No.

In the Supreme Court of the United States

GARY SAMPSON, PETITIONER

v.

UNITED STATES, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

For purposes of the collateral estoppel component of the Double Jeopardy Clause, does the ordinary requirement for collateral estoppel that the prior determination have been necessary to the ultimate outcome—which is intended to ensure that a determination received careful attention, and to deny preclusive effect where the outcome deprived a party of the opportunity for appellate review it otherwise would have had—apply to a jury's special findings in a capital case that the prosecution failed to prove certain alleged aggravating factors?

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Gary Sampson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS

The opinion of the court of appeals (App., *infra*, 1a–23a) is not yet reported. An earlier opinion of the court of appeals (App., *infra*, 99a–133a) is reported at 724 F.3d 150 (2013). The order of the district court denying petitioner's motion to strike the alleged aggravating factors of obstruction of justice and future dangerousness (App. 27a–71a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

STATEMENT

After committing bank robberies in North Carolina, petitioner Gary Sampson traveled to Massachusetts in July 2001. On July 23, 2001, he "called the Boston office of the [FBI] in an attempt to turn himself in. However, his call was disconnected and, although he waited to be arrested, the FBI failed to arrive and arrest him." *United States v. Sampson*, 335 F. Supp. 2d 166, 174 (D. Mass. 2004). In the four-day period after this failed attempt to surrender to authorities, petitioner killed Philip McCloskey in Marshfield, Massachusetts and attempted to steal his car, and he then killed Jonathan Rizzo in Abington, Massachusetts and stole his car. *United States v. Sampson*, 486 F.3d 13, 18 (1st Cir. 2007). After killing a third person in New Hampshire on July 30, 2001, petitioner turned himself in to law enforcement the next day and quickly confessed to all three killings. *Id.*

A. The Charges, Guilty Plea, and Initial Penalty-Phase Hearing

On the basis of the events in Massachusetts, petitioner was indicted in the District of Massachusetts on two counts of carjacking resulting in death. *Id.* at 18–19. A superseding indictment later alleged various statutory aggravating factors under the Federal Death Penalty Act ("FDPA"), 18 U.S.C. §§ 3591–3599.

In November 2002, Attorney General John Ashcroft authorized the government to seek the death penalty in this case, and it filed notice of its intent to do so. The government also gave notice that, as to each of the two counts, it would seek to prove, in addition to statutory aggravating factors, the following non-statutory aggravating factors, among others: (1) "Murder to Obstruct Justice," i.e., that petitioner murdered the victim "to seize control of his vehicle and to prevent him from reporting the carjacking to authorities"; and (2) "Future Dangerousness." Doc. 103, at 4–5, 8–9.

After Sampson pleaded guilty to both counts, a penalty-phase trial was held before a jury between October and December 2003. The alleged aggravating factors of obstruction of justice and future dangerousness were both litigated. *See* Tr. of Nov. 18, 2003 at 29–31, 64–67, 70–77, 79–82; Tr. of Nov. 19, 2003 at 6–58; Tr. of Dec. 15, 2003 at 30–47; Tr. of Dec. 18, 2003 (Closing Arguments) at 36–39, 81–82, 104–05, 128–39.

When the case was submitted to the jury, the court provided a special verdict form for each count. App. 79a–98a. Each form required the jury to return separate findings as to the following subjects, in this order: the defendant's age; each alleged gateway eligibility factor enumerated in 18 U.S.C. § 3591(a)(2); each alleged

statutory aggravating factor; each alleged non-statutory aggravating factor; each alleged mitigating factor; any additional mitigating factor; and whether aggravating factors sufficiently outweighed mitigating factors to make a death sentence appropriate.

The fourth part of each form included seven separate questions, one question for each alleged non-statutory aggravating factor. The pertinent questions for Count One asked:

> Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, murdered Philip McCloskey for the sole or primary purpose of preventing him from reporting the attempted theft of his automobile to authorities?
>
> . . . .
>
> Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of prison officials and inmates as demonstrated by his history of prison misconduct?

App. 84a–85a. The corresponding parts of the special verdict form for Count Two were identical in all material respects. App. 94a–95a.

The court specifically instructed the jury to address the questions on the verdict forms in order, and stated that the verdict forms provided a road map of the process that the law required the jury to follow. Tr. of Dec. 19, 2003 (Jury Charge) at 102.

In its special findings, the jury found as to each count the gateway eligibility factors, two statutory aggravating factors, and certain non-statutory aggravating factors. App. 80a–84a, 90a–94a. But as to future dangerousness and obstruction of justice, the jury returned special findings against the government as to each count, with the foreperson in each instance checking the box "1 or More Jurors Say No." App. 84a–85a, 94a–95a.

The jury then found certain mitigating factors, but it also found that the aggravating factors sufficiently outweighed the mitigating factors to make a death sentence appropriate. App. 85a–88a, 95a–98a.

The court imposed a death sentence in January 2004 "in accordance with the Special Findings and Jury Verdicts." Ct. App. J.A. 56–57. In a subsequent opinion, the court noted that its decision to submit the issue of future dangerousness to the jury had been controlled by *Jurek v. Texas*, 428 U.S. 262 (1976), but observed that "the court's experience in the case causes it to wonder whether it is impossible for lay jurors, as well as for trained experts, to predict future dangerousness with the level of reliability necessary to ensure that the death penalty is not being 'wantonly and . . . freakishly imposed.'" *Sampson*, 335 F. Supp. 2d at 218, 222 (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). "There are relatively recent studies," the court noted, "that suggest that it is not just difficult for jurors to predict reliably whether a murderer is likely to commit violent crimes again, but that it is impossible." *Id.* at 222.

The court of appeals affirmed petitioner's conviction and sentence in 2007. 486 F.3d 13.

B. The Ruling That Petitioner Was Denied the Right to an Impartial Jury

In June 2008, as required by the FDPA, the district court appointed new counsel to represent petitioner in post-conviction proceedings. In May 2009, they filed on petitioner's behalf a timely motion under 28 U.S.C. § 2255 setting forth multiple claims for relief. An amended motion was filed in March 2010. The motion asserted, *inter alia*, that petitioner's original lawyers had rendered ineffective assistance with respect to both his decision to plead guilty and the trial of the penalty phase. For example, no use had been made (at trial or in providing information to experts) of Brockton Hospital records showing that, at age four, petitioner had been brought to the emergency room by police with swelling to the back of his head after falling from ten feet and hitting his head. Doc. 1041-3 at 2. Similarly, the MRI of petitioner's brain that the original lawyers had ordered, while sufficient for clinical purposes to discover life-threatening conditions such as tumors, had not been adequate for forensic purposes to uncover the type and extent of his brain damage. Doc. 1041-196 at 6–7.

On the government's motion, the district court summarily dismissed the ineffective-assistance challenge to the guilty plea, but it refused to grant such relief with respect to the ineffective-assistance challenge to counsel's handing of the penalty phase. *United States v. Sampson*, 820 F. Supp. 2d 202 (D. Mass. 2011). The latter claim was never adjudicated, however, as the death sentence was set aside on other grounds.

During the § 2255 proceedings, the defense discovered evidence that one of the jurors (Juror C) had lied on voir dire. After holding evidentiary hearings, the

court found that the juror had repeatedly lied and that her conduct had violated petitioner's Sixth Amendment right to a fair and impartial jury. Accordingly, the court vacated the death sentence. *United States v. Sampson*, 820 F. Supp. 2d 151 (D. Mass. 2011).

The government appealed and also filed a petition for a writ of mandamus. The court of appeals reviewed the order under its mandamus power and denied the government's petition. The court concluded that, "if fully informed of Juror C's willingness to lie repeatedly, her fragile emotional state, her past experiences with [her husband and her daughter], and the similarities between those experiences and the evidence to be presented during the penalty-phase hearing, any reasonable judge would have found that the cumulative effect of those factors demonstrated bias (and, thus, a valid basis for excusal for cause)." App. 130a. The court explained that information concealed by Juror C "raise[d] a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard her own family's involvement with substance abuse and avoid a bias against the defendant on account of his substance abuse," and raise[d] a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard [her daughter's] troubles with the law and avoid a bias against the defendant on this account." App. 129a–30a. Consequently, "the defendant was deprived of the right to an impartial jury and is entitled to a new penalty-phase hearing." App. 130a.

C. The Government's Attempt To Relitigate Obstruction of Justice and Future Dangerousness

The government thereafter elected to seek reimposition of a death sentence. It also gave notice that

it would again seek to prove the alleged aggravating factors of future dangerousness and obstruction of justice. In May 2015, the defense moved to preclude relitigation of those alleged aggravating factors, invoking the collateral estoppel component of the constitutional protection against double jeopardy.

D. The District Court's Ruling

When the motion was argued in March 2016,[1] the district court, pointing to the jury's special findings on obstruction of justice and future dangerousness, remarked: "It's hard to think of clearer evidence of decision from a jury than that." Ct. App. J.A. 338. Nevertheless, the court denied the motion. Relying upon *Bobby v. Bies*, 556 U.S. 825 (2009), the court held that the jury's special findings on obstruction of justice and future dangerousness had no preclusive effect because they were "not essential to the judgment of death." App. 37a; *see also* App. 50a.[2]

The district court then granted a certificate of appealability under 28 U.S.C. § 2253(c)(2). If petitioner's double jeopardy claim prevailed, the court explained, "it

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[1] Between the filing and the argument of the motion, the case was reassigned from Judge Wolf to Judge Sorokin. Doc. 2129.

[2] In addition to the claim of collateral estoppel, the defense also invoked, as a second basis for relief, the separate aspect of the Double Jeopardy Clause that prohibits reprosecution after acquittal, *see Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 306–07 (1984), on the theory that the findings in 2003 regarding obstruction of justice and future dangerousness constituted acquittals. The district court rejected that claim as well, as did the court of appeals. App. 12a–16a, 34a–36a. This petition is confined to the issue of collateral estoppel.

would materially narrow the focus" of the new penalty-phase hearing "by eliminating two non-statutory aggravating factors from the jury's consideration (and from the universe of evidence against which Sampson will be required to defend)." App. 74a–75a. The court added that "Waiting to appeal the double jeopardy ruling until after the second penalty phase trial runs the risk of necessitating a ***third*** trial in this matter, should Sampson prevail on this issue in a post-trial appeal." App. 76a.

The district court also asked the court of appeals to expedite the appeal because jury selection for the new penalty-phase hearing had been set for September 14, 2016. App. 77a. After the defense filed a timely notice of appeal, the court of appeals did set an expedited schedule for briefing and argument.

E. The Decision of the Court of Appeals

Before the court of appeals, the defense contended, *inter alia*, that the reasons for the essential-to-the-judgment requirement set forth in *Bies*—that a determination not essential to the judgment (i) may have been made without sufficient care and (ii) leaves the winning party without its usual opportunity for appellate review—do not justify denying preclusive effect to special findings rejecting alleged aggravating factors in a capital case, where the jury is told to assess aggravating factors before any weighing of aggravating and mitigating factors. The defense argued that such findings receive careful attention and cannot be challenged on appeal regardless of their relationship to the judgment. *See* Opening Br. & Pet. of Gary Sampson at 37–39, 44–45; Reply Br. of Gary Sampson at 3, 16–17. It was undisputed before the court of appeals that the

obstruction and future dangerousness aggravating factors were fully litigated at the 2003 penalty phase hearing; that, if the jury followed the court's instructions, it would not have known, when it made its determinations regarding those aggravating factors, that its findings would not affect its ultimate determination as to petitioner's sentence; that the jury must be presumed to have followed the court's instructions; and that the juror who lied concealed information indicative of bias in favor of the government, not the defense.

The court of appeals affirmed the district court's ruling. Bypassing the question whether the appeal fell within its appellate jurisdiction, the court "conclude[d] that . . . we at least have and will exercise advisory mandamus jurisdiction." App. 8a. On the merits, the court of appeals relied, as the district court had, upon this Court's decision in *Bies*. App. 16a–22a.

Because the alleged aggravating factors of obstruction of justice and future dangerousness "were not necessary to the determination of [petitioner's] original death sentence," the court held, "the government may relitigate them at the new penalty-phase proceeding." App. 22a. Although the court insisted that "the principle articulated in *Bies* that collateral estoppel requires a determination that is essential to the prior judgment . . . dictates that we reject Sampson's collateral-estoppel argument," App. 19a–20a, nowhere did the court address whether the reasons for the essential-to-the-judgment requirement apply to special findings rejecting alleged aggravating factors in a capital case. The court deemed it irrelevant that *Bies* involved "spare statements" in appellate court opinions, App. 18a (quoting *Bies*, 556 U.S. at 834), in

contrast to "the more elaborate process of the special findings at issue here." *Id.* "[T]he collateral-estoppel principle articulated in *Bies* makes no distinction," the court wrote, "between judge- and jury-made determinations, nor any distinction based on the procedure for making the determination — it focuses on whether the determination was necessary to the prior judgment." App. 18a–19a.[3]

REASONS FOR GRANTING THE PETITION

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Id.* at 445. "'Collateral estoppel' is an awkward phrase," the Court explained, "but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

Because *appellate opinions* in civil and criminal cases have similar characteristics, in 2009 this Court, in rejecting a claim of collateral estoppel that rested on

[3] As an additional ground for rejecting petitioner's claim of collateral estoppel, the district court had held that there was no preclusion because "the jury verdict was tainted by a juror who lied about her ability to be impartial in this case." App. 36a. On appeal, the defense challenged that conclusion, pointing out, *inter alia*, that the juror had concealed information indicative of bias *in favor of the government*. The government did not defend that ground for the district court's ruling, *see* Brief for the United States and Response to Petition at 57 n.8, and the court of appeals similarly chose not to address it. App. 16a.

determinations in appellate opinions in a criminal case, relied upon the Restatement (Second) of Judgments (Am. Law Inst. 1982), even though the Restatement "deals with the preclusive effects of judgments in *civil* actions," *id.* ch. 1, Introduction, Scope note, at 1 (emphasis added). *See Bobby v. Bies*, 556 U.S. 825, 835 (2009). In particular, the Court in *Bies* invoked the Restatement's essential-to-the-judgment requirement for collateral estoppel, in concluding that brief statements by the Ohio Court of Appeals and Supreme Court about mental retardation, which were not essential to affirming the respondent's death sentence, had no preclusive effect. *Id.* (applying Restatement § 27).

Although appellate opinions share certain basic similarities regardless of the nature of the case and can contain dicta whether a case is civil or criminal, *determinations at trial* are fundamentally different in civil and criminal cases. Most importantly, whereas determinations in civil trials are subject to challenge by motion or appeal,[4] a verdict in favor of a criminal defendant cannot be so challenged. *See, e.g.*, *Standefer v. United States*, 447 U.S. 10, 22 (1980) (prosecution "is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt").[5] In

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[4] *See, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433–36 (1996); *Brady v. S. Ry. Co.*, 320 U.S. 476, 479–80 (1943).

[5] *Accord United States v. Pimentel-Lopez*, No. 14-30210, 2016 WL 3874414, at *3 (9th Cir. July 15, 2016) (Kozinski, J.) ("'Special findings ... are dispositive of the questions put to the jury. Having agreed to the questions, the government cannot now ask us to ignore the answers; to do so would be a clear violation of petitioner's

recognition of the basic differences between civil and criminal litigation, it has long been recognized that principles regarding preclusion developed in civil cases cannot automatically be extended to criminal cases. *E.g.*, *id.* at 21–22 ("[P]etitioner urges us to apply nonmutual estoppel against the Government . . . . This, however, is a criminal case, presenting considerations different from those in *Blonder-Tongue* [*Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971),] or *Parklane Hosiery* [*Co. v. Shore*, 439 U.S. 322 (1979)]."). [6]

Sixth Amendment rights.'" (alteration in original) (quoting *Mitchell v. Prunty*, 107 F.3d 1337, 1339 n.2 (9th Cir. 1997), *overruled on other grounds by Santamaria v. Horsley*, 133 F.3d 1242, 1248 (9th Cir. 1998) (en banc))).

[6] *See, e.g.*, *United States v. Kramer*, 289 F.2d 909, 916–17 (2d Cir. 1961) (Friendly, J.) (concluding that "[w]hatever the force" of the court's earlier statement that a judgment is conclusive only as to "'ultimate'" and not as to "'mediate'" facts and "its repetition in the Restatement [of Judgments (Am. Law Inst. 1942)] may be in civil cases, the statement ought not be literally applied to criminal judgments," and noting that "one of the co-reporters of the Restatement[] has wisely remarked that the application of *res judicata* in criminal cases presents 'questions of policy quite different from those applicable to civil proceedings[.]'" (quoting Austin W. Scott, *Introduction, Symposium on the Subject of Res Judicata*, 39 Iowa L. Rev. 214, 216 (1954))), *cited in Ashe*, 397 U.S. at 443; *People v. Aguilera*, 623 N.E.2d 519, 522 (N.Y. 1993) (Kaye, C.J.) ("Collateral estoppel, or 'issue preclusion' is a common-law doctrine rooted in civil litigation that, when applied, prevents a party from relitigating an issue decided against it in a prior proceeding. While the principle applies in criminal cases as well in the criminal context 'it cannot be applied in quite the same way as in civil cases.'" (citations omitted) (quoting *People v Plevy*, 417 N.E.2d 518, 522 (N.Y. 1980))).

In this case, however, the court of appeals has interpreted *Bies* as creating a rigid rule that *no determination* in a criminal case—even a special finding by a jury in a capital case regarding an alleged aggravating factor—is entitled to collateral estoppel effect under the Double Jeopardy Clause unless it was essential to the judgment. If this rule stands, whenever capital cases are retried (as many are because of the high reversal rate in such cases), the prosecution will be free to relitigate aggravating factors that the jury rejected in the first trial, even if the prosecution had a full and fair opportunity to prove those aggravating factors the first time. The court of appeals acknowledged that "The government admitted at oral argument that as a matter of logic its position"—which the court essentially adopted—"is that a sentencing jury's determinations on non-statutory aggravating factors can never be essential to the judgment in an FDPA case, because non-statutory aggravating factors are neither necessary to nor sufficient for the imposition of the death penalty under the FDPA." App. 20a.

This reading of *Bies* should be repudiated by this Court. It extends the essential-to-the-judgment requirement to a context where the reasons for the requirement plainly do not apply. See pp. 17–20, *infra*. Particularly because of its implications for capital cases, both federal and state, the mechanical and illogical interpretation of *Bies* adopted by the court of appeals should be overturned.

A. The Decision of the Court of Appeals Conflicts with the Decision of Another Court of Appeals

The holding of the court of appeals that the doctrine of collateral estoppel does not apply, because petitioner

was sentenced to death notwithstanding the special findings on obstruction of justice and future dangerousness, cannot be reconciled with the decision of another court of appeals.

In *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), *abrogated on other grounds by Floyd v. Secretary, Florida Department of Corrections*, 638 F. App'x 909, 924 (11th Cir. 2016) (per curiam), the Eleventh Circuit held that a judge's determination, at Delap's first trial, that the evidence was insufficient to support a jury instruction on felony murder, *id.* at 308, precluded the government from seeking to prove felony murder as an aggravating factor when Delap was retried (because the State could not provide a complete transcript for appellate review). *Id.* at 314-16.[7] The court so held even though Delap had been found guilty and sentenced to death as a result of the first trial. Just as the jury's special findings here on obstruction of justice and future dangerousness did not affect petitioner's sentence in 2004, the rejection of the felony murder theory at Delap's first trial had not affected the crime of conviction or the sentence: Delap nonetheless had been found guilty of first degree murder under the single-count indictment against him (on a theory of premeditated murder), and he nonetheless had been sentenced to death. *See id.* at 288, 308 n.27.

The Eleventh Circuit recognized that in general collateral estoppel applies only if "the determination was a critical and necessary part of the final judgment in the

[7] The opinion in *Delap* was written by Judge Lanier Anderson and joined by Judges Peter Fay and Robert Vance.

earlier litigation." *Id.* at 314. But the court held that Delap was protected against relitigation of the felony murder issue because the determination that the evidence was insufficient to permit a finding of felony murder "was final" and "'could not be appealed.'" *Id.* at 315 (emphasis omitted) (quoting district court order).

If the court of appeals had followed *Delap* here, it could not rationally have rejected petitioner's claim of collateral estoppel on the ground that the jury findings in petitioner's favor were not essential to the judgment. It would have asked whether the jury's special findings on obstruction of justice and future dangerousness were final and could be appealed. The answers would have been clear—that those special findings, like the rejection of the felony murder theory in *Delap*, were final and could not be appealed.

The court of appeals attempted to distinguish *Delap* on the ground that in that case preclusive effect was accorded to a determination in the guilt-or-innocence phase of the trial, whereas petitioner's "challenge concerns the collateral-estoppel effect of one sentencing-phase determination on another." App. 21a–22a. This is a distinction of little, if any, constitutional significance. Determinations relating to sentencing as well as those relating to guilt or innocence can have preclusive effect. *See, e.g.*, *United States v. Pimentel-Lopez*, No. 14-30210, 2016 WL 3874414, at *3 (9th Cir. July 15, 2016) (Kozinski, J.); *United States v. Lemus*, 2016 WL 3524925, at *5 (9th Cir. June 28, 2016) (holding that under the Double Jeopardy Clause, "Because the drug quantity finding fails based on insufficient evidence, the government may not retry that issue, and instead must seek resentencing based solely on the basic possession

conviction . . . ."); *Ex parte Mathes*, 830 S.W.2d 596, 598–99 (Tex. Crim. App. 1992) (en banc) (where defendant was charged in separate indictments with murdering two victims in single incident, determination at trial for murdering one victim that prosecution had not proved future dangerousness estopped prosecution from seeking to establish future dangerousness at later trial for murdering second victim); *State v. Sawatzky*, 125 P.3d 722, 726 (Or. 2005) (en banc) ("[U]nder *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)], a jury determination of a sentencing enhancement factor is now part and parcel of a jury trial and we now must view that determination similarly to a jury's decision to acquit or convict.").

Despite the protestations of the court of appeals, its holding is fundamentally at odds with the holding of the Eleventh Circuit in *Delap*.

B. The Decision of the Court of Appeals Is Erroneous

It is also apparent that the court of appeals erred in treating the essential-to-the-judgment requirement as an immutable principle applicable not only to appellate opinions as in *Bies* but to determinations at the trial of a capital or other criminal case.[8] The court of appeals

[8] In it discussion of collateral estoppel, the court of appeals also mentioned in passing *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). App. 16a, 21a. But that case did not involve a claim of collateral estoppel; the defendant instead claimed that the State had violated the Double Jeopardy Clause's prohibition against reprosecution after acquittal. *See* Petr.'s Br., *Sattazahn* (No. 01-7574), 2002 WL 1275103, at *13 ("[W]hen a Pennsylvania capital defendant receives a life sentence after a capital sentencing proceeding tried to completion, 'requiring [him] to submit to a second, identical proceeding [is] tantamount to permitting a second prosecution of an acquitted defendant.'" (third alterations in

should have heeded the maxim that "the rationale of a legal rule no longer being applicable, that rule itself no longer applies." *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (citing 1 Edward Coke, *Institutes* *70b (1797)); *see Green v. Liter*, 12 U.S. (8 Cranch) 229, 249 (1814) (Story, J.) ("*cessante ratione, cessat ipsa lex*").

The rationale of the essential-to-the-judgment requirement is that determinations not essential to the judgment

> [1] have the characteristics of dicta, and [2] may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Restatement (Second) of Judgments § 27 cmt. h (1982). As to the first point, "There is some reason for attaching more weight to findings which a court supposes to be

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original) (quoting *Schiro v. Farley*, 510 U.S. 222, 231 (1994))). Moreover, in contrast to this case, in *Sattazahn* no alleged aggravating factors were rejected at the first trial. *See Sattazahn*, 537 U.S. at 109 ("The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance."). *Poland v. Arizona*, 476 U.S. 147 (1986), another case briefly mentioned by the court of appeals in its discussion of collateral estoppel, App. 16a, likewise involved only a claim based on the prohibition against reprosecution after acquittal. In *Poland*, there was also a significant change in the legal standard governing the aggravating factor in question between the first sentencing and the second sentencing. *See* 476 U.S. at 150.

necessary to its conclusions than to those which it does not. Their importance to the result may be thought to insure more deliberateness and care in their making." *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926) (L. Hand, J.). As to the second point, because an appeal is an important safeguard against error,[9] when a party is denied the opportunity to challenge a ruling on appeal merely because the judgment is in its favor, it is generally unfair to treat the ruling as preclusive.

With respect to most determinations, these two considerations justify allowing relitigation where a determination is not essential to the judgment. They do not, however, justify relitigation where it is distinctly determined by special finding or otherwise, at the trial of a capital or other criminal case, whether in the innocence-or-guilt phase or in the penalty phase, that the prosecution has failed to carry its burden of proof as to a particular issue. Such a specific determination does not have "the characteristics of dicta." A jury's special finding on a single issue, or for that matter a trial judge's specific ruling on a single issue as in *Delap*, is a far cry from observations in an appellate opinion that are unnecessary to the result. Moreover, the prosecution cannot challenge such a determination by appeal (or post-trial motion) *regardless of its relationship to the*

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[9] *See, e.g.*, Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 2 (1976) ("[T]he traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decision-maker.").

final judgment.[10] The fact that in a particular criminal case a determination at trial is not essential to the judgment therefore does not deprive the prosecution of an opportunity to appeal that it otherwise would have had. Accordingly, the fact that a determination in favor of a defendant in a capital case does not support the judgment provides no basis for permitting relitigation of the issue determined.[11]

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[10] *See, e.g.*, *Standefer v. United States*, 447 U.S. 10, 22 (1980) (prosecution "is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt"); *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 410 (1947) ("[G]uilt is determined by the jury, not the court."); *Sparf v. United States*, 156 U.S. 51, 105 (1895) ("'In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside.'" (quoting *United States v. Taylor*, 11 F. 470, 474 (C.C.D. Kan. 1882))), c*ited in Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Stow v. Murashige*, 389 F.3d 880, 890 (9th Cir. 2004) (invoking "the rule that appellate courts should not scrutinize jury verdicts" in rejecting government's contention that jury made mistake in finding defendant "Not Guilty" of attempted murder); Lester B. Orfield, *Judgment Notwithstanding the Verdict in Federal Criminal Cases*, 16 U. Pitt. L. Rev. 101, 108 (1955) ("[T]he right to a judgment *n.o.v.* . . . is confined to the criminal defendant."); *see also Sullivan*, 508 U.S. at 277 (judge "may not direct a verdict for the State, no matter how overwhelming the evidence"); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." (citations omitted)).

[11] *Bies* involved not only determinations in appellate opinions rather than at trial but also other circumstances, highlighted in this

"[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). "[W]e often read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). "[W]ords of our opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).[12]

The court of appeals went astray in reflexively applying the language of *Bies* to a situation in which the reasons for the essential-to-the-judgment requirement are not implicated. The court's error is magnified when one considers that courts have often recognized that the requirements for collateral estoppel are not identical in all contexts. *See, e.g.*, *Henglein v. Colt Indus. Operating*

Court's decision, that militated against preclusion. *See* 556 U.S. at 833–34 ("At issue now is Bies' second run at vacating his death sentence, not an effort by the State to retry him or to increase his punishment" (citation and internal quotation marks omitted)); *id.* at 834–35 ("[I]t is not clear from the spare statements of the Ohio appellate courts that the issue of Bies' mental retardation under the [state-law test adopted to implement *Atkins v. Virginia*, 536 U.S. 304 (2002),] was actually determined at trial or during Bies' direct appeal."); *id.* at 836 (noting that appellate courts' statements were based on a record made before *Atkins*, when prosecutors "had little incentive vigorously to contest evidence of retardation").

[12] *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.").

Corp., 260 F.3d 201, 212 (3d Cir. 2001) ("Generally, to have preclusive effect, the challenged ruling must be necessary to the prior judgment. . . . The necessity principle has diminished importance in the declaratory judgment setting."); *Davenport v. DeRobertis*, 844 F.2d 1310, 1314 (7th Cir. 1988) (Posner, J.) (collateral estoppel "does not require a final judgment in the conventional sense"); *Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964) (Friendly, J.) ("[W]e see no reason why in an appropriate case a ruling that is final on the issue of liability should not preclude the party against whom the decision ran from presenting further evidence on the issue there finally determined."), *cited in Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 322–23 (1971); *see also B & B Hardware, Inc. v. Hargis Industries*, 135 S. Ct. 1293, 1303 (2015) ("Although the idea of issue preclusion is straightforward, it can be challenging to implement. The Court, therefore, regularly turns to the Restatement (Second) of Judgments for a statement of the *ordinary* elements of issue preclusion." (emphasis added)).

C. The Question Presented Is an Important and Recurring One That Merits the Court's Review in This Case

Finally, the question presented warrants review by this Court because of its importance in the litigation of capital and other criminal cases.

In capital cases, the question has arisen before[13] and is likely to arise again because new trials are ordered in

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[13] *See Romano v. Gibson*, 239 F.3d 1156, 1178–79 (10th Cir. 2001) (holding that rejection of alleged aggravating factor of future

such cases at an extremely high rate. *See Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting) ("Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. State courts on direct and postconviction review overturned 47% of the sentences they reviewed. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases." (citations omitted)).

"To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion," this Court has "invalidated procedural rules that tended to diminish the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (internal quotation marks omitted). *See, e.g.*, *Skipper v. South Carolina*, 476 U.S. 1, 4–8 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 328–41 (1985); *Eddings v. Oklahoma*, 455 U.S. 104, 112–17 (1982); *Beck*, 447 U.S. at 638–46; *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 358–62 (1977) (Op. of Stevens, J., joined by Powell & Stewart, JJ.). The court of appeals has adopted a procedural rule that, if not set aside by this Court, would tend to reduce the reliability of the sentencing

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dangerousness in earlier trial for one murder did not, under doctrine of collateral estoppel, bar prosecution from seeking to prove future dangerousness when it later tried one of the defendants for another murder); *United States v. Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010) ("[T]he Court finds that the aggravating factors that were answered 'No' by the original jury are not precluded by collateral estoppel in this resentencing . . . .").

determination by allowing the prosecution to seek a death sentence based in part on alleged aggravating factors that a jury rejected, after the prosecution had a full and fair opportunity to prove them. At a time when "There is increasing evidence . . . that the death penalty as now applied lacks that requisite reliability[,]" *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting), any significant additional threat to the reliability of determinations in capital litigation is a matter of great concern.

Whether the essential-to-the-judgment requirement adopted by the American Law Institute for civil cases, and extended by this Court to appellate opinions in criminal cases, also applies to a jury's special findings rejecting alleged aggravating factors in a capital case is a question of broad significance. It fully warrants plenary consideration by this Court.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted.

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August 2016

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 16-1727

GARY LEE SAMPSON,

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondent, Appellee.

PETITION FOR A WRIT OF MANDAMUS TO AND APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Leo T. Sorokin, *U.S. District Judge*]

Before

Lynch, Selya, and Lipez,
Circuit Judges.

Paul Mogin, with whom *William E. McDaniels*, *Jennifer G. Wicht*, *Williams & Connolly LLP*, *Michael Burt*, *Law Office of Michael Burt*, *Danalynn Recer*, and *Gulf Region Advocacy Center* were on brief, for appellant.

Mark T. Quinlivan, Assistant U.S. Attorney, with whom *Carmen M. Ortiz*, United States Attorney, was on brief, for appellee.

August 4, 2016

LYNCH, *Circuit Judge*. Gary Lee Sampson pled guilty in September 2003 to two counts of the crime of carjacking resulting in death. In December 2003, following a penalty-phase trial, a jury sentenced Sampson to death under the Federal Death Penalty Act ("FDPA") for those crimes. *See* 18 U.S.C. §§ 3591-3599. His death sentence was later vacated due to jury taint, and his case returned to the district court for further proceedings. The government filed an amended notice that it sought the death penalty. That notice listed the factors that in its view justified the death penalty, largely tracking the original notice. Sampson challenged several aspects of that notice.

Sampson now both petitions for a writ of mandamus, and appeals from an order by the district court denying his motion in limine to dismiss or strike two non-statutory aggravating factors the prosecution intends to present in a second penalty-phase proceeding under the FDPA.[1] Those factors, which were also included in the original notice, are: (1) future dangerousness, and (2) obstruction of justice by means of murder to conceal the theft and attempted theft of victims' automobiles.

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[1] The term "appeal" hereinafter refers to Sampson's arguments before this court generally, including his arguments for granting mandamus and his arguments on the merits.

The new penalty-phase trial is scheduled to start on September 14, 2016. We have expedited this appeal.

Sampson argues that because the jury in his first penalty-phase proceeding did not find unanimously that the government proved these two non-statutory aggravating factors beyond a reasonable doubt, their introduction at the new penalty-phase proceeding is barred by the Double Jeopardy Clause of the Constitution, including its collateral-estoppel component. Under Supreme Court precedent, Sampson's claims must be rejected. We affirm the district court's order.

I.

The facts of the case are familiar from earlier opinions, and we recite only those relevant to this appeal. *See United States v. Sampson* (*Sampson I*), 486 F.3d 13 (1st Cir. 2007); *United States v. Sampson* (*Sampson II*), 820 F. Supp. 2d 151 (D. Mass. 2011); *United States v. Sampson* (*Sampson III*), 820 F. Supp. 2d 202 (D. Mass. 2011); *United States v. Sampson* (*Sampson IV*), 58 F. Supp. 3d 136 (D. Mass. 2012); *Sampson v. United States* (*Sampson V*), 724 F.3d 150 (1st Cir. 2013).[2]

Sampson murdered three people over the course of a week in 2001. He murdered Philip McCloskey in Massachusetts on July 24, 2001, and attempted to steal McCloskey's car; murdered Jonathan Rizzo in Massachusetts and stole Rizzo's car on July 27; and murdered Robert Whitney in New Hampshire on July 30.

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[2] This reproduces the sequence and labeling of Sampson decisions in *Sampson V*, 724 F.3d at 154, and adds *Sampson V* to that sequence.

On August 8, 2002, a grand jury, in a second superseding indictment, indicted Sampson on two counts of carjacking resulting in death. The government then filed a notice of intent to seek the death penalty, as required by the FDPA. *See* 18 U.S.C. § 3593(a).

Under the FDPA, after the government has filed a notice of intent to seek the death penalty, the criminal trial divides into two phases, one focused on guilt (the "guilt phase") and the other on sentencing (the "penalty phase"). *See id.* § 3593(b). If the defendant is convicted of a predicate capital offense in the guilt phase, the government then must prove beyond a reasonable doubt in the penalty phase that the defendant was at least 18 years old, committed one of four acts with the requisite mental state,[3] and committed at least one of sixteen statutory aggravating factors. *Id.* §§ 3591(a), 3592(c), 3593(c)-(d).

If the government satisfies these prerequisites and proves that the defendant is eligible for death, the jury must decide whether death is justified by weighing any proven mitigating factors with the proven aggravating factors, including both statutory and non-statutory aggravating factors. *Id.* § 3593(e). "The term 'non-statutory aggravating factor' is used to 'refer to any aggravating factor that is not specifically described in 18 U.S.C. § 3592.'" *Sampson I*, 486 F.3d at 44 n.14 (quoting *Jones v. United States*, 527 U.S. 373, 378 n.2 (1999)). The jury must submit special findings on any aggravating factors, 18 U.S.C. § 3593(d), and must find unanimously that the government has proven any aggravating factors,

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[3] Alternatively, the government may prove that the defendant engaged in espionage or treason. *See id.* § 3591(a)(1).

statutory or non-statutory, beyond a reasonable doubt, *id.* § 3593(c)(d).

Sampson pled guilty to both charges of carjacking resulting in death. The first penalty-phase hearing followed. At the close of the penalty phase, the jury found unanimously for the death penalty. For each count, the jury submitted a special verdict form that contained separate findings on each alleged statutory and non-statutory aggravating factor. The jury's special verdict form stated that it found unanimously that the government had proven two statutory aggravating factors and a number of non-statutory aggravating factors for each charge against Sampson.

Pertinent to this appeal, the jury did not find unanimously that the government had proven beyond a reasonable doubt two alleged non-statutory aggravating factors, future dangerousness and murder to obstruct justice, for either charge.[4] That is, the unanimity

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[4] Specifically, for both Count 1 ("Carjacking Resulting in the Death of Philip McCloskey") and Count 2 ("Carjacking Resulting in the Death of Jonathan Rizzo"), the jury checked "1 or More Jurors Say No" on the special verdict form in response to the following two non-statutory aggravating factors (represented here by the Count 1 factors):

> Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, murdered Philip McCloskey for the sole or primary purpose of preventing him from reporting the attempted theft of his automobile to authorities?
>
> Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of prison officials and inmates as demonstrated by his history of prison misconduct?

requirement had not been met as to those two factors. It is from this circumstance that Sampson constructs his argument in this appeal.

After being sentenced to death, Sampson appealed, and this panel affirmed. *Sampson I*, 486 F.3d at 52. Rehearing en banc was denied. *United States v. Sampson*, 497 F.3d 55, 56 (1st Cir. 2007).

In 2009, Sampson petitioned for a new trial under 28 U.S.C. § 2255. The district court, finding that a juror had lied during the voir dire process in answering questions about her ability to be impartial, *Sampson II*, 820 F. Supp. 2d at 192 97, vacated Sampson's sentence, *id.* at 202. The government appealed, and we took jurisdiction and affirmed on the basis of juror misconduct. *Sampson V*, 724 F.3d at 170.

We further held that the juror's lies during voir dire concealed significant evidence of bias that would have provided grounds to excuse her for cause. *Id.* at 168. We held that Sampson "was deprived of the right to an impartial jury and is entitled to a new penalty-phase hearing." *Id.* The case returned to the district court for further proceedings in 2013.

In March 2014, the government filed an amended notice of intent to seek the death penalty. The amended notice again alleged for both counts of Sampson's conviction, inter alia, the two non-statutory aggravating factors — that (1) Sampson is "likely to commit criminal acts of violence in the future" and pose a danger to prison officials and inmates ("future dangerousness"); and (2) that Sampson murdered Philip McCloskey and Jonathan Rizzo "to prevent [the victims] from reporting the carjacking[s] to authorities" ("murder to obstruct justice") — which the original sentencing jury found that

the government failed to prove beyond a reasonable doubt to the satisfaction of all jurors. The amended notice also stated that the government would use new evidence from Sampson's conduct in prison from 2004 to the present in order to prove future dangerousness.

On May 15, 2015, Sampson moved to dismiss or strike a number of the statutory and non-statutory aggravating factors from the amended notice. He was partially successful. As to the issues on appeal, Sampson argued that the renewed allegations of the non-statutory aggravating factors of future dangerousness and obstruction of justice violated the Double Jeopardy Clause's retrial and collateral-estoppel components. The government opposed the motion.

The district court denied the motion to dismiss or strike the two non-statutory aggravating factors. It held that the Double Jeopardy Clause does not preclude alleging the non-statutory factors at the new penalty-phase hearing because the original penalty-phase jury's findings on those factors did not constitute an "acquittal." And it held that the factors are not barred by the collateral-estoppel component of the Double Jeopardy Clause, because "the jury verdict was tainted by a juror who lied about her ability to be impartial," and because the jury's rejection of the factors was "not essential to the judgment of death."

Sampson then moved for a certificate of appealability under 28 U.S.C. § 2253(c). The district court, citing *Abney v. United States*, 431 U.S. 651, 662, 659 (1977), reasoned that its rejection of Sampson's motion to dismiss or strike the two non-statutory aggravating factors was a "pretrial order [] rejecting [a] claim[] of former jeopardy," and so was one of the "small class of cases that [are] beyond the confines of the final-

judgment rule." The district court granted Sampson's motion and issued a certificate of appealability on the following question: "Whether the Double Jeopardy Clause bars the government, at Sampson's new penalty phase hearing, from seeking to prove two non-statutory aggravating factors which the jury at Sampson's first penalty phase hearing found had not been proven beyond a reasonable doubt." Sampson then filed this timely appeal.

II.

Appellate Jurisdiction

Before reaching the merits of Sampson's appeal, we must satisfy ourselves that we have jurisdiction to hear it. The government disputes that we have jurisdiction, but argues that we may skip that analysis in favor of a merits analysis. Sampson argues, among other things, that we should exercise the mandamus power available to us under the All Writs Act, 28 U.S.C. § 1651(a). We conclude that, whether or not we have statutory jurisdiction, we at least have and will exercise advisory mandamus jurisdiction.

The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* "[M]andamus must be used sparingly and only in extraordinary situations." *In re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993). There are two types of mandamus, supervisory and advisory. *United States v. Horn*, 29 F.3d 754, 769 n.19 (1st Cir. 1994). "The former is used when an appellate court issues the writ to correct an established trial court practice that significantly distorts proper procedure," *id.*, whereas the latter is used in

"cases . . . that present novel questions of great significance which, if not immediately addressed, are likely to recur and to evade effective review," *United States v. Green*, 407 F.3d 434, 439 (1st Cir. 2005). "We typically exercise [advisory mandamus] to settle substantial questions of law when doing so would give needed guidance to lawyers, litigants, and lower courts." *Sampson V*, 724 F.3d at 159.

We exercised advisory mandamus jurisdiction in the prior appeal to address the juror misconduct issue. *Id.* at 159-61. It is appropriate to exercise advisory mandamus here. Sampson's appeal meets all of the stringent requirements for its "strong medicine." *In re Sony BMG Music Entm't*, 564 F.3d 1, 4 (1st Cir. 2009).

First, the issue, as framed, is novel.[5] As Sampson notes, neither this court nor the Supreme Court has passed on the precise type of double-jeopardy challenge presented in this appeal. Second, it is of high public importance. "Like the right to trial by jury, [the guarantee against double jeopardy] is clearly 'fundamental to the American scheme of justice.'" *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (quoting

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[5] *See In re Justices of Superior Court Dep't of Mass. Trial Ct.*, 218 F.3d 11, 16 (1st Cir. 2000) (advisory mandamus appropriate because the "availability of pretrial federal habeas relief for 'disinterested prosecutor' claims [was] an issue of first impression" implicating "greater issues of federalism"); *Horn*, 29 F.3d at 770 (advisory mandamus appropriate for the question of whether sovereign immunity bars federal court's order of attorneys' fees and costs against government in criminal case because "[t]he issue presented ha[d] never before been squarely decided"); *In re Globe Newspaper Co.*, 920 F.2d 88, 90 (1st Cir. 1990) (advisory mandamus warranted to decide "novel and important" question of press access to jury list (quoting *In re Globe Newspaper Co.*, 729 F.2d 47, 50 (1st Cir. 1984))).

Duncan v. Louisiana, 391 U.S. 145, 149 (1968)). Third, as we emphasized when we exercised advisory mandamus to affirm the district court's vacatur of Sampson's sentence for jury taint, an already significant legal question is even more so in the context of a capital case, because "death is [] different." *Sampson V*, 724 F.3d at 159 (alteration in original) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion)). Fourth, exercising review now offers pragmatic benefits in this case. As Sampson notes, and as the district court observed, deferring review of the district court's rejection of his double-jeopardy challenge presents risks of a third penalty trial. Incurring the pain inflicted by a third trial is to be avoided, if not needed.

The government essentially concedes that the appeal raises novel questions of public importance, that exercising mandamus would offer significant pragmatic benefits, and that it "undoubtedly would provide needed guidance to the district court, the lawyers, and litigants in this case." The government rests its argument against advisory mandamus instead on an assertion that the issue raised in the appeal will not "almost certainly recur," *Green*, 407 F.3d at 440, and that it will not evade review.

The government's point is that FDPA cases are extremely rare in this circuit — Sampson's was the first FDPA conviction that we reviewed, *see Sampson I*, 486 F.3d at 17[6] — and the particular issue in this appeal will arise even less frequently, making it implausible to consider the question in the appeal "systemically important," *In re Sony*, 564 F.3d at 4. This is too narrow

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[6] This court also has pending the appeal in *United States v. Tsarnaev* (No. 16-6001), another death-penalty case.

a view of systemic importance. Federal courts often find error in capital cases. *See Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J., dissenting). Similar double-jeopardy challenges to subsidiary determinations by a sentencing jury in capital cases may well recur.

The government argues that the question presented will not evade review because Sampson can raise it after his resentencing. But this misses the point. The double-jeopardy challenge here asserts that Sampson should not have to defend once more against the two non-statutory aggravating factors at issue. Postponing review of the double-jeopardy challenge until after the second penalty-phase proceeding will frustrate the appeal's central assertion: that Sampson should not have to defend against these particular allegations again. The claim would evade review because one of the most important protections of the Double Jeopardy Clause would be lost. *Abney*, 431 U.S. at 662.

Sampson's appeal satisfies the stringent requirements of advisory mandamus, and we take jurisdiction.

III.

Double Jeopardy and Collateral Estoppel

Where, as here, an appeal raises "constitutional questions 'such as the district court's denial of a motion to dismiss . . . on the grounds of double jeopardy and collateral estoppel,'" our review is de novo. *United States v. Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998) (alteration in original) (quoting *United States v. Aguilar-Aranceta*, 957 F.2d 18, 21 (1st Cir. 1992), *overruled on other grounds by Yeager v. United States*, 557 U.S. 110 (2009)).

Sampson argues that the government's re-allegation of the non-statutory aggravating factors of future dangerousness and murder to obstruct justice violates the Double Jeopardy Clause.[7] The Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. He contends that the jury's special verdict on the two non-statutory aggravating factors is an "acquittal" for double-jeopardy purposes, and also that the collateral-estoppel component of the Double Jeopardy Clause bars relitigating the two factors. Neither argument is persuasive. We address each in turn.

A. *The "Acquittal" Argument*

The Supreme Court has explained that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). In the context of aggravating circumstances at sentencing, the Court "reject[s] the . . . premise . . . that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an 'acquittal' of that circumstance for double jeopardy purposes." *Poland v. Arizona*, 476 U.S. 147, 155 (1986). Instead, an "acquittal" in the capital sentencing context turns on "whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate*."

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[7] Sampson also argued to the trial court that the future dangerousness factor was unconstitutionally unreliable and vague, and that the law of the case barred relitigating future dangerousness and murder to obstruct justice. Those issues are not before this court.

Id. (quoting *Bullington v. Missouri*, 451 U.S. 430, 443 (1981)); *see also Bobby v. Bies*, 556 U.S. 825, 833-34 (2009). If the decision being examined does not meet the standard of an acquittal, then the "clean slate" rule applies, *Bullington*, 451 U.S. at 443, and the defendant "constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served," *id.* at 442.

The earlier penalty-phase jury's decision in Sampson's case is not an acquittal. Quite the opposite — the jury found the death penalty justified, despite also finding that the government had not proven two non-statutory aggravating factors beyond a reasonable doubt to all members of the jury.

The Supreme Court has been clear that the "concern with protecting the finality of acquittals is not implicated when . . . a defendant is sentenced to death, *i.e.*, 'convicted.' There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has." *Poland*, 476 U.S. at 156. In *Bobby v. Bies*, the Court likewise held that there was no acquittal for double-jeopardy purposes where the original jury imposed the death sentence despite the presence of the mitigating factor of mental retardation, and a new hearing on the defendant's mental capacity was held in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). 556 U.S. at 833-34. And in *Sattazahn v. Pennsylvania*, the Court held that a deadlocked sentencing-jury verdict automatically resulting in a life sentence was not an "acquittal" of the death penalty for double-jeopardy purposes. 537 U.S. at 109-110. The Court has been consistent in a variety of different factual circumstances. *See also Bullington*, 451 U.S. at 444-45 (verdict of life imprisonment in sentencing proceeding that "*explicitly*

requires the jury to determine whether the prosecution has 'proved its case'" for death is an acquittal of the death penalty for double-jeopardy purposes).

Double jeopardy clearly does not apply here. *See Evans v. Michigan*, 133 S. Ct. 1069, 1075 (2013) (contrasting substantive rulings that trigger double jeopardy, including rulings that go to insufficiency of evidence, or guilt and innocence, with procedural rulings "that 'are unrelated to factual guilt or innocence,'" such as "'a legal judgment that a defendant, although criminally culpable, may not be punished' because of some problem like an error with the indictment," and which do not trigger double jeopardy (quoting *United States v. Scott*, 437 U.S. 82, 98 & n.11 (1978))). Our vacation of Sampson's original death-penalty sentence on Sixth Amendment grounds based on juror misconduct does not change this analysis. That decision rested on the basis that a juror had improperly withheld material information to get on the jury, and "had nothing to do with either the sufficiency of the evidence or [Sampson's] guilt or innocence." *United States v. Szpyt*, 785 F.3d 31, 37-38 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016). Sampson was not acquitted, and the Double Jeopardy Clause is not triggered.

Sampson tries to marshal quotes from case law at the periphery of double-jeopardy jurisprudence in an effort to construe the original penalty-phase jury's determinations on the non-statutory aggravating factors as an "acquittal." In particular, he points to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases interpreting it, to suggest an "expanding" of "the concept of 'acquittal,'" and to argue that "non-statutory as well as statutory aggravating factors are constitutionally significant under the FDPA." Sampson cites various

non-binding decisions from other courts, *see, e.g.*, *State v. Sawatzky*, 125 P.3d 722, 726 (Or. 2005) (en banc), as well as non-precedential dicta from a Supreme Court plurality opinion, *Sattazahn*, 537 U.S. at 110-12 (plurality opinion), that have reasoned from *Apprendi* to hold or suggest that double-jeopardy protections apply to jury determinations on sentencing enhancements even if there was never an acquittal on the death penalty. And he provides various cases discussing the relationship between the FDPA and *Apprendi*, as well as the FDPA and the Confrontation Clause, in an attempt to demonstrate the evolving "constitutional significance" of FDPA non-statutory aggravating factors.

But *Apprendi* is not a double-jeopardy case; its holding concerns what must be submitted to, and found to be proven beyond a reasonable doubt by, a jury in the first instance. *Apprendi*, 530 U.S. at 476. Here the jury in the first instance did properly find beyond a reasonable doubt that the death penalty should be imposed.

Our question is not what *Apprendi* requires of the FDPA, nor whether non-statutory aggravating factors are "constitutionally significant," but rather whether relitigating two non-statutory aggravating factors found not proven by an earlier penalty-phase jury is barred by the Double Jeopardy Clause. The Supreme Court's cases squarely addressing the question of what is an "acquittal" for double-jeopardy purposes control the question, and they compel rejection of Sampson's argument.[8] Because neither the original penalty-phase

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[8] Sampson argues that *Roper v. Simmons*, 543 U.S. 551 (2005), "indicates" that a lower court may depart from controlling Supreme Court precedent when it addresses "issues implicating the Eighth Amendment." Whatever *Roper*'s implications for stare decisis in the

jury's verdict nor the vacatur of Sampson's sentence constitutes an acquittal, double-jeopardy principles do not prevent the government from alleging again the two non-statutory aggravating factors.

B. *The Collateral-Estoppel Argument*

Sampson argues at greater length that collateral estoppel, which "is embodied in the Fifth Amendment guarantee against double jeopardy," *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), bars the relitigation of the two non-statutory aggravating factors.[9] His argument again runs directly against Supreme Court precedent, and fares no better than his "acquittal" argument.[10]

As the Supreme Court explained in *Bies*, issue preclusion, also known as collateral estoppel, "bars

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Eighth Amendment capital punishment context — an issue we do not address today — we know of no support for such a proposition in the context of the Double Jeopardy Clause, and Sampson provides none.

[9] One might wonder why, if a Fifth Amendment Double Jeopardy Clause argument that there was an acquittal on the merits fails, as a matter of logic there is still a double-jeopardy claim available to make. No party makes an issue of this and both accept the analytical structure presented by Sampson, so we have done so as well. We conclude that *Bies*, *Sattazahn*, and *Poland* resolve this question against Sampson.

[10] The district court rejected Sampson's collateral-estoppel argument on two grounds. It held that, because the penalty-phase jury's verdict was vacated for juror bias, the penalty-phase verdict does not have any preclusive effect. And it held that collateral estoppel did not apply because "the rejection of [the non-statutory aggravating factors] was not essential to the judgment of death." Because we find the latter rationale sufficient to dispose of the issue, it is unnecessary to address the effect of the vacatur for jury bias on Sampson's collateral-estoppel argument.

successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.'" 556 U.S. at 834 (alteration in original) (quoting *Restatement (Second) of Judgments* § 27 (1980)). The *Bies* Court emphasized that "[a] determination ranks as necessary or essential only when the final outcome hinges on it." *Id.* at 835 (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4421, at 543 (2d ed. 2002)).

The *Bies* Court found that the issue for which collateral estoppel had been claimed — evidence of the defendant's "mild to borderline mental retardation," which served as a mitigating factor in the original jury's sentencing deliberations, *id.* at 828 — failed to meet this standard, *id.* at 835. The defendant had been sentenced to death by the original jury, and that sentence was affirmed on review by the Ohio appellate courts, with the Ohio Supreme Court "observ[ing] that Bies' 'mild to borderline mental retardation merit[ed] some weight in mitigation,' but conclud[ing] that 'the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt.'" *Id.* at 828 (second and fourth alterations in original) (quoting *State v. Bies*, 658 N.E. 2d 754, 761-62 (Ohio 1996)).

The *Bies* Court reasoned that "it [was] clear that the [Ohio] courts' statements regarding Bies' mental capacity were not necessary to the judgments affirming his death sentence." *Id.* at 835. The Court held that the Sixth Circuit, which found that collateral estoppel did apply to the issue of the defendant's retardation, erred by "conflat[ing] a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative." *Id.* The

Court concluded that "[i]ssue preclusion cannot transform Bies' loss at the sentencing phase into a partial victory." *Id.* The same is true here.

The two non-statutory aggravating factors rejected by the first penalty-phase jury were not necessary to Sampson's death sentence. Indeed, "[f]ar from being necessary to the judgment," the jury's failure to find unanimously that the government proved the two non-statutory aggravating factors beyond a reasonable doubt, like the retardation mitigating factor in *Bies*, "cuts against [the judgment] — making [it] quintessentially the kind[] of ruling[] not eligible for issue-preclusion treatment." *Id.* (quoting *Bies v. Bagley*, 535 F.3d 520, 533 (6th Cir. 2008) (Sutton, J., dissenting from denial of rehearing en banc)). And at least one other federal court has come to the same conclusion: that collateral estoppel does not bar the introduction at a second penalty-phase proceeding of non-statutory aggravating factors presented to, and not found proven by, an earlier penalty-phase jury. *United States v. Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010).

Sampson attempts unsuccessfully to distinguish *Bies*. He first observes that "the prior determination [in *Bies*] . . . was made by a court in an opinion" (emphasis omitted), whereas the prior determinations in this case "were made by a jury in special findings" (emphasis omitted). He contrasts the "spare statements" reviewed in *Bies*, 556 U.S. at 834, with the more elaborate process of the special findings at issue here. But the collateral-estoppel principle articulated in *Bies* makes no distinction between judge- and jury-made determinations, nor any distinction based on the procedure for making the determination — it focuses on

whether the determination was necessary to the prior judgment.

Sampson also argues that unlike here, where the issues being relitigated are legally identical to issues in the prior determination, the issue in the second proceeding in *Bies* — whether, under the rule announced in *Atkins*, the defendant's retardation rendered him ineligible for the death penalty — involved a legal principle that was new and different from the prior determination. He argues that the Court noted that novelty as another basis for not finding collateral estoppel. *See Bies*, 556 U.S. at 836-37. But the Court made the observation that this would be an alternative ground to reject the collateral-estoppel argument "even if the core requirements for issue preclusion had been met," *id.* at 836; its essential point was that, as here, those core requirements were not present.

All of Sampson's other purported distinctions[11] share the same flaw. They do not affect the principle articulated in *Bies* that collateral estoppel requires a determination that is essential to the prior judgment. That principle dictates that we reject Sampson's

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[11] Sampson argues that here, unlike in *Bies*, there was "every incentive" to fully litigate the non-statutory aggravating factors; that the non-statutory factors must be proven beyond a reasonable doubt under the FDPA, unlike the Ohio mitigating factors at issue in *Bies*; that the appeal in *Bies*, unlike Sampson's, "was governed by the limitations on federal habeas review of state judgments"; and that *Bies* involved a "second run at vacating [the defendant's] death sentence," 556 U.S. at 834 (quoting *Bagley*, 535 F.3d at 531 (Sutton, J., dissenting from denial of rehearing en banc)), and "not an effort by the State to retry him or to increase his punishment," *id.* The government correctly notes that none of these distinctions is material to the collateral-estoppel principles articulated by the *Bies* Court and the Second Restatement of Judgments.

collateral-estoppel argument. There is simply no way the two non-statutory aggravating factors at issue here were essential to the first jury's death sentence.[12]

Sampson further contends that a number of other decisions of federal courts provide alternative analyses that support his collateral-estoppel claim. They do not. He relies on language in this court's decision in *United States v. Bravo-Fernandez*, 790 F.3d 41 (1st Cir. 2015), *cert. granted*, 136 S. Ct. 1491 (2016), including that collateral-estoppel claims "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *id.* at 46 (quoting *Ashe*, 397 U.S. at 444), and that "if a review of [the record of the prior proceeding] shows that a 'rational jury,' as a practical matter, decided adversely to the government an issue to be relitigated in the new prosecution, then the defendant gets the benefit of collateral estoppel," *id.* But that language comes from an inquiry into the preclusive effect of *acquittals* on an attempt to prove various facts in a retrial of vacated convictions arising from the same split verdict. *See id.* at 43, 48. In other words, the determinations at issue in *Bravo-Fernandez* were potentially necessary to the prior judgment; the determinations that Sampson attacks could not have been.

Sampson's reliance on *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), *abrogated on other grounds by Floyd v. Sec'y, Fla. Dep't of Corr.*, 638 F. App'x 909, 924 (11th Cir.

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[12] The government admitted at oral argument that as a matter of logic its position is that a sentencing jury's determinations on non-statutory aggravating factors can never be essential to the judgment in an FDPA case, because non-statutory aggravating factors are neither necessary to nor sufficient for the imposition of the death penalty under the FDPA.

2016) (per curiam) (citing *Fry v. Pliler*, 551 U.S. 112, 119-20 (2007), and *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)) is equally misplaced. He argues that the case illustrates "that an impact on the express terms of a judgment is not an absolute prerequisite for collateral estoppel." This proposition is simply not so, and misconstrues *Delap*. *Delap*, in any event, does not control our decision. *Delap* was decided in 1989, 27 years ago, and well before *Sattazahn* and *Bies*, the Supreme Court cases that dictate our holding.

Delap concerned a trial in which the prosecution pursued multiple theories of guilt on one count of murder. The defendant was convicted of murder on one theory (first-degree premeditation), and the trial judge found that there was insufficient evidence to convict the defendant on a theory that the murder was committed during a felony. 890 F.2d at 308-12. The Eleventh Circuit first held that the insufficiency-of-the-evidence finding on the theory that there was a concomitant felony constituted an acquittal, because the finding "decide[d] that the prosecution has not proved its case." *Id.* at 313 (quoting *Bullington*, 451 U.S. at 443). It then asked whether the felony murder acquittal as to guilt "bar[red on retrial] a finding that the murder occurred during the commission of a felony so as to constitute an aggravating factor justifying imposition of the death penalty." *Id.* at 314. The court emphasized that "in this case Delap's acquittal of felony murder occurred during the *guilt/innocence* phase of his first trial." *Id.* at 318. It distinguished and said that it "need not address what collateral estoppel effect, if any, would result had the jury at the sentencing phase of Delap's first trial concluded that he had not committed murder during the course of a felony." *Id.* Sampson pled guilty, and his challenge concerns the collateral-estoppel effect of one

sentencing-phase determination on another. *Delap* is inapposite.

As we explained in *Manganella v. Evanston Ins. Co.*, 700 F.3d 585 (1st Cir. 2012), another case Sampson cites: "We do not ask whether the resolution of an issue was necessary to reach the same outcome; rather, the inquiry is whether the issue was necessary to the decision actually rendered." *Id.* at 594. By that standard, his argument fails: the non-statutory aggravating factors simply could not have been "necessary to the decision actually rendered." *Id.*; *see Bies*, 556 U.S. at 835. Because the non-statutory aggravating factors were not necessary to the determination of his original death sentence, the government may relitigate them at the new penalty-phase proceeding.

In the end, Sampson's argument is that there should be a more relaxed standard for collateral-estoppel claims in the context of capital sentencing. But the Supreme Court's scrupulous doctrinal reliance on the Second Restatement of Judgments in *Bies*, 556 U.S. at 834, makes clear that the core requirements of collateral estoppel apply with full force in the capital-sentencing context. Sampson's argument fails to meet those requirements.

Finally, Sampson makes a vague "Eighth Amendment values" argument trying to strengthen his collateral-estoppel position. He emphasizes the general principle that "[the Supreme] Court has demanded that factfinding procedures aspire to a heightened standard of reliability," *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion), and argues from it that "[r]eliability could only be impaired by allowing prosecutors multiple opportunities to pursue particular aggravating factors." The argument cannot save a

double-jeopardy claim when the claim fails on its own terms.

The district court correctly ruled that it would not strike the government's notice of intended use of the non-statutory aggravating factors of future dangerousness and murder to obstruct justice because the earlier jury's findings were not an acquittal, nor were they essential to the jury's death sentence. The Double Jeopardy Clause does not bar the government from alleging those non-statutory aggravating factors again at Sampson's new penalty-phase proceeding.

IV.

The order of the district court is *affirmed*.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 16-1727

GARY LEE SAMPSON

Petitioner – Appellant

v.

UNITED STATES

Respondent - Appellee

Before

Lynch, Selya and
Lipez, *Circuit Judges*

JUDGMENT

Entered: July 28, 2016

Following expedited briefing and oral argument in this appeal and mindful that a trial date is set for September 14, 2016, we have chosen to dispose of this appeal by means of the instant judgment, with an opinion to follow. For the reasons to be set forth in that opinion, the order of the district court entered on April 11, 2016 is *affirmed*.

Mandate shall issue forthwith.

Any petition for panel rehearing or en banc review must be filed within fourteen days of the date of the opinion.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Honorable Leo T. Sorokin
Robert M. Farrell, Clerk of Court
Miriam Conrad
Elizabeth Prevett
John Martin Richey
William E. McDaniels
Jennifer G. Wicht
Danalynn Recer
Michael Norman Burt
Paul Mogin
Mark T. Quinlivan
Zachary R. Hafer
Dina Michael Chaitowitz
Dustin Ming Chao
Michael S. Warbel
David Sean McMahon
Eric J. Rietveld

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

Criminal Action No. 01-10384-LTS

GARY LEE SAMPSON

ORDER ON DEFENDANT'S MOTION IN LIMINE TO DISMISS OR STRIKE CERTAIN STATUTORY AND NON-STATUTORY AGGRAVATING FACTORS FROM GOVERNMENT'S AMENDED NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND TO EXCLUDE CERTAIN EVIDENCE

April 8, 2016

SOROKIN, J.

Before the Court is the Defendant Gary Lee Sampson's Motion in Limine to Dismiss or Strike Certain Statutory and Non-Statutory Aggravating Factors from Government's Amended Notice of Intent to Seek the Death Penalty and to Exclude Certain Evidence (Motion). Doc. No. 1904-1. The government opposes the Motion. Doc. No. 1963. For the reasons

that follow, the Motion is ALLOWED IN PART and DENIED IN PART.

I. *Background*

In 2001, Sampson committed three murders in the span of one week. First, on July 24, Sampson was hitchhiking when he murdered Philip McCloskey, a 69-year old man, and attempted to steal Mr. McCloskey's car. Then, on July 27, Sampson — again while hitchhiking — murdered Jonathan Rizzo and stole Mr. Rizzo's car. A few days later, on July 30, Sampson murdered Robert Whitney in New Hampshire.

A grand jury returned the original Indictment on October 24, 2001 charging Sampson with two counts of carjacking resulting in the deaths of Mr. McCloskey and Mr. Rizzo, in violation of 18 U.S.C. § 2119. Subsequently, pursuant to the Federal Death Penalty Act (FDPA), the government filed a notice of intent to seek the death penalty identifying, inter alia, certain statutory and non-statutory aggravating factors that it asserted warranted imposition of the death penalty on Sampson. Notably, the notice of intent did assert that Sampson posed a future danger in prison, but did not assert that he had demonstrated a lack of remorse. Sampson pled guilty to each offense of carjacking resulting in death in the Second Superseding Indictment on September 9, 2003. Thereafter, the Court convened a sentencing trial for determination by a jury whether the government had established, under the statute and the notice of intent to seek the death penalty, that death, rather than life imprisonment without parole, was warranted. The jury found unanimously that the death penalty was justified. Accordingly, on January 29, 2004, the Court sentenced Sampson to be executed. Sampson appealed, and in 2007 the First Circuit affirmed his

death sentence as well as virtually all the legal and evidentiary rulings challenged on appeal. *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007).

Then, in 2009, Sampson petitioned this Court for a new trial under 28 U.S.C. § 2255 asserting various constitutional violations. After lengthy hearings, the Court in 2011 vacated Sampson's death sentence — over the government's vigorous objection — in light of evidence that a juror on his sentencing trial had lied repeatedly under oath about her ability to be impartial in this case. The government sought and received the Court's permission to appeal on an interlocutory basis the decision vacating the sentence. The First Circuit affirmed the Court's decision. It held that "the defendant was deprived of the right to an impartial jury and is entitled to a new penalty-phase hearing." *Sampson v. United States*, 724 F.3d 150, 168 (1st Cir. 2013). In ordering a new sentencing trial, the First Circuit noted that "it is indisputable that the grant of a new penalty-phase hearing in a capital case is not a final disposition of the [pending § 2255] proceedings," meaning that Sampson's resentencing is a continuation of the § 2255 proceedings. *Id.* at 157. *See United States v. Sampson*, 82 F. Supp. 3d 502, 509 (D. Mass. 2014). The government sought neither en banc review nor certioari to the Supreme Court. Thus, on November 15, 2013, the case returned to this Court for further proceedings.

Eschewing the notice of intent to seek the death penalty on which it had proceeded in the first trial, and on which it had both obtained a verdict of death and a judgment from the Court of Appeals affirming that verdict, the government elected to revise its notice. The amended notice of intent made several material changes

to the original notice of intent, in that it: (1) revised the future dangerousness factor to encompass conduct occurring during the years Sampson has been in custody since the original jury rendered its verdict of death; and (2) inserted a new non- statutory aggravating factor alleging Sampson "has not expressed genuine remorse" which allegedly arises both from the period *preceding* the original notice of intent and the period following the original verdict of death. *Compare* Doc. No. 1326, with Doc. No. 103. Sampson objects to the revisions and additions made in the amended notice of intent. Sampson also advances some objections to other unchanged portions of the amended notice.

II. *Discussion*

A. *Federal Death Penalty Act*

If the government chooses to seek a death sentence under the FDPA, "the statute requires it to give the defendant notice of its election and of the aggravating factors that it plans to prove." *Sampson*, 486 F.3d at 20 (citing 18 U.S.C. § 3593(a)). Then, in the penalty phase of a capital case, the defendant is rendered "death-penalty eligible only if a jury finds beyond a reasonable doubt that the defendant acted with the statutorily required intent, and that at least one statutorily defined aggravating factor exists." *Id.* at 20 (citations omitted). "While only the finding of a statutory aggravating factor can render a defendant death-eligible," the jury is entitled also to consider "non-statutory aggravating factors" to determine whether a death sentence is justified.[1] *Id.* at 44 n.14 (citing 18 U.S.C. § 3593(c)-(e)).

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[1] "The term 'non-statutory aggravating factor' is used to 'refer to any aggravating factor that is not specifically described in 18 U.S.C.

At the sentencing hearing, the "government may present any information relevant to [a statutory or non-statutory] aggravating factor for which notice has been provided[,]" 18 U.S.C. § 3593(c), and the jury also may take into account mitigating factors. 18 U.S.C. § 3593(e). In the end, only if the jury finds beyond a reasonable doubt that the defendant acted with the intent required by the statute, and "that at least one statutorily defined aggravating factor exists," then the jury weighs the (proven) aggravating factor or factors against any (proven) mitigating factors to decide whether the death penalty is warranted. *Sampson*, 486 F.3d at 20 (citing 18 U.S.C. § 3593(c)-(e)). Against this framework of the FDPA, the Court turns to Sampson's arguments.

B. *Future Dangerousness*

The government's amended notice of intent to seek the death penalty sets forth the non-statutory aggravating factor of "Future Dangerousness of the Defendant While Incarcerated" as to both counts of carjacking resulting in death. Doc. No. 1326. The future dangerousness factor is articulated as follows:

> The defendant, Gary Lee Sampson, is likely to commit criminal acts of violence in the future that would be a continuing and serious threat to the lives and safety of prison officials and inmates, as demonstrated by his history of prison misconduct, including, but not limited to, escapes, attempted escapes, verbal threats to harm prison officials and inmates, possession, fashioning, and use of dangerous weapons while incarcerated, and multiple violent assaults of prison officials.

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§ 3592.'" *Sampson*, 486 F.3d at 44 n.14 (quoting *Jones v. United States*, 527 U.S. 373, 377 n.2 (1999)).

> Evidence in support of this aggravating factor will include evidence of Sampson's prison misconduct at USP Terre Haute from 2004 to the present.

Id. Sampson raises a host of objections to the future dangerousness non-statutory aggravating factor, and the Court considers them in turn.[2]

i. *Constitutionality*

Most broadly, Sampson contends that this factor violates the Fifth and Eighth Amendments to the Constitution because predictions of an individual's future dangerousness are inherently unreliable. The Supreme Court has held, however, that a jury in a capital sentencing trial may consider whether the defendant will engage in dangerous conduct in the future. *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976). Accordingly, this Court explained following Sampson's first sentencing trial that in "*Jurek*, the Supreme Court held that the Texas death penalty scheme, under which a question virtually identical to the aggravating factor [of future dangerousness] alleged in this case was posed to the jury, was constitutional." *United States v. Sampson*, 335 F. Supp. 2d 166, 218 (D. Mass. 2004) (citing *Jurek*, 428 U.S. at 269). As this Court noted then, "[i]f the Supreme Court has directly decided an issue, the lower courts must reach the same result 'unless and until [the] Court reinterpret[s] the binding precedent.'" *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997)). *Jurek*,

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[2] The aggravating factor of future dangerousness set forth in the government's original notice of intent filed prior to Sampson's first sentencing trial is substantially similar to that in the amended notice of intent; the only difference arises from the amended notice of intent's reference to Sampson's conduct in prison since 2004. *See* Doc. No. 103.

therefore, controls and forecloses Sampson's argument that the non-statutory aggravating factor of future dangerousness is unconstitutional.

As Sampson points out, however, it is true that this Court in that same 2004 post-trial order also encouraged the Supreme Court to revisit the question of whether future dangerousness is a constitutionally viable aggravating factor in a capital case in light of substantial evidence that predications of future dangerousness are erroneous. *See id.* at 218-23. Despite the Court's analysis on this score, the Supreme Court has not revisited *Jurek*; it remains the law, and district courts continue to permit future dangerousness as an aggravating factor. *See, e.g.*, *United States v. Wilson*, 923 F. Supp. 2d 481, 483-85 (E.D.N.Y. 2013). Insofar as Sampson challenges particular evidence, the relevance and reliability of specific evidence is a separate issue that will be decided separately. *See infra* at 13.

ii. *Double Jeopardy and Collateral Estoppel*

The jury in Sampson's first sentencing trial found, in response to a special question on each carjacking count, that the government failed to prove the non-statutory aggravating factor that Sampson posed a future danger; thus, the jury did not weigh this factor in deciding whether to impose the death penalty. Doc. Nos. 654 at 7; 654-2 at 7. Now, Sampson argues that the principles of double jeopardy and collateral estoppel preclude the government from proceeding with this non-statutory aggravating factor. Essentially, Sampson argues the findings constitute an acquittal for purposes of double jeopardy. The Court is not persuaded.

The "Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). In a similar vein, collateral estoppel "bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 27 (1980)). Collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

The Court concludes that the principals of double jeopardy have no application to the first jury's special findings on the non-statutory aggravating factor of future dangerousness. This is so based on Supreme Court precedent and the structure of the FDPA. Sampson cites a long line of Supreme Court cases, culminating in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), to argue that double jeopardy protections attach to the jury's findings on future dangerousness. In *Sattazahn*, the Supreme Court held that in a capital proceeding "the relevant inquiry for double-jeopardy purposes [is] not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence — i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Id.* at 108.

For one thing, Sampson did not receive a life sentence at the conclusion of his first sentencing trial. *See Bobby*, 556 U.S. at 833. Moreover, the court in *Sattazahn*

interpreted a state death penalty statute that required a sentence of death if a jury found one aggravating factor and no mitigating factor, or if the jury found that the aggravating factors outweigh any mitigating factors. *Sattazahn*, 537 U.S. at 104. The aggravating factors in the state statute were therefore the equivalent of the FDPA's *statutory* aggravating factors, the finding of at least one of which is required to return a verdict in favor of death under the FDPA. Therefore, the directive in *Sattazahn* that the double jeopardy inquiry in a capital case is whether the defendant was acquitted based on "findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt" is applicable to findings on statutory, rather than non-statutory aggravating factors, because only findings adverse to the government on the former are "sufficient to establish legal entitlement to [a] life sentence."[3] *See id.* at 108. In other words, whatever *Sattazahn* may imply about the application of double jeopardy protections to a jury's findings on *statutory* aggravating factors, the total absence of which entitles a defendant to a life sentence under the FDPA, *see Sampson*, 486 F.3d at 20, it does not support applying double jeopardy protections to a jury's findings with regard to a non-statutory factor like future dangerousness. A finding that a non-statutory factor is absent is not "sufficient to establish legal entitlement to [a] life sentence," as evidenced by the fact that the jury did not find future dangerousness in Sampson's first sentencing trial but

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[3] Despite Sampson's argument to the contrary, the fact that courts have treated statutory and non-statutory aggravating factors similarly for purposes of the Confrontation Clause does not resolve the issue before the Court. *See, e.g.*, *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006).

nevertheless, lawfully, recommended a sentence of death. *See United States v. Brown*, 441 F.3d 1330, 1368 (11th Cir. 2006) ("[A] non-statutory aggravating factor does not 'increase the penalty for a crime beyond the prescribed statutory maximum[.]'" (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000))); *United States v. Higgs*, 353 F.3d 281, 320 (4th Cir. 2003) ("Once a defendant has been rendered eligible for the death penalty by the jury's finding of a statutory aggravating factor, the use of nonstatutory aggravating factors serves only to individualize the sentencing determination."); *United States v. Sampson*, 275 F. Supp. 2d 49, 100 (D. Mass. 2003) ("The finding of a non-statutory aggravating factor is neither a necessary nor sufficient prerequisite to imposing a death sentence."). Accordingly, double jeopardy does not bar the government from pursuing at Sampson's resentencing trial the non-statutory aggravating factor of future dangerousness.[4]

Turning to collateral estoppel, there can be no preclusive effect given to the first jury's findings with regard to future dangerousness because the Court found, and the First Circuit affirmed, that the jury verdict was tainted by a juror who lied about her ability to be impartial in this case.[5] *See Sampson*, 724 F.3d at

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[4] For this reason, the Court also rejects Sampson's argument that his due process rights are offended by the government's asserting the aggravating factor of future dangerousness at his resentencing trial. *See Sattazahn*, 537 U.S. at 116 ("We decline petitioner's invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.").

[5] This important fact bears on another of Sampson's arguments. Sampson argues that the aggravating factor of future

168; *Bobby*, 556 U.S. at 834 (noting that collateral estoppel "bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment'" (quoting Restatement (Second) of Judgments § 27 (1980)) (emphasis added)). The Court is persuaded in this regard by the decision in *United States v. Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010), in which the court considered whether the government was "collaterally estopped from pursuing a second time those nonstatutory aggravating factors to which the jury, at the first trial, answered 'No' because of the Double Jeopardy Clause of the Fifth Amendment and collateral estoppel." There, the court declined to strike on collateral estoppel grounds the non-statutory aggravating factors that were not found by the original jury, in part because the court of appeals in that case had "essentially erased the entire initial sentence," meaning that the defendant's "first sentencing was not a 'valid and final' judgment because of the prior error." *Id.*

In any event, the rejection of future dangerousness was not essential to the judgment of death. For collateral estoppel purposes, a "determination ranks as necessary or essential only when the final outcome hinges on it." *Bobby*, 556 U.S. at 835. Therefore, the Supreme Court has held that consideration of a mitigating factor in a capital case is "hardly essential to

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dangerousness calls for evidence that is unreliable under the Eighth Amendment because the jury in Sampson's first sentencing trial found that the evidence did not support a finding that Sampson would be dangerous in the future. The Court disagrees, however, because that jury verdict was tainted and, therefore, the Court declines to infer, from that jury's decision on future dangerousness, the unreliability of the factor or the evidence supporting it.

the death sentence" and, accordingly, that it does not bar future litigation on the issue. *Id.* at 828-29. In a death penalty proceeding, mitigating factors play a similar role to non-statutory aggravating factors, in that both are considered only after the jury has found that the defendant acted with the requisite mental state and that at least one statutory aggravating factor is proven beyond a reasonable doubt. *See* 18 U.S.C. § 3593(e). Therefore, the reasoning of Bobby extends to the circumstances here, and the original jury's finding on future dangerousness does not preclude further litigation on the subject.[6]

iii. *New Allegations*

Next, Sampson argues that the Court should strike future dangerousness as an aggravating factor because the government's amended notice of intent to seek the death penalty indicates that the government will seek to admit evidence of Sampson's behavior in prison since the

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[6] There is, however, tension between the statutory scheme of the FDPA and the Supreme Court's double jeopardy and collateral estoppel jurisprudence. As a matter of constitutional law, Sampson is entitled to have a jury make special findings as to the existence, or non-existence, of a mental state factor and statutory aggravating factors, which qualify as elements of the offense. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002); *United States v. Sampson*, 245 F. Supp. 2d 327, 332 (D. Mass. 2003). Moreover, the FDPA provides Sampson a right to have a jury make special findings with regard to the existence of aggravating factors, both statutory and non-statutory. 18 U.S.C. § 3593(d). In some respects, such special findings have the quality of a decision on an element of the offense that would terminate litigation on the issue. However, as stated in the text, a jury's special findings on a non-statutory aggravating factor, such as future dangerousness, do not give rise to collateral estoppel or double jeopardy protection under current Supreme Court law.

first trial in order to prove the existence of this factor. Sampson contends that the Court should not permit the government to establish his future dangerousness through new evidence obtained after his first trial, particularly because his resentencing trial is a continuation of proceedings under 18 U.S.C. § 2255. *See Sampson*, 82 F. Supp. 3d at 505-06 ("Where, as here, there has been a violation of the defendant's constitutional rights, the court has broad power [under § 2255] to craft an appropriate remedy. That remedy should, as much as possible, be tailored to the injury Sampson suffered and seek to restore him to the circumstances that existed before the violation, while not unnecessarily infringing on competing interests.").

The Court disagrees. The government does not assert the aggravating factor of future dangerousness for the first time in its amended notice of intent; it asserted the factor at the first sentencing trial. Given that the government only seeks to set forth additional evidence obtained since Sampson's first trial to establish this aggravating factor, the Court permits the government to do so.[7] See Stitt, 760 F. Supp. 2d at 580 (noting, in the context of a resentencing trial in a capital case, that "new evidence in support of a properly drafted aggravating factor . . . is appropriate and acceptable"). The Court remains cognizant of the objective of

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[7] The Court understands the government to be almost exclusively offering as new evidence of future dangerousness that evidence which arose after Sampson's first sentencing trial. To the extent the government intends to introduce limited additional evidence pertaining to Sampson's future dangerousness that was available at the time of the first trial but not offered, *see* Doc. No. 1833 at 3-5, the Court will consider the admissibility of such evidence in the face of particular challenges or objections.

restoring Sampson to the circumstances in existence before the deprivation of his right to an impartial jury, but the question the jury will be called upon to decide in this case as to future dangerousness is whether, at the time of the resentencing proceeding, the government has proven beyond a reasonable doubt that Sampson is then likely to pose a future danger to prison officials or inmates. Evidence of Sampson's conduct during his many years in prison since the first trial bears on that question.[8]

Finally, to the extent the Court must rule that there was good cause to amend the notice of intent in March 2014 to add allegations arising after the first trial in support of the future dangerousness aggravating factor, *see* 18 U.S.C. § 3593(a), the Court concludes that there was good cause to do so. *See United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999) (assuming "that good cause is needed when the Government seeks just to notify the defendant of additional evidence," and concluding that there is good cause to amend a notice of intent where the additional evidence "occurred after the filing of the original notice and certainly had a bearing on the factor of future dangerousness," and where the government gave the defendant "notice of its intent to rely" on this additional evidence).

iv. *Vagueness*

Sampson contends also that the future dangerousness factor as written in the amended notice of intent is

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[8] The Court is not ruling admissible the entire history of Sampson's conduct in prison since the original trial, but only that, given the general relevance of evidence drawn from that period, the Court declines to categorically exclude all such evidence as Sampson requests.

unconstitutionally vague and open-ended, in that it states that evidence supporting the factor will "include" Sampson's misconduct in prison since 2004. An aggravating factor is not unconstitutionally vague "if it has some 'common-sense core of meaning . . . that criminal juries should be capable of understanding . . . .'" *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (quoting *Jurek*, 428 U.S. at 279 (White, J., concurring)). Courts differ on whether terms such as "including" render an aggravating factor impermissibly vague. *Compare United States v. Grande*, 353 F. Supp. 2d 623, 636 (E.D. Va. 2005), *with United States v. Diaz*, No. 05-00167 WHA, 2007 WL 196752, at *5 (N.D. Cal. Jan. 23, 2007). However, "adequate notice of [an] aggravating factor" suffices. *Higgs*, 353 F.3d at 325. Moreover, this Court did not strike the future dangerousness factor on vagueness grounds before Sampson's first trial, even though the original notice of intent set forth the evidence that would establish future dangerousness as Sampson's "history of prison misconduct *including, but not limited to*, escapes, attempted escapes, verbal threats to harm prison officials and inmates, and possession of dangerous weapons." *Sampson*, 275 F. Supp. 2d at 108-09 (emphasis added).

Accordingly, the Court declines to strike on vagueness grounds the aggravating factor of future dangerousness. To the extent that Sampson argues that some evidence of his prison misconduct from years ago may be too remote in time to be reliable, the Court notes that it will measure specific evidence offered to prove this factor against the standard in death penalty cases that "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c); *Woodson v. North Carolina*, 428 U.S. 280, 305

(1976) ("Because of [the] qualitative difference [between death and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Insofar as the Motion argues for exclusion of specific evidence of future dangerousness on grounds of relevance or reliability, the Court notes that such evidentiary issues present separate questions the Court will resolve as to particular pieces of evidence at the appropriate junctures.

v. *Law of the Case*

"Writ large, the law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Matthews*, 643 F.3d 9, 12 (1st Cir. 2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). "The law of the case doctrine has two branches." *Id.* at 13. "The first branch — known colloquially as the mandate rule — 'prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case.'" *Id.* (quoting *United States v. Moran*, 393 F.3d 1, 7 (1st Cir. 2004)). The other branch "contemplates that a legal decision made at one stage of a criminal or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court." *Id.* (quoting *Moran*, 393 F.3d at 7); *accord Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). In the procedural context of this case, the "presumption . . . is that a successor judge should respect the law of the case" because the "orderly functioning of the judicial process requires that judges of coordinate jurisdiction honor one another's orders and

revisit them only in special circumstances." *Ellis*, 313 F.3d at 646. There are, however, exceptions to the doctrine: "A party may avoid the application of the law of the case doctrine only by showing that, in the relevant time frame, 'controlling legal authority has changed dramatically'; or by showing that 'significant new evidence, not earlier obtainable in the exercise of due diligence,' has come to light; or by showing that the earlier decision is blatantly erroneous and, if uncorrected, will work a miscarriage of justice." *Matthews*, 643 F.3d at 14 (quoting *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)).

Here, the law of the case doctrine does not bar the government's assertion of the future dangerousness factor. First, even assuming the law of the case doctrine encompasses responses to special verdict questions by a jury which are not given preclusive effect by the Double Jeopardy Clause of the Constitution, the doctrine does not apply here where Judge Wolf determined the government presented sufficient evidence to present the question to the jury and the Court vacated the jury's ultimate decision, at the defendant's request, due to the presence of a juror who had lied regarding material matters during jury selection.[9] Second, at the trial commencing on September 14, 2016, this factor calls upon the jury to determine whether the government

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[9] While the Court recognizes the principle articulated in *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013), and applied under the Double Jeopardy Clause in a similar context by the court in *United States v. Morrison*, 984 F. Supp. 2d 125, 138-39 (E.D.N.Y. 2013), the law of the case doctrine serves different purposes than the protection accorded by the Double Jeopardy Clause to an acquittal. Accordingly, the Court does not find persuasive or binding either *Evans* or *Morrison*.

proves beyond a reasonable doubt that Sampson then poses a future danger to prison officials or inmates. Legally, this is a somewhat different question than that which the jury answered in 2003, i.e., whether at that time, in 2003, Sampson posed a future danger to prison officials or inmates. Third, Judge Wolf determined that the government presented sufficient evidence at the first trial to submit this issue to the jury. The government, though it failed to bear its burden of proof on this issue at the first trial, has proffered additional evidence arising since the first trial.

vi. *28 U.S.C. § 2255*

There remains the question of whether it is equitable, under 28 U.S.C. § 2255, for the Court to permit the government to assert the future dangerousness aggravating factor even though the jury rejected this factor at the first trial. The Court's equitable authority under § 2255 is a multifaceted balancing of competing concerns. *See United States v. Torres-Otero*, 232 F.3d 24, 30 (1st Cir. 2000) ("The § 2255 remedy is broad and flexible, and entrusts to the courts the power to fashion an appropriate remedy." (quoting *United States v. Garcia*, 956 F.2d 41, 45 (4th Cir. 1992))). At this stage, the Court cannot say that these considerations preclude the government from proceeding on the future dangerousness factor for several reasons: (1) the government submitted sufficient evidence to permit the Court to submit the factor to the jury at the first trial; (2) the government asserts it possesses additional post-trial information to support the factor; and (3) the jury's determination of whether Sampson in 2003 posed a future danger is a different question than whether he now poses a future danger.

In sum, insofar as the Motion contends that the non-statutory aggravating factor of future dangerousness must be stricken from the government's amended notice of intent, the Motion is DENIED.

C. *Lack of Remorse*

The government's amended notice of intent to seek the death penalty sets forth the non-statutory aggravating factor of "Lack of Remorse" as to both Counts of carjacking. Doc. No. 1326. With regard to Count 1, carjacking resulting in the death of Mr. McCloskey, the lack of remorse factor states as follows:

> The defendant, Gary Lee Sampson, *has not expressed genuine remorse* for killing Philip A. McCloskey, as demonstrated by, but not limited to, Sampson's subsequent killings of Jonathan M. Rizzo and Robert "Eli" Whitney and the carjacking of William Gregory following the killing of Philip A. McCloskey, Sampson's statements to law enforcement agents, prison officials, and others following the offenses alleged in the Second Superseding Indictment, and Sampson's pattern of violent, disruptive, and non-remorseful behavior, both in prison and in court, since his arrest and incarceration for the offenses alleged in the Second Superseding Indictment.

Doc. No. 1326 at 5 (emphasis added). The lack of remorse factor attending to Count 2, carjacking resulting in the death of Mr. Rizzo, is substantially identical and set forth in the margin.[10] Although most of

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[10] With regard to Count 2, the lack of remorse factor appears in the amended notice of intent as follows:

the evidence described as proving this factor occurred prior to submission of the matter to the original jury, the Government first asserted this factor after the First Circuit affirmed, over the government's objection, Judge Wolf's Order vacating the original judgment of death. Sampson seeks dismissal of this factor. At and after the hearing on this Motion, the government stated that (1) it intends to offer only evidence of Sampson's affirmative conduct in support of the lack of remorse factor, and (2) the factor should be treated as expressing that "Sampson has demonstrated a lack of remorse." Doc. No. 2174 at 16. For purposes of this Motion, the Court accepts the government's position.[11]

> The defendant, Gary Lee Sampson, *has not expressed genuine remorse* for killing Jonathan M. Rizzo, as demonstrated by, but not limited to, Sampson's subsequent killing of Robert "Eli" Whitney and the carjacking of William Gregory following the killing of Jonathan M. Rizzo, Sampson's statements to law enforcement agents, prison officials, and others following the offenses alleged in the Second Superseding Indictment, and Sampson's pattern of violent, disruptive, and non- remorseful behavior, both in prison and in court, since his arrest and incarceration for the offenses alleged in the Second Superseding Indictment.

Doc. No. 1326 at 8 (emphasis added).

[11] In light of how the Court ultimately resolves the lack of remorse issue in this Order, the Court assumes without deciding that there is now good cause for the government to amend the lack of remorse factors, *see* 18 U.S.C. § 3593(a), and the Court treats the lack of remorse factors in the amended notice of intent to seek the death penalty as amended to state that Sampson "has demonstrated a lack of remorse." The Court notes that this amendment to the lack of remorse aggravating factors is not merely technical, because as written originally the factors raised substantial Fifth Amendment concerns. *See United States v. Caro*, 597 F.3d 608, 629 n.19 (4th Cir. 2010) ("[P]enalizing a capital defendant for failure to articulate remorse burdens his Fifth Amendment privilege against self-

After a lengthy and careful investigation culminating in the original notice of intent to seek the death penalty, the government elected not to allege any lack of remorse aggravating factor and Judge Wolf specifically ruled it out at Sampson's first sentencing trial. He "instructed the jury that '[i]f it is proven that Mr. Sampson is remorseful, his remorse is a mitigating factor. If, however, you find that Mr. Sampson is not remorseful, you may not consider that to be an aggravating factor in this case.'" *United States v. Sampson*, 335 F. Supp. 2d at 234. The vast majority of the evidence listed in the amended notice of intent in support of the lack of remorse factor (and the most probative evidence) arises from the killing of Mr. Rizzo, the other conduct related to the charged offenses, the murder of Mr. Whitney in New Hampshire, and the carjacking of Mr. Gregory in Vermont. The government has not advanced any substantial reason for now asserting lack of remorse when it did not do so before. Nor is there good reason for disregarding Judge Wolf's statement of the applicable law. While the decision of the government not to allege lack of remorse as an aggravating factor at the first trial likely contributed to or caused Judge Wolf to

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incrimination."); *United States v. Umana*, 707 F. Supp. 2d 621, 636 (W.D.N.C. 2010) (finding "the government's allegation that the defendant 'has never expressed any remorse' somewhat troubling" in light of the Fifth Amendment); *United States v. Roman*, 371 F. Supp. 2d 36, 50 (D.P.R. 2005) ("[T]he government may not urge the applicability of the aggravator on information that has a substantial possibility of encroaching on the defendants' constitutional right to remain silent."). In all, however, the government's unequivocal representation in its post-hearing memorandum that it seeks to offer only evidence of Sampson's affirmative conduct to prove this factor eliminates from consideration the concern that the government previously intended to do otherwise. *See* Doc. No. 2047 at 5; Doc. No. 1833 at 6-7, 20; Doc. No. 1963 at 22.

preclude the jury from considering it, the government's decision supports striking the lack of remorse factor. The government does not rely on new law and the gravamen of the factor depends upon old rather than new evidence, i.e., evidence available at the first trial. The upcoming sentencing trial is a continuation of Sampson's § 2255 proceeding, the legal objective of which is to "restore [the defendant] to the circumstances that existed before" he was deprived of a trial before an impartial jury. *See Sampson*, 82 F. Supp. 3d at 505-06. Accordingly, the Court exercises its "broad power to craft an appropriate remedy" under § 2255 to strike the lack of remorse aggravating factors. *See id.* at 505; *cf. Stitt*, 760 F. Supp. 2d at 579-80 (noting the "uniquely high prejudice to Defendant" resulting from the government attempting "to seek the death penalty based on new aggravating factors some twelve years after Defendant's initial sentence").

In sum, insofar as the Motion seeks to strike the non-statutory aggravating factors of lack of remorse, the Motion is ALLOWED, and the Court strikes these factors from the government's amended notice of intent to seek the death penalty.[12]

D. *Torture, Vulnerability Due to Age, Substantial Planning and Premeditation (as to the killing of Mr. McCloskey), and the May 17, 2001 Bank Robbery*

In addition, Sampson urges the Court to strike certain aggravating factors, or the allegations supporting them, in light of rulings the Court made at Sampson's first trial

[12] Because the Court strikes the lack of remorse factors on the ground of 28 U.S.C. § 2255, the Court need not reach Sampson's other arguments in favor of striking these factors.

regarding the sufficiency of the evidence supporting these factors. In particular, Sampson requests that the Court strike the government's amended notice of intent insofar as it alleges the following with regard to statutory aggravating factors: (1) that Sampson tortured Mr. McCloskey; (2) that Sampson tortured Mr. Rizzo; (3) that Mr. McCloskey was vulnerable due to age; and (4) that Sampson engaged in substantial planning and premeditation with regard to killing Mr. McCloskey. In the same vein, Sampson asks the Court to strike as an element of the "Other Serious Acts of Violence" non-statutory aggravating factor the allegation that Sampson committed an armed bank robbery on May 17, 2001.

Initially, the government opposed Sampson on these points, but in a post-hearing filing the government withdrew its opposition in light of the law of the case doctrine. Doc. No. 2174 at 5. Given that these requests of Sampson now are unopposed, it is ORDERED that the following are stricken from the amended notice of intent to seek the death penalty: (1) the assertion that Sampson tortured Mr. McCloskey and Mr. Rizzo in the statutory aggravating factors of "Heinous, Cruel, and Depraved Manner of Committing the Offense";[13] (2) the assertion that Mr. McCloskey was "vulnerable due to old age" in the statutory aggravating factor of "Vulnerability of Victim";[14] (3) the "Substantial Planning and Premeditation" statutory aggravating factor asserted as to Count 1, which pertains to the killing of Mr. McCloskey; and (4) the assertion that Sampson committed an armed bank robbery on May 17, 2001 in

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[13] The remainder of these factors is not stricken.

[14] The remainder of this factor is not stricken.

the non-statutory aggravating factors of "Other Serious Acts of Violence – Bank Robberies."[15]

E. *Murder to Obstruct Justice*

Sampson argues that the Court should strike the "Murder to Obstruct Justice" non-statutory aggravating factors asserted with regard to each Count of the Indictment because the government, at the first trial, failed to meet its burden of proving these factors beyond a reasonable doubt to a unanimous jury. In support, Sampson raises the same arguments he pursues to contend that the Court should strike the future dangerousness aggravating factors. For the same reasons, discussed above, that the Court declines to strike the future dangerousness aggravating factors, the Court declines to strike the murder to obstruct justice factors.

Additionally, the first reason that the law of the case doctrine does not bar the future dangerousness factor, *see supra* at 14, applies with equal force to the murder to obstruct justice factors. Therefore, separately, but for largely the same reasons, the Court declines to dismiss the murder to obstruct justice factors pursuant to its authority under § 2255.

F. *Substantial Planning and Premeditation (as to the killing of Mr. Rizzo)*

Although the Court now has stricken the "Substantial Planning and Premeditation" statutory aggravating factor asserted in the amended notice of intent as to the killing of Mr. McCloskey, Sampson also asks the Court to strike this factor insofar as the government asserts it

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[15] The remainder of these factors is not stricken.

with regard to the killing of Mr. Rizzo. The factor reads as follows:

> The defendant, Gary Lee Sampson, committed the offense after substantial planning and premeditation to cause the death of Jonathan M. Rizzo (18 U.S.C. § 3592(c)(9)).

Doc. No. 1326 at 6. Sampson contends that this factor is improper in that it fails to narrow the class of offenders subject to the death penalty, and is vague. He adds that this factor is duplicative of the elements of the underlying crimes to which Sampson pled guilty, the non-statutory aggravating factors of "Contemporaneous Convictions for More than One Murder," and the gateway factors concerning whether Sampson acted with the statutorily-required intent.

The Court declines to strike this factor insofar as it relates to the killing of Mr. Rizzo. As this Court held previously, "Sampson's vagueness challenge to the aggravating factor alleging that '[t]he defendant committed the offense after substantial planning and premeditation to cause the death of a person' is . . . without merit." *Sampson*, 275 F. Supp. 2d at 104. The Court noted that Sampson's view that this factor is vague "has, for good reason, been 'uniformly rejected' by other courts." *Id.* (quoting 1 Leonard B. Sand et al., *Modern Federal Jury Instructions*, Inst. 9A-13 cmt., at 9A-53). *See, e.g.*, *United States v. McCullah*, 76 F.3d 1087, 1110-11 (10th Cir. 1996) (rejecting a claim that an aggravating factor alleging that the defendant "committed the offense after substantial planning and premeditation" is unconstitutionally vague); *United States v. Williams*, No. 4:08-cr-00070, 2013 WL 1335599, at *27 (M.D. Pa. Mar. 29, 2013) (same).

Moreover, this Court has held that the factor appropriately narrows the class of murderers subject to the death penalty:

> Substantial planning and premeditation is a statutory aggravating factor. Congress has decided that substantial planning and substantial premeditation distinguish a defendant from other murderers in a way that justifies the death penalty. This statutory aggravating factor expresses a legislative determination that "this [type of] murder is different." *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir.1987), *aff'd*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). This factor is not unconstitutionally vague. *See Tipton*, 90 F.3d at 895–96. Substantial planning and premeditation is a true aggravating factor, for it narrows the class of murderers in a way that is constitutionally relevant. *See United States v. Frank*, 8 F.Supp.2d 253, 278 (S.D.N.Y.1998).

Sampson, 335 F. Supp. 2d at 209. Courts continue to find that this factor appropriately narrows the class of offenders subject to execution. *See, e.g.*, *United States v. Briseno*, No. 2:11-cr-00077, 2015 WL 163526, at *9 (N.D. Ind. Jan. 12, 2015) (rejecting the argument that the "substantial planning and premeditation" aggravating factor fails to "narrow[] the class of people eligible for the death penalty"). Accordingly, the Court rejects Sampson's contention that the factor does not serve a narrowing function.[16]

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[16] Sampson further argues that this factor fails to narrow the class of offenders subject to the death penalty in light of the Court's instruction to the original jury that "substantial" means "large."

Finally, the Court rejects Sampson's argument that this factor is duplicative of Sampson's crimes and other portions of the amended notice of intent. "[A]ggravating factors are duplicative when one necessarily subsumes the other, or, in other words, when a jury would necessarily have to find one in order to find the other." *United States v. Fell*, 531 F.3d 197, 236 (2d Cir. 2008) (citations and quotations omitted). However, the Supreme Court has "never before held that aggravating factors could be duplicative so as to render them constitutionally invalid . . . ." *Id.* at 235 (quoting *Jones v. United States*, 527 U.S. 373, 398 (1999)).[17] Regardless, the "substantial planning and premeditation" factor cannot be said to "necessarily subsume" the offenses to which Sampson pled guilty in this case, because substantial planning and premeditation is not required to prove carjacking resulting in death. *See* 18 U.S.C. § 2119. Similarly, this factor does not duplicate the "Contemporaneous Convictions for More Than One Murder" aggravating factors. This is so because the

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Doc. No. 773 at 81. It is true that the Supreme Court has posited that "the indefiniteness of the terms 'large' or 'substantial' is obvious . . . ." *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 670 (1947). However, given the weight of authority that this factor adequately performs a narrowing function, the Court declines to invalidate the factor on the basis of the Supreme Court's statement in a case outside the death penalty context

[17] In fact, a "circuit split exists as to whether duplicative aggravating factors are unconstitutional." *United States v. Casey*, No. 05-227 (ADC), 2012 WL 6645702, at *3 n.8 (D.P.R. Dec. 20, 2012) (citing *Fell*, 531 F.3d at 235-36). "The First Circuit Court of Appeals has not yet indicated whether it intends to apply the subsuming test to determine the validity of allegedly duplicative factors or whether it intends to follow the circuits that do not prohibit duplicative aggravating factors." *Id.*

latter factors refer to convictions for carjacking resulting in the deaths of Mr. McCloskey and Mr. Rizzo, and those convictions, as just stated, do not require proof of substantial planning or premeditation.[18] Moreover, the government need not establish that Sampson engaged in "substantial planning and premeditation" to prove one of the gateway factors concerning the intent required to trigger death eligibility. See 18 U.S.C. § 3591(a)(2).

Accordingly, insofar as the Motion seeks to strike the "substantial planning and premeditation" statutory aggravating factor regarding the killing of Mr. Rizzo, the Motion is DENIED.

G. *Heinous, Cruel, and Depraved Manner of Committing the Offense*

The government's amended notice of intent includes the statutory aggravating factor of "Heinous, Cruel, and Depraved Manner of Committing the Offense" as to both counts of carjacking. Doc. No. 1326 at 3, 6. With regard to Count 1, carjacking resulting in the death of Mr. McCloskey, the factor is presented as follows:

> The defendant, Gary Lee Sampson, committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to Philip A. McCloskey (18 U.S.C. § 3592(c)(6)).

Doc. No. 1326 at 3. The factor also is asserted as to Count 2, and it differs from the factor just quoted only in

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[18] For this same reason, the "substantial planning and premeditation" aggravating factor does not duplicate the "Murder to Obstruct Justice" aggravating factors, which refer to Sampson's carjackings that resulted in the deaths of Mr. Rizzo and Mr. McCloskey.

that it refers to Mr. Rizzo rather than Mr. McCloskey. Doc. No. 1326 at 6. The Court struck the references to "torture" from each of these factors, *supra*, but Sampson raises additional challenges to these factors. Similar to Sampson's tack regarding the "substantial planning and premeditation" factor, Sampson argues that the Court should strike the "heinous, cruel and depraved" factors because they are vague, overbroad, and duplicative.

Sampson's vagueness claim is foreclosed by the First Circuit's decision in his direct appeal from his death sentence. In its opinion, the First Circuit agreed "with other courts of appeals that have found the FDPA's 'especially heinous, cruel, or depraved' factor not unconstitutionally vague when coupled with the type of limiting instruction given by" the Court in Sampson's first trial. *Sampson*, 486 F.3d at 38. The First Circuit reasoned that "[t]his factor avoids facial vagueness by requiring that the offense involve serious physical abuse or torture," and noted that the Court "carefully defined each of the relevant terms — heinous, cruel, depraved, and serious physical abuse — in a manner that was easily understood and that afforded the jurors a commonsense core of meaning." *Id.* Moreover, to the extent Sampson now argues that the "heinous, cruel, and depraved" factor applies too broadly to encompass any murder, the First Circuit noted that the "narrowing accomplished by the statutory inclusion of the serious physical abuse component, especially when combined with the district court's thorough instructions, leaves no room to doubt the factor's constitutionality." *Id.* In light of the First Circuit's ruling, and its approval of the Court's jury instructions regarding the "heinous, cruel, and depraved" aggravating factors, the Court rejects

Sampson's argument that the factors are vague or overbroad.[19]

Nor is the Court persuaded that these factors duplicate the offenses to which Sampson pled guilty. Sampson does not explain why these factors are duplicative of his crimes, and the Court concludes that the factors are not duplicative because "heinous, cruel, and depraved" conduct is not an element of carjacking resulting in death. *See* 18 U.S.C. § 2119; *Fell*, 531 F.3d at 236 (noting that "aggravating factors are duplicative . . . when a jury would necessarily have to find one in order to find the other").

To the extent Sampson's Motion requests that the Court strike the "heinous, cruel or depraved" aggravating factors, the Motion is DENIED.

H. *Gateway Mental States*

Under 18 U.S.C. § 3591(a)(2), a jury may consider whether to sentence Sampson to death only if it finds beyond a reasonable doubt that he:

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

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[19] Sampson also notes that different courts apply the "heinous" factor differently in terms of whether "serious physical abuse" may occur after the victim's death. He argues that the difference in treatment renders this factor unconstitutional because it is applied arbitrarily from circuit to circuit. He does not cite any authority for this proposition. Moreover, the First Circuit affirmed the Court's instructions to the original jury on this subject, in which the Court stated that "[s]erious physical abuse can be inflicted either before or after death." *Sampson*, 486 F.3d at 36-38. Given the First Circuit's affirmance, there can be no argument that the factor is being applied arbitrarily as to Sampson.

> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act . . . .

These commonly are referred to as "gateway mental states." *See, e.g.*, *Sampson*, 335 F. Supp. 2d at 179. The amended notice of intent to seek the death penalty asserts all four gateway mental states as to each Count of carjacking resulting in death. Doc. No. 1326 at 2-3, 5-6. Sampson argues that the Court should limit the government to the mental state articulated in § 3591(a)(2)(A) — because the government's sole theory is that Sampson "intentionally killed" Mr. McCloskey and Mr. Rizzo — and preclude the government from presenting the other gateway mental states to the jury. In support, Sampson contends that the § 3591(a)(2)(B) mental state is duplicative of the "intentionally killed" mental state, and argues also that the mental states enunciated in § 3591(a)(2)(C) & (D) concern "aiding and abetting" theories that are inconsistent with the government's evidence. The Court rejects these arguments.

"Numerous decisions have approved submission of multiple mental states in FDPA cases." *United States v. Bolden*, 545 F.3d 609, 629 (8th Cir. 2008) (collecting

cases). *See, e.g.*, *United States v. Troya*, No. 06-80171-Cr., 2008 WL 4327004, at *16 (S.D. Fla. Sept. 22, 2008), *report & recommendation adopted by* 2008 WL 5109257 (S.D. Fla. Nov. 21, 2008) (rejecting the defendant's argument that the notice of intent "impermissibly contains four separate mental states" because "the inclusion of multiple mental states does not skew the process towards the death penalty because intent is a preliminary, threshold matter and not an aggravating factor" that the jury must weigh in determining the appropriate sentence). As is consistent with these rulings, the Court permitted the first sentencing trial jury to consider all four gateway mental states. Doc. No. 654 at 3; Doc. No. 654-2 at 3. Therefore, the Court at this juncture declines to strike any of the gateway mental states asserted in the amended notice of intent.

Sampson's argument that the gateway mental state that appears in 18 U.S.C. § 3591(a)(2)(B) must be stricken because it is "subsumed" by the mental state in § 3591(a)(2)(A) is without merit. This is so because, "even if one gateway intent factor 'necessarily subsumes' another, this cannot lead to an unconstitutional duplication of aggravating factors with concomitant skewed weighing because the gateway intent factors are not aggravating factors — they have no role in the weighing process through which the jury makes its ultimate sentencing recommendation." *United States v. Cheever*, 423 F. Supp. 2d 1181, 1200 (D. Kan. 2006) (citation omitted); *see United States v. Kee*, No. S1 98 CR 778 (DLC), 2000 WL 863119, at *11 (S.D.N.Y. June 27, 2000) ("[T]he four enumerated mental states are not four separate aggravating factors, and are not in any sense unfairly duplicative of one another.").

The cases upon which Sampson relies do not alter the Court's view. Although the court in *United States v. Basciano* did strike a gateway mental state from the government's notice of special findings, it did so because the government conceded that the mental state was inconsistent with its theory of the case. 763 F. Supp. 2d 303, 344 (E.D.N.Y. 2011). The government has made no such concession here.

Sampson also relies on *Stitt*, 760 F. Supp. 2d at 582-83, in which the Court struck certain mental state factors, in part because these factors were inconsistent with the evidence, and in part because of the risk that multiple gateway factors could skew the jury's weighing of whether the death penalty was justified. That case, however, was decided under 21 U.S.C. § 848, and "in a Section 848 case, the jury is to consider the type of intent as an aggravating factor itself, rather than a threshold matter . . . ." *Id.* at 582. Conversely, under the FDPA, the jury is not to consider the gateway mental states when weighing whether a death sentence is the appropriate punishment. 18 U.S.C. § 3593(e). Accordingly, the reasoning in Stitt that there is "the potential that the inclusion of more than one mental state factor could skew the weighing process" carries little force here. *Stitt*, 760 F. Supp. 2d at 583. *See United States v. Cooper*, 91 F. Supp. 2d 90, 110 (D.D.C. 2000) (noting that, under the FDPA, "[i]f the jury finds one or all four of the [gateway] factors, there is no risk of skewing because the jury finds intent, and then starts with a clean slate in evaluating separate aggravating factors.").

In any event, to the extent that *Stitt* — as well as *United States v. Johnson*, 377 F. Supp. 2d 689, 694 (N.D. Iowa 2005), another case cited by Sampson — suggest

that the Court should strike any gateway mental states that are inconsistent with the government's evidence or theory, the Court declines to do so prior to the resentencing trial. Nevertheless, "if the government fails to present evidence from which a reasonable juror could find that a particular mental state existed, the jury will not be instructed on that mental state, and will not be permitted to return a finding thereon." *Cheever*, 423 F. Supp. 2d at 1201.

Finally, as the Court noted at the hearing on this Motion, the Court will endeavor to craft the special verdict slip in this case in a way that requires the jury to consider each gateway mental state one-by-one, and in a manner that instructs the jury not to consider the remainder of the gateway mental states once —and if — they have found unanimously that one such state exists beyond a reasonable doubt. The purpose of doing so is to safeguard against the risk that the jury gives undue consideration to the gateway mental states in the course of its deliberations.[20]

In all, to the extent Sampson seeks to strike certain gateway mental states from the amended notice of intent, the Motion is DENIED.

I. *Other Serious Acts of Violence*

For both Counts of carjacking, the government's amended notice of intent to seek the death penalty lists as non-statutory aggravating factors "Other Serious

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[20] With regard to Sampson's argument that the jury will not be able to follow the Court's instructions not to consider the gateway mental states when weighing the appropriateness of a death sentence, the Court notes that it is "duty-bound to presume that jurors will follow their instructions." *Wilkins v. United States*, 754 F.3d 24, 30 (1st Cir. 2014).

Acts of Violence — Murder of Robert 'Eli' Whitney,"[21] "Other Serious Acts of Violence — Carjacking of William Gregory,"[22] and "Other Serious Acts of Violence – Bank Robberies."[23] Doc. No. 1326 at 3, 6. Sampson urges the Court to consolidate these factors into one non-statutory aggravating factor of "Other Serious Acts of Violence" for each Count. In addition, he requests that the carjacking of Mr. Gregory and the bank robberies be stricken under the Eighth Amendment or 18 U.S.C. § 3593(c) because they are not relevant to the question of whether Sampson should be sentenced to death or life in prison without the possibility of release.

Prior to Sampson's first sentencing trial, the Court noted that a "concern implicated by including the bank robberies and carjacking as distinct non-statutory aggravating factors is the risk that jurors will improperly assign extra weight to aggravating factors because of sheer numerosity." *Sampson*, 275 F. Supp. 2d at 106. Despite this concern that the "sheer numerosity" of aggravating factors could influence the

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[21] The text of these factors reads: "The defendant, Gary Lee Sampson, on or about July 30, 2001, in Meredith, New Hampshire, committed the murder of Robert 'Eli' Whitney." Doc. No. 1326 at 3, 6.

[22] The government's amended notice of intent explains these factors as follows: "The defendant, Gary Lee Sampson, on or about July 31, 2001, committed the carjacking of William Gregory in a 1989 Chrysler LeBaron, Vermont registration CSM916." Doc. No. 1326 at 3, 6.

[23] These factors state that the "defendant, Gary Lee Sampson, committed the following acts of violence[,]" and then proceed to list five armed bank robberies, including the date and location of each robbery. Doc. No. 1326 at 3-4, 6-7. The Court, supra, struck one of these robberies from the amended notice of intent.

jury's decision, the Court did not require that the three "Other Serious Acts of Violence" factors be consolidated into one factor per Count. Instead, the Court permitted the jury in the first sentencing trial to consider the murder of Mr. Whitney, the carjacking of Mr. Gregory, and the armed bank robberies as distinct non-statutory aggravating factors pertaining to each Count of carjacking resulting in death. Doc. No. 654 at 5- 6; Doc. No. 654-2 at 5-6. The Court, however, instructed the jury not to render a verdict in favor of death based simply on the number of aggravating factors:

> You must decide if the proven aggravating factor or factors *sufficiently* outweigh the proven mitigating factors. This is not a matter of arithmetic. You are not being asked to simply count the total number of aggravating and mitigating factors and reach a decision based on which number is greater. Instead, you must consider the weight and value that you feel should be given to each factor. Different factors may be given different weights or values by different jurors. You might find that a single aggravating factor is serious enough to outweigh several mitigating factors. Similarly, a single mitigating factor might outweigh several aggravating factors.

Doc. No. 1870 at 56-57. The First Circuit then affirmed the Court's decision "authorizing the jury to consider four of [the] robberies as potential non-statutory aggravating factors." *Sampson*, 486 F.3d at 46. Likewise, the First Circuit noted that Sampson conceded

on appeal that the murder of Mr. Whitney constituted a valid non-statutory aggravating factor. *Id.* at 44.[24]

It is true that some courts have indicated that non-statutory aggravating factors must be consolidated where they attend to the same conduct or are probative of the same issue. *See United States v. Johnson*, 915 F. Supp. 2d 958, 1031-32 (N.D. Iowa 2013) (noting that "if the defendant can demonstrate that specific separate 'nonstatutory aggravating factors' are so closely-related factually or that they are probative of essentially the same issue such that treating them as separate factors improperly inflates the number of 'aggravating factors,' [the court] will likely require the prosecution to reformulate those factors into a single 'umbrella factor'"; noting also that "separate incidents of uncharged criminal conduct may more properly be reformulated as a single 'uncharged criminal conduct' 'non-statutory aggravating factor'"), *vacated on other grounds*, 764 F.3d 937 (8th Cir. 2014); *Stitt*, 760 F. Supp. 2d at 586 (requiring the government to combine aggravating factors into a "single factor" where the separate factors "all revolve around the same conduct"); *United States v. Bin Laden*, 126 F. Supp. 2d 290, 300 (S.D.N.Y. 2001) (consolidating two aggravating factors, and holding that "the Government's attempt to spin off multiple freestanding aggravators from what should really only be one represents a strategy that should not be permitted" where "such parsing of categories serves no evidentiary purpose (since such evidence would still be admitted under the aegis of the umbrella factor)," and,

[24] To be sure, the First Circuit did not address whether the Court should have consolidated the bank robberies, Mr. Gregory's carjacking, and Mr. Whitney's murder into one factor per Count that concerned all Sampson's other acts of violence.

therefore, "the sole motivation for doing so is to ratchet up the number of aggravating factors").

Here, however, each aggravating factor of "Other Serious Acts of Violence" pertains to a distinct type of violent conduct — murder, carjacking, and bank robbery — occurring at different times. Accordingly, different evidence supports the different types of conduct. And, even though each act of violence bears, to some extent, on the same aspects of Sampson's purported character, the government notes correctly that the murder, carjacking and robberies bear also, to a certain degree, on separate characteristics of Sampson, ranging from his willingness to kill to his willingness to steal.

Moreover, given that the Court was concerned with the volume of aggravating factors at Sampson's first sentencing trial but nevertheless permitted the jury — with careful instructions — to consider Mr. Whitney's murder, Mr. Gregory's carjacking, and the armed bank robberies as separate aggravating factors in connection with each Count of carjacking, and that the First Circuit in affirming Sampson's death sentence did not reject the use of the bank robberies or the murder as aggravating factors, the Court declines to require the government to consolidate the robberies, murder and carjacking into a single aggravating factor for the resentencing trial.[25]

With regard to Sampson's additional argument that the bank robberies and Mr. Gregory's carjacking are irrelevant to the question of whether he should be executed, the First Circuit indicated that the bank

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[25] In ruling that the government need not consolidate Sampson's other acts of violence into one non-statutory aggravating factor, the Court takes no position on whether consolidation of the mitigating factors proposed by the defense is appropriate.

robberies, in fact, are relevant to that issue. *Sampson*, 486 F.3d at 46. Moreover, the Court is satisfied that Mr. Gregory's carjacking is relevant to the question of whether Sampson lives or dies, in that it tends to show Sampson's violent nature and further reveals the extent of his criminal activity after he had already committed the underlying offenses.

In sum, insofar as Sampson's Motion requests that the "Other Serious Acts of Violence" non-statutory aggravating factors be consolidated, and that the armed bank robberies and Mr. Gregory's carjacking be stricken as irrelevant, the Motion is DENIED.

J. *Contemporaneous Convictions for More Than One Murder, and Murder to Obstruct Justice*

Next, Sampson contends that the Court must strike two non-statutory aggravating factors — "Contemporaneous Convictions for More Than One Murder" and "Murder to Obstruct Justice" — because Sampson was convicted of carjacking resulting in death, and not convicted of murder. As to the "Contemporaneous Convictions" factors, Sampson is correct as a matter of fact. "Conviction" is a term of legal significance, and Sampson was not convicted of murder with regard to Mr. McCloskey or Mr. Rizzo. Therefore, it is ORDERED that the government correct these aggravating factors within seven days. However, the gravamen of the government's theory is that Sampson murdered Mr. McCloskey and Mr. Rizzo, even though these murders came in the course of a carjacking. Therefore, the "Murder to Obstruct Justice" aggravating factors, which contain no mention of a conviction, are consistent with the substance of the government's theory, and the Court declines to rename them.

Sampson argues also that the "Contemporaneous Convictions for More Than One Murder" aggravating factors must be stricken because they conflict with, or expand upon, the Second Superseding Indictment. While the grand jury charged in the Indictment that Sampson "intentionally killed and attempted to kill more than one person in a *single* criminal episode," Doc. No. 74 at 4, 6 (emphasis added), the aggravating factors in the amended notice of intent state that Sampson "intentionally killed Philip A. McCloskey and Jonathan M. Rizzo over the course of a *series* of criminal episodes." Doc. No. 1326 at 4, 7 (emphasis added). Sampson contends, therefore, that the government's assertion of the "Contemporaneous Convictions for More Than One Murder" factors amounts to a contradiction and expansion of the charges in the Indictment in violation of Sampson's Sixth Amendment rights.

Insofar as Sampson argues that the amended notice of intent unconstitutionally expands the charges against him, his claim is without merit. As this Court recently held, "[i]n the context of the FDPA, *Apprendi* and its progeny do not require that non-statutory aggravators be alleged in the indictment or found to be sufficiently supported by the grand jury." *United States v. Sampson*, Cr. No. 01-10384-MLW, 2015 WL 7962394, at *30 (D. Mass. Dec. 2, 2015). To be sure, in the wake of *Ring*, in which the Supreme Court "held that an aggravating factor necessary for imposition of the death penalty has to be found by a jury," courts of appeals "have unanimously found that th[is] holding applies with equal force in the context of a Fifth Amendment challenge to the lack of *statutory* aggravating factors in an indictment charging a death-eligible crime under the FDPA." *United States v. Brown*, 441 F.3d 1330, 1367 (11th Cir. 2006) (emphasis added). However, because

non-statutory aggravating factors "are neither sufficient nor necessary under the FDPA for a sentence of death," *id.* at 1368 (quoting *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir. 2005)), courts of appeals "have soundly rejected the argument that non-statutory aggravating factors must be alleged in the indictment." *Id.* (collecting cases); *Sampson*, 2015 WL 7962394, at *30 n.26; *United States v. Lighty*, 616 F.3d 321, 367 (4th Cir. 2010). Accordingly, the amended notice of intent's inclusion of non-statutory aggravating factors, such as "Contemporaneous Convictions for More Than One Murder," does not offend Sampson's Sixth Amendment rights, even though these factors did not appear in his indictment.[26]

Sampson's contention that these factors should be stricken because they contradict the Second Superseding Indictment fares no better. In 2003, the Court considered an identical issue with regard to the original notice of intent to seek the death penalty, which asserted non-statutory aggravating factors of "Contemporaneous Convictions for More Than One Murder" that are identical to those in the amended notice of intent. *Compare* Doc. No. 103 *with* Doc. No. 1326. As the Court explained in discussing these factors:

> When the government obtained the Second Superseding Indictment, it contained a special finding alleging the statutory aggravating factor

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[26] The concerns identified in *United States v. Green*, 372 F. Supp. 2d 168, 173 (D. Mass. 2005), resulting in a different approach to aggravating factors alleging the commission of unadjudicated prior criminal conduct are inapplicable here given Sampson's conviction for the murder of Mr. Whitney, the seemingly undisputed evidence of Sampson's commission of the armed bank robberies, and the law of the case doctrine.

> of multiple killings in a single criminal episode. However, when the government filed its Notice of Intent to Seek the Death Penalty, it did not include this statutory aggravating factor and instead put the defendant on notice of its intent to prove the non-statutory aggravating factor at issue."

Sampson, 275 F. Supp. 2d at 107 n.21 (emphasis added). The Court nevertheless permitted the jury to hear the non-statutory aggravating factors of "Contemporaneous Convictions for More Than One Murder" during a series of criminal episodes. *Id.* at 107-08. Given that Sampson has not put forth a compelling reason, based either in law or fact, to veer from the Court's approach at the first sentencing trial, the Court declines to strike the "Contemporaneous Convictions for More Than One Murder" factors on the ground that they are inconsistent with the Second Superseding Indictment.

Alternatively, Sampson argues that the "Contemporaneous Convictions for More Than One Murder" factors should not be alleged as to each count of carjacking resulting in death. Instead, Sampson contends, the Court should merge them into one factor to prevent against undue weight being given to these factors. This Court has rejected this argument:

> "Double-counting occurs when one aggravating circumstance for a crime found by the jury necessarily subsumes another aggravator found by the jury for the same crime." *Hale v. Gibson*, 227 F.3d 1298, 1325 (10th Cir. 2000). In this case, there are two crimes for which the defendant could receive the death penalty. There is no double-counting when the jury considers each aggravating factor once for each crime.

Sampson, 275 F. Supp. 2d at 107. Accordingly, it is inappropriate for the Court to limit the factor to appearing in only one Count.

In all, to the extent Sampson's Motion argues that the "Contemporaneous Convictions for More Than One Murder" aggravating factors must be stricken, the Motion is DENIED, except that the government shall correct, within seven days, these aggravating factors due to the use of the word "convictions."

K. *Evidence Remote in Time*

Insofar as Sampson's Motion urges the Court to exclude under the Eighth Amendment and 18 U.S.C. § 3593(c) any evidence that is too remote in time to be reliable or probative on the question of whether Sampson is sentenced to execution or life in prison without the possibility of release, the Motion is DENIED WITHOUT PREJUDICE. As stated, supra, the relevance and reliability of specific evidence is a separate issue from the validity of the amended notice of intent to seek the death penalty, and the Court will consider the reliability and relevance of certain evidence separately.

L. *Judicial Screening of Evidence*

Finally, Sampson contends that the Court should screen the evidence supporting a given aggravating factor to ensure that it is reliable before permitting the jury to consider the factor. To this end, Sampson argues that the Court should require the government to submit a proffer of its evidence supporting the aggravating factors.

The Court's resolution of this issue is animated by a few principles. First, the evidence that Judge Wolf ruled admissible at Sampson's first sentencing trial is

judicially screened and, therefore, is presumptively admissible at the resentencing trial. Conversely, the evidence that Judge Wolf ruled inadmissible at the first trial is presumptively inadmissible at the resentencing trial, and the government may not admit such evidence without first seeking the Court's permission. Two universes of evidence remain: (1) evidence that arose before the first trial, but that the government did not offer then, and (2) evidence that has arisen after Sampson's first trial. The government has indicated that, with limited exception, it will not seek to admit evidence it had at the time of the first trial but did not offer. *See* Doc. No. 2133 at 2 ("[T]he government again reiterates that it intends to present substantially the same case-in-chief in 2016 that it presented in 2003."); Doc. No. 1833 at 3-5. Given that the government seeks to admit a rather small amount of evidence that arose before the first trial but was not offered therein, the Court will address the admissibility of such evidence in response to particular challenges to particular pieces of evidence. As for the second universe of evidence, the government has submitted a proffer of the evidence it intends to introduce regarding Sampson's conduct in prison since the first trial. Doc. No. 2021. Accordingly, Sampson's request for a proffer of the government's evidence in aggravation is DENIED WITHOUT PREJUDICE AS MOOT.

III. *Conclusion*

Insofar as the Motion seeks to strike the non-statutory aggravating factors of lack of remorse, the Motion (Doc. No. 1904-1) is ALLOWED, and the Court strikes these factors from the government's amended notice of intent to seek the death penalty. Moreover, the Motion is ALLOWED AS UNOPPOSED in that it is

ORDERED that the following are stricken from the amended notice of intent to seek the death penalty: (1) the assertion that Sampson tortured Mr. McCloskey and Mr. Rizzo in the statutory aggravating factors of "Heinous, Cruel, and Depraved Manner of Committing the Offense"; (2) the assertion that Mr. McCloskey was "vulnerable due to old age" in the statutory aggravating factor of "Vulnerability of Victim"; (3) the "Substantial Planning and Premeditation" statutory aggravating factor asserted as to Count 1, which pertains to the killing of Mr. McCloskey; and (4) the assertion that Sampson committed an armed bank robbery on May 17, 2001 in the non-statutory aggravating factors of "Other Serious Acts of Violence — Bank Robberies." The Motion is further ALLOWED in that it is ORDERED that the "Contemporaneous Convictions for More Than One Murder" aggravating factors be corrected, within seven days, due to the use of the word "convictions." In all other respects, however, the Motion is DENIED.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	Criminal Action
	)	No. 01-10384-LTS
GARY LEE SAMPSON	)	

ORDER ON DEFENDANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY (DOC. NO. 2246)

June 2, 2016

SOROKIN, J.

Gary Lee Sampson pled guilty to two counts of carjacking resulting in death and was sentenced to death in 2004 after a penalty phase hearing which lasted several months. Although the jury unanimously recommended a sentence of death, it also determined that the government had failed to prove two non-statutory aggravating factors beyond a reasonable doubt: that Sampson posed a future danger in prison to other inmates or corrections officers, and that Sampson committed one or both of the underlying murders in order to obstruct justice. Doc. No. 654 at 7, 11; Doc. No. 654-2 at 7, 11. In 2011, the Court (Wolf, J.) vacated the death sentence in light of juror misconduct, and the First Circuit affirmed, ruling that Sampson is entitled to a new

penalty phase hearing pursuant to 28 U.S.C. § 2255. *Sampson v. United States*, 724 F.3d 150, 170 (1st Cir. 2013). The case was reassigned to this session of the Court on January 6, 2016.

In April 2016, this Court ruled that the Double Jeopardy Clause of the Fifth Amendment does not bar the government from again seeking to prove the two non-statutory aggravating factors which the first jury rejected. Doc. No. 2189 at 6-10, 20. Sampson wishes to appeal that ruling, and has requested issuance of a certificate of appealability under 28 U.S.C. § 2253(c) "out of an abundance of caution," despite his belief that the requirements of § 2253(c) are "inapplicable to the order in question." Doc. No. 2246 at 1 n.1. The government has opposed Sampson's request based, in part, on its view that the relevant order is not "final" and, thus, not subject to appeal under § 2253(c) at this time. *See generally* Doc. No. 2264.

Section 2253 provides that "the final order" in "a proceeding under section 2255" is "subject to review, on appeal," but only if the petitioner is first granted a certificate of appealability. § 2253(a), (c). Generally speaking, the "final order" in § 2255 proceedings enters only when "the defendant is sentenced anew." *Sampson*, 724 F.3d at 157; *accord Andrews v. United States*, 373 U.S. 334, 339-40 (1963). Obviously, no such final decision has issued here, as Sampson's new penalty phase trial has not yet occurred. If the question at issue in Sampson's impending appeal were not one involving Double Jeopardy, the Court would deny the requested certificate of appealability without further discussion. The Fifth Amendment's Double Jeopardy Clause, however, presents a unique set of considerations. *See Abney v. United States*, 431 U.S. 651, 663 (1977)

(emphasizing "the special considerations permeating claims of [double jeopardy] which justify a departure from the normal rule of finality").

In a typical criminal case, a defendant may immediately appeal a "pretrial order[] rejecting [a] claim[] of former jeopardy," without awaiting a "final decision" resolving the entire criminal action. *Id.* at 662. The Supreme Court has held that such an order, though "lack[ing] the finality traditionally considered indispensable to appellate review, . . . fall[s] within the 'small class of cases' that [are] beyond the confines of the final-judgment rule." *Id.* at 659. This is so for several reasons. First, such an order "constitute[s] a complete, formal, and . . . final rejection of a criminal defendant's double jeopardy claim." *Id.* Second, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged." *Id.* And third, "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

Each of these reasons, identified by the Supreme Court in the context of ordinary criminal proceedings, similarly applies here. This Court's order denying Sampson's double jeopardy claim was a complete and final rejection of that claim, which attacks the two non-statutory aggravators without regard to whether the government will be able to offer sufficient proof of them at trial. And although the double jeopardy argument advanced by Sampson, if successful, would not prevent a second penalty phase hearing, it would materially

narrow the focus of the hearing by eliminating two non-statutory aggravating factors from the jury's consideration (and from the universe of evidence against which Sampson will be required to defend).[1] As such, for the same reasons the Supreme Court held pretrial double jeopardy rulings in criminal cases constituted "final decisions" appealable pursuant to 28 U.S.C. § 1291, *Abney*, 431 U.S. at 662, this Court will treat its order rejecting Sampson's double jeopardy challenge as a "final order" for purposes of § 2253.[2]

Thus, the Court will turn to the merits of Sampson's request and the government's contention that, even if a certificate is available here, Sampson cannot demonstrate he is entitled to one. A certificate of appealability is available to Sampson if he "has made a substantial showing of the denial of a constitutional right," § 2253(c)(2), i.e., if "reasonable jurists could debate whether (or, for that matter agree that) the [motion] should have been resolved in a different manner," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This standard is not onerous. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (noting petitioners need not

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[1] One of those two factors in particular — future dangerousness — is expected to entail testimony by a significant number of witnesses, including more than a dozen individuals who did not appear during Sampson's first penalty phase trial. That "new" portion of the government's case- in-chief — focusing on Sampson's conduct while incarcerated at USP Terre Haute since his first trial — has spurred substantial and time-consuming pretrial motion practice which has not concluded as yet. *See, e.g.*, Doc. Nos. 2173, 2179, 2237.

[2] Neither party has identified a ruling by a federal court considering this issue in the unusual circumstances presented here, nor has the Court has found such a ruling.

show "that the appeal will succeed," and instructing that certificates of appealability should not be denied based on a belief that "the applicant will not demonstrate an entitlement to relief"). Given the unusual circumstances presented in this case,[3] and for the reasons identified by Sampson in support of his request, *see* Doc. No. 2246 at 3-7, the Court finds Sampson has satisfied the requirements of § 253(c).[4] His application is, therefore, ALLOWED, and a certificate of appealability is ISSUED regarding the following question: Whether the Double Jeopardy Clause bars the government, at Sampson's new penalty phase hearing, from seeking to prove two non-statutory aggravating factors which the jury at Sampson's first penalty phase hearing found had not been proven beyond a reasonable doubt.[5]

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[3] Federal capital prosecutions are rare in this District, and a penalty phase retrial pursuant to 28 U.S.C. § 2255 is unprecedented here. Such proceedings also are uncommon in other federal jurisdictions. The Court is aware of only one other federal trial court decision examining the general issue presented here, and that case did not involve the additional problem of a verdict tainted by juror misconduct. *See* Doc. No. 2189 at 9 (discussing *United States v. Stitt*, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010)).

[4] The Court also notes that an immediate appeal will ensure that Sampson's second penalty phase retrial will be free from this particular constitutional error. If Sampson prevails in the Court of Appeals, the trial will proceed without the two relevant non-statutory aggravators; if this Court's decision is affirmed on appeal, the trial will proceed as the parties and the Court have prepared it. Waiting to appeal the double jeopardy ruling until after the second penalty phase trial runs the risk of necessitating a ***third*** trial in this matter, should Sampson prevail on this issue in a post- trial appeal.

[5] Whether appellate jurisdiction lies is, of course, a question for the Court of Appeals.

The undersigned respectfully requests that the Court of Appeals expedite any appeal of this issue taken by Sampson, in light of the unique posture of these proceedings. Both parties have stated, after ample consideration and in response to focused inquiry from the Court, that: a) any appeal by Sampson of the double jeopardy issue, absent an express order of stay from the Court of Appeals, will not interfere with the undersigned's authority to proceed with this case during the pendency of the appeal; and b) neither party believes a stay is necessary or appropriate in the event of an appeal. The Court agrees. Judge Wolf originally scheduled the new penalty phase hearing in this matter for February 2015 and, at Sampson's request, later continued the hearing to September 2015. That trial date was canceled when proceedings were stayed pending resolution of a motion by the government seeking Judge Wolf's recusal (and a related motion to reconsider after the recusal request was denied). Doc. Nos. 2024, 2037, 2049, 2077, 2093.

Shortly after the matter was reassigned to the undersigned, the Court established a ***firm*** trial date of September 14, 2016. Doc. No. 2138. The Court carefully selected the date in light of the time required to review the fifteen-year history of this case, the numerous then-pending motions requiring resolution, and the need for orderly pretrial development of substantial expert testimony to facilitate efficient use of jurors' time during trial. In addition, Sampson's lead death-qualified counsel, Michael Burt, is also counsel in another death penalty retrial currently pending in the District of Vermont. That case, which will encompass both guilt and penalty phases, is scheduled to commence in February 2017. The undersigned coordinated closely with the presiding judge in Vermont to select trial dates

that would permit prompt resolution of both matters while allowing Mr. Burt the time necessary to remain as counsel for both defendants. Under these circumstances, a delay — even a short one — may create a substantial risk of interfering with pretrial proceedings in the Vermont case and, thus, could necessitate a continuance of Sampson's penalty phase hearing of a year or more (i.e., until after the conclusion of all phases of the Vermont trial). Besides Sampson's possible appeal, nothing that has arisen to date in this Court's handling of this case suggests any basis for either the government or the defendant to seek a postponement of the September trial date.

In sum, if Sampson prevails on appeal, the penalty phase hearing, although narrowed, still will go forward. Proceedings associated with this second penalty phase hearing already have consumed substantial resources and effort on the part of the government, the defendant (represented by court-appointed counsel under the Criminal Justice Act), and the Court. Moreover, any delay would only exacerbate the difficulties these proceedings pose for the families of the victims and increase the expense for the taxpayers. For all of these reasons, it appears to the undersigned as though the interests of all major stakeholders here would be best served by proceeding according to the existing schedule, with trial commencing on September 14, 2016.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR No. 01-10384-MLW
	)	
GARY LEE SAMPSON	)	

VERDICT FORM FOR COUNT 1
CARJACKING RESULTING IN THE DEATH OF PHILIP MCCLOSKEY

[page 2]

PART ONE – AGE OF THE DEFENDANT

Answer the following question.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, was eighteen years of age or older at the time he committed the carjacking resulting in the death of Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

If you answered this question "YES", then continue with Part Two of this Verdict Form. If you answered this question "NO", then continue with Part Seven of this

Verdict Form.

[page 3]

PART TWO – GATEWAY ELIGIBILITY FACTORS

Answer each of the following four questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally killed Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally inflicted serious bodily injury that resulted in the death of Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

C. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally engaged in conduct intending that Philip McCloskey be killed or that lethal force would be used against Philip McCloskey, and Philip McCloskey died as a direct result of that conduct?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

D. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally and specifically engaged in conduct that he knew would create a grave risk of death of a person other than to himself and this conduct constituted a reckless disregard for human life, which directly resulted in the death of Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

If you answered A, B, C *or* D "YES", then continue with Part Three of this Verdict Form. If you answered A, B, C *and* D "NO", then continue with Part Seven of this Verdict Form.

[page 4]

PART THREE – STATUTORY AGGRAVATING FACTORS

Answer both of the following two questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the carjacking resulting in the death of Philip McCloskey in an especially heinous, cruel, or depraved manner in that it involved serious physical abuse to Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that Philip McCloskey was particularly vulnerable due to infirmity?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

If you answered A *or* B "YES", then continue with Part Four of this Verdict Form. If you answered A *and* B "NO", then continue with Part Seven of this Verdict Form.

[page 5]

PART FOUR – NONSTATUTORY AGGRAVATING FACTORS

Answer each of the following seven questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the murder of Robert Whitney on or about July 30, 2001 in Meredith, New Hampshire?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the carjacking of a 1989 Chrysler LeBaron, Vermont registration CSM916, from William Gregory on or about July 31, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[page 6]

C. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed any of the following armed robberies:

(1) armed robbery of First National Bank, Archdale, North Carolina, on or about May 24, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(2) armed robbery of Lexington State Bank, Lexington, North Carolina, on or about May 31, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(3) armed robbery of Branch Banking and Trust Company, Denton, North Carolina, on or about June 15, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(4) armed robbery of First Bank, Archdale, North Carolina, on or about July 10, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

D. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson,

intentionally killed Philip McCloskey and Jonathan Rizzo over the course of a series of criminal episodes?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[page 7]

E. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, murdered Philip McCloskey for the sole or primary purpose of preventing him from reporting the attempted theft of his automobile to authorities?

ALL 12 JURORS SAY YES:

1 OR MORE JURORS SAY NO: √

F. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, caused injury, harm, or loss to the family of Philip McCloskey because of Philip McCloskey's personal characteristics as an individual human being and the impact of the death upon Philip McCloskey's family?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

G. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to

the lives and safety of prison officials and inmates as demonstrated by his history of prison misconduct?

ALL 12 JURORS SAY YES:

1 OR MORE JURORS SAY NO: √

Regardless of how you answered the questions in this Part, continue with Part Five of this Verdict Form.

[page 8]

PART FIVE – MITIGATING FACTORS

For each of the following seventeen mitigating factors, indicate the number of jurors, if any, who find that the defendant has proven, *by a preponderance of the evidence*, that the mitigating factor exists.

A. If not sentenced to death, Gary Sampson will be sentenced to a term of life in prison without any possibility of release.

NUMBER OF JURORS WHO SAY YES: 12

B. At the time he committed the carjacking resulting in the death of Philip McCloskey, Gary Sampson's capacity to conform his conduct to the requirements of the law was significantly impaired.

NUMBER OF JURORS WHO SAY YES: 0

C. At the time he committed the carjacking resulting in the death of Philip McCloskey, Gary Sampson was under a severe mental or emotional disturbance.

NUMBER OF JURORS WHO SAY YES: 0

D. At the time he committed the carjacking resulting in the death of Philip McCloskey, Gary Sampson was mentally ill.

NUMBER OF JURORS WHO SAY YES: 0

E. Gary Sampson is now mentally ill.

NUMBER OF JURORS WHO SAY YES: 0

F. Gary Sampson has a brain dysfunction.

NUMBER OF JURORS WHO SAY YES: 0

G. Gary Sampson attempted to surrender himself to the FBI before either of the offenses charged in this case occurred.

NUMBER OF JURORS WHO SAY YES: 8

[page 9]

H. Gary Sampson called 911 and surrendered himself to the Vermont State Police after the offenses charged in this case occurred.

NUMBER OF JURORS WHO SAY YES: 12

I. Following his surrender, Gary Sampson cooperated with every investigating agency which wished to speak with him about the offenses charged in this case.

NUMBER OF JURORS WHO SAY YES: 11

J. Gary Sampson's post-arrest statements led to the recovery of Jonathan Rizzo's body.

NUMBER OF JURORS WHO SAY YES: 12

K. Gary Sampson's post-arrest statements led to the recovery of significant items of physical evidence later used in this prosecution.

NUMBER OF JURORS WHO SAY YES: 12

L. Gary Sampson offered to plead guilty to the murders in February 2002, and to accept a sentence of life in prison without possibility of release, at a time when the Department of Justice had not decided whether to seek the death penalty.

NUMBER OF JURORS WHO SAY YES: 12

M. On September 13, 2003, Gary Sampson voluntarily pled guilty to the two charges in this case.

NUMBER OF JURORS WHO SAY YES: 12

N. By his conduct Gary Sampson has accepted responsibility for his crimes.

NUMBER OF JURORS WHO SAY YES: 5

O. As a child, Gary Sampson was the subject of verbal, emotional, and/or physical abuse.

NUMBER OF JURORS WHO SAY YES: 0

P. Gary Sampson is remorseful for his conduct.

NUMBER OF JURORS WHO SAY YES: 0

[page 10]

Q. If Gary Sampson is executed, one or more other people will suffer grief and loss.

NUMBER OF JURORS WHO SAY YES: 11

* * * *

Regardless of how you answered the questions in this Part, continue with Part Six of this Verdict Form.

[page 11]

PART SIX – DETERMINATION OF SENTENCE

Answer the following question. If the answer to Question 6A is "YES", each juror must sign his or her name. If the answer is "NO", the Foreperson must sign his or her name. If you answered Question 6A "YES", then continue with Part Seven of this Verdict Form. If you answered Question 6A "NO", then answer Question 6B.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factors found to exist to make death, rather than life in prison without the possibility of parole, the appropriate penalty for Gary Sampson for the carjacking resulting in the death of Philip McCloskey?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[Signatures omitted.]

DATE Dec. 22, 2003

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR No. 01-10384-MLW
	)	
GARY LEE SAMPSON	)	

VERDICT FORM FOR COUNT 2
CARJACKING RESULTING IN THE DEATH OF JONATHAN RIZZO

[page 2]

PART ONE – AGE OF THE DEFENDANT

Answer the following question.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, was eighteen years of age or older at the time he committed the carjacking resulting in the death of Jonathan Rizzo?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

If you answered this question "YES", then continue with Part Two of this Verdict Form. If you answered this question "NO", then continue with Part Seven of this

Verdict Form.

[page 3]

PART TWO – GATEWAY ELIGIBILITY FACTORS

Answer each of the following four questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally killed Jonathan Rizzo?

ALL 12 JURORS SAY YES: 12 √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally inflicted serious bodily injury that resulted in the death of Jonathan Rizzo?

ALL 12 JURORS SAY YES: 12 √

1 OR MORE JURORS SAY NO:

C. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally engaged in conduct intending that Jonathan Rizzo be killed or that lethal force would be used against Jonathan Rizzo, and Jonathan Rizzo died as a direct result of that conduct?

ALL 12 JURORS SAY YES: 12 √

1 OR MORE JURORS SAY NO:

D. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally and specifically engaged in conduct that he knew would create a grave risk of death of a person other than to himself and this conduct constituted a reckless disregard for human life, which directly resulted in the death of Jonathan Rizzo?

ALL 12 JURORS SAY YES: 12 √

1 OR MORE JURORS SAY NO:

If you answered A, B, C *or* D "YES", then continue with Part Three of this Verdict Form. If you answered A, B, C *and* D "NO", then continue with Part Seven of this Verdict Form.

[page 4]

PART THREE – STATUTORY AGGRAVATING FACTORS

Answer both of the following two questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the carjacking resulting in the death of Jonathan Rizzo in an especially heinous, cruel, or depraved manner in that it involved serious physical abuse to Jonathan Rizzo?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the carjacking resulting in the death of Jonathan Rizzo after substantial planning and premeditation to cause the death of Jonathan Rizzo?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

If you answered A *or* B "YES", then continue with Part Four of this Verdict Form. If you answered A *and* B "NO", then continue with Part Seven of this Verdict Form.

[page 5]

PART FOUR – NONSTATUTORY AGGRAVATING FACTORS

Answer each of the following seven questions.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the murder of Robert Whitney on or about July 30, 2001 in Meredith, New Hampshire?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

B. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed the carjacking of a 1989 Chrysler

LeBaron, Vermont registration CSM916, from William Gregory on or about July 31, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[page 6]

C. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, committed any of the following armed robberies:

(1) armed robbery of First National Bank, Archdale, North Carolina, on or about May 24, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(2) armed robbery of Lexington State Bank, Lexington, North Carolina, on or about May 31, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(3) armed robbery of Branch Banking and Trust Company, Denton, North Carolina, on or about June 15, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

(4) armed robbery of First Bank, Archdale, North Carolina, on or about July 10, 2001?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

D. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, intentionally killed Philip McCloskey and Jonathan Rizzo over the course of a series of criminal episodes?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[page 7]

E. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, murdered Jonathan Rizzo for the sole or primary purpose of preventing him from reporting the theft of his automobile to authorities?

ALL 12 JURORS SAY YES:

1 OR MORE JURORS SAY NO: √

F. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, caused injury, harm, or loss to the family of Jonathan Rizzo because of Jonathan Rizzo's personal characteristics as an individual human being and the impact of the death upon Jonathan Rizzo's family?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

G. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the defendant, Gary Sampson, is likely

to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of prison officials and inmates as demonstrated by his history of prison misconduct?

ALL 12 JURORS SAY YES:

1 OR MORE JURORS SAY NO: √

Regardless of how you answered the questions in this Part, continue with Part Five of this Verdict Form.

[page 8]

PART FIVE – MITIGATING FACTORS

For each of the following seventeen mitigating factors, indicate the number of jurors, if any, who find that the defendant has proven, *by a preponderance of the evidence*, that the mitigating factor exists.

A. If not sentenced to death, Gary Sampson will be sentenced to a term of life in prison without any possibility of release.

NUMBER OF JURORS WHO SAY YES: 12

B. At the time he committed the carjacking resulting in the death of Jonathan Rizzo, Gary Sampson's capacity to conform his conduct to the requirements of the law was significantly impaired.

NUMBER OF JURORS WHO SAY YES: 0

C. At the time he committed the carjacking resulting in the death of Jonathan Rizzo, Gary Sampson

was under a severe mental or emotional disturbance.

NUMBER OF JURORS WHO SAY YES: 0

D. At the time he committed the carjacking resulting in the death of Jonathan Rizzo, Gary Sampson was mentally ill.

NUMBER OF JURORS WHO SAY YES: 0

E. Gary Sampson is now mentally ill.

NUMBER OF JURORS WHO SAY YES: 0

F. Gary Sampson has a brain dysfunction.

NUMBER OF JURORS WHO SAY YES: 0

G. Gary Sampson attempted to surrender himself to the FBI before either of the offenses charged in this case occurred.

NUMBER OF JURORS WHO SAY YES: 8

[page 9]

H. Gary Sampson called 911 and surrendered himself to the Vermont State Police after the offenses charged in this case occurred.

NUMBER OF JURORS WHO SAY YES: 12

I. Following his surrender, Gary Sampson cooperated with every investigating agency which wished to speak with him about the offenses charged in this case.

NUMBER OF JURORS WHO SAY YES: 11

J. Gary Sampson's post-arrest statements led to the recovery of Jonathan Rizzo's body.

NUMBER OF JURORS WHO SAY YES: 12

K. Gary Sampson's post-arrest statements led to the recovery of significant items of physical evidence later used in this prosecution.

NUMBER OF JURORS WHO SAY YES: 12

L. Gary Sampson offered to plead guilty to the murders in February 2002, and to accept a sentence of life in prison without possibility of release, at a time when the Department of Justice had not decided whether to seek the death penalty.

NUMBER OF JURORS WHO SAY YES: 12

M. On September 13, 2003, Gary Sampson voluntarily pled guilty to the two charges in this case.

NUMBER OF JURORS WHO SAY YES: 12

N. By his conduct Gary Sampson has accepted responsibility for his crimes.

NUMBER OF JURORS WHO SAY YES: 5

O. As a child, Gary Sampson was the subject of verbal, emotional, and/or physical abuse.

NUMBER OF JURORS WHO SAY YES: 0

P. Gary Sampson is remorseful for his conduct.

NUMBER OF JURORS WHO SAY YES: 0

[page 10]

Q. If Gary Sampson is executed, one or more other people will suffer grief and loss.

NUMBER OF JURORS WHO SAY YES: 11

* * * *

Regardless of how you answered the questions in this Part, continue with Part Six of this Verdict Form.

[page 11]

PART SIX – DETERMINATION OF SENTENCE

Answer the following question. If the answer to Question 6A is "YES", each juror must sign his or her name. If the answer is "NO", the Foreperson must sign his or her name. If you answered Question 6A "YES", then continue with Part Seven of this Verdict Form. If you answered Question 6A "NO", then answer Question 6B.

A. Do each and every one of you find that the government has proven, beyond a reasonable doubt, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factors found to exist to make death, rather than life in prison without the possibility of parole, the appropriate penalty for Gary Sampson for the carjacking resulting in the death of Jonathan Rizzo?

ALL 12 JURORS SAY YES: √

1 OR MORE JURORS SAY NO:

[Signatures omitted.]

DATE Dec. 23, 2003

* * * *

APPENDIX G

United States Court of Appeals
First Circuit

No. 12-1643

GARY LEE SAMPSON,

Petitioner, Appellee,

v.

UNITED STATES OF AMERICA,

Respondent, Appellant.

No. 12-8019

GARY LEE SAMPSON,

Respondent,

v.

UNITED STATES OF AMERICA,

Petitioner.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, *U.S. District Judge*]

Before

Lynch, *Chief Judge*,
Selya and Lipez, *Circuit Judges*.

Mark T. Quinlivan, Assistant United States Attorney, with whom *Carmen M. Ortiz*, United States Attorney, was on brief, for appellant.

William E. McDaniels, with whom *Jennifer G. Wicht*, *Cadence Mertz*, *Williams & Connolly LLP*, *J. Martin Richey*, *Elizabeth L. Prevett*, Federal Public Defender's Office, and *Susan K. Marcus* were on brief, for appellee.

July 25, 2013

SELYA, *Circuit Judge*. Few accouterments of our criminal justice system are either more fundamental or more precious than the accused's right to an impartial jury. That right is threatened when—as in this case—juror dishonesty occurs during the voir dire process yet is not discovered until well after final judgment has entered on the jury's verdict. But finality is also valuable, and not every instance of juror dishonesty requires setting aside a previously rendered verdict.

In its present posture, this case poses important questions about when and under what circumstances the belated discovery of juror dishonesty during the voir dire process demands vacatur of a jury verdict. The stakes are high — the jury here recommended a death sentence — and the cases that populate this arcane corner of the law are muddled.

The architecture of these appeals is easily described. Gary Lee Sampson, the defendant in the underlying

criminal case, is on death row following his conviction on two counts of carjacking (death resulting), a penalty-phase hearing in which the jury voted to recommend capital punishment, and an unsuccessful direct appeal. *See United States v. Sampson* (*Sampson I*), 486 F.3d 13 (1st Cir. 2007), *cert. denied*, 553 U.S. 1035 (2008). In an effort to undo his sentence, the defendant brought a habeas petition, 28 U.S.C. § 2255, and confronted the district court with a claim that juror dishonesty during the voir dire process antecedent to the penalty-phase hearing deprived him of an impartial jury. Following an evidentiary hearing, the district court agreed; it vacated the death sentence and ordered a new penalty-phase hearing. *United States v. Sampson* (*Sampson IV*), No. 01-10384, 2012 WL 1633296, at *15 (D. Mass. May 10, 2012); *United States v. Sampson* (*Sampson II*), 820 F. Supp. 2d 151, 202 (D. Mass. 2011). The government seeks immediate review of this decision.

We first address nuanced questions that cast doubt upon our appellate jurisdiction. Concluding, as we do, that we can proceed to the merits of the juror dishonesty claim, we adopt the district court's findings of fact, articulate the proper legal framework, array the district court's findings of fact against that framework, and hold that the defendant's sentence must be set aside and a new penalty-phase hearing conducted.

I. BACKGROUND

We rehearse here only those facts that are needed to tee up this proceeding. The reader who hungers for more details should consult the litany of earlier opinions in this case. *See, e.g.*, *Sampson I*, 486 F.3d 13; *Sampson II*, 820 F. Supp. 2d 151; *United States v. Sampson* (*Sampson III*), 820 F. Supp. 2d 202 (D. Mass. 2011); *see also McCloskey v. Mueller*, 446 F.3d 262 (1st Cir. 2006).

In 2001, the defendant engaged in a crime spree that took him up the eastern seaboard. The spree included a series of bank robberies in North Carolina and a botched attempt to surrender to the Federal Bureau of Investigation. *See McCloskey*, 446 F.3d at 264. The defendant then perpetrated two Massachusetts carjackings that led to the slaying of the carjacked drivers (Phillip McCloskey and Jonathan Rizzo). In each instance, the defendant hitched a ride with the victim, forced the victim at knifepoint to drive to a secluded area, and committed murder.

Following these gruesome incidents, the defendant fled to New Hampshire in Rizzo's vehicle, forcibly entered a house, and strangled the caretaker (Robert Whitney). He then drove Whitney's vehicle to Vermont, abandoned it, and resumed hitchhiking. Another Good Samaritan, William Gregory, gave him a lift. To repay his kindness, the defendant attempted to force Gregory at knifepoint to drive to a secluded spot. This time, however, the intended victim escaped. The defendant later called 911, surrendered to the authorities, and confessed.

On October 24, 2001, a federal grand jury sitting in the District of Massachusetts charged the defendant with two counts of carjacking, death resulting.[1] *See* 18 U.S.C. § 2119(3). A superseding indictment, deemed necessary to comply with *Ring v. Arizona*, 536 U.S. 584, 609 (2002), reiterated these charges; and the government served a notice of intent to seek the death penalty under

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[1] Since neither Whitney's murder nor Gregory's carjacking was charged by the government, these separate crimes were relevant only as aggravating factors for sentencing purposes. *Sampson II*, 820 F. Supp. 2d at 160.

the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3593(a).

In due course, the defendant admitted guilt with respect to both counts. The district court empaneled a death-qualified jury to consider the punishment to be imposed. *See id.* § 3593(b)(2)(A); *see also United States v. Green*, 407 F.3d 434, 436-37 (1st Cir. 2005) (discussing "death-qualified jury" requirements).

The voir dire lasted seventeen days and involved an extensive effort to ensure that each juror could — and would — decide the defendant's fate solely on the evidence. As a preliminary matter, hundreds of potential jurors were required to answer under oath seventy-seven written questions, carefully designed to elicit information concerning possible bias and life experiences that might have subconsciously affected an individual's ability to consider the defendant's sentence objectively. Many venirepersons were excused based on their written responses. Those who passed muster were interrogated by the court and the parties.

Prospective jurors were repeatedly directed to answer all questions accurately and honestly. All were advised that, upon request, responses concerning sensitive subjects (whether written or oral) would be kept out of the public record.

After individual questioning, the district court excused potential jurors for cause for a wide variety of reasons, including pretrial exposure to information about the case, attitudes that raised questions about impartiality, emotional life experiences comparable to matters that would be aired at trial, and responses that lacked candor. Eventually, the court seated a jury of twelve, along with six alternates. During the six-week

penalty-phase hearing, the court learned that two jurors had answered voir dire questions inaccurately and replaced them with alternates.

The penalty-phase hearing turned in large measure on the existence vel non of statutory and non-statutory aggravating factors and mitigating factors. *See* 18 U.S.C. §§ 3592(a), (c), 3593(c). In the end, the jury unanimously recommended that the defendant be sentenced to death on both counts. The district court followed this recommendation and imposed a sentence of death. *See id.* §§ 3553, 3594; *United States v. Sampson*, 300 F. Supp. 2d 275, 278 (D. Mass. 2004). The court also denied a flurry of post-trial motions. *United States v. Sampson*, 332 F. Supp. 2d 325, 341 (D. Mass. 2004).

On direct review, we affirmed the sentence. *Sampson I*, 486 F.3d at 52. The Supreme Court denied the defendant's ensuing petition for a writ of certiorari. *See Sampson v. United States*, 553 U.S. 1035 (2008).

On June 25, 2008, the district court appointed new counsel to handle post-conviction proceedings. *See* 18 U.S.C. § 3599(a)(2). After some procedural skirmishing, the defendant filed a petition to vacate, set aside, or correct the judgment. *See* 28 U.S.C. § 2255. Pertinently, the defendant claimed that he was deprived of the right to have his sentence decided by an impartial jury because three jurors, designated for the sake of anonymity as Jurors C, D, and G, had falsely answered material voir dire questions.[2]

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[2] The defendant's section 2255 petition also includes claims that he was denied effective assistance of counsel; that the government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); that the government committed misconduct during the grand jury process; that execution would violate his Eighth Amendment

The district court prudently convened an evidentiary hearing to determine the scope and severity of the allegedly inaccurate voir dire responses. This hearing was held over three non-consecutive days. The first session concerned all three of the contested jurors; the second and third sessions focused exclusively on Juror C.

After careful consideration, the district court concluded that the inaccuracies contained in Juror D's and Juror G's responses were unintentional errors that did not justify setting aside the results of the penalty-phase hearing. *Sampson II*, 820 F. Supp. 2d at 197-201. The court reached a different conclusion as to Juror C, finding that she had repeatedly and intentionally provided dishonest responses to important voir dire questions. *Id.* at 192-97. The court stated that truthful answers would have resulted in Juror C's excusal for cause during voir dire because the court would have "inferred bias." *Id.* at 165-66, 194-97. Consequently, the court set aside the defendant's sentence,[3] *id.* at 181-97, and on May 10, 2012, ordered a new penalty-phase hearing, *Sampson IV*, 2012 WL 1633296, at *15.

At the government's behest, the court subsequently certified the following questions for immediate appeal under 28 U.S.C. § 1292(b): "(1) whether [*McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548

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rights due to his severe mental impairment; and that the FDPA and/or the death penalty are unconstitutional. Only the jury dishonesty claim is before us.

[3] In a separate opinion, the court summarily dismissed some of the defendant's other claims. *See Sampson III*, 820 F. Supp. 2d at 212-13; *see also supra* note 2. These rulings need not concern us because the court has withheld the entry of orders on them. *Sampson IV*, 2012 WL 1633296, at *15.

(1984)] requires proof of actual bias or implied bias to obtain relief; and, if not, (2) whether [the district] court correctly stated the *McDonough* test." *Sampson IV*, 2012 WL 1633296, at *15.

Recognizing that its right to prosecute an immediate appeal of the district court's order was freighted with uncertainty, the government went down three different but complementary roads. First, it sought to pursue an appeal of the decision as a final order under 28 U.S.C. § 1291 and/or 18 U.S.C. § 3731. Second, it sought to pursue an interlocutory appeal under the aegis of 28 U.S.C. § 1292(b). Third, the government argued that, should we find the decision not otherwise immediately appealable, it nonetheless ought to be reviewed through an exercise of advisory mandamus. *See id.* § 1651. We have consolidated all of these initiatives.

Because resolution of the jurisdictional conundrum is logically antecedent to any discussion of the juror dishonesty claim, we start there.

II. APPELLATE JURISDICTION

The most conventional assurance of appellate jurisdiction is the existence of a final decision. *See id.* § 1291 (vesting courts of appeals with jurisdiction over "appeals from all final decisions of the district courts"). The government asseverates that the district court's decision vacating the defendant's sentence and granting him a new penalty-phase hearing is a final decision and, thus, is immediately appealable. The government is wrong.

The beacon by which we must steer is the Supreme Court's decision in *Andrews v. United States*, 373 U.S. 334 (1963). There, the Court held that an order in a section 2255 proceeding that vacated a previously

imposed sentence and required a new sentencing hearing was not a final decision and, thus, not immediately appealable. *Id.* at 339-40. Finality does not attach until the defendant is sentenced anew. *Id.*

The government contends that *Andrews* is not controlling because the decision appealed from here is not an order for resentencing but, rather, a grant of a new trial which, in a section 2255 case, is immediately appealable. *See United States v. Gordon*, 156 F.3d 376, 378-79 (2d Cir. 1998) (per curiam); *United States v. Allen*, 613 F.2d 1248, 1251 (3d Cir. 1980). In support, the government suggests that a penalty-phase hearing in a capital case is more akin to a traditional trial than to a resentencing. It emphasizes that a jury must be empaneled and certain aggravating factors must be proven beyond a reasonable doubt. *See* 18 U.S.C. § 3593(b)-(c); *Ring*, 536 U.S. at 602, 609.

To be sure, such similarities do exist, but they are superficial. In any event, the question of whether an order for a new penalty-phase hearing in a capital case should be characterized as a grant of a new trial as opposed to an order for resentencing is not open to us.[4] In *Andrews*, the Supreme Court stated squarely that "[w]here, as here, what was appropriately asked and appropriately granted was the resentencing of the petitioners, it is obvious that there could be no final disposition of the § 2255 proceedings until the petitioners were resentenced." 373 U.S. at 340. We are bound by

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[4] As the government points out, courts sometimes refer to a penalty-phase "trial." But the relevant portion of the FDPA, 18 U.S.C. § 3593(b), describes the penalty-phase proceeding as a "sentencing hearing." We think that Congress's description controls.

this precedent. *See Figueroa v. Rivera*, 147 F.3d 77, 81 n. 3 (1st Cir. 1998).

Given this holding, it is indisputable that the grant of a new penalty-phase hearing in a capital case is not a final disposition of the proceedings. "In general, a judgment or decision is final for the purpose of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *Parr v. United States*, 351 U.S. 513, 518 (1956) (internal quotation marks omitted). A decision ordering a new penalty-phase hearing in a capital case does not satisfy this benchmark. The litigation regarding the defendant's sentence will not terminate until after the conclusion of the penalty-phase hearing and the court sentences him anew.

In a variation on this theme, the government suggests that the order for a new penalty-phase hearing must be final because the last thing that the judge does in an FDPA case is to order a penalty-phase hearing (after all, under most circumstances, the FDPA requires the jury to determine the sentence). Thus, the government's suggestion goes, an order granting a new penalty-phase hearing is necessarily final.

This suggestion is hopeless. It may be a jury that determines the sentence, but it is the judge who must empanel the jury, preside over the new penalty-phase hearing, and impose the sentence. *See* 18 U.S.C. §§ 3593(d), 3594. Such a series of steps to be taken falls comfortably within the ambit of section 2255. *See* 28 U.S.C. § 2255(b).

In determining that no final decision has yet been rendered, we do not write on a pristine page. Two other

courts of appeals have confirmed the applicability of *Andrews* to capital penalty-phase hearings and concluded that no final disposition exists until the new hearing is complete and the court imposes a new sentence. *See United States v. Hammer*, 564 F.3d 628, 632-36 (3d Cir. 2009); *United States v. Stitt*, 459 F.3d 483, 485-86 (4th Cir. 2006). We agree with these courts.

We likewise reject the government's entreaty that the Criminal Appeals Act (CAA), 18 U.S.C. § 3731, which permits an appeal from an "order . . . granting a new trial" in a criminal case, furnishes a basis for jurisdiction. The *Andrews* Court specifically held that the CAA "has no applicability" to section 2255 proceedings. 373 U.S. at 338, 83 S.Ct. 1236. Andrews is binding on us.

This brings us to the government's assertion that we have jurisdiction under 28 U.S.C. § 1292(b). By its terms, section 1292(b) confers discretionary appellate jurisdiction over certain interlocutory orders not otherwise appealable. But this avenue is available only when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* The district court found that these conditions had been satisfied and certified questions to us under section 1292(b). *Sampson IV*, 2012 WL 1633296, at *11-15. The government, in turn, filed a petition asking that we agree to exercise our section 1292(b) jurisdiction.

There is, however, a threshold question. Congress has expressly restricted the operation of section 1292(b) to "civil action[s]." 28 U.S.C. § 1292(b). Whether a section 2255 proceeding may appropriately be characterized as a civil action for purposes of section

1292(b) is an unsettled question. This uncertainty results from pervasive "confusion over whether § 2255 proceedings are civil or criminal in nature." *Wall v. Kholi*, 131 S. Ct. 1278, 1289 n.7 (2011); *see* 3 Charles A. Wright et al., Federal Practice and Procedure § 622 (4th ed. updated Apr. 2013). Several cases indicate that section 2255 proceedings are predominantly civil. *See, e.g.*, *Heflin v. United States*, 358 U.S. 415, 418 n. 7 (1959); *Rogers v. United States*, 180 F.3d 349, 352 n. 3 (1st Cir. 1999). Other cases indicate that section 2255 proceedings are predominantly criminal. *See, e.g.*, *United States v. Martin*, 226 F.3d 1042, 1047 n. 7 (9th Cir. 2000); *United States v. Quin*, 836 F.2d 654, 655-56 n. 2 (1st Cir. 1988).

An advisory committee note suggests that a section 2255 proceeding should be considered "a continuation of the criminal case," rather than a separate civil action. *E.g.*, Rule 3, Rules Governing Section 2255 Proceedings, advisory committee's note. Some courts have found this controlling, *see, e.g.*, *United States v. Cook*, 997 F.2d 1312, 1319 (10th Cir. 1993), and others have not, *see, e.g.*, *United States v. Nahodil*, 36 F.3d 323, 328-29 (3d Cir. 1994).

To complicate the matter, some courts have abjured an ironclad characterization and have treated section 2255 proceedings as hybrid; that is, as civil for some purposes and criminal for other purposes. *See, e.g.*, *United States v. Hadden*, 475 F.3d 652, 664-65 (4th Cir. 2007) (collecting cases); *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir. 2003) ("[W]hile a § 2255 motion is deemed a further step in the movant's criminal case, it is also considered a civil remedy for purposes of appellate jurisdiction."); *see also Trenkler v. United States*, 536

F.3d 85, 94 (1st Cir. 2008) (making similar observation regarding analogous petition for writ of coram nobis).

There is a smattering of direct precedent; courts occasionally have authorized or refused to authorize the use of section 1292(b) in section 2255 cases. *Compare, e.g.*, *United States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005) (granting interlocutory appeal), *with, e.g.*, *Murphy v. Reid*, 332 F.3d 82, 83 (2d Cir. 2003) (per curiam) (denying interlocutory appeal). But these courts have done so without elaboration and the decisions are, therefore, generally unhelpful.

Given this lack of uniformity, we think that it is an open and enigmatic question as to whether section 1292(b) can be deployed in a section 2255 case. In the last analysis, we find it unnecessary to answer this vexing question today. Instead, we prefer to take a different route and exercise jurisdiction over the underlying juror dishonesty issue through our advisory mandamus power. *See United States v. Horn*, 29 F.3d 754, 769-70 (1st Cir. 1994); *see also* 16 Charles A. Wright et al., Federal Practice and Procedure § 3934.1 (2d ed. updated Apr. 2013) ("Writ review that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders.").

In pursuance of the All Writs Act, 28 U.S.C. § 1651, federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This provision allows a court of appeals, in certain circumstances, to afford immediate review to otherwise unappealable orders. *See, e.g.*, *Horn*, 29 F.3d at 769.

The type of writ most appropriate here is advisory mandamus. This writ is reserved for a small class of cases in which the usual general mandamus requirements are not met. *See id.* It is "strong medicine and, as such, should be dispensed sparingly." *In re Sony BMG Music Entm't*, 564 F.3d 1, 4 (1st Cir. 2009). We typically exercise this power to settle substantial questions of law when doing so would give needed guidance to lawyers, litigants, and lower courts. *See Horn*, 29 F.3d at 770. Advisory mandamus is particularly well-suited to the resolution of important questions "which, if not immediately addressed, are likely to recur and to evade effective review." *Green*, 407 F.3d at 439.

The case at hand fits snugly within these narrow confines. To begin, the case presents an unsettled question of systemic significance. *See Horn*, 29 F.3d at 769-70. Vacating a determination made by a jury that has heard evidence for days on end is a serious step. That is especially true in a capital case: "death is [ ] different," *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), and repastinating previously plowed ground in a capital case exposes the families of his victims and the defendant to renewed emotional strain. It also entails additional costs.

Additionally, the right at stake in this case deserves great respect. "All would agree that an impartial jury is an integral component of a fair trial" and must be "jealously safeguard[ed]." *Neron v. Tierney*, 841 F.2d 1197, 1200-01 (1st Cir. 1988).

Here, moreover, the framework for determining when a new trial is warranted because of juror dishonesty is not well-defined. The leading case on the effect of post-trial discovery of juror dishonesty is the Supreme

Court's seminal decision in *McDonough*. *McDonough* involved quite different facts and its teachings are open to interpretation. Further, the district court's reading of *McDonough* is problematic.

Two other data points are also worthy of note. First, the issue before us will almost certainly recur. The specter of juror dishonesty presents a recurring danger in all cases, civil and criminal, capital and non-capital. A clarification of the applicable legal standard would be a great utility in allowing courts in future cases to cope with this recurrent problem.

Second, forbearance on our part might well result in the juror dishonesty question evading review. Let us explain.

Were we to squander this opportunity to review the district court's decision, the new penalty-phase hearing ordered by the district court would proceed and a newly empaneled jury would recommend the sentence (life imprisonment or death). If the new jury votes for a death sentence, the government would have no incentive to appeal — and, indeed, would be foreclosed from doing so. *See United States v. Moran*, 393 F.3d 1, 12 (1st Cir. 2004). Nor would the defendant appeal the earlier grant of a new penalty-phase hearing since it occurred at his behest. *See United States v. Angiulo*, 897 F.2d 1169, 1216 (1st Cir. 1990) ("[D]efendants can[not] properly challenge on appeal a proposal they themselves offered . . . .").

If, however, the newly empaneled jury votes for life imprisonment, the district court's order may still evade review. The defendant, of course, would not appeal. For its part, the government might be prevented from appealing the earlier decision to vacate the death

sentence and order a new penalty-phase hearing. After all, the Double Jeopardy Clause, U.S. Const. amend. V, cl. 2, applies to sentencing hearings in capital cases. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 107-09 (2003).

A jury's disavowal of the death penalty the second time around, based on "findings sufficient to establish legal entitlement to the life sentence," would normally be tantamount to an acquittal for double jeopardy purposes. *Id.* at 107-09. Permitting the government to appeal after a second death-eligible jury has disavowed the death sentence would raise serious double jeopardy concerns, and at the least would lead to an incongruous result. Indeed, the Court has said that "[t]he policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal." *United States v. Wilson*, 420 U.S. 332, 352 (1975).

Withal, we note that the Double Jeopardy Clause may not bar a government appeal following a second penalty-phase jury's recommendation of life imprisonment. As a general rule, no double jeopardy problem is presented where an "error could be corrected without subjecting [the defendant] to a second trial before a second trier of fact." *Id.* at 345. The Court has held that "[w]hen a jury returns a verdict of guilty and a trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal, the Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilty." *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005). The Supreme Court has yet to speak directly to this difficult issue.

We need not enter this quagmire: for present purposes, it suffices to say that there is a credible possibility that the district court's decision would evade appellate scrutiny were we to defer review until after a

new penalty-phase hearing is completed. If a deferral of review carries with it an appreciable degree of danger that the underlying issue will escape review entirely, that danger argues in favor of exercising advisory mandamus. *See United States v. Pleau*, 680 F.3d 1, 4 (1st Cir. 2012) (en banc).

To say more about the question of appellate jurisdiction would serve no useful purpose. For the reasons elucidated above, we deem this case an appropriate one for the exercise of our advisory mandamus authority. Consequently, we proceed to the merits.

III. JUROR DISHONESTY

The government asserts that the district court erred as a matter of law in vacating the defendant's sentence and ordering a new penalty-phase hearing. In the government's view, the court misinterpreted the Supreme Court's opinion in *McDonough*, 464 U.S. 548 (1984), and erected an erroneous legal framework for handling post-trial claims of newly discovered juror dishonesty.

Our standard of review is bifurcated. We review findings of raw fact for clear error. See *United States v. George*, 676 F.3d 249, 256 (1st Cir. 2012). We review the correctness of the district court's legal analysis de novo. *See Prou v. United States*, 199 F.3d 37, 42 (1st Cir.1999).

The government's challenge primarily targets the district court's legal regime. We agree with the government that the district court misinterpreted *McDonough* and erected an erroneous framework. In this instance, however, applying the appropriate framework leads to the same result.

To explain these conclusions, we begin by canvassing the district court's findings of fact. We turn next to the appropriate legal framework. Then, we array the facts supportably found against the appropriate framework. Finally, we deal with two peripheral arguments advanced by the government.

A. *Facts Supportably Found.*

The district court's meticulous factfinding brought to light a litany of lies told by Juror C during voir dire. We rehearse the particulars.

The post-trial hearing stretched out over three separate court days. During those occasions, the district judge had ample opportunity to gauge Juror C's credibility and evaluate her impartiality. The court supportably found that Juror C gave false answers not only during voir dire but also during the post-trial hearing itself. These false answers related primarily to two aspects of Juror C's life.

The first area about which Juror C persistently lied involved her ex-husband, P. The second involved her daughter, J.[5]

The district court supportably found, based on evidence adduced during the post-trial proceeding, that P, an employee of the United States Postal Service, regularly abused alcohol and marijuana. P rebuffed Juror C's adjurations to seek treatment and his continued substance abuse contributed to Juror C's decision to obtain a divorce.

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[5] The following summary of the district court's pertinent findings is drawn from the court's exegetic opinion in *Sampson II*, 820 F. Supp. 2d at 181-88.

During their marriage, Juror C feared physical abuse as P often threatened to harm her. On one occasion, P menaced Juror C with a shotgun. After her sons took the weapon away, Juror C reported the incident to the police. She requested and received an abuse prevention order that required P to stay away from her. P violated this order, committing a criminal offense, when he approached Juror C at their home, chased her into the bedroom, and would not let her leave. P was arrested and prosecuted for violating the abuse prevention order. When Juror C belatedly admitted these events, she characterized them as "horrible" and "a nightmare."

Juror C described her experiences with J, whose very existence she had failed to acknowledge either in her responses to the juror questionnaire or during the voir dire, in much the same way. As Juror C well knew, J at one time held an administrative job with the Sanibel Police Department in Florida. J lost this position in 1997, however, when she was placed on probation after admitting to the theft of property. J violated the terms of her probation and was given a six-month incarcerative sentence. Juror C vouchsafed her beliefs that J had been treated fairly by the authorities during this ordeal.

J also became a cocaine addict. Ashamed of J's criminal conduct and drug use, Juror C had tried to forget about these experiences because thinking of them was "killing" her. She was unwilling to admit that such events could happen in her family.

Although Juror C signed the written voir dire questionnaire under the pains and penalties of perjury, the proof adduced during the post-trial proceeding, summarized above, made it pellucid that no fewer than ten of her responses were apocryphal. We give the

flavor of this mendacity by recounting some of the responses given by Juror C on the questionnaire.

- Question 32 inquired whether Juror C or anyone close to her ever had a drug problem. She answered "no."
- Question 34 inquired whether Juror C or anyone close to her worked for the federal government. She answered "no."
- Question 47 inquired as to how many children Juror C had. She indicated that she had only two sons.
- Question 59 inquired whether Juror C, or anyone close to her had ever been a victim of a crime or a witness to a crime. She answered "no."
- Question 61 inquired whether Juror C or anyone close to her had ever been questioned as part of a criminal investigation. She answered "no."
- Question 63 inquired whether Juror C or anyone close to her had ever been charged with committing a crime. She answered "no."
- Question 64 inquired whether Juror C knew anyone who had ever been in prison. She answered "no."
- Question 65 inquired whether Juror C or anyone close to her ever had an experience with the police in which she (or that other person) was treated fairly. She answered "no."

- Question 68 inquired whether Juror C or anyone else close to her had ever been employed in law enforcement. She answered "no."

Each of these answers was false. Juror C perpetuated these falsehoods during the individual voir dire questioning.

To make a bad situation worse, Juror C continued her charade during the initial session of the post-trial hearing. When defense counsel attempted to probe her lies about P, she resisted that line of inquiry, professing that she did not "want to go into all of these [things]."

On the second day of the post-trial hearing, the truth about J began to emerge; Juror C admitted, for the first time, that she had a daughter who had been arrested.[6]

During the same post-trial session, Juror C testified that she did not speak to any of her fellow jurors after the trial had concluded. She also denied any contact with the victims' families. These statements were untrue — and Juror C admitted as much during the final session of the post-trial hearing. Although these lies did not occur during voir dire, they are plainly relevant to Juror C's credibility and strongly support the district court's finding of juror dishonesty.

Based on this and other evidence, the district court found that Juror C had intentionally and repeatedly dissembled about P and J because of both the emotional

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[6] Juror C testified that she wanted to call the court about this set of lies after the first post-trial session but did not have the telephone number. The court, noting that its telephone number was on both her subpoena letter and on the court's general website, found this excuse incredible. *Sampson II*, 820 F. Supp. 2d at 187.

pain involved in discussing these experiences and her desire to avoid the humiliation of sharing them. *Sampson II*, 820 F. Supp. 2d at 181, 197. This finding has overwhelming support in the record. Juror C herself acknowledged that she had withheld the information about P and J because, when completing the questionnaire, she "didn't think [her] personal life had anything to do with [] being a juror." *Id.* at 187. In all events, her demeanor while testifying evinced her emotional pain and humiliation; she was visibly distraught when discussing P and J, crying and incoherently attempting to excuse her mendacity. *See id.* at 184, 185, 190.

B. *The Legal Framework.*

We come next to the underlying legal principles that govern post-trial claims of newly discovered juror dishonesty. It is constitutional bedrock that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend VI. An impartial jury is one "capable and willing to decide the case solely on the evidence before it." *McDonough*, 464 U.S. at 554 (internal quotation marks omitted). The right to an impartial jury is nowhere as precious as when a defendant is on trial for his life. *See Ross v. Oklahoma*, 487 U.S. 81, 85 (1988).

The FDPA enshrines this right. It requires that the jury be unanimous in concluding that the death penalty is justified. *See* 18 U.S.C. § 3593(d). If even a single biased juror participates in the imposition of the death sentence, the sentence is infirm and cannot be executed. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Voir dire is a singularly important means of safeguarding the right to an impartial jury. A probing

voir dire examination is "[t]he best way to ensure that jurors do not harbor biases for or against the parties." *Correia v. Fitzgerald*, 354 F.3d 47, 52 (1st Cir. 2003). This goal, however, is not easy to achieve: a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit her lack of objectivity. *See McDonough*, 464 U.S. at 554; *Crawford v. United States*, 212 U.S. 183, 196 (1909). As the Supreme Court explained over a century ago, "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." *Crawford*, 212 U.S. at 196.

The voir dire process, which is fluid rather than mechanical, is frustrated when a prospective juror is dishonest. Both the juror's dishonesty and her motivation for that dishonesty may cast doubt upon her impartiality. *See McDonough*, 464 U.S. at 556. "If the answers to [voir dire] questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only." *Clark v. United States*, 289 U.S. 1, 11 (1933).

In *McDonough*, the Supreme Court spoke to the question of when a party is entitled to a new trial after learning that a juror failed to disclose material information during the voir dire. In *McDonough*, a seated juror in a product liability case, when queried during voir dire whether he or his immediate family members had ever sustained severe injury in an accident, did not disclose that his son had been hurt in a truck tire explosion. 464 U.S. at 549-51. Following a verdict for the defendant and the disclosure of this information, the district court denied a motion for a new

trial.[7] The court of appeals reversed. The Supreme Court ruled that the juror's "mistaken, though honest," response did not necessitate a new trial. *Id.* at 555. Emphasizing that a party "is entitled to a fair trial but not a perfect one," *id.* at 553 (internal quotation marks omitted), the Court explained that parties cannot be granted a new trial if the only purpose is "to recreate the peremptory challenge process because counsel lacked . . . information," *id.* at 555.

The *McDonough* Court distinguished the case before it from a situation in which a juror was intentionally dishonest during voir dire, and the combination of the undisclosed information and such dishonesty demonstrates bias. To secure a new trial, in the latter situation, a party must show "that a juror failed to answer honestly a material question" at voir dire, and "then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. In this regard, the Court noted that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.*

We think it follows that, under *McDonough*, a party seeking a new trial based on juror dishonesty during voir dire must satisfy a binary test. *See id.*; *see also Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 407 (1st Cir. 2002). The party must show, first, that the juror failed to answer

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[7] The government argues that standards for review of post-conviction claims of juror dishonesty must be more stringent than standards for review of a district court's decision during voir dire to exclude a juror for bias. Because we base our decision on *McDonough*, we do not discuss this argument.

honestly a material voir dire question.[8] *See McDonough*, 464 U.S. at 556. For this purpose, a voir dire question is material if a response to it "has a natural tendency to influence, or is capable of influencing," the judge's impartiality determination. *Neder v. United States*, 527 U.S. 1, 16 (1999) (internal quotation marks and alteration omitted).

The second part of the binary test requires a finding that a truthful response to the voir dire question "would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. Jurors normally are subject to excusal for cause if they are biased or if they fail to satisfy statutory qualifications. 2 Charles Alan Wright et al., Federal Practice and Procedure § 382 (4th ed. updated Apr. 2013). In this instance, only bias is relevant.

What constitutes a valid basis for excusal within the purview of the binary test is the question that lies at the heart of these appeals. The district court took a categorical approach to this question, identifying three such bases: actual bias, implied bias, and inferable bias. *Sampson II*, 820 F. Supp. 2d at 162-67. We find this categorical delineation unhelpful.

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[8] Of course, a juror, during voir dire, may make honest, but mistaken responses. This category includes situations in which, for example, the juror misunderstands the wording of the question, fails to recall the correct response, or is not asked a question that would necessitate disclosure of the relevant information. We do not explore here the effect of honest but mistaken voir dire responses. For present purposes, it suffices to say that in the absence of dishonesty, post-trial relief, if available at all, will require a more flagrant showing of juror bias. *See Amirault v. Fair*, 968 F.2d 1404, 1405 (1st Cir. 1992) (per curiam).

The *McDonough* Court saw no need to use pigeonholes of this sort. The Court started by defining impartiality as a condition that allows a juror to be "capable and willing to decide the case solely on the evidence." *McDonough*, 464 U.S. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). The flip side of impartiality is bias, but the Court warned that "hints of bias [are] not sufficient." *Id.* Instead, only "[d]emonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause." *Id.*

This means, of course, that cognizable juror bias is a valid basis for excusal. But *McDonough* imposes no requirement that cognizable bias be confined to any particular sub-categories. Everything depends on the particular circumstances. Seen in this light, we think that attempting to classify biases in sub-categories is likely to do more harm than good. Consequently, we eschew the district court's formulation and hew to the line plotted by the *McDonough* court. *Id.* at 555-56.

Refraining from a categorical approach makes eminently good sense: after all, bias is not a pedagogical conception but rather a state of mind. To reveal the existence of this state of mind, "the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46 (1936).

When all is said and done, the existence vel non of a valid basis for a challenge for cause is not a matter of labels. Any inquiry into potential bias in the event of juror dishonesty must be both context specific and fact specific. The outcome of this inquiry depends on whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason

behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed). *See McDonough*, 464 U.S. at 554. The party seeking to upset the jury's verdict has the burden of showing the requisite level of bias by a preponderance of the evidence. *See DeBurgo v. St. Amand*, 587 F.3d 61, 71 (1st Cir. 2009).

A number of factors may be relevant in determining whether a juror has both the capacity and the will to decide the case solely on the evidence. This compendium may include (but is not limited to) the juror's interpersonal relationships, *see, e.g.*, *United States v. Colombo*, 869 F.2d 149, 151-52 (2d Cir. 1989); *United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir. 1988); the juror's ability to separate her emotions from her duties, *see, e.g.*, *Dennis v. Mitchell*, 354 F.3d 511, 518-19, 521 (6th Cir. 2003); *Burton v. Johnson*, 948 F.2d 1150, 1158-59 (10th Cir. 1991); the similarity between the juror's experiences and important facts presented at trial, *see, e.g.*, *United States v. Torres*, 128 F.3d 38, 47-48 (2d Cir. 1997); *Burton*, 948 F.2d at 1158-59; the scope and severity of the juror's dishonesty, *see, e.g.*, *Dyer v. Calderon*, 151 F.3d 970, 983-84 (9th Cir. 1998) (en banc); *Scott*, 854 F.2d at 699-700; and the juror's motive for lying, *see McDonough*, 464 U.S. at 556; *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998). Although any one of these factors, taken in isolation, may be insufficient to ground a finding of a valid basis for a challenge for cause, their cumulative effect must nonetheless be considered. *See United States v. Perkins*, 748 F.2d 1519, 1532-33 (11th Cir.1984).

C. *Integrating Fact and Law.*

It remains for us to evaluate the impact of the facts supportably found in terms of the appropriate legal framework. But there is a rub: the district court misunderstood the applicable legal framework, instead creating a new sub-category that it called "inferable bias" to serve as the cornerstone of its conclusion that Juror C's dishonesty necessitated a new penalty-phase hearing. *See Sampson II*, 820 F. Supp. 2d at 165-67, 192-96.

The district court's mistaken view of the law, however, does not require us to throw out the baby with the bath water. Where, as here, a trial court, notwithstanding its misapprehension of the law, makes a detailed set of subsidiary findings as to the raw facts, those findings sometimes may be subject to reuse. *See Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 642 (1st Cir. 1992) (concluding that, in a case in which the trial court supportably found the facts but applied the wrong rule of law, court of appeals had the authority, in lieu of remand, to array the findings against the correct legal standard); *United States v. Mora*, 821 F.2d 860, 869 (1st Cir. 1987) (similar). This is such a case.

We turn now to the task of arraying the lower court's factual findings against the correct legal framework. The first part of the binary test focuses on whether Juror C failed to answer honestly one or more material voir dire questions. The district court's factual findings make manifest that this benchmark was satisfied. Juror C understood her duty to be truthful in answering the voir dire questionnaire, yet her certification under the pains and penalties of perjury was knowingly false. As Juror C later admitted, she had been deliberately

dishonest when answering the questions that called for information about the exploits of P and J.

The materiality of the questions that Juror C answered dishonestly is nose-on-the-face plain. Each question, individually, was designed to solicit information that potentially could impugn a juror's impartiality; and the questions, collectively, bore heavily on that subject. Questions that go to the heart of juror impartiality are unarguably material to the voir dire process.

This brings us to the second element of the binary test: whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed). We conclude that this showing was made. Our conclusion rests on three cross-braced pillars: (i) Juror C's habitual dissembling; (ii) the intense emotions Juror C exhibited when belatedly relating her life experiences involving P and J; and (iii) the similarities between Juror C's unreported life experiences and the evidence presented during the penalty-phase hearing. We comment briefly about the way in which these pillars interact to demonstrate a valid basis for excusal for cause.

Although juror dishonesty, by itself, is not sufficient to demonstrate bias, it can be a powerful indicator of bias. *See Colombo*, 869 F.2d at 151; *Perkins*, 748 F.2d at 1532-33. Here, Juror C lied repeatedly in the voir dire questionnaire and directly to the court. This parlous pattern of persistent prevarication supports an inference that Juror C's ability to perform her sworn duty as an impartial juror was compromised from the start.

What is more, Juror C's repetitive acts of dishonesty illustrate the powerful emotions she harbored about P and J. *See Burton*, 948 F.2d at 1159. To put this proposition in bold relief, Juror C left no doubt but that she would rather lie to the court than discuss these painful life experiences. The record fully supports the district court's observation that, even years after the penalty-phase hearing, her "shame and embarrassment were so intense that she could not discuss those matters candidly, unemotionally or, often, coherently." *Sampson II*, 820 F. Supp. 2d at 193.

This display of emotional distress illuminates Juror C's motives for lying. The *McDonough* Court made clear that "only those reasons [for lying] that affect a juror's impartiality can truly be said to affect the fairness of a trial." 464 U.S. at 556. Here, it is far more likely than not that — as the district court found — Juror C's reasons for lying about P and J impaired her ability to decide the case solely on the evidence. The magnitude of Juror C's emotional distress strongly suggests that it would have been a Sisyphean task for her to separate the evidence presented at the penalty-phase hearing from her intense feelings about her own life experiences.

Juror C's inability to remain detached is especially troubling in this case because of the similarity between her distress-inducing life experiences and the evidence presented during the penalty-phase hearing. When a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias. *See Torres*, 128 F.3d at 47-48; *Burton*, 948 F.2d at 1158-59. In such a situation, the juror may have enormous difficulty separating her own life experiences from

evidence in the case. For example, it would be natural for a juror who had been the victim of a home invasion to harbor bias against a defendant accused of such a crime.

In the case at hand, the overlap is striking. We offer a few illustrations.

For one thing, the jurors heard evidence that the defendant threatened bank tellers at gunpoint during the string of North Carolina bank robberies and his murder victims at knife point. For her part, Juror C was frequently threatened by her then-husband once with a shotgun and other times with his fists. The shotgun threat occurred in fairly close temporal proximity to the empanelment of the jury (three years or so). *See Sampson II*, 820 F. Supp. 2d at 185. These parallels raise a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard her own experiences in evaluating the evidence.

For another thing, the government presented evidence during the penalty-phase hearing that the defendant had substance abuse problems — problems that contributed, inter alia, to the dissolution of his marriage. For her part, Juror C was forced to deal with the substance abuse of both her husband and her daughter. Indeed, P's substance abuse was a catalyst for the dissolution of Juror C's marriage. These parallels raise a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard her own family's involvement with substance abuse and avoid a bias against the defendant on account of his substance abuse.

Then, too, the jury heard evidence during the penalty-phase hearing anent the defendant's criminal history, including his incarceration for robbery. Analogously,

Juror C's daughter committed larceny and was incarcerated as a result. Juror C testified that she was deeply ashamed of her daughter's immurement. These parallels raise a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard J's troubles with the law and avoid a bias against the defendant on this account.[9] This concern is magnified by the powerful emotions that Juror C displayed about her parallel life experiences.

We conclude that if fully informed of Juror C's willingness to lie repeatedly, her fragile emotional state, her past experiences with P and J, and the similarities between those experiences and the evidence to be presented during the penalty-phase hearing, any reasonable judge would have found that the cumulative effect of those factors demonstrated bias (and, thus, a valid basis for excusal for cause). Indeed, the court below excused a number of prospective jurors for cause on less compelling grounds. Thus, the defendant was deprived of the right to an impartial jury and is entitled to a new penalty-phase hearing.

D. *Attempts at Avoidance.*

As a last resort, the government tries to catch lightning in a bottle. It argues that even if Juror C's dishonesty constitutes a valid basis for dismissal for cause, the district court had no right to vacate the defendant's sentence and order a new penalty-phase

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[9] In this regard, Juror C might also have identified with the defendant's parents, whom the penalty-phase evidence depicted as being ashamed of their child (abandoning him and refusing to cooperate with his attorneys). *See Sampson II*, 820 F. Supp. 2d at 158, 181.

hearing. It advances two theories. We find neither theory persuasive.

To begin, the government asserts that the district court developed a new constitutional rule when it based the grant of a new penalty-phase hearing on "inferable bias." The application of this new rule, the government's thesis runs, transgressed the non-retroactivity principle for criminal cases under collateral review. *See Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that a criminal defendant is generally not entitled to collateral relief if granting that relief would require the court to apply a new constitutional rule implicating criminal procedure); *Ferrara v. United States*, 456 F.3d 278, 288 (1st Cir. 2006) (same).

This proposition is rendered moot by our rejection of the district court's "inferable bias" formulation. The legal framework that we have used does not embody any new constitutional rule of criminal procedure but, rather, merely applies the rule laid down by the Supreme Court in *McDonough* to the circumstances of the case at hand. Such a course of action does not offend the non-retroactivity principle. After all, a case is deemed to announce a new constitutional rule of criminal procedure only if the result is not driven by precedent that existed at the time of the decision. *See Teague*, 489 U.S. at 301 (plurality opinion). A case does not announce a new constitutional rule of criminal procedure when it is "merely an application of the principle that governed" a prior decision to a different set of facts. *Id.* at 307 (plurality opinion; internal quotation marks omitted); *accord Chaidez v. United States*, --- U.S. ---- (2013); *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

If more were needed — and we do not think that it is — the government's assertion of the non-retroactivity

principle is untimely. The government makes this argument for the first time on appeal. A *Teague* defense is not jurisdictional, and the government's failure to raise such a defense in a timeous manner constitutes a waiver. *See Ferrara*, 456 F.3d at 289. Because the government failed to interpose this defense below, it is waived.

The government's second attempt at avoidance is no more convincing. It asserts that because the defendant seeks remediation on collateral review, constitutional error does not entitle him to relief in the absence of actual prejudice. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Building on this foundation, the government insists that there has been no showing of actual prejudice here.

The government is wrong. There is more than sufficient evidence of prejudice in the record to entitle the defendant to relief,[10] given the extent of Juror C's bias and the capital penalty-phase proceedings in which she participated. As the Supreme Court said in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), where a biased juror sits on a jury that sentenced a defendant to death and the issue was properly preserved, the sentence would have to be overturned, *id.* at 316 (citing *Ross*, 487 U.S. at 85); *see also Morgan*, 504 U.S. at 729 (stating that "[i]f even one [biased] juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence").

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[10] In view of the existence of actual prejudice, we need not reach the defendant's contention that the doctrine of structural error applies and obviates any need for a showing of actual prejudice. *See Brecht*, 507 U.S. at 629-30.

IV. CONCLUSION

This case is a stark reminder of the consequences of juror dishonesty. Jurors who do not take their oaths seriously threaten the very integrity of the judicial process. The costs, whether measured in terms of human suffering or monetary outlays, are staggering. But the ultimate lesson that this case teaches is that the protections afforded by the Constitution and laws of the United States are, in the end, sufficient to protect against even the most insidious threat.

We need go no further. For the reasons elucidated above, we dismiss the government's two appeals. Exercising our advisory mandamus power, we conclude — as did the district court — that the death sentence must be vacated and a new penalty-phase hearing undertaken. Accordingly, we deny the government's request for the issuance of an extraordinary writ.

So Ordered.