defendant was sentenced to death in part based on information about a prior conviction that was "materially inaccurate"); *Simmons* v. *South Carolina*, 512 U.S. 154, 170-171 (1994) (plurality opinion) (jury was misled about whether the defendant could be released from prison if sentenced to life), Knapp testified truthfully and accurately when she described that Roof had drawn swastikas in his cell and continued his racist writings. JA-6180-6183, 6190-6193, 6196, 6200, 6209-6210.

Roof contends (Br. 174) that introducing Knapp's testimony was misleading without also mentioning any measures that the Bureau of Prisons has in place to prevent Roof from communicating outside the prison. But that is the type of evidence that Roof would be expected to introduce in support of his mitigating factors. See JA-496, 5251. And Knapp's testimony was not misleading. This is not like *United States* v. *Johnson*, No. 02-C-6998, 2010 WL 11668097, at *1-3 (N.D. Ill. Dec. 13, 2010), where the government rebutted the defendant's argument that he could be safely confined in a special housing unit with incorrect expert

testimony about the government's ability to place an inmate there, or *United States* v. *Gilbert*, 120 F. Supp. 2d 147, 154-155 (D. Mass. 2000), where the government failed to explain how a nurse who had poisoned people would continue to be dangerous in prison without access to poison. Knapp was not an employee of the Federal Bureau of Prisons, nor did she testify about the likelihood that Roof's writings would reach the outside world. In fact, she testified that she had intercepted a letter before it was mailed. JA-6178, 6180-6181.

Finally, the Court should reject Roof's contention (Br. 175) that the prosecutor improperly "vouched" for the government's view of the evidence by stating during closing argument that Roof's future-dangerousness mitigating factors were "not true." JA-6697. The cases Roof cites on improper "vouching" involve prosecutors giving a personal opinion that a defendant is guilty, see *United States* v. *Young*, 470 U.S. 1, 5 (1985); *Boyle* v. *Million*, 201 F.3d 711, 715 (6th Cir. 2000), or personally vouching for a witness's credibility, see *Hodge* v. *Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). Here, in contrast, the prosecutor's references to Roof's mitigators being true or untrue were supported with an explanation of whether evidence had been introduced on the point. JA-6697-6698. Because Roof introduced no evidence about his future dangerousness, the prosecutor properly argued those mitigators were "not true." JA-6697.

E. The District Court Did Not Abuse Its Discretion By Declining To Further Define The Mitigators

Roof next contends (Br. 177-179) that the district court abused its discretion by declining to further define the future-dangerousness and safe-confinement mitigators in response to jury questions. Whether to issue a clarification in response to a jury note is "left to the sound discretion of the district court." *Smith*, 62 F.3d at 646.

The jury asked whether Roof had to prove that he would not be dangerous to others in prison, or whether those factors included consideration of his inciting people outside the prison to violence. JA-6765, 6775. Roof complains (Br. 179) that the judge's response to use common sense and interpret the factors as written "effectively expand[ed] the defense burden of proof." But Roof presented *no* evidence or argument in support of those mitigating factors, so clarifying them was unnecessary. The court did not abuse its discretion by telling the jury to apply the mitigators as written.

F. Any Error With Respect To These Mitigators Was Harmless

Assuming any error occurred regarding Roof's future-dangerousness mitigators, it was harmless beyond a reasonable doubt. See 18 U.S.C. 3595(c)(2); *Barnette*, 211 F.3d at 824. Contrary to Roof's characterization (Br. 180), the government could hardly have said less about these mitigators during summation, instead simply noting that they would appear on the verdict form, that Roof had

provided no evidence to support them, and that Roof was continuing to engage in problematic behavior in prison. JA-6697-6698.

Nor do the jury's notes on those mitigators signal, as Roof contends (Br. 180), that the jury found this issue especially important. Rather, the notes highlighted what even the judge perceived as a mismatch between the language of the mitigators, *i.e.*, that Roof posed no risk of danger "to other inmates or prison staff," and the government's rebuttal, which was that Roof might send letters out of the prison attempting to incite violence. See JA-6765-6769, 6804. Most importantly, even assuming that capital juries generally find evidence about a defendant's future dangerousness important (Br. 181), Roof provided no evidence on which any juror could have based a lack-of-future-dangerousness finding.

Furthermore, this case involved a brutal, racially-motivated mass murder of parishioners attending a Bible study that Roof meticulously planned to have the most devastating impact. See pp. 7-18, 24-25, *supra.* The jury unanimously found every alleged aggravating factor: Roof had engaged in substantial premeditation and planning, killed multiple people in a single episode, killed three parishioners who were especially vulnerable due to age, attempted to incite violence, caused unimaginable loss to the parishioners' families, endangered the safety of others, murdered based on his hatred of African Americans, targeted a church to magnify his impact, and demonstrated a lack of remorse. JA-6796-6801.

Beyond a reasonable doubt, the jury would have imposed the death penalty even if Roof had presented evidence of non-dangerousness in prison. See *United States* v. *Troya*, 733 F.3d 1125, 1136-1137 (11th Cir. 2013) (erroneous exclusion of mitigation evidence on future dangerousness was harmless beyond a reasonable doubt in case involving "a gangland-style murder of two children"). The Court should not vacate Roof's sentence based on a dispute about mitigating factors that he made no attempt to prove and that would not have impacted the jury's verdict.

XII

EYEWITNESS TESTIMONY THAT ROOF WAS "EVIL" DID NOT TAINT THE DEATH VERDICT

Roof next contends (Br. 183-199) that the district court improperly admitted inflammatory aggravating evidence when its first guilt-phase witness, Felicia Sanders, stated that Roof was "evil" and would go to the "pit of hell." The Court should reject that argument.

A. Background

1. The government opened the guilt phase with eyewitness Felicia Sanders. JA-3666, 3699-3701. Sanders described the horrific crime she had witnessed from underneath a table with her granddaughter in her arms, stating that she laid there listening to gunshots, "waiting on [her] turn." JA-3700-3702. As she recounted the events of that night, including the murder of her son, she remarked that there had been "[s]eventy-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. After Sanders finished testifying and the jury left the room, defense counsel objected to her testimony that Roof had sat there "evil." JA-3703-3704. The court overruled the objection, finding it was Sanders's observation of what she had witnessed and that the objection was untimely. JA-3704.

On cross-examination, defense counsel asked Sanders whether she remembered Roof saying that he was only 21 and talking about what he was going to do afterward. JA-3706. The cross-examination proceeded as follows:

> 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.

JA-3706.

The next day, Roof moved for a mistrial. JA-3813-3817. He contended that in a capital case, survivors and victims' families are not permitted to offer their opinions concerning the appropriate penalty for the defendant and that a contemporaneous objection would have been insensitive. JA-3815-3816. Roof

alternatively asked the court to: (1) order the government to instruct its witnesses on the proper limits of their testimony; (2) instruct the jury that the opinion of a survivor or victim's family member regarding the appropriate punishment should receive no weight; and (3) preclude the government from referring to Sanders's comments about Roof being "evil" or belonging in the "pit of hell" during closing argument at the guilt and penalty phase. JA-3816-3817. The motion did not request that the testimony be struck. JA-3813-3818.

2. The district court denied the motion as untimely. JA-3837-3838; see JA-3822-3829. The court further explained that Sanders's testimony that Roof sat there "evil" was not a characterization, but her personal observation of his demeanor while she witnessed the crime. JA-3832, 3837-3838. The court acknowledged that Sanders's further comment about Roof going to the "pit of hell" possibly could be interpreted as a comment on sentencing and stated that it would instruct the jury "out of an abundance of caution" that the sentencing decision is their responsibility alone. JA-3838. The court declined to strike the testimony, which defense counsel had only requested orally on the day after Sanders testified, stating that the request was untimely and unnecessary. JA-3833, 3839.

Upon the jury's return, the court instructed: "Ladies and gentlemen of the jury 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 [c]ourt or the attorneys or the witnesses. It always will be yours." JA-3839-3840.

In a written order, the court reiterated that defense counsel had waived the objections by failing to timely object. JA-4662-4663. The court further explained that on the merits, Sanders's description of Roof sitting there "evil" among the churchgoers was relevant to malice and to obstruction of the enjoyment of the free exercise of religious beliefs, and her statement about Roof going to hell was a comment "on where *she* believed [Roof] would go when he died," not a call for the death penalty. JA-4663-4664.

3. The penalty phase did not commence until almost a month after Sanders testified. JA-3618, 5745. The court nevertheless reminded the jury before the penalty phase: "[Y]ou should not infer from the testimony of any witness, including any victim witnesses, what sentence should be imposed in this case. The determination of the appropriate sentence is for you, the jury, to make after receiving all the evidence, considering all the laws I've given to you, and weighing all the aggravating and all the mitigating factors." JA-5774.

Sanders provided victim-impact testimony about the life of her son, Tywanza. JA-6554-6581. Other than objecting to a few photos (JA-6557), Roof had no objections to Sanders's testimony. In its final penalty-phase instructions, the court again instructed the jury that "whether or not the circumstances of this

case justify a sentence of death rather than a sentence of life imprisonment without release is a decision the law leaves to you the jury." JA-6746.

B. Standard Of Review

Review of an untimely objection and motion to strike testimony is limited to plain error. Fed. R. Crim. P. 52(b). To obtain relief under that standard, Roof must show "that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [his] substantial rights * * * ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (brackets and quotations omitted). For a properly preserved objection, an evidentiary ruling raising a constitutional claim is reviewed de novo. *United States* v. *Williams*, 632 F.3d 129, 132 (4th Cir. 2011). The Court cannot reverse or vacate a death sentence based on a harmless error. *Barnette*, 211 F.3d at 824.[6]

C. Sanders's Testimony Did Not Constitute Improper Aggravating Evidence

1. The propriety of comments like Sanders's is governed by *Booth* v. *Maryland*, 482 U.S. 496 (1987), overruled on other grounds by *Payne* v. *Tennessee*, 501 U.S. 808 (1991). In *Booth*, the Supreme Court held that the

[6] Although Roof states at times (Br. 183, 195, 198) that the district court abused its discretion by denying his motion for a mistrial, he "limits his appeal to the errors' impact on jurors' sentencing decision" (Br. 194 n.38). The decision whether to grant a mistrial would be reviewed for abuse of discretion. *United States* v. *Morsley*, 64 F.3d 907, 914 (4th Cir. 1995).

admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. *Id.* at 508-509; see *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam). Roof also contends (Br. 190) that Sanders's comments violated the Due Process Clause by "dehumanizing" him and therefore rendered the proceedings fundamentally unfair. See *Darden* v. *Wainwright*, 477 U.S. 168, 179-181 (1986).

Examples of this type of impermissible victim-impact evidence include an opinion from the victims' family that the victims were "butchered like animals," that the victims' son "doesn't think anyone should be able to do something like that and get away with it," or that their daughter "could never forgive anyone for killing [her parents] that way" and "doesn't feel that the people who did this could ever be rehabilitated." *Booth*, 482 U.S. at 508 (quotations omitted). Those types of statements are "irrelevant to a capital sentencing decision," and they "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 502-503.

2. The comments at issue here are nothing like those in *Booth*. When Sanders remarked that Roof had sat there "evil," she was giving eyewitness testimony in the guilt phase. To wrap up her account of the crime, which began with her impression that Roof had wanted to participate in their Bible study (JA-3698), she testified that after Roof sat with them for 45 minutes, there were

gunshots "from someone who we thought was there before the Lord, but in return, he just sat there the whole time evil" (JA-3698-3699, 3702). Unlike the victim-impact testimony in *Booth*, Sanders was giving her account of how the crime unfolded—Roof had tricked the parishioners into thinking he was there for Bible study, but in fact he had attended the meeting with a sinister plan.

Moreover, when Sanders said on cross-examination that she had been counting on Roof to kill himself because "[t]here's no place on earth for him except the pit of hell" (JA-3706), she was not giving a sentencing recommendation. Cf. *Bosse*, 137 S. Ct. at 2 (Court vacated conviction where prosecutor asked three of the victims' relatives to recommend a sentence to the jury and they each recommended death). Sanders clarified a few sentences later that, if Roof had killed *himself*, that is where he would go. JA-3706-3707. Nevertheless, out of an abundance of caution, the court instructed the jury that the sentencing decision belonged to them, not to witnesses or the court. JA-3839-3840. It reiterated that instruction at the beginning and end of the penalty phase. JA-5774, 6746.

The court was not required to do more. The testimony was not victim characterization of the defendant or a sentencing recommendation, and the court did not err—much less plainly err—by declining to strike the testimony.

D. Any Error In Admitting Sanders's Testimony Was Harmless

Even assuming Sanders's testimony was improper, Roof cannot show that it rendered his sentencing proceeding so unfair that it amounted to a denial of due process. That prejudice showing is required by the constitutional arguments he raises. See *United States* v. *Lighty*, 616 F.3d 321, 361-362 (4th Cir. 2010) (reversal not warranted where prosecutor commented that victim's family had asked for death because defendant suffered no prejudice); *United States* v. *Mitchell*, 502 F.3d 931, 990 (9th Cir. 2007) (improper characterization of defendant did not warrant reversal because comment "was brief, isolated, and could not have had more than a marginal impact on the jury"); *Humphries* v. *Ozmint*, 397 F.3d 206, 218 (4th Cir. 2005) (en banc) (defendant alleging that victim-impact evidence violated his due process rights must show that improper comments "were so unfair as to make the conviction a denial of due process"). Prejudice is also part of the plain-error analysis, see *Marcus*, 560 U.S. at 262, and the statutory harmless-error standard, 18 U.S.C. 3595(c)(2).

Sanders's comments in her guilt-phase testimony were isolated and, remarkably, are the only improper comments Roof has identified in a trial where two surviving eyewitnesses to a horrific racially-motivated mass murder and 23 victim-impact witnesses testified. The testimony did not pervade the trial or sentencing, and the government never mentioned the testimony in its guilt or

penalty-phase arguments. The court instructed the jurors three times that Roof's sentence was their decision alone. JA-3839-3840, 5774, 6746.

As the cases cited in Roof's brief demonstrate (Br. 190-191), this is not enough to warrant a new penalty hearing. See *Darden*, 477 U.S. at 179-181 & n.12 (prosecutor's comments that defendant was an "animal" who should not "be out of his cell unless he has a leash on him" did not deprive defendant of a fair trial); *United States* v. *Bernard*, 299 F.3d 467, 480 (5th Cir. 2002) (victim-impact testimony that the crime was a "useless act of violence and a total disregard of life" and defendant had a "hard" heart were inadmissible under *Booth*, but brief statements did not prejudice the jury); *Furnish* v. *Commonwealth*, 267 S.W.3d 656, 663 (Ky. 2008) (prosecutor improperly called defendant "evil," an "animal," and a "wolf," but isolated comments did not render the trial fundamentally unfair); *Lighty*, 616 F.3d at 361-362 (prosecutor's remark that the victim's family had asked for death was isolated, aggravation was overwhelming, and district court gave curative instruction); *United States* v. *Barnette*, 390 F.3d 775, 800 (4th Cir. 2004) (given the brutal nature of the murder, a "few sentences" of charged testimony by the victim's mother "do not rise to the level of being 'so unduly prejudicial'" that they render the trial fundamentally unfair under *Payne*), vacated on other grounds, 546 U.S. 803 (2005).

Roof cites a handful of cases where improper testimony warranted a new proceeding, and the contrast to what happened here is stark. See *Bennett* v. *Stirling*, 842 F.3d 319, 321, 323-324 (4th Cir. 2016) (prosecutor suffused sentencing proceeding with racially coded references such as "King Kong," "caveman," "mountain man," a "big old tiger," "monster," and "[t]he beast of burden") (quotations omitted); *Cauthern* v. *Colson*, 736 F.3d 465, 475-477 (6th Cir. 2013) (prosecutor's sentencing rebuttal consisted of 80% improper rhetoric referring to defendant as "the evil one" and comparing him to infamous killers like Jeffrey Dahmer to inflame the jury) (quotations omitted); *People* v. *Johnson*, 803 N.E.2d 405, 419-423 (Ill. 2003) (prosecutor compared defendant to an animal, mischaracterized evidence and law, suggested the defense had been deceptive, and gratuitously noted the crime scene's proximity to a school). Given the isolated nature of Sanders's comments, the curative instructions, and the significantly aggravated nature of Roof's crime, no reasonable likelihood exists that Sanders's comments affected the jury's verdict or caused the jury to impose the death penalty in an arbitrary and capricious manner.

XIII

THE GOVERNMENT'S VICTIM-IMPACT EVIDENCE WAS APPROPRIATE

Roof next contends (Br. 199-208) that the government improperly introduced evidence of the victims' religious activities and argued that the death

penalty was warranted because of the "comparative worth" of the victims. He is incorrect.

A. Background

In seeking the death penalty, the government provided notice of aggravating factors that it intended to prove, including: (1) the impact of Roof's crimes on the parishioners and their families, friends, and co-workers; and (2) Roof's targeting of people participating in a Bible-study group at Mother Emanuel to magnify the societal impact of his offense. JA-149-150.

During the penalty phase, the jury heard from 23 victim-impact witnesses—with at most three witnesses speaking about each victim. JA-5795-5902, 5905-5967, 6003-6032, 6045-6105, 6110-6175, 6313-6366, 6368-6469, 6527-6581. After the government's second witness, Roof objected to the number of witnesses. JA-5902-5903; see JA-5743-5744. The government responded that it was doing its best "to present a snapshot into the[] lives [of the parishioners] through a limited number of witnesses" and that its presentation was driven by the reality that Roof had killed nine people. JA-5903-5904. The judge determined that the government's presentation was reasonable. JA-5904.

The next day, Roof again objected. JA-6033-6040; see JA-6260-6262. Roof argued that the government need not "show[] a video of a prayer" to demonstrate that a person is a talented preacher (JA-6261)—a reference to a video

of Reverend Pinckney that had been admitted the previous day without objection (JA-5911, 5914). Anticipating upcoming testimony, Roof also argued that "a victim's ability as a singer may be remembered without playing a song" (JA-6261)—a reference to an audio clip of Reverend Middleton-Doctor singing a hymn, which was later admitted without objection (JA-6110-6111). The court determined that the government had not crossed any line. JA-6033-6039.

Roof objected in real time to an audiotape of Reverend Coleman-Singleton preaching and a video of a song her son wrote about her, which the court overruled. JA-6059-6060, 6082. Later in the day, Roof submitted another motion objecting to those exhibits and requesting "a standing objection to further testimony." JA-6264 & n.1. The court denied the motion, noting that the taped sermon "went to [Coleman-Singleton's] professional accomplishments" and the song by her son was proper. JA-6108.

As Roof notes (Br. 201-202), the government's presentation also included: (1) photos of Reverend Pinckney preaching and in religious attire (JA-5970-5976); (2) a photo of Reverend Simmons in church (JA-6255); (3) photos of Tywanza Sanders, Reverend Simmons, Reverend Thompson, and Reverend Coleman-Singleton at a baccalaureate ceremony (JA-6655-6657); and (4) an audiotape of a voicemail left by Reverend Pinckney for a sick friend (JA-5916-5918). All of this

evidence was admitted, and Roof objected only to the baccalaureate ceremony photos (JA-5800, 5817, 5819, 5869-5870, 5916-5917, 6133, 6557).

In closing argument, the prosecutor recapped the victim-impact evidence and referred at points to Roof having killed "extraordinarily good" or "great" people. JA-6668-6669, 6692-6693, 6701. The prosecutor also referred at times to the parishioners' faith. JA-6669 (Reverend Simmons was "a man of the Word"); JA-6671 (Reverend Coleman-Singleton had "deep faith"); JA-6672-6673 (Reverend Thompson was working to become a minister, and Cynthia Hurd was working on a church recruitment poster); JA-6671 (reference to Reverend Middleton-Doctor singing a hymn). The prosecutor also pointed out that Roof had specifically sought to kill the most innocent people he could imagine, saying "[h]e went there hoping to find the best among us. And he did indeed find them." JA-6703.

B. Standard Of Review

Most of the evidence Roof identifies was admitted without objection. JA-6261 (untimely objection to Pinckney videotape); JA 5970-5976, 6255 (photos); JA-5916-5918 (audiotape of Pinckney voicemail). Roof raised timely objections to the audiotape of Reverend Middleton-Doctor singing (JA-6261), the audiotape of Reverend Coleman-Singleton preaching (JA-6059-6060), the song performed by Coleman-Singleton's son (JA-6082), and the baccalaureate ceremony photos (JA-

6557); and he objected before the closing argument to references to the victims being especially good (JA-6519). Admission of evidence without objection is reviewed for plain error. Fed. R. Crim. P. 52(b). Roof's contention (Br. 200) that a *pro se* litigant is not required to preserve objections unless specifically warned by the district court is incorrect, see *Cohen*, 888 F.3d at 685, and the district court warned Roof of his obligation to make objections in any event (JA-2105). Even for preserved objections, the admission of evidence in support of a victim-impact aggravator is reviewed for abuse of discretion. *Runyon*, 707 F.3d at 499. The Court cannot reverse or vacate a death sentence if the error was harmless. *Barnette*, 211 F.3d at 824.

C. Payne And The FDPA Authorize Victim-Impact Evidence

1. In *Payne* v. *Tennessee*, the Supreme Court held that States may, consistent with the Eighth Amendment, allow evidence of a crime's impact on the victim and the victim's family at a capital trial's penalty phase. 501 U.S. at 827. In doing so, the Court overruled its prior decision in *Booth*, 482 U.S. 496, which had held that victim-impact testimony was "*per se* inadmissible in the sentencing phase of a capital case except to the extent that it 'relate[d] directly to the circumstances of the crime.'" *Payne*, 501 U.S. at 818 (quoting *Booth*, 482 U.S. at 507 n.10).

The defendant in *Payne* was accused of stabbing to death a mother and her daughter, and he challenged sentencing-phase testimony about the effect of the crimes on a surviving child. 501 U.S. at 811-813. The Court held that such evidence was admissible because "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it * * * evidence of the specific harm caused by the defendant." *Id.* at 825. The Court recognized that victim-impact evidence "serves [the] entirely legitimate purpose[]" of "allowing the jury to bear in mind that harm at the same time it considers the mitigating evidence introduced by the defendant." *Ibid.* Consistent with *Payne*, Congress has specified that the government may introduce victim-impact evidence as a non-statutory aggravating factor. 18 U.S.C. 3593(a) and (c).

2. Under *Payne*, the government's presentation of victim-impact evidence was appropriate. The government "[u]nquestionably" is entitled to ask the jury to consider the victims' uniqueness and the magnitude of the loss when those unique victims are killed. *Humphries*, 397 F.3d at 222; *Payne*, 501 U.S. at 825 (government can "remind[] the sentencer that * * * the victim is an individual whose death represents a unique loss to society and in particular to his family") (quotations omitted). That evidence can include the impact of the victim's death on co-workers and evidence of the victim's professional life. *Runyon*, 707 F.3d at

500-501. This Court has also allowed victim-impact witnesses to deliver poems reflecting their sadness and regret over their loss. *Barnette*, 211 F.3d at 818. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair," the Due Process Clause provides a mechanism for relief. *Payne*, 501 U.S. at 825; *Humphries*, 397 F.3d at 218.[7]

3. Roof contends (Br. 202-206) that the government's argument that the defendants were especially good people is unconstitutional "comparative worth" evidence prohibited by *Payne*. That argument is misconceived. In *Payne*, the Court addressed the defendant's concern that "admission of victim impact evidence permits a jury 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." 501 U.S. at 823. The Court dismissed that concern because victim impact evidence is not generally offered in a comparative way—"for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." *Ibid.* Rather, victim-impact evidence "is designed to show * * * *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Ibid.* In other words, the government may tell

[7] Roof does not appear to argue that the due-process limit was crossed here, and the district court repeatedly found that it was not. JA-5904, 6033-6034, 6109.

the jury about the victim's unique characteristics, and the jury can determine what value to place on that unique loss.

This Court has recognized that *Payne* explicitly allows a defendant to be sentenced to death for killing a victim who is "more 'unique' than another" or whose loss leaves a greater mark on the victim's family and society. *Humphries*, 397 F.3d at 222 n.6. And even if *Payne* prohibits direct "comparisons between the victim[s] and other victims of society," *id.* at 224, the government did not make any such comparison here. The prosecutor's description of the parishioners as "particularly good" or "great" people explained the impact of Roof's decision to end the lives of these unique individuals based on witness testimony.

D. The Government Was Not Prohibited From Introducing Religious Evidence

Roof further contends (Br. 205) that the government unconstitutionally injected the victims' religion into the sentencing process by showing photos of the victims at church or playing tapes of them engaged in religious activity. But Roof killed nine people inside a church during a Bible study, so it is no surprise that the window into the victims' lives permitted by *Payne* involved religion. 501 U.S. at 823. Just as the government can present testimony about a victim's Navy service to describe his "professional background and accomplishments," *Runyon*, 707 F.3d at 501, where victims are ministers and members of the church choir, the government can show photos and tapes of the victims preaching and singing to

establish the impact of their deaths on their families and the Mother Emanuel congregation. Those are precisely the unique attributes of these human beings that are now lost to the community because of Roof's actions. See *United States* v. *Mikhel*, 889 F.3d 1003, 1053-1054 (9th Cir. 2018), cert. denied, 140 S. Ct. 157 (2019); *Mitchell*, 502 F.3d at 989-990; *Bernard*, 299 F.3d at 477-480.

Furthermore, the government noticed a separate aggravating factor that Roof had specifically targeted innocent people at a Bible study to maximize the societal impact of his crimes. JA-150. The government therefore appropriately reminded the jury in summation that Roof targeted the best people to kill. JA-6703, 6686 (Roof explained in his jail writings that he created the biggest wave by targeting innocent people in a church); JA-4271, 4280-4281 (Roof explained during his confession that he chose an African-American church to magnify his message). Victim-impact evidence of a religious nature was separately admissible in support of that aggravating factor.

Finally, the government did not contend, as Roof suggests (Br. 205), that Roof should be sentenced to death because of the religion of his victims. The jury was instructed at the penalty phase: "[Y]ou must not consider race, color, religious beliefs, national origin, or gender of either the defendant or any victim." JA-6747. The jury is presumed to have followed that instruction, *Richardson* v. *Marsh*, 481

U.S. 200, 211 (1987), and each juror signed a certification attesting that they followed it (JA-6808).

E. Any Error In Admitting Victim-Impact Evidence Or Religious Evidence Was Harmless

Even if the Eighth Amendment barred testimony that the parishioners were good or religious, which it does not, the testimony did not impact the jury's verdict. There was therefore no reversible plain error (if the error was unpreserved), or any error was harmless beyond a reasonable doubt (if the error was preserved). See 18 U.S.C. 3595(c)(2); *Jones* v. *United States*, 527 U.S. 373, 402-403 (1999).

As explained above, p. 130, *supra*, Roof's crime was extremely aggravated. The outcome of the penalty phase would have been the same if the handful of exhibits about which Roof complains and the prosecutor's references to the parishioners as good or religious people were excised. *Jones*, 527 U.S. at 402-403 (inclusion of two improper aggravating factors was harmless in part because jury found other factors sufficient to justify death); *Runyon*, 707 F.3d at 510 ("Excising the portions of the prosecution's closing argument challenged on Fifth and Sixth Amendment grounds would have yielded no change to the jury's sentencing verdict.").

Given what the jurors heard and saw about the crime itself (which occurred during Bible study) and the devastating impact of the loss of these nine

parishioners on their families and community, the jurors were not likely to be overly swayed by hearing that they were good and devout people or by seeing religious images of them. No reasonable likelihood exists that the jury would not have returned a death verdict if the challenged exhibits and the prosecutor's comments had been excluded. See, *e.g.*, *Jones*, 527 U.S. at 404-405.

XIV

THE DEATH PENALTY IS NOT PLAINLY CRUEL AND UNUSUAL PUNISHMENT BASED ON ROOF'S AGE OR MENTAL CAPACITY

Roof contends (Br. 208-215) that his death sentence violates the Eighth Amendment because: (1) the categorical ban on executing offenders under 18 should be extended to those 21 and younger; and (2) his autism and mental illness render the death penalty cruel and unusual punishment. The Court should reject those arguments.

A. Background

When standby counsel requested a second competency hearing, they attached a draft motion to preclude application of the death penalty due to Roof's age, autism, and mental illness. See JA-7752-7762. Roof stated that the marshals had brought the draft to him at the prison, and he expressed great concern that this motion may have been filed on his behalf. JA-5517. The court told Roof that the draft motion had not been submitted and would not be considered. JA-5517.

B. Standard Of Review

Roof never argued in the district court that a death sentence was unconstitutional as applied to him based on his age, autism, or mental illness. The Court's review is therefore limited to plain error. Fed. R. Crim. P. 52(b).

C. Applying The Death Penalty To Roof Is Not Plainly Erroneous Based On His Age

In *Roper* v. *Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the Eighth Amendment "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed" based on a "national consensus against the death penalty for juveniles." *Id.* at 564, 578. *Simmons* recognized that "[d]rawing the line at 18 years of age" was "subject * * * to the objections always raised against categorial rules." *Id.* at 574. But "18 is the point where society draws the line for many purposes between childhood and adulthood," and it is "the age at which the line for death eligibility ought to rest." *Ibid.*

Because *Simmons* drew the line at 18, Roof cannot show error—much less a "clear or obvious" error—in imposing a death sentence for a crime he committed at age 21. *Marcus*, 560 U.S. at 262 (quotations omitted). "[I]f a Supreme Court precedent has direct application in a case, [this Court] must follow it." *United States* v. *Stitt*, 459 F.3d 483, 485 (4th Cir. 2006) (quotations omitted); see *United States* v. *Tsarnaev*, 968 F.3d 24, 97 (1st. Cir. 2020) (rejecting argument on plain-

error review that categorical ban on death penalty should be extended to age 20 and stating "whether a change should occur is for the Supreme Court to say"), petition for cert. pending, No. 20-443 (filed Oct. 6, 2020).

Roof now asserts on appeal (Br. 210-211) that scientific research has explained the effects of brain maturation on the behavioral and decision-making abilities of adolescents in their late teens and early twenties. But the two articles he cites (Br. 210) do not signify a shift in scientific consensus. He identifies (Br. 211-212) a 2017 report by the U.S. Sentencing Commission, *Youthful Offenders in the Federal System*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf, which states that "[brain] development continues into the 20s." *Id.* at 6-7. But the report relied primarily on studies conducted at or before the time of *Simmons* so it cannot signify a shift in scientific consensus, *id.* at 6-7 & nn.29-32, and it cited the research to explain why it defined youthful offenders as 25 and younger "for purposes of this study," *id.* at 5.

Roof also points (Br. 211) to the American Bar Association's (ABA) resolution calling for the prohibition of capital punishment for those 21 or younger at the time of their offenses. Am. Bar Ass'n Resolution 111 (2018), available at https://americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf. The resolution asserts that "the line drawn by the U.S. Supreme Court no longer

fully reflects the state of the science on adolescent development," but admits "there were findings that pointed to this conclusion prior to 2005" when *Simmons* was decided. *Id.* at 6-7. And notwithstanding an ABA resolution, this Court is bound by *Simmons*.

Roof also contends (Br. 211-212) that "[c]ourt rulings" reflect that emerging adults comprise a different class of offenders. He cites *State* v. *Norris*, 2017 WL 2062145, at *4-5 (N.J. Super. Ct. App. Div. 2017), where a New Jersey court remanded an 80-year sentence imposed on a 21-year-old, but did not adopt any categorical bar on long prison sentences for that age group. He also cites a Kentucky decision holding that the death penalty is unconstitutional for offenders under 21. See *Commonwealth* v. *Bredhold*, No. 14-CR-161 (Ky. Cir. Ct. Aug. 1, 2017) (unpublished order). That decision would not benefit Roof, who was 21 at the time of his offense. Moreover, the decision was vacated by the Supreme Court of Kentucky. *Commonwealth* v. *Bredhold*, 599 S.W.3d 409 (2020), petition for cert. pending, No. 19-8873 (filed June 26, 2020).

D. Applying The Death Penalty To Roof Is Not Plainly Erroneous Based On His Mental Capacity

Finally, Roof contends (Br. 212-214) that his sentence should be vacated based on his autism and mental-health disorders. The Court should reject that argument. In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment bars execution of "mentally retarded" offenders. *Id.* at

321. The Court reasoned that this category of offenders is "less morally culpable" because of diminished capacity to understand and process information, learn from experience, engage in logical reasoning, or control impulses. *Id.* at 320. The Court also observed that it may be difficult for such persons to assist counsel, testify, or create an impression for the jury of remorse, which creates a "special risk of wrongful execution." *Id.* at 320-321.

Roof is not "mentally retarded" as that term is defined in *Atkins*. His full-scale I.Q. is 125, which places him in the 95th percentile. This is not a case where a defendant acted impulsively or was incapable of showing remorse due to diminished mental capacity. Roof meticulously planned his crime and had no remorse. JA-5719, 6796-6801. The district court repeatedly found him competent to stand trial and represent himself. There was no error—plain or otherwise—in applying the death penalty to Roof based on his mental capacity.

XV

ROOF'S CONVICTIONS UNDER 18 U.S.C. 247 ARE VALID

Roof challenges his convictions under 18 U.S.C. 247 for obstruction of the free exercise of religious beliefs (Counts 13-24), contending that: (1) Section 247 is facially unconstitutional because it exceeds Congress's Commerce Clause authority; (2) the government presented insufficient evidence of an interstate commerce nexus; (3) the district court improperly instructed the jury on the

interstate commerce element; and (4) the government failed to prove that Roof was motivated by religious hostility. Br. 216-244. None has merit.

A. Background

1. Before trial, Roof moved to dismiss the Section 247(a)(2) counts, raising facial and as-applied challenges to Congress's Commerce Clause authority to enact Section 247. JA-215-227. The district court denied both challenges. JA-3518-3525.

As to Roof's facial challenge, the court noted that Roof was required to establish that "under no circumstances" could an attack on a church (or its worshippers) be in or substantially affect interstate commerce, which the court deemed "an impossible burden" in this case. JA-3521. The court emphasized that Section 247 has a jurisdictional element "restricting it to conduct that has a sufficient nexus with interstate commerce." JA-3522. It likewise rejected Roof's as-applied challenge because his offenses' alleged connections with interstate commerce were sufficient to survive a motion to dismiss. JA-3525.

2. At trial, the government presented uncontested evidence that in planning, preparing for, and committing his crimes, Roof used things that had traveled in interstate commerce and multiple channels and instrumentalities of interstate commerce.

a. From April to June 2015, Roof purchased a semi-automatic pistol, bullets, and magazines that had all traveled in interstate commerce. The gun was manufactured in Austria, imported into Georgia, and transported to South Carolina. JA-4494-4495. The ammunition was manufactured in Illinois or Mississippi before traveling to South Carolina. JA-4496-4497. The magazines were made in Austria and imported into the United States. JA-4498. The pouch Roof used to carry the gun and magazines was manufactured in Vietnam, imported into California, and shipped to South Carolina. JA-4141, 4268-4269, 4274, 4804-4809. Roof bought these items to carry out his "mission" to "kill black people." JA-4304; see pp. 13-15, *supra*.

b. Using the Internet, Roof visited a website called sciway.net, which provides information on South Carolina, and researched black churches in Charleston. He identified Mother Emanuel as a target. JA-4152, 4270-4272, 4322-4323, 4417-4418, 4628, 4896; see also p. 14, *supra*.

c. On February 23, 2015, Roof made a telephone call from his house's landline to Mother Emanuel. See p. 15, *supra*.

d. Roof paid for a foreign Internet server to host the writings and photos he posted on LastRhodesian.com. See pp. 16-17, *supra*. His online postings (JA-4623-4627; SJA-276-278, 281-311) explained Roof's motives for the killings and called for others to join him in taking "drastic action" (JA-4625).

e. From December 2014 to May 2015, Roof used a GPS device while driving on interstate highways when he made six trips to the area immediately surrounding Mother Emanuel, the "main place" Roof was considering for his attack (JA-4323). See pp. 15-16, *supra*.

f. On the day of the shootings, GPS data showed that Roof drove on interstate highway I-26 from Columbia to Charleston, stopping near Mother Emanuel. See p. 16, *supra*.

g. Roof entered Mother Emanuel carrying the firearm and loaded magazines in the tactical pouch. Roof used the gun to fire 74 bullets, killing nine parishioners and attempting to kill three, as they prayed. See pp. 9-12, *supra*.

3. During trial, Roof requested a jury instruction that would have required the government to prove that "the Defendant was motivated by hostility to the victims' religious beliefs or to the free exercise thereof." JA-4388; see also JA-4374. The government opposed the instruction. JA-4652-4657. After the government rested, Roof moved for acquittal, arguing in part that the government failed to prove that he acted out of religious hostility. JA-4956-4957. The court denied the motion (JA-5026), noting that religious hostility is "not a requirement of the statute" (JA-5025; see also JA-5051).

4. On December 14, 2016, the district court convened a charge conference to discuss the guilt-phase jury instructions and circulated a draft of its proposed instructions. JA-4962, 5039-5040; see SJA-427-471.

a. The court's proposed instructions stated that the government must prove that Roof's Section 247 offenses were "in or affect[ed] interstate commerce." SJA-453, 457. They stated that the jury could find that Roof's conduct was "in" interstate commerce if he (1) "used a channel or instrumentality of interstate commerce," even if his use of the channel or instrumentality "occurred entirely within the State of South Carolina," or (2) "used a firearm or ammunition during the offense" and that firearm or ammunition "traveled across state lines at any point in its existence." SJA-453-454.

The proposed instructions stated that the jury could find that Roof's conduct "affect[ed]" interstate commerce "if it in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among states." SJA-454. They also provided that "[t]he effect of the offense on interstate commerce does not need to be substantial" and that "[a]ll that is necessary" is that "the natural consequence of the offense potentially caused an impact—positive or negative—on interstate commerce." SJA-454-455.

b. The district court and the parties discussed certain aspects of the proposed interstate commerce instructions, but Roof's counsel did not object to any of the proposed instructions discussed above. JA-5050-5055. The court instructed the jury accordingly. JA-5141-5143. Afterward, Roof's counsel offered technical corrections and made no further objections. JA-5160-5161.

5. The jury convicted Roof on all 12 counts charging Section 247(a)(2) violations. JA-5166-5168, 5186-5190.

In both his initial motion for judgment of acquittal and later motion for new trial or judgment of acquittal, Roof argued that the government had failed to prove the required nexus to interstate commerce. JA-4957-4959, 5023-5024, 6973-6977. The district court denied the motions. JA-5026, 6998-7001. It found that the government produced sufficient evidence of the required nexus (JA-5026, 6999-7000) and emphasized that Congress had plenary Commerce Clause authority to "prohibit use of the channels of interstate commerce, like the internet, or use of things in interstate commerce, like an imported Austrian pistol, for criminal purposes like mass murder" (JA-7000; see also JA-7000-7001 (citing Dkt. No. 735, at 21 (JA-3521))).

B. Standard Of Review

1. A preserved constitutional challenge is reviewed de novo. *United States* v. *McLean*, 715 F.3d 129, 136 (4th Cir. 2013).

2. Roof's sufficiency challenge is reviewed de novo. The Court must consider the evidence "in the light most favorable to the government" and "sustain the jury's verdict if *any* rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Hilton*, 701 F.3d at 969.

3. Roof's challenge to the jury instruction on Section 247's interstate commerce element is subject to plain-error review, as provided by Federal Rule of Criminal Procedure 30(d). That rule requires that "[a] party who objects to any portion of the [jury] instructions or to a failure to give a requested instruction must inform the court of the *specific objection and the grounds for the objection* before the jury retires to deliberate." *Ibid.* (emphasis added). Failure to object "precludes appellate review, except as permitted under Rule 52(b)," *ibid.—i.e.*, for plain error. See *Jones*, 527 U.S. at 388; *United States* v. *Cowden*, 882 F.3d 464, 475 (4th Cir. 2018). A request for an alternative instruction is insufficient to preserve an objection to the instruction given. *Jones*, 527 U.S. at 388; *Cowden*, 882 F.3d at 475.

4. Whether Section 247(a)(2) requires proof of religious hostility is a question of statutory interpretation reviewed de novo. *United States* v. *Savage*, 737 F.3d 304, 306-307 (4th Cir. 2013).

C. Section 247(a)(2) Is Facially Valid

At the time of Roof's offenses, Section 247(a)(2) provided that, 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 as provided in subsection (d). 18 U.S.C. 247(a) and (a)(2) (2012).[8] Section 247(b) requires that "the offense is in or affects interstate or foreign commerce." 18 U.S.C. 247(b). This jurisdictional element requires proof of a sufficient interstate commerce nexus in each case and hence defeats Roof's facial challenge.

1. Section 247 Applies To The Full Extent Of Congress's Commerce Clause Authority

As Roof acknowledges, Section 247(a)(2) reaches to the full extent of Congress's commerce power. Br. 222-223. In *United States* v. *Lopez*, 514 U.S. 549 (1995), the Supreme Court identified three categories of activity that Congress may regulate under the Commerce Clause. "First, Congress may regulate the use of the channels of interstate commerce." *Id.* at 558. Channels of interstate commerce are "the interstate transportation routes through which persons and goods move." *United States* v. *Morrison*, 529 U.S. 598, 613 n.5 (2000). "These

[8] Congress subsequently amended Section 247(a)(2) to add "including by threat of force against religious property." Pub. L. No. 115-249, § 2, 132 Stat. 3162 (2018). That change is immaterial to this appeal.

channels include highways, railroads, navigable waters, and airspace, as well as telecommunications networks." *United States* v. *Ballinger*, 395 F.3d 1218, 1225-1226 (11th Cir. 2005) (en banc) (citations omitted). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558. These include cars, planes, trains, highways, interstate roads, as well as the Internet, telephones, and communications networks. *Ballinger*, 395 F.3d at 1226. "Finally, Congress' commerce authority includes the power to regulate those activities * * * that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-559. Under this third category, Congress may regulate purely intrastate activity "that is not itself 'commercial'" if it is part of a "class of activity" that has a substantial effect on interstate commerce. *Gonzales* v. *Raich*, 545 U.S. 1, 17-18 (2005).

Section 247's jurisdictional element, which requires that the offense is "in or affects interstate * * * commerce," 18 U.S.C. 247(b), is "coextensive with the constitutional power of Congress." *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 277 n.6 (1975); see also *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977). The "in commerce" language "denotes the first two *Lopez* categories—regulation of the channels and of the instrumentalities of commerce." *Ballinger*, 395 F.3d at 1231. The "affects commerce" language "invokes the third

Lopez category—regulation of intrastate activities that substantially affect commerce." *Ibid.*

Section 247's legislative history confirms the statute's broad reach. As originally enacted, Section 247 applied only if "in committing the offense, the defendant travels in interstate or foreign commerce, or uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce." Pub. L. No. 100-346, § 1, 102 Stat. 644 (1988). That legislation proved to be "totally ineffective" because of its "highly restrictive and duplicative language." H.R. Rep. No. 621, 104th Cong., 2d Sess. 4 (1996) (H.R. Rep. No. 621); see also *id.* at 9-10 (Department of Justice (DOJ) Views); *Ballinger*, 395 F.3d at 1235, 1239-1240 (discussing legislative history).

Consequently, Congress amended Section 247(b) to "broaden[]" the statute's jurisdictional scope to enable prosecution "if the offense 'is in or affects interstate or foreign commerce.'" H.R. Rep. No. 621, at 7; accord 142 Cong. Rec. 17212 (1996) (Joint Statement of Floor Managers); see Pub. L. No. 104-155, § 3(3), 110 Stat. 1392-1393 (1996). Under the revised jurisdictional element, the statute is satisfied whenever "in committing, planning, or preparing to commit the offense," the defendant "either travels in interstate or foreign commerce, or uses the mail or any facility or instrumentality of interstate or foreign commerce." H.R. Rep. No. 621, at 7; 142 Cong. Rec. 17212. "Congress could not have made clearer its

intention to exercise its full commerce power." *Ballinger*, 395 F.3d at 1240; accord *United States* v. *Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001).

2. Section 247's Jurisdictional Element Defeats A Facial Challenge

Because Section 247 contains a jurisdictional element that extends to Congress's full commerce power, Roof's facial challenge necessarily fails. As the Sixth Circuit has recognized, "the presence of the jurisdictional element defeats [defendant's] facial challenge." *United States* v. *Chesney*, 86 F.3d 564, 568 (6th Cir. 1996) (addressing a facial challenge to 18 U.S.C. 922(g)(1)). Moreover, a facial challenge fails unless the challenger establishes "that the law is unconstitutional in all of its applications." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008). The district court's hypothetical where a defendant mails a bomb to a church (JA-3521), an application that would indisputably "place that offense in commerce," see *Ballinger*, 395 F.3d at 1237, makes clear that Roof's facial challenge fails.

This conclusion comports with the Supreme Court's decisions in *Lopez* and *Morrison*. In holding that the Gun-Free School Zones Act, which criminalized possessing a firearm in a school zone, exceeded Congress's Commerce Clause power, *Lopez* emphasized that the statute "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. Congress later amended the statute

to add a jurisdictional element requiring that the firearm "has moved in or * * * otherwise affects interstate or foreign commerce," 18 U.S.C. 922(q)(2)(A), and courts have upheld it. See, *e.g.*, *United States* v. *Dorsey*, 418 F.3d 1038, 1045-1046 (9th Cir. 2005), abrogated on other grounds by *Arizona* v. *Gant*, 556 U.S. 332 (2009); *United States* v. *Danks*, 221 F.3d 1037, 1038-1039 (8th Cir. 1999); see also *United States* v. *Hill*, 927 F.3d 188, 206 (4th Cir. 2019), cert. denied, 2020 WL 5882402 (2020). Similarly, in striking down the civil remedy provision in the Violence Against Women Act (VAWA), the Supreme Court emphasized in *Morrison* that the statute contained no interstate commerce jurisdictional element. 529 U.S. at 613; cf. *United States* v. *Al-Zubaidy*, 283 F.3d 804, 812 (6th Cir. 2002) (upholding VAWA's criminal provision and noting that it "provides an explicit jurisdictional element requiring interstate travel").

In sum, Section 247 invokes Congress's full commerce power, requires that the government prove an interstate commerce element in each case, and is constitutional on its face.

3. Roof's Arguments Challenging Section 247's Facial Validity Fail

Roof makes three arguments to support his facial challenge: (1) the jurisdictional element does not restrict the regulated conduct to commercial activity or otherwise limit the statute's reach; (2) the proscribed conduct does not target the channels or instrumentalities of interstate commerce; and (3) the

prohibited conduct does not "substantially affect" interstate commerce. Br. 222-231. None justifies relief.

a. First, Roof asserts (Br. 223) that a valid jurisdictional element must restrict the regulated conduct to "identifiable commerce-related activities" or limit the regulated conduct in some unspecified way so that it is not as broad as "the Clause itself." Neither point is correct.

i. Congress's commerce power is not limited to addressing commercial or economic conduct. As the district court recognized, numerous federal statutes target noncommercial conduct, but because they contain jurisdictional elements, they are "universally upheld as within Congress's Commerce Clause powers." JA-3522. For example, federal courts have upheld federal statutes penalizing arson, possession of firearms or other dangerous items, receipt of child pornography, failure to register as a sex offender, or threats—regardless of whether the offense is commercial. The key is that the statutes contain a jurisdictional element requiring proof in each case of an interstate commerce nexus. See *United*

States v. *Coleman*, 675 F.3d 615, 620 (6th Cir. 2012).[9] This Court recently emphasized that it had identified no case "in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause." *Hill*, 927 F.3d at 204 (upholding conviction for bias-motivated assault under 18 U.S.C. 249(a)(2)).

Roof asserts (Br. 222-223) that the jurisdictional element is insufficient because Congress chose not to narrow it compared to the reach of the Commerce Clause itself. The district court aptly labeled that argument "baffling." JA-3522. Congress explicitly stated its intent to reach "any conduct which falls within the interstate commerce clause of the Constitution." JA-3522 (quoting H.R. Rep. No. 621, at 7). Likewise, Roof's reliance (Br. 222) on *United States* v. *Rodia*, 194 F.3d 465, 472 (3d Cir. 1999), for the statement that "[t]he mere presence of a jurisdictional element" does not render a statute "per se constitutional," is misplaced. *Rodia* stands only for the unremarkable proposition that a jurisdictional element is insufficient where it fails adequately to tie the conduct at issue to

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[9] See, *e.g.*, *United States* v. *Mahon*, 804 F.3d 946, 953-954 (9th Cir. 2015) (arson); *Coleman*, 675 F.3d at 620-621 (sex-offender registration); *United States* v. *Alderman*, 565 F.3d 641, 647-648 (9th Cir. 2009) (possession of body armor); *United States* v. *MacEwan*, 445 F.3d 237, 243-245 (3d Cir. 2006) (receipt of child pornography); *United States* v. *Corum*, 362 F.3d 489, 493-495 (8th Cir. 2004) (threats); *United States* v. *Wells*, 98 F.3d 808, 810-811 (4th Cir. 1996) (firearm possession); *United States* v. *Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996) (possession of explosives).

interstate commerce. That proposition presents no difficulty here. By the statute's plain terms, *no* scenario exists in which Section 247 would penalize conduct insufficiently linked to interstate commerce.

b. Second, Roof asserts that Section 247 is beyond Congress's Commerce Clause power because the statute does not "'target the movement of' things" through the channels or instrumentalities of interstate commerce and is not "directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce." Br. 225-226 (citations omitted). Roof is wrong again.

"[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964). That power extends to misuse of the channels and instrumentalities of interstate commerce even when the misuse is local. Thus, the district court correctly recognized that Congress may prohibit use of the interstate highway system, national telecommunications networks, the Internet, a GPS device, and the interstate market in firearms and ammunition to attack churches (or their worshippers). JA-3521, 7000-7001; see *Ballinger*, 395 F.3d at 1226 (reasoning, in upholding Section 247, that congressional power to regulate the channels and instrumentalities of commerce "includes the power to prohibit their

use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature").

This reasoning follows directly from *Lopez*, which recognized that Congress may regulate and protect the channels or instrumentalities of interstate commerce, or persons or things in interstate commerce, "even though the threat may come only from intrastate activities." 514 U.S. at 558. Thus, courts have rejected challenges to Congress's exercise of that authority, even where the defendant's conduct occurred entirely intrastate. For example, in *United States* v. *Cobb*, 144 F.3d 319 (4th Cir. 1998), this Court upheld the federal carjacking statute, 18 U.S.C. 2119, as a valid exercise of Congress's power to regulate the instrumentalities of interstate commerce, even though not every car "has an interstate destination." 144 F.3d at 322; see also *United States* v. *MacEwan*, 445 F.3d 237, 243-245 (3d Cir. 2006) (upholding convictions under 18 U.S.C. 2252A(a)(2)(B), despite no proof that the child pornography images defendant downloaded from the Internet crossed state lines); *United States* v. *Corum*, 362 F.3d 489, 493-494 (8th Cir. 2004) (upholding conviction under 18 U.S.C. 844(e) for communicating a threat by telephone, "even if the calls were made intrastate").

Contrary to Roof's claim, Section 247 is "directed at" the channels or instrumentalities of interstate commerce, or things in interstate commerce. Br. 225. Section 247(b) need not specifically prohibit a defendant from using interstate highways, cars, telephones, the Internet, GPS devices, or firearms or ammunition that have moved in interstate commerce to attack churchgoers. Its text covers an offense that is "*in*" interstate commerce, 18 U.S.C. 247(b) (emphasis added), and that "particularized" language denotes the first two *Lopez* categories. *Ballinger*, 395 F.3d at 1231; see also *American Bldg. Maint. Indus.*, 422 U.S. at 276 ("in commerce" language denotes "only persons or activities within the flow of interstate commerce"); *United States* v. *Bowers*, No. 18-cr-292, 2020 WL 6196294, at *8 (W.D. Pa. Oct. 15, 2020) (concluding that Section 247 is a valid exercise of Congress's authority under the first two *Lopez* categories); *United States* v. *Hari*, No. 18-cr-0150, 2019 WL 7838282, at *3 (D. Minn. Sept. 17, 2019), adopted, 2019 WL 6975425, at *1-2 (D. Minn. Dec. 20, 2019) (same).

c. Finally, Roof contends that Section 247 is facially invalid because it "does not regulate conduct that 'substantially affects' interstate commerce" (the third *Lopez* category). Br. 226. Because Section 247 falls squarely within Congress's power under the first two *Lopez* prongs, this Court need not decide its facial validity under the third. See *Ballinger*, 395 F.3d at 1227.

But Roof is wrong to question it. For a law to be facially invalid, it must be unconstitutional in all applications. Where, for example, a defendant's conduct prevents a church from engaging in an activity that affects interstate commerce—*e.g.*, operating a summer camp or a daycare center—then a federal statute punishing that conduct falls within the third *Lopez* category and cannot be facially invalid. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573-574 (1997) (camps involve commerce); *United States* v. *Terry*, 257 F.3d 366, 369-371 (4th Cir. 2001) (arson of church containing a daycare center satisfied jurisdictional element of federal arson statute). Accordingly, courts have upheld Section 247 as a valid exercise of Congress's power under the third *Lopez* category. See *Grassie*, 237 F.3d at 1209-1211 (rejecting challenge to Section 247 in part because churches can be involved in activities affecting interstate commerce); accord *Bowers*, 2020 WL 6196294, at *8; *Hari*, 2019 WL 7838282, at *4-6, adopted, 2019 WL 6975425, at *1-2.

The district court correctly recognized that "Congress may prohibit attacks on churches when the attacks have a nexus with interstate commerce"—both "attacks that use interstate channels and instrumentalities of commerce" and "attacks that substantially affect interstate commerce." JA-3524.

D. The Government Proved That Roof's Conduct Satisfies Section 247's Jurisdictional Element

Roof's real quarrel is with whether his offense is "in or affects interstate * * * commerce," as required by Section 247(b). Although he frames his argument as an as-applied constitutional challenge (Br. 231), Roof actually argues that the government presented insufficient evidence of a nexus between his offense and interstate commerce. Br. 217-218, 231-234. Viewing the evidence in the light most favorable to the government, the district court correctly concluded that the government established the requisite nexus. JA-5026, 6999-7001.

1. Roof's Use Of A Gun, Ammunition, Magazines, And Tactical Pouch That Had Traveled In Interstate Commerce Satisfies Section 247(b)

The Supreme Court's decision in *Scarborough*, 431 U.S. 563, confirms that Roof's shooting and killing parishioners using a firearm, ammunition, magazines, and tactical pouch that had all traveled in interstate commerce made his offense one that was "in or affect[ed] interstate * * * commerce." 18 U.S.C. 247(b).

In *Scarborough*, the Court upheld the defendant's conviction for violating 18 U.S.C. App. 1202(a) (a predecessor to 18 U.S.C. 922(g)(1)), which prohibited felons from possessing a firearm "in commerce or affecting commerce," 431 U.S. at 564, the same standard Congress used in Section 247(b). The Court found it "apparent" that by prohibiting both possessions "in" and "affecting" commerce, "Congress must have meant more than to outlaw simply those possessions that

occur in commerce or in interstate facilities." *Id.* at 572. The Court concluded that Congress intended to require only the "minimal nexus" that the firearm have, *at some time*, traveled in interstate commerce. *Id.* at 575; see also *Ballinger*, 395 F.3d at 1241 (relying on *Scarborough*).

This Court and others have recognized that the Supreme Court's decision in *Lopez* did not affect its *Scarborough* holding. In prosecuting cases under 18 U.S.C. 922(g), which likewise requires possession "in or affecting commerce," the government need show only that the firearm previously moved in interstate commerce. See, *e.g.*, *United States* v. *Wells*, 98 F.3d 808, 811 (4th Cir. 1996); accord *United States* v. *Singletary*, 268 F.3d 196, 199-205 (3d Cir. 2001); *United States* v. *Nathan*, 202 F.3d 230, 234 (4th Cir. 2000).

Analogizing to *Scarborough*, courts likewise have upheld convictions based on body armor having previously traveled in interstate commerce, *e.g.*, *United States* v. *Cook*, 488 F. App'x 643, 645-646 (3d Cir. 2012); *United States* v. *Patton*, 451 F.3d 615, 635 (10th Cir. 2006), and where explosives were manufactured out-of-state, *e.g.*, *United States* v. *Joos*, 638 F.3d 581, 586 (8th Cir. 2011). The logic of this case law applies equally to violations of Section 247, where Congress made its intention to exercise "its full commerce" power clear. *Ballinger*, 395 F.3d at 1240. As the district court correctly recognized: "Equally unpersuasive is [Roof's] argument that Congress may prohibit mere possession of a firearm that

has traveled in interstate commerce but may not prohibit actual use of the same firearm for mass murder." JA-7001 n.2.

Roof relies (Br. 232-233) on *Rodia*, 194 F.3d at 473, and other cases to suggest that his use of items once sold in interstate commerce was "only tenuously related" to the criminalized conduct and therefore insufficient. This argument misses the mark. Roof shot and killed parishioners using a gun, ammunition, and magazines that had moved in interstate commerce. Roof's use of these items was not "tenuously related" (Br. 232) to his obstruction of the victims' exercise of religion.

2. Roof Used Channels And Instrumentalities Of Interstate Commerce

Roof also extensively used the channels and instrumentalities of interstate commerce in planning, preparing for, and committing this crime.

First, Roof used the Internet to research churches in Charleston with predominantly African-American congregations, identifying Mother Emanuel as his target. Additionally, Roof paid for a foreign Internet server to set up a website, LastRhodesian.com, on which he posted a call to arms that was part and parcel of his offense. See pp. 14-17, 156-157, *supra*. "[I]t is beyond debate that the Internet and email are facilities or means of interstate commerce." *United States* v. *Gray-Sommerville*, 618 F. App'x 165, 168 (4th Cir. 2015) (citation omitted); see also

United States v. *Morgan*, 748 F.3d 1024, 1033-1034 & nn.11-12 (10th Cir. 2014); *MacEwan*, 445 F.3d at 245.

Second, Roof used his home telephone to call Mother Emanuel before the crime. See pp. 15, 156, *supra*. A telephone is an instrumentality of interstate commerce, even if used to make an intrastate call. See, *e.g.*, *Morgan*, 748 F.3d at 1033-1034 & n.11; *United States* v. *Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999); *Corum*, 362 F.3d at 497.

Third, Roof used his car and interstate highways to scout out Mother Emanuel on multiple occasions and to travel to the church to carry out the attack. See pp. 15-16, 157, *supra*. Interstate highways and automobiles are channels or instrumentalities of interstate commerce. See, *e.g.*, *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 129-130 (1943); *United States* v. *Mandel*, 647 F.3d 710, 720-722 (7th Cir. 2011); *Cobb*, 144 F.3d at 322.

Finally, Roof used a GPS device and navigation satellites to steer him on his trips to Mother Emanuel and the vicinity, including his final trip. See pp. 15-16, 157, *supra*. GPS devices are instrumentalities of interstate commerce. *Morgan*, 748 F.3d at 1033 n.12 (finding no plain error in determination that a GPS is an instrumentality of interstate commerce).

Roof's use of any of these channels or instrumentalities of interstate commerce—alone or in combination—sufficiently satisfied Section 247(b).

3. The Government Need Not Prove That Roof's Offense Was "Directed At" The Channels Or Instrumentalities Of Interstate Commerce

Roof claims that his crime was not "directed at" the channels or instrumentalities of interstate commerce and that he did not use any channel or instrumentality "*during* it." Br. 231-234 (citation omitted). The Eleventh Circuit rejected a similar argument in *Ballinger*, 395 F.3d at 1231-1238, *i.e.*, that Section 247(b) required that the defendant have committed the ultimate *actus reus*—there, igniting a church—"in commerce." Such a limitation "severs unnaturally the offender from the offense," for "the offense is more than the last step in a sequence of acts that add up to the statutorily prohibited conduct" and includes travel and procurement of materials that are "necessary and indispensable steps" in committing the crime. *Id.* at 1236.

Numerous courts have upheld convictions under federal criminal statutes "directed at" harms distinct from the interstate commerce nexus. For example, in *Runyon*, this Court rejected—as "fail[ing] by a wide margin"—the defendant's argument that, by reaching "use [of] any facility of interstate or foreign commerce," the murder-for-hire statute exceeded Congress's commerce power. 707 F.3d at 489. Yet obviously, Congress was not targeting harm to the instrumentalities of interstate commerce *themselves* but murder-for-hire facilitated by use of such instrumentalities. Similarly, courts have upheld convictions under the federal kidnapping statute where instrumentalities of commerce were used to

further the crime, even though Congress was targeting a different harm. See, *e.g.*, *Morgan*, 748 F.3d at 1031-1032. "An act that promotes harm, not the harm itself, is all that must occur in commerce." *Ballinger*, 395 F.3d at 1227.[10]

Roof's use of multiple channels and instrumentalities of interstate commerce (and weaponry that traveled in interstate commerce) is more than sufficient to uphold his Section 247 convictions.

E. The District Court Did Not Err, Let Alone Plainly Err, In Instructing The Jury On the Interstate Commerce Element

Roof argues for the first time on appeal (Br. 235-240) that the district court incorrectly instructed jurors on the jurisdictional element regarding the "in" and "affects" interstate commerce prongs. Because Roof did not object to the instructions on these grounds, his challenge is reviewed for plain error. Fed. R. Crim. P. 30(d), 52(b). Roof cannot demonstrate any error, much less plain error.

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[10] Roof claims the GPS use in *Morgan* illustrates that the instrumentality must be used "during the commission of the crime itself." Br. 233 (emphasis omitted). But Morgan used the GPS, cell phone, and the Internet to locate the victim and facilitate his kidnapping, 748 F.3d at 1031, just as Roof used the Internet and telephone to research his target; an interstate highway, his car, and GPS both to scout out and reach the church to attack parishioners; and a gun, bullets, and magazines that had traveled in interstate commerce to commit the attack.

1. The District Court's "In" Interstate Commerce Instruction Was Correct

First, Roof argues that the district court erred in instructing the jury that it could find Roof's conduct "in" interstate commerce even if his use of the channel or instrumentality "occurred entirely within the State of South Carolina." JA-5141-5142; see Br. 235-236. As discussed above, that aspect of the instruction was right. See pp. 168-170, 174-177, *supra*.

Second, Roof challenges the court's instruction that the jury could find the interstate commerce element satisfied if the defendant used a "firearm or ammunition [that] traveled across state lines at any point in its existence." JA-5142. That aspect of the instruction, too, comports with *Scarborough* and this Court's decisions. See pp. 172-174, *supra*. This Court has upheld jury instructions that a defendant's possession of a firearm or ammunition "was in or affecting interstate or foreign commerce" where the firearm or ammunition "had traveled in interstate or foreign commerce *at some point during its existence*." *Nathan*, 202 F.3d at 232, 234 (emphasis added); see also *United States* v. *Gallimore*, 247 F.3d 134, 138 (4th Cir. 2001).

The stray sentences Roof plucks from a few cases (Br. 236-237) do not cast doubt on the instruction. This Court in *United States* v. *Brantley*, 777 F.2d 159, 161-162 (4th Cir. 1985), found the interstate commerce link under the Hobbs Act lacking because the FBI, working undercover, transported from another state its

own gambling devices and whiskey; the Court explained that the government cannot contrive the required link. Roof's citation to *United States* v. *Wall*, 92 F.3d 1444 (6th Cir. 1996), is also off-base because Roof is quoting the dissent, *id.* at 1471 (Boggs, J., concurring in part and dissenting in part), which believed the statute at issue was unconstitutional under the third *Lopez* category in part because it contained no jurisdictional element, *id.* at 1471-1473.

Roof's invocation of *Jones* v. *United States*, 529 U.S. 848 (2000) (Br. 237), fares no better. There the Supreme Court construed the federal arson statute, 18 U.S.C. 844(i), to cover arsons only of "property currently *used* in commerce or in an activity affecting commerce," because that is what the statutory text expressly requires. *Id.* at 854-856, 859 (emphasis added). The plain terms of Section 247(b)'s jurisdictional element contain no such limitation. *United States* v. *Doggart*, 947 F.3d 879, 887 (6th Cir. 2020).

Finally, Roof complains that virtually all criminal activity in the United States involves "the use of some object that has passed through interstate commerce." Br. 237 (citation omitted). But the district court did not instruct the jury that the interstate commerce element would be satisfied if it found that Roof had on him just "some object" that had crossed state lines (*e.g.*, his shoes) when he committed the offense. Instead, the court instructed that the jury could find the element satisfied if it found that Roof used *a firearm or ammunition* during the

offense and that the firearm or ammunition had crossed state lines. JA-5142. The weaponry was integral to Roof's crime.

2. The District Court's "Affects" Interstate Commerce Instruction Was Correct

Roof also challenges the district court's instruction regarding whether his offense "affects" interstate commerce. He complains that the court instructed the jury that "[t]he effect of the offense on interstate commerce does not need to be substantial." Br. 238 (quoting JA-5142). That instruction was proper.

Because Section 247 contains a jurisdictional element, the government need not prove a *substantial* effect on interstate commerce in a particular case. See *Nathan*, 202 F.3d at 234. Instead, the government need show only a "minimal effect" on interstate commerce. See, *e.g.*, *United States* v. *Suarez*, 893 F.3d 1330, 1334 (11th Cir. 2018), cert. denied, 139 S. Ct. 845 (2019); *United States* v. *Williams*, 342 F.3d 350, 354 (4th Cir. 2003).

Courts in other Section 247 cases have declined to instruct the jury that the government must prove a "substantial effect." In *Grassie*, 237 F.3d at 1206 n.5, 1209, the Tenth Circuit approved the district court's jury instruction that "any effect at all" on interstate commerce would suffice. The district court in *Corum* rejected the defendant's challenge to its instruction that the jury need not find a "substantial connection with interstate commerce" but only that the defendant's acts "affected interstate commerce to some extent, however slight." *United States*

v. *Corum*, No. CR-01-236, 2003 WL 21010962, at *2-5, aff'd, 362 F.3d 489 (8th Cir. 2004); see also *Corum*, 362 F.3d at 497.

F. Section 247(a)(2) Does Not Require The Government To Prove Religious Hostility

Roof argues that the government failed to prove, and the district court did not instruct the jury that it was required to find, that Roof was motivated by hostility to his victims' religious beliefs. Br. 240-244. He cites DOJ web pages that discuss a collection of federal hate-crime statutes, but those web pages do not support his argument. Br. 240. There was no error.

The proper interpretation of a statute begins with its text, *e.g.*, *United States* v. *Wills*, 234 F.3d 174, 178 (4th Cir. 2000), not websites. The relevant text of Section 247 is clear and unambiguous: "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 as provided in subsection (d)." 18 U.S.C. 247(a) and (a)(2) (2012). The statute contains a single *mens rea* requirement—that the government prove that the defendant acted "intentionally." As the district court instructed jurors here (JA-5140), to commit an act intentionally is to do so "deliberately and not by accident." *United States* v. *Fuller*, 162 F.3d 256, 260 (4th Cir. 1998).

Thus, the government needed to prove—and did prove—that when Roof obstructed the victims, by force, in their enjoyment of the free exercise of religious

beliefs (or attempted to do so), he did so deliberately and not by accident. This Court cannot engraft an additional religious-motive requirement that does not appear in Section 247(a)(2)'s text. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (declining to "revise" a provision of the material-support statute to include a specific intent requirement "inconsistent with the text of the statute"); *Wills*, 234 F.3d at 178 ("If Congress wished to make accompaniment by the defendant over state lines a requirement under the [Federal Kidnapping] Act, it could easily have written the Act to provide for it."). That Congress included bias motive requirements in the text of the neighboring provisions, 18 U.S.C. 247(a)(1) and (c), further undercuts Roof's argument. See *Humanitarian Law Project*, 561 U.S. at 17 (finding plaintiffs' argument for a specific-intent requirement "untenable in light of the sections immediately surrounding" the provision at issue); *United States* v. *Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989).

Lacking textual support, Roof cherry-picks statements from the legislative history about the "growing number of incidents of religiously-motivated violence" and the bill's purpose "to make violence motivated by hostility to religion a Federal offense." Br. 242 (quoting S. Rep. No. 324, 100th Cong., 2d Sess. 2-3 (1988)). But from the outset, Congress focused on racially-motivated, as well as religiously-motivated, violence against religious institutions and their worshipers. The legislative history conveys Congress's concerns about the targeting of "[b]lack

churches," S. Rep. No. 324, at 3, and the rise of hate groups targeting places of worship, H.R. Rep. No. 337, 100th Cong., 1st Sess. 3 (1987). Congress drafted Section 247(a)(2) to penalize intentional obstruction, by force or threat of force, of any person's exercise of religious beliefs—without requiring proof of the offender's motive. When "Congress knows how to say something but chooses not to, its silence is controlling." *Discover Bank* v. *Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

* * *

For the above reasons, this Court should affirm Roof's Section 247 convictions.[11]

XVI

ROOF'S CONVICTIONS UNDER 18 U.S.C. 249 ARE VALID

Roof next challenges his convictions (Counts 1-12) under the Shepard-Byrd Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009), 18 U.S.C. 249(a)(1). Roof argues that Section 249(a)(1) exceeds Congress's power under the Thirteenth Amendment. Br. 245-258. The district court correctly rejected this challenge, and

[11] Even if this Court finds Roof's Section 247 convictions invalid, no resentencing is required because the jury voted for separate death sentences on the capital counts under Section 924(c) and (j)(1). See pp. 222-226, *infra*.

every court to consider the matter has upheld Section 249(a)(1) as an appropriate exercise of Congress's power to enforce the Thirteenth Amendment.

A. Background

1. The Shepard-Byrd Act prohibits willfully causing bodily injury to a person when the assault is motivated by a specific, statutorily-defined bias. 18 U.S.C. 249(a)(1)-(3). Section 249(a)(1) applies to violent acts undertaken "because of the actual or perceived race, color, religion, or national origin of any person." Congress enacted this subsection under its Thirteenth Amendment authority. 34 U.S.C. 30501(7) and (8); H.R. Rep. No. 86, 111th Cong., 1st Sess. 15 (2009) (H.R. Rep. No. 86).

2. Roof was charged with 12 violations of Section 249(a)(1). JA-52-54. He moved to dismiss these counts, arguing that Section 249(a)(1) is unconstitutional because it is not appropriate legislation to enforce the Thirteenth Amendment. JA-227-234. He also argued that the statute did not meet the "congruence and proportionality" requirements of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (*Boerne*), and was not justified by the "current needs" test of *Northwest Austin Municipal Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 203 (2009). JA-231-232.

The district court found "no merit" in these arguments. JA-3505. The court determined that *Boerne's* congruence test applies but that legislation enforcing the Thirteenth Amendment is congruent with Section 1 of the Amendment when, as

here, "it targets rationally identified badges and incidents of slavery." JA-3511-3512. The court found *Boerne's* proportionality test inapplicable and rejected Roof's effort to import a "current needs" test. JA-3508-3509, 3512. Finally, the court concluded that the statute properly attempts "to abolish what is rationally identified as a badge or incident of slavery in the United States." JA-3515.

The jury convicted Roof on all Section 249(a)(1) violations. JA-5165-5166, 5184-5186.

B. Standard Of Review

The Court reviews a defendant's preserved challenge to a statute's constitutionality de novo. See *United States* v. *Hager*, 721 F.3d 167, 182 (4th Cir. 2013). The Court may strike down a statute "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 538 (2012) (brackets and quotations omitted).

C. Section 249(a)(1) Is Appropriate Legislation To Enforce The Thirteenth Amendment

1. Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII. Section 2 grants Congress the "power to enforce" Section 1's ban on slavery by "appropriate legislation." *Ibid.*

In 1883, the Supreme Court held that Section 2 empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. 3, 20.

Eighty-five years later, in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438-444 (1968), the Supreme Court upheld the constitutionality of 42 U.S.C. 1982, which prohibits racial discrimination in the sale of property. *Jones* confirmed that Section 2 grants Congress the power to do "much more" than abolish slavery, reaffirming Congress's authority to enact "all laws necessary and proper for abolishing all badges and incidents of slavery." *Id.* at 439 (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. at 20).

Since *Jones*, the Supreme Court has repeatedly reaffirmed this broad interpretation of Congress's Section 2 powers. For example, in upholding the constitutionality of 42 U.S.C. 1985(3), the Court explained that "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery." *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971). The Court also reaffirmed that Congress is empowered "rationally to determine what are the badges and the incidents of slavery" and "translate that determination into effective legislation." *Ibid.* (quoting *Jones*, 392 U.S. at 440); see also *Runyon* v. *McCrary*, 427 U.S. 160, 168, 179

(1976) (relying on *Jones* to uphold 42 U.S.C. 1981's prohibition of racial discrimination in making and enforcing private contracts).

2. Under this settled precedent, for Section 249(a)(1) to be unconstitutional, Roof would need to show that Congress acted *irrationally* in deeming racially-motivated violence a badge and incident of slavery. This he cannot do.

In enacting Section 249(a)(1), Congress expressly found that "[s]lavery and involuntary servitude were enforced * * * through widespread public and private violence directed at persons because of their race, color, or ancestry." 34 U.S.C. 30501(7). Congress also concluded that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." *Ibid.* Additionally, Congress compiled extensive contemporary evidence that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86, at 5; see pp. 195-196, *infra*. Consequently, the relationship between slavery and racial violence is "not merely rational, but inescapable." *United States* v. *Beebe*, 807 F. Supp. 2d 1045, 1052 (D.N.M. 2011), *aff'd sub nom.*, *United States* v. *Hatch*, 722 F.3d 1193 (10th Cir. 2013).

3. Given the longstanding links between slavery and racial violence, courts have had "no trouble" concluding that Section 249(a)(1) represents a valid exercise

of congressional power to "rationally determine the badges and incidents of slavery." *Hatch*, 722 F.3d at 1206. Indeed, every court to address Section 249(a)(1)'s constitutionality has upheld it. See *United States* v. *Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); *United States* v. *Cannon*, 750 F.3d 492, 502 (5th Cir. 2014); *Hatch*, 722 F.3d at 1206; *United States* v. *Maybee*, 687 F.3d 1026, 1031 (8th Cir. 2012); *Bowers*, 2020 WL 6196294, at *4; *United States* v. *Diggins*, 435 F. Supp. 3d 268, 274 (D. Me. 2019); *United States* v. *Henery*, 60 F. Supp. 3d 1126, 1130 (D. Idaho 2014).

In *Hatch*, the Tenth Circuit explained that "the Supreme Court has never revisited the rational determination test it established in *Jones*," and that "Congress could rationally conclude that physically attacking a person of a particular race" because of racial animus "is a badge or incident of slavery." 722 F.3d at 1204, 1206. Likewise, in *Cannon*, the Fifth Circuit stated that racially-motivated "violence was essential to the enslavement of African-Americans and widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement." 750 F.3d at 502, 505; accord *Metcalf*, 881 F.3d at 645.

Courts have also unanimously upheld a similar law that criminalizes race-based violence—18 U.S.C. 245(b)(2)(B)—as a valid exercise of Congress's Thirteenth Amendment authority. See *United States* v. *Nelson*, 277 F.3d 164, 190-

191 (2d Cir. 2002); *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003). These holdings apply just as forcefully to Section 249(a)(1).

D. Roof's Arguments Against The Constitutionality Of Section 249(a)(1) Are Unavailing

Roof asks this Court effectively to disregard the Supreme Court's decision in *Jones* and evaluate Section 249(a)(1) under Fourteenth and Fifteenth Amendment standards, importing the "congruence and proportionality" test from *Boerne* and the "current needs" test from *Shelby County* v. *Holder*, 570 U.S. 529 (2013). Br. 246-255. Roof argues that Section 249(a)(1) fails these tests and that the statute is not "necessary" under *Jones*. Br. 253-254. Roof is wrong on each point.

1. The "Congruence And Proportionality" Test Does Not Apply

a. In *Boerne*, the Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA) was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. Section 5 gives Congress the "power to enforce, by appropriate legislation," that Amendment's substantive guarantees, including rights protected by the Due Process and Equal Protection Clauses. U.S. Const. Amend. XIV. The Court held that legislation enforcing these guarantees must demonstrate "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end," *Boerne*,

521 U.S. at 520, and that RFRA, as applied to state and local governments, failed this test, *id.* at 534-536.

Nothing in *Boerne* undermines the Supreme Court's decision in *Jones*. *Boerne* did not cite *Jones*, mention the Thirteenth Amendment, or discuss Congress's power to identify and legislate against the "badges and incidents of slavery." Important differences between the Thirteenth and Fourteenth Amendments also confirm that *Boerne* left *Jones* undisturbed. Unlike the Thirteenth Amendment, which reaches private conduct, the Fourteenth Amendment applies only to state action, which means that legislation under the latter will often impact state sovereignty. Accordingly, *Boerne* recognized that Congress lacks authority to redefine Fourteenth Amendment rights—and that its legislative power extends only to preventive or remedial measures that are congruent and proportional to those rights as judicially interpreted. 521 U.S. at 520, 524. Nothing in that conclusion contradicts *Jones*'s recognition that Congress has a broader role in determining the "badges and incidents of slavery."

Because "appropriate" legislation under the Thirteenth Amendment is not necessarily "appropriate" under the Fourteenth Amendment, courts have rejected the argument that *Boerne*'s "congruence and proportionality" test supersedes *Jones*'s rational-determination standard. For example, in 2014, the Fifth Circuit recognized that *Boerne* "never mentioned the Thirteenth Amendment or *Jones*, and

did not hold that the 'congruence and proportionality' standard was applicable beyond the Fourteenth Amendment." *Cannon*, 750 F.3d at 505; accord *Metcalf*, 881 F.3d at 645 (*Boerne* does not "address[] Congress's power to legislate under the Thirteenth Amendment," and "*Jones* constitutes binding precedent."); *Hatch*, 722 F.3d at 1204 (The Supreme Court "has never revisited the rational determination test it established in *Jones*."); *Bowers*, 2020 WL 6196294, at *2 n.4; *Diggins*, 435 F. Supp. 3d at 273; *Henery*, 60 F. Supp. 3d at 1131.

Roof acknowledges that *Jones* applies here (Br. 246-247, 253-254) and does not contend that *Jones* has been overruled. That settles the matter. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Therefore, even if recent Supreme Court cases undermine *Jones*'s Thirteenth Amendment analysis—which they do not—this Court should not "blaze a new constitutional trail simply on that basis." *Hatch*, 722 F.3d at 1204; accord *Cannon*, 750 F.3d at 505.

b. Even if *Boerne* applied here, Section 249(a)(1) is congruent and proportional. Congress's enforcement power under the Reconstruction Amendments "is broadest when directed to the goal of eliminating discrimination

on account of race." *Tennessee* v. *Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (quotations omitted); see also *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.). Here, Congress enacted Section 249(a)(1) based on its well-supported finding that race-based violence is an intrinsic feature of slavery that persists today. See 34 U.S.C. 30501(7) and (8).

Contrary to Roof's characterization (Br. 255), Section 249(a)(1)'s response to race-based violence is direct and limited. As the Tenth Circuit recognized in *Hatch*, Section 249(a)(1) is a tailored provision that punishes only those who commit racial violence, which is "intended to enforce * * * social and racial superiority." 722 F.3d at 1205-1206. Accordingly, Section 249(a)(1) is hardly so "[l]acking" in proportionality with the "injury to be prevented or remedied" as to substantively redefine the rights protected by the Thirteenth Amendment. See *Boerne*, 521 U.S. at 520; see also *Beebe*, 807 F. Supp. 2d at 1056 n.6 (concluding that, if applicable, Section 249(a)(1) "would also survive under *City of Boerne*").

Roof nonetheless argues that Section 249(a)(1) does not satisfy the congruence and proportionality test because of the law's "expansive reach, targeting conduct unrelated to slavery, including discriminatory acts against people of all races, colors, religions, and ethnicities." Br. 252, 255. This case, however, involves "mass murder at a historic African-American church for the avowed purpose of reestablishing the white supremacy." JA-3517-3518. With certain

exceptions not applicable here, a court may not entertain a constitutional challenge to a statute unless it is unconstitutional as applied to the challenger. See *United States* v. *Raines*, 362 U.S. 17, 22 (1960); see also *Griffin,* 403 U.S. at 104 ("[W]e need not find the language of [the statute] now before us constitutional in all its possible applications [under the Thirteenth Amendment] in order to uphold its facial constitutionality and its application * * * in this case.").

Although this Court need not address Roof's hypotheticals about whether the Thirteenth Amendment empowers Congress to target racially-motivated violence against white victims, similar arguments have been rejected as "plainly wrong." *Beebe*, 807 F. Supp. 2d at 1055. The Thirteenth Amendment "bans 'slavery' as an institution in its entirety, whatever its form and whomever its victims might be." *Ibid.* As the Supreme Court has long recognized, the Amendment "was a charter of universal civil freedom for *all* persons, of whatever race, color, or estate, under the flag." *Bailey* v. *Alabama*, 219 U.S. 219, 240-241 (1911) (emphasis added).

2. The "Current Needs" Test Does Not Apply

a. Roof also attempts to import the "current needs" test from *Shelby County*. Br. 248-250. In *Shelby County*, the Supreme Court held that Section 4(b) of the Voting Rights Act of 1965 was invalid under the Fifteenth Amendment. 570 U.S. at 535, 556-557. Section 4(b) prescribed a formula to identify jurisdictions that

needed to obtain federal preclearance before enacting new voting laws. *Id.* at 537-538. The Court held that Section 4(b) failed to respond to "current needs" because it imposed requirements based on factual circumstances that existed "[n]early 50 years" earlier and "things ha[d] changed dramatically" in the intervening decades. *Id.* at 547, 550-557. The Court also emphasized that "Congress may draft another formula based on current conditions." *Id.* at 557.

Shelby County did not announce a blanket rule that requires all legislation enforcing the Reconstruction Amendments to be based on "current conditions." Rather, the Court limited its holding to a provision that (1) imposed different obligations on different States, and (2) impinged on state sovereignty through the extraordinary step of demanding federal preclearance of changed electoral practices. 570 U.S. at 543-544. Section 249(a)(1), by contrast, applies uniformly nationwide and "imposes no burden upon states." JA-3509 n.4.

As with *Boerne*, *Shelby County* did not cite *Jones*, mention the Thirteenth Amendment, or otherwise question Congress's authority to identify and proscribe the badges and incidents of slavery. And courts have similarly rejected *Shelby County*'s applicability to constitutional challenges to Section 249(a)(1). See *Metcalf*, 881 F.3d at 645; *Cannon*, 750 F.3d at 505; *Bowers*, 2020 WL 6196294, at *2 n.4; *Diggins*, 435 F. Supp. 3d at 273; *Henery*, 60 F. Supp. 3d at 1131. Therefore, the district court correctly concluded that "congressional authority

under the Thirteenth Amendment to prohibit hate crimes is not contingent on any current need." JA-3509.

b. Even if *Shelby County*'s "current needs" standard applied, Section 249(a)(1) satisfies it because Congress enacted the provision only after considering extensive evidence concerning current conditions. For example, the House Report emphasized that "[b]ias crimes are disturbingly prevalent," noting that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes." H.R. Rep. No. 86, at 5. In 2007 alone, the FBI documented more than 7600 hate crimes, 64% of which were motivated by race or national origin bias. *Ibid.*; see also S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002) (noting that "the number of reported hate crimes has grown almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight"). Such evidence establishes that Section 249(a)(1) responds to current conditions and is "rational in both practice and theory." *Shelby County*, 570 U.S. at 550 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966)).

Roof argues, however, that because numerous states had hate-crime laws in 2009, the Shepard-Byrd Act addresses no current need and is not "necessary and proper for abolishing all badges and incidents of slavery." Br. 251, 253-254 (quoting *Jones*, 392 U.S. at 439-440). But race-based violence has a strong nexus to slavery, and the "serious national problem" that prompted Congress to pass the

statute exists notwithstanding state efforts to combat hate crimes. 34 U.S.C. 30501(1). Moreover, Congress designed Section 249(a)(1) to strengthen state laws, finding that state and local governments can "carry out their responsibilities more effectively with greater Federal assistance." 34 U.S.C. 30501(3); see also 34 U.S.C. 30501(9) (finding that federal jurisdiction over hate crimes would "enable[] Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes").

3. The Certification Requirement Buttresses The Law's Constitutionality

Because Section 249(a)(1) is constitutional under any standard, the Court need not consider Roof's final argument, which presumes the unconstitutionality of the law and argues that the certification provision does not "save" it. Br. 255-258. The provision states that the Attorney General or a designee must certify that a sufficient federal interest exists before prosecuting an offense under the Shepard-Byrd Act. See 18 U.S.C. 249(b)(1) (listing four circumstances when a prosecution may proceed). The certification requirement is designed "to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion." H.R. Rep. No. 86, at 14.

Although Roof argues that the certification requirement "set[s] no meaningful limits" and that the federal government has not exercised restraint in prosecuting Section 249(a)(1) cases (Br. 256-257), he offers no authority or data

for these conclusory statements. Moreover, courts have rejected the argument that the Shepard-Byrd Act's certification requirement "proves the need for congruence and proportionality, or the lack of it." *Hatch*, 722 F.3d at 1208. As the district court correctly recognized here, the law's prohibition of racially-motivated violence "imposes no cognizable burden needing justification." JA-3516.

In the end, Roof's true grievance is that South Carolina's murder prosecution failed to shield him from a federal hate-crimes prosecution. Br. 256. But the Shepard-Byrd Act specifically contemplates dual prosecutions, 18 U.S.C. 249(b)(1)(C), and the dual-sovereignty doctrine permits parallel state and federal prosecutions. *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). Thus, the statute is valid regardless of whether, as Roof contends, South Carolina objected to the federal prosecution.[12]

* * *

The Shepard-Byrd Act represents not only a rational, but a congruent, proportional, and necessary response to a current need to combat race-based

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[12] Roof claims that the federal prosecution was "unwelcomed by the State," citing documents from his state-court prosecution. Br. 257. Although this Court previously took judicial notice of certain state-court documents, ECF No. 96, it may not judicially notice disputed facts from those documents. See *Nolte* v. *Capital One Fin. Corp.*, 390 F.3d 311, 317 n.* (4th Cir. 2004). South Carolina's views regarding the federal prosecution cannot be "accurately and readily determined" and are subject to "reasonable dispute," making them unsuitable for judicial notice. Fed. R. Evid. 201(b)(2).

violence. No matter which standards apply, this Court should uphold Section 249(a)(1)'s constitutionality.

XVII

THE ATTORNEY GENERAL PROPERLY CERTIFIED ROOF'S PROSECUTION

In addition to his constitutional challenges to 18 U.S.C. 247 and 249, Roof contends that Attorney General Loretta Lynch "had no basis" for certifying that his prosecution was "in the public interest" and "necessary to secure substantial justice." Br. 258 (citing 18 U.S.C. 249(b)(1)(D) and 247(e)). This Court should reject Roof's challenges because: (1) these statutes do not allow for judicial review of the Attorney General's discretionary determination to prosecute Roof; and (2) the Attorney General properly certified the prosecution.

A. Background

The Shepard-Byrd Act requires the Attorney General (or a designee) to certify that at least one of four conditions exists before a case may be prosecuted: (1) the State does not have jurisdiction; (2) the State requested the federal government to assume jurisdiction; (3) the verdict or sentence obtained under state charges left a federal interest unvindicated; or (4) a federal prosecution is "in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1)(A)-(D). For the United States to prosecute violations of Section 247, the Attorney General must certify that, "in his judgment a prosecution by the United

States is in the public interest and necessary to secure substantial justice." 18 U.S.C. 247(e).

Here, the Attorney General issued two certifications. For the Section 249(a)(1) charges, the Attorney General certified that South Carolina "lacks jurisdiction to bring a hate crime prosecution" and that Roof's prosecution "is in the public interest and is necessary to secure substantial justice." JA-62. For the Section 247(a)(2) charges, the Attorney General certified that Roof's prosecution "is in the public interest and is necessary to secure substantial justice." JA-63.

In the district court, Roof challenged only the Section 249 certification and did not raise any infirmities with the Section 247 certification. JA-232-234. In moving to dismiss the indictment, Roof argued that the court should look beyond Section 249's facial certification requirements and review whether his prosecution truly was in the public interest. JA-232-234. The court determined that the certification was subject to judicial review but concluded that the Attorney General properly certified Roof's prosecution. JA-3517-3518.

B. Standard Of Review

Whether the Attorney General's certifications are subject to judicial review is a legal conclusion, which is reviewed de novo. *United States* v. *Williamson*, 953 F.3d 264, 268 (4th Cir.), cert. denied, 2020 WL 6121674 (2020). If the certifications are reviewable (which they are not), this Court should give them

"substantial deference," as it has done with other statutorily-mandated certifications. See *United States* v. *Juvenile Male*, 554 F.3d 456, 465 (4th Cir. 2009) (reviewing a U.S. Attorney's certification under 18 U.S.C. 5032 that a juvenile committed a crime of violence).

Because Roof did not raise this issue before the district court, his challenge to the Section 247 certification is reviewed for plain error under Federal Rule of Criminal Procedure 52(b). See p. 135, *supra*.

C. The Attorney General's Discretionary Decision To Certify Roof's Prosecution Is Not Subject To Judicial Review

Neither Section 249 nor Section 247 provides for judicial review of the Attorney General's certifications. This statutory silence demonstrates that Congress did not intend for courts to second-guess these certification decisions. Indeed, the Attorney General's certification decision epitomizes the type of prosecutorial decision-making that is "particularly ill-suited to judicial review." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). As the Supreme Court has emphasized, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *Greenlaw* v. *United States*, 554 U.S. 237, 246 (2008) (quoting *United States* v. *Nixon,* 418 U.S. 683, 693 (1974)); see also *Rowsey* v. *Lee*, 327 F.3d 335, 343 (4th Cir. 2003). This should begin and end the analysis.

In arguing that this Court should nonetheless examine the reasons underlying the Attorney General's determinations (Br. 260), Roof relies on *United States* v. *Juvenile Male No. 1*, 86 F.3d 1314, 1317 (4th Cir. 1996) (*Juvenile Male*). That case, however, interpreted a different statute, 18 U.S.C. 5032, requiring Attorney General certifications in juvenile prosecutions. Although the Court allowed judicial review of whether a "substantial [f]ederal interest" existed to prosecute a juvenile, the Court recognized that the question "comes closer to the sort of discretionary decision more commonly thought of as the type of prosecutorial decisions that are immune from judicial review." *Id.* at 1319.

This Court should not extend *Juvenile Male* to the Attorney General's discretionary determinations under Sections 247(e) and 249(b). In holding this discretionary decision reviewable in *Juvenile Male*, this Court relied on the importance of judicially reviewing decisions to prosecute juveniles in federal court given the traditional focus on rehabilitating juveniles within state systems. 86 F.3d at 1319-1321. Such considerations do not apply to the more routine decision here to prosecute an adult accused of violent crimes.

Furthermore, the Court's decision in *Juvenile Male* is an outlier that should not be extended to new contexts. See *United States* v. *F.S.J.*, 265 F.3d 764, 768 (9th Cir. 2001) (collecting cases and noting that "[o]nly the Fourth Circuit has held that the government's certification of a substantial federal interest is subject to

judicial review"). Finally, other courts outside this circuit have consistently declined to review the substance of federal hate-crime certifications. See *Bowers*, 2020 WL 6196294, at *10; *Diggins*, 435 F. Supp. 3d at 276; *Hari*, 2019 WL 7838282, at *7-8, adopted, 2019 WL 6975425, at *2; *United States* v. *Maybee*, No. 3:11–cr–30006–002, 2013 WL 3930562, at *3 (W.D. Ark. July 30, 2013); *United States* v. *Jenkins*, 909 F. Supp. 2d 758, 774 (E.D. Ky. 2012).

Therefore, the district court erroneously concluded that the Attorney General's Section 249(b) certification is reviewable, and this Court should not consider Roof's Section 249 certification challenge or his unpreserved Section 247 certification challenge.

D. The Attorney General Properly Certified Roof's Prosecution

Even if the certifications are reviewable, Roof's arguments on their supposed infirmities fail, especially considering that the Attorney General's certification decision "'deserves great deference.'" JA-3517 (quoting *United States* v. *Hill*, 182 F. Supp. 3d 546, 551 (E.D. Va. 2016), rev'd on other grounds, 700 F. App'x 235 (4th Cir. 2017).

Under Section 249(b)(1), the Attorney General determined that (1) South Carolina lacked jurisdiction to prosecute the hate-crimes counts, and (2) the federal charges were in the public interest and necessary to secure substantial justice. JA-62. These are two *independent* bases for certification. 18 U.S.C. 249(b)(1)(A) and

(D). First, because South Carolina lacked a hate-crimes law to prosecute him, Roof's challenge to the Section 249 certification necessarily fails. Second, under either Section 249(b)(1)(D) or Section 247(e), Roof cannot show that the Attorney General wrongly concluded that his prosecution was "in the public interest and necessary to secure substantial justice."

As the district court observed, Roof committed "a mass murder at a historic African-American church for the avowed purpose of reestablishing the white supremacy that was the foremost badge of slavery in America." JA-3518. His actions thus implicate "a substantial federal interest, which would not be vindicated by an ordinary murder prosecution." JA-3518; see also *Juvenile Male*, 86 F.3d at 1321 (six "particularly egregious" felonies involving carjacking and murder supported federal jurisdiction); *Hill*, 182 F. Supp. 3d at 551-552 (upholding hate-crimes certification because a state simple-assault prosecution would not have considered the defendant's "discriminatory intent").

The Attorney General's certifications were proper.

XVIII

ROOF'S CONVICTIONS UNDER 18 U.S.C. 924 ARE VALID

Lastly, Roof challenges his firearms convictions under 18 U.S.C. 924(c) and (j)(1) (Counts 25-33). Section 924 criminalizes using a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). The statute authorizes

the death penalty if the defendant "causes the death of a person through the use of a firearm" in violation of Section 924(c) and the killing constitutes murder under federal law. 18 U.S.C. 924(j)(1) (incorporating 18 U.S.C. 1111).

Roof argues that the two predicate offenses—hate crimes resulting in death under 18 U.S.C. 249(a)(1) and religious obstruction resulting in death under 18 U.S.C. 247(a)(2) and (d)(1)—are not "crimes of violence" under Section 924(c). Br. 262-273. He is incorrect. Although only one qualifying predicate offense is necessary to affirm Roof's Section 924(c) convictions, see 18 U.S.C. 924(c) (prohibiting firearm use "during and in relation to *any* crime of violence") (emphasis added), both offenses categorically require intentional and violent physical force. *United States* v. *Bowers*, No. 18-cr-292, 2020 WL 6119480, at *2 (W.D. Pa. Oct. 16, 2020) (holding that Sections 247(a)(2) and 249(a)(1) are categorically crimes of violence under Section 924(c)). Moreover, Roof's death sentence must stand even if the firearms convictions are invalid because the jury voted for separate death sentences on the capital counts under Section 247.

A. Background

1. Roof was charged with nine counts of violating 18 U.S.C. 924(c) and (j)(1), one count for each of the parishioners whom he shot and killed (Counts 25-33). JA-57-58. According to the indictment, Roof "knowingly used and discharged a firearm * * * during and in relation to a crime of violence." JA-57.

The indictment identifies two predicate crimes of violence—the hate-crimes charges under 18 U.S.C. 249 (Counts 1-9), and the religious-obstruction charges under 18 U.S.C. 247 (Counts 13-21). JA-57.

Before trial, Roof moved to dismiss the firearms counts, arguing that the predicate offenses do not qualify as crimes of violence under Section 924(c). JA-234-245. The district court disagreed, concluding that the elements of each underlying offense categorically require the use of violent physical force. JA-3526-3532.

2. The jury convicted Roof on all firearms counts and found that he committed all predicate violations of Sections 247 and 249. JA-5165-5172, 5184-5197. During the penalty phase, the jury voted unanimously to sentence Roof to death on each capital count (Counts 13-21, 25-33), specifically stating that its death sentences were "separate[] as to each count" (JA-6781-6782, 6790-6791, 6806-6807). The court then imposed an independent death sentence on each count. JA-6938-6942.

Roof moved for a new trial, again arguing that the hate-crimes and religious-obstruction charges do not constitute "crimes of violence" under Section 924(c). JA-6977-6980. The district court again rejected the argument. JA-7025.

B. Standard Of Review

The Court reviews de novo whether an offense qualifies as a crime of violence under Section 924(c). See *United States* v. *Bryant*, 949 F.3d 168, 172 (4th Cir. 2020).

C. The Categorical Approach Applies

As relevant here, Section 924(c)(3) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A).[13] To determine whether an offense satisfies that definition, courts apply the categorical approach, under which a court must "focus solely" on the elements of the crime, "while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). "When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not 'categorically' a crime of violence" under Section 924(c)(3)(A). *United States* v. *Simms*, 914 F.3d 229, 233 (4th Cir.) (en banc), cert. denied, 140 S. Ct. 304 (2019).

In applying the categorical approach, a court may need to determine whether a statute is divisible. A divisible statute contains multiple alternative elements, rather than alternative means of committing a single element. See *United States* v.

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[13] After Roof was convicted, the Supreme Court invalidated an alternative definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B). See *United States* v. *Davis*, 139 S. Ct. 2319 (2019). That provision is not at issue here.

Allred, 942 F.3d 641, 648 (4th Cir. 2019) (citing *Mathis*, 136 S. Ct. at 2247-2248, 2256-2257), cert. denied, 140 S. Ct. 1235 (2020). Divisible statutes are evaluated under the "modified categorical approach." *Ibid.* (citing *Descamps* v. *United States*, 570 U.S. 254, 260 (2013)). Under that approach, a court may look to a limited class of documents (for example, the indictment or jury instructions) to determine what particular offense was charged and whether that offense qualifies as a crime of violence under Section 924(c)(3)(A). See *Mathis*, 136 S. Ct. at 2249; *Allred*, 942 F.3d at 652.

D. The Predicate Hate-Crimes Offenses Are Categorically Crimes Of Violence

1. The Elements of Section 249(a)(1) Satisfy The Modified Categorical Approach

As a threshold matter, the modified categorical approach applies; Roof does not argue otherwise. Section 249(a)(1) is divisible because certain sentencing enhancements (such as when "death results") have separate elements that must be proved to the jury beyond a reasonable doubt. 18 U.S.C. 249(a)(1)(A)-(B); see *Burrage* v. *United States*, 571 U.S. 204, 210 (2014) (holding that a "death results" penalty enhancement is an element that must be submitted to the jury). The indictment and jury instructions show that Roof was charged with violations of Section 249(a)(1) resulting in death. 18 U.S.C. 249(a)(1) and (a)(1)(B)(i); see JA-52-53, 57 (indictment); JA-5130-5132, 5152 (jury instructions).

The elements of this offense are that a defendant must (1) willfully; (2) cause bodily injury to any person; (3) because of that person's race, color, or national origin; and (4) death results. 18 U.S.C. 249(a)(1) and (a)(1)(B)(i); see also Br. 267. The statute's definition of "bodily injury" explicitly "does not include solely emotional or psychological harm to the victim." 18 U.S.C. 249(c). These elements satisfy Section 924(c)(3)(A)'s definition of a "crime of violence."

The Supreme Court has construed "physical force" to mean "force exerted by and through concrete bodies" and not "intellectual force or emotional force." *Curtis Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (interpreting the Armed Career Criminal Act's force clause); see also *United States* v. *Evans*, 848 F.3d 242, 245 (4th Cir. 2017) (applying *Curtis Johnson* to Section 924(c)(3)(A)). Put simply, physical force means "violent force," or "force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140. The Court does not require "any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." *Stokeling* v. *United States*, 139 S. Ct. 544, 554 (2019). By contrast, de minimis force, such as an offensive touching, does not qualify. See *Curtis Johnson*, 559 U.S. at 139-140.

Applying this precedent, this Court has recognized that "a statute that has as an element the intentional or knowing causation of bodily injury categorically requires the use of 'force capable of causing physical pain or injury to another

person.'" *Allred*, 942 F.3d at 654; see also *United States* v. *McNeal*, 818 F.3d 141, 155-156 (4th Cir. 2016) ("[T]o qualify as a crime of violence, an offense must require either specific intent or knowledge with respect to the use, threatened use, or attempted use of physical force."). Section 249(a)(1) requires that the defendant willfully cause bodily injury. Because the "offense contemplates an intentional causation of bodily injury," it satisfies Section 924(c)(3)(A). *United States* v. *Battle*, 927 F.3d 160, 166 (4th Cir.), cert. denied, 140 S. Ct. 671 (2019); see also *United States* v. *Doggart*, No. 1:15-cr-39, 2016 WL 6205804, at *5 (E.D. Tenn. Oct. 24, 2016) ("[W]illfully causing bodily injury" to a person under Section 249(a)(1) "categorically include[s] an element of using or attempting to use physical, violent force sufficient to cause physical pain or injury.").

Although this Court need look no further, the final element of Roof's offense—"death results"—extinguishes any doubt that his offense is a crime of violence. 18 U.S.C. 249(a)(1)(B)(i). "Simply, [i]t is hard to imagine conduct that can cause another to die that does not involve physical force against the body of the person killed." *In re Irby*, 858 F.3d 231, 236 (4th Cir. 2017) (quotations omitted); see also *Tsarnaev*, 968 F.3d at 104 ("[A]ny crime for which 'death results' (or any serious bodily injury results) is an element [that] automatically satisfies the ACCA's 'violent force' requirement.").

2. Roof Incorrectly Argues That Section 249(a)(1) Can Be Violated Without Violent Physical Force

Roof argues that his offense is not a crime of violence because the statute can be violated with de minimis force or without force. Br. 267-268. He is incorrect.

a. Roof contends that Section 249(a)(1) does not categorically require use of violent physical force because it can be violated by bruising or starvation. Roof's hypotheticals fall short.

Roof is correct that a bruise would qualify as a "bodily injury" under the Shepard-Byrd Act. 18 U.S.C. 249(c)(1) (importing the definition from 18 U.S.C. 1365(h)(4)). He is wrong, however, that willfully causing a bruise does not constitute violent force. Br. 265, 267-268 (citing *United States* v. *Castleman*, 572 U.S. 157, 165 (2014)).

Roof's reliance on *Castleman* is misplaced because the Supreme Court's subsequent decision in *Stokeling* resolved the question that *Castleman* left open: whether "relatively minor forms of injury—such as 'a cut, abrasion, [or] bruise'—'necessitate[s]' the use of 'violent force.'" 139 S. Ct. at 554 (quoting *Castleman*, 572 U.S. at 170). *Stokeling* explained that "physical force" includes any amount of force "sufficient to overcome a victim's resistance," "'however slight' that resistance might be." *Id.* at 550, 554. That includes "force as small as 'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling,'" all of which are

"capable of causing physical pain or injury." *Id.* at 554 (quoting *Castleman*, 572 U.S. at 182 (Scalia, J., concurring)). In fact, this Court found Section 924(c)(3)(A) satisfied by another federal statute that contains the *exact same* definition of "bodily injury" as the Shepard-Byrd Act. See *Allred*, 942 F.3d at 654-655 (interpreting witness retaliation through bodily injury under 18 U.S.C. 1513(b)(1), with "bodily injury" defined in 18 U.S.C. 1505(a)(5)). Tellingly, Roof does not cite *Stokeling* or *Allred*.

Roof fares no better with his hypothetical (Br. 268) that a person could violate Section 249(a)(1) by starving a child. The Supreme Court has held that indirect force, such as using poison to cause physical harm, can satisfy the force clause. See *Castleman*, 572 U.S. at 171. Relying on that logic, this Court has already determined that intentionally withholding food would categorically qualify as violent physical force. See *United States* v. *Rumley*, 952 F.3d 538, 551 (4th Cir. 2020) (citing *United States* v. *Peeples,* 879 F.3d 282, 286-287 (8th Cir. 2018)), petition for cert. pending, No. 20-5733 (filed Sept. 15, 2020). As *Rumley* explains, "there is just as much a 'use of force' when a murderous parent uses the body's need for food to intentionally cause his child's death as when that parent uses the forceful physical properties of poison to achieve the same result." *Ibid.*; accord

United States v. *Jennings*, 860 F.3d 450, 459-460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018).[14]

b. The Shepard-Byrd Act's findings and rules of construction also confirm that Congress intended Section 249(a)(1) to cover only violent crimes. See *United States* v. *Johnson*, 915 F.3d 223, 228 (4th Cir.) (a court may consider a statute's purpose when applying the categorical approach), cert. denied, 140 S. Ct. 268 (2019). Here, Congress's findings reflect that its purpose was to target *violent* hate crimes. 34 U.S.C. 30501. Additionally, the statute's Rules of Construction expressly provide that the law applies only "to *violent acts* motivated by actual or perceived race, color." 34 U.S.C. 30506(2) (emphasis added); see also JA-3530-3531 (district court's opinion citing this rule of construction). Therefore, this Court should reject Roof's argument that someone could violate Section 249(a)(1) by using only de minimis force.

3. Roof Incorrectly Argues That Unintentional Use Of Force Can Violate Section 249(a)(1)

Roof next argues that his offense does not categorically require the "intentional" use of violent physical force because the "death results" element does

[14] As Roof notes (Br. 266), a Third Circuit panel held that "deliberate failure to provide food or medical care" does not constitute violent physical force. *United States* v. *Mayo*, 901 F.3d 218, 227 (3d Cir. 2018). The full Third Circuit is considering whether to overrule *Mayo*. See *United States* v. *Harris*, No. 17-1861 (3d Cir. argued Oct. 16, 2019).

not require an intent to kill. Br. 268-270. As discussed above, however, Section 249(a)(1) qualifies as a crime of violence regardless of whether death results because the offense requires the willful causation of bodily injury. See, *e.g.*, *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007) (explaining that, "in the criminal law," the term "willfully" typically requires a "knowing violation[]" of law and "a criminal intent beyond the purpose otherwise required for guilt") (citing cases).

Moreover, Section 249(a)(1) requires not only that the defendant "willfully cause bodily injury," but that the defendant be motivated by "the actual or perceived race" of the victim. 18 U.S.C. 249(a)(1). When a statute contains "not one, but *two* heightened mens rea requirements for conviction," it is "difficult to imagine a realistic scenario in which a defendant would knowingly engage in conduct [prohibited by the statute] and thereby only recklessly or negligently cause bodily injury." *Allred*, 942 F.3d at 654 (interpreting 18 U.S.C. 1513(b)(1)).

Roof's hypotheticals addressing the "death results" element do not support his argument in any event. Br. 270. A person dying unexpectedly from an arm squeeze still involves the willful causation of bodily injury, see *Stokeling*, 139 S. Ct. at 554; the unintended result is beside the point. "[I]nitiating, however gently, a consequence that inflicts injury constitutes the use of physical force." *Villanueva* v. *United States*, 893 F.3d 123, 128-129 (2d Cir. 2018).

Roof's reliance (Br. 267, 269-270) on *United States* v. *Middleton*, 883 F.3d 485 (4th Cir. 2018), is also misplaced because the state involuntary manslaughter statute at issue could be violated through reckless conduct, which the Court held did not categorically qualify as violent physical force. *Id.* at 492; *id.* at 497-498 (Floyd and Harris, JJ., concurring). This Court has emphasized that *Middleton* "applies only where a crime does *not* have as an element the intentional causation of death or injury." *Battle*, 927 F.3d at 166 (emphasis added); see also *Allred*, 942 F.3d at 653-654 (*Middleton*'s logic "extends to those offenses that can be committed innocently, negligently, or recklessly"). By contrast, as Roof concedes (Br. 267), his offense requires *willful* causation of bodily injury and that "death result[ed] from the offense." 18 U.S.C. 249(a)(1) and (a)(1)(B)(i).

This Court should affirm Roof's convictions on the firearms counts because Section 249(a)(1) is categorically a crime of violence.

E. The Predicate Religious-Obstruction Offenses Are Categorically Crimes Of Violence

1. The Elements of Section 247(a)(2) And (d)(1) Satisfy The Modified Categorical Approach

Section 247 also is divisible. Aside from setting out different offenses with distinct elements, see 18 U.S.C. 247(a)(1)-(2) and (c), the statute's sentencing enhancements have distinct elements that must be proved to the jury beyond a reasonable doubt. See 18 U.S.C. 247(d) (listing five possible punishments,

including death); *Doggart*, 947 F.3d at 887 (Section 247 is divisible). Therefore, this Court again should apply the modified categorical approach. See *Allred*, 942 F.3d at 648.

The indictment specifies that the predicate crimes of violence include Counts 13-21, religious obstruction resulting in death under 18 U.S.C. 247(a)(2) and (d)(1). JA-54-55, 57-58; see also JA-5137-5139, 5152 (jury instructions). When Roof was convicted, the elements of this offense were as follows: a defendant (1) intentionally; (2) by force or threat of force; (3) obstructs any person in the enjoyment of that person's free exercise of religious beliefs; (4) death results; and (5) the offense is in or affects interstate commerce. 18 U.S.C. 247(a)(2), (b), and (d)(1) (2012). Roof agrees that these elements defined his offense when committed, though he contends that this Court should apply a version of the law enacted in 2018 *after* he was convicted. Br. 271 n.48. The amended law added a clause to the second element, which now reads "by force or threat of force, *including by threat of force against religious real property*." 18 U.S.C. 247(a)(2) (emphasis added); see Pub. L. No. 115-249, 132 Stat. 3162.

Roof identifies no authority allowing the Court to apply a law not in effect at the time of conviction, and this Court should not do so. See *United States* v. *Cornette*, 932 F.3d 204, 213 (4th Cir. 2019) (explaining that the categorical approach looks to the law existing "at the time of [the defendant's] conviction").

Even with the new language, though, the elements of Roof's offense categorically would require the use of violent physical force. One district court applying the amended law has already held that "the offenses set forth in § 247(a)(1) and § 247(a)(2) qualify as predicate 'crimes of violence' for purposes of § 924(c)." *Hari*, 2019 WL 7838282, at *11, adopted, 2019 WL 6975425, at *2.

Under either version, an offense under Section 247(a)(2) requires that the defendant intentionally obstruct, "by force or threat of force," "any person" in the enjoyment of that person's free exercise of religious beliefs. 18 U.S.C. 247(a)(2). These elements track Section 924(c)(3)(A), which defines a crime of violence as the "use, attempted use, or threatened use" of "physical force against the person or property of another." In fact, this Court has held that Hobbs Act robbery—which includes the similar element "by means of actual or threatened force, or violence, or fear of injury"—meets this standard. See *United States* v. *Mathis*, 932 F.3d 242, 265-266 & n.24 (4th Cir.), cert. denied, 140 S. Ct. 639 and 140 S. Ct. 640 (2019); see also *United States* v. *Burke*, 943 F.3d 1236, 1237-1239 (9th Cir. 2019).

Because Section 247(a)(2)'s threshold elements categorically require violent force, this Court need look no further to conclude that the offense qualifies as a crime of violence. Yet the final element of Roof's offense—that "death results"—again removes any doubt that his offense categorically requires violent force. 18 U.S.C. 247(d)(1). Although, as Roof points out (Br. 273), the government was

not required to prove that Roof intended to kill his victims, the government still needed to prove but-for causation between Roof's intentional religious obstruction by force and the death of another person. See *Burrage*, 571 U.S. at 214 ("a phrase such as 'results from' imposes a requirement of but-for causation"). That causal connection, coupled with intentional conduct, is enough. See *Tsarnaev*, 968 F.3d at 104; *In re Irby*, 858 F.3d at 236.

2. Roof Incorrectly Argues That His Offense Can Be Committed Without Violent Physical Force

Notwithstanding the elements of Section 247(a)(2), Roof contends that the use of de minimis force can violate the statute, focusing on minor property damage. Br. 271-272. This argument fails.

Importantly, Section 247(a)(2) does not criminalize property damage in and of itself. To be sure, other subsections of the statute prohibit damage to religious real property under specified circumstances, but Roof was not charged with those offenses. See 18 U.S.C. 247(a)(1) and (c).[15] As Roof implicitly acknowledges, the elements of his charged offense require intentionally obstructing *a person's*

[15] As Roof notes, Congress enacted Section 247(a)(1) to prohibit damage to religious real property, such as anti-Semitic graffiti. Br. 271. Roof's selective citations to the legislative history, however, do not show that Congress intended to penalize such vandalism in Section 247(a)(2)—the provision under which Roof was convicted. See H.R. Rep. No. 337, 100th Cong., 1st Sess. 4-5 (1987) (section-by-section analysis of Sections 247(a)(1) and (2)); S. Rep. No. 324, 100th Cong., 2d Sess. 5 (1988) (same).

"free exercise of religious beliefs" by using *force or threat of force that results in death*. Br. 271; 18 U.S.C. 247(a)(2) and (d)(1).

As this Court has recognized, injuries to persons are "radically distinct" from injuries to property. *Allred*, 942 F.3d at 650. For that reason, Roof's reliance on a case that discussed a hypothetical spray-painting of a car is inapposite. Br. 271-272 (citing *United States* v. *Bowen*, 936 F.3d 1091, 1104 (10th Cir. 2019) (holding that witness retaliation through conduct that "damages the tangible property of another" under 18 U.S.C. 1513(b) does not constitute a crime of violence)). Here, Roof's offense required proof that he intentionally obstructed a person's free exercise through force and that "death result[ed]," which by definition requires violent force. *Tsarnaev*, 968 F.3d at 104; *In re Irby*, 858 F.3d at 236; see p. 209, *supra*.

Even apart from the "death results" element, property damage alone does not violate Section 247(a)(2). A violation requires a corresponding use of violent force or threat of such force that obstructs a person's religious free exercise. For example, someone who spray-painted a church with a message threatening to kill worshippers who entered would potentially violate Section 247(a)(2) because the perpetrator obstructed worshippers' religious exercise by threatening violent physical force against *them*. That threat, not the force used to damage the property, constitutes a crime of violence. See *Mathis*, 932 F.3d at 266 & n.24 (holding that

an offense, when "committed by means of causing fear of injury, qualifies as a crime of violence," and noting that a threat conveyed by throwing paint at someone's house involves a threat of violent force).[16]

Finally, Roof fails to show "a realistic probability, not a theoretical possibility," that the crime can be committed in a way that falls outside the scope of Section 924(c)(3)(A). *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Unsurprisingly, he cites no case charging a violation of Section 247(a)(2) by a defendant who engaged in "simple vandalism" or "graffiti." Br. 271. See *United States* v. *Doctor*, 842 F.3d 306, 312 (4th Cir. 2016) ("Doctor provides no examples of South Carolina cases that find de minimis actual force sufficient to sustain a conviction for robbery by violence.").

3. Roof Incorrectly Argues That Damage To One's Own Property Can Violate Section 247(a)(2)

Roof next argues that someone could violate Section 247(a)(2) by damaging his *own* property, which would not satisfy Section 924(c)'s requirement that force be used against "the person or property of another." Br. 272 (citing Section

[16] Even the (inapplicable) 2018 version does not prohibit property damage itself but only certain *threats of force* against religious real property. 18 U.S.C. 247(a)(2). Such a threat—*e.g.*, threatening to bomb a church—triggers the statute only when it threatens physical force that obstructs a person's free exercise of religion. H.R. Rep. No. 456, 115th Cong., 1st Sess. 2 (2017) (stating that under the amended law, a threat to religious property would violate Section 247(a)(2) if it were "so serious that it caused someone to feel fear of bodily harm").

924(c)(3)(A)). According to Roof, a person could violate Section 247(a)(2) if he burned his own cross or burned down his own "house church." Br. 272. These far-fetched hypotheticals, however, epitomize the "legal imagination" that cannot suffice to treat an offense as categorially overbroad. *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013). As another court noted in rejecting an equally tortured argument that an individual could violate Section 247(a)(2) by using force to obstruct his *own* exercise of religion, "[t]his interpretation is neither reasonable nor logical." *Hari*, 2019 WL 7838282, at *10, adopted, 2019 WL 6975425, at *2.

These property damage hypotheticals fail for the reasons discussed above. First, intentional conduct that results in death categorically requires violent force. *Tsarnaev*, 968 F.3d at 104; *In re Irby*, 858 F.3d at 236. Second, someone burning his own cross in front of an African-American church would violate Section 247(a)(2) only if it conveyed a threat of violent force against the church's parishioners—not because someone used force to damage his own cross. See *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) ("[T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."); *McNeal*, 818 F.3d at 153 (holding that intimidation necessarily "involves the threat to use [physical] force").

Roof's fanciful hypothetical about burning down a shared prayer room in his own "house church" (Br. 272) is no more apt. Realistically, such conduct would violate Section 247(a)(2) only if the defendant used or threatened physical force against a person—for example, if the defendant intentionally burned down his house church knowing there were worshippers inside and those worshippers were injured or died as a result (or if the defendant threatened such harm). But that potential crime, like the cross burning, still involves the intentional use of force or threat of force to obstruct *other people*.

Roof's analogy to the federal arson statute also fails. Br. 272. The arson statute does not satisfy the categorical approach under Section 924(c) because the crime is complete as soon as someone maliciously damages property—including his own property—that was used in interstate commerce. See 18 U.S.C. 844(i). Not so under Section 247(a)(2). Damaging property—no matter who owns it—cannot by itself violate Section 247(a)(2).

Finally, Roof does not—and cannot—show that the government prosecutes people under Section 247(a)(2) for damaging their own property. Because Roof cannot "'demonstrate that the State actually prosecutes the relevant offense in cases' in the manner [he] claims," his challenge fails. *Battle,* 927 F.3d at 164 (quoting *Moncrieffe*, 569 U.S. at 206).

* * *

For the above reasons, this Court should affirm Roof's Section 924 convictions because his predicate offenses—either of which will suffice—are categorically crimes of violence.

F. Roof's Death Sentences Under Section 247 Must Stand Regardless Of The Firearms Counts

Roof maintains that if his firearms convictions are invalid, he is entitled to a new penalty hearing. Br. 273-278. Specifically, he contends that the jury might not have imposed a death sentence on the remaining capital counts for the Section 247 violations (Counts 13-21) had it known that his firearms convictions were invalid, and he also claims that the sentencing package doctrine requires a new penalty hearing. Leaving aside that his Section 924(c) convictions are valid, Roof is wrong on both points.

1. Roof's resentencing arguments rely heavily on *United States* v. *Tucker*, 404 U.S. 443 (1972). Br. 274-275. In *Tucker*, the Supreme Court vacated a 25-year sentence that was partly based on two prior convictions that were later held to be unconstitutional. 404 U.S. at 447. Roof's sentence, however, was not grounded on "assumptions concerning [the defendant's] criminal record which were materially untrue." *Ibid.* In fact, the jury issued a separate verdict of death on each capital count, including the capital religious-obstruction counts under Section 247 (Counts 13-21). JA-6790-6791, 6806.

Contrary to Roof's contentions, this Court does not need to speculate whether the jury's sentencing verdict would have been the same without his firearms convictions. Br. 276. First, the jury charge and the sentencing phase verdict form explicitly instructed jurors to consider each capital count separately. JA-6720-6721, 6729-6731, 6733-6734, 6737, 6739, 6743-6745, 6747 (jury charge); JA-6789-6808 (special verdict form). Second, "[j]urors are presumed to understand and follow instructions." *United States* v. *Zelaya*, 908 F.3d 920, 930 (4th Cir. 2018), cert. denied, 139 S. Ct. 855, 139 S. Ct. 1581, and 140 S. Ct. 314 (2019). Finally, the jury's verdict specifically stated: "We vote unanimously that the defendant shall be sentenced to death separately as to each count." JA-6781-6782, 6806.

These instructions ensured that if one of Roof's capital counts were later vacated, there would be no need for a new penalty-phase hearing, which would require empaneling a new jury and requiring victims to return to court to "relive their disturbing experiences." *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Consequently, there is no basis for this Court to remand for resentencing in these circumstances. Cf. *United States* v. *Causey*, 185 F.3d 407, 423 (5th Cir. 1999) (vacating death sentences and remanding for resentencing because "[t]he jury did not make separate recommendations concerning the appropriate penalties for each count of conviction").

The other cases Roof cites are off-point because, like *Tucker*, they involved sentences that rested on invalid convictions that influenced the defendants' sentences. Br. 275. Unlike in *Johnson* v. *Mississippi*, for example, Roof's Section 924(c) convictions were not an aggravating factor in the jury's consideration of the death penalty. 486 U.S. at 581, 586. Nor is this a case where the firearms charges resulted in the admission of prejudicial evidence against Roof. The Section 247 and Section 924(c) charges arose from the same facts, and the same evidence would have been presented if Roof had been charged solely with capital religious obstruction resulting in death. Thus, Roof's *conduct* in murdering nine parishioners with a firearm while they prayed—not his *convictions* under Section 924(c)—led the jury to sentence him to death under Section 247.

2. Roof fares no better in invoking the "sentencing package doctrine." Br. 277. That doctrine provides that "when a court of appeals 'vacates a sentence and remands for resentencing, the sentence becomes void in its entirety and the district court is free to revisit any rulings it made at the initial sentencing.'" *United States* v. *Ventura*, 864 F.3d 301, 309 (4th Cir. 2017) (brackets omitted). The doctrine does not require an appellate court to vacate an entire sentence just because one conviction is invalid. *United States* v. *Pratt*, 915 F.3d 266, 275 (4th Cir. 2019). Rather, appellate courts "have discretion to vacate only the sentences for vacated convictions." *Ibid.*

Courts adopted the sentencing package doctrine because sentences on multiple charges are "often interconnected." *Pratt*, 915 F.3d at 275; see also *Ventura*, 864 F.3d at 309 (noting that sentencing "'on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence.'") (quoting *United States* v. *Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014)). But when a reversed count and other valid counts are not "interrelated or interdependent," the sentencing package doctrine does not require resentencing. See *United States* v. *Clark*, 816 F.3d 350, 360 (5th Cir. 2016) (declining to order resentencing based on court's earlier reversal of the defendant's Section 924(c) conviction).

Here, the death sentences imposed on Roof's capital religious-obstruction counts were not dependent on his firearms convictions. In imposing a sentence on death-eligible offenses in a capital case, a district court does not make discretionary decisions about, for example, statutory sentencing factors or Sentencing Guidelines calculations for interconnected convictions. To the contrary, the FDPA requires the court to impose a death sentence after the jury recommends it, 18 U.S.C. 3594, as the district court did here.

Roof cites no capital cases applying the sentencing package doctrine. Rather, the cases he cites unremarkably state that if an invalid Section 924(c) violation *increases* a defendant's sentence, the case must be remanded for

resentencing so the court can consider whether to adjust the sentences on other counts to preserve the overall sentencing package. Br. 277. But here, vacating the Section 924(c) counts would not change Roof's sentence. Therefore, even if the Court vacates Roof's convictions and death sentences on Counts 25-33, no remand for resentencing is warranted.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the request of appellant's counsel for oral argument.

CERTIFICATE OF COMPLIANCE

I certify that this brief:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), and this Court's order dated October 19, 2020, because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 49,988 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman 14-point font.

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